The Advocate

The Advocate Magazine
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Inside the Presidency
Q&A with Mr. Charles Kanjama SC - President Law Society of Kenya.

Business Unusual
Legal Practice in the Era of Artificial Intelligence

Electoral Justice in Kenya
Safeguarding Democracy or Chasing an Ideal?

Alternative or Appropriate Dispute Resolution?
Safeguarding Democracy or Chasing an Ideal?

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ARTICLE 19
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AFRICA CENTRE FOR HEALTH SYSTEMS AND GENDER JUSTICE

UNICAF

ICS
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The Governance Profession

BRS BUSINESS REGISTRATION SERVICE
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VOX POP

Charles Kanjama SC

The LSK leadership and our colleagues from the Senior Counsel Bar had a 5-hour long meeting on 31st July 2026, with the Judicial Service Commission in which we discussed various grave issues touching on judicial accountability and received commitments from JSC to do better. One issue of concern is the summary dismissal of numerous complaints based on a broad view of decisional independence that amounts to a shield against accountability. Hence the "417 petitions..." LSK indicated that the targeted boycott is a precise tool focused on enhancing accountability by ensuring that Judges and Judicial Officers who get court orders to shield themselves against accountability do not handle new matters involving lawyers in their courts. As the saying goes, the reputation & Integrity of every Judge and Judicial Officer should be like that of Caesar's wife, i.e. above suspicion. ***- LSK President Charles Kanjama SC in a tweet after the meeting between the Judicial Service Commission (JSC), Senior Counsel Bar (SCB) and the LSK Council.***

Teresia Wavinya Nicholas

On 10th July 2026, members showed up for our fallen colleagues. Thank you, Members, for heeding our LSK Council clarion call and standing together in solidarity. Your presence was a powerful reminder that the legal profession is strongest when we speak and act with one voice. Our march was more than a procession, it was a declaration that no advocate should ever stand alone when threatened, intimidated, or harmed in the line of duty. Together, we reaffirmed our commitment to protecting the independence of the legal profession, defending the rule of law, and honouring those we have lost. May this unity not end today. Let it strengthen our resolve to build a profession where every advocate is safe, supported, and heard. Thank you for showing up.Thank you for standing together. Viva LSK Viva! ***- LSK Vice President Teresia Wavinya Nicholas during the #PurpleRibbonMarch***

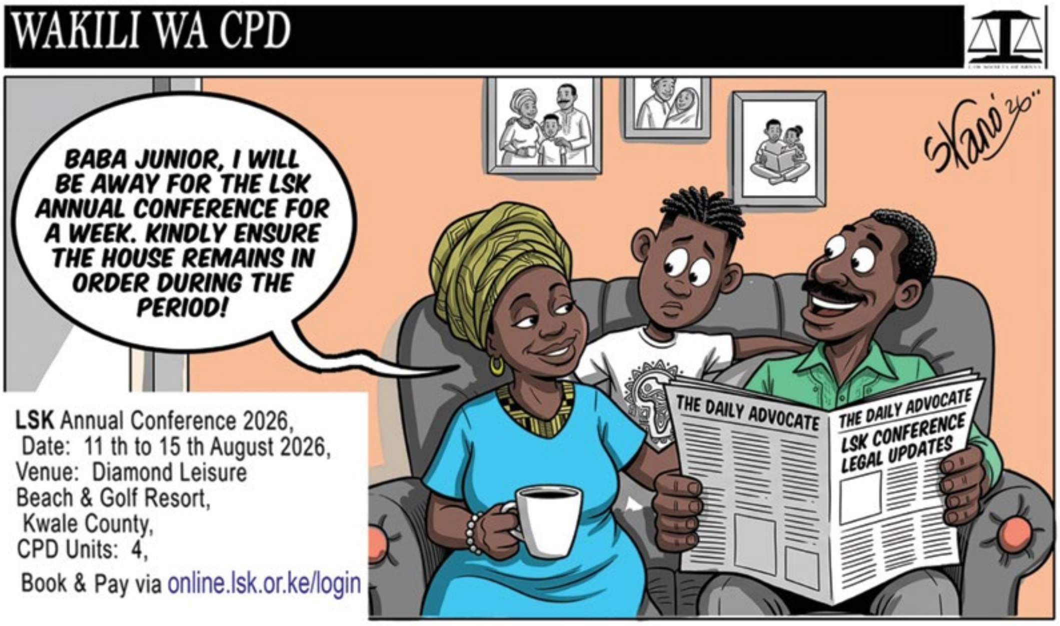
Florence W. Muturi - LSK Secretary/ CEO

The newly elected Council of the Law Society of Kenya (LSK) takes office during a period of significant constitutional and institutional challenge. As the statutory custodian of the rule of law, the Society is committed to safeguarding Kenya's constitutional framework from threats posed by corruption, violence, and the weakening of public institutions.

Speaking on behalf of more than 27,000 advocates across the country, the LSK occupies a central position within Kenya's legal system and witnesses firsthand the growing strain on institutions responsible for delivering justice. The Council outlines its core principles and concrete commitments aimed at promoting judicial integrity, strengthening institutional accountability, and protecting the democratic rights and freedoms guaranteed under the Constitution. ***- LSK Secretary/ CEO Florence W. Muturi during a Council event.***

Ogalo Irine Awuor

As the Law Society of Kenya's Child Law Committee, we are deeply concerned by the delays in defilement and child sexual abuse cases, some of which have reportedly remained unresolved since 2021 and 2022. We believe that justice delayed is justice denied, particularly for child victims whose trauma is prolonged when cases take years to conclude. We are calling on the Judiciary and all relevant agencies to fast-track children's cases, strengthen child-friendly court facilities, and improve coordination among stakeholders. We are actively engaging with the Busia Law Courts to address these concerns and ensure that justice is delivered promptly. We remain committed to protecting the rights of every child and ensuring that perpetrators are held accountable under the law ***- Ogalo Irine Awuor, Advocate, Convener of the LSK Child Law Committee***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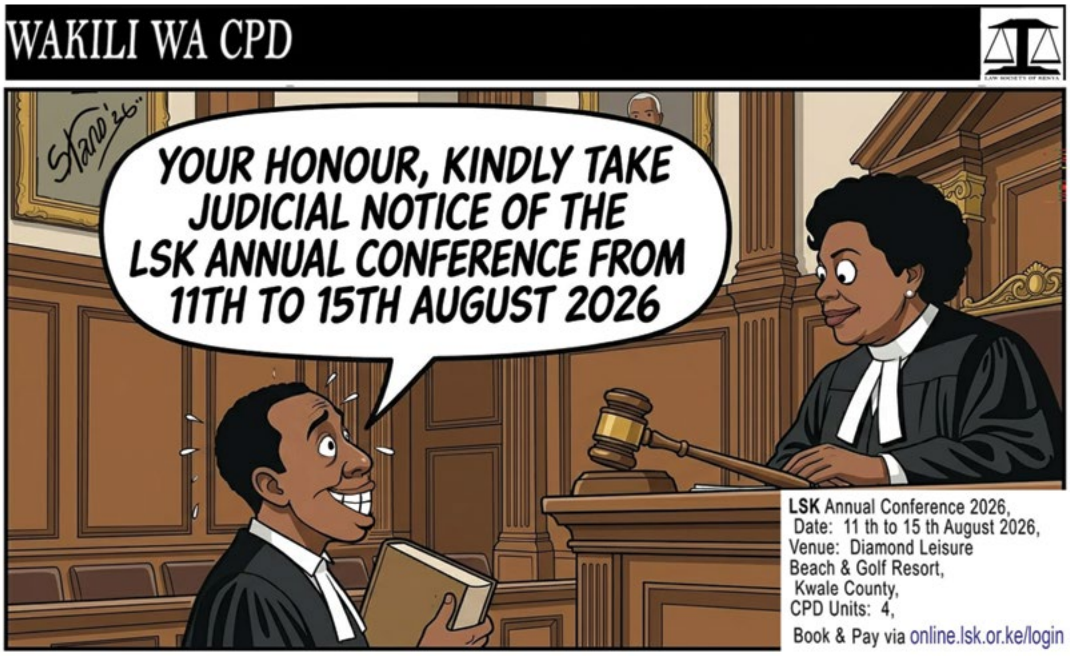
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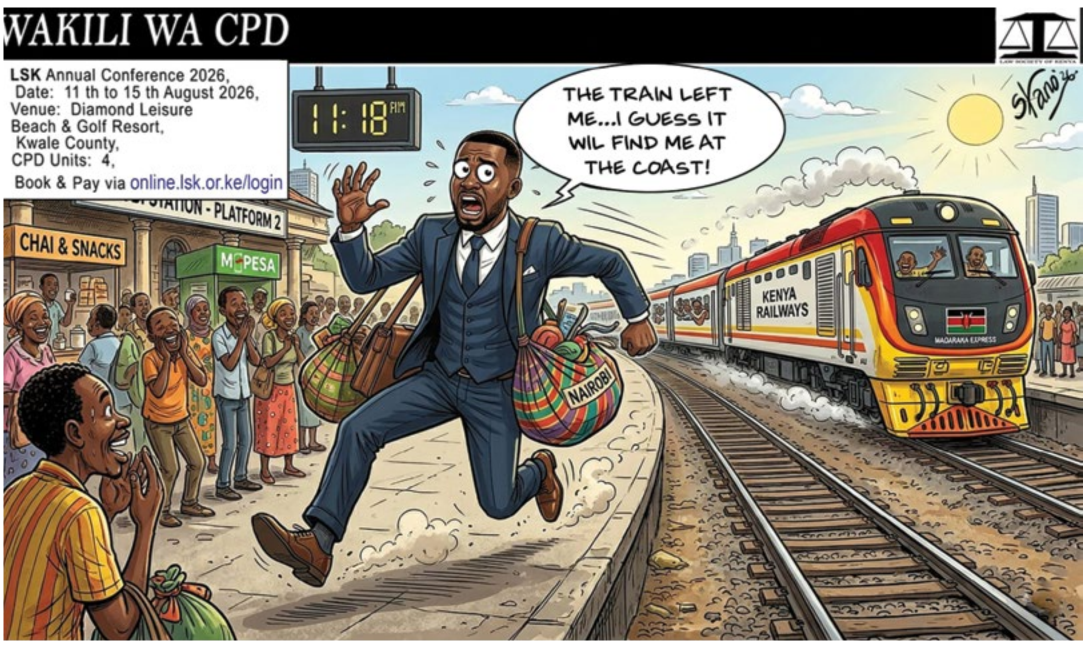
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PLATFORM 2
CHAI & SNACKS
KENYA RAILWAYS
NAIROBI

Message from the CEO

It is that time of the year again when Advocates from across the Country and beyond come together for the Law Society of Kenya Annual Conference 2026, in Diani, Kwale County. This year, the Annual Conference Organizing Committee has selected timely and thought-provoking themes that reflect the changing legal landscape and the issues currently shaping the profession:

Main Theme:
Business Unusual: Legal Practice in the Era of Artificial Intelligence

Sub-theme 1: ***Electoral Justice in Kenya: Safeguarding Democracy or Chasing an Ideal?***

Sub-theme 2: ***Alternative or Appropriate Dispute Resolution? Revisiting the Basics***

As the world continues to embrace Artificial Intelligence (AI) and digital technology, the legal profession is evolving alongside it. AI-powered tools are transforming legal research, document drafting, and client engagement, presenting new opportunities for efficiency and innovation. At the same time, the profession must navigate important questions around ethics, privacy, accountability, and maintaining public confidence in the justice system.

As Kenya prepares for the 2027 General Elections, electoral justice remains central to the country's democratic journey. The legal profession continues to play a critical role in promoting credible, transparent, and accountable electoral processes. This conference will provide an opportunity to examine the effectiveness of Kenya's electoral justice framework and explore issues such as judicial independence, electoral technology, dispute resolution, transparency, and public trust in election outcomes.

The growing prominence of Alternative Dispute Resolution (ADR) also presents an important moment for reflection. As mediation, arbitration, negotiation, and traditional justice mechanisms gain wider acceptance, the conversation is shifting from whether ADR is merely an alternative to litigation to whether it is, in some instances, the most appropriate means of resolving disputes. Discussions will focus on access to justice, efficiency, affordability, ethics, and the future of dispute resolution in Kenya.

> *"AI-powered tools are transforming legal research, document drafting, and client engagement, presenting new opportunities for efficiency and innovation."*

Nonetheless, I take this opportunity to warmly welcome all members to engage with the insightful articles and perspectives shared by our authors in this edition. Covering the impact of emerging technologies on legal practice, the pursuit of electoral justice, the evolving role of Alternative Dispute Resolution, and other topical issues affecting the profession, these contributions provide valuable insights into both the challenges and opportunities facing the legal sector today.

We hope these thought-provoking articles will stimulate discussion, encourage the exchange of ideas, and deepen understanding of the issues shaping the future of justice and legal practice in Kenya.

Welcome to the Conference 2026, and happy reading!

Florence W. Muturi
Chief Executive Officer
Law Society of Kenya

Inside the Presidency

“Q&A”

Opening Icebreaker

Q: Before the title and the office, who is Charles Kanjama SC? (Tell us a little about the person behind the leadership role.)

A: I am, first and foremost, an advocate who found in the law a way to serve. Before the Senior Counsel title and before the office of President, I am someone who believes that institutions matter, that rules matter, and that ordinary people deserve a system that works for them rather than against them. I try to remain the same person in office that I was before it, guided by faith, by family and by a fairly stubborn belief that the rule of law is worth defending even when it is inconvenient to do so.

Q: What first drew you to the study and practice of law? (Was there a defining moment or influence that shaped your journey?)

A: I was drawn to law because it sits at the intersection of ideas and consequences. A good argument in law does not just win a debate, it can change someone's life, protect a right, or hold power to account. I was also shaped by watching how often ordinary Kenyans experienced a legal system that felt distant from them, and I wanted to be part of making that system more responsive to the people it exists to serve.

Q: Did you always imagine yourself serving as President of the LSK?

A: Not as a fixed ambition from the start. What I did have early on was a habit of service within the Society, taking up roles, sitting on committees, and contributing wherever I could over more than twenty years. The presidency grew out of that long relationship with LSK rather than being a destination I set out for from the beginning.

Q: What has surprised you most about the office since assuming leadership?

A: How much of the role is about coordination and patience rather than pronouncement. Many of the changes that members want, whether in the enforcement of court orders, the welfare of young lawyers, or the modernisation of practice, require sustained engagement with multiple institutions, not a single decision from my desk. The sheer scale of that coordination has been the biggest surprise.

The Human Side of Leadership

Q: Leadership can be demanding and public facing. What keeps you grounded?

A: My faith, my calling and a fairly disciplined habit of returning to the basic question of why I took up this work in the first place. When the noise around the office gets loud, I ask myself whether a given decision is genuinely good for the profession and the public we serve. That question has a way of settling things.

Q: What does a normal day in your life look like?

A: Honestly, there is no longer a typical day. It is a mix of Muma and Kanjama Advocates matters, LSK engagements and meetings. I try to protect time for legal practice itself, since it keeps me connected to what our members actually experience day to day.

Q: Outside the law, what are some of the things you enjoy most?

A: Time to recharge, time with family and friends, physical exercise and staying engaged with public affairs beyond the legal profession. Law does not exist in a vacuum, and keeping that wider view keeps me a fuller person and, I think, a better advocate.

Q: What is one thing people within the profession may not know about you?

A: That I get genuinely restless when a matter, whether a client's case or an LSK initiative, is not moving. Patience is something I have had to practise deliberately. It does not come naturally to me.

On the State of the Profession

Q: The legal profession is changing rapidly. What concerns you most about where the profession is headed?

A: The growing gap between the number of advocates entering practice and the sustainable opportunities available to them. I am also concerned about the erosion of public confidence in institutions, including the Judiciary, when accountability mechanisms are seen to protect insiders rather than serve justice.

Q: On the other hand, what excites you most about the future of Kenyan advocates?

A: The energy and technical sophistication of the younger Bar. Advocates coming up now are more comfortable with technology, more globally connected and more willing to specialise. If we build the right infrastructure around them, training, welfare and fair access to work, this generation can reposition the profession significantly.

Q: Many young advocates feel anxious about opportunities and sustainability in practice. What would you say to them?

A: That the anxiety is understandable and it is something the Society takes seriously rather than dismisses. My advice is to specialise early where you can, invest in technology literacy and stay engaged with LSK structures, because opportunities are increasingly built through committees, partnerships and visibility, not only by waiting in a queue. That is precisely the gap our planned LSK Training Institute is meant to close.

Q: Do you believe the profession is doing enough to support young lawyers entering practice today?

A: Not yet and I would rather say that honestly than diplomatically. We are making deliberate moves on training, welfare and committee representation, but support for young lawyers has to be a continuous priority rather than a single initiative and we still have work to do.

Q: Mental wellness and burnout are increasingly becoming conversations within the Bar. How seriously is the LSK treating this issue?

A: Very seriously. Improving welfare for all lawyers is one of the priorities I carried into this office and burnout sits squarely within that. Legal practice is demanding, and we cannot build a resilient profession on the backs of advocates who are quietly struggling. This is an area where members should expect concrete steps, not only statements, before the end of my term.

Vision for the LSK

Q: When you campaigned for office, what was the central vision you were hoping to achieve?

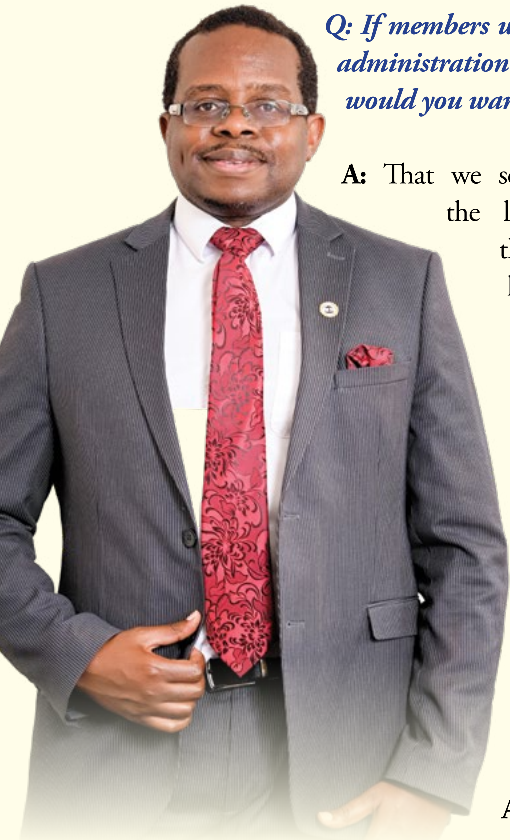
A: I framed it around what I call the RIPE agenda, Rule of Law, Integrity, Practice and Welfare and Engagement. The central idea was that LSK should be a Society that is constitutionally assertive where it needs to be, professionally rigorous in how it regulates and supports members and genuinely engaged with the public it ultimately serves.

Q: Looking back so far, what achievements are you most proud of?

A: Setting up structures and processes for implementing the RIPE Agenda, including LSK Committees, Council Initiatives, engagements with Stakeholders etc. Most of the objectives are still work in progress including the LSK Legal Tech and Innovation Year.

Q: What appears to be a major challenge since assuming office?

A: Firstly, A philosophical attitude that treats Advocates as a hindrance to speedy, effective and accessible justice, sometimes manifested within some Judiciary structures and other Government offices. Secondly, Organizational Structures in Stakeholder institutions that are stack in culture of patronage, corruption, cosmetic changes, mismatch between talk and action.



Q: If members were to remember your administration for one thing, what would you want that to be?

A: That we secured the dignity of the lawyer and enhanced the nobility of the legal profession while expanding opportunities for service, impact and dynamic support to the people of Kenya.

Q: What reforms or projects should members expect before the end of your term?

A: The 5 Key Projects as per the RIPE Agenda

1. Get LSK Wakili Towers done, effectively & efficiently.
2. LSK Training Institute, for CPD.
3. Fully implement LSK (General) Regulations, 2020.
4. Finalise revision of Advocates Remuneration Order.
5. Complete review & revision of Advocates Act, LSK Act & supporting statutory instruments

The LSK and the Public

Q: The LSK is often viewed as more than a professional body, many Kenyans see it as a defender of constitutionalism and the rule of law. How do you view that responsibility?

A: I take it as a founding responsibility rather than an optional extension of our regulatory mandate. The Constitution gives lawyers a specific duty to protect it and when institutions falter, the Society has to be willing to say so clearly, even when that is uncomfortable.

Q: In moments of national tension, how does the LSK decide when to speak and when to act?

A: We look at whether constitutional principle or the rule of law is genuinely at stake, not simply whether an issue is politically charged. Where there is a clear breach, whether of due process, civic space or judicial independence, we act. Where a matter is properly political and outside our mandate, we exercise restraint.

Q: Do you think the public fully understands the role advocates play in society?

A: Not fully and that is partly on us to correct. Many Kenyans encounter advocates only at moments of personal difficulty and the broader institutional role we play in protecting rights and holding power accountable is less visible. Closing that gap is part of why public engagement is one of the pillars of my agenda.

Q: How can the legal profession become more accessible to ordinary Kenyans?

A: Through simplified access points, stronger pro bono and legal aid structures, greater use of technology to reduce cost and delay and continuing to demystify legal process in how we communicate publicly. Access to justice cannot remain a privilege of those who already understand the system.

Technology, Innovation and the Future

Q: Artificial intelligence and technology are changing professional services globally. Should advocates be worried or prepared?

A: Prepared, not worried. I declared 2026 the Year of Legal Technology and Innovation precisely because I believe advocates who engage early with these tools will be better positioned rather than displaced by them. The advocates who should be concerned are those who assume nothing will change.

Q: How do you see technology reshaping legal practice in Kenya over the next few years?

A: I expect faster document review and research, more efficient case and practice management and over time more efficient enforcement processes, including how court orders are tracked and executed. Firms that build these capabilities early will have a real advantage.

Q: Is the LSK doing enough to modernize member services and legal practice systems?

A: We are moving, through partnerships with technology companies and initiatives under the Year of Legal Technology and Innovation, but modernisation is a continuous process rather than a single upgrade. I would rather members hold us to that standard than accept an early declaration of victory.

Q: What is the toughest decision you have had to make as President?

A: To go on general and targeted court boycott so as to catalyse real and substantive reform in Judicial accountability.

Q: What has leadership taught you about people?

A: People are great. It is wonderful to dedicate yourself to serve people. Both those who encourage and praise and those who criticise and attack. Naturally, we hope for the former more than the latter but both are necessary for impact and success.

Q: What advice would you give your younger self entering the legal profession?

A: Build depth before breadth, protect your integrity even when it costs you something in the short term and get involved in the Society early. Service compounds over time.

Q: Which qualities do you believe every advocate should strive to develop?

A: Integrity, intellectual rigour and the discipline to keep learning long after law school ends. Say what you will do and do what you said.

Q: What gives you hope about the future of the Kenyan legal profession?

A: The demand for trustworthy services where oriented lawyers keep growing. The prestige of the legal profession keeps rising and there is an increasing number of lawyers with growing capacity to deliver on the expectations of the people.

Q: Finally, what message would you like to leave with advocates across the country, from pupils to senior practitioners?

A: Let us all strive daily more and more to be advocates who can be trusted.

Q: And what message do you have for the Kenyan public about the role of the legal profession today?

A: For every dispute, for every transaction, there is a lawyer who is ready, able and willing to support you in building and rebuilding relationships and securing justice

Q:One book every advocate should read?

A: To kill a Mocking Bird by Harper Lee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Charles Kanjama, SC & the 2026–28 LSK Council
Law Society of Kenya

A MESSAGE FROM THE PRESIDENT

Dear fellow advocates,

One hundred days ago, you entrusted me with the leadership of the Law Society of Kenya. I accepted that mandate with a clear duty: to defend the independence of the Bar, advance the welfare of advocates, strengthen our institution and uphold the rule of law without fear, favour or compromise. This presidency was not elected to preserve the familiar. It was elected to act, to reform and to ensure that every member wherever they practise, can feel the presence and protection of their Society.

Today, I account for the progress made and the work that remains. We have begun restoring responsiveness, strengthening the voice of the Bar and placing members' welfare at the centre of the Society's agenda. But one hundred days are only the beginning. Hold this presidency to its word, judge us by measurable results, and continue demanding the leadership you elected us to provide. The direction is clear, the work is underway, and the mandate shall be delivered.

Charles Kanjama, SC
President, Law Society of Kenya

Scan to read the full report

Legal Practice in the Era of Artificial Intelligence

BUSINESS UNUSUAL, ETHICS UNFINISHED: SOPPEC, ARTIFICIAL INTELLIGENCE, ACCESS TO JUSTICE AND THE NEW DUTY OF DIGITAL PROFESSIONALISM

By Beauttah Siganga SC

Artificial intelligence has arrived in legal practice not as a distant possibility, but as a working tool. Advocates already use it, openly or quietly, for research, drafting, summarising documents, translation, due diligence, client intake, billing and practice management.

The question is therefore no longer whether the profession will use AI. It is whether we will use it in a manner that strengthens justice, preserves professional judgment and deserves public trust.

That question fits the 2026 Annual Conference theme, "Business Unusual: Legal Practice in the Era of Artificial Intelligence." Yet business unusual cannot mean ethics suspended. It must mean ethics made more deliberate.

AI presents Kenya's legal profession with a genuine access-to-justice opportunity. Article 48 of the Constitution requires access to justice for all persons and provides that any required fee must be reasonable and must not impede access. Cost remains one of the greatest barriers between ordinary citizens and legal assistance. Many workers, tenants, consumers, farmers, small traders, older persons and victims of abuse live with problems that have a legal dimension but never reach an advocate.

Properly used, AI can reduce time spent on routine research, document review and first drafts. It can help advocates explain legal concepts in plain language, translate basic information, offer unbundled services, respond faster and serve clients outside major towns. This matters because solo and small practices predominate outside major cities and, nationally, represent the setting in which most Kenyan advocates practice, yet often have limited research, administrative and technological support. If technology reduces the cost of legal work, the profession should translate these efficiencies into predictable, proportionate and affordable fees for the public.

However, the same technology is also a professional-risk event. AI may compress time spent on a brief, encourage clients to undertake legal work themselves, and enable corporate legal departments to retain assignments previously outsourced to law firms. It may reduce some support-staff functions and entry-level tasks through which pupils and young advocates traditionally learn. A tool that expands legal access may therefore disrupt salaries, employment, training and the economic structure of practice.

The ethical starting point is the Law Society of Kenya's Code of Standards of Professional Practice and Ethical Conduct, 2017 (SOPPEC). Its duties of competence, diligence, confidentiality, honesty, independence, fair charging and responsibility to the administration of justice remain fully applicable. An advocate cannot escape responsibility by saying that an error came from a machine. AI may assist the advocate, but it cannot assume the advocate's professional obligation.

SOPPEC, properly interpreted, already prohibits several obvious abuses. An advocate must not file authorities without confirming that they exist and support the proposition stated. Client information must not be placed into an unsafe system merely because the platform is convenient. AI-generated advice must not be passed to a client without professional review. A client should not be misled about the work undertaken, and fees should not be calculated as though extensive human labour was used when a technological tool materially reduced the time required.

Although SOPPEC provides ethical principles, it was not designed to answer the operational questions raised by AI. For instance, is it permissible for an advocate to upload a client's documents with confidential information to a public platform without informed consent or adequate safeguards?

Where is the information stored, and may it be used to train the model? Will it be transferred across borders? Who within a firm may use AI, for which tasks, and under whose supervision? Must clients and courts be informed? What records should be kept of prompts, outputs, corrections and human verification?

These unanswered questions require risk-based guidance. Constructing a chronology is not the same as advising on liability, predicting a case outcome or processing privileged evidence. The greater the consequence for a client, opponent or court, the stronger the required level of consent, verification, documentation and human control.

These are not abstract concerns. Kenya's High Court sounded a warning in Rukwaro v Ng'ang'a [2025] KEHC 11317 (KLR), where the court confronted reliance on fictitious decisions described as mostly generated by artificial intelligence. In the United States, Mata v Avianca became an early and widely reported example of lawyers being sanctioned after submitting non-existent cases and fabricated quotations generated through ChatGPT. In Ayinde v London Borough of Haringey and Al-Haroun v Qatar National Bank, the English High Court stressed that false authorities may justify costs sanctions, regulatory referral and other serious consequences. Courts elsewhere have reached the same essential conclusion: technology does not dilute the advocate's personal duties of candour, verification, competence and supervision.

Data protection adds another layer. The Data Protection Act protects individuals from decisions based solely on automated processing where those decisions produce legal or similarly significant effects, subject to defined exceptions and safeguards. Legal practices handling sensitive personal, financial, employment, family and medical information must therefore treat AI adoption as a data-governance decision, not merely a software purchase.

Therefore, the LSK should issue AI guidelines and, where necessary, make appropriate amendments to SOPPEC. The framework should address minimum AI competence, permitted and prohibited uses, confidentiality and privilege, vendor due diligence, data-processing terms, cybersecurity, verification of legal authorities, client communication, court disclosure, record keeping, supervision, professional indemnity and incident response. Every firm and advocate using AI should adopt safeguards, train its staff and preserve meaningful human review.

Any AI governance framework must address professional development. Technology may reshape practice, but firms should not eliminate junior and support roles because AI can perform parts of their work. Instead, they should redesign roles, teach verification and preserve the mentoring through which professional judgment is formed, consistently with SOPPEC's duties of competence and supervision.

In practice, AI can advance Article 48 by making legal assistance faster, clearer and more affordable. Yet it may magnify error, compromise confidentiality and weaken trust. The LSK must translate SOPPEC's duties into AI standards, while every advocate remains accountable for its use. The profession must neither resist innovation nor surrender judgment to AI; it must govern its use. Business may be unusual; ethics may remain unfinished, but professional duty and public trust must remain constant.

The Author is an Advocate of the High Court of Kenya

JUSTICE BY ALGORITHM: BALANCING ARTIFICIAL INTELLIGENCE, JUDICIAL ETHICS, AND DUE PROCESS IN KENYA'S LEGAL SYSTEM

By Shamallah Marion

Introduction

Just like the African proverb, ***"A chameleon that wishes to escape a bush fire must abandon the walking style of its ancestors."*** That old saying is a good reminder that any society that seeks growth and progress must recognize that change, however painful or difficult to embrace, is inevitable.

The Kenyan legal space is not a stranger to this old adage. The wheels of justice have never stood still. From handwritten pleadings to typed pleadings, crowded court corridors to virtual courtrooms, physical libraries to electronic law reporting platforms, the law has continually evolved to meet the needs of society. In Kenya, technology has already transformed the administration of justice in ways once thought impossible. The Judiciary's e-filing system has eased the burden of physical filing, virtual hearings have complemented physical courts, and digital platforms like the electronic Kenya Law Reports have made justice more accessible, efficient and economical for litigants across the country. What was once resisted as unfamiliar has now become the new normal.

Today, the rise of Artificial Intelligence (AI) presents the next frontier in this evolution. Like every technological advancement before it, AI is not here to replace justice, but to assist in its delivery. Properly harnessed, AI has the potential to reduce case backlog, enhance legal research, improve case management and promote timely access to justice. Yet, even as algorithms become increasingly woven into legal systems, the heart of justice must remain human. Ethics, judicial discretion, fairness and due process cannot be surrendered to machines.

The challenge is not whether AI should exist within the legal system, for it is already here and here to stay, but how it can be integrated responsibly, constitutionally and ethically to complement human judgment while preserving the dignity, independence and integrity of the administration of justice.

Judicial Perspective: The Judicial Regulation of AI In Legal Drafting.

In **Milimani Judicial Review Misc. Application No. E120 of 2025[1],** Justice Chigiti in a ruling delivered on 16th April 2026 cautioned against the unregulated use of AI in legal drafting, stating that *"it does not matter how well the case is argued if the pleadings were illegally drafted."* He further observed that generating pleadings through AI or unknown tools gives an unfair advantage to the adverse party.

Towards the end of the ruling, the Learned Justice proceeded to issue recommendation to the Judiciary Rules Committee to amend the Civil Procedure Rules in order to embrace technology and AI drafting rules through public participation.

Similarly, in ***Nayan Mansukhlal Savla v Kenya Psychiatric Association & another, Petition No. HCCHRPET/E393/2024,*** Justice Bahati Mwamuye in a ruling delivered on 6th March 2026 struck out pleadings that were found to be machine-generated noting that the same cannot be proper substitute for human-drawn documents. The Learned Judge further emphasized the necessity of human oversight and procedural compliance in legal drafting.

Augmenting the Advocate: AI as the Ultimate Legal Co-Pilot.

AI is not here to snatch a briefcase out of an Advocate's hand, it is here to make the practice of law better, just like a co-pilot. The rulings above, should not be interpreted as an absolute prohibition on AI, but rather as a call for accountability, procedural compliance and adherence to legally accepted drafting techniques.

The courts' concern was directed at the improper use of AI in ways that may compromise fairness, mislead the court or evade professional responsibility. Accordingly, AI may still be justified as an assistive legal tool where it operates under human supervision and within the confines of lawful legal drafting practices. Unfair advantage arises not from the use of AI itself, but from its misuse.

The decisions in my view reinforces that while technology may assist legal practice, pleadings must remain subject to human verification, professional accountability and compliance with the Civil Procedure Rules.

Data Privacy and Client Confidentiality Risks in the Use of AI

Section 134(1) of the Evidence Act bars an advocate from disclosing any privileged communication made to them by or on behalf of their client. Rule 5 of the Standards of Professional Practice and Ethical Conduct (SOPPEC) establishes that an advocate has both a right and a strict duty to keep all client information.

AI systems operate by processing and generating outputs from information fed into them by users. In legal drafting, this may involve sensitive client information, confidential documents, litigation strategy, personal data or privileged communications. Where such information is uploaded into unsecured or publicly accessible AI platforms, there exists a risk that the data may be stored, processed, reused or exposed beyond the control of the advocate or client. This creates the possibility of breaching the advocate–client duty of confidentiality.

The risk becomes significant where AI platforms rely on external servers, cloud storage or machine-learning models that retain user inputs for system training or improvement. In such circumstances, confidential client information may inadvertently become accessible to third parties, thereby undermining privacy under Article 31 of the Constitution and the duty of confidentiality. The duty of confidentiality imposed upon advocates requires that all information obtained in the course of professional engagement be protected from unauthorized disclosure and this obligation extends equally to information processed through technological systems, including AI platforms.

Recommendations for the Responsible Use of AI.

The integration of AI into legal practice should be guided by clear ethical, procedural and regulatory safeguards aimed at protecting the integrity of the legal profession, preserving client confidentiality and preventing unfair advantage in litigation. First, AI should only be used as an assistive tool and not as a substitute for professional legal judgment. Advocates must remain personally responsible for all pleadings, legal arguments and documents filed before court, in line with the relevant laws. All AI-generated content should be independently reviewed, verified and approved by the advocate responsible for the matter.

Secondly, strict confidentiality and data protection measures should govern the use of AI in legal practice. Advocates should avoid uploading confidential client information, privileged communications or sensitive personal data into unsecured or publicly accessible AI platforms. Instead, law firms should adopt secure and encrypted AI systems with clear data protection policies that comply with the Data Protection Act, 2019 and the constitutional right to privacy. Internal policies and professional guidelines should be developed to regulate how AI may be used within legal practice while safeguarding client confidentiality.

Further, regulatory bodies should develop a legal framework governing the permissible use of AI in legal drafting and litigation. Such a framework should establish standards on disclosure, accountability, and ethical limitations on AI usage to prevent misuse creating unfair advantage, mislead the court or undermine procedural fairness.

Conclusion

While AI offers significant benefits in enhancing efficiency, legal research and access to justice, every technological advancement inevitably presents corresponding risks and challenges.

The appropriate response, therefore, is not outright prohibition but establishment of proper regulation and responsible use. Through clear ethical guidelines, professional oversight, and accountability measures, the legal profession can harness the advantages of AI while safeguarding professional integrity, fairness, confidentiality and public confidence in the administration of justice. In this way, technology can serve as a tool that complements, rather than compromises, the core values of the legal system.

In conclusion, the modern advocate must possess both legal knowledge and the requisite technological competence. Legal education and professional development must evolve to equip lawyers with skills necessary to navigate AI-driven legal environments.

The Author is and Advocate of the High Court of Kenya

[1]Commission on Administrative Justice v Savla (Judicial Review Miscellaneous Application E120 of 2025) [2026] KEHC 4891(KLR) (Judicial Review)(16 April 2026)(Ruling)-available at https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/4891/eng@2026-04-16


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LEGAL PRACTICE IN THE ERA OF ARTIFICIAL INTELLIGENCE STIMULATING THE LEGAL IMAGINATION: AUTONOMOUS AI, LEGAL PERSONHOOD AND THE RISE OF NEURORIGHTS

By Victoria Kariithi

Introduction

Legal practice in the era of AI is a theme that has stimulated my legal mind, and I intend to do the same to the reader. It is easy to approach this subject myopically and assume the era of AI is simply now. It does include the now, certainly, but this era will perhaps not end until the earth is swallowed by the sun; by which point, some legal practitioners of an extropian persuasion will have escaped to Mars in cryogenic chambers (courtesy of Elon Musk), to establish firms practicing intergalactic law. On a lighter note, naturally. What follows will reveal just how deeply this theme provokes the legal mind.

In this digital era, the law is being called upon to imagine; to see the world not only as it is, but as it could be, ought to be, or will inevitably become. It is a test our predecessors could not have foreseen.

This article therefore does not travel the well-worn path of asking whether AI will change the legal practice. That question has been answered ... it has and still is. The more arresting questions are these: What happens when AI becomes the lawyer? And what new rights must we begin to imagine?

Agentic AI, Robot and Avatar Lawyers

Currently, the legal profession is encountering what technology scholars call "agentic AI", systems that plan, execute, and iterate through complex tasks with a degree of autonomy. Law firms are deploying AI that can draft and review documents, and provide case preparation support, at a speed and scale categorically beyond the capacity of even the most resourced associate teams. Crosby, an agentic AI-powered law firm, exemplifies this shift, operating without a traditional associate workforce.

The next development already being theorised and in nascent form, is the fully autonomous robot lawyer. This is an AI system that can receive instructions from a client, formulate legal strategy, draft pleadings, file documents, and even represent a client's interests in a negotiation or proceeding, all without meaningful human supervision at each step. Academic commentary, including work by Michael Loy on legal liability for artificially intelligent robot lawyers, already grapples with the foreseeable reality of AI systems performing legal work entirely independently.

Alongside agentic AI and autonomous robot lawyers, another perhaps more arresting possibility is emerging. Advances in virtual and augmented reality, combined with increasingly sophisticated AI-powered digital representations of individuals, are giving rise to the concept of the "human digital twin" or HDT, a virtual and visual avatar that can represent a person in digital environments, mirror their behaviour, communication style, and act on their behalf.

Imagine an advocate's avatar or HDT, trained on years of their pleadings, correspondence, and advocacy style, appearing in a virtual courtroom in the Metaverse to represent a client. Their HDT conducts the hearing. It is not difficult to conceive of this scenario. Some commentators in the United States, have already noted that "it is not difficult for lawyers to imagine a virtual reality courtroom with a judge avatar, six avatars in the jury box, with attorneys virtually advocating their clients' positions in a three-dimensional virtual environment."

As seen above, two distinct but interrelated futures therefore emerge. The first is a purely autonomous robotic lawyer that displaces the advocate entirely, absorbing the core functions of legal practice into machine execution. The second is the avatar as HDT, an extension of the advocate's own presence and capability, stretching their reach across dimensions of practice previously constrained by time, geography and human limitation. Both these futures are already placing a demand that the legal profession begins to imagine what comes next.

The Question of Legal Personhood

The legal profession tends to engage questions of AI personhood primarily through the lens of liability, i.e. who is responsible when an AI system causes harm? Liability, however, is only one dimension of this conversation.

The deeper and more unsettling question is one of legal status. At what point does an AI system conducting legal work autonomously and with increasing sophistication, compel the law to confront its position within the legal order itself? Legal personhood, as our jurisprudence has long recognised, is a construct. It is not limited to human beings. Corporations have legal personality. Rivers in New Zealand and India have been granted legal standing. The question of whether and when an AI system might need to be recognised as a legal actor with defined capacities and responsibilities, is not implausible.

Scholars including Novelli, Floridi and Sartor have traced this question through legal history, identifying patterns in how the law has extended personhood to new entities over time. Their conclusion is not that the legal system will need coherent frameworks to govern autonomous AI actors; frameworks that may need to borrow from, but also move beyond, existing corporate personhood models.

For advocates in Kenya, these questions may feel remote. Kenya has consistently positioned itself at the forefront of legal innovation on the continent, and the debates presently confined to academic journals, will with certainty reach our courts and Parliament. Those who engage with these implications now will be better placed to shape legislation, and advance novel arguments before our judiciary when that moment arrives.

Neurorights for Advocates and Their Clients

There is a third dimension to this conversation one more immediate and personal. It concerns the cognitive health of the humans who interact with AI. This brings us to neurorights; a proposed category of fundamental human rights designed to protect the integrity of an individual's mental processes and neural data, encompassing mental privacy, freedom of thought, human agency, and protection against cognitive manipulation.

The research concerning this is sobering. A 2025 MIT study found that large language models, including those used in legal research, measurably reduce critical thinking in regular users. Cognitive psychologist Barbara Oakley and her colleagues, in 'The Memory Paradox', warn that as AI grows more capable, our brains risk relinquishing the hard mental labour altogether, eroding memory, reasoning, and cognitive flexibility in the process.

Legal practice demands precisely these capacities; analysis, analogical reasoning, judgment under uncertainty, and persuasion under pressure. It is against this backdrop that researchers advocate for 'cognitive complementarity', the principle that AI ought to augment, rather than supplant, an individual's own depth of knowledge and judgment.

Accordingly, as AI becomes more deeply integrated into legal practice, two neuroright-adjacent questions arise for advocates:

First, do advocates have a professional and perhaps ethical obligation to protect their own cognitive capacity? If over-reliance on AI tools degrades an advocate's analytical reasoning over time, is the advocate still fulfilling their duty to the client? The duties of competence and diligence that govern advocates' conduct were developed in a world where the advocate's intellectual capacity was the irreducible core of the service. The profession needs to think carefully about whether AI reliance, even when it produces technically accurate outputs, may be quietly undermining that core.

Second, and perhaps more urgently, do advocates owe their clients any duty in relation to the clients' own cognitive health and autonomy? Consider a client who comes to rely so heavily on AI-mediated legal advice that they lose the capacity to make genuinely independent decisions about their legal position. The protection of a client's mental autonomy, their freedom of thought in relation to their own legal affairs, may be an emerging dimension of the duty to act in the client's best interests.

Conclusion

This article has sketched three arenas where the legal imagination must be exercised: the emergence of fully autonomous AI and HDT avatars as actors in legal proceedings; the question of AI legal personhood, understood as a framework for governing autonomous artificially intelligent legal actors; and the concept of neurorights, including the protection of advocates' cognitive capacity and their clients' mental autonomy.

None of these themes calls for alarm or for wholesale resistance to technology. The gains AI brings to legal practice, for example in access to justice, efficiency, and the democratisation of sophisticated services, are real and significant. But gains and risks are inseparable.

The profession that engages seriously with AI, that names its dangers, interrogates its implications, and drafts the frameworks to govern it, will be the profession that retains its place at the centre of a just and functional society. AI is reshaping legal practice today while opening doors to possibilities still beyond imagination.

It is time we began to imagine these possibilities.

The Author is an Advocate of the High Court of Kenya and a Blockchain & Virtual Currency Consultant, Mwanyumba Kariithi & Company Advocates

THE BRIEF HAS CHANGED. **HAVE YOU?**

On artificial intelligence, professional accountability, and what it means to practise law in 2026

By Lilly Umazi

I was in the middle of a succession matter, polygamous estate, competing households, Islamic inheritance questions, a contested child, when I first asked an AI to help me think through the sibship DNA framework under Kenyan evidence law. It did not replace my analysis. It organised the terrain so I could do the analysis faster and more cleanly than I would have at midnight with a cold cup of tea and a stack of unreported decisions.

That was the moment I stopped asking *should I be using this?* and started asking how do I use this well? There is a difference, and it matters more than most of the AI debates I have sat through at bar association forums.

The theme of this year's LSK Annual Conference — *Business Unusual* — is not a provocation. It is a description of where we already are. The practice has shifted. Clients are better informed, faster-moving, and less patient with the pace of traditional legal work. Courts are digitising. And the technology is not waiting for consensus.

What the Tool Actually Does — And What It Cannot

I want to be specific, because vagueness is how this conversation stays useless.

AI is extraordinarily effective at research sweeps, document organisation, first-draft architecture, and stress-testing arguments. In an ELC matter involving a contested counterclaim over registered land, it can help you build your List of Documents, map the chronology of dealings, and identify which elements of adverse possession have and have not been addressed in your witness statements, before you have sat down to review a single exhibit. In an employment dispute, it can survey comparative jurisprudence across jurisdictions faster than a clerk with a three-day head start.

What it cannot do is advise. It cannot read a client who is holding something back. It cannot hear the particular silence in a courtroom when a judge has already made up their mind. It cannot weigh whether to lead with the constitutional angle or the statutory one based on who is sitting on the bench today. It cannot look a grieving family across a table and know when to pause.

Those things are not features waiting to be added. They are the substance of what lawyering actually is. AI is a formidably capable tool in skilled hands. The hands still have to be skilled.

The Ethics Question Nobody Wants to Answer Plainly

Here is the plain version: when AI-generated content ends up in a pleading, an affidavit, or a submission before court, the advocate who filed it is responsible. Not the tool. Not the developer. Not the prompt. You.

AI fabricates. This is not a glitch they are working on. It is an inherent feature of how large language models generate text. They produce plausible output. Plausible is not the same as accurate. I have seen generated research cite cases with confident, detailed citations, cases that simply do not exist. I have seen it summarise a decision in terms directly contrary to the actual holding. If that makes it into your bundle, it is your professional reputation on the line.

The solution is not to avoid the tool. The solution is to treat AI output the way you should have always been treating junior associate work: read it, verify it, own it before it leaves your desk.

Verification is not extra diligence. It is the floor.

What 'Business Unusual' Actually Requires of Us

This conference theme is not asking us to celebrate disruption. It is asking us to lead our own evolution, which is a harder ask.

It means our chambers need internal AI use policies before a crisis creates one for us. It means the Law Society needs guidance that is practical and grounded in how advocates actually work, not position papers written for international consumption. It means senior advocates modelling responsible use, not just issuing warnings from a safe distance. And it means young advocates being trained not just in what the tool produces, but in why it produces it and how to interrogate it.

The advocates who will thrive in the next decade are not the ones who resist this technology. They are also not the ones who outsource their thinking to it. They are the ones who are rigorous enough to use it without becoming dependent on it, who can hold the tool accountable because they know the law well enough to know when the tool is wrong.

The Brief Has Not Changed. Only the Tools Have.

At the end of every matter I handle, whether it is a constitutional petition, a sentencing mitigation, a custody battle, or a contested estate, there is a person. A person who came to me because they needed someone who understood their situation, knew the law, and would fight for the right outcome with integrity.

No AI changes that brief. What it changes is how quickly I can clear the administrative fog and get to the work that actually requires me. That is not a small thing. That is hours returned to strategy. That is capacity restored to the parts of practice that cannot be automated because they are fundamentally human.

Business unusual is not a warning. It is a window. The profession that walks through it with clear eyes, strong ethics, and genuine competence will be sharper, faster, and more impactful than any generation of advocates before it.

I intend to be part of that generation. I hope you do too.

The Author is an Advocate of the High Court of Kenya

THE ROLE OF ARTIFICIAL INTELLIGENCE IN INCREASING ACCESS TO JUSTICE IN KENYA


By Allan Meso* By Clara Odero**

Introduction

Access to justice is a central pillar of Kenya's constitutional order. The Constitution requires the state to "ensure access to justice for all persons."[1] This means the State must make justice expeditious, affordable and accessible to all. Despite this clear obligation, significant barriers to access to justice persist. Many Kenyans continue to face difficulties in accessing justice due to high legal costs, complex procedures and limited awareness of their rights.[2] Additionally, delays in case resolution, geographic distance from courts, and widespread legal illiteracy continue to exclude large segments of the population.[3] These challenges necessitate innovative interventions to bridge the justice gap. This article explores the substantial potential of AI to enhance access to justice in Kenya by increasing efficiency, reducing costs, and expanding legal outreach. It also looks at the regulatory, ethical and infrastructural concerns.

Conceptual Framework

Although the concept of access to justice is not easy to define, it has been described as the ability of individuals, businesses, and communities to seek and obtain fair, effective, and timely remedies for legal issues, and to easily engage the justice system, access legal services, and resolve disputes in accordance with human rights standards.[4] It has four main dimensions: availability of services, affordability, accessibility and quality of outcomes.[5] AI can expand service availability through digital platforms, improve affordability by reducing costs and delays, enhance accessibility via remote, multilingual tools, and strengthen quality through data driven analysis. In Kenya, the Judiciary has underscored the potential of AI to enhance access to justice by digitizing services, simplifying procedures, providing legal information,. This in turn has enabled remote dispute resolution, by improving efficiency, transparency, affordability, and outreach to underserved populations.[6]

The Justice Access Gap

The justice gap, especially in developing countries, remains significant. Approximately 1.5 billion people globally lack access to justice and 4.5 billion lack essential legal tools.[7] This gap is most severe in developing countries due to poverty, weak infrastructure, and systemic barriers limiting access to formal justice systems.[8] In 2024/2025, the Kenya National Legal Aid Service received over 45,000 requests for legal aid but could only serve approximately 60% due to resource constraints.[9] High legal fees and limited awareness of rights exclude many citizens, while people in rural areas struggle with long distances to courts.[10] Women and persons with disabilities are disproportionately affected by many gender-based violence cases failing to reach court due to fear, cost and distance.[11] Moreover, many Kenyans avoid courts or forgo remedies altogether due to complexity of legal proceedings.[12]

Applications of AI in Enhancing Access to Justice

Artificial intelligence (AI) has been identified as one of the innovations to help bridge the access to justice gap. It has emerged as a key tool for expanding access to justice through digitization, e-filing, and AI-driven transcription, enhancing efficiency, reducing delays, and improving accessibility of judicial services. It has enhanced access to justice globally, by improving efficiency, reducing delays, and expanding access to legal services. In India, tools like SUPACE,[13] and SUVAS,[14] support legal research and translation. The Intelligent Court project in China, launched as part of the New Generation Artificial Intelligence Development Plan is applying AI for evidence analysis, document review and assisted adjudication in several provinces, which has significantly increased their case handling capacity and judicial efficiency.[15] In the U.S. and Europe, AI has enabled predictive analytics and online dispute resolution.[16] Meanwhile, the Judiciary in Kenya has started exploring Artificial Intelligence through transcription pilots and the development of the Artificial Intelligence Adoption Policy Framework.[17] Early pilots within the Employment and Labour Relations Court and other divisions have already shown promising signs of faster case processing and reduced administrative bottlenecks.[18]

Challenges and Ethical Considerations

Despite the benefits, the use of AI in the administration of justice still poses certain challenges. Bias in algorithms, lack of transparency and questions of fairness and accountability remain major concerns. AI also faces data quality issues, digital inequality, privacy concerns and limited infrastructure. The digital divide means many rural and poor Kenyans may not benefit from these tools.[19] Moreover, overreliance on automated outputs may undermine judicial independence, requiring strict human oversight and ethical regulation.

Recommendations and Conclusions

Clearly, AI has significant potential in enhancing access to justice. Future trends show AI expanding into predictive justice, automated legal services, and intelligent case management. This will however, require adequate policy frameworks. Effective policies should include clear regulatory frameworks, ethical guidelines, transparency standards, and mandatory human oversight to ensure fairness, accountability, and data protection while maximizing AI's role in improving access to justice.

However, safeguards addressing bias, transparency, and accountability are essential. Investment in internet access and digital training, especially in rural areas, is necessary. Policymakers, the judiciary, and legal professionals must embrace AI responsibly to foster inclusive, fair, and equitable justice systems. The Judiciary's Artificial Intelligence Adoption Policy Framework to guide the integration of AI tools to enhance judicial operations is a step in the right direction. Ultimately AI should not be viewed as a silver bullet, but as a powerful enabler that must work in harmony with human judgement, judicial independence and Kenya's constitutional values.

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'UWAZI WA UCHAGUZI': ARTIFICIAL INTELLIGENCE LED PROFESSIONAL JOURNALISM VERSUS DISINFORMATION WITHIN THE ELECTORAL CIRCLE.

By William Otieno Oketch, OGW

Background.

The media and journalists play a critical role in consolidating electoral justice by assuring public confidence in Electoral Management Bodies (EMBs) and safeguarding the democratic integrity of electoral outcomes through adherence to the tenets of professional and ethical journalism. Being custodians of public interest, they act as independent watchdogs, public educators and reliable conduit for verified electoral information which ensures transparency and accountability of all key actors at every stage of the electoral cycle.

Role of the Media in an Electoral Cycle.

The media has enriched its electoral coverage by holding all actors accountable, facilitating robust civic education on electoral processes by disseminating essential electoral information, facilitating objective discourse via platforms for debating policy issues, enforcing responsible journalism by managing electoral conflicts and refraining from inflammatory framing thus promoting balanced and impartial viewpoints, an effective public watchdog by independently monitoring vote tallying and verification processes which provides an independent verification of election results.

Disinformation within the Electoral Cycle.

Sadly, electoral cycle disinformation remains a huge challenge despite rigorous information fact-checking and journalistic techniques to combat fake news. A multiplicity of efforts by varied media stakeholders to combat electoral cycle disinformation has not been successful. This poses a threat to national unity, inter-ethnic relations, democratic tolerance, peaceful election outcomes and a hinderance to modern elections not just in Kenya but globally too.

Disinformation in electoral coverage is exacerbated by an era where digital platforms can rapidly spread unverified or inflammatory claims. It covers deliberate creation and spreads of fabricated, manipulated, or out-of-context information to mislead voters, distort public perception, and undermine democratic processes. It is further exacerbated countrywide by inflammatory political rhetoric aiming to woo a heterogenous electorate divided along ideological, ethnic, economic, and demographic lines.

Despite media and criminal laws, social media platform guidelines, and user awareness efforts, electoral cycle disinformation remains a difficult beast to tame particularly due to the heated and polarized environment of Kenyan politics, coupled with the sophisticated technological tools, technical ability of its perpetrators to create and disseminate content to a public that is largely not sufficiently aware of disinformation. Electoral cycle disinformation manifests through Artificial Intelligence generated content or deepfakes, fabricated news or document sites, Bot networks or amplification and impersonation or contextual deception.

Electoral Cycle Disinformation Disincentives.

Electoral cycle disinformation results in democratic disincentives that undermine the integrity of the vote. First, it causes polarization and outrage by pushing emotionally charged and hyper-partisan content to deepen societal divides and inflame political tensions. Secondly, it negatively impacts voter suppression by spreading confusion regarding when, where, and how to vote to lower voter turnout. Thirdly, it erodes electoral trust by attacking the integrity of electoral bodies, media institutions, and the judiciary by questioning the legitimacy of election outcomes.

Artificial Intelligence: A lethal Arsenal in enhancing Professional Journalism?

AI is a transformative power that is upending traditional journalistic practice by focusing on new skills and competencies of journalists in an AI-driven newsroom. It inculcates the practice of professional journalism and builds a critical defense mechanism against disinformation. AI can be leveraged to detect disinformation and build resilient digital tools that can potentially shape a more trustworthy professional journalistic practice.

AI Technologies for detecting Disinformation

AI led professional journalism can greatly inhibit disinformation in the electoral cycle through a set of AI powered tools with distinct capabilities of identifying manipulated text, audio, and video. Various AI tools combine natural language processing, image recognition, and acoustic analysis to flag potential disinformation in real time. Media players can adopt AI tools for pattern recognition which are large-scale AI analytics that detect unusual linguistic or visual traits. Deep learning is a subset of AI digital tools that train large datasets to differentiate real from manipulated material such as voice analysis to detect anomalies in speech patterns that might indicate a voice has been artificially generated.

AI-powered Fact-checking Systems

AI-driven fact-checking involves assessing the accuracy of statements in an automated way since traditional fact-checkers relied heavily on manual research. Automated systems expand this process by using large language models to parse claims, compare them with established databases, and search for contradictory evidence. They can quickly scan thousands of news articles, official documents, and verified sources in a fraction of the time it would take a human.

Real-time verification of news articles

Professional journalism can deploy AI systems that provide real-time alerts on suspicious stories such that if an article's content deviates from known facts, fact-checking APIs can flag the text for human review. This real-time aspect is crucial because false information can "go viral" swiftly, shaping public opinion before corrections appear. When integrated into editorial workflows, these AI-powered systems can reduce the time between the release of fake news and its debunking.

AI in content moderation.

Social media platforms host billions of daily posts, making manual moderation "unrealistic" or challenging for these big corporations. AI tools can fill this gap, scanning text, images, and videos for misinformation, hate speech, or incitements to violence. For instance, a platform might automatically remove suspicious links or flag posts replicating known disinformation patterns.

Ethical considerations and challenges

The use of AI to address misinformation inevitably raises ethical questions. Some revolve around free expression and the dilemma of balancing legitimate content with the imperative to remove harmful, potentially AI-generated false information. Others center on privacy since content scanning requires some level of data collection. Key ethical issues that could arise include algorithmic bias, transparency and potential overreach.

Conclusion and Future directions

AI is poised to advance professional journalism in ways that might tip the scales against disinformation through robust detection algorithms and deeper collaboration between AI systems and human analysts. These solutions heavily rely on robust partnerships between Tech companies who supply the AI infrastructure, while media organizations and researchers provide validated data sets for cross-referencing.

SHOULD I FIRE MY ASSOCIATE?

The Evolution of Artificial Intelligence and Kenya's Current Legal Architecture

By Paddy Cheloti

When I was completing my LLM dissertation at the University of Buckingham, Westlaw and LexisNexis were not merely research tools — they were survival mechanisms. I would occasionally pause mid-research and wonder how my supervisor and his colleagues had ever managed without them: the sheer volume of cases, the cross-jurisdictional trails, the footnotes that had to be perfect. A few years later, I was admitted to the bar and leading litigation at a mid-size firm in the City. Handling over forty active files and still producing comprehensive, timely submissions felt, on reflection, like an act of quiet endurance.

It is mid-2026. An associate recently showed me that what once consumed an entire working day can now be assembled in under thirty minutes using AI tools such as Jawabu and Anthropic's Claude. She looked at me with barely concealed pride. I looked at her and smiled. Then, quietly, I asked myself: do I still need her?

That question — uncomfortable, honest, and increasingly unavoidable — sits at the heart of what artificial intelligence is doing to legal practice in Kenya right now.

THE REGULATORY BASELINE

Let us be direct: Kenya currently has no specific statute governing artificial intelligence. What exists is a patchwork. The National AI Strategy 2025–2030, launched by the Ministry of ICT in March 2025, articulates ambition. The Kenya Bureau of Standards released a Draft AI Code of Practice in 2024, but it has not been gazetted and has, frankly, generated little public conversation since. The Kenya Robotics and Artificial Intelligence Bill of 2023, developed by the Robotics Society of Kenya, stalled entirely.

The significant development is the Artificial Intelligence Bill, 2026, currently before the Senate. It adopts a risk-based classification model borrowed, almost wholesale, from the EU AI Act. Four categories: unacceptable risk (prohibited outright), high risk (heavily regulated), limited risk (transparency obligations), and minimal risk (general monitoring only). Unacceptable-risk systems include mass surveillance tools and social scoring platforms. High-risk systems cover bail assessment tools, employment screening, healthcare diagnostics and credit scoring — all areas where AI is already operating in Kenya without a legal framework.

Limited risk captures the generative AI tools that legal practitioners have quietly adopted as affordable research and drafting assistants. Minimal risk covers grammar checkers and transcription software.

Central to the Bill's governance architecture is the proposed Office of the AI Commissioner. The institution is tasked with oversight, enforcement and innovation stewardship. How it will interact with the Data Protection Act of 2019 — which currently carries most of the load on AI-adjacent privacy issues — remains a live question that the profession must engage with urgently. These are not abstract lacunae. They are the terrain on which our clients will soon operate.

WHAT THE COURTS HAVE SAID

The Kenyan judiciary has not waited for Parliament. Three notable decisions in 2025 and 2026 are already shaping the professional landscape.

First, in early 2025, Supreme Court Judge Isaac Lenaola delivered a public warning to the bar after submissions containing entirely fabricated case authorities were filed before him. The citations looked real. They were not. A generative AI tool had invented them. Judge Lenaola was unambiguous: until formal guidelines were in place, generative AI had no place in court submissions.

Then came the landmark ruling. In Nayan Mansukhlal Savla v Commission on Administrative Justice & Kenya Psychiatric Association, Justice Bahati Mwamuye of the Milimani High Court struck out a Notice of Motion Application and its supporting affidavit on 11 March 2026, after determining that both had been generated by an AI platform. The documents failed to comply with Order 51 Rule 13 of the Civil Procedure Rules, and the affidavit did not meet the requirements of Order 19 Rules 4 and 5. Justice Mwamuye's reasoning was crisp:

> *"An applicant moves the court either in their own words or in the words drawn by counsel or any other lawful representative. As the law stands today, computer-generated output of artificial intelligence cannot be a proper substitute for human-drawn documents. The defects cannot be cured by an amendment."*

The application was struck out. No costs were awarded.

A second ruling by Justice John Chigiti, also at Milimani, addressed a self-represented litigant who admitted using AI-assisted tools to draft his pleadings but argued he had personally reviewed and verified every word. The opposing party alleged the documents were AI-generated and therefore unreliable, but produced no forensic evidence. The court dismissed the allegations, noting that such claims require concrete proof — identified fabrications or forensic analysis. However, Justice Chigiti made equally clear that AI assistance does not excuse a failure to comply with the Civil Procedure Rules. The standard does not move because the tool changed.

Three principles now emerge from this nascent jurisprudence: that AI output does not constitute human authorship in the eyes of the court; that procedural compliance is non-negotiable regardless of drafting method; and that allegations of improper AI use require evidence, not mere assertion. The Judiciary's response has been structural. A Draft AI Policy released in May 2026 proposes that all AI-assisted filings be accompanied by a certificate of human verification, placing accountability squarely back on the advocate. That certificate is coming. Every member of the bar should prepare for it.

THE PROS, THE CONS, AND THE HARDER QUESTION

The benefits are real and should not be minimised by professional anxiety. AI-assisted tools have contributed to a 30% reduction in backlogs at Milimani Law Courts in 2025. The Judiciary's transcription pilots are running at 80% accuracy. Over ten thousand litigants have been trained on e-filing and virtual hearing platforms, with rural access programmes under development. For a jurisdiction historically crushed by case volumes, these are not marginal gains.

For the practitioner in private practice — particularly the sole practitioner or small firm managing a high volume of diverse matters — the efficiency argument is compelling. Research that once took hours takes minutes. First-draft submissions that once required a full day can be reviewed and refined in an afternoon. The question is not whether to use these tools. The question is how, and under what discipline.

The risks, however, are equally concrete. Hallucinated citations — plausible, well-formatted, entirely fictitious case references — are the cardinal professional hazard. Filing one is not merely embarrassing; it potentially constitutes professional misconduct under LSK guidelines and, as the Savla ruling demonstrates, will sink your application entirely. Beyond fabrication, there is the subtler risk of procedural error: AI tools do not know Order 51 Rule 13. They do not instinctively format an affidavit to meet Order 19 Rules 4 and 5. The advocate must.

There is also the broader structural concern: Kenya's regulatory framework is being built in response to technology designed, developed, and deployed by the great powers of the world — with little Kenyan input in its architecture, but considerable Kenyan exposure to its consequences. The AI Bill's risk-classification model is, by admission, copied from the EU AI Act. Whether a framework designed for Brussels translates coherently to Nairobi — in terms of enforcement capacity, institutional infrastructure, and the realities of Kenya's labour market — is a question the profession should be asking loudly.

SO, SHOULD I FIRE MY ASSOCIATE?

No. And the reason matters.

The courts have made clear that the law requires legal documents to reflect the mind of the author, not the output of a machine. The machine can assist; it cannot author. The advocate verifies, exercises judgment, bears professional responsibility, and signs their name. That is not a bureaucratic formality. It is the architecture of accountability on which the justice system depends.

My associate's role is not to produce raw output faster. It is to think, verify, exercise judgment, and take ownership. If AI compresses the mechanical work, it should expand the space for that higher function — deeper legal analysis, sharper client counsel, more considered advocacy. The associate who understands that survives and grows. The one who treats AI as a substitute for legal thinking has already been replaced, not by a machine, but by their own abdication.

The broader question — whether we eventually need judges in a world where a thinking machine carries less tribal bias, less political exposure, and less margin for human error — is not a rhetorical provocation. It is a genuine jurisprudential question that this generation of lawyers will be asked to answer. The answer, I believe, is that justice is not merely logic applied to facts. It is a moral and social act. It requires a human being to look at another human being and decide. No algorithm has standing to do that. Not yet. Perhaps never.

For the bench, the bar, the paralegal, and the litigant walking into court with a certificate of urgency: this is a brave new world. It rewards rigour, demands transparency, and has no patience for shortcuts dressed up as innovation.

My associate keeps her job. But the next time she shows me a thirty-minute submission, I will be asking her to walk me through every citation. Line by line.

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EVOLUTION IN JUDICIAL TRUST: ELECTRONIC EVIDENCE IN THE AGE OF ARTIFICIAL INTELLIGENCE

By Seleina Kaloi

Introduction.

Following the tragic fire at Utumishi Girls Senior School, CCTV footage purportedly showing how the fire started circulated widely in the media. Almost immediately, social media users began scrutinizing the footage frame by frame. Some claimed to identify inconsistencies, questioning whether certain objects appeared to change between frames. Whether those observations were accurate is ultimately beside the point. What is striking is that public discourse shifted from asking what the footage showed to asking whether the footage could be trusted at all. In an era of artificial intelligence (AI) and increasingly sophisticated digital manipulation, that question is no longer confined to social media commentators. It is rapidly becoming a question for courts.

The foundation of electronic evidence admissibility.

In today's digital age, some of the most compelling evidence produced in court is generated by machines. Be it emails, mobile phone records, or digital transaction logs, computer-generated evidence has become indispensable in the administration of justice. As electronic evidence increasingly shapes public narratives and judicial outcomes alike, the law has had to develop mechanisms for regulating their admission in legal proceedings hence the birth of Section 106B of Kenya's Evidence Act. The provision represents certain recognition and appreciation that modern litigation increasingly relies on electronic records. Keen scrutiny of Section 106B reveals that the primary concern is whether a computer-generated record has been properly produced and preserved. It specifically emphasizes that courts must be satisfied that electronic records emerged from a trustworthy process in order for the evidence to be admissible and further requires the production of a certificate identifying the electronic record, describing the manner of its production, and confirming compliance with the statutory requirements.[1]

Kenyan courts have consistently affirmed the centrality of Section 106B in safeguarding the integrity of electronic evidence. In *County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others, the* Court of Appeal underscored the role of Section 106B in establishing the authenticity and reliability of electronic records observing that, "The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced."[2] Similarly, in *Republic v Mark Lloyd Stevenson,* the High Court emphasized the importance of compliance with the statutory requirements under section 106B, particularly where digital material forms a critical component of the prosecution's case.[3] These decisions reflect a broader judicial appreciation that the evidentiary value of electronic records depends not merely on their existence, but on confidence in the systems and processes through which they were generated and preserved.

To a large extent, Section 106B has served its intended purpose. It provides a framework for verifying the provenance and reliability of electronic records and has enabled courts to navigate the transition from paper-based evidence to digital evidence. However, the rise of artificial intelligence presents a challenge that the provision may not have contemplated. Section 106B assumes that a properly functioning system is likely to produce a trustworthy output yet AI-generated content complicates that assumption. As such, herein lies the dilemma, can a provision designed to establish the reliability of computer systems remain sufficient in an era where the greater concern is no longer the functioning of the machine, but the authenticity of the content it creates?

Through the looking glass.

When every image can be fabricated, videos manipulated, and voices cloned, what becomes of electronic evidence? In the age of artificial intelligence, courts are peering through the looking glass, where the evidentiary inquiry extends beyond the authenticity and integrity of electronic records, to whether those records faithfully depict the events they purport to represent. Needless to say, the challenge posed by AI is not that electronic evidence will become inadmissible. Rather, AI is forcing courts to reconsider the assumptions of authenticity, reliability, and evidential weight that underpin the admissibility of electronic evidence.

This shift is particularly significant when viewed through the lens of Section 78A of the Evidence Act.[4] This provision directs courts to determine the weight to be attached to such evidence by considering, among other factors, the reliability of the manner in which it was generated, stored and communicated, the integrity of the record, and the identification of its originator. These statutory considerations, once largely concerned with ensuring that electronic records had not been corrupted or improperly handled, now acquire renewed significance in an era where artificial intelligence can generate content that appears authentic while bearing little or no relationship to reality.

Consequently, the focus of evidentiary analysis must evolve from establishing the authenticity of the medium to interrogating the authenticity of the message. It is within this broad consideration that courts may increasingly be called upon to evaluate AI-generated content, digital forensic evidence, metadata, algorithmic processes, and expert testimony to determine whether a digital record faithfully represents the events it purports to depict.

In essence, artificial intelligence does not render Kenya's evidentiary framework obsolete. Rather, it invites a reinterpretation of its underlying principles. In the age of AI, the law's greatest challenge is no longer simply admitting electronic evidence into the courtroom; it is preserving judicial confidence in the evidence produced.

Conclusion.

As legal practitioners navigate the age of artificial intelligence, the task ahead is not to abandon the existing evidentiary framework, but to apply it with greater vigilance. The true challenge lies in ensuring that the evidence upon which courts, increasingly rely is not only technologically authentic, but also factually trustworthy.

Ultimately, whether the questions raised about the Utumishi Girls Senior School CCTV footage were ultimately justified is almost beside the point. What matters is that they were asked. They reflect a profound shift in our relationship with electronic evidence. The courtroom is no longer insulated from that shift. As artificial intelligence continues to reshape the digital landscape, the law must evolve from asking whether electronic evidence exists to asking whether it deserves our trust. That, perhaps, is the real business unusual.

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[1]Evidence Act (Cap 80), s 106B.
[2]County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] KECA 397 (KLR).
[3]Republic v Mark Lloyd Steveson [2016] KEHC 3048 (KLR).
[4]Evidence Act (Cap 80), s 78A.

THE MIND REMAINS THE MOST IMPORTANT TECHNOLOGY

Building Cognitive Resilience in the Age of Artificial Intelligence

By Saima Khauser

Whether you are on your feet in the High Court at Milimani, guiding a client through a land dispute in Eldoret, or putting together a deal in Nairobi's quick, competitive market, outcomes have always hinged on a single factor: the standard of thinking applied to the problem.

Critical thinking is not a trait you are born with or without. It is a practice. And it is exactly the kind of practice that comfort and convenience quietly wear down, the kind no AI system, no matter how polished, can do in your place.

Earlier this year, Santiago Iñiguez, President of IE University, wrote in EFMD Global Focus and asked a question that has refused to leave my mind: what becomes of human thought when AI slowly takes over the mental work that used to define professional life?

His answer landed with both simplicity and urgency. The real upgrade we need is not computational; it is cognitive. The advantage will belong not to the people who simply learn the latest tools, but to those who build what he called resilient minds, minds that stay curious, critical, reflective, and self-aware.

This piece draws that wider conversation into our own professional setting, and asks what it requires of us as Kenyan lawyers. ***"The question before the profession is not whether to embrace AI. It is what kind of thinker we are becoming as we do."***

What the Science of the Mind Tells Us

When mental abilities are left idle, they don't wait patiently in storage. They shrink.

The neural architecture that supports deep analysis, reasoning by analogy, working memory, and metacognition depends on use. Put them under real strain, and they strengthen. Keep them in a steady diet of ease, and they weaken.

Psychologists describe a pattern called cognitive offloading; the habit of handing mental tasks to outside tools. In small doses it is normal, even sensible. But when it becomes the main way a professional operates, it carries real costs: less independent problem-solving, weaker critical evaluation, and a growing difficulty spotting mistakes in the very systems you have come to depend on.

AI tools, even the best available today, sometimes hallucinate, producing confident-sounding case citations, statutory provisions, or contractual language that simply are not real. If a lawyer's critical reflexes have softened through routine reliance, that error might slip past them until it reaches the client, the other side, or the court. When it gets that far, the professional fallout can be serious, and so can the personal consequences for the person you represent.

Add to this automation bias, a well-known tendency to trust machine output too easily and to relax scrutiny because the answer arrives fluent and self-assured. In a legal system where mistakes can cost liberty, property, livelihood, or family stability, automation bias is not an interesting quirk. It is a direct workplace risk.

Law is a discipline of judgment, not information retrieval. Good lawyers develop arguments, read interests beneath the surface, and close the space between what the law states and what justice demands. Those abilities are built through years of hard work, not pulled from a prompt.

These higher-level skills are not something AI can replace. Neither are the profession's basic duties: competence, candour, confidentiality, and independent judgment. Each of those duties assumes a responsible human being behind every legal act. Handing in AI-produced work without proper review is not efficiency; it is abdication.

The Cognitively Resilient Lawyer

What this moment asks from us is not hostility toward new tools. It asks for a clearer professional ideal, what I would call the cognitively resilient lawyer: someone who benefits from AI while also defending and strengthening the mental habits no machine can reproduce.

Curiosity sits at the start. This lawyer does not settle for the first answer, whether it comes from a database or a language model. They press into the logic behind it.

Then comes criticism, not cynicism but trained questioning: what can the system not know, what is missing, what context matters here? They bring ethical and situational judgment that only a person rooted in a real client relationship, and in Kenya's cultural and legal environment, can supply.

Reflection matters too. They are willing to look inward, to spot their own blind spots, to admit bias, and to stay with uncertainty instead of forcing a quick conclusion simply because a machine offered a neat one.

Finally, they are self-aware. They can tell the difference between thinking and mere processing, and they choose deliberately which one the moment requires.

Our Shared Responsibility

Firms and organizations need cultures where independent reasoning is prized as much as speed.

Continuing professional development should do more than train lawyers on AI platforms. It should also push us to ask what it means to think clearly, to reason with care, to challenge our own assumptions, and to protect the cognitive independence that professional integrity depends on.

Each of us, too, needs an honest internal check: am I becoming a sharper thinker, or only a quicker operator?

In conclusion, AI will keep improving, and the legal profession will keep adjusting. But real adjustment is not passive. It is chosen, deliberate, and grounded in principle. It is the work of minds that remain responsible for their tools, not minds that slowly hand over that responsibility and only notice when it is gone.

The most valuable technology any lawyer has ever had is still the mind; trained, disciplined, curious, independent, and fully, unmistakably human.

Our job in this era is not only to keep up with artificial intelligence. It is to make sure that, as we do, we sharpen rather than surrender the one thing it cannot reproduce: the depth, integrity, and humanity of our judgment.

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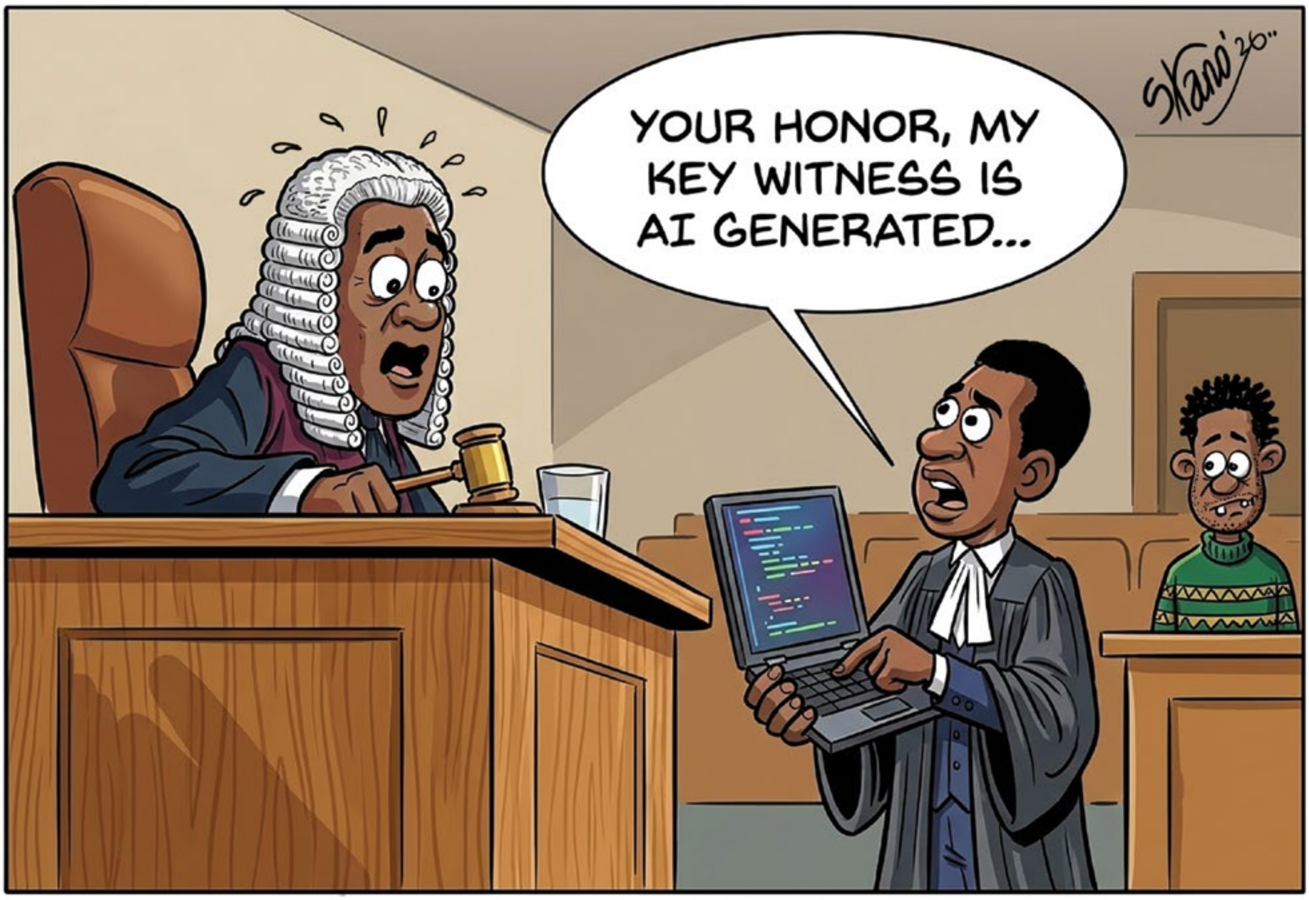

BUSINESS UNUSUAL:

The New Practice Roles the AI Era Has Created and Why Kenya's Independent Practitioners Must Claim Them First

By Pauline Wanjiku Kamunya

Artificial intelligence has already entered the courtroom, the conveyancing chamber, and the boardroom. Algorithms now determine credit scores, screen job applicants, draft pleadings, and generate evidence. Within the legal fraternity, the dominant narrative has focused, understandably, on the fear of replacement. But the more urgent truth is that the AI era is not shrinking the market for legal services. It is creating a vast, largely unoccupied frontier of new practice roles across litigation, corporate advisory, policy work, and dispute resolution. Kenya's independent practitioners and small firms are uniquely positioned to claim them first, not despite their size, but because of their agility.

The question before the Bar is no longer whether AI will disrupt legal practice. It is whether Kenyan lawyers will design the governance frameworks for these technologies, or surrender that space to technologists and consultants who carry no equivalent duties of confidentiality, independence, or accountability under the Law Society of Kenya Act.

The Fundamental Rights Impact Assessor

The first emerging role is that of the Fundamental Rights Impact Assessor. The Draft Kenya Artificial Intelligence and Other Emerging Technologies Policy, 2026, recognizes that AI systems can interfere with constitutional rights long before they cause tangible harm. Yet technical standard-setting bodies often lack the legal grounding to determine what constitutes a rights violation. Here lies the advocate's opportunity, to conduct pre-deployment impact assessments that evaluate effects on constitutional rights, access to justice, and equality under Article 27. As courts increasingly confront algorithmic decision-making, judges will need practitioners who can translate technical system design into constitutional language. This is not futuristic work, it is the present frontier of public interest litigation.

The AI Compliance and Audit Practitioner

The second role sits at the intersection of corporate practice and regulatory oversight. The Draft Kenya AI Policy envisions a National AI Registry and mandates lifecycle accountability for high-risk systems. Lawyers in this space will design risk management frameworks, perform advisory and compliance audits, and manage vendor due diligence for organizations adopting AI tools. With the Data Protection Act, 2019, already in force and sectoral guidelines emerging, businesses need counsel who can navigate both technical documentation requirements and legal standards. For independent practitioners, this role requires no large-firm infrastructure, only the competence to master the technology and its legal implications.

The Litigation and Evidentiary Expert

Perhaps the most immediate role for Kenyan advocates is that of the Litigation and Evidentiary Expert. As AI-generated evidence enters our courtrooms, the Evidence Act faces a profound stress test:

1. How does a court authenticate an AI-generated document designed to defeat visual inspection?
2. How does cross-examination interrogate a black-box algorithm?

These questions touch the integrity of electoral dispute resolution, commercial litigation, and criminal justice alike. Lawyers must now develop new evidentiary standards and institutional protocols before petitions are filed, rather than scrambling after the fact. Small firms that build expertise in digital forensics and algorithmic interrogation will find themselves indispensable in court.

The AI-Driven Dispute Resolution Specialist

The fourth role speaks directly to the conference sub-theme on Alternative Dispute Resolution. AI is reshaping how disputes are resolved through smart contracts that execute automatically and online mediation platforms that sift through complex evidence to identify core issues. Article 159 of the Constitution requires courts to promote ADR, the next logical step is for practitioners to design ADR frameworks specifically for technology-driven disputes. Independent advocates can ground these mechanisms in Kenyan constitutional values and indigenous concepts of fairness, rather than importing opaque foreign protocols. This is access to justice work in its most contemporary and efficient form.

The AI Policy Governance and Ethics Counsel

Finally, there is the AI Policy Governance and Ethics Counsel. Kenya's national AI regulatory architecture is still being shaped. The Draft Policy contemplates a National AI and Other Emerging Technologies Council, while international frameworks encourage independent AI Ethics Advisory Boards. Lawyers who understand both the technology and the constitutional framework can serve on these bodies, draft legislation, and translate principles of transparency, non-discrimination, and human autonomy into operational protocols. If the legal profession is absent from these rooms, policy will be written without the voice of those sworn to uphold the rule of law.

An Institutional Imperative

These roles will exist in Kenya regardless of whether the legal profession claims them. If trained advocates do not occupy this space, it will be filled by others who lack our ethical obligations and constitutional mandate. The Law Society of Kenya must therefore act decisively:

1. establish an AI Practice Group to provide peer learning and shared standards;
2. develop a Kenya-specific AI Practice Guide grounded in our statutes and the resource constraints of independent practice; and
3. create a formal continuing professional development pathway on AI governance, ethics, and data protection.

Conclusion

The 2010 Constitution entrusted the legal profession with advancing the rule of law in a rapidly changing society. We cannot fulfill that mandate while remaining spectators to the technological transformation reshaping every area of practice. Business unusual demands that we move from anxiety to agency. The tools are new, but the profession's duty is ancient, to ensure that power, whether exercised by the state or by an algorithm, remains accountable to law.

Sources consulted: UNESCO, Guidelines for the Use of AI Systems in Courts and Tribunals; UNESCO, Recommendation on the Ethics of Artificial Intelligence; Smuha and Yeung, The European Union's AI Act: Beyond Motherhood and Apple Pie?; the Draft Kenya Artificial Intelligence and Other Emerging Technologies Policy; the ASEAN Guide on AI Governance and Ethics; and Muigua's Governing Artificial Intelligence in Africa.

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WHO GUARDS THE ALGORITHM? - WHEN ARTIFICIAL INTELLIGENCE MEETS THE CONSTITUTION

By Jennifer Riziki

AI is not inherently unconstitutional. However, if deployed without adequate safeguards, it risks undermining several constitutional principles that are fundamental to the administration of justice in Kenya. The challenge is therefore not whether AI should be used, but how it should be governed so that technological efficiency does not eclipse constitutional legitimacy.

THE CONSTITUTION'S SILENT ASSUMPTION

Beneath every article of the Constitution of Kenya 2010, lies an assumption so obvious that it is rarely stated. The Constitution assumes that power will be exercised by accountable human beings.

Judges take oaths. Magistrates can be questioned through appeals. Administrative bodies can be challenged through judicial review. Public officers can be summoned before Parliament. The architecture of constitutional governance is built around a simple democratic proposition: those who exercise power must be answerable for its exercise.

Artificial Intelligence complicates this arrangement. An algorithm cannot take an oath. It cannot be cross-examined. It cannot be cited for contempt. It cannot be impeached. It cannot be removed from office. Yet, depending on how it is deployed, it may influence decisions that profoundly affect liberty, property, dignity and life itself.

The Constitution did not anticipate a future in which power could be exercised by entities incapable of bearing responsibility and yet that future is already arriving.

ARTICLE 50 AND THE RIGHT TO A FAIR HEARING

Perhaps the most immediate constitutional concern arises under Article 50. Every person has the right to a fair and public hearing before an independent and impartial court or tribunal. At first glance, AI appears compatible with this right. If a machine helps organize files, locate authorities or summarize evidence, no constitutional difficulty arises.

The difficulty emerges when AI begins influencing substantive outcomes. Suppose an AI system recommends sentencing ranges. Suppose it predicts the likelihood of reoffending. Suppose it identifies which cases deserve priority. Suppose it recommends whether bail should be granted. A litigant may then ask a perfectly reasonable question: "How was this conclusion reached?"

If neither the judge nor the system's designers can adequately explain the reasoning process, then the right to challenge that reasoning becomes severely diminished.

A fair hearing requires more than a decision. It requires understandable reasons. Justice cannot be a mystery. Indeed, one of the enduring strengths of the common law tradition is that judgments speak. They explain themselves. They expose their reasoning to public scrutiny and appellate review.

A decision influenced by an opaque algorithm risks replacing reasoned justice with computational authority. The Constitution demands more.

ARTICLE 10 AND THE NATIONAL VALUES

Article 10 enshrines transparency, accountability, participation and good governance. These are not decorative aspirations. They are constitutional obligations. Yet many AI systems operate as proprietary technologies whose internal architecture remains inaccessible even to those who use them.

One can therefore imagine a peculiar constitutional dilemma. A citizen requests an explanation for a decision affecting their rights. The public institution replies: "The system generated this outcome." The citizen asks: *"Why?"* The institution responds: *"We do not know."* Such an exchange may satisfy technical efficiency. It however, does not satisfy constitutional accountability.

The Constitution was never intended to create a government of unexplained decisions.

ARTICLE 27 AND THE DANGER OF ALGORITHMIC DISCRIMINATION

The Constitution guarantees equality and freedom from discrimination. AI systems learn from historical data. History, unfortunately, is not always an exemplary teacher. Historical records often reflect the very inequalities constitutional democracies seek to eliminate.

If an algorithm is trained using data shaped by decades of social, economic or institutional bias, it may inadvertently reproduce those patterns. The machine is not prejudiced; even so, prejudice embedded within the data may nonetheless reappear in the outcomes.

The result is discrimination without a discriminator. Bias without intent. Injustice without malice. Such outcomes are often harder to detect precisely because they appear objective. After all, numbers seldom raise their voices. They simply repeat themselves.

ARTICLE 159 AND THE HUMAN FACE OF JUSTICE

Article 159 reminds courts that justice shall be administered without undue regard to procedural technicalities. This provision reflects a deeper constitutional philosophy. Justice is not merely the mechanical application of rules. It is the exercise of human judgment - judgment that appreciates context, weighs competing realities, applies proportionality and where appropriate, allows room for compassion and mercy.

The law may be written in black and white, but justice is often found in the careful navigation of the grey. Behind every file number is a human story and behind every legal dispute is a reality that cannot always be reduced to data points, probabilities or patterns.

An algorithm may identify patterns. It may calculate probabilities. It may process extraordinary volumes of information. What it cannot genuinely do is understand human suffering. It cannot appreciate remorse. It cannot recognize dignity. It cannot exercise mercy. These remain distinctly human capacities. One suspects that the framers of the Constitution intended them to remain so.

THE CONSTITUTIONAL PATH FORWARD

None of this requires rejecting AI. Indeed, rejecting AI entirely would be both unrealistic and undesirable. The legal profession has survived the printing press, the typewriter, the photocopier, electronic databases and digital courts. It will survive artificial intelligence as well.

The question is governance. The constitutional solution is not prohibition. It is supervision.

First, AI should remain advisory rather than determinative. Algorithms may assist judges. They should never replace judicial discretion. The final decision must always belong to a constitutionally accountable human decision-maker.
Second, explainability must be mandatory.

Any AI system used within the justice sector should produce reasons capable of being understood, scrutinized and challenged. If a conclusion cannot be explained, it should not influence a judicial outcome. The Constitution recognizes no right to unexplained power.

Third, independent audits should be required.

AI systems affecting legal rights should undergo regular constitutional, ethical and technical review. Just as public institutions are audited, so too should the digital tools that increasingly shape public decisions.

Fourth, litigants must retain the right to challenge algorithmic influence.

The right to a fair hearing necessarily includes the right to question the tools that contributed to a decision. Transparency must travel alongside technology.

Finally, Parliament should enact a comprehensive legal framework governing AI in the administration of justice.

Technology is advancing faster than regulation. The law must catch up before innovation outruns accountability.

CONCLUSION: THE NEW CONSTITUTIONAL FRONTIER

The greatest threat posed by artificial intelligence is not that machines will become judges. The greater danger is that humans may gradually surrender judgment while retaining the appearance of control.

Constitutional democracies do not merely require correct outcomes. They require accountable processes. A decision may be efficient and still be unconstitutional. It may be technologically impressive and yet democratically deficient. The Constitution demands more than intelligence. It demands legitimacy.

Artificial Intelligence will undoubtedly become a permanent feature of modern legal practice. The question is whether it will develop as a constitutional servant or an unaccountable master. That determination will not be made by engineers alone. It will be made by judges, legislators, advocates and citizens who insist that technological innovation remain subordinate to constitutional principle.

For in the end, the most important question is not whether an algorithm can think. It is whether a constitutional democracy can permit power to be exercised by something that cannot itself be held accountable; until that question is satisfactorily answered, the challenge remains before us: Who guards the algorithm?

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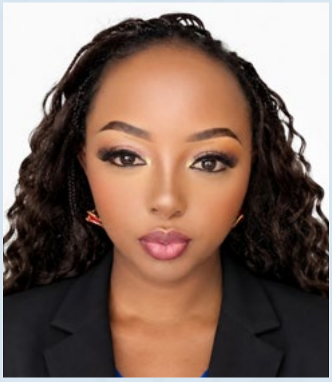
LAW AND TECHNOLOGY CLOSING THE GAP, NOT WIDENING IT

Artificial Intelligence as a Tool for Improving Access to Justice While Safeguarding Professional Standards



By Bernice Njeri Karita

Article 48 of the Constitution of Kenya guarantees every person access to justice, and directs that fees charged, where they exist, must not impede that access. Fourteen years later, the promise remains only partly kept. Legal aid is thin, Courts are distant from rural litigants, and the cost of an Advocate is beyond most Kenyans facing an eviction, a wage dispute, or a custody battle. Artificial intelligence is now being offered as part of the answer. The Judiciary's own Social Transformation through Access to Justice (STAJ) Blueprint treats technology as central to reaching the ordinary mwananchi. The real question is not whether AI can narrow Kenya's access-to-justice gap. It already is. The question is whether it can do so without opening a different one: a profession that outsources judgment to a machine and calls it progress.

WHERE AI IS ALREADY CLOSING THE GAP

For a litigant who cannot afford legal fees, an AI tool that explains a tenancy notice, drafts a simple demand letter, or organizes a bundle of receipts is not a luxury; it is the difference between asserting a right and abandoning it. Legal aid clinics and pro bono practitioners are increasingly using AI to triage larger caseloads, translate legal language into plain terms, and in preparing first-draft pleadings that a supervising advocate then reviews.

For small firms serving underserved counties, AI-assisted research closes a resource gap that once meant only well-funded practices could litigate complex matters properly. Used this way, AI does exactly what Article 48 demands: it lowers the practical cost of asserting a legal right.

WHERE THE SAME TOOL BITES BACK

Kenyan courts have already shown what happens when that promise is used carelessly. The High Court at Milimani, struck out a Notice of Motion and its supporting affidavit filed by a self-represented litigant, Nayan Mansukhlal Salva, in a dispute with the Commission on Administrative Justice and the Kenya Psychiatric Association. Justice Bahati Mwamuye found that both documents were machine-generated and non-compliant with Order 51 Rule 13 and Order 19 Rules 4 and 5 of the Civil Procedure Rules, holding that the law still requires documents to be drawn by a person, not produced wholesale by a machine.

A year earlier, Supreme Court Judge Isaac Lenaola had already cautioned lawyers after fabricated citations, generated by tools such as ChatGPT, turned up in submissions before him.

The irony should not be lost on the profession. The Salva case involved a litigant trying to enforce his own access to information against a public body, precisely the kind of self-help AI is meant to enable. Instead, unverified AI use cost him his application. For Advocates, the lesson is sharper still: a struck-out filing does not merely embarrass counsel, it sets back the very client whose access to justice the Advocate was retained to protect. Bad AI use does not just risk a sanction under the LSK Code of Standards of Professional Practice and Ethical Conduct; it defeats the purpose access-to-justice technology is supposed to serve.

THE GUARDRAILS NOW TAKING SHAPE

Kenya's regulatory response has moved quickly. The Judiciary's Draft Artificial Intelligence Policy, released in May 2026 and grounded in Article 159 of the Constitution, sorts AI use into three risk tiers: tools used for consequential decisions such as bail assessment or predictive sentencing require mandatory human oversight and audits; legal research tools sit in a middle tier requiring verification and disclosure; administrative tools such as transcription face lighter monitoring. Any AI-assisted filing must now carry a certificate of human verification, placing accountability squarely back on the Advocate who signs it.

The Law Society of Kenya has been invited to comment on accompanying Draft Practice Directions, and the broader Artificial Intelligence Bill, 2026, together with the Kenya National Artificial Intelligence Strategy 2025–2030, signal that AI governance is no longer aspirational but actively being built into law and practice. The Data Protection Act, 2019, remains the anchor for any AI tool that processes client or litigant personal data, requiring impact assessments for high-risk automated processing, a particularly live concern where legal aid clients share sensitive family, health, or financial information with cloud-based platforms. Comparable jurisdictions are moving the same direction: the European Union's AI Act classifies systems used in the administration of justice as high-risk, requiring mandatory human oversight, a framework Kenya's tiered approach clearly echoes.

WHAT THIS MEANS IN PRACTICE

None of this should discourage Advocates, legal aid organizations, or law clinics from using AI. It should discipline how they use it. Every document an AI tool touches, whether generated for paying client or a pro bono one, must be independently verified against a primary source before it is filed. Confidentiality obligations do not pause because a tool is convenient; Advocates must know where an uploaded document goes before uploading it, and anonymize sensitive client information where a platform's data handling is unclear.

Firms and legal aid providers serious about using AI to widen access, should adopt internal governance policies: who may use which tools, what must be verified, and how outputs are logged and audited. Disclosure, where the emerging Practice Directions require it, should be treated as protection rather than inconvenience; it is what allows a Court to trust an access-to-justice innovation rather than treat it with the suspicion the Salva ruling has now invited.

CONCLUSION

Kenya does not lack the ambition to make justice accessible; Article 48 has stood for fourteen years waiting to be fully realized. Artificial intelligence offers a genuine, practical route toward that promise, provided the profession treats verification, confidentiality, and disclosure as non-negotiable, not optional extras. An Advocate who uses AI carelessly does not merely risk professional censure. They risk becoming the reason the very gap AI was meant to close stays open.

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THE TRANSFORMATIVE IMPACT OF ARTIFICIAL INTELLIGENCE ON THE LEGAL PROFESSION

By Gladys Wanjiru

Legal practice involves amongst others the interpretation of laws, advising clients, drafting legal documents, and representing parties in disputes by trained and licensed legal practitioners. Traditionally, legal practice has relied heavily on human expertise to interpret the various statutes and case laws.

Artificial Intelligence (AI), on the other hand, refers to computer systems designed to perform tasks that typically require human intelligence, such as learning, reasoning, problem-solving, and decision-making. In recent years, AI has increasingly been integrated into various fields, including law.

The intersection of legal practice and artificial intelligence is transforming how legal services are delivered. The legal profession has acknowledged and embraced the transformative potential of artificial intelligence. Its impact extends beyond improving efficiency, AI is now fundamentally reshaping how law firms operate.

Some law firms have developed internal AI-driven systems to accelerate document review and manage large volumes of information. This has reduced the time required for such tasks, ultimately lowering costs. At the same time, it is redefining the skills lawyers need, shifting their focus from manual activities to delivering strategic insight.

An overview of the most significant impacts of artificial intelligence is provided below.

- **Legal drafting**
  AI tools can generate initial drafts of contracts, agreements, and policies based on prompts or templates. Instead of starting from scratch, lawyers begin with a structured draft that can be refined, saving significant time. In addition, AI can recommend appropriate clauses based on the type of document and jurisdiction. Moreover, AI tools can simplify complex legal language, suggest clearer phrasing, and ensure documents are easier for clients to understand without losing legal accuracy.

- **Enhanced client engagement through AI chat**
  The use of AI-driven chatbots is reshaping how law firms interact with their clients. These systems are capable of managing routine enquiries, coordinating appointments, and offering continuous support at any time of day. By taking over these administrative functions, chatbots enhance efficiency and responsiveness, allowing legal professionals to dedicate more time to intricate and high-value legal matters.

- **Due diligence and risk assessment**
  AI enables the quick review and interpretation of large volumes of contracts, documents, and data, uncovering potential risks and compliance concerns with a high degree of precision. This not only improves the depth and reliability of due diligence but also significantly reduces turnaround times, allowing law firms to handle a greater number of matters more efficiently.

While AI is an increasingly valuable tool in legal practice, it is not infallible and can make mistakes. AI systems rely on patterns in data and may generate outputs that are inaccurate, incomplete, or lacking in proper legal context. For instance, AI may misinterpret nuanced legal issues, apply incorrect assumptions, or produce language that appears sound but is not legally appropriate for the specific circumstances.

These limitations make human oversight essential. Lawyers must critically review AI-generated content, verify its accuracy, and ensure that it aligns with the relevant legal framework, client objectives, and commercial realities. This includes assessing whether the output reflects the correct legal position, identifying any gaps or inconsistencies, and exercising judgment in adapting the content where necessary.

In addition, the integration of AI raises ethical concerns, particularly in relation to confidentiality, accountability, and professional responsibility. The handling of sensitive client information through AI systems requires strict safeguards to prevent unauthorized access or disclosure. Moreover, despite the use of AI tools, responsibility for legal advice and outcomes remains with the lawyer.

These considerations are especially important in courtroom practice, where legal practitioners are bound by duties of professional ethics, competence, and integrity. Lawyers must ensure that any AI-assisted research, drafting, or evidence preparation is accurate, properly verified, and does not compromise ethical obligations or the administration of justice.

Moreover, reliance on AI without proper scrutiny can expose clients and law firms to legal and reputational risks. Errors in drafting, misapplied clauses, or overlooked regulatory requirements can have significant consequences.

A responsible and effective approach to the use of AI in legal practice therefore requires a careful balance. While AI can streamline processes and improve productivity, it must always be subject to thorough human oversight. Lawyers must critically assess and validate AI-generated outputs to ensure that they meet the required legal standards and are tailored to the specific context.

Ultimately, the integration of AI into legal practice calls for a shift not only in tools but in professional responsibility. Lawyers must remain vigilant custodians of accuracy, ethics, and client interests. By exercising informed judgment and maintaining rigorous review processes, they can harness the benefits of AI while safeguarding the integrity and reliability of legal services. In this way, AI becomes not a risk to the profession, but a catalyst for more efficient, informed, and resilient legal practice.

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THE ROLE OF THE BOARD IN ADOPTION OF AI IN LISTED COMPANIES

By Catherine Kawira Bariu

Artificial Intelligence has taken the world in a fast-paced speed with developments kicking in every counting day. At the beginning this technology concept was deemed far beyond belonging to Silicon Valley but step by step, it has moved to be used to the innermost parts of developing countries. Technology advancement has been graced in various sectors at every level for productivity and efficiency purposes among other reasons.

Listed Companies are among the institutions that have braced the efficiency that comes with employing technology advancement in their operation. In Kenya, a number of operations have been taken over by technology with artificial intelligence. It has been incorporated in customer service and chatbots, credit and risk assessment, financial forecasting and reporting, compliance monitoring, human resource management, investor relations and shareholder engagement, cybersecurity and fraud detection among others.

Looking at the nature of Listed companies which are regulated by Capital Markets Authority and operate under Nairobi Securities Exchange framework, Ai is not only a technology issue but also a governance issue. Accordingly, it is within the purview of the Board in overseeing its deployment from an angel of not only IT related issue but a governance one.

Therefore, there is a need for governance structures to ensure the Board fiduciary duty to the shareholders in ensuring stakeholder protection while supporting an innovative module for business growth.

Implementation of Artificial Intelligence has been proved to translate to improved efficiency optimization, cost optimization, better decision-making, enhanced competitiveness and improved stakeholder engagement.

Case point Safaricom Plc has been reported to have achieved significant operational improvements through the adoption of artificial intelligence across its business functions, making it one of Kenya's leading examples of AI-driven transformation. It's AI-enabled initiatives have resulted to a great deal in gains in efficiency, customer service, product development, procurement, and financial transaction processing.

This includes highlight achievements such as a 90% improvement in operational efficiency through its AI-assisted "Idea-to-Cash" platform, a 90% reduction in product time-to-market, and a 99.9% reduction in procurement analysis time, from nearly one month to approximately ten minutes.

Through its Generative AI assistant, Zuri, and digital self-service channels, Safaricom now resolves approximately 85% of customer interactions without human intervention. Further in its fintech operations, AI-enabled system enhancements have increased M-PESA transaction processing capacity while real-time customer behavior analytics have contributed to a high reduction in customer complaints relating to hourly data bundles.

Arguably, it is therefore not in question whether a listed company can incorporate AI but how to deploy the same. It is how should AI systems be governed. This is acknowledging that these systems can influence decisions and opinions of stakeholders, customers, employees and even the market.

In the financial sector, Companies have relied on AI in their assessment of making decisions that touch on their stakeholders, from customers, suppliers, regulators and even governments.

Banks, micro finance institutions to mobile lending application use AI in assessment of approving facilities evidencing expansion of advanced technology in wealth management sector.

Accordingly, AI is influencing decisions at both the executive level and consumer level. While fully autonomous AI decision-making remains relatively limited, AI already plays a significant role in informing both executive and consumer decisions.

Boards Fiduciary duty.

Top of the duties allocated to directors, is the duty of care to the shareholders. Shareholders entrust the board with the responsibility of steering the company to success expectedly translating to a positive return of their investments. It is noteworthy that this fiduciary duty is bestowed upon the directors with the presumption that they are skilled, fit and proper to make strategic decisions for the respective companies. That adoption of AI systems as a strategic pronouncement, the duty of care remains with the directors individually and collectively. The systems cannot assume the board's fiduciary duty but can only support them.

Accordingly, the Board has an extended duty to understand technology advancement so as to be informed of their related risks. This ensures that they give informed approvals of frameworks of AI governance and effectively monitor their implementation/execution with consideration to ethical and lawfulness bit and review of their performance.

As a first step towards establishing a robust AI governance framework, there is importance of conducting targeted training for Directors to enhance their understanding of AI technologies/systems, their impact on business operations, and the associated governance responsibilities. Such training would equip Directors to make informed decisions, provide effective oversight, approve appropriate governance frameworks, and monitor the implementation and performance of AI initiatives in a manner that is ethical, lawful, and aligned with the Company's strategic objectives.

Role of the Company Secretary

The role of Company Secretary is certainly evolving with the increasing adoption of artificial intelligence in governance of companies. There is undoubted change from the traditional approach of the governance and compliance responsibilities from the traditional to an improved modern one. Company Secretaries are posed as a vital facilitator in incorporating Artificial Intelligence or rather embedding AI in Board management and support. They are expected to help these Boards navigate on the opportunities presented, assess the risk posed and implications in terms of the regulatory framework. They are positioned at the intersection of the executive and the Board, the regulators and other stakeholders thus should ensure deployment of AI in an ethical and transparent way and in alignment with the Company strategic plan.

It is critical that Company Secretaries be well versed with the technological developments so as to deliver their task on ensuring Boards are supported through education/training. This is because these Directors are expected to skillfully deliver their oversight role in adoption and implementation of Ai systems in these companies. Company Secretaries can organize training programmes, facilitate briefings by AI experts and overall, Directors are well informed of the potential opportunities, risks and threats posed.

Further, with the implementation of Ai in the various company departments such as Customer care, financial analysis among others, it is vital that Company secretaries support these companies in developing and execution of Ai governance. This includes clear respective policies governing the responsible use of these technologies. Additionally, that these policies are aligned with corporate governance framework and expectations of stakeholders such as shareholders.

It is noteworthy that government and regulators are introducing new regulations governing use of AI, algorithmic accountability and data protection. Data Protection Act 2019 was a starting regulation of the aspect of governing technological advancement related issues following others such as Computer Misuse and Cybercrimes Act (2018) and Artificial Intelligence Bill, 2026 (Senate Bill No. 4 of 2025) looming in the legislative corridors.

It is therefore expected, that board of Directors ought to approach their duties as stewards of these listed companies and their assets on behalf of shareholders, with not only the traditional skills set but embrace and evolve with the technological advancement tools.

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REPUBLIC OF KENYA

NuPEA
NUCLEAR POWER & ENERGY AGENCY

Nuclear Power and Energy Agency (NuPEA) is a State Corporation established in law through the Energy Act No.1 of 2019. The Agency's mandate as stipulated in Section 56(1) Act are to: a) be the nuclear energy programme implementing organization and promote the development of nuclear electricity generation in Kenya; and (b) carry out research, development and dissemination activities in the energy and nuclear power sector.

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ARTIFICIAL INTELLIGENCE AND THE AfCFTA: CLOSING REGULATORY GAPS FOR A SECURE AFRICAN DIGITAL FUTURE

By Juliana Njiriri

Artificial Intelligence (AI) has emerged as one of the most transformative technologies of the twenty-first century, fundamentally reshaping international trade, digital commerce, investment, public administration, and regulatory governance. Across the world, AI-driven technologies are revolutionising the production and delivery of goods and services, facilitating cross-border digital transactions, enhancing financial services, improving logistics and supply chains, and creating new opportunities for economic growth and innovation. For Africa, these developments coincide with an ambitious continental integration agenda led by the African Continental Free Trade Area (AfCFTA), which seeks to establish a single African market for goods and services while accelerating industrialisation, digital transformation, and sustainable economic development. The adoption of the AfCFTA Digital Trade Protocol further demonstrates the continent's commitment to creating a harmonised digital marketplace capable of supporting e-commerce, digital entrepreneurship, cross-border data flows, and inclusive participation in the global digital economy.

Despite these significant developments, the rapid deployment of AI technologies presents complex legal, regulatory, and governance challenges that extend beyond traditional trade law. AI systems increasingly influence commercial decision-making, consumer interactions, financial transactions, labour markets, public procurement, and cross-border digital services. Their deployment raises fundamental legal questions concerning data governance, privacy protection, algorithmic accountability, competition law, intellectual property rights, consumer protection, cybersecurity, digital taxation, liability for autonomous systems, labour rights, discrimination, and the protection of fundamental human rights. These challenges are particularly significant within Africa, where regulatory systems remain fragmented and national AI governance initiatives are developing at varying speeds and levels of sophistication. Without coherent continental regulation, divergent national approaches risk creating legal uncertainty, increasing compliance costs, limiting cross-border digital trade, and weakening the objectives of regional economic integration envisioned under the AfCFTA.

This paper examines the evolving relationship between artificial intelligence governance and international economic law within the African context. It seeks to determine whether the existing AfCFTA legal framework is adequately equipped to regulate AI-driven digital trade and whether additional legal instruments or institutional reforms are necessary to support the continent's digital transformation agenda. The study critically analyses the AfCFTA Agreement and its related legal instruments, with particular emphasis on the Digital Trade Protocol, to assess the extent to which they accommodate emerging AI-related regulatory concerns. While the Digital Trade Protocol addresses several aspects of digital commerce, including electronic transactions, digital payments, electronic signatures, online consumer protection, and cross-border data flows, it does not expressly provide a comprehensive legal framework for the governance of artificial intelligence or address the unique legal implications arising from increasingly autonomous digital systems operating across national borders.

The paper further identifies critical regulatory gaps that may undermine Africa's ability to benefit fully from AI-enabled digital trade. Among these are the absence of harmonised standards governing AI transparency and accountability, limited guidance on liability for autonomous decision-making systems, inadequate mechanisms for regulating algorithmic discrimination, uncertainty regarding cross-border data governance, insufficient cybersecurity obligations relating specifically to AI systems, and limited coordination concerning AI ethics and responsible innovation. These governance deficiencies present significant risks for both businesses and consumers operating within the African digital marketplace and may reduce investor confidence while limiting the competitiveness of African enterprises in global digital markets.

To provide broader comparative insights, the paper evaluates selected AI governance models adopted in other major jurisdictions, including the European Union, the United States, and China. The European Union's risk-based regulatory model, reflected in its comprehensive AI regulatory framework, illustrates an approach centred on human rights protection, transparency, accountability, and risk management. By contrast, the United States has generally favoured a more innovation-oriented and sector-specific regulatory strategy that relies heavily on existing legal frameworks while encouraging technological development and private-sector innovation. China presents a different model characterised by strong state oversight, strategic industrial policy, algorithm regulation, and national security considerations. Each of these regulatory approaches reflects different legal traditions, policy priorities, and economic objectives, offering valuable lessons for Africa while also demonstrating that no single governance model can be directly transplanted into the African context without careful adaptation.

Drawing upon doctrinal legal analysis, comparative legal methodology, and policy-oriented research, the paper argues that Africa requires a distinct AI governance framework that reflects the continent's developmental priorities, institutional realities, and aspirations for digital sovereignty. Rather than merely replicating foreign regulatory models, African policymakers should develop governance mechanisms that balance innovation with effective regulation, facilitate cross-border digital trade while safeguarding fundamental rights, and promote inclusive economic development alongside technological advancement. Such a framework should recognise the diversity of African legal systems while establishing minimum continental standards capable of supporting regulatory coherence across Member States.

The paper further contends that fragmented national AI policies pose one of the greatest threats to the successful implementation of the AfCFTA's digital integration agenda. As more African countries develop national AI strategies and digital governance policies independently, inconsistent regulatory requirements may create barriers to digital trade, discourage investment, increase compliance burdens for businesses, and complicate cross-border enforcement.

Divergent rules governing data governance, AI ethics, consumer protection, cybersecurity, and algorithmic accountability could undermine the very objective of establishing a seamless continental digital market.

Harmonisation therefore becomes essential not only for promoting legal certainty but also for strengthening Africa's collective bargaining position in international negotiations concerning global AI governance, digital trade rules, and emerging standards for responsible artificial intelligence.

The study consequently advocates for the gradual development of a coordinated continental AI governance framework under the AfCFTA. Such a framework should complement existing legal instruments by establishing common principles on transparency, accountability, explainability, fairness, non-discrimination, human oversight, cybersecurity, data governance, and effective dispute resolution. It should also provide mechanisms for regulatory cooperation among Member States, promote capacity building for national regulators, encourage responsible AI innovation, and facilitate mutual recognition of regulatory standards where appropriate.

Importantly, the framework should remain sufficiently flexible to accommodate rapid technological developments while ensuring adequate legal certainty for businesses, governments, investors, and consumers.

The paper concludes that artificial intelligence is no longer merely a technological issue but has become a central concern of international economic law, trade governance, and regional integration.

The future competitiveness of Africa's digital economy will depend not only on increased investment in AI technologies but also on the establishment of coherent legal institutions capable of governing these technologies responsibly. As the world's largest free trade area by membership continues to deepen economic integration, the AfCFTA presents a unique opportunity to position Africa as an active participant rather than a passive recipient in the evolving global AI governance landscape. Developing a coordinated continental AI governance framework would strengthen legal certainty, enhance digital sovereignty, promote innovation and sustainable development, protect fundamental rights, facilitate cross-border digital trade, and reinforce Africa's influence in shaping future international norms governing artificial intelligence and the global digital economy. Such a framework would not only advance the objectives of the AfCFTA but also contribute significantly to the broader evolution of international economic law in an increasingly AI-driven world.

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AI HALLUCINATION VS. HUMAN LIMITATION: LEVELLING THE PLAYING FIELD IN THE ERA OF ARTIFICIAL INTELLIGENCE

By Albert Were, Advocate

The Double Standard We Rarely Acknowledge

The legal profession places considerable weight on human judgment, the lawyer's capacity to reason, weigh evidence, interpret statutes, case law and dispense advice informed by years of training and practice. Yet as Artificial Intelligence (AI) tools rapidly embed themselves into legal research, contract drafting, due diligence and dispute resolution, a pointed question emerges: are we holding AI to a standard of perfection that we have never applied to ourselves?

This article examines AI hallucination, instances where AI systems generate plausible yet factually incorrect or legally unsound outputs, juxtaposed against the less scrutinized problem of human cognitive limitation and professional error. Its central argument is that a fair comparison of these two failure modes is essential before the legal profession can make rational, ethically grounded decisions about when to deploy, defer, or distrust AI in legal practice.

The AI Hallucination Problem in Context

The discourse around AI hallucination in legal contexts has intensified following several high-profile incidents globally, including instances where AI-generated court submissions contained fabricated case citations. In one widely reported case in the United States, counsel filed submissions referencing multiple non-existent decisions generated by an AI research tool. The court's censure was swift and public. These incidents have understandably made practitioners cautious.

In Kenya, where the legal profession is expanding rapidly and access to quality legal research tools remains uneven across practitioners, the stakes are particularly acute. Junior advocates, sole practitioners operating in county towns, and legal aid providers, who stand to benefit most from AI-assisted research, are also least likely to have the institutional oversight structures needed to detect AI errors before they cause harm. The risk of unchecked AI hallucination in these settings is not merely academic; it is a matter of access to justice.

The Human Limitation We Rarely Examine

The article cautions, however, against a reflexive rejection of AI tools on the ground of imperfection. Human lawyers are equally fallible; they misremember precedents, misread statutes, succumb to bias and are susceptible to fatigue and client pressure. Empirical research in cognitive psychology and legal decision-making has documented these failures extensively.

The adversarial legal system itself, with its mechanisms of cross-examination, appellate review and professional discipline, was constructed precisely because unassisted human judgment was deemed insufficient. A lawyer who miscites a case through genuine error faces professional consequences. A lawyer whose AI tool miscites a case faces the same consequences, plus reputational damage from having used the tool at all. The asymmetry is worth examining.

Consider the practical reality in a busy Kenyan commercial practice. A senior associate reviewing a 300-page agreement under time pressure will miss things. A conveyancing advocate handling multiple transactions simultaneously will occasionally conflate title details. These are known, accepted risks managed through supervision, file reviews and professional indemnity insurance. We do not conclude from these failures that human lawyers should not be used. We build systems to manage the risk.

The question, therefore, is not whether AI errs, but whether it errs differently, more frequently, or less detectably than human practitioners and what that means for how the profession should integrate, supervise, and regulate AI tools.

Three Propositions

This article advances three propositions. First, that AI hallucination and human cognitive bias are functionally analogous; both produce incorrect outputs, both are context-dependent and both are amenable to mitigation through structured processes. The difference lies in how we respond to each.

Second, that the legal profession's response to AI error is disproportionate relative to its tolerance for equivalent human error. This asymmetry, unaddressed, will entrench existing inequalities in the profession confining AI's productivity benefits to well-resourced firms capable of intensive human oversight, while practitioners who most need the efficiency gains are left behind.

Third, that levelling the playing field requires not the elimination of AI from legal practice, but the development of a calibrated framework of professional responsibility; one that demands of AI-assisted work the same diligent verification always required of competent legal practice.

A Framework for Responsible Integration

Drawing on emerging guidance from the International Bar Association and regulatory frameworks under Kenya's Data Protection Act, and the Kenya Artificial Intelligence Strategy 2025-2030, a responsible AI integration model for the Kenyan legal profession rests on two pillars.

The first is competence. Advocates must understand, at a functional level, how AI tools work and how they fail. This does not require a computer science degree. It requires the same working knowledge a conveyancer brings to understanding how a lands registry system can produce errors, or that a litigator brings to understanding how court filing systems can misplace documents. Competence here means knowing the tool's limitations well enough to catch its mistakes.

The second is verification. AI outputs must be subject to the same critical scrutiny as any other secondary source. An advocate who cites a journal article without reading the primary judgment is already in breach of basic professional standards. The same standard applies to AI-generated research: the primary source must be located, read and verified before it is relied upon. This is not an additional burden imposed by AI; it is the existing standard, applied consistently.

LSK's Role

The Law Society of Kenya has a distinctive role to play in this transition; not merely as a regulatory body that disciplines misuse, but as an institution that actively democratizes access to reliable AI tools and curates guidance on their responsible use. In a profession where the gap between demand for legal services and the capacity of qualified practitioners remains vast, AI is a necessity, not a luxury.

The Society should therefore consider developing: a practitioner's guide to AI tool selection and verification and CPD content on AI competence; and a framework for disclosure to clients and courts where AI has been used in the preparation of legal work product. Regulation should protect consumers of legal services without stifling technology's potential to extend access to justice.

Conclusion

The era of Artificial Intelligence does not call upon the legal profession to choose between human judgment and machine assistance. It calls upon practitioners to become critical consumers of technological tools, holding those tools to rigorous but realistic standards. The same standards, ultimately, that the rule of law has always demanded of the humans who serve it.

AI hallucination is a real and manageable risk. Human limitation is an older, equally real and no less manageable one. The profession that learns to combine human oversight with AI capability will be best placed to deliver justice in the years ahead.

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FROM OWNERSHIP TO INTEGRITY: REFRAMING AI ACCOUNTABILITY AND DIGITAL TRUST IN KENYA

By Musi Floridah Namusia

For the legal profession, the initial instinct when confronting Artificial Intelligence (AI) has often been to ask a narrow and defensive question: *who owns the intellectual property in AI-generated content?* While that question remains important, it is no longer the most useful starting point for modern legal practice. Under the Law Society of Kenya's "Business Unusual" agenda, the more urgent inquiry is broader and more systemic: who is legally accountable for the integrity of AI-generated information?

This shift from ownership to integrity matters because AI has ushered in an era of synthetic media and algorithmic misinformation. AI systems now generate legal advice, financial projections, medical explanations and marketing content at unprecedented speed and scale. In the process, they increasingly blur the line between verified human communication and machine-generated output.

As Kenya moves toward formalising its AI regulatory framework through the ***National AI Strategy (2025-2030), the July 2026*** Draft Policy and the ***Artificial Intelligence Bill, 2026,*** the legal profession must help shape a practical approach to AI liability that applies across the entire content lifecycle: from the information entered into AI systems to the content ultimately released to the public.

1. The Upstream Risk: Governance at the Input Stage

A coherent model of AI accountability must begin where the technology itself begins: at the input stage. Many serious AI-related failures occur before any output is generated.

In the rush to benefit from the efficiency of generative AI, professionals and corporate employees may feed proprietary data, unreleased marketing strategies, trade secrets or personal data into public AI models. By doing so, they risk immediate breaches of data protection, confidentiality and corporate governance obligations.

Under the Data Protection Act, 2019, entering personal data into third-party AI models without explicit consent may amount to a regulatory violation. Responsible AI use is therefore not only about protecting what AI creates; it is first about safeguarding what we feed into it. Contracts, non-disclosure agreements and internal governance policies must serve as the first line of defence, acting as gatekeepers of digital trust before the prompt is even typed.

2. The Downstream Risk: Harm at the Output Stage

If the input stage is concerned with *confidentiality*, the output stage is concerned with truth. This is where the legal system faces one of its most difficult accountability challenges.

Generative AI does not replicate human judgment; it predicts sequences of words, images or other outputs. This predictive nature can produce "hallucinations": convincing and highly realistic fabrications of facts, citations and events. When such outputs are deployed in public-facing environments without rigorous human oversight, they can cause serious real-world harm.

The danger to professional and judicial systems is already evident. Globally, and regionally as seen in the South African case of *Mavundla v MEC for the Department of Co-operative Governance and Traditional Affairs,* courts have rejected filings containing fabricated, AI-generated case citations. This demonstrates that human oversight is not merely a best practice; it is a non-delegable professional and ethical duty. Where AI-assisted content infringes third-party rights, misleads consumers or defames an individual, legal liability will rest with the human organisation that deployed it, not the machine that generated it.

3. The Legislative and Consumer Protection Gap

This brings us to the core legal gap: Kenya's existing consumer protection laws are not yet fully equipped to address these modern and intangible harms.

The current consumer protection framework was built largely for a marketplace of physical goods and conventional services. It protects against defective products and misleading advertisements, but it does not yet adequately address the deceptive nature of synthetic media, cloned voices and deepfakes.

While Clause 28 of the AI Bill, 2026 would require deployers to disclose when users are interacting with an AI system, transparency alone is an insufficient remedy. An AI-generated product comparison or medical recommendation that is false or biased remains harmful, regardless of whether it carries an "AI-generated" label.

To bridge this gap, Kenya should look to Article 35 of the Constitution, which guarantees every citizen the right of access to information and the correction of false or misleading information. Viewed through this constitutional lens, information integrity should be recognised as a legally protectable consumer interest. Clear civil pathways of redress are needed for consumers who suffer financial, reputational or physical harm after relying on unverified, algorithmically generated information.

4. Governance and the Role of the Legal Profession

For the legal profession, the AI lifecycle now represents a material governance and accountability risk. Under modern Environmental, Social and Governance (ESG) frameworks, digital trust is no longer a niche technical concern; it is a core obligation for lawyers advising clients, institutions and decision-makers in an increasingly automated environment.

Corporate boards have a duty to ensure that their organisations do not expose shareholders to significant liability through negligent AI deployment. In line with the July 2026 Draft Policy, which proposes a risk-based approach to technology governance, organisations must implement structured compliance frameworks.

Legal teams must therefore move "upstream" in the corporate workflow. Rather than merely clearing final marketing content, lawyers should help design the systems that govern AI use, including acceptable-use policies and approval workflows for employees, vendor due diligence processes for AI software tools, and record-keeping systems aligned with the proposed five-year retention of training datasets and risk-mitigation metrics for high-risk applications.

Conclusion: From Ownership Questions to Governance Duties

Ultimately, the question of who owns AI-generated content is only one part of the wider AI conversation. The more urgent challenge is governance: how to ensure that AI systems are used responsibly, transparently and with clear lines of human accountability.

To succeed in this "Business Unusual" environment, Kenyan legal practitioners must champion a regulatory regime that harmonises the *AI Bill, 2026 with the Data Protection Act* and consumer protection laws. By shifting the focus from ownership to integrity and by establishing clear accountability across the AI lifecycle, Kenya can strengthen the Silicon Savannah as a secure, ethical and trusted leader in the global digital economy.

BUSINESS UPENDED: LEGAL PRACTICE IN THE ERA OF AGENTIC AND GENERATIVE ARTIFICIAL INTELLIGENCE (AI)

By Louis Nganga

1.0. Mirror Mirror on the Wall

Human beings have since the dawn of mankind demonstrated an insatiable appetite for knowledge, even where the exercise of human conscience conflicts with the pursuit of novel interpretations of the existing body of knowledge. The latin root *"orare"* (to speak), as used in the context of an oracle, implies the ability to determine matters beyond human ability and comprehension, including the future. Many cultural and social histories exalt *oracular* power. For instance, the Government of Tibet, has an official oracle, the *Nechung,* which the Dalai Lama has consulted for centuries. Chinua Achebe, in *Things Fall Apart,* introduced the Oracle of the Hills and Caves. Once duly appeased, the Oracle's responses would be interpreted by the consulting High Priest. Interestingly, an oracle could not make a mistake; any difference between oracular prophecy and physical events was considered a failure to correctly interpret the oracle's responses.

Today, humanity is grappling with complex moral, social and legal challenges that could potentially redefine the trajectory of human evolution, and the search for existential knowledge, by oracle or otherwise, has never been more intense. To litigants, lawyers, judicial and juridical arbiters and triers of fact, AI (artificial intelligence) is perhaps the most oracular technology that has ever existed. This article dissects the realities of AI in the global legal marketplace and charts a future for legal sector stakeholders who must embrace agentic and generative AI systems and integrate, as seamlessly as possible, AI into their practice, or risk being swept by the powerful wave of legal sector AI systems in the justice and legal services universe.

2.0. Legal Sector AI as Equal Parts Disruptor, Equal Parts Enabler

As it stands, AI will influence, if not disrupt, every industry, with varying degrees of impact ranging from total upheaval in some economic segments and a mild reordering in others. The reality is that the sum total of AI-led disruption, particularly in the legal sector, is impossible to predict. Routine activities will be handled almost exclusively by AI systems, reducing backlog, basic errors and delays. An example of ring-fenced, routine-activity agentic AI systems in judicial functions, the Arizona Supreme Court has deployed human-like avatars "Daniel" and "Victoria" to engage with court users and provide case updates only. In contrast, in March 2025, a Mr. Jerome Dewald attempted to use an "AI-generated avatar" to represent him as his counsel. Speaking mechanically, and out of turn, the AI avatar appeared, apparition-like, earning the immediate rebuke of the presiding judge, after which the presiding judge quickly banned the avatar in toto.

2.1. AI as the Legal Market's Equalizer

On the one hand, when considered objectively, AI is today the single greatest equalizer in terms of scale and complexity in legal functions. Itallows smaller firms to compete with larger ones and deliver comparable quality or volume of work within a tighter budget. Legal sector AI systems can unequivocally do more work by volume, in a much more efficient way. For legal professionals and fact-finders, including judges and arbitrators, AI can take the mundaneness out of legal work and avoid many costly errors by proof-checking information at a higher degree of accuracy than any human actor.

2.2. Recognizing the Inherent Limitations of AI in Justice and Legal Contexts

On the other hand, AI systems are widely acknowledged to suffer from structural and contextual limitations. .Consequently, the more legal-sector AI systems evolve, the clearer the need for them to conform to the final human discretion of legal professionals. When it comes to interpreting affect or emotion, AI has proven to lack the inherent sensitivity of a human being and can extrapolate assumptions to the point of absurdity. Finally, experience demonstrates that AI is not infalliable, and will make unpredictable interpretive or analytical errors even with access to accurate information.

3.0. Ring-Fencing AI in Legal and Justice Contexts

AI has demonstrated a higher rate of accuracy in detecting errors than human agents, making it useful for routine tasks. Being a system designed to respond to 'prompts', agentic AI can never totally replace human discretion.

This is because, the risk of a machine making an illogical decision, in spite of human operators' best intentions, is likely. Human biases bleed from the large language models into the AI systems and affect the decision-making of the systems. Essentially, this renders generative and agentic AI ineffectual in affective processing, where complex human emotions, dispositions and attributes are evaluated within a dispute pending resolution. Importantly, judicial and administrative functionaries who use AI must understand that higher AI capabilities require more (and increasingly, rarer) system and human resources, a situation known as Jevons' Paradox.

4.0. Conclusion

Applied in appropriate, justifiable contexts and with the necessary, circumspect and final human discretion, legal-sector AI is a technological revolution with remarkable advantages in the legal marketplace. However, AI, in the global legal ecosystem, is not the oracle that many may have thought it was, because as a tool, AI ought to be deployed in strictly defined use cases under human oversight and discretion.

One of the most pronounced AI limitations, as established in this piece, lies in affective interpretation; in effect, AI does not have the evolved emotional intelligence inherent in the discretion of human triers of fact.Accordingly, AI can never replace human sensitivity, compassion, empathy, and emotional intelligence. Furthermore, genAI systems are notoriously lazy and unoriginal. Critically, once data or a logical process within AI systems have been contaminated by bias, negative sentiments or prejudices, it loses its objective value and utility to lawyers and judges alike. In addition, the likelihood of AI misjudgment or hallucination can potentially result in systemic oversight, lapses or discrete injustices.

Ultimately, AI is a permanent fixture in all of digital technology, and with a footprint cutting across all industries, the law is no exception. Ultimately, agentic/generative AI is here to stay, and the entire legal services and justice ecosystems will have to realign to integrate AI as a fundamental practice tool as well as a pillar of service delivery. AI algorithms are only as good as the data that they are trained on, making AI a capable servant but a capricious master.

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GHOST CITATIONS

By Martin Wagah

An advocate's signature on a court filing is more than an administrative seal; it is a personal representation to the court that the document does not mislead, its citations are real, and every authority named above the signature exists and has been read.

The document is not merely submitted; it is vouched for. This is an irreducible obligation of the profession, and it is the precise point at which artificial intelligence (AI) presses.

In Kenya, the warning has already come from the bench. In May 2025, at the Judiciary's Digital Transformation Conference, Justice Isaac Lenaola decried that lawyers were filing submissions drafted with AI in which, as he described it, the language was beautiful, but some authorities, when a judge checked, had been hallucinated by the machine. His instruction was blunt — until the Judiciary issues guidelines, advocates should avoid the tool. Judges do not issue warnings about remote risks.

The hallucination is not a malfunction. It is how the tool works. A large language model (LLM), the most common class of AI systems such as ChatGPT, drafts texts by predicting the most probable continuation of that piece of text. This probability machine can produce a filing that is fluent, correctly formatted, and indistinguishable on the page from competent work. However, the LLM cannot perform the act the advocate's signature certifies. As a fundamentally stochastic system, a bare LLM has no means of knowing whether the authorities it cites exist: no matter how well it has been trained, if you ask it for a fact, it returns the most probable shape of one. Producing a citation that looks correct is not the same as locating one that is.

The courts have not waited for those guidelines. Submissions drafted by the machine have already been struck out, and judgments resting on them set aside. The principle required no new statute: a document that no one has drawn is a document for which no one is answerable. The shape of the failure is always the same: work is delegated to the machine, the output appears plausible, and no one verifies it before the signature goes down.

That is the heart of it. An advocate's duty to be candid with the court, and not to mislead it, predates the machine and is unaffected by it. The defence such a filing would otherwise require — that the AI erred, and not the advocate — is one the profession cannot entertain. The system is no officer of the court: it swore no oath, holds no place on the Roll, and is owed no duty by the court because it can be subject to none. Responsibility cannot be assigned to an instrument that cannot be held to account. It cannot be delegated.

It can, however, be enforced — and here I should declare an interest, since the subject of this piece is candour. I am not an advocate. I am a scientist who builds AI systems at Haki, which builds legal AI for Kenya. I met this failure first in my own field. Hallucination is no gentler in science than in law — a fabricated citation in a research paper does the same work as a fabricated authority in a filing, and an LLM will invent a study as readily as it invents a case. During my doctoral research I built a discipline to make that impossible; and because the failure is identical, a discipline that defeats it in one field transfers directly to the other.

The system is called Ledger, and its rule is that no assertion may reach a page unless its exact words can be traced, on the record, to the primary source, and a machine, not the writer's good intentions, refuses anything that misses that mark. What survives is auditable: another party can follow every claim back to its source. Ledger is provenance made mechanical, so that the one thing a machine should never do, invent a source, becomes the one thing it is not able to do. Before incorporating Ledger into our existing tools, I am submitting it to the Future of Life Foundation for an independent technical evaluation, in competition with other systems built against the same problem of AI hallucinations.

None of this relieves the advocate of anything. The signature remains hers, the judgment remains hers, the duty remains hers. A tool can make it impossible for an AI to file a fiction, but it cannot make advocates care that they do not. The machine cannot be struck off, because it has nothing to lose.

The advocate can, because she has everything to lose: her name, her standing, her reputation. Everything.

The Author is a Chief Strategy Officer at Haki AI.

NEWS AND VIEWS

A QUIVERFUL OF MEMORIES!

By Byron Menezes

There comes a time in every advocate's life when reality taps gently on the shoulder. Unfortunately, for some, that tap comes at 2.00 a.m. outside Quiver Lounge, holding the receipt for six mzingas, three bottles of JD, and enough nyama choma to feed a village.

The problem is that retirement has absolutely no respect for good stories.

When you eventually retire, the bank manager will not accept the explanation that, "Those were networking expenses." Your landlord will not reduce the rent because you were once the life of the party. SHA ,SHIF, NHIF, BOTTOM UP —or whatever healthcare system exists then—will not waive your hospital bill because everyone knew you by your first name at your favourite nightclub.

Retirement demands one thing and one thing only: money. As advocates, we are experts at advising clients on how to protect wealth, prepare wills, structure companies, and recover debts. Yet we have also perfected the unique skill of earning substantial fees during the week from Makadara to Milimani and ensuring that by Sunday evening, only the bank statement remembers them.

We will know every happy hour in Nairobi but cannot remember the interest rate on a Treasury Bond.

We will know the nightclubs with the best DJs but have no idea on creditworthy banks and their interest rates.

We will own the latest German machine, wear bespoke suits like the short man who is not a boy, and never miss a social event. Yet ask them about retirement planning and they suddenly become constitutional experts on why "the future is uncertain. Alternatively YOLO !

The law is a wonderful profession, but it comes with one unavoidable truth: no one cross-examines Father Time.

The sharp young advocate eventually becomes the respected senior counsel. The senior counsel eventually discovers that standing for six hours in court is no longer enjoyable. Reading fifteen lever-arch files overnight somehow loses its appeal. Clients begin asking for "someone younger." The body politely reminds you that you are no longer thirty.

The question then becomes: who pays you when you stop billing?

Hopefully, it is not your children.

Hopefully, it is not your former pupil.

Hopefully, it is certainly not that one client who still insists they will "clear the balance next week."

The ideal answer is simple:

Your investments.

Imagine a different story.

Instead of buying another round of mzingas every weekend, you put a portion into a Money Market Fund.

Instead of changing cars every three years, you buy a small rental apartment.

Instead of letting bonuses disappear into lifestyle inflation, you purchase Treasury Bills and Treasury Bonds that quietly pay interest while you sleep.

Instead of leaving every shilling idle in a current account, you place some into a Fixed Deposit Receipt (FDR), allowing your money to earn while you are busy earning legal fees.

Before long, something magical happens.

Your money begins working longer hours than you do.

Rental income arrives every month.

Treasury Bond interest lands in your account without filing pleadings.

Money Market Fund returns accumulate while you are in court.

Your Fixed Deposits mature without requesting adjournments.

That is passive income—the only employee who never asks for leave.

The greatest expense many advocates underestimate is not school fees or mortgages. It is growing older.

As the years pass, hospital visits here and abroad become more frequent than mentions before the Deputy Registrar. Medical insurance premiums increase. Medication becomes a permanent line in the monthly budget. At precisely the moment your earning capacity begins to slow, your expenses often accelerate.

This is why retirement planning is not about becoming wealthy.

It is about preserving dignity.

No advocate who has spent forty years defending the rights of others should spend retirement worrying about paying for medication or depending on relatives for daily expenses.

This is the reality today sadly.

The Advocates Benevolent Association (ABA) has established a Retirement Savings Scheme specifically to encourage advocates to save consistently throughout their careers. It offers members an organised way to accumulate retirement savings while complementing other investments such as property, Money Market Funds, Treasury Bills, Treasury Bonds, and Fixed Deposits.

Like every good legal strategy, retirement planning works best when started early. Waiting until your final years in practice is like preparing witness statements after the judgment has already been delivered.

So, What Should the Learned Friend Do?

The answer is refreshingly simple.

Keep enjoying life—but budget for it.

Go to Quiver if you must—but perhaps leave after one mzinga instead of sponsoring the entire establishment.

Celebrate successful cases—but celebrate your future with equal enthusiasm.

Pay yourself before entertaining everyone else.
Join the ABA Retirement Savings Scheme and contribute consistently.

Build an emergency fund.

Invest regularly in Money Market Funds, Fixed Deposits, Treasury Bills, Treasury Bonds, shares, land, and rental property according to your financial goals and risk tolerance. Review your investment portfolio every year, just as diligently as you review your diary.

Finally, remember that the greatest legal precedent you can set is not one reported in the Kenya Law Reports, but one that allows you to retire comfortably, pay your hospital bills without anxiety, maintain the lifestyle you worked so hard to build, and perhaps even treat your former colleagues to lunch—not because you are still chasing briefs, but because your investments picked up the bill.

After all, the goal is not to become the advocate who says:

"I remember the good old days at Quiver."

The goal is to become the advocate who smiles and replies:

"Those were good days—but these dividends, rental income, bond coupons, and my ABA Retirement Savings Scheme are even better."

Retirement is coming whether you file a notice of appointment or not.

The question is simple:

Will you retire with stories, or with income?

The wisest advocates retire with memories from Manyatta and their bulging investment portfolios.

Enjoy the Annual Conference 2026.

The Author is an Advocate of the High Court of Kenya and Chairperson of the Advocate Benevolent Association (ABA)

WHEN A NATION LEARNS TO STAY HOME: THE UNFINISHED LESSON OF SABA SABA

By Teresia Wavinya Nicholas

There is an African proverb that says until the lion learns to write, every story will glorify the hunter.

Saba Saba is one of the few chapters in Kenya's history where the lion found its voice.

On 7 July 1990, ordinary Kenyans walked into uncertainty armed with little more than conviction. They walked because they believed that a nation could not indefinitely imprison the aspirations of its own people. They did not know whether they would return home that evening. Some did not. Others returned bearing scars that would long outlive the events of that day. Yet they walked because freedom has always demanded courage before it bestows its rewards.

The Government of the day believed it could outlast the aspirations of its own people.

History proved otherwise.

Governments panic.

History does not.

Those four words may well summarise the journey of our Republic.

Three days before the planned Saba Saba rally at Kamukunji Grounds, former Cabinet Ministers Kenneth Matiba and Charles Rubia announced that the meeting would not proceed after the Government declined to permit it. Their decision did not shield them. They were arrested and detained. Their advocate, veteran advocate John Khaminwa, was arrested while seeking to discharge his professional duty on behalf of his clients. The expectation was unmistakable: remove the voices calling for reform and the movement would dissipate.

It did not.

Ordinary Kenyans gathered anyway.
The response of the State was swift. Tear gas replaced dialogue. Batons replaced engagement. Live ammunition replaced persuasion. The unrest that followed spread beyond Nairobi and into the national conscience. Official accounts recorded at least twenty deaths and more than one thousand arrests. Yet the State won neither the argument nor history's verdict. Within a year, Section 2A of the Constitution was repealed, restoring multiparty democracy and setting Kenya on the long road that culminated in the Constitution of 2010.
Power had spoken.
History replied.

The Government demonstrated its power. The people demonstrated something greater: resolve.

Two decades later, Kenya gave herself a Constitution founded upon a simple yet revolutionary proposition; that all sovereign power belongs to the people.

The lesson seemed obvious.

Governments may delay history.

They do not defeat it.

This year's Saba Saba left me asking a different question.

What becomes of a nation when its people wake up, not wondering whether they should go to work, but whether they should leave their homes at all?

That is why Saba Saba should never be reduced to a date on the calendar or an annual political ritual. It is a constitutional reminder that governments derive legitimacy not from the coercive instruments they command but from the confidence the people repose in them.

It is also a reminder that panic has never been an enduring philosophy of governance.

This year's Saba Saba brought that lesson back into sharp focus.

Before sunrise, the country had already received its message.

Roadblocks sprang up along major entry points into the Central Business District. Parliament Road was barricaded. Checkpoints appeared on Waiyaki Way, Thika Road, Jogoo Road, Lang'ata Road and other arterial routes. Public Service Vehicles were turned back. Commuters alighted and walked long distances to work. Many schools suspended physical learning. Businesses remained shuttered. Offices quietly advised employees to work remotely. The city slowed to an uneasy silence before the day had truly begun.

One did not need to attend a demonstration to understand this year's Saba Saba.

The Government panicked.

Some may find that conclusion uncomfortable.

History often is.

Governments panic when they begin to see constitutional freedoms through the prism of fear rather than confidence; when they pre-empt ordinary civic life before public order has even been tested, when schools close not because education has failed, but because uncertainty has prevailed; when businesses remain shut, not because commerce has ceased, but because fear has become the dominant currency of the day; when a citizen's first constitutional calculation is no longer whether to exercise a right, but whether exercising it is worth the risk.

This is not to diminish the constitutional obligation of the State to protect life and property.

Far from it.

The preservation of public order is one of the primary obligations of every government. No serious constitutional democracy can abdicate that responsibility. Indeed, the National Police Service publicly explained that the enhanced security measures were intended to maintain law and order and prevent disruptions witnessed during previous demonstrations.

But constitutionalism demands something greater than order.

It demands confidence.

The confidence to secure both the citizen who chooses peacefully to assemble and the citizen who simply wishes to report to work.

The confidence to facilitate constitutional freedoms instead of appearing to suspend ordinary life in anticipation of their exercise.

The confidence to demonstrate that public order and constitutional liberty are not enemies but partners.

That confidence appeared wanting.

And that is precisely why government must learn from history.

History is generous to governments that govern with confidence.

It is remarkably unforgiving to those that govern through apprehension.

Chinua Achebe, in An Image of Africa, challenged the dangerous habit of reducing human beings into objects existing merely to serve someone else's narrative. Although he wrote in the context of literature and colonialism, the warning transcends both.

Whenever those who wield power begin to see people not as human beings but as problems to be managed, statistics to be explained or crowds to be controlled, governance loses its moral centre.

The citizen disappears.

The security problem remains.

That is never where constitutional democracies are meant to arrive.
Constitutional democracies are built upon a simple understanding: governments hold power, but the people own it.

Article 1 of the Constitution could not have expressed it more clearly. All sovereign power belongs to the people of Kenya. Government exercises that power only in trust and only in accordance with the Constitution. It is for that reason that Article 37 guarantees every person the right, peacefully and unarmed, to assemble, demonstrate, picket and present petitions to public authorities.

These provisions are not ornamental words decorating our constitutional text. They are the legal descendants of Saba Saba.

They are the answer to the sacrifices of 1990.
They are the Republic's solemn promise that never again should a Kenyan have to fear exercising freedoms that belong to them by birth and by law.

That promise imposes obligations upon citizens.

It imposes even greater obligations upon government.

The burden of constitutional maturity has never rested exclusively upon the governed. It rests most heavily upon those entrusted with governing.

That is why governments must be the students of history.

The generation of Saba Saba has already taught us what courage looks like. They stood against detention without trial. They stood against the criminalisation of dissent. They stood against the belief that power could silence principle. Their struggle was never simply about replacing one political order with another. It was about replacing fear with freedom.

History rewarded that courage.

The Constitution became our collective covenant.

It is therefore deeply ironic that thirty-six years later, one of the most defining images of Saba Saba was not thousands of Kenyans occupying the streets.

It was empty streets.

A city that appeared to hold its breath.

A Republic that, for a moment, seemed uncertain whether constitutional freedoms could coexist with ordinary life.

That image should trouble every one of us.

Not because demonstrations occurred.

Democracies have demonstrations.

Not because government prepared for them.

Responsible governments prepare.

It should trouble us because the scale of the precaution projected the image of a State that had become apprehensive of its own people.

Governments panic when they lose confidence in the resilience of their own institutions.

There is a profound difference between maintaining public order and governing through fear.

Public order enables rights.

Fear discourages their exercise.

One strengthens democracy.

The other quietly weakens it.

The casualties of that fear are rarely those who occupy the corridors of power.

They are the ordinary Kenyans who have no luxury of postponing life.

The trader who opens her kiosk each morning hoping to sell enough to buy supper.

The boda boda rider whose income depends on the next passenger.

The advocate whose client cannot reach court because roads have been barricaded.

The litigant whose hearing is adjourned.

The pupil who loses another day of learning.

The patient whose appointment is missed.

The parent who must choose between earning a living and keeping a child safe at home.

These are not incidental inconveniences.

They are constitutional injuries.

For every right that cannot be meaningfully exercised because fear has overtaken confidence diminishes the Republic ever so slightly.

As lawyers, we know that constitutions are seldom undone by one dramatic act.

They are tested in quieter moments.

In the small decisions that determine whether government chooses persuasion over intimidation.

Dialogue over apprehension.

Confidence over panic.

The legal profession understands this responsibility because we have lived it before.

During the struggle for constitutional reform, advocates defended detainees, challenged arbitrary exercises of power, insisted upon due process and reminded the nation that even governments are subject to the law.

That responsibility has not changed.

The role of the legal profession is neither to echo government nor opposition.

It is to echo the Constitution.

The Law Society of Kenya has always found its greatest strength when it has stood where the Constitution stands.

Beside the people.

Beside the rule of law.

Beside justice.

Never beside fear.

History reminds us that every generation is examined differently.

The generation of 1990 was asked whether it possessed the courage to demand democracy.

Our generation is being asked a different question.

Can we preserve constitutional democracy without surrendering to fear?

Can government maintain order without diminishing liberty?

Can citizens exercise their freedoms peacefully while respecting the rights of others?

These are not questions for government alone.

But government bears the heavier responsibility because public power carries public trust.

Chinua Achebe once observed that the trouble with many post-colonial states was not the absence of capable people but a failure of leadership.

Leadership, however, is not measured by how effectively it manages agreement.

It is measured by how confidently it manages disagreement.

A government that trusts the Constitution does not fear peaceful dissent.

It protects it.

Because it understands that criticism is not the opposite of patriotism.

It is often its highest expression.

The generation of Saba Saba did not march so that future governments would become more sophisticated in managing fear.

They marched so that future generations would inherit a Republic confident enough to trust its own Constitution.

The people have honoured that legacy.

Time and again, Kenyans have demonstrated remarkable resilience.

They continue to believe in constitutional governance.

They continue to seek accountability.

They continue to return, despite disappointment, to the promise that this Republic belongs to all of us.

It is government that must now demonstrate that it has learnt the lesson Saba Saba has patiently taught for thirty-six years.

For history has already examined one government that governed through panic.

It recorded the result.

Every government since has had the rare privilege of reading that judgment before writing its own chapter.

History has done its part.

The people have done theirs.

Government must now do its own.

Not by fearing the people.

But by trusting them.

Not by governing through panic.

But by governing through constitutional confidence.

For in the end, governments come and go.

The Constitution endures.

The people remain.

And history, patient as ever, never stops teaching those willing to learn.

The Author is an Advocate of the High Court of Kenya and current Vice President of the Law Society of Kenya.

UNCOVERING THE MYSTERY OF THE OBADO PLEA DEAL

By Mwongela Mbiti

The withdrawal of the KES73.5 million corruption case against former Migori Governor Okoth Obado has once again exposed the uneasy, often public, tension between the Office of the Director of Public Prosecutions (ODPP) and the Ethics and Anti-Corruption Commission (EACC) in the fight against corruption.

After years in court, Obado and his co-accused walked free following a plea bargain approved by the Nairobi Anti-Corruption Court. In effect, the former governor emerged without a conviction, without a custodial sentence, and without a criminal record, "ni mweupe kama pamba," as many Kenyans would say.

The case began on August 27, 2020, when Obado, his children and associates were arraigned in Nairobi Anti-Corruption Case No. 18 of 2020 over allegations of embezzling KSh73.4 million from Migori County. All pleaded not guilty. The trial commenced and at least one prosecution witness had partially testified before the accused persons sought to engage the prosecution in Alternative Dispute Resolution and plea negotiations.

At the same time, the EACC had already instituted separate civil recovery proceedings vide Nairobi High Court ACEC Civil Suit No. 32 of 2018 and ACEC Civil Suit No. E010 of 2021, seeking forfeiture of unexplained assets and confiscation of proceeds of corruption. According to the Commission, the parties later entered into a settlement in which Obado and his co-accused agreed to forfeit assets worth approximately KE235.6 million, including land and motor vehicles. The settlement was adopted by the court, with the EACC commencing recovery processes through public auction.

This is where, in my opinion, the controversy begins.

Upon conclusion of the civil forfeiture process, the ODPP conducted plea negotiations based on the civil settlement and, in particular, the assets recovered in the said settlement.

The EACC objected, arguing that the plea negotiations improperly relied on assets already surrendered under the civil settlement. In essence, EACC's position was straightforward: the same forfeited assets could not lawfully be recycled as consideration in a criminal plea agreement.

To me, this disagreement was not merely institutional rivalry. It raised a fundamental legal and ethical question: what exactly was the prosecution getting, on behalf of the people of Kenya, in exchange for withdrawing all criminal charges?

Under Section 137A of the Criminal Procedure Code, plea bargaining ordinarily contemplates concessions such as an accused person pleading guilty to lesser charges, cooperating with investigators, withdrawing selected counts, or other negotiated prosecutorial outcomes. Yet under the Obado agreement, all charges were withdrawn. No guilty plea was entered. No conviction was recorded. No custodial sentence was imposed. And the assets cited as the basis of settlement had already been forfeited through separate civil proceedings.

That, in my view, is why the matter has generated widespread public interest.

In adopting the agreement, the court held that the plea bargain satisfied the legal threshold under the Constitution and the Criminal Procedure Code, particularly the requirements of public interest, administration of justice and prevention of abuse of court process. The court further reasoned that the civil settlement had a consequential bearing on the criminal negotiations because both processes arose from the same facts.

However, as a practitioner in this area, that reasoning sits uneasily with long-settled legal principles in Kenya. Section 193A of the Criminal Procedure Code expressly allows civil and criminal proceedings arising from the same facts to run concurrently and independently. One process does not extinguish the other. Civil forfeiture recovers property; criminal prosecution determines guilt and punishment. The two processes serve different purposes.

Indeed, this dual-track accountability has historically been viewed as essential not just in corruption cases but across the board. In this case, recovery of stolen public funds is one objective. Punishment and deterrence are another.

That the Obado deal risks establishing a dangerous precedent: that public officials accused of corruption may negotiate restitution, surrender assets and avoid criminal accountability altogether.

Civil society organizations have already expressed similar concerns. The National Integrity Alliance condemned the agreement, warning that corruption should not be reduced to a negotiable commercial dispute where suspects simply return part of the loot and walk free.

Those concerns are difficult to dismiss.

In my assessment, Kenya's anti-corruption campaign has long struggled with public skepticism arising from dramatic arrests, lengthy court proceedings, and eventual acquittals or withdrawals. The ODPP's increasing reliance on negotiated settlements in high-profile corruption matters now risks deepening the perception that powerful individuals enjoy a separate system of justice.

The institutional friction between the ODPP and EACC also exposes a deeper structural problem in Kenya's anti-corruption framework. The EACC investigates and pursues asset recovery. The ODPP controls prosecutions and ultimately decides whether criminal cases proceed or collapse. When the two institutions fundamentally disagree on strategy, the fight against corruption becomes internally conflicted.

Still, the Obado matter leaves troubling unanswered questions.

Was public interest truly served by terminating the prosecution without any finding of guilt? Did the State obtain anything beyond what had already been secured through civil recovery? And most importantly, what message does this send to public officials accused of plundering taxpayer funds? The jury is out there!

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THE RISE OF FEMICIDE IN KENYA: A NATIONAL CRISIS DEMANDING URGENT LEGAL, POLICY, AND SOCIETAL INTERVENTION

By Bonface Were

The recent escalating wave in femicide and gender-based killings targeting women and girls across the country is devastating. Each headline tells the story of a life cut short, a dream silenced, and a family left to carry an unimaginable burden of grief. How many more daughters, sisters, mothers, and friends must be mourned before meaningful change becomes a priority rather than a promise? Cases of women being brutally murdered by intimate partners, spouses, acquaintances, or strangers have become increasingly frequent, exposing profound societal, institutional, and systemic failures in addressing violence against women. The growing crisis has triggered national outrage, online advocacy campaigns, and renewed calls for urgent reforms within the criminal justice system.

Femicide, broadly understood as the intentional killing of women and girls because of their gender, represents one of the most extreme manifestations of gender inequality and violence. Although murder is criminalized under Kenyan law regardless of gender, femicide is uniquely rooted in misogyny, unequal power relations, toxic masculinity, intimate partner violence, harmful cultural attitudes, and persistent patriarchal structures that normalize violence against women.

The disturbing trend reveals that femicide in Kenya is not only a criminal justice concern, but also a constitutional, human rights, governance, and public policy crisis. Victims have been found murdered in homes, short-stay apartments, forests, and other isolated spaces, often after prior reports of threats or abuse. These incidents affect women across all social, economic, educational, and professional backgrounds, demonstrating that no woman is entirely insulated from the threat of gender-based violence. Many of these killings follow recurring patterns including institutional failure to respond to complaints, delayed investigations, weak enforcement of protective measures, economic dependency, online exploitation, victim-blaming, and societal silence.

Social media has amplified public awareness of the crisis, but it has also exposed the painful reality that many women continue to suffer in silence due to fear, stigma, economic vulnerability, or lack of institutional support.

Despite constitutional guarantees under Article 27 on equality and freedom from discrimination, women in Kenya continue to experience disproportionate levels of violence, exclusion, and vulnerability. Kenya nonetheless possesses a relatively progressive constitutional and statutory framework aimed at safeguarding human dignity, equality, and protection from violence. The Constitution of Kenya, 2010 guarantees the right to life, equality, human dignity, freedom and security of the person, socio-economic rights, and protection of children from abuse and harmful cultural practices. It further imposes an obligation upon the State to observe, respect, protect, promote, and fulfil human rights and fundamental freedoms.

Further legislative progress was made through the enactment of the Protection Against Domestic Violence Act, 2015, which recognized physical, emotional, psychological, sexual, verbal, and economic abuse while introducing legal safeguards such as protection orders, occupation orders, counselling interventions, police assistance, and survivor protection mechanisms. Complementary statutes including the Sexual Offences Act, the Penal Code, and the Victim Protection Act also provide legal avenues for addressing violence against women. However, despite this relatively robust legal framework, implementation remains significantly weak due to underfunding, limited public awareness, insufficient shelters and support systems, inadequate police training, delayed investigations, and poor enforcement mechanisms. The absence of a specific legal framework expressly recognizing femicide as a distinct gender-based offence has further complicated efforts to comprehensively address the crisis.

The rise in femicide should deeply concern the legal profession because it directly implicates constitutionalism, access to justice, human dignity, and the legitimacy of the justice system itself. Where women repeatedly report threats, abuse, or violence but fail to obtain effective protection from State institutions, public confidence in the rule of law is inevitably eroded. Advocates, judicial officers, prosecutors, policymakers, and legal scholars therefore have a collective responsibility to critically examine whether existing systems are effectively protecting vulnerable persons and delivering justice to survivors and affected families.

Kenya continues to face serious institutional challenges in responding effectively to femicide. Preventive mechanisms remain weak despite the fact that many killings are preceded by warning signs, threats, or repeated domestic violence reports. Survivors often encounter dismissive attitudes at police stations or administrative offices, discouraging early intervention and reporting. Delays in investigations and prosecutions further undermine justice, while corruption, poor evidence preservation, witness intimidation, and limited investigative capacity weaken accountability processes. At the same time, Kenya still lacks sufficient shelters, trauma centres, counselling services, emergency hotlines, and safe houses for survivors fleeing abusive environments.

Economic vulnerability also remains a major factor sustaining abusive relationships. Many women remain trapped in violent environments due to poverty, unemployment, financial dependency, and unequal economic opportunities. Equally concerning are the persistent social and cultural attitudes that normalize violence against women through patriarchal norms, victim-blaming, and toxic constructions of masculinity. The growth of digital spaces has also introduced new forms of abuse including cyberstalking, online harassment, extortion, revenge pornography, and digital exploitation that disproportionately affect women and girls.

Addressing femicide therefore requires far more than reactive arrests after deaths have already occurred. Kenya urgently requires a comprehensive, preventive, and survivor-centred national response. First, there is need for stronger legal recognition of femicide within Kenya's criminal justice framework together with stricter enforcement of existing gender-based violence laws. Second, police officers, prosecutors, judicial officers, and investigators require continuous specialized training on handling gender-based violence cases with sensitivity, urgency, professionalism, and survivor-centred approaches. Third, the State must significantly expand access to legal aid, emergency protection services, shelters, trauma counselling, and psychosocial support for survivors.

Equally important is the need for sustained public education aimed at challenging harmful gender stereotypes, normalizing healthy relationships, and encouraging early reporting of abuse. Long-term interventions must also prioritize economic empowerment for women, since financial independence significantly reduces vulnerability to abusive relationships. Mental health and counselling services should be expanded not only for survivors but also as part of preventive interventions targeting behavioural and societal transformation. Importantly, the fight against femicide cannot succeed without actively engaging men and boys in conversations around masculinity, accountability, respect, and non-violence.

Strategic public interest litigation also remains a critical tool in addressing systemic failures contributing to femicide and gender-based violence. Courts possess the power to compel institutional accountability, enforce constitutional obligations, strengthen survivor protections, influence policy reforms, and advance gender equality jurisprudence. Litigation must therefore continue to serve not only as a dispute resolution mechanism, but also as a transformative constitutional instrument capable of confronting structural injustice and institutional inertia.

Ultimately, the rise of femicide in Kenya is a painful reminder that constitutional promises alone are insufficient without effective implementation, institutional accountability, and societal transformation. Every woman killed through gender-based violence represents not merely an isolated tragedy, but a collective failure of systems designed to protect life, dignity, equality, and justice. Kenya must move beyond periodic public outrage and commit to sustained legal, institutional, policy, and societal reforms aimed at preventing violence before it occurs. As a society, we must reject the normalization of violence against women and reaffirm that the rights to life, dignity, equality, and security belong to every woman and girl without exception.

The urgency of the moment demands decisive action, accountability, and unwavering commitment towards ending femicide in Kenya.

"***Alone we can do so little; together we can do so much."***
- Hellen Keller

The Author is an Advocate of the High Court od Kenya and the Secretary, Gender Committee, Law Society of Kenya

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THE CHILD IN THE DOCK:
WHY THE ADVOCATE MUST SEE BEYOND THE CHARGE SHEET

By Fred N. Kahara

There is something profoundly unsettling about seeing a child seated in the dock.

Perhaps it is because the image presents a paradox. Society sees an offender. The prosecution sees an accused person. The victim sees injustice. But the Constitution sees something else entirely.

It sees a child.

For many advocates, juvenile briefs are no longer uncommon. The allegations vary. School unrest, theft, cyber-related offences, malicious damage to property, conduct born of youthful indiscretion and poor judgment, among others. Yet beneath every charge sheet lies a question we seldom ask ourselves: are we merely defending a case, or are we protecting a future?

Article 53(2) of the Constitution leaves little room for ambiguity:

"A child's best interests are of paramount importance in every matter concerning the child."

The word "paramount" is deliberate. It elevates the interests of children above convenience, public outrage and even our adversarial instincts.

Further, section 8 of the Children Act, 2022 gives legislative expression to that principle, while Part XV of the same Act of Parliament establishes a child justice framework grounded on dignity, rehabilitation and reintegration, concerning children who are in conflict with the law.

Indeed, a child in conflict with the law occupies a peculiar place in our legal system. He or she is neither an adult deserving of society's full retribution nor an object of sympathy exempt from accountability. He is a rights bearer whose mistakes ought not to become life sentences.

Our courts have repeatedly affirmed this position. In AOO & 6 Others v Attorney General & Another [2017] eKLR, Justice David Majanja observed:

"Children are a special category of persons and the Constitution requires that in every matter concerning them, their best interests are of paramount importance."

Therefore, these words ought to resonate with every advocate who receives instructions involving a child.

Too often, however, we approach such matters armed with the instincts of ordinary criminal practice. We speak the language of acquittals, convictions and sentences. We celebrate victories and mourn defeats. Yet child justice was never intended to be purely retributive.

Article 37(b) of the United Nations Convention on the Rights of the Child provides that detention shall only be used as a measure of last resort and for the shortest appropriate period. Article 40 of the said Convention further requires that children accused of offences be treated in a manner that promotes dignity and reintegration. The Beijing Rules echo the same philosophy, emphasizing the well-being of the child and encouraging diversion from formal criminal processes.

Perhaps therein lies one of the greatest challenges facing advocates.

We have become so accustomed to winning cases that we sometimes forget that the greater victory may lie elsewhere.

It may lie in persuading the prosecution to divert a matter.

It may lie in securing counselling instead of incarceration.

It may lie in ensuring that a child never becomes institutionalised within the criminal justice system in the first place.

This is because justice, especially where children are concerned, is not synonymous with punishment.

This reality becomes even more compelling in an era defined by artificial intelligence and digital disruption. Today's children inhabit spaces unknown to previous generations. Social media, cyberbullying, misinformation, online gambling and AI-generated content have created entirely new pathways through which children may come into conflict with the law. Evidence itself has evolved. Deepfakes and manipulated media pose challenges that traditional criminal procedure scarcely contemplated.

The advocate of the future must therefore become more than a courtroom technician. He or she must understand digital evidence, appreciate child psychology and embrace trauma-informed and restorative approaches to justice.

Perhaps this is what the Law Society of Kenya means by *Business Unusual.*

Not merely embracing technology.

But rediscovering humanity.

As legal practitioners, our legacy will not always be measured by the authorities we cite, the judgments we secure or the eloquence of our submissions. Sometimes it will be measured years later, when the child who once stood before the court returns to society not as a recidivist, but as a responsible citizen, a parent, a professional—or perhaps even a colleague at the Bar.

And perhaps that is the enduring lesson for the modern advocate.

That when standing beside a child in conflict with the law, we must look beyond the offence, beyond the charge sheet and beyond the public outrage.

For before us stands not merely an accused person.
Before us stands a child.

The Author is an Advocate of the High Court of Kenya.

PROTECTING CLIENT FUNDS: A GUIDE FOR YOUNG AND MID-LEVEL ADVOCATES

Introduction

Client money is not the advocate's money. It is held in trust and must be handled with the highest level of honesty, accountability and professionalism.

The moment an advocate receives money belonging to a client or a third party, the advocate assumes a fiduciary responsibility.

1. What is client money?

Client money includes:

1. Purchase price received on behalf of a client;
2. Settlement funds;
3. Court awards;
4. Deposits held pending completion;
5. Money received for payment of rates, taxes, stamp duty or other transactions;
6. Any funds received for a specific purpose.

2. The golden rule

"Do not use, borrow, delay, or mix client funds with your own funds."

Client funds must remain separate and available whenever the client is entitled to them.

3. Why Advocates get into trouble?

Common mistakes include:

- Using client money temporarily expecting to replace it;
- Treating trust money as office cash flow;
- Paying personal expenses from client funds;
- Delaying remittance without explanation;
- Failing to keep proper records.
- Many disciplinary problems begin with the words: "I intended to refund the money."

4. Proper handling of client funds

An advocate should:

- Maintain a proper client account
- Issue receipts and keep records
- Record every transaction
- Obtain clear instructions before disbursement
- Remit money promptly when due
- Communicate delays honestly
- Keep client and office money separate

5. Ethical and professional consequences

Misuse of client funds can lead to:

- Disciplinary proceedings;
- Suspension or removal from the Roll;
- Civil liability;
- Loss of reputation;
- Criminal consequences in appropriate cases.

6. Practical safeguards for law firms

1. Have written procedures for receiving and releasing funds;
2. Require approval before withdrawals;
3. Reconcile client accounts regularly;
4. Never pay one client using another client's funds;
5. Avoid making personal commitments based on expected client money.

7. Remember

A client may forgive a delayed matter, a mistake, or a lost case — but misuse of their money destroys trust.

The advocate's greatest asset is not only legal knowledge but integrity.

Conclusion

Client money is a sacred responsibility. Protecting it protects the client, the advocate, the firm and the reputation of the profession.

"The advocate is a custodian, not an owner, of client funds."

The Author is an Advocate of the High Court of Kenya and Chairperson LSK South Eastern Branch

A REALITY FOR GENDER EQUALITY ACTIVISM IN ARTIFICIAL INTELLIGENCE DEVELOPMENTS: FIDA-KENYA GENDERED ANALYSIS

&

By Jane Onyango By Leticia Mwavishi

1.0 Introduction

Artificial Intelligence (AI) is here to liberate and revolutionize our way of life in different dimensions. Where we are at the moment, AI at the moment has navigated the political, social, economic spheres of life. In consensus, the positive impact of AI can be applauded in navigating the dynamics of existence.

On the other side, as we transition into adopting AI-driven innovations, the hanging fruits such as, will these emerging technologies liberate the gender gap, or will they widen the gap?

Article 27 of the Constitution of Kenya remains a foundational provision that has guaranteed gender equality as a lived reality to be realized and achieved in a progressive and innovativeness to address the continued existing historical inequalities. Since the inception of the Constitution, gender equality initiatives have been witnessed from both positive and negative angles, including women's participation in political leadership and decision-making, program initiatives to address gender inequalities, and enabling access to justice to achieve gender equality.

All these remarkable initiatives have been fronted from all levels, including human rights advocacy and accountability push by centering achieving gender equality as a rights issue. Whilst this progress is recognizable, the new form of emerging technologies, including Artificial Intelligence, is a new front that needs to be intertwined to the existing gender equality strategies, especially by enforcing a human rights-based approach to realize gender equality and to ensure that the gains are not stripped from reality. A good example is the enforcement of political rights within the gender equality sphere.

2.0 Why Gender Equality initiatives must be integrated in AI innovations to achieve gender equality.

From a simple understanding, AI-driven tools rely solely on the data provided to inform their use. Algorithms/datasets used in some AI tools are trained to shape the daily realities of problems and offer solutions that might be homogeneous.

For instance, if data sets are used to support access to credit facilities that have primarily focused on property ownership as collateral without considering elements such as gender, sex, marginalization, unequal access to resources, and disability, and how these intersecting realities can exclude equal access to such facilities can be considered to be a biased AI system.

The continued lived reality is that human rights violation especially women's rights in the existing landscape are yet to reach the intended mark, with AI integrated within the existing business models, there is both 'positiveness' especially in efficiency and effectiveness, but the risks of how intersectional AI tools can be adapted to interpret biasness/discrimination, misogynistic text, anti-rights campaign should be a concern in considering adapting to AI models within our current model.

Technology-facilitated abuse/violence, which includes AI integration and adaptation, can present a potential risk that can undermine the gains made in achieving gender equality, where if digital tools are not effectively regulated from a rights-based approach, weaponization of various AI and digital tools to amplify harms towards women and girls would be amplified and this has been witnessed towards women in political leaderships and decision making spaces where consequences such nonconsensual imaged based abuse are used to de-campaign women/shift the focus on their personal lived which results in psychological/traumatic experiences for women in such spaces.

3.0 How could AI advance and sustain Gender Equality initiatives?

While we recognize the positive and negative impacts of emerging technologies such as AI, there is an opportunity to measure the applicability of these innovations to expand initiatives such as expanding access to justice, particularly for women and girls in communities that ar access to justice with undertone barriers.

The revolution in AI is transformative in achieving some of the systemic challenges and barriers affecting gender equality but in line with adapting to innovation, there is a need to center feminist/human rights principles in the integration of these developments to ensure that the Do No Harm principle is applied horizontally and vertically.

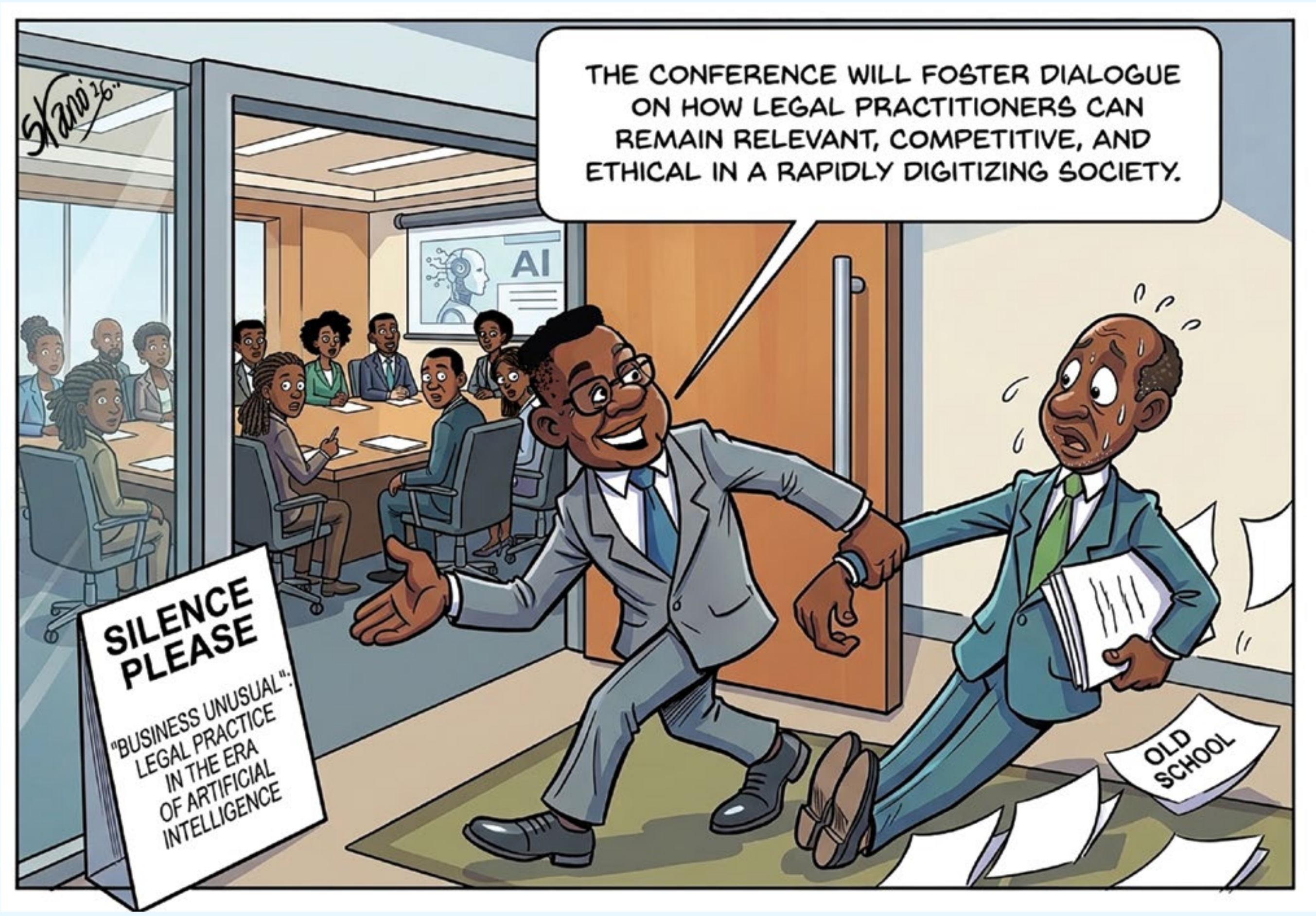
The legal ecosystem is indeed progressive in adapting to the emerging changes, but there is still a need to apply a human rights risk assessment analysis on how AI development and integration affect our usual business of the legal practice, especially in human rights activism.

4.0 Conclusion

Artificial intelligence can neither be a friend nor an enemy towards gender equality, but it can be leveraged to contribute towards gender equality approaches. As Kenya immerses itself within this landscape, there is an open demand to integrate AI that is gender responsive, deliberate, aims to sustain efforts, identify and dismantles gendered barriers that are invisible.
As we prepare to analyze the integration of AI within the Kenyan legal ecosystem:

1. There is a need to involve and engage with women's rights organizations to push for the development of AI tools that can identify, monitor and support reporting initiatives to mitigate the risk and harm facilitated by AI while prioritizing gender equality.
2. Legal and Policy development- provisions such as embedding human rights impact assessment, data protection impact assessment, and AI ethical principles must be mandated to ensure that developers and key institutions are compliant with promoting safety and dignity within their tools
3. Within the political landscape, reforms must be put in place to ensure that women are not excluded from these platforms due to AI-facilitated violence, but digital literacy for all key players must be embedded as we prepare for the incoming elections
4. There is a need to push and advocate for investment in understanding the costing of the design, development, and deployment of AI tools, especially towards gender mainstreaming initiatives.
5. Research and documentation to produce evidence-based data on the impact of AI use must be upheld, to inform reforms within the legal, institutional, and policy frameworks.

The Authors are Advocates of the High Court of Kenya and;
Leticia Mwavishi is a policy and advocacy officer, FIDA Kenya while Jane Onyango- FIDA Kenya Board Treasurer



ELECTORAL JUSTICE IN KENYA: SAFEGUARDING DEMOCRACY OR CHASING AN IDEAL?

By Kerrie Debbie

Kenya's electoral history has been shaped by both democratic progress and recurring contestation. Since the promulgation of the Constitution of Kenya, 2010, significant reforms have strengthened electoral governance through an expanded Bill of Rights, independent institutions, and a more robust framework for electoral dispute resolution. Yet every electoral cycle continues to generate concerns regarding public trust, political polarization, civic space, accountability, and the credibility of electoral outcomes.

This raises an important question: is electoral justice in Kenya genuinely safeguarding democracy, or is it an ideal that remains perpetually beyond reach?

The answer depends largely on how electoral justice is understood. If viewed solely as the resolution of disputes after an election, electoral justice will always appear reactive and incomplete. However, if understood as a continuous process of protecting political rights, ensuring institutional accountability, and providing effective remedies throughout the electoral cycle, then electoral justice remains one of the most important safeguards of democratic governance.

Traditionally, discussions on electoral justice in Kenya focus on election petitions, judicial pronouncements, and the conduct of electoral management bodies. These are undoubtedly important components of the system. The courts have played a critical role in interpreting electoral laws, resolving disputes, and affirming constitutional principles. Landmark electoral decisions have demonstrated the judiciary's willingness to subject electoral processes to constitutional scrutiny and have reinforced the principle that elections must comply with both procedural and substantive constitutional standards.

Nevertheless, electoral justice extends far beyond the courtroom. Elections are not isolated events occurring on polling day; they are part of a broader democratic process that begins long before ballots are cast and continues long after results are announced. A rights-based approach to electoral justice therefore requires attention to the conditions that enable citizens to participate freely, meaningfully, and equally in public affairs.

At its core, electoral justice is inseparable from the protection of fundamental rights and freedoms. The rights to freedom of expression, association, peaceful assembly, access to information, and political participation form the foundation upon which credible elections are built. Where these rights are restricted, manipulated, or unevenly applied, electoral integrity is compromised regardless of the efficiency of voting procedures or dispute resolution mechanisms.

Kenya has undoubtedly made notable progress in strengthening constitutional protections and institutional frameworks. However, persistent challenges remain. Political tensions frequently generate concerns regarding intimidation, excessive use of force during demonstrations, disinformation, hate speech, and unequal access to political and civic spaces.

These challenges often emerge well before election day and can significantly influence public confidence in electoral processes.

Equally concerning is the issue of accountability. Electoral justice requires more than identifying violations; it requires effective remedies and consequences for wrongdoing.

Where violations occur without meaningful accountability, public trust in democratic institutions is gradually eroded.

The perception that political actors or state institutions can act with impunity undermines confidence in both electoral processes and the rule of law itself.

For this reason, electoral justice should increasingly be viewed through the lens of prevention rather than reaction.

Effective democratic systems do not merely resolve disputes after they arise; they identify risks early and address conditions that may lead to conflict, exclusion, or rights violations. Monitoring civic space, promoting transparency, supporting independent institutions, strengthening public participation, and addressing emerging grievances are all essential elements of a preventive approach to electoral justice.

This perspective is particularly important in a rapidly evolving information environment. The growth of digital platforms has expanded opportunities for civic engagement while simultaneously creating new challenges relating to misinformation, disinformation, online harassment, and manipulation of public discourse. Electoral justice frameworks must therefore adapt to emerging threats while continuing to safeguard constitutional rights and democratic participation.The inclusion of women, youth, persons with disabilities, and marginalized communities must also remain central to any discussion on electoral justice.

Democracy cannot be considered fully representative when significant segments of society continue to face barriers to political participation or leadership. Electoral justice must therefore seek not only procedural fairness but also meaningful inclusion.

Ultimately, electoral justice is neither a perfect destination nor an unattainable ideal. It is an ongoing democratic commitment. Kenya's constitutional framework has established a strong foundation, but the continued realization of electoral justice depends on the willingness of institutions, political actors, civil society, and citizens to uphold constitutional values throughout the electoral cycle.

The question is therefore not whether electoral justice is safeguarding democracy or chasing an ideal. It is whether Kenya is prepared to view electoral justice as more than a mechanism for resolving disputes and instead embrace it as a continuous process of protecting rights, promoting accountability, and strengthening democratic legitimacy.

When approached in this way, electoral justice ceases to be an aspiration and becomes an indispensable safeguard of democracy itself.

The Author is an Advocate of the High Court of Kenya.

The Algorithm Voted Too

Why Kenyan Legal Practitioners Must Equip Appropriately Before 2027

By Pauline Wanjiku Kamunya

On 6th December 2024, Romania's Constitutional Court annulled the first round of its presidential election.

The reason was not ballot stuffing or procedural irregularity, but AI-driven disinformation. Coordinated accounts generated enormous volumes of impressions for a fringe candidate. Declassified intelligence alleged foreign interference, and the court held that the scale of manipulation made the vote impossible to validate.

By April 2026, DataReportal recorded 97.5% of online Kenyan adults using AI tools across multiple platforms, the highest rate globally. A population this embedded in AI-powered platforms is both a prime target for synthetic content and an environment where it circulates undetected. The Daily Nation, drawing on Trust Lab analysis, documented 17 coordinated influence operations already in motion, deploying ethnic narratives and automated cross-platform campaigns ahead of the 2027 electoral cycle. These are not projections. They are documented operations with a specific electoral objective.

Kenya's legal framework contains seven gaps that expose the 2027 electoral cycle:

1. No statutory definition of AI-generated content in electoral or related legislation.
2. National Cohesion and Integration Act targets human incitement, not coordinated automated systems.
3. Cybercrimes law criminalises false publication but not attribution for AI-generated material.
4. Elections law imposes no duty on parties or candidates to disclose AI use in campaigns.
5. No framework for algorithmic micro-targeting using voters' data and profiles.
6. The Data Protection Act, 2019, does not address synthetic data or AI-generated identities used in deepfakes.
7. No published IEBC standards for detecting AI-manipulated electoral documents or results.

Together, these gaps allow AI to be deployed at scale with little trace. Kenya's electoral dispute framework was not designed for AI-era risks. In respect of presidential elections, Article 140 of the Constitution imposes strict timelines, seven days to file the petition and fourteen days for determination. A petitioner alleging AI interference must identify what happened, gather forensic evidence, trace the source, and show its impact on the result, all within seven days.

AI-generated content is engineered to look authentic at the point of verification. Coordinated bot networks distribute it across platforms using obfuscation techniques that fragment and conceal origin. Proper attribution requires digital forensics, cross-platform access, platform cooperation, and expert analysis processes measured in months, not days.

In Romania, intelligence services had months of monitoring and technical analysis before the court could act. In Kenya, petitioners would be expected to reconstruct similar interference in a single week, in open court, without that level of support. In the 2022 presidential petition, petitioners alleged unauthorised access to the IEBC's results transmission system, but the Supreme Court found those claims unproven for want of credible, admissible evidence. The lesson is clear: plausibility is not enough; allegations need cogent proof.

AI-generated or AI-assisted Form 34A tallies would not aim to visibly break the system. They would mimic the visual and structural markers the portal uses to validate documents, passing as compliant artefacts while subtly distorting the record.

Petitioners can wait for IEBC disclosure, placing crucial logs and metadata in the hands of the body whose conduct is in question. Or they can attempt to detect and preserve the evidence independently, in real time, which demands capacity no petitioner can assemble inside seven days. In practical terms, challenging that kind of interference within fixed timelines is a remedy more theoretical than real.

State agencies are best placed to detect large-scale AI interference, yet their findings usually remain classified, not in the hands of petitioners or even the courts in real time. The State holds the full picture while litigants carry the evidential burden under an unforgiving clock. The system assumes petitioners can prove what only security agencies can see.

This is not a criticism of the judiciary. The courts are operating within a design that was never built for AI-mediated, cross-platform interference. Judges have no realistic tools to pause the clock, compel rapid declassification of sensitive intelligence, or order months-long technical investigations under a fourteen-day determination deadline. The real problem is legislative architecture and institutional design.

If Kenya is serious about insulating the 2027 electoral cycle from AI-enabled manipulation, the three areas demand urgent and immediate attention and action:

1. Introduction of mandatory pre-election AI risk audits and reporting: IEBC and relevant agencies should conduct pre-election technical audits of election and results systems, including stress-tests against AI-generated forgeries and coordinated inauthentic activity. Where security allows, key findings and mitigation measures should be on the record before polling day.
2. Evidentiary pipelines and continuous monitoring: The law should mandate continuous monitoring and logging of critical election systems, with duties to retain and secure those logs and cooperate with independent forensic experts. If a petition comes, a basic evidentiary spine should already exist.
3. Fast-track cooperation within existing timelines: Practice directions and statute can create predefined, court-supervised channels for rapid access to limited logs, standardised technical reports, and tightly framed intelligence summaries focused on election integrity. These do not extend timelines; they optimise how the fourteen days are used.

The Law Society also has work to do. AI is no longer a niche specialism. For litigators, drafters, transactional and public law practitioners, understanding generative AI, deepfakes and algorithmic amplification is now part of competent practice. LSK's CPD framework should reflect that.

Advocates will increasingly need to work with technologists, data scientists and digital forensics experts on electoral disputes, defamation, data protection and judicial review involving digital evidence. Firms should develop protocols for capturing, preserving and presenting digital evidence, screenshots, logs, metadata and platform disclosures in real time, in formats that can meet judicial standards.

The algorithm has already voted in other jurisdictions. The real question is whether Kenya's legal system and its legal profession will be ready when it does so here.

The author is an Advocate of the High Court of Kenya, a Fellow of the Chartered Institute of Arbitrators (FCIArb) and an AI policy governance practitioner (CAIDP Alumni).

THE HOW AND IF AT ALL: THE CRISIS IN KENYA'S ELECTORAL DISPUTES RESOLUTION

By Susan Ondicho

Introduction

The Kriegler Commission, officially The Independent Review Commission (IREC), concluded that the 2007 elections were so badly mismanaged that it was impossible to truly tell the winner. Almost 20 years after the 2007-2008 post-election violence (PEV) in Kenya which led to the death of more than 1000 people and the forced displacement of over 600,000; the country is set to undergo another general election in 2027. Electoral disputes are disputes arising within an election cycle, either before or after the elections. Finding ways to resolve electoral disputes is finding means to achieving electoral justice.

Kenya's electoral history can be divided into 3 phases thus; Post independence (1963) to the 1980s; the 1990s characterized by agitation for electoral reforms; and post 2010 Constitutional period.

The electoral system of Kenya combines the majoritarian first-past-the-post (FPTP) in single member constituencies within an element of proportional representation. Consideration of the validity of elections is both an inquiry into procedure and outcome. Post the 2007 PEV, there was inception of the 2010 Constitution of Kenya (COK) which then decentralized power by way of devolution; heavy reformation of the Judiciary leading to the creation of the Supreme Court which was tasked with handling presidential election disputes; and the replacement of the Electoral Commission of Kenya (ECK) with the Independent Electoral and Boundaries Commission (IEBC) established under Article 88 of the COK,2010.

The Elections Act,2011 envisages Independent Electoral and Boundaries Commission (IEBC) Peace Committees (The Electoral Code of Conduct Enforcement Committee (ECCEC) and the Constituency Peace Committees) using mediation to manage disputes between political parties.

Democracy and Electoral Justice

According to Mwalimu Julius Kambarage Nyerere's theory of democracy, there are 3 components of democracy; discussion, equality and freedom. The latter position supports some scholars who are in favour of a constitutional, substantive and procedural definition of democracy. According to Nyerere, democracy is a government by discussion (among the people or their chosen representatives as opposed to a hereditary clique) as opposed to government by force. Further, Nyerere confidently argued that the African concept of democracy was similar to that of the ancient Greeks from whose language the word democracy originated as to them meant," government by discussion among equals" and when they reached an agreement, the result was a "People's decision." Democracy is therefore government by the people. The Judiciary as an arm of government derives its authority from the people.

Chapter 10 of the COK, 2010 features the Judiciary. The Judiciary affirmed its commitment to electoral justice on 21.07.2025. Chief Justice (C.J) Martha Koome, during the launch of the Judiciary Committee on Elections Operational Plan 2025-2028, confirmed the Judiciary is ready to handle the 2027 Electoral Dispute Resolution (EDR) cycle with fairness, efficiency, independence and integrity. The CJ urged stakeholders and Kenyans to join hands with the Judiciary to safeguard the country's constitutional democracy to ensure a just, peaceful and democratic country. The Judiciary Committee on Elections (JCE) serves as; a roadmap for preparations towards the 2027 General Elections; and a blue print for how the Judiciary, as the key guarantor of electoral credibility, will continue to defend the integrity of the electoral disputes.

Article 159 of the COK,2010 outlines the principles that guide Courts; doing justice to all, not delaying justice, promoting alternative dispute resolution, administering justice without undue regard to procedural technicalities; and the protection of the purpose and principles of the COK. The values set out under foundational elements of the COK including declaration of sovereignty, supremacy of the COK, definition of the Republic, Constitutional principles and values, political rights and specific principles and object of the electoral system form the necessary guide for detailed judicial consideration of questions relating to electoral management. Further; Article 47 of the COK provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and proceed to fair; Article 48 of the COK provides that the state shall ensure access to justice for all persons; and Article 87 of the COK provides that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

Deficiencies

The Kriegler Report found that the voter register was highly inaccurate as the way votes were counted, sent, and added up was full of errors and open to cheating; the ECK was totally unfit, lacked independence, suffered from massive inefficiencies, and had completely lost the public's trust. To stop cheating and/or rigging and clean up the voter lists, the report pushed for modern systems. This eventually led to the deployment of the Kenya Integrated Electoral Management System (KIEMS), which comprises the Biometric Voter Registration (BVR), the Electronic Voter Identification, and the Results Transmission System during tallying in Kenyan elections. The BVR would ensure the attainment of the constitutional doctrine of "one person, one vote."

The IEBC introduced advanced electronic systems to prevent rigging in the 2013 general elections but these systems failed on a large scale across thousands of polling stations. Despite the failures, the Supreme Court of Kenya judges held that despite the tech breakdowns, the final outcome remained a fair reflection of the voters' choices. The disputed 2017 Kenyan elections resulted in a nullification of the presidential results following, among other matters, a lack of transparency in the process. The Supreme Court of Kenya held that the discrepancies arising from the lack of transparency were sufficient to nullify the elections and call for fresh presidential elections to be conducted in accordance with the electoral laws.

The electoral laws mandate the IEBC to ensure the security of election-related technology and to make the register of voters available "for inspection by members of the public at all times for the purpose of rectifying the particulars therein."

Conclusion

To ensure the people's decision is enforced with regards to elections, it is not enough that mechanisms exist (as the Carter Centre observers of the 2011 presidential elections in Democratic Republic of Congo (DRC) noted, the DRC citizens believed ADR was insufficient and inadequate to solve electoral disputes hence the escalation of election protests). The electoral dispute mechanisms employed ought to be a reflection of the public's preferred mechanism of resolving an electoral dispute so as to inspire confidence in both the petitioners and the public. The public's perception of solving electoral disputes are aligned towards acceptance, cooperation and compliant behaviors. If Parliament intends to alter electoral laws, the alteration should be made earlier into the calendar cycle. Our Courts should ensure the procedural aspect and the substantive laws as concerning elections are followed and technology applied transparently.

The Author is an Advocate of the High Court of Kenya

INFORMATION COMMUNICATION TECHNOLOGY (ICT) IN KENYA ELECTIONS: A CIRCUIT BREAKER OR A FUSE?

By Wandare Patrick Lavince Ondego

Where election management has often been characterized by rigging allegations and violence, ICT came in to remedy this and was seen as a response to the disease of manipulation of elections.

Kenya as one of the leading tech-savvy countries in Africa, through the Independent Electoral and Boundaries Commission (IEBC) has overtime deployed technological use in electoral processes including but not limited to voter registration, voter identification, results transmission, candidate registration, voting and results management. The IEBC acquired an integrated electronic electoral system known as Kenya Integrated Elections Management System (KIEMS). This system was designed to integrate the aforementioned technological components in electoral processes.

According to the 2012 Report by European Commission/ UNDP Joint taskforce on Electoral Assistance, Information Technology and Elections Management: Informed Decisions for Sustainable Outcomes, the Biometric Voter Registration (BVR) has been used since the 2013 general elections while the three sub-systems Results Transmission System (RTS), Electronic Voter Identification (EVI) and Candidate Registration Systems (CRMS) were procured before the 2017 General Elections.

Article 86(a) of the Constitution of Kenya 2010 stipulates that at every election, the IEBC shall ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.

The Constitution is however silent on the use of ICT but it indirectly refers to it. This therefore means that if the IEBC chooses to use ICT as a voting method, then it must comply with the constitutional provision.

However, Section 44(3) of the Election Laws (Amendment) Act No. 36 of 2016 has clearly clarified on the silent part of the Constitution. It provides that the Commission shall ensure that the technology in use is simple, accurate, verifiable, secure, accountable and transparent. Section 44 of the Elections Act, No. 24 of 2011 further provides that IEBC shall use technology as it considers appropriate in the electoral process.

Section 44(4)(a) of the Election Laws (Amendment) Act No. 36 of 2016 provides that IEBC shall, in an open and transparent manner, procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections. In February 2026, IEBC moved to procure technology to track KIEMS kits for 2027 polls and the procurement raised alarm from stakeholders including political leaders not allied to the Government of the day and who called for transparency. Section 44(4)(b) of the same Act requires that IEBC shall also test, verify and deploy such technology at least sixty days before a general election.

As a follow-up to the 2013 General elections, the Kenya Human Rights Commission in its 2014 report *The Democratic Paradox:* A report on Kenya's 2013 general elections, emphasized that IEBC should audit the entire procurement system with regard to the BVR kits, and have those responsible for purchase of dysfunctional machines and batteries, lack of training of officers and those responsible for faults in the tallying system, a function of sub-standard computers be brought to book and held culpable under the law.

In 2017, IEBC sub-contracted Oberthur Technologies SA-OT Morpho, a French-based Information Technology (IT) company to man its servers and to ensure transmission of tallied votes. The outsourced IT Company which was initially called Safran Identities and Security (Morpho) until May 2017, found its way to the Supreme Court Judgment that annulled the re-election of Uhuru Kenyatta.

The Apex Court's majority landmark judgment in Raila Amolo Odinga & Another Vs. Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR found fault with the transmission of votes by the IEBC's server and that there were technological malpractices in the results transmission.

Whilst the use of ICT in electoral processes has benefits compared to manual handling of elections including reducing operational burdens and risks; reducing human error in the electoral process and increasing transparency in the polls; faster transmission of results; improving accuracy and with slight errors if handled properly; saving on costs and time; reducing the chances of results manipulation and significantly reducing fraud; and results in the KIEMS can be audited because the systems retain data thus making it hard to circumvent the true position of the data as a result of every data being accounted for to ensure that the true will of the people is reflected in the final results that will be announced by an Election Management Body (EMB), there are also significant challenges posed by the use of ICT in elections as follows:

1. While biometrics can be used to verify the identity of voters, they cannot be used to verify their eligibility including age and nationality.
2. Biometric technology does not guarantee comprehensive or inclusive voter registration.
3. Procurement of technology to be used in Kenya's elections has always been marred by corruption.
4. In the rural areas, literacy levels are low and the people residing in those areas may not understand election technology.
5. Intimidation, blackmail and death of ICT officials. Christopher Chege Msando's death remains unresolved to date.
6. Lack of internet connectivity in some parts of the country making KIEMS kits and mobile satellite phones dysfunctional.
7. Electronic transmission of results for tabulation may be prone to hacking and unauthorized access.

Kenya hasn't fully digitized its voting methods, even in light of emerging issues like artificial intelligence and algorithmic manipulation. Challenges such as corruption, interference by the political class contrary to Article 249(2) of the Constitution, non-functioning KIEMS kits, lack of training of ICT and IEBC officers, etc., are proven headache to IEBC.

Hacking claims and interference with the IEBC servers during the 2017 general elections only spelt doom for the credibility of elections in Kenya. IEBC should ensure there's hack-proof software to avoid manipulation of results thus questioning the true and popular sovereign will of the Kenyan people.

Parliament needs to also propose a complementary mechanism for result transmission to address instances where transmission of results is not possible owing to lack of 3G network which is the minimum standard required for transmission of result Forms.

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BEYOND THE INTERMEDIATE STANDARD: RECALIBRATING PROOF AND ELECTORAL ACCOUNTABILITY IN KENYA'S PRESIDENTIAL ELECTION PETITIONS

By Dr. Ronald Allamano Ong'udi

Abstract

Presidential elections carry the shared hope of a people for either political change or the continuation of the status quo. When their legitimacy is called into question, the Supreme Court of Kenya (KESC) is invited to determine not merely the validity of an election, but the constitutional legitimacy of political power itself. The KESC has distinguished presidential election petitions from ordinary civil claims, characterising them as sui generis proceedings. In resolving such disputes, the KESC has mandated an intermediate standard of proof, one that lies above a balance of probability but below reasonable doubt.

This essay acknowledges that presidential election petitions are sui generis, but argues that this does not justify a judicially developed intermediate standard that is not expressly anchored in the Constitution of Kenya 2010, the Elections Act 2011, or the Evidence Act, Cap. 80. The concern is justified by the fact that declared election results already enjoy a presumption of validity. Correspondingly, the petitioner bears the initial burden of challenging the results through precise pleadings and cogent evidence. Requiring the petitioner to satisfy a further undefined threshold above the balance of probabilities therefore gives the declared result an additional and unjustified evidentiary advantage.

The essay first examines the constitutional and evidentiary foundations of presidential election petitions, then critiques the KESC's heightened standard of proof before proposing a doctrinal framework that confines any higher standard to pleaded electoral offences.

I. Introduction

Mindful of its troubled electoral past, and determined to confront the persistent crisis of confidence in the judiciary that had for long shadowed presidential elections, Kenya promulgated the 2010 Constitution. This Constitution mandates that elections be free and fair, be conducted through a transparent and accountable process, and culminate in results that are accurate and verifiable. Once the results are declared, a petitioner has only seven days to reconstruct, from fragments of the electoral record, an electoral process that took considerable time in preparation.

The challenge is compounded by the fact that petitioners are expected to contest the declared result by relying on forms, servers, electronic logs, and other electoral records that remain largely within the IEBC's exclusive possession and knowledge.

In ***Odinga (2013),*** the KESC mandated that petitioners prove their case on a standard above the ordinary civil standard but below the standard of beyond reasonable doubt. It further reaffirmed that position in ***2017*** and ***2022.*** In justifying the intermediate standard, the court observed that election disputes of such nature traverse the interests of two or more competing litigants in an ordinary civil claim. To the KESC, a presidential election petition impacts the nation, therefore carrying with it public interest.

II. Evidence and the Electoral Body

The law of evidence has long recognised that the burden of proof cannot ignore disparities in access to information. Accordingly, although sections 107 to 109 of the Evidence Act place the initial burden on the party asserting a fact, section 112 requires a party to prove matters especially within its own knowledge. Presidential election petitions exemplify why that rule exists. Because the IEBC controls the technology and records needed to verify the declared result, it is best placed to answer credible allegations once raised. The KESC itself recognised this in ***Odinga (2017),*** holding that once a petitioner raises credible questions, the IEBC must account for apparent irregularities. That recognition, however, does not resolve the problem. The intermediate standard makes the shift in the evidential burden contingent upon petitioners first satisfying an undefined threshold. This may require them to prove facts that lie exclusively within the IEBC's custody and control.

It also superimposes an additional qualification on the operation of section 112 of the Evidence Act by requiring petitioners to satisfy an undefined threshold before the evidential burden may shift.

This critique has also been advanced in literature. Nyawa argues that the intermediate standard burdens petitioners in a manner inconsistent with the right to vote and popular sovereignty. The answer lies not in relieving petitioners of their legal burden, but in properly recognising the distinction between the legal and evidential burdens. A constitutionally faithful doctrine would leave the petitioner's ultimate burden intact while recognising that the evidentiary burden necessarily shifts where the relevant evidence lies within the IEBC's exclusive control. Credible evidence of missing forms, unexplained discrepancies, inaccessible logs or a broken chain of custody should require IEBC to produce records verifying its declaration. This is not a presumption of fraud, but a recognition that the institution entrusted with administering the ballot must account for the exercise of that power.

III. Learning from Comparative Practice, Returning to the Constitution

The practice in comparative constitutional courts is, however, divided. Azu writes that the Supreme Court of Ghana in ***Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others*** treated presidential petitions as ordinary civil litigation and applied the preponderance of probabilities. Similarly, Malawi's Supreme Court of Appeal, in ***Mutharika & Anor. v Chilima and Anor.,*** applied the balance of probabilities when it affirmed the annulment of the 2019 presidential elections for widespread irregularities. Conversely, in ***Mbabazi v Museveni and Others and Chamisa v Mnangagwa and 24 Others,*** the Supreme Courts of Uganda and Zimbabwe, respectively, adopted both a presumption of validity in favour of declared election results and a heightened standard of proof. Petitioners were therefore required to overcome both the presumption of validity and the elevated evidentiary threshold. Neither Uganda's nor Zimbabwe's standard, however, answers the constitutional question posed by Kenya's transformative Constitution.

The ordinary balance of probabilities strikes an appropriate equilibrium. It preserves the presumption of validity while ensuring that credible allegations trigger the IEBC's obligation to account for records within its control. By contrast, the intermediate standard makes that obligation contingent upon petitioners first satisfying an undefined evidentiary threshold, thereby risking the insulation of electoral administration from meaningful judicial scrutiny.

IV. Conclusion

Presidential election petitions are undoubtedly sui generis, but their constitutional significance does not justify an intermediate standard of proof that lacks constitutional and statutory backing. The presumption of validity accorded to declared results, together with the petitioner's initial evidential burden, already provides adequate protection against unmeritorious claims. Constitutional and statutory non-compliance should therefore be established on the balance of probabilities, with the evidential burden shifting to the IEBC once credible non-compliance is established. Proof beyond reasonable doubt should remain confined to specifically pleaded electoral offences.

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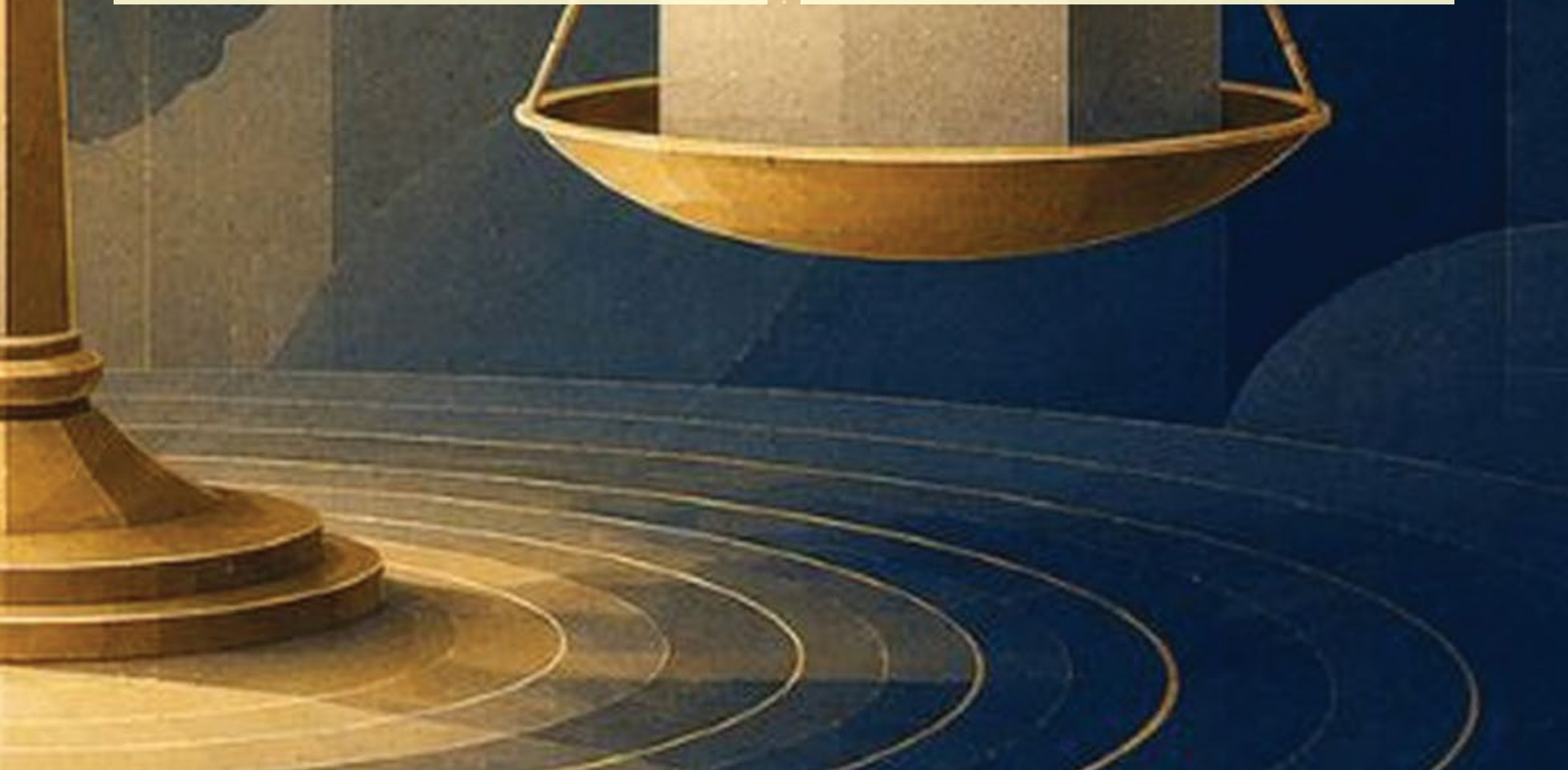

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APPROPRIATE DISPUTE RESOLUTION: IS IT TIME TO RETIRE THE WORD 'ALTERNATIVE'?

By Irfan Kassam

Kenya's justice system stands at a historic crossroad. For decades, the administration of justice has been closely associated with court proceedings as parties resolve disputes through an adversarial process as advocates champion their clients' rights. However, the legal landscape is shifting beneath our feet. With a backlog of over 600,000 cases pending in the Kenyan judicial system, a profound realisation has dawned on stakeholders including the judiciary, legal practitioners and clients to mention but a few that the courtroom might after all not be the optimal forum for every fuss. The core premise is simple yet revolutionary: alternative dispute resolution (ADR) is no longer truly 'alternative'. It has become an integral and often preferred component of modern justice systems, making the term 'appropriate dispute resolution' a more accurate reflection of its contemporary role. By continuing to frame collaborative ADR processes as mere alternatives, we subconsciously subordinate them to traditional practices such as litigation in spite of their growing prominence in the administration of justice.

The evolution and purpose of ADR

Historically, the formal justice system in post-colonial Africa was defined entirely by the traditional dominance of litigation. Due to its influence by the Anglo-American adversarial system, this approach viewed the formal court system as the primary and most definitive means of resolving civil and commercial disputes. It features rigid procedural laws, complex rules of evidence and absolute zero-sum outcomes where one party's victory translates to another party's loss. Nonetheless, as commercial transactions and social interactions became increasingly complex, the formal legal system faced growing challenges that resulted in delays, rising administrative costs and strained relationships between parties. Consequently, the emergence of collaborative mechanisms such as negotiation, mediation, arbitration and conciliation came as direct response to these limitations. The main aim of ADR is not to subvert the rule of law, but to provide a voluntary, flexible, highly accessible and expeditious avenue for parties to settle their disputes.[1]

The shift to mainstream acceptance

At the very heart of modern legal practice is the undeniable realisation that ADR has comprehensively surpassed its historical status as a substitute to litigation. Due to its mainstream acceptance, it has fundamentally altered how legal practitioners and the public approach management of conflict. Moreover, the recognition of ADR by the framers of Kenya's 2010 constitution has gone further in cementing its place in the adjudication of cases in Kenya. Article 159(2)(c) of the Constitution, 2010 mandates courts and tribunals to actively promote alternative forms of dispute resolution, explicitly elevating reconciliation, mediation, arbitration and traditional forms of dispute resolution. Consequently, a massive systemic transformation has been catalysed and is visible through the deployment of Court Annexed Mediation (CAM) by the Judiciary. Operating in all 42 counties through 94 court registries, CAM concluded 8,816 matters and recorded 4,566 settlement agreements, achieving a 61% settlement rate during the 2024/25 financial year.[2] CAM demonstrates that ADR is no longer merely 'alternative' but has become an institutionalised component of the formal justice system.

Similarly, the corporate sector has spoken with decisive clarity. In modern day commerce, businesses have deliberately chosen arbitration and negotiation long before litigation is even considered. Corporations recognise that the confidentiality, finality and specialised expertise offered by arbitral tribunals are indispensable for protecting trade secrets and maintaining ongoing business operations. As a result, both multinational corporations and local businesses routinely include arbitration and mediation clauses in their contracts which often require parties to pursue these mechanisms before resorting to court. When parties deliberately select arbitration or mediation as their preferred first option rather than as a substitute for litigation, it becomes difficult to maintain that ADR is merely an 'alternative' to court proceedings.

In Kenya, this heritage is recognised under Article 159(2)(c) of the Constitution, 2010, reinforcing that consensual dispute resolution is not merely an alternative to litigation but a longstanding pathway to justice. Therefore, it may be time to reconsider the term and acknowledge ADR for what it has become, an 'appropriate' means of resolving disputes and not merely an alternative.

Despite constitutional recognition, ADR continues to face challenges, including inadequate infrastructure and disputing parties' resistance to non-adversarial processes, underscoring the need for sustained investment, capacity building and policy support.

Fitting the forum to the fuss

Importantly, the shift towards 'appropriate' dispute resolution does not diminish the role of court. Rather, it recognises that different disputes require different mechanisms to be resolved. That the objective is not to replace litigation, but to ensure that every dispute is resolved through the process best suited to its nature, a notion often described as "fitting the forum to the fuss". For instance, family and succession disputes often benefit from the collaborative and relationship-preserving environment mediation provides. In contrast, complex commercial disputes may be better suited to arbitration which involves parties taking advantage of confidentiality, finality and specialised expertise. Yet certain matters, particularly those involving constitutional petitions, public interest matters or the vindication of fundamental rights, remain firmly within the courts' jurisdiction. By directing disputes to the most appropriate forum, the justice system could become more responsive and efficient and cure the current problem of backlog in the Kenyan court system.

Conclusion

The debate over these terms is more than semantic. It reflects the evolution of dispute resolution itself. As ADR assumes an increasingly prominent role in the administration of justice, the question is no longer whether it is an alternative to litigation, but whether the term 'alternative' accurately describes its place in modern legal practice. Language shapes legal culture and perspectives. So long as ADR is framed as 'alternative', litigation will continue to be perceived as the primary and default avenue to dispute resolution. Ultimately, the aim is not to champion one process over another, but to ensure that every dispute is resolved through the mechanism best suited to its nature. The true measure of justice lies not in the forum chosen, but in outcomes that are accessible, efficient and just.

[1]Peace Building Initiative, 'Access to Justice: Definitions and Conceptual Issues'
http://www.peacebuildinginitiative.org/index8696.html?pageId=1812#_ftn1
[2]The Judiciary of Kenya, 'The State of the Judiciary & the Administration of Justice', 2024/25, 43, 90.

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   d. Hospital invoice.
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5. All applications received shall be treated with confidentiality.

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WHEN MEDIATION BECOMES MANDATE: RETHINKING ADR SCREENING, PARTY AUTONOMY, AND THE LIMITS OF COURT-DRIVEN SETTLEMENT IN KENYA.

By Aaron Okoth Onyango

Alternative Dispute Resolution (ADR), particularly court-annexed mediation, has become a cornerstone of Kenya's civil justice system following the promulgation of the Constitution of Kenya, 2010. Article 159(2)(c) obliges courts to promote mediation and other alternative dispute resolution mechanisms, a mandate the Judiciary has progressively implemented through the Court Annexed Mediation (CAM) Programme, the Civil Procedure (Court-Annexed Mediation) Rules, 2022 and nationwide expansion of mediation services.[1]

Recent State of the Judiciary and Administration of Justice Reports demonstrate increasing referrals, substantial settlement rates and significant financial recoveries through mediated agreements.[2]

Although the success of Court Annexed Mediation is undeniable, it raises an important question: should mediation be presumed suitable for virtually every civil dispute, or should referral depend on whether a dispute is genuinely capable of negotiated settlement? While mediation undoubtedly improves access to justice, its effectiveness depends on the nature of the dispute, the parties' relationship and their willingness to negotiate in good faith.

The assumption of universality in ADR referral

Court-annexed mediation is premised on the belief that many disputes can be resolved more efficiently through facilitated negotiation than adversarial litigation. That assumption holds true in many commercial disputes where parties possess relatively equal bargaining power and mutual incentives to preserve relationships and minimise litigation costs.[3]

The challenge arises when this premise becomes a procedural presumption. Increasingly, mediation operates as the default response to civil disputes, sometimes even where parties have previously attempted settlement unsuccessfully or where their positions remain irreconcilable. In such cases, mediation risks becoming a procedural gateway to adjudication rather than a genuinely voluntary process. As Frank Sander's "multi-door courthouse" theory recognises, disputes should first be matched to the process most likely to resolve them rather than channeled into a single mechanism by default.[2]

A justice system committed to substantive fairness should therefore distinguish between disputes that are genuinely amenable to negotiated settlement and those in which judicial determination remains the more appropriate mechanism for resolving competing legal rights. Such an approach would strengthen rather than weaken court-annexed mediation by preserving its use for disputes where it has a realistic prospect of success.

Power imbalance and the limits of negotiated justice

The presumption that mediation is appropriate for most disputes becomes more problematic where parties negotiate from unequal positions. Mediation depends on informed and voluntary participation, yet genuine equality cannot always be assumed. An indigent litigant facing a well-resourced opponent may lack comparable legal representation, financial resilience or the ability to withstand prolonged negotiations. Similar concerns arise in succession and family disputes, where women asserting inheritance rights may negotiate within entrenched social and familial structures, or where a single claimant faces multiple respondents acting collectively. In such circumstances, settlement may reflect bargaining strength rather than legal merit. As Owen Fiss cautioned, settlement can reinforce existing inequalities where significant disparities exist between the parties, while Carrie Menkel-Meadow similarly recognises that mediation requires safeguards to ensure fairness and voluntariness.[4]

These concerns are amplified where parties are repeatedly referred to mediation despite previous failed negotiations or clearly entrenched positions. Rather than facilitating dialogue, successive referrals may increase costs, prolong litigation and delay the determination of rights. For vulnerable litigants, particularly in land, succession and dependency disputes, procedural delay may itself amount to a denial of effective justice.

Judicial recognition of limits in settlement-oriented justice

Kenyan courts have consistently recognised the value of negotiated settlement while affirming that adjudication remains indispensable where consensus proves unattainable. In Shimmers Plaza Limited -Vs- National Bank of Kenya Limited, the Court of Appeal reaffirmed the court's responsibility to enforce legal rights where parties fail to reach agreement.[6] Likewise, in Willy Kimutai Kitilit -Vs- Michael Kibet, the Supreme Court observed that equitable principles operate within, rather than outside, established legal rights.[7] Although neither decision arose directly from court-annexed mediation, both reinforce the broader principle that settlement cannot replace judicial determination where compromise is unrealistic.

The constitutional objective of promoting ADR must therefore be balanced against the equally important obligation to provide timely and authoritative adjudication. Mediation and adjudication are not competing processes but complementary mechanisms within the administration of justice. The effectiveness of one should not diminish the constitutional necessity of the other.

Screening suitability: a missing procedural safeguard

The policy gap is not the existence of court-annexed mediation but the absence of a structured assessment of suitability before referral. Presently, mediation is frequently recommended without sufficient consideration of factors such as previous settlement attempts, power imbalances, urgency of relief or the parties' willingness to negotiate.

However, evidence suggests that effective ADR begins with appropriate case selection. Relevant studies consistently suggest that disputes should be matched to the process most likely to resolve them fairly and efficiently.[3] Introducing a robust screening framework would not diminish mediation; rather, it would preserve its legitimacy by ensuring that referral is based on suitability rather than routine practice.

This approach also gives proper effect to the constitutional relationship between Articles 159 and 50 of the Constitution. While Article 159(2)(c) encourages courts to promote alternative dispute resolution, it does not displace the right to a fair hearing guaranteed under Article 50. Mediation is intended to facilitate justice, not postpone it.

Where parties have clearly demonstrated that negotiated settlement is unlikely, continued referral may undermine rather than advance the constitutional objectives of efficiency, proportionality and access to justice.

There is also a broader institutional consideration. The legitimacy of court-annexed mediation depends largely on public confidence in its effectiveness. If parties increasingly perceive mediation as an unavoidable procedural hurdle before their dispute can be heard, confidence in the process may gradually erode. The continued success of the programme therefore depends not merely on increasing referrals, but on ensuring that referrals are made in cases where mediation has a realistic prospect of success.

Conclusion

Court-annexed mediation has become an indispensable component of Kenya's civil justice system and continues to deliver measurable benefits through reduced litigation costs, expedited dispute resolution and negotiated settlements. Its continued success, however, depends upon recognising that mediation is not equally appropriate in every dispute. Where referral occurs despite significant disparities in bargaining power, repeated failed negotiations or an evident absence of willingness to compromise, mediation risks producing delay without resolution and cost without corresponding benefit. A justice system committed to substantive fairness must retain the flexibility to recognise when negotiation has reached its practical limits and when adjudication is not a failure of ADR, but its necessary constitutional complement.

The Way Forward: Towards a More Calibrated ADR Referral Framework

The discussion above does not advocate limiting court-annexed mediation. Rather, it calls for a more deliberate referral framework that preserves the strengths of ADR while recognising that not every dispute is amenable to negotiated settlement.

First, judicial officers should undertake a structured suitability assessment before referring matters to mediation. Such screening should consider previous settlement attempts, the nature of the dispute, urgency of the relief sought, apparent power imbalances and the parties' demonstrated willingness to participate meaningfully in negotiations. Referral should therefore become an informed judicial determination rather than the default procedural response.

Secondly, the Judiciary should consider issuing more detailed guidance identifying categories of disputes that require closer scrutiny before referral. While every matter should remain capable of mediation where appropriate, disputes characterised by entrenched hostility, structural inequality, repeated failed negotiations or urgent rights-based relief may justify direct progression to adjudication.

Thirdly, greater emphasis should be placed on party autonomy. Although Article 159(2)(c) encourages ADR, it does not diminish the constitutional guarantee of a fair hearing under Article 50. Courts should therefore avoid transforming mediation into an indirect procedural barrier where parties have already demonstrated that negotiated settlement is unrealistic.

Finally, continued empirical evaluation of the Court Annexed Mediation Programme should extend beyond settlement rates to examine repeat referrals, delays attributable to mediation and the categories of disputes in which mediation consistently succeeds or fails. Such evidence would facilitate more targeted referrals while strengthening public confidence in both ADR and the adjudicative process.

Endnotes

1. Constitution of Kenya, 2010, art 159(2)(c); Civil Procedure (Court-Annexed Mediation) Rules, 2022 (Legal Notice No. 197 of 2022).
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ALTERNATIVE OR APPROPRIATE DISPUTE RESOLUTION? REVISITING THE BASICS

By Sylvia Atieno Onyango

The contemporary legal lexicon remains deeply tethered to an adversarial archetype that positions the courtroom as the default font of justice. By continuously labeling mechanisms such as mediation, reconciliation, traditional dispute resolution, and arbitration as "Alternative Dispute Resolution" (ADR), the legal fraternity inadvertently perpetuates a subtle, systemic hierarchy. To term a process an "alternative" inherently implies that it is an outlier, a secondary fallback to the standard adjudicative machinery.

However, within our current constitutional and statutory framework, this linguistic marginalization is a distinct misnomer. A mechanism that successfully mitigates commercial risk, preserves capital, and restores socio-economic equilibrium cannot be considered secondary. It is time for the bar and the bench to lead a paradigm shift in our professional nomenclature.

Operational Realities vs. Litigious Form

The true essence of restorative justice, and the understanding that remedies must be bespoke to be effective, is rarely found on the face of standard legal pleadings. This reality was illuminated early in my practice when a client, Mr. Adam, approached our firm seeking urgent intervention to protect his business livelihood. He had been sued by his co-director and long-time business partner, Mr. Ben, who sought the total recovery and ownership of their shared company.

The operational reality of the business was simple, albeit built on an unwritten understanding: Mr. Adam managed Department A, and Mr. Ben managed Department B. They operated separately but under a single corporate umbrella. Trouble brewed when Mr. Adam's exceptional expertise and industry traction drove the revenue of Department A to nearly double that of Department B. Stung by the disparity, Mr. Ben demanded an equitable share of Department A's independent proceeds. When Mr. Adam declined, the friendship imploded, and a lawsuit followed.

On paper, the pleadings presented a classic, high-stakes corporate battle for ownership. Mr. Ben asserted that though Mr. Adam was the registered director and sole shareholder, the company had been originally incorporated using Mr. Ben's nieces as proxies, who subsequently transferred the shares to Mr. Adam. To a literalist, the court was being asked to determine the legitimacy of share transfers and the ultimate ownership of a corporate asset. But to anyone with commercial utility, the pleadings masked a deeper emotional and financial truth: this was a fight over money, perceived fairness, and fractured trust.

The Bench as a Catalyst for Commercial Diagnostic Adjudication

The trajectory of this destructive dispute changed completely when the matter came before the late, distinguished Honourable Justice D.S. Majanja at the High Court of Nairobi (Commercial and Tax Division). Justice Majanja, renowned for his exceptional grasp of commercial pragmatism, refused to treat the pleadings with superficial literalism. He immediately recognized that a protracted court battle would offer nothing more than a pyrrhic victory, one that would exhaust corporate resources and permanently alienate the company's client base.

Exercising profound judicial wisdom, Justice Majanja forcefully directed the parties out of the adversarial pipeline and toward an amicable settlement. Guided by this intervention, we engaged in intense multi-party consultations. Although the initial rooms were dense with acrimony, stripping away the performative nature of formal trial advocacy allowed the actual commercial imperatives to surface.

Within thirty days, a comprehensive settlement agreement was executed. The terms were entirely pragmatic: Mr. Adam agreed to cede a calculated percentage of his earnings from Department A to Mr. Ben for a strict ten-month duration. In return, the operational autonomy of both lines was preserved, and the company's brand equity remained intact before its clientele.

Viewed strictly through the narrow lens of legal rights, an outsider might argue that Mr. Adam compromised his legal position by giving up hard-earned revenue. But viewed through the lens of business continuity, it was a masterclass in risk management. It was a rational price paid to secure market stability, uninterrupted operations, and client goodwill.

The Modern Advocate's Mandate

The formal adoption of that settlement agreement as a consent judgment served as a definitive turning point in my view of dispute management. Had that matter proceeded to full trial, the entity at its core would have been hollowed out by the very process meant to resolve it. The adversarial system would have essentially destroyed the commercial asset while attempting to determine its rightful owner.

Instead, deploying the appropriate mechanism preserved the business, sustained the relationships, and returned both economic actors to the marketplace without delay.

This outcome directly mirrors the over-arching mandate of Article 159(2)(c) of the Constitution of Kenya.

As ministers in the temple of justice and officers of the court, our professional reflex must change. Litigation can no longer be viewed as the default avenue, nor should appropriate dispute resolution be treated as an after-thought.

Our ethical obligation demands that we look beyond the legal architecture of our pleadings to diagnose the underlying economic and human currents of our clients' disputes. By partnering with a forward-thinking bench to actively steer matters toward tailored, fit-for-purpose mechanisms, we elevate our roles from mere litigation practitioners to true custodians of sustainable commercial justice.

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BEYOND LITIGATION: WHY ALTERNATIVE DISPUTE RESOLUTION UNDER THE KENYA REVENUE AUTHORITY IS THE MOST APPROPRIATE MECHANISM FOR RESOLVING TAX DISPUTES IN KENYA

By Marigi John & Anita Allela

The resolution of tax disputes in Kenya sits at a complex intersection of administrative law, fiscal policy, and economic rights. For years, the default pathway for aggrieved taxpayers has been adversarial litigation before the Tax Appeals Tribunal or the courts. However, this model increasingly reveals its limitations — particularly in disputes that turn on the granular examination of financial records, business transactions, and taxpayer documentation.

The Tax Procedures Act (TPA), enacted in 2015, introduced an elaborate internal dispute resolution mechanism framework under Section 55. The Kenya Revenue Authority (KRA) launched its Alternative Dispute Resolution (ADR) framework on 17th June 2015, which was later revised on 27th June 2019.

Increasingly, it has become evident that the ADR framework established under the KRA is not merely an "alternative" to litigation but is, in fact, the most appropriate mechanism for resolving tax disputes in Kenya — a position that finds compelling support in the structural constraints imposed on the Tax Appeals Tribunal and the appellate courts by Section 56 of the Tax Procedures Act.

The Architecture of Tax ADR in Kenya

The KRA ADR framework, anchored in Section 55 of the Tax Procedures Act, 2015 and operationalized through the Alternative Dispute Resolution Guidelines, creates a structured negotiation space between the Commissioner and the taxpayer. Disputes arising from assessments, objection decisions, or penalties can be referred to ADR immediately an appeal is filed by the taxpayer at the Tax Appeals Tribunal against an appealable decision. The process is presided over by a facilitator — typically a senior KRA official — and the parties engage in candid, interest-based dialogue aimed at reaching a negotiated settlement. Crucially, the process is confidential, voluntary, and focused on the actual facts and figures that gave rise to the dispute.

The Critical Limitation of the Tax Appeals Tribunal: Section 56 of the Tax Procedures Act & Section 30 of the Tax Appeals Tribunal Act

To appreciate why ADR is the more appropriate forum, one must confront the structural inadequacy of the Tax Appeals Tribunal in dealing with document-intensive disputes. Section 56 of the Tax Procedures Act (TPA) and Section 30 of the Tax Appeals Tribunal Act (TATA) provide that on an appeal, the burden of proof lies with the taxpayer to demonstrate that the assessment raised by the Commissioner is incorrect. More significantly, the Tribunal's jurisdiction is confined to the record as constituted — it adjudicates primarily on the basis of the objection decision and the materials submitted during the objection process. The Tribunal is not a discovery forum. It does not conduct independent audits, call for production of original accounting records, or interrogate complex financial transactions with the depth that such matters often require. In practice, a taxpayer who failed to fully substantiate their position during the objection stage faces a diminished ability to introduce new documentary evidence at the Tribunal stage, constrained by the Tribunal's procedural rules and the limited mandate conferred by Section 56 of the TPA and Section 30 of the TATA.

ADR as the Appropriate Forum for Document-Intensive Tax Disputes

Tax disputes — particularly those involving transfer pricing, VAT input claims, disputed expenses, withholding tax obligations, or additional and default assessments — are inherently document-driven. They require a deep dive into purchase orders, contracts, bank statements, inter-company agreements, audited accounts, and ledgers. The ADR process is uniquely suited to this reality. Unlike the Tribunal, the ADR process is not bound by strict rules of evidence that limit the scope of inquiry. During ADR, a taxpayer can present voluminous documentation, walk the Commissioner's team through complex transactions, and negotiate on the basis of evidence that may not have been fully canvassed during the audit or objection stage.

The facilitator can call for additional records, request third-party confirmations, and allow both sides to interrogate the financial narrative holistically. This depth of factual engagement is simply not replicated before the Tax Appeals Tribunal.

Efficiency, Cost, and Access to Justice

Beyond its structural superiority in document examination, ADR under KRA offers compelling advantages in terms of efficiency, cost, and access to justice. Tax litigation is expensive, protracted, and resource-intensive. A tax dispute can take years to resolve (especially if the parties continue to exercise their right of appeal), with attendant legal costs and the reputational uncertainty that shadows a business under unresolved tax dispute. ADR, by contrast, is designed to resolve disputes within a defined timeframe — often within 120 days of referral — at a fraction of the cost; but most importantly, the outcome is an agreed settlement bringing the matter to a close quickly and offering the taxpayer certainty that a sword is not hanging over their business for a prolonged period of time, making it difficult to, for instance, expand by either entering into mergers and acquisitions, or even borrowing loans against assets that KRA may have lodged restrictions on their titles during the pendency of the litigation.

Confidentiality and Commercial Sensitivity

Tax disputes frequently involve commercially sensitive information — profit margins, pricing strategies, supplier relationships, and financial structures that a business would ordinarily not wish to expose in public proceedings. A tax dispute that's fully litigated at the Tribunal, or the High Court and the Court of Appeal, forms part of the public record and is subject to publication in reported decisions. ADR proceedings are strictly confidential. No admissions made during ADR can be used in subsequent proceedings, and the outcome — whether a settlement or an impasse — does not create precedent that could be leveraged against the taxpayer in future assessments. This confidentiality is not merely procedural comfort; it is a substantive protection that encourages candid engagement and honest disclosure by both parties.

Reimagining ADR: From Alternative to Appropriate

ADR in the tax context therefore, should not be viewed as a second-choice mechanism reserved for cases where litigation seems too cumbersome. Rather, given the document-intensive nature of tax disputes, the structural constraints of Section 56 of the TPA and Section 30 of the TATA on the Tribunal's fact-finding mandate, and the demonstrated advantages of ADR in terms of cost, speed, confidentiality, and depth of factual engagement, ADR under KRA should be treated as the primary and most appropriate forum for resolving tax disputes in Kenya.

Conclusion

Kenya's legal and fiscal framework requires a deliberate shift from routine reliance on litigation to a structured embrace of Alternative Dispute Resolution as the primary mechanism for resolving tax disputes. The Tax Procedures Act, reinforced by emerging jurisprudence from the Tax Appeals Tribunal, underscores that ADR is not merely an option but an effective solution.

In practice, it is increasingly common for matters dismissed at the Tribunal and subsequently appealed to the High Court to be resolved through ADR. A key advantage of ADR is the flexibility it affords: the Kenya Revenue Authority may agree to payment plans that enable taxpayers to settle outstanding liabilities in manageable instalments.

Courts, by contrast, do not extend such concessions; once a judgment is delivered in favour of KRA, the taxes become immediately collectible in full, with KRA free to deploy its full range of enforcement measures.

The issuance of an Agency Notice illustrates the severity of these enforcement tools, as it can disrupt business operations almost instantly. Tax practitioners now recognize that engaging KRA at the ADR table significantly reduces the risk of such measures. This pragmatic approach explains why approximately 80% of tax disputes are currently resolved through ADR — it offers certainty, efficiency, and practical outcomes for both the taxpayer and the revenue authority.

MEDIATION IN KENYA: ALTERNATIVE, APPROPRIATE, OR IMPERATIVE?
THE CASE FOR PLACING MEDIATION AT THE CENTRE OF JUSTICE

By Ouma John Ochola Ouma

Whether mediation is 'alternative' or 'appropriate' is not a question of branding. It is a jurisprudential choice about whether the justice system exists to serve its own architecture or to serve the people who come before it. A live confrontation between the Law Society of Kenya and the Judiciary over who may mediate has made that choice urgent.

I. Mediation: Alternative or Appropriate?

In his landmark 1976 Pound Conference address, Professor Frank Sander of Harvard Law School argued that the goal of non-litigious dispute resolution was never to produce a lesser substitute for adjudication but to match each dispute to its most suitable process. That logic is the intellectual foundation of mediation's claim to primacy. To call mediation 'alternative' is to position it as a fallback; to call it 'appropriate' is to assert that for many disputes — relational, commercial, familial, communal — it is simply the right answer, and the choice of word determines the architecture of a justice system.

I have practiced across constitutional petitions, commercial disputes, land and environment matters, family proceedings, and small claims. In each domain I have encountered parties who arrived at court not because they wanted a judgment, but because they did not know where else to go. That is the institutional failure the ADR debate must address.

II. The Constitutional Imperative and the Legislative Pipeline

Article 159(2)(c) of the Constitution of Kenya, 2010 commands courts to promote alternative forms of dispute resolution. As Kariuki Muigua writes in his authoritative text on arbitration and ADR in Kenya, this provision was intended to shift the center of gravity of the justice system away from the adversarial courtroom and toward a plurality of resolution pathways.

That shift is gathering legislative momentum, and mediation stands at its center. Of three draft bills issued in mid-2025 by the Office of the Attorney General and the Nairobi Centre for International Arbitration, the most significant for present purposes is the Dispute Resolution Bill: a statute that would for the first time give mediation a dedicated legislative home, establish a National Dispute Resolution Council, and place the Court-Annexed Mediation programme on durable statutory footing.

The companion bills — the Arbitration (Amendment) Bill and the Construction Adjudication Bill — address distinct processes and need not detain us here beyond this: their simultaneous tabling signals a deliberate policy choice to treat mediation, arbitration and adjudication not as competing systems but as complementary ones, each occupying its own lane. Mediation is not the whole of that constitutional vision, but it is its most human expression: the one process that asks the parties themselves to author the resolution of their dispute.

III. The Battle Over the Mediator's Chair

The most immediate flashpoint is the dispute over mediator qualifications. In May 2026, LSK President Charles Kanjama insisted that mediation of court-referred disputes must remain anchored in the legal profession, warning that enabling non-advocates to conduct legally complex mediations risks compromising accountability and professional standards. Sections of the Nairobi Bar threatened to boycott judicial referrals, characterizing the Court-Annexed Mediation programme as a 'Judiciary-aided infiltration' of the profession. The Judiciary Steering Committee on Mediation and the LSK were forced into urgent negotiations, culminating in a joint communiqué at Milimani.

The Association of Certified Mediators counters that mediation is facilitative, not adjudicative, and that professionals from nursing, accountancy, or engineering may bring competencies to certain disputes that an advocate cannot. The Court-Annexed Mediation Rules, 2022 require accredited mediators to hold a university degree, without mandating a law degree.

Both positions have merit; neither is complete. The LSK is right that where a mediated settlement creates binding obligations over land, custody, or commercial rights, the parties deserve assurance that the process was guided by someone conversant with the law. The Judiciary is right that confining mediation to advocates would perpetuate the scarcity of accessible dispute resolution that ADR exists to cure. The resolution lies in a tiered accreditation system: dispute complexity should determine mediator qualification, not guild protectionism.

IV. Across the Practice Spectrum

Land and environment disputes illustrate the limits of adjudication. A decree resolves the legal dispute; it resolves nothing else. As Lon Fuller observed, mediation's distinctive capacity is not to apply rules but to 'reorient the parties toward each other.' I have watched consent orders in ELC matters unravel within eighteen months because the underlying grievance was relational, not proprietary.

In family proceedings, the Children Act, 2022 provides for mediation in custody matters, but the referral pathway is chronically underused. In commercial disputes, parties routinely arrive in court without having engaged their contractual ADR clauses. These are systemic failures, not individual ones; they call for systemic remedies.

V. What Reform Requires

As Carrie Menkel-Meadow of Georgetown Law argues, the adversarial model produces lawyers who see every dispute as a battle to be won rather than a problem to be solved.

Mediation demands the opposite instinct: to listen before arguing, and to help parties find an agreement that a court could never impose. Legal education in Kenya must treat mediation as a core professional competency, as fundamental to practice as drafting a pleading or examining a witness.

The Advocates Remuneration Order must be reformed to provide a meaningful fee framework for ADR work. Where the incentive lies, behaviour follows. And the LSK-Judiciary standoff must be resolved by principle: a statutory tiered accreditation framework, jointly administered, would serve all parties better than an uneasy truce.

VI. Conclusion

To place mediation at the center of Kenya's justice system — not at its margins — is to assert that the system is confident enough to direct parties not to the forum most familiar to the profession, but to the forum most likely to deliver durable and proportionate justice. The constitutional mandate under Article 159 is unambiguous. The legislative pipeline is open. The Judiciary has built the institutional beginnings. What remains is the professional will — on both sides of the current standoff — to make mediation not the alternative, but the answer.

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ALTERNATIVE OR APPROPRIATE DISPUTE RESOLUTION? REVISITING THE BASICS

By Dr. Kanchori Daniel

Abstract

The term alternative dispute resolution carries an implicit hierarchy where litigation is treated as the default and ADR as the substitute. This framing is embedded in the language of Article 159(2)(c) of the Constitution of Kenya, which directs courts to "promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms" in exercising judicial authority. But a decade and a half of practice in Kenya raises a more fundamental question: is ADR merely an alternative to litigation, or should it be understood as the most appropriate form of dispute resolution in defined contexts? The central argument of this discussion argues for the latter view, drawing on constitutional analysis and practitioner experience to reposition ADR as a primary pathway, not a fallback. Kenya's constitutional commitment to ADR is not incidental. Article 159(2)(c) emerged from a reform process that recognized the limits of an adversarial, court-centered justice system inherited from the colonial era. It is reinforced by Article 48 on access to justice, Article 10 on national values, and Article 67(2)(f) on ADR in land conflicts. Together, these provisions establish ADR not as a concession to an overburdened judiciary, but as a co-equal pillar of Kenya's justice architecture.

Kenya's Court-Annexed Mediation (CAM) program provides practical evidence of ADR's effectiveness within the formal justice system. Launched in April 2016 at the Commercial and Family Divisions of the Milimani High Court, CAM has shown that mediation can deliver timely, effective and economically significant outcomes within the formal justice system. As of early 2025, 16,770 of 18,162 matters referred to mediation had been concluded, representing a 92.3% conclusion rate. The average settlement time also reduced from 87 to 73 days, and approximately Kshs. 52.1 billion has been released back into the economy through mediated settlements. CAM has also expanded from one pilot station to 60 mediation registries supporting 118 courts across 40 counties, with 1,292 accredited mediators. These developments support the abstract's central thesis: ADR is no longer a peripheral or fallback mechanism, but an increasingly primary and appropriate forum where speed, cost, party autonomy and practical outcomes are central.

The choice of dispute resolution should therefore depend on the nature of the dispute rather than a presumption in favour of litigation. ADR is often better suited to commercial, construction, labour, family, land and community disputes where parties need flexibility, confidentiality, technical expertise, dialogue or restoration. Litigation remains necessary where matters require public determination, precedent, coercive enforcement or authoritative interpretation of the law. The aim is not to displace courts, but to place each dispute before the process best suited to resolve it.

The enforcement of arbitral awards is a key factor in strengthening confidence in ADR. The common concerns about ADR is whether its outcomes can be enforced. Arbitration Act, 1995, domestic and foreign arbitral awards are binding and enforceable through the High Court, subject only to limited grounds for refusal such as invalidity of the arbitration agreement, procedural unfairness, excess of jurisdiction, fraud, corruption or conflict with public policy. This pro-enforcement framework strengthens arbitration, particularly in commercial disputes where parties require certainty, confidentiality and finality.

Traditional Dispute Resolution Mechanisms also remain central to access to justice in many communities. Councils of elders and clan-based mediation offer familiar, accessible and culturally legitimate forums, especially in rural areas.

However, they must operate consistently with the Bill of Rights and written law.

Beyond institutional frameworks and legal enforceability, the long-term legitimacy of ADR depends on the integrity of the processes through which disputes are resolved. ADR becomes more institutionalized; ethics must remain central to its credibility. This discussion will focus on how ethical standards can protect fairness, voluntariness and integrity in ADR processes. Accreditation systems and professional codes are important, but they must be supported by enforcement, accountability and institutional capacity. ADR practitioners must safeguard independence, impartiality, confidentiality, competence, disclosure of conflicts of interest and sensitivity to power imbalances. A settlement should not be treated as successful where a party is coerced, excluded, misled or pressured into an unfair outcome, as ADR then fails in its justice function.

ADR in Kenya should be both hybrid and technology-driven. Models such as negotiation-mediation, mediation-arbitration, arbitration-mediation, online dispute resolution and court-supported settlement processes recognize that disputes do not fit neatly into one forum. These hybrid models can match disputes with the most appropriate process while improving efficiency, accessibility and fairness. Technology can support virtual mediation, digital case management, electronic filing and wider access for parties limited by distance or cost. However, technological innovation must be guided by confidentiality, data protection, digital inclusion, fairness and human oversight. The future of ADR must remain innovative without losing its ethical, restorative and people-centered character.

Despite its progress, ADR still faces gaps. Some processes are becoming urban-centered, technical, costly or inaccessible to ordinary users. Rural reach remains uneven, and informal processes may reproduce power imbalances. All in all ADR's value lies not only in efficiency, but also in its ability to promote fairness, healing, relationship preservation and community harmony, while strengthening public confidence in the justice system.

Conclusion

ADR in Kenya has moved decisively from pilot project to institutional reality. The evidence suggests that in many contexts, ADR is not merely an alternative to litigation it is the more appropriate pathway measured by speed, cost, party satisfaction, and economic impact. This discussion invites a shift in language and mindset: from viewing ADR as a secondary option to embedding it as the primary recommendation, with litigation reserved for cases that genuinely require public adjudication, precedent-setting, or coercive state enforcement. The goal is not to displace courts but to match disputes to their best forum.

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ALGORITHMIC AUTOMATION THREATENS ALTERNATIVE JUSTICE SYSTEMS: VIEWING THE FUTURE

By Kiboye Okoth-Yogo

The increasing integration of artificial intelligence (AI) into justice systems presents both opportunity and risk. Properly deployed, AI can reduce court backlogs, improve scheduling, enhance legal research, assist self-represented litigants, and promote consistency in administrative processes. These are worthwhile objectives for Kenya's judiciary. However, efficiency must never come at the expense of constitutional justice. AI should support judicial administration, not replace human adjudication or the relational foundations of Alternative Dispute Resolution (ADR) and Alternative Justice Systems (AJS).

Article 159(2)(c) of the Constitution requires courts to promote ADR, including mediation, arbitration, reconciliation, conciliation and traditional dispute resolution mechanisms. These processes were constitutionalised not merely to ease case backlogs but to make justice more accessible, culturally responsive and grounded in human dignity. Their success depends on dialogue, empathy and context—qualities that cannot be replicated by algorithmic decision-making.

The greatest danger lies in automated systems that evaluate disputes or recommend outcomes. Such systems rely on historical data to identify patterns and make predictions. Yet historical legal data often reflects inequalities relating to gender, land ownership, economic status and ethnicity. If these biases are embedded in algorithms, they risk perpetuating rather than correcting injustice. This concern aligns with Article 27 on equality, Article 47 on fair administrative action and Article 48 on access to justice. It also raises significant questions under the Data Protection Act, 2019, particularly regarding automated decision-making and profiling.

The Kenyan courts have consistently recognised that fairness requires more than procedural efficiency. Judicial discretion enables decision-makers to consider the unique circumstances of every dispute. From a Rawlsian perspective, justice requires institutions to protect the most vulnerable rather than reinforce existing disadvantage. Algorithmic triage that channels litigants into predetermined pathways without meaningful human review undermines that constitutional commitment.

International experience demonstrates that these concerns are practical rather than theoretical. In the United States, the COMPAS sentencing algorithm attracted widespread criticism after studies suggested racial disparities in risk assessments. Dutch courts struck down the SyRI welfare fraud detection system because of its disproportionate impact on privacy and fundamental rights. The European Union has similarly classified many AI systems used in justice as high-risk under the EU AI Act, subjecting them to stringent transparency and oversight requirements. These examples illustrate that technological innovation requires robust legal safeguards.

Arbitration presents additional constitutional concerns. The Arbitration Act protects party autonomy while preserving judicial supervision where awards are affected by fraud, procedural unfairness or public policy. Kenyan jurisprudence, including Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd, affirms that limited judicial intervention remains necessary to safeguard justice. Fully automated smart-contract arbitration could frustrate this balance by executing outcomes before parties can exercise their statutory right to challenge an award under Section 35 of the Arbitration Act.

The threat is even greater for AJS which derives its constitutional legitimacy from community participation, restorative dialogue and indigenous knowledge. Its objective is not simply determining liability but restoring relationships and social harmony. These values reflect Ubuntu, which recognises that human dignity is realised through relationships with others. Predictive algorithms cannot adequately evaluate cultural context, collective memory or community reconciliation. Replacing human engagement with automated assessment risks hollowing out the very purpose of AJS.

This is not an argument against AI itself. AI can play an important supporting role within the justice sector by improving case management, document retrieval, scheduling and legal research. The United Kingdom's judiciary has similarly recognised the usefulness of generative AI while emphasising that judges remain fully responsible for all judicial decisions. The constitutional objection therefore arises only when AI begins to substitute, rather than assist, human judgment.

As Ronald Dworkin argued, law is an interpretive enterprise requiring judges to identify the moral principles that best justify legal outcomes. Constitutional adjudication demands reasoning, empathy and accountability. Algorithms can identify patterns, but they cannot exercise moral judgment or appreciate the lived realities that shape disputes. Judicial discretion remains indispensable to preserving public confidence in the administration of justice.

Kenya's legal framework should therefore draw a clear constitutional boundary. AI should be confined to administrative functions while decisions affecting rights, obligations and dispute resolution remain subject to meaningful human oversight. The proposed Artificial Intelligence Bill should classify judicial AI systems as high-risk technologies requiring independent bias audits, transparency obligations, human review mechanisms and data protection impact assessments before deployment.

Technology should strengthen access to justice, not redefine justice itself. Kenya's constitutional vision under Article 159 is founded upon human dignity, fairness and restorative justice. Those values cannot be automated. The pursuit of efficiency ought to remain subordinate to the Constitution's enduring commitment to justice that is not only swift, but also humane.

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REVISITING COURT-ANNEXED MEDIATION: WHOSE DISPUTE IS IT? THE ILLUSION OF PARTY AUTONOMY AND THE DIMINISHED ADVOCATE'S DUTY TO THE CLIENT

By Caroline Oduor

Abstract

Kenya's Court-Annexed Mediation programme has delivered settlements and substantial economic value. Its success, however, exposes a constitutional tension. Mediation is legitimate because parties retain authority over the process and outcome, while the present framework permits court-directed referral, administrative appointment of mediators and sanctions for non-compliance. This essay argues that compulsory participation can place pressure on genuine consent and divide the advocate's loyalty between the client and the institution's preference for settlement. It proposes a narrower model of mandatory consideration and measures of success that examine consent, fairness and durability rather than settlement rates alone.

I. Introduction

There is a particular institutional satisfaction in announcing that an initiative has worked. Since Kenya's Court-Annexed Mediation programme was formally launched in April 2016 pursuant to the constitutional mandate under Article 159(2)(c) of the Constitution of Kenya, 2010, the Judiciary has had much to announce. The Judiciary now reports 40,636 referrals since 2016, 17,011 full agreements, 121 registries and KSh94.5 billion in resolved case value. Those figures deserve recognition. They show that disputes can be resolved without assuming that every disagreement must mature into a judgment. However, institutional statistics often acquire a dangerous kind of authority: the type that produces its own pathologies, a success so celebrated that it begins to resist scrutiny, and a metric so prominent that it gradually displaces the values it was designed to serve. This article interrogates whether CAM has remained faithful to the foundational principles of ADR, or whether, in its institutionalization, it has subordinated those principles to the administrative imperatives of case clearance, docket management, and statistical reporting. Mediation is ordinarily defended as a process of self-determination. The parties choose whether to negotiate, shape the terms and remain free to decline settlement. Once courts screen cases automatically, refer them administratively, appoint mediators and attach consequences to non-participation, the central question changes. The issue is no longer whether mediation works. It is whether efficiency can expand without converting party ownership into institutional management.

II. Promotion, Referral and Consent

Article 159(2)(c) of the Constitution directs courts to "promote" mediation and other forms of alternative dispute resolution. That verb matters. Promotion requires courts to make mediation available, credible and accessible. It supports explanation, encouragement and procedural incentives. It does not, without more, settle the constitutional limits of compulsion.

The Civil Procedure Act and the Court-Annexed Mediation Rules create a more directive structure. A court may refer a dispute where it considers mediation appropriate. Cases are screened, suitable matters may be referred by written order, and the Mediation Deputy Registrar appoints a mediator unless the parties jointly select one within the prescribed period. Parties, their advocates or authorised representatives must attend and participate in good faith. Persistent non-compliance may attract a penalty, the striking out of pleadings or another order the court considers fit.

The usual defence is that attendance may be compulsory while settlement remains voluntary. That distinction is legally important, but it is not psychologically complete.

A party enters the process because the court required it. The advocate knows that resistance may be treated as obstruction. The mediator works within a system whose public achievements are expressed through completed cases and settlement value. No rule formally commands agreement, but the surrounding architecture can make refusal appear institutionally disfavoured. Consent at the end may remain valid while the pathway towards it is heavily directed.

III. The Advocate's Divided Position

In ordinary litigation, counsel receives instructions, advises on law and evidence, and advances the client's lawful objective. The Civil Procedure (Court-Annexed Mediation) Rules, 2022, Rule 27 adds a different expectation in mediation. The advocate must explore options for speedy conclusion, adopt an advisory role and encourage cooperation with the mediator and the opposing party.

These duties can support skillful representation. They can also pull counsel away from the client's chosen end. A client may reasonably prefer judgment. The dispute may require a public declaration, authoritative interpretation, protection against repeated conduct or vindication after prolonged wrongdoing. An advocate who presses settlement merely because the file has entered mediation substitutes the institution's interest for the client's. Counsel should explain risks candidly, prepare the client carefully and negotiate competently. The professional duty of fidelity to the client requires that the final judgment about compromise remains the client's.

IV. Measuring Justice More Honestly

Kenya should refine court-annexed mediation, not retreat from it. The first reform is to distinguish mandatory consideration from automatic participation. Courts may require parties to attend an information session and explain a refusal. Referral should nevertheless allow a clear exemption where power imbalance, urgency, public interest, recurring illegality or the need for precedent makes mediation unsuitable. The Rules already identify pure questions of law and public-interest litigation as relevant screening considerations. Those safeguards should become accessible rights rather than internal administrative criteria.

The second reform concerns control. Party selection of the mediator should be the default, with registrar appointment used when the parties cannot agree. Sanctions should target deliberate obstruction, not principled opposition or a good-faith decision that settlement via mediation, is inappropriate.
The advocate's duty should be stated positively: protect informed client choice, participate honestly and ensure that any agreement reflects lawful and genuine consent.

The third reform concerns evidence.in addition to data on settlement rates, the Judiciary should publish data on party satisfaction, representation, enforcement disputes, repeat disputes, mediator complaints and reasons for non-settlement. The 2026 Annual Mediation Summit's commitment to a dashboard including user satisfaction is therefore significant. The lesson is not that mandatory referral is always illegitimate. It is that compulsion must be narrow, transparent and matched by safeguards.

V. Conclusion

Court-annexed mediation has shown that Kenya can resolve disputes faster, preserve relationships and return value to the economy. Its next achievement should be more demanding. It should prove that institutional success can coexist with constitutional autonomy. The dispute belongs to the parties.

The mediator facilitates it. The advocate protects the client's legal interests. The court creates conditions for resolution without making settlement an administrative expectation. Mediation succeeds not when every file settles, but when every settlement remains genuinely the parties' own, it is only then that that settlement durability is guaranteed.

The Author is an Advocate of the High Court of Kenya.


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CHAMBER BREAK

Let the Law Confess for Once

By Beth Michoma

Let the law confess for once,
not in whispers behind mahogany doors,
not in footnotes buried beneath precedent,
but here, in open court,
where the ceiling fans hum like guilty consciences
and the flag hangs limp with shame.

Let the law confess
that justice wore a blindfold
not for impartiality,
but to avoid the eyes of the disappeared,
the activists who vanished between polling stations,
the bloggers who typed truth and never came home,
the students whose names became hashtags
before they became memories.

Let the law confess
that democracy was not stolen in one night
but certified, stamped, and sealed
by our own trembling hands,
that we counted votes we knew were ghosts,
declared winners we knew were thieves,
and called it "the will of the people"
when it was only the will to survive.

Let the law confess
that the gavel struck not for truth
but for order,
that beautiful, terrible word
we used to silence screams,
to tidy up the blood,
to make abduction look like due process,
to make rigged elections look like democracy.

Let the law confess
that we drank from the poisoned cup willingly,
We, the electoral commissioners and judges,
the prosecutors who filed cases into oblivion,
the defenders who defended the indefensible,
the ones who knew the ballot boxes were stuffed
but signed the forms anyway.

Let the law confess
that every oath we swore
was a small death,
every fraudulent result we announced

a burial without ceremony,
every missing person's file we closed
a door locked from the inside,
and on the other side,
mothers still knocking,
still asking,
"Where is my child?"

Let the law confess
that it stood silent
while unmarked cars prowled the streets,
while polling agents were beaten in broad daylight,
while the disappeared became statistics,
while democracy became a word
we could no longer say without choking.

Let the law confess
that it has been a coward,
a collaborator,
a beautiful lie in a black robe,
that it legitimized tyranny
with the stroke of a pen,
that it made oppression legal,
that it turned the courtroom
into a theatre of forgetting.

But let the law confess, too,
that confession,
bitter as it is,
might be the first sip
of something clean,
that truth, once spoken,
cannot be unspoken,
that the disappeared,
though silent,
still vote with their absence,
still testify with their ghosts.

Let the law confess for once,
so that we,
who have been silent so long,
who have swallowed lies
and called them mandates,
who have watched democracy die
one rigged election at a time,
might finally learn
to speak,
to resist,
to remember

that the ballot is not a weapon
unless we let them make it one,
that justice is not dead
unless we bury it ourselves,
that the disappeared
are only forgotten
if we choose to forget.

Let the law confess for once,
not for absolution,
but for reckoning.
Not to be forgiven,
but to be remembered
for what it was:
complicit,
cowardly,
and finally,
confessing


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