

The GLOCEPS

Weekly Influential Brief

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Addressing case backlog in Magistrates' Courts in Kenya

Stephen Nduvi
Sherry Omulando



Photo Credit: Office of the Auditor-General

Executive Summary

Case backlog in Kenya is a major policy concern across the judiciary, especially at the magistrates' courts. It undermines timely dispensation of justice and portrays the ineffectiveness of the judiciary in resolution of cases, leading to loss of public confidence. This brief addresses key issues impacting on case backlogs, among them, shortage of judicial officers, underutiliza-

tion of Alternative Dispute Resolution (ADR) mechanisms and deficiencies in Electronic Case Management System (ECMS). It recommends capacitating of the electronic system and boosting the strength of judiciary human capital. Further recommendations are increased utilization of virtual courts and enhanced multi-agency collaboration to guide ADR mechanisms.





Context

Case backlog has been a recurring issue in Kenya for decades, undermining Judiciary's effectiveness in delivering justice expeditiously. Before the promulgation of the Constitution of Kenya 2010, the major contributing factors were lack of impartiality in the judiciary. This was due to the absolute executive powers the President of the Republic of Kenya had over the judiciary, including appointing the Chief Justice and all the members of the Judicial Service Commission (JSC). Since the JSC was only responsible to the Executive, it created avenues for partial and politically biased judicial officers and by extension, their courts. This led to intentional delays of certain cases, thereby causing backlog.

However, despite the enactment of the 2010 Constitution, which provided for the Judicial Service Act 2011, and the Judiciary Transformation Framework (JTF) to address administrative challenges, efficient reduction of case backlog is yet to be achieved. The magistrates' courts account for 73% of filed criminal and civil cases that have taken more than one year to resolve. The resultant delays in dispensation of justice can be used by accused persons to evade justice through manipulation of the court processes. This can be achieved through distortion of evidence and interference with witnesses leading to prolonged investigations. As a consequence, the trials go beyond acceptable time limits for determination of cases, leading to case backlog.



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Key Issues

While there are a number of factors contributing to case backlog in Kenya, this brief has identified electronic case management system, shortage of judicial officers, and underutilization of ADR mechanisms as the most prevalent.



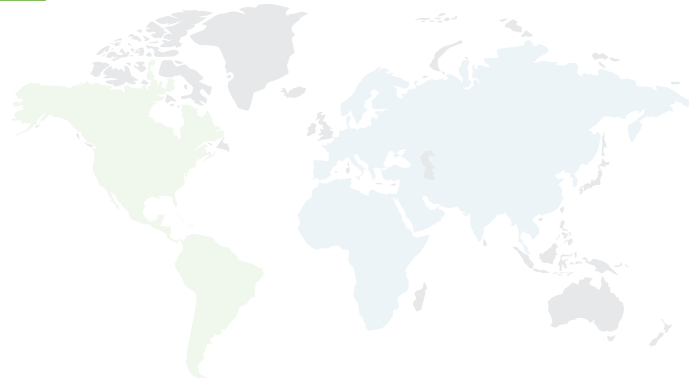
Shortage of judicial officers

Shortage of judicial officers at magistrates' courts has been a significant hindrance to timely dispensation of justice in Kenya's judicial system. As such, the impact of higher productivity in the elimination of case backlog in these courts is highly compromised. The law courts currently operate at 45% of their optimum capacity, leaving a 55% deficit. Workload analysis in financial year 2019/20 shows that on average, each magistrate closed the year with a significant amount of unresolved cases. This shows that the number of magistrates in the country are

not enough to effectively handle cases before them and reduce case backlog.

Further, there is a high vacancy rate in the judiciary, especially in the magistrates' courts. This is attributed to retirement, resignation, or death of judicial officers. The selection and training of new judicial officers to fill such vacancies takes time. The longer it takes to find a suitable replacement, the longer the delay in determination of cases, hence an increase in pending cases and eventually backlog in the courts.





Alternative Dispute Resolution (ADR) mechanisms

Alternative Dispute Resolution (ADR) mechanisms such as reconciliation, mediation, arbitration and traditional dispute resolution options have been used as means to dispense justice as enshrined in the Constitution of Kenya, 2010. However, there is underutilisation of ADR instruments by courts in exercising judicial authority. This has been occasioned by several challenges including having male-dominated panels in traditional dispute resolution sessions, especially in Northern Kenya regions. Here, patriarchal norms and customs disregard role of women in dispute resolution even when they have knowledge in such processes. As a result, disputes affecting girls and women are unlikely to be handled fairly by such panels. This leads to such individuals seeking justice in courts, instead of traditional ADR mechanisms, hence

increasing number of cases in courts leading to backlogs.

Additionally, ADR mechanisms are not properly regulated despite the existence of a National Legal Aid Act (2016), which promotes the use of ADR initiatives and enhances legal literacy and awareness. Most village elders and panellists exercising such powers are not well-trained on constitutional matters. Therefore, judgements delivered by such persons are not in conformance with the laws of Kenya. This leads to some of their decisions being contested in court of law. As a result, these cases remain pending as they await formal judicial hearing. This adversely weakens the potential of ADR mechanisms to promote timely resolution of cases, leading to backlogs.





Electronic Court Case Management System (ECMS)

The Electronic Case Management System initiative is yet to achieve its goal of reducing case backlog since it was officially launched in 2020. The system supports electronic service, electronic payment and receipting, electronic filing of documents, electronic request for extraction of orders, and electronic search of case files. Its interface allows law firms, lawyers, and individuals to register through the e-filing portal on the Judiciary website or through e-citizen portal. Additionally, judicial officers can access court documents and issue rulings through email or the portal. Further, the system has been integrated with audio and video conferencing through virtual platforms such as skype or zoom.

ECMS had been previously piloted in Eldoret law courts in 2011 by the National Council for Law Reporting (Kenya Law), before its official launch. In addition, virtual courts were piloted in Mombasa and Nairobi within the same year.

However, the judiciary's efforts to use the lessons from the piloting to inform the rollout of ICT integration (2012-16) did not reach its potential. This was caused by inadequate access to facilities such as internet connection, WI-FI linkages, computers, and unreliable electricity supply. To date, ECMS still faces similar challenges which have continued to undermine its ability to provide reliable access to case files and records. For instance, law courts in remote areas such as Isiolo law court continue to face poor internet connectivity, inconsistent power supply and lack of access to digital facilities.

Additionally, a high number of judicial officers and self-represented parties lack skills to efficiently use the e-filing and case management system. The Law Society of Kenya has over the past year conducted skill-enhancing activities including virtual commercialized training to litigants on e-filing and litigation. However, the capacity of litigants, Court User Committees



Photo Credit: Lawyer Monthly





(CUCs), and judicial officers to effectively adopt and use the system remains a challenge. This is because institutional training requires financial resources, which is largely lacking.

Further, implementing digital technology in criminal litigations is a challenge since accused persons on remand have inadequate access to computers and internet for virtual hearing. Even in cases where the parties have access to such facilities, determination of criminal cases through video conferencing still poses a challenge to some magistrates and judges. They find it difficult gauging witness credibility

when assessing non-verbal cues, such as defendants' eye movements and emotions during cross examination. Similarly, video conferencing does not allow effective detection of signs of ill-treatment of accused individuals. This has the potential to skew the criminal justice system, as individuals on remand may lack confidence or feel intimidated during virtual proceedings. Consequently, determination of such cases may be pushed or delayed until they are able to physically appear before a magistrate or judge. The aforementioned have occasioned increase in case backlogs in our judicial system.

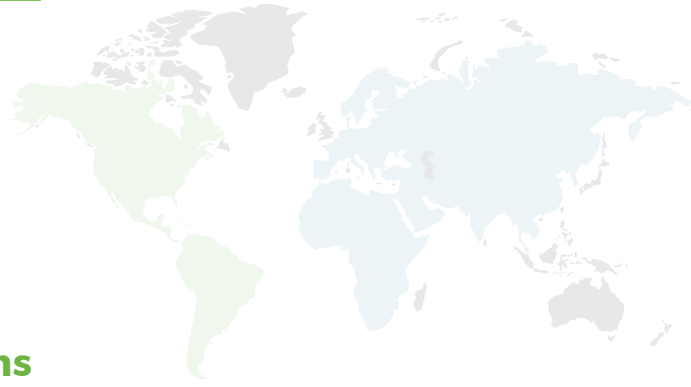


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Conclusion

Shortage of judicial officers, underutilization of ADR mechanisms, and deficiencies in Electronic Case Management System have constrained the effectiveness of the judiciary in reducing case backlog in Kenya. The resultant delays in case determination often lead to lack of public trust in public institutions mandated with the provision of justice in the country. A number of intervention measures are required to address the challenge.





Recommendations

1. The Judicial Service Commission in collaboration with the Law Society of Kenya (LSK) should enhance outreach programs and training to sensitize the public and judicial officers on court processes and use of electronic filing and case management system.
2. The Judicial Service Commission in collaboration with the Ministry of Information Communications and Technology and the Ministry of Energy & Petroleum should provide stable power and internet services to courts in marginalized areas like Isiolo.
3. The Judicial Service Commission in collaboration with the Ministry of Information Communications and Technology should:
 - i) launch ICT stations in marginalized areas to enable litigants to attend virtual court sessions and get assistance in filing documents at no costs.
 - ii) enhance adoption of modern management practices i.e. ICT in case management processes.
4. The Judicial Service Commission in collaboration with the National Council on the Administration of Justice (NCAJ) should recruit more judicial officers to reduce the number of cases per magistrate.
5. The Judicial Service Commission in collaboration with the National Council on the Administration of Justice and the National Legal Aid Service should intensify use of ADR mechanisms with judicial officers providing reviews of the handled cases to avoid cases being referred back to courts.
6. The Judicial Service Commission in collaboration with the National Gender and Equality Commission (NGEC) should conduct sensitization outreach programs with an aim to include more women in ADR processes.

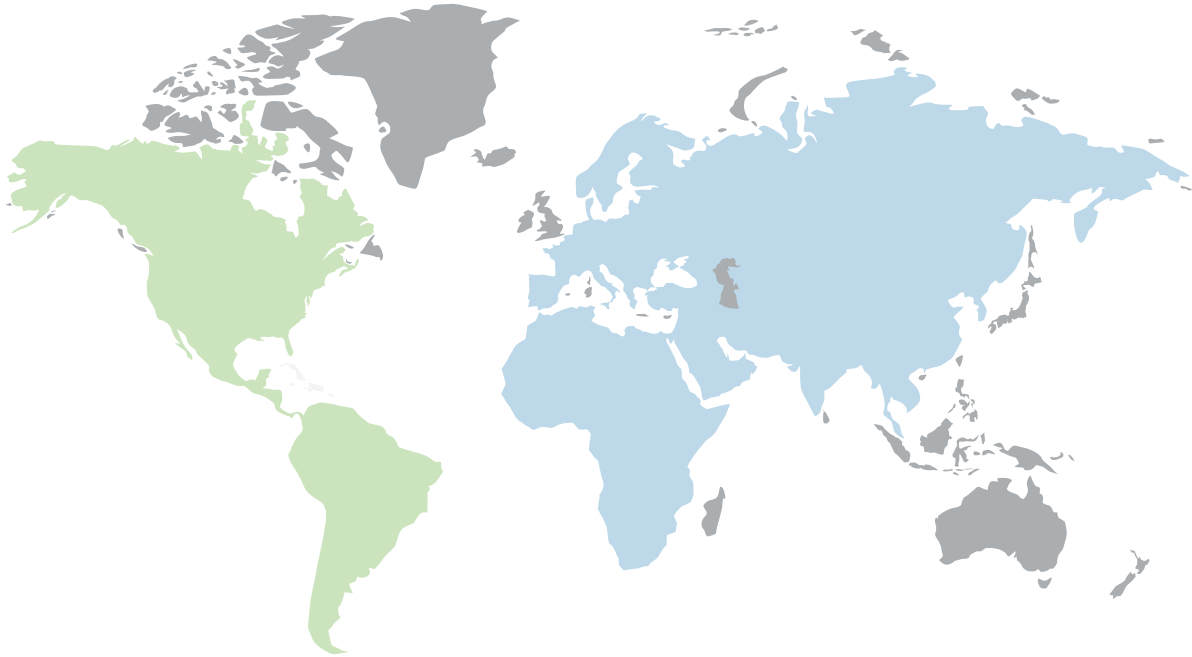


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Off Kiambu Road, Nairobi Kenya
P.O. Box 27023-00100, Nairobi.
Telephone: 0112401331
Email: info@gloceps.org
Web: www.gloceps.org

