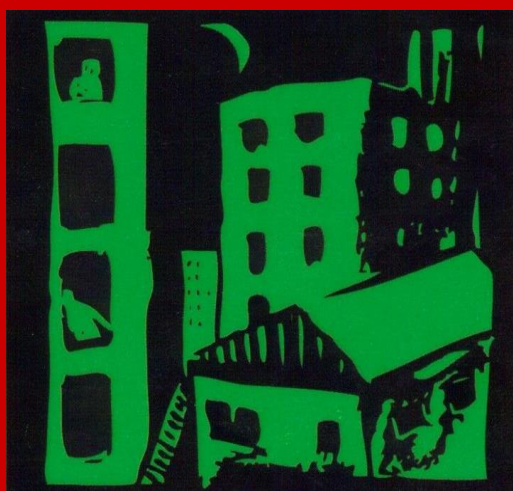
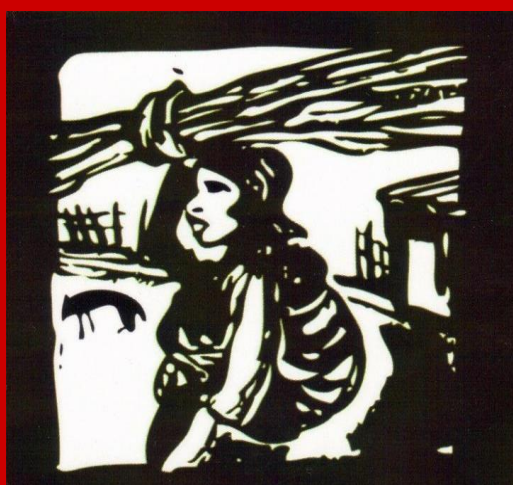


# LAW DEMOCRACY & DEVELOPMENT



**VOLUME 25 (2021) Special Edition**

DOI: <http://dx.doi.org/10.17159/2077-4907/2020/idd.v25.spe9>

ISSN: 2077-4907  
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## Leveraging the local administration to engender access to justice in Kenya: the case of Mukuru Kayaba Informal Settlement, Nairobi County, Kenya

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### ABSTRACT

*Constitutional change in Kenya has opened up spaces of contestation of rights for citizens. However, marginalisation of certain segments of the population remains a key constraint to achieving universal protections. A lack of awareness and capacity of both citizens and the government hinders the advancement of the goals to lift the standards of all the citizens. There has been the extension of the rights to the individual to cover political, economic, social, economic and cultural rights. Communities living in informal settlements face extreme marginalisation which is vividly expressed in the lack of access to justice.*

*This is specifically difficult for women and children as they face social, cultural and economic constraints. Using Mukuru Kayaba informal settlement as a case study, this article will examine how the place and status of the local administration can be leveraged and negotiated to secure access to justice for women and children. Secondary data will be analysed and presented narratively. This is to contribute to the debate on effectively engendering access to justice for women and children ; it is especially important at the grassroots level where women and children may lack the capacity to seek redress from other sources.*

**Keywords:** Kenya, informal settlements, engendering justice, women, children .

## 1 INTRODUCTION

This article examines how local public administration, specifically the offices of the local chief and the assistant chief, can serve as an avenue for improving access to justice for women and children in urban informal settlements. The article is set out as follows. The introduction sets out the main issues that the article seeks to examine. The second part addresses the central idea of the study: engendering access to justice. In this part, the article examines how women and children experience access to justice through the lens of inequality, exclusion and disempowerment. The third part unpacks the location of the public administration found in the midst of constitutional change, and its relationship with informal settlement communities. The fourth and fifth parts of the article present a brief discussion of the findings and the conclusions drawn .

Even after the devolution of power and resources in Kenya, public administration remains an integral part of the nation's administrative apparatus. It plays an important role, especially in rural and urban informal settlements. It serves as a symbol of government power, responsibility and presence. The devolution of power and resources to the county governments has increased space for citizens to contest for their rights. Devolution is the country's governance project implemented so that government services are brought as close to the people as possible. It is the culmination of the clamour for decentralised governance that was the dream of the Kenyan founding fathers and it has found its fulfilment in the post-independence government.

The formal recognition that women are entitled to enjoy all the rights in international human rights law is the result of sustained effort since the 1950s. This is in addition to the requirement for equality and the principle of non-discrimination in the main human rights instruments. Women's access to justice is the ability of women to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards. Public Administration in Kenya deals with an unmet need of women and children in informal settlements. It is also true that women are least likely to act when confronted with a legal problem, especially those living in poverty. For example, in Nigeria, women living in poverty face greater hardship in getting legal problems resolved. Only three out of ten women fully resolve legal

demands.<sup>1</sup> Women's justice needs vary enormously depending on socio-economic and family status, location, ethnicity, as well as the nature of the legal system and the extent of protection and discrimination under the law.<sup>2</sup>

There are several cross-cutting themes shaping our understanding of women's justice needs, namely, legal discrimination, plural systems and overlapping disadvantages.<sup>3</sup> Overlapping disadvantages and social exclusion limit the ability to fully participate in society, the economy and civic life.<sup>4</sup> When greater social inclusion is achieved, opportunities and justice are more accessible to all. Marginalised and socially excluded populations are more likely to experience legal problems than other groups; for example, in Jordan, people living in poverty are more likely to have legal needs involving family matters, such as, marriage and divorce, child support and custody, and alimony and inheritance.<sup>5</sup> Marginalised and disadvantaged groups face both cultural and structural obstacles daily that hinder their ability to access justice, such as, illiteracy, language barriers and disability.

The plurality of legal systems means that there are several laws and venues for resolving disputes.<sup>6</sup> The formal justice system is simply one possible avenue in the reality of multiple legal orders. The informal justice system is a broad notion that covers all conflict resolution and justice mechanisms that operates outside of the formal legal system.<sup>7</sup> This includes religious and customary systems, alternative dispute resolution mechanisms and popular justice forums.<sup>8</sup> Although there is legislation, such as the Convention on the Elimination of all Forms of Discrimination against Women, 1979 (CEDAW), Article 5 of which calls on States to eliminate some customary practices that are discriminatory in nature, it is important to note that engaging with informal systems is important due to the progressive change that can come through such organs.<sup>9</sup>

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<sup>1</sup> International Development Law Organisation (IDLO) "Strengthening women's access to justice: Making rights a reality for women and girls; Concept Note" (2018) available at <https://www.idlo.int/system/files/event-documents/IDLO%20CN%20-%20Access%20to%20Justice%20for%20Women%20and%20Girls%20NO%20CONTACTS.PDF> (accessed 22 November 2019).

<sup>2</sup> See IDLO (2018).

<sup>3</sup> Avis WR "Urban governance: Topic Guide - Governance and Social Development Resource Centre, University of Birmingham" (2016) available at <https://gsdrc.org/topicguides/urbangovernance/key-policy-challenges/participation-and-inclusion> (accessed 1 August 2020).

<sup>4</sup> See Avis (2016).

<sup>5</sup> See IDLO (2018).

<sup>6</sup> See IDLO (2018).

<sup>7</sup> The United Nations Children's Fund (UNICEF) "Informal justice systems: charting a course of human rights-based engagement – A Summary n.d." available online at: [www.unicef.org/protection/files/INFORMAL\\_JUSTICE\\_SYSTEMS\\_SUMMARY.pdf](http://www.unicef.org/protection/files/INFORMAL_JUSTICE_SYSTEMS_SUMMARY.pdf) (accessed 31 June 2020).

<sup>8</sup> See UNICEF (2020).

<sup>9</sup> UN Women "A practitioner's toolkit on women's access to justice programme; United Nations entity for gender equality and the empowerment of women" (2018) New York: United Nations available at

## 2 METHODOLOGY: DATA COLLECTION AND ANALYSIS

Using Mukuru Kayaba slum as a case study, this article examines how access to justice for women and children living in informal settlements can be leveraged through the work of local administrators. Secondary data was employed to highlight the lived experience and the perceptions of the community regarding access to justice for these individuals. Secondary data collected from the analysis of documents from the government, non-governmental organisations and academic journals is used in this article. The data was analysed thematically and presented narratively. Themes will be drawn from the documents seeking heterogeneity in the data.

## 3 ENGENDERING ACCESS TO JUSTICE

### 3.1 International and regional agreements on accessing justice

Globally, there are various policies, legal documents and instruments that reiterate the reality that access to justice for women and girls is not only a right in itself but also an essential factor in the enjoyment of other rights.<sup>10</sup> Such documents include the CEDAW, the Beijing Declaration and Platform for Action, and the United Nations Security Council Resolutions on Women, Peace and Security. Agenda 2030 also highlights the importance of women's access to justice in achieving Sustainable Development Goals 5 and 16.<sup>11</sup>

The CEDAW General Recommendation No 33 on women's access to justice lists six components which are necessary for ensuring women's access to justice: justiciability, availability, accessibility, good quality, accountability, as well as the provision of remedies.<sup>12</sup> Women's access to justice and, by extension, to property is critical for their security and that of their offspring.<sup>13</sup> This gives them greater independence and a bigger role in decision-making. All over the world, the knowledge of this reality is curtailed by traditional and legal barriers that demean women and relegate them and their priorities to the periphery. Other instruments that have been established at the regional and international level by the impetus of the CEDAW Committee are the Optional Protocol to the CEDAW, the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the Inter-American Convention on the

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<https://www.unwomen.org/en/digital-library/publications/2018/5/a-practitionerstoolkit-on-womens-access-to-justice-programming> (accessed 22 November 2019).

<sup>10</sup> See generally Sen A *Development as freedom* New York: Knopf (1999).

<sup>11</sup> International Development Law Organisation (IDLO) "Justice for Women: High Level Group Report. UN Women, IDLO, the World Bank and Taskforce on Justice" (2019) available at <https://idlo.int/sites/default/files/pdfs/publications/Justice%20For%20Women%20Report%20FINAL> (accessed 17 July 2020).

<sup>12</sup> United Nations Division for Social Development (UNSD) "Agenda 21: Global action for women towards Sustainable and Equitable Development – Chapter 24" (1992) available at <http://www.un.org/esa/sustdev/agenda21.htm> (accessed 31 July 2020).

<sup>13</sup> UN Women. "Improving women's access to justice during and after conflict: Mapping UN rule of law engagement", (2014) New York: UN Women and United Nations Development Programme available at <https://www.undp.org/content/dam/undp/library/gender/gender%20and%20governance/ImprovingWomensAccessToJustice-UNDP-UNWomen-Mapping.pdf> (accessed 26 November 2019).

Prevention, Punishment and Eradication of Violence against Women, 1994.<sup>14</sup> Article 16 of CEDAW states that women are to be treated equally before the law and that they have the legal right to enter into contracts, own property and choose where to live.<sup>15</sup>

International instruments have been adopted with the aim of improving the status of women and providing inclusion. The CEDAW – General Assembly Resolution 34/180 has been adopted to end gender-based discrimination and ensure greater access for women to land, education, and safe and equal employment.<sup>16</sup> There is also the adoption of the World Declaration on the Survival, Protection and Development of Children, 1990, and the Plan of Action for implementing the Declaration (A/45/625).<sup>17</sup> Conventions of the International Labour Organisation (ILO) and the United Nations Educational Scientific and Cultural Organisation (UNESCO)<sup>18</sup> necessary to eliminate constitutional, legal, and administrative obstacles have also been adopted to end gender discrimination.

UNESCO and the ILO have also adopted that the provision of infrastructure, public care services and social protection are essential in bridging the gender gap for women in employment. For example, the provision of infrastructure can be a source of decent work for women. In Kenya, the Kazi kwa Vijana (employment for the youth) initiative has created employment for women living in informal settlements as close to their homes as possible during the Corona virus pandemic in 2020; and in 2003, South Africa launched the Expanded Public Works Programme and invested in early childhood and community-based care services.<sup>19</sup> This increased the employment of women in care work and reduced their share of unpaid care work. The Nairobi forward-looking strategies for the advancement of women emphasise the participation of women in national and international management. These agreements and instruments are a critical basis for the achievement of Agenda 21.<sup>20</sup>

Agenda 21, the United Nations Conference on Environment and Development (UNCED), was the blueprint for sustainable development, and it acknowledged the need to integrate women and gender at all levels into all policies, programmes, and activities.<sup>21</sup> The Women's Action Agenda 21 is a document of principles that women

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<sup>14</sup> See generally the CEDAW.

<sup>15</sup> See generally the CEDAW.

<sup>16</sup> See UNSD (1992).

<sup>17</sup> See UNSD (1992).

<sup>18</sup> See UNSD (1992).

<sup>19</sup> International Labour Organisation (ILO) "A quantum leap for gender equality: for a better future of work for all" (2019) available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_674831.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_674831.pdf) (accessed 08 October 2020).

<sup>20</sup> United Nations (UN) "Report of the world conference to review and appraise the achievements of the UN decade for women, equality, development and peace, Nairobi, 15-20 July" Nairobi : UN Publications (1986).

<sup>21</sup> WEDO "WEDO primer: Women and sustainable development: A local agenda" (2001) available at <https://www.wedo.org/wp-content/uploads/local-agenda-primer.htm> (accessed 20 July 2020).

worldwide could both contribute to and use for their own advocacy.<sup>22</sup> It aims to encourage women to take and lead action, and to recommend accountability measures for advocacy at the United Nations (UN) and other international agencies. Specific instruments include the Declaration on the Elimination of Discrimination against Women, 1967, and the CEDAW that require States to pay particular attention to eliminating discrimination in law and in practice.<sup>23</sup>

The persistence and prevalence of violence against women has been described by UN Women as a pandemic, and as a public health epidemic by the World Health Organisation (WHO). Gender-based Violence (GBV) is recognised as severely infringing on the rights of women; it is a form of torture and discrimination.<sup>24</sup> There is also a broad understanding that States must fulfil their obligation to prevent, stop and redress GBV through a variety of legal and practical initiatives. Access to justice for women for acts of GBV means that States must implement a range of measures, such as, amending the law to define acts of violence against women as crimes, putting into place appropriate procedures for investigation and for prosecution, and providing access to effective remedies and reparation.<sup>25</sup>

Although it is often assumed that access to justice for women just requires prosecution of the perpetrators, women may have different ideas. They may identify with the importance of seeking safety through protection orders, and physical and mental recovery through good quality and accessible health services.<sup>26</sup> The opportunity to seek a divorce and start a new life free of spousal violence could also be the better option for them. For the sake of their safety and that of their loved ones, women may prefer the knowledge and the actual creation of formidable and credible protections before they approach the relevant authorities.

The 2030 Agenda which is commonly known as the Sustainable Development Goals (SDGs), includes SDG16, a Goal that seeks to create peaceful, just and inclusive societies.<sup>27</sup>

The 2030 Agenda commits to leaving no one behind, and so women's access to justice for the as yet unmet need for the most vulnerable living in informal settlements must be top of the agenda.<sup>28</sup> The unmet legal needs of people refer to situations where they do not have the capacity to access justice and deal with legal problems, and which thus increases the extent of the legal problems they face. For women, CEDAW General

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<sup>22</sup> See WEDO (2001).

<sup>23</sup> See UNICEF (2020).

<sup>24</sup> International Commission of Jurists (ICJ) "Women's access to justice for gender based violence: a practitioner's guide No 12" International Commission of Jurists. Geneva: Switzerland (2016).

<sup>25</sup> World Health Organisation (WHO) "Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner violence" Geneva : World Health Organisation (2013).

<sup>26</sup> See ICJ (2016).

<sup>27</sup> See IDLO (2018).

<sup>28</sup> See IDLO (2018).



Recommendation No 33 highlights these constitutional, criminal, civil, family and administrative protections.<sup>29</sup> It also acknowledges the importance of formal and informal and legal pluralism in understanding women's unmet justice needs.<sup>30</sup>

### 3.2 Women and engendering justice

Women experience everyday life differently from men. This is so because of traditional gender roles and the multiple roles that women juggle in the private and public spheres. The demands that are placed on women means that they have less time to participate in local politics, and they cannot participate fully in decision-making which impacts their lives.<sup>31</sup> Women are also poorly served as citizens because of the way services, infrastructure and the design of cities and villages rarely meet their specific needs.<sup>32</sup> It has been argued that differentiating access to justice based on gender is useful for sustainable development. This is so because it accounts for the nuanced needs of women perhaps having been due to the circumstances that lead to many living the way do. Many are living in abusive relationships or are single mothers fleeing domestic violence, or are widows or those abandoned by their spouses. The main strategies used by women in their efforts to access justice are working within legal frameworks, influencing customary legal frameworks and assisting women to access the court system.<sup>33</sup>

Women and children face social and institutional barriers in accessing justice and finding suitable solutions for their legal problems due to gender discrimination, social stigma, lack of knowledge of their rights, and economic and social disadvantages. The World Justice Project (WJP) carried out a survey between July and December 2017 on legal needs and access to justice in forty-five countries.<sup>34</sup> Data from the survey showed that 53 per cent of women reported experiencing a legal problem within the last two years. Only 13 per cent of them turned to an authority or third party to resolve their problem, and 67 per cent of women who resolved their problems knew where to get advice regarding their issues.<sup>35</sup> However, the legal problems of 53 per cent of women who had legal problems remained unresolved. It was also in the WJP report that 43 per cent of women also faced hardship or stress as a result of their problem.<sup>36</sup> It is important to gain an understanding of women's legal needs and experiences in accessing justice which provides important insights for the development of policies that deal with entrenched barriers. Ensuring equal access to justice fosters economic

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<sup>29</sup> See generally CEDAW.

<sup>30</sup> See generally CEDAW.

<sup>31</sup> See WEDO (2001).

<sup>32</sup> See WEDO (2001).

<sup>33</sup> See UN Women (2014).

<sup>34</sup> World Justice Project (WJP). "Women's access to justice: A global snapshot" (2019) available at <https://worldjusticeproject.org/news/womens-access-justice-global-snapshot> (accessed 15 November 2019).

<sup>35</sup> See WJP (2019).

<sup>36</sup> See WJP (2019).

development and inclusive growth making it a crucial component of promoting sustainable development.

The International Development Law Organisation (IDLO) in 2017 proposed five thematic areas to focus on women's access to justice.<sup>37</sup> These are : GBV against women and girls; women's right to land and natural resources; economic participation of women, including legal rights and access to justice for women entrepreneurs and women in the informal economy; equal rights to participate in political and public life ; and women's right to health. This was matched with their three critical areas starting with discriminatory legal and policy frameworks.<sup>38</sup> It is estimated that over 90 per cent of countries have legal provisions that discriminate against women. They place significant restrictions on the acquisition of travel documents, legal barriers on the types of jobs women can do , and having to seek spousal consent to carry out various activities.<sup>39</sup>

Conventional legal reforms continue to ignore gender inequalities. They tend to sideline the need to reform discriminatory personal laws even though there is recognition of substantial gender inequities in this area.<sup>40</sup> There is usually a lot of action taken to stifle reforms that promote adherence to discriminatory customary laws and traditions as a way of showing support for local laws and regulations. Some laws are poorly conceived; while others make effective enforcement difficult due to a lack of secondary legislation in terms of rules and regulations.<sup>41</sup>

There are various challenges to women's participation. There is a lack of gender consciousness: the lack of awareness of how gender issues affect access to justice. The problem is further problematised by the lack of significant data on access to justice for women and children. The lack of credible data makes it difficult to comprehend the depth of the problem based on the lived experiences of women and children trying to access justice. Tradition is considered one the main barriers for women engaging in public processes. Women face barriers to entering the public sphere at every level of society. Obstacles from social mores that dictate the place of women and children also affect the handling of their issues in the public sphere. The multiple roles that women play in the home, workplace and community is a significant barrier to their accessing justice. The private sphere and its responsibilities dominate the lives of women whether they work outside the home or in the home. The lack of flexibility in meeting hours, the cost of the processes required, a shortage of child care facilities, and lack of affordable transport stand in the way of women seeking justice.

There is also a lack of institutional support for integrating women in governing processes. Most of the leaders in the informal settlement communities are men. Research has shown that women's hidden roles affect their public roles. This means that

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<sup>37</sup> See IDLO (2018).

<sup>38</sup> See IDLO (2018).

<sup>39</sup> See IDLO (2018).

<sup>40</sup> See WJP (2019).

<sup>41</sup> See IDLO (2018).



fewer women enter politics and those who do, do so at older ages of between forty- five and fifty.<sup>42</sup> The understanding by men of the difficulties faced by women is hard because they do not live their lives as women in the slum.<sup>43</sup> The number of women who take up leadership positions in the slum are usually of a wealthier class. Their ability to connect with poorer women may be affected by the layers of power and aloofness that surround their roles even as they purport to represent women. It is also interesting to note that most of the women are chosen because they seem to have a higher visibility and profile in the community.<sup>44</sup> Many of the serious decisions may gain voice and visibility amongst men rather than women.<sup>45</sup> Also, in most forums, the contributions of men are considered more seriously than those of women.<sup>46</sup>

There is a gender bias that even where women's participation and gender concerns are theoretically accepted, in multi-stakeholder forums, it takes substantial effort to change the balance of power relations.<sup>47</sup> The men always seem to have an upper hand even on issues that greatly affect women. Gender bias plays an important role in influencing resource allocation.<sup>48</sup> Men rarely take part in initiatives that improve access to justice for women by allocating funding and other resources that may be required.<sup>49</sup> Attitudinal barriers are deeply rooted in patriarchy-based socialisation where men are considered more important than women. Women have little presence in decision-making bodies, which results in the exclusion of their issues and concerns from the policy agenda.<sup>50</sup> Poverty and illiteracy rates prevent the civic participation of women who form a majority of the world's poor.

There is also a limited capacity to deliver justice for women and children. The lack of responsiveness of the justice systems is a serious deterrent to seeking justice. Also, many women are adversely affected by under-reporting and case attrition in cases of GBV.<sup>51</sup> Globally, it is also clear that conventional justice reforms have effectively

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<sup>42</sup> Institute for Women's Policy Research (IWPR) "Gender, Urbanisation and Democratic Governance: White Paper" (2015) available at <https://www.ndi.org/sites/default/files/Gender%20Urbanization%20and%20Local%20Governance%20White%20Paper.pdf> (accessed 08 October 2020).

<sup>43</sup> African Institute for Children Studies (AICS) "Gender and power analysis in five urban informal settlements –Nairobi, Kenya. Project: Promoting livelihoods and inclusion of vulnerable women domestic workers and women small scale traders", Nairobi: Oxfam (2015).

<sup>44</sup> Kabeer N "Gender equality and women's empowerment: a critical analysis of the third MGD" (2005) 13(1) *Gender and Development* 13 .

<sup>45</sup> Chattopadhyay R & Duflo E "Women as policy makers: evidence from a randomised policy experiment in India" (2004) 72(5) *Econometrica* 1409 .

<sup>46</sup> See Chattopadhyay & Duflo (2004) at 1409.

<sup>47</sup> Institute of Economic Affairs (IEA) "Profile of women's socio-economic states in Kenya" Nairobi : Institute of Economic Affairs (2008).

<sup>48</sup> See IEA (2008).

<sup>49</sup> See Chattopadhyay & Duflo (2004).

<sup>50</sup> See Kabeer (2005).

<sup>51</sup> See WHO (2013).

excluded women by ignoring intra-household and intra-community disputes because they seem to be private matters and outside the realm of public dispute resolution.<sup>52</sup> There is also under-investment in the judicial subsectors that matter most to women, such as, family courts, specialised GBV mechanisms or small claims tribunals. The system also has a greater focus on formal justice systems and their outcomes rather than those that would benefit women the most.

In fragile situations and crises, women's access to justice is faced with the problem of legal reforms that are not coupled with process reforms that assist women to claim and enforce their rights. This leaves women with rights without remedy.<sup>53</sup> Justice reform processes fail to address gender biases that are personal and organisational. Gender concerns are not integrated into capacity and competency building programmes for the judiciary and other justice sector actors.

### 3.3 Children's rights and access to justice

Although important issues arise regarding the rights of children in relation to informal justice systems, there is very little literature on it. They have the same basic rights as any other person in proceedings before the informal justice system. The Convention on the Rights of the Child (CRC) recognises four principles that should guide the interpretation of the other articles and must be taken into account in all matters concerning the rights of children:

- The primacy of the best interests of the child;
- The prohibition of discrimination;
- The survival and development of the child; and
- The rights of the child to be heard and to have their views taken into account.<sup>54</sup>

A number of instruments have been adopted that provide guidance on how these fundamental international standards about children and justice should be implemented. The most relevant are: The Standard Minimum Rules on the Administration of Juvenile Justice, and Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.<sup>55</sup> In many societies, traditional values attribute little or no importance to the opinions and wishes of children and many informal justice systems ignore the rights of children to be heard in matters that affect them.<sup>56</sup> Deeply-held attitudes regarding the role of children can present a major challenge for engaging with informal justice systems. In some communities, children are considered property under customary

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<sup>52</sup> See ICJ (2016).

<sup>53</sup> See UN Women (2014).

<sup>54</sup> See UNICEF (2018).

<sup>55</sup> See UNICEF (2018).

<sup>56</sup> See AICS (2015).

norms.<sup>57</sup> Certain matters that involve children, such as child marriage, can be viewed as matters for the family or the local community rather than the law.<sup>58</sup>

States have an obligation to make efforts to ensure that informal justice systems respect the rights of the children, for example, in South Africa where the Law Reform Commission carried out research on the compatibility of customary law with the rights of children before deciding the extent to which legislation should recognise customary law.<sup>59</sup> The kinds of measures that may help to bring informal justice systems into greater harmony with the rights of the child will depend on the nature of the informal justice system and interaction with the formal system.<sup>60</sup> The most difficult and pervasive barriers to children's access to justice are cultural and social. However, social perceptions of children and young people are not static and the flexibility of the informal justice system to adapt to these changes is an important element to take into account when engaging with informal justice systems to advance the rights of children.<sup>61</sup>

### 3.4 Exclusion and disempowerment of women

Women suffer from exclusion and disempowerment by issues of distance. Distance has various dimensions, geographic, financial and political, from justice structures.<sup>62</sup> This means that women and children are prevented from claiming and realising their rights.<sup>63</sup> One of the most challenging obstacles to women's empowerment remains GBV. It limits the exercising of their rights of political participation, freedom of movement, marriage and family life, employment, education, health, and seeking redress for rights violations. These limitations enforce the exclusion of women and children. This is extended to civil spaces of decision-making at local and national levels.

Empowerment is a progression that helps people gain control over their own lives and increase their capacity to act on issues that they themselves define as important.<sup>64</sup> It is an emancipation process in which the disadvantaged are enabled to exercise their rights, obtain access to resources, and participate actively in the process of shaping society and making decisions.<sup>65</sup> Empowerment is both individual and collective; it draws on individual capacities as well as collective action in order to address

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<sup>57</sup> See AICS (2015).

<sup>58</sup> See IEA (2008).

<sup>59</sup> See ICJ (2016).

<sup>60</sup> See UNICEF (2018).

<sup>61</sup> See UNICEF (2018).

<sup>62</sup> See UN Women (2014).

<sup>63</sup> Omamo R "Women and access to justice" in Ghirmazion A, Nyabera A & Kamweru EW (eds) *Perspectives on gender discourse: gender and constitution-making in Kenya* Nairobi : Heinrich Boll Foundation(2002) 25.

<sup>64</sup> Luttrell C & Quiroz S *Understanding and operationalising empowerment* London: Overseas Development Institute (2007).

<sup>65</sup> See IEA (2008).

inequalities that are the causes of poverty. According to Kabeer,<sup>66</sup> poverty and disempowerment go hand in hand because of the inability to meet basic needs that results in dependence on others which makes it hard for people to make meaningful choices.

There are several risks that are associated with the economic autonomy of women. It increases their options, helps them to stand up to abusive spouses, and they are able to contribute to household assets.<sup>67</sup> This may expose women to domestic violence and conflict because of their increased command over financial resources. It may lead to aggression by husbands against their wives.<sup>68</sup> The acquisition of assets provides a tangible exit option, strengthening the fall-back position and their bargaining power within marriage and acts as a deterrent to marital violence.<sup>69</sup> The Constitution of Kenya, 2010 provides for equality of both men and women, and prohibits discrimination on the basis of gender under Articles 27(3) and (4). The Employment Act 11 of 2007 and the National Policy on Gender and Development also provide guidance for different sectors and agencies on the empowerment and equality of women.<sup>70</sup> The formulation of legislation and policies is an important step towards addressing discrimination against women, but without proper implementation they can never be effective.

### **3.5 Urban governance, conflict and informal settlements**

The 21<sup>st</sup> century has been referred to as the first urban century and more than 50 per cent of the world's population live in urban areas. Urban governance is the process by which governments at all levels, whether local, regional or national, and other stakeholders collectively decide how to plan, finance and manage urban cities.<sup>71</sup> Urban governance influences whether the poor benefit from economic growth, and determines how it brings its influence to bear and whether political and institutional systems, processes and mechanisms facilitate inclusive and pro-poor decisions and outcomes.<sup>72</sup> It is usually a continuum of negotiation and contestation for power and other resources. It involves formal and informal structures that are part of, and have an effect on, economic and social forces, institutions and relationships.

Urban governance is political; it is influenced by the creation and operation of political institutions, government capacity to make and implement decisions, and the extent to which these recognise and respond to the needs of the poor.<sup>73</sup> The lack of formal representation means that the inequalities in power, influence and access will

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<sup>66</sup> See Kabeer (2005).

<sup>67</sup> See Kabeer (2005).

<sup>68</sup> See AICS (2015).

<sup>69</sup> See AICS (2015).

<sup>70</sup> See IEA (2008).

<sup>71</sup> See Avis (2016).

<sup>72</sup> See Avis (2016).

<sup>73</sup> See Avis (2016).

tilt urban developments in favour of the elite.<sup>74</sup> The most vulnerable are the ones often disenfranchised from decision-making processes. Their political voice is often controlled by tokenistic relationships where votes are traded for certain community benefits.<sup>75</sup> There are gaps between the poor and better-off residents in accessing social, political and economic opportunities and in their ability to participate in and leverage the benefits of urban living.<sup>76</sup> Urbanisation in developing countries has led to the growth of informal settlements and informal inequalities. The informal sector is important to urban economies and the livelihoods of the poor. Urban authorities often fail to provide adequate access to services.

Urban conflict and violence are a significant global phenomena; they affect national and metropolitan economic development and the livelihoods and wellbeing of the poor.<sup>77</sup> Conflict can be resolved and violence mitigated when urban governance arrangements leverage community and city-level political processes to encourage groups to negotiate, debate and form coalitions of interest.<sup>78</sup> Supporting these coalitions can help manage urban conflict and prevent its spiralling into violence, and at the same time promote gainful activities. It is also important to listen to the voice of the poor, and to adopt innovative means for creating space for their participation is important in ensuring that those who are disenfranchised and discriminated against are not left behind. Expanding urban populations are straining already overburdened and ill-equipped local government, planning mechanisms, infrastructure and urban finance. In many areas, the population has increased faster than the capacity of the planners to provide affordable housing for the working poor and infrastructure and local businesses to provide jobs.<sup>79</sup> This has led to an increase in informal settlements, crime, an informal economy and increased social tensions.

Whitzman, Andrew & Viswanath discuss interventions for GBV and call for a multi-pronged approach.<sup>80</sup> This framework includes four categories of actors: elected officials as “champions”, public servants as “enablers”, community groups as “advocates” and researchers as “information brokers”. A greater understanding of the most appropriate scale for policy action is key; reliance on local strategies to reduce GBV needs to be linked with actions to contest and confront GBV at regional, national and international levels.<sup>81</sup> This approach shifts the focus from individualised security measures to those

<sup>74</sup> UN “World Social Report 2020: inequality in a rapidly changing world” (2020) available at <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/02/World-Social-Report2020-FullReport.pdf> (accessed 27 September 2021).

<sup>75</sup> See UN (2020).

<sup>76</sup> Mitlin D & Satterthwaite D *Urban poverty in the global south: scale and nature* Abingdon: Routledge (2012).

<sup>77</sup> See WHO (2013).

<sup>78</sup> See Avis (2006).

<sup>79</sup> See Avis (2016).

<sup>80</sup> Whitzman C, Andrew C & Viswanath K “Partnerships for women’s safety in the city : “four legs for a good table” (2014) 26(2) *Environment and Urbanization* 1 .

<sup>81</sup> See Whitzman et al (2014).

identified through collective and consultative processes in which women assert their right to live, work and participate in city life.<sup>82</sup> Urban governance is important to the management and resolution of conflict and the mitigation of violence.<sup>83</sup> It involves more than just laws and regulations; it covers the manner in which we live and how challenges are resolved.

There are several risk factors that influence urban conflict and its potential to descend into violence: city density, poverty, inequality, youth population bulges, male youth unemployment, legacies of conflict and governance failures.<sup>84</sup> Living in informal settlements disproportionately affects certain groups, especially migrants, women, the disabled and children.<sup>85</sup> For example, Mitlin & Satterthwaite note that in certain informal settlements in Nairobi, child mortality rates are twice as high as the national Kenyan average.<sup>86</sup> Women spend more time and energy accessing basic services which limits their ability and time to earn a living through gainful employment.<sup>87</sup> Women are also concentrated in low pay, low skilled and home based jobs in the informal sector.<sup>88</sup> They are also poorer than men and have lower decision-making opportunities. They experience greater difficulty in accessing resources and services tailored to their needs.<sup>89</sup> These barriers contribute to a range of obstacles that women face in participating in social, economic and political processes.

Many governments refuse to acknowledge the existence of informal settlements which undermines their sustainable development. These settlements continue to be geographically, economically, socially and politically excluded from the wider urban systems and sidelined from urban opportunities and decision-making. City government attitudes to informal settlements range from opposition to eviction - as in the case of the demolition of Nairobi's Kariobangi North slums at the height of the Corona virus pandemic in May 2020, to reluctant tolerance and support for legislation and upgrading as in the case of the Mukuru Special Planning Area in Nairobi in 2017. Urban governance can help to address the problems of engendering justice by instituting and adapting gender-sensitive governance. This involves substantive representation of women in urban decision-making and enhanced awareness and understanding of gender-specific needs within governance structures.<sup>90</sup> It is often seen as elevating women's voices and participation in decision-making and agency to effect change. It identifies gaps in policy and service provision that disproportionately affect women, acknowledging their unique contribution to urban settings in the formation of policy

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<sup>82</sup> See Whitzman et al (2014).

<sup>83</sup> See Avis (2016).

<sup>84</sup> See Avis (2016).

<sup>85</sup> See Avis (2016).

<sup>86</sup> See Mitlin & Satterwaite (2012).

<sup>87</sup> See IEA (2008).

<sup>88</sup> See AICS (2015).

<sup>89</sup> See IEA (2008).

<sup>90</sup> See AICS (2015).



resources.<sup>91</sup> It involves meaningful interaction of government representatives with grassroots women's movements and civil society groups.<sup>92</sup>

### 3.6 Tackling gender inequality and empowering women in Kenya

Kenya's commitment to addressing gender equity and inequalities can be traced to both national and international policy commitments. Sustainable Development Goals 3 and 5 underscore the need for gender parity, especially in education and access to social, economic and political opportunities.<sup>93</sup> The country has put in place various policies and interventions, including, legislation, female-specific policies, and plans and programmes aimed at addressing specific gender gaps or forms of discrimination. Such interventions include affirmative action, promoting girl child education and economic empowerment through the introduction of the Women's Development Fund. Most of the policy interventions that target the elimination of gender gaps are however not consistently documented and are not informed by data or statistics. They are products of politicians using their spaces as lawmakers to legislate on matters that they have little understanding of or rarely taking into account the input of concerned women's rights activists when they present their memoranda as apart of citizen participation.

Violence against women is understood through the lens of the subordinate status of women and children in Kenyan society. Many cultures have beliefs, norms and social institutions that legitimise and therefore perpetuate violence against women.<sup>94</sup> Scholars, such as Guedes<sup>95</sup>, argue that violence against women cannot be separated from the norms, social structures and gender roles that influence women's vulnerability to violence.<sup>96</sup> In many cultures it is considered both a right and an obligation for men to physically chastise their wives for perceived transgressions. Most of the cultural norms in communities where GBV is rampant not only encourage male violence against women but also serve to entrap women in violent relationships by teaching them that it is normal and deserved.<sup>97</sup>

It is important to have women as political decision-makers because they make different choices than men.<sup>98</sup> They invest more in infrastructure relevant to the well-being of communities at large, such as, water, fuel, roads and healthcare services. On the other hand, men tend to invest in educational services with a preference for those that

<sup>91</sup> See Chattopadhyay & Duflo (2004).

<sup>92</sup> Beall J "Urban governance: why gender matters" UNDP gender in development monograph series No 1 New York : United Nations Development Programme (1996).

<sup>93</sup> See IEA (2008).

<sup>94</sup> Heise L, Ellsberg M & Gotemoeller M "Ending violence against women; Population reports" 27 (4) (1999) available at [www.inforforhealth.org/pr/IIledsum.shtml](http://www.inforforhealth.org/pr/IIledsum.shtml) (accessed 17 July 2020).

<sup>95</sup> Guedes A "Addressing gender based violence from the reproductive health/HIV sector. A literature review and analysis" Washington DC: USAID (2004).

<sup>96</sup> See Guedes (2004).

<sup>97</sup> See IEA (2008).

<sup>98</sup> See Chattopadhyay & Duflo (2004).

target boys.<sup>99</sup> The majority of households in Kenya are headed by men, portraying the patriarchal nature of Kenyan society.<sup>100</sup> Yet, overall, 23 per cent of urban households are headed by females. Poverty has gender dimensions in Kenya. In 2005/6, the poverty headcount was 46 per cent for women in urban areas, and the poverty ratio was 50 per cent for female-headed households in urban areas.<sup>101</sup> This situation is likely to further perpetuate poverty in an environment where women are not sufficiently empowered in decision-making and resource mobilisation.<sup>102</sup>

Various indicators show that there exists a challenging environment of exclusion and disempowerment for most women. Their wellbeing is affected because of lack of empowerment and lack of inclusion in the social, economic and political spheres.<sup>103</sup> For instance, women have lower literacy rate than men at 74% to 85%; more men than women transit to university; HIV and AIDS are more prevalent among women than men; and it is easier for men than women to access credit.<sup>104</sup> Social, cultural and traditional practices and unfounded norms deny women various opportunities to effectively participate in various spheres of public life. Cultural norms form a major challenge in Kenya. Most Kenyan cultures still regard the place of the women as being in the kitchen, and also raising children as part of their reproductive role.<sup>105</sup> This kind of socialisation affects the way men think, making it difficult for them to share a platform with women.

Even when women participate in politics, they are still considered as breaking the rules that govern gender roles.<sup>106</sup> Female Members of Parliament, such as Millie Odhiambo, a lawyer and a vital voice for women and children, have faced harassment in the House and during campaigns.<sup>107</sup> Traditional practices that govern land and livestock ownership, access to and control over land and the benefits accruing to land produce further disparities that tend to favour men over women. For example, it is estimated that close to only one per cent of land titles in Kenya are held by women; and only 5.6 per cent are held jointly.<sup>108</sup> Changing the attitudes and behaviour of men towards GBV is an essential strategy. It is instructive to note that the problem is not policy

<sup>99</sup> See Chattopadhyay & Duflo (2004).

<sup>100</sup> See IEA (2008).

<sup>101</sup> Kenya Integrated Household Budget Survey (KIHBS) 2005/06 *Basic Report* available at <https://www.kpda.or.ke/documents/Industry-Reports/KIHBS%202005%20Basic%20Report.pdf> (accessed 28 September 2021).

<sup>102</sup> See IEA (2008).

<sup>103</sup> See IEA (2008).

<sup>104</sup> See KIHBS (2005/06).

<sup>105</sup> See IEA (2008).

<sup>106</sup> See IEA (2008).

<sup>107</sup> Agora- Portal for Parliamentary Development "Kenya: What female politicians go through in quest to ascend to power" (2017) available at <https://agora-parl.org/news/kenya-what-femalepoliticians-go-through-quest-ascend-power> (accessed 08 October 2020).

<sup>108</sup> See KIHBS (2005).

implementation but the entrenchment of socio-cultural mores that dictate how and why people choose to live the way they do.

#### **4 ENGENDERING ACCESS TO JUSTICE AND THE SLUM**

Gender is a socio-cultural construct of society that determines the identities, roles and functions, entitlements and deprivation of women and men, boys and girls in society.<sup>109</sup> Although devolution has succeeded in bringing government closer to the citizens, Kenyan women remain economically, socially and politically disadvantaged. Women are under-represented in decision-making positions. Women of all age groups have experienced violence from their partners notwithstanding that they were pregnant or unwell.<sup>110</sup> There is a trivialisation of crimes against women and children and interpreted in a way that perpetuates the subservience of women or undermines their rights to equal protection.<sup>111</sup> The formal justice system remains remote, unaffordable and incomprehensible to the average Kenyan woman.<sup>112</sup> It forces women to rely on customary or traditional justice. The systems are inherently male dominated and intolerant of women. They also deny women their rights or fail to provide them with fair and effective solutions to pressing legal problems.<sup>113</sup> Some of the problems that impede access to justice include the following<sup>114</sup> :

##### **i. Cultural biases**

Gender-based attitudes and beliefs of judicial officers, police, prisons and probate departments undermine women's right to justice. Justice is viewed from a male perspective and women engage with the justice system from a position of disadvantage. Cultural prejudices play a critical role in preventing women from reporting offences committed against them and starting or stopping court proceedings. Very few women use the formal justice system to seek redress because:

- a) of traditional norms where women cannot charge their husbands;
- b) of the stigma attached to sexual assault;
- c) of the unprofessional and cruel behaviour of police officers;
- d) women are forced to seek alternative means of seeking redress; and
- e) sometimes courts issue lenient sentences even for horrendous violations of the rights of women.

##### **ii. Poverty**

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<sup>109</sup> See IEA (2008).

<sup>110</sup> Kenya National Bureau of Statistics (KNBS) "Facts and figures about men and women" Nairobi: Government Printer (2017).

<sup>111</sup> See ICJ (2016).

<sup>112</sup> See Omamo (2002).

<sup>113</sup> See Beall (1996).

<sup>114</sup> See KIHBS (2005).

Omamo opines that poverty negatively impacts on the capacity of persons to use the law and to obtain the protection to which they are entitled.<sup>115</sup> Limited access to finance means that not many women can pay legal fees, court fees, and travel costs to and from the courts. Poverty also places women on a path in conflict with the law. Women are driven by poverty to engage in illegal activities, such as, hawking, selling illicit liquor, vagrancy, and offences limited to property. Most women offenders are single women with large dependent families. Access to justice for women requires empowerment and the development of a legal service delivery process to indigent persons.

### **iii. Logistical obstacles**

Many women and children are unable to access the nearest court or police station due to the distances and the frequent costs. For example, in Nairobi, the distance from the informal settlements to the main offices of their local locations or sub-locations can make the cost of travelling prohibitive. Starehe sub-county stretches all the way from Mukuru Kayaba to the boundary with Eastleigh. If people want to attend a meeting concerning the welfare of their children, they have to travel all the way to the main offices at the Starehe sub-county offices. This makes it difficult to report or to follow up on the proceedings and procedures of any filings. It acts as a serious deterrent to women and children in accessing justice as it would entail great cost and inconvenience. This is especially true of women's hidden and unpaid roles in the household sphere. Many of them have to take part in income-generating activities that affect their availability.

### **iv. Illiteracy and ignorance**

Many women suffer from ignorance of their legal rights and how to formally address injustice. Even those who are educated remain largely ignorant or misinformed about their rights and legal procedures. The cultural inhibition of women curtails their ability to understand their rights. Women's rights are often muted or hidden by social, economic and political factors.

## **4.1 The Constitution of Kenya, 2010: devolution and engendering access to justice**

The Constitution of Kenya, 2010 contains a comprehensive Bill of Rights. It guarantees all Kenyans economic, social and cultural rights. The right to social protection also includes the right to healthcare, human dignity, reasonable working conditions and access to justice.<sup>116</sup> This shows a commitment by the drafters of the document to build an ethos that protected the most vulnerable members of society. However, the implementation of these aspirations has been curtailed by vestiges of social, economic and cultural practices. These have made it difficult for vulnerable women and children to access the justice they need to improve their wellbeing. Access to formal justice is hindered by insufficient funds for legal representation, and understaffing of the

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<sup>115</sup> See Omamo (2002).

<sup>116</sup> See Kenya National Social Protection Policy, 2011.

judiciary and other law enforcement agencies. Other difficulties include general inefficiency, inadequate infrastructure, public ignorance, lack of experts and corruption.<sup>117</sup> Poor Kenyan women experience greater difficulty in accessing justice. In Kenya, all public institutions responsible for the administration and interpretation of justice remain heavily under the influence of patriarchy, which denies women and children equal rights and access to justice. Omamo explains that the formal justice system fails to treat women as credible victims, witnesses and litigants.<sup>118</sup> There is also institutionalised violence against women through rigid discriminatory laws and gender-based ethics.

#### **4.2 Historical overview of public administration in Kenya and its relationship with informal justice systems in informal settlements**

The Provincial or Public Administration (PA) was a creature of the colonial era. It was established as an instrument of the State whose activities included general representation of the authority of the Executive at the local level, co-ordination of government activities in the field and chairing several committees at the local level. Under the old Constitution, the co-ordination of central government policies and development programmes at the local level was done by this department. The PA was a department in the Office of the President. The system divided Kenya into eight provinces; and then into districts, division, locations and sub-locations. They supervised central government ministries at the provincial and district levels but also co-ordinated their programmes and policies. They served as the representatives of the President in local areas and exercised upward accountability because they served at the pleasure of the President. One of the reasons why activists and architects of the new Constitution sought the scrapping of the PA is that it followed the orders of the Executive without question. This meant that even when people were disenfranchised as a result, it could not change its actions. The PA, therefore, came to symbolise repression, dictatorship, impunity and authoritarianism.<sup>119</sup>

The new Constitution phased out provinces and introduced 47 counties which are further sub-divided into sub-counties, wards, locations and sub-locations. Some of the powers that the PA had have been taken away and given to the County Executive Committee (CEC). The CEC is headed by a governor and has a cabinet of CEC bureaucrats. The transfer of powers from a central government bureaucrat to a locally elected governor is meant to establish a culture of accountability. The fear of arbitrary uses of power in Kenya is still eminent with the retention of the PA. Even the restructuring of the organisation has not led to better sentiments. Some reasons give observers concern; such as the fact that under the Constitution of Kenya, 2010 the functions of the CEC and the PA bear a resemblance. The 2007 Scheme of Service for field administrative officers within the PA sets out their roles in the field. Some of the

<sup>117</sup> See ICJ (2016).

<sup>118</sup> See Omamo (2002).

<sup>119</sup> Bagaka O *Restructuring the provincial administration: an insider's view. A constitution working paper series No 3, Society for international development* Nairobi : Regal Press Kenya Ltd (2011).

roles conflict with those of the CEC as mentioned above. Scholars, such as Bagaka, have argued that they now form the basis of the intergovernmental relationship between the central government and the county governments.<sup>120</sup>

Intergovernmental relations are the complex network of overlapping and interlocking roles between different levels of government. They go deeper and are more involved than the formal understanding of devolution.<sup>121</sup> They also refer to the set of policies and mechanisms by which the interplay between different levels of government serves a common geographical area.<sup>122</sup> Intergovernmental relations are oriented towards governmental issues rather than political ones. In Articles 176, 186 and 189 of the Constitution of Kenya, 2010 provision for a political structure is made. Underneath this constitutional structure, there is an administrative structure which is created to carry out specific functions of governance. The reality is that both the political and administrative structures are important in governing the country.

Although the Constitution of Kenya, 2010 enumerates the functions of both the national and county governments, implementing a constitution is more than ceding and sharing authority. There are issues, such as, education, health, terrorism, security, disaster management and peacebuilding, that have both national and local implications. They are then within the purview of different levels of government. This system in Kenya then acts as a nexus between national and county governments.<sup>123</sup> In 2012, following the signing of an Executive Order by the then President, officers from the former arrangement were formally designated as national government administrative officers (NGAOs).<sup>124</sup> They included 47 county commissioners, deputy county commissioners, assistant county commissioners, chiefs and assistant chiefs.

Section 17 of the Constitution of Kenya, 2010 stipulates that within five years the “new” formations should have undergone a restructuring. This, however, has not happened and the administrative operatives function as they did before. Therefore, to an extent, they maintain the same aloofness of their operational history.<sup>125</sup> Also, the vestiges of the past in the form of consolidation of power by Kenya’s post-colonial rulers have affected their ethical standards.<sup>126</sup> This has exacerbated the marginalisation of local administration and led to weak accountability and capacity to respond efficiently

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<sup>120</sup> See Bagaka (2011).

<sup>121</sup> See Peters (2004).

<sup>122</sup> Shafritz J, Russell, EW & Borick C *Introducing public administration* New York: Longman/Pearson (2011).

<sup>123</sup> See Bagaka (2011).

<sup>124</sup> The Standard “State rebrands provincial administration” (2014) available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) (accessed 22 June 2020).

<sup>125</sup> See Bagaka (2011).

<sup>126</sup> Mbai OC “Public service accountability and governance in Kenya since independence” (2003) 8(1) *African Political Science* 113 .



to all residents. The inability to devise effective strategies to deal with informal settlement communities has affected the lives of the residents.<sup>127</sup>

An informal justice system refers to the resolution of disputes and the regulation of conduct adjudication or the assistance of a neutral third party that is not part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.<sup>128</sup> The PA is a State-run para-judicial system that is outside the classic State structure. In most countries, there are formal linkages between State justice providers and informal justice providers. State law may define such linkages and provide official forms of collaboration. These include appeal procedures, referrals, and division of labour, justice, advice and assistance.<sup>129</sup> The formal system can exert influence even where its mechanisms are not directly involved.

Informal justice systems may be tolerated or incorporated into formal systems as a way for the State to accommodate different religious and ethnic traditions. It may also serve as a way to regulate them by limiting their scope of jurisdiction by defining that customs or traditions apply only to certain domains.<sup>130</sup> In deciding the kind of Informal Justice System to use, there are several factors that people consider:<sup>131</sup>

- a) The ineffectiveness and popular perception of illegitimacy of formal justice systems due to obstacles, such as, distance, cost, outcomes that are not as preferable as local preferences, as well as issues of corruption.
- b) The preference for less formalised settlement procedures, such as, voluntary participation and reaching decisions based on mutual consent.
- c) Informal justice systems that emphasise reconciliation, restoration, compensation and reintegration which are preferred to custodial sanctions.
- d) The emphasis of informal justice systems on compensation as a symbol of reconciliation which ensures that victims' and offenders' families do not become economically destitute.
- e) Cultural, religious, customary beliefs and practices of the informal justice system which people find are more aligned to their own local cultures.
- f) People have preferences based on their long interaction as communities and individuals with informal justice systems for dispute resolution.
- g) Power relation within communities and amongst individuals put social pressure on individuals to use informal justice systems

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<sup>127</sup> See Menon B, Mutero J & Macharia S "Decentralisation and local governments in Kenya" *International Studies Programme*, Working Paper 08-32 Andrew Young School of Policy Studies Atlanta : Georgia State University (2008).

<sup>128</sup> See UNICEF (2020).

<sup>129</sup> See UNICEF (2020).

<sup>130</sup> See UNICEF (2020).

<sup>131</sup> See UNICEF (2020).

- h) There are also local beliefs that traditional leaders or religious leaders have the legitimate authority to adjudicate, decide or mediate a case.

### 4.3 Public administration and engendering access to justice in Kenya

With the creation of the two-tier system of governance, the national and county governments in accordance with the provisions of the Constitution have laid down provisions to ensure that the marginalised communities have improved access to justice. The Constitution of Kenya, 2010 provides fresh impetus for women to be empowered and remedy traditional exclusion.<sup>132</sup> The capital city, Nairobi, is a city-county where its inhabitants live in urban and peri-urban areas. Of its total population, more than 60 per cent live in the various informal settlements within the city.<sup>133</sup> In search of jobs and better living conditions, the number of people living in these communities is increasing. The national government by retaining control of the administration of the country has put in place local government administration at the grassroots level in the form of local chairpersons; these are both men and women who work in tandem with the chiefs and assistant chiefs. These are the most direct persons who have the closest contact with local communities. They are especially critical in informal settlements as they are an assertion of governmental control and order. The use of local leadership provides dialogue with these key gatekeepers who are chosen by the community.

Based on the levels of risk and vulnerability they face in the slum, the role of administrators in protecting the right of access to justice is important.<sup>134</sup> This will be an important base in ensuring that the extension of the rights due to the individual as envisioned by the Bill of Rights of the Constitution are actualised. These provisions are binding on all persons and all State organs of which local administrators are part.<sup>135</sup> These are important in protecting the rights of access to justice of citizens who are already marginalised by gender, place and culture. These are key rights that act as a lens through which women and children can access secure housing, healthcare, nutrition, and protection from sexual and physical violence.

Mukuru Kayaba slum is part of the vast Mukuru slums in Nairobi. The slums arose on land previously owned by white settlers. Some of the land was acquired by their former workers and in collaboration with other individuals; they began to put up shacks made of cartons and polythene paper. The local government in the 1970s declared that the land was condemned and unsuitable for human habitation. However, in the late 1970s and early 1980s, people began streaming into the city from the rural areas in search of employment. Many of them ended up in these areas because they were unable

<sup>132</sup> Consult the Kenya National Bureau of Statistics. See Constitution of Kenya 2010

<sup>133</sup> African Population and Health Research Centre (APHRC) "Population and health dynamics in Nairobi's informal settlements: report of the Nairobi cross-sectional slums survey (NCSS) 2012" Nairobi: APHRC (2014).

<sup>134</sup> See UNICEF (2020).

<sup>135</sup> See Chap 4, Arts 19 (1) & 20(1) of the Constitution of Kenya, 2010.

to find cheap housing. There was a steady growth of the slums as the number of people and their dependents increased. These areas were especially beneficial to the job seekers due to their proximity to the industrial centres of the city. It made it easier for job seekers to access these potential sources of employment at minimal cost in terms of transportation.

The Mukuru Kayaba Informal Settlement lies on the edge of the Industrial Area and is bounded by the Ngong River as well. It is made up of nine villages that are led by chairpersons. Together with the local administrators, they maintain public law and order. This area is home to thousands of people who work in the industries nearby. Due to the casual nature of their employment, the only housing they can afford is in the slum. It turns out to be their source of housing, food, entertainment, and healthcare. Precarious arrangements for healthcare, housing, food and work increases levels of marital and relational instability.<sup>136</sup>

This leads to a greater incidence of violence against women and children. Intimate Partner Violence (IPV) and child abuse form the bulk of the cases presented to both the chairpersons and local administrators who act as arbitrators during these proceedings. It is therefore important that the capacity of these leaders as arbitrators and decision-makers should be developed and strengthened. This is because they act as buffers and deterrents against violence and the loss of protection for women and children in these communities. This would mean that their judgements should carry the force of law. They should also be empowered as centres that improve access to justice for women and children in the community where they live and to provide protection as they voice their problems.

## 5 DISCUSSION OF FINDINGS

As the country grapples with how to design sustainable slum improvement and upgrading programmes, it becomes apparent that there is a need to address the critical issue of dignified and secure housing.<sup>137</sup> This requires the adoption of systems that ensure the security of land tenure. However, in many instances, problems arise as more than half of the land on which slums are located is contested. The land is either private property, government land or land set aside for public goods, such as, petroleum pipelines, electricity wayleaves and railway line expansion.<sup>138</sup> This diminishes the prospects of ensuring slum upgrading on these pieces of land and leaves communities vulnerable to arbitrary eviction. Those at greatest risk remain women and children due to the increase of the feminisation of poverty and female-headed households with low incomes.

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<sup>136</sup> See APHRC (2014).

<sup>137</sup> Lines K & Makau J “*Muungano Nguvu Yetu* (unity is strength): 20 years of the Kenya federation of slum dwellers” Working Paper London: International Institute for Environment and Development (2017).

<sup>138</sup> Centre for Urban Research and Innovations (CUIR) “Mukuru kwa Njenga slum upgrading project” Nairobi: The University of Nairobi (2013).

Apathy remains one of the leading threats to engendering justice in this community. People are driven to fend for their most basic needs to the point where it becomes apparent that there is a failure to prioritise the protection of women and girls. As long as women and children are more heavily dependent on men as primary breadwinners, then their protection will stagnate. A lack of understanding by the general populace of the fact that they can seek justice from the local public administration makes it difficult to protect the vulnerable. Cultural norms in this African context have a strong bearing. Women and children often prioritise the preservation of families' "face" at the expense of their safety and dignity. If they eventually move, they are forced to bear the brunt of their actions in terms of sliding much further into poverty. The women, as mothers, have to seek ways of earning a living as well as meeting the needs of their families. The enforcement of the rulings and directives of the local PA on issues of families are difficult to secure.

There are greater dangers for women and children in the informal settlement.<sup>139</sup> There is a greater likelihood for women living in this community to report GBV than women living in rural areas.<sup>140</sup> Due to the breakdown of social mores that govern relations between the sexes, there is also a lesser likelihood that neighbours would intervene. Poverty, social exclusion and inadequate wages also produce frustration among men and vulnerability among women. There are changes brought about by the migration of women to urban areas and their entrance into the workforce where they compete with men. As they compete with men for employment there is an increase in GBV as the men perceive the competition as a challenge to traditionally male-dominated structures.<sup>141</sup>

In an era of increasing urbanisation, women must be able to take their rightful place in the city as fully equal citizens able to live in dignity, peace and security. There are various triggers for the need to protect women and children by the local public administration. These include GBV, discrimination, exclusion, prejudice and abuse. Women's equality necessitates that social change should be brought about at all levels-family, community and the institutions of government. The status of women in the family affects their ability to make fundamental choices about their lives and to seek and receive equal protection. There is a need for effective legal remedies for victims of GBV. Trust must be built with women in informal settlements to facilitate the reporting of cases.<sup>142</sup> This will also create safe spaces for women and children in the informal settlement communities. Legal protection for women and children must be operationalised and activated through the local administration.

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<sup>139</sup> See Avis (2016).

<sup>140</sup> See Centre on Housing Rights and Evictions (COHRE) "Women, slums and urbanisation: examining the causes and the consequences" Geneva: Women and Housing Rights Programme (2008).

<sup>141</sup> See COHRE (2008).

<sup>142</sup> See ICJ (2016).

It is important that the government in Kenya, and by extension, other developing countries must pay attention to access to justice in informal settlements.<sup>143</sup> There must be changes to public policy that views these communities as invisible by failing to include them.<sup>144</sup> There are issues around corruption, criminal justice and community policing. Corruption significantly undermines citizens' trust in political arrangements and reduces their willingness to engage in formal policing and justice systems.<sup>145</sup> There is a positive highlight through the work of non-governmental organisations (NGOs), such as Microjustice4all. Through the assessment of the legal needs in Nairobi's slums, they found that there was a lack of access to justice for women and children.<sup>146</sup> They created a toolkit with information on birth certificates, cohabitation contracts, inheritance proceedings, land and housing registration, registration of women's businesses, and access to micro-finance and social benefits.<sup>147</sup> Through their links with the local administration in the form of the chiefs and assistant chiefs, they allow more families to easily access services and acquire trust in the institutions intended to serve them.<sup>148</sup>

## 6 CONCLUSION AND RECOMMENDATIONS

There is a need to create an enabling environment, which means creating basic conditions that must exist within a State for women to access justice systems and for justice actors to effectively respond to women's justice needs. The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) notes that the creation of an enabling environment is a central pillar to achieving reduced inequality and to achieving gender equality across the world.<sup>149</sup> To achieve this milestone will require the application of international standards, the reformation of national constitutions, the reformation of discriminatory legislation and the design of new ones, changing punitive informal laws, and finally, making essential financial services available. Many of the reforms and strategies articulated in writing suffer from an implementation gap. The enactment of laws must go hand in hand with actual implementation. If this is not carried out, women and children will only have the right to find a remedy but will not access civil spaces to exercise these rights. Even as this study highlights the fact that all spaces are bounded by vestiges of power and old practices<sup>150</sup>,

<sup>143</sup> See ICJ (2016).

<sup>144</sup> Amnesty International "Kenya, the unseen majority: Nairobi's two million slum dwellers" London: Amnesty International Publications (2009).

<sup>145</sup> Commins S "From urban fragility to urban stability" (2018) Africa Center for Strategic Studies available at <https://africacenter.org/publication/from-urban-fragility-to-urban-stability> (accessed 22 November 2019).

<sup>146</sup> World Justice Project (WJP) "Microjustice4all Kenya: The micro justice toolkit for women and children in Nairobi slums" (2011) available at <https://worldjusticeproject.org/> (accessed 22 June 2020).

<sup>147</sup> See Commins (2018).

<sup>148</sup> See WJP (2011).

<sup>149</sup> See UN Women (2018).

<sup>150</sup> Smith BC "Participation without power: subterfuge or development?" (1998) 33(3) *Community Development Journal* 197.

it is, however, important to note that all spaces have the opportunity to be leveraged and negotiated to provide relief for marginalised members of communities.

It is also important that an increase in the proportion of women decision-makers, planners, technical advisers and managers is the main objective of all the objectives set out to achieve gender equality.<sup>151</sup> The objective is to develop and issue by the year 2030 a strategy of changes necessary to eliminate constitutional, legal, administrative, cultural, behavioural, social and economic obstacles. It will also increase women's full participation in sustainable development and public life. Governments and their policy-makers must consider adopting, strengthening and enforcing legislation prohibiting violence against women and children, and take all the necessary administrative, social and educational measures to eliminate violence against women in all forms.<sup>152</sup>

Access to Justice Programmes for women and children can be accelerated through the following measures:<sup>153</sup>

- i. Eliminate legal discrimination against women;
- ii. Enact legislation, enforcement measures and appropriate action for the prevention of violence against women;
- iii. Leave no woman or child behind by ensuring legal services and legal empowerment for poor and marginalised women. Accessibility means that: it is physically accessible to the disabled; it is affordable; people have the right to information which they seek; receive and impart the ideas about justice; linguistic difficulties must also be eliminated by ensuring the services are available in the language of the user; and cultural diversity and interculturality must be respected;
- iv. Empower women economically and also as rights holders ;
- v. Women must be included as decision-makers ;
- vi. Work strategically with customary, informal and religious leaders to advance justice;
- vii. Invest in data collection and data analysis on women's legal needs ; and
- viii. Develop new partnerships.

As the African city evolves, greater urbanisation is inevitable. There is a need to improve justice in urban settings. Access to justice for women and children in these rapidly expanding cities secures the future for communities who have made informal settlements their home. The increase in gender mainstreaming will raise levels of awareness and aid in tackling systemic issues of culture that affect the treatment of women and children. This is important because Kenya remains a deeply patriarchal society and it may be that change will come with younger generations.

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<sup>151</sup> See Chattopadhyay & Duflo (2004).

<sup>152</sup> See UNSD (1992).

<sup>153</sup> See IDLO (2018).



An increase in safe spaces for women and children to shelter and access justice is critical. More evidence for this has come from the current Corona virus pandemic and its effect on women and children. They have faced increased cases of abuse and the process of accessing justice has been affected by the current restrictions on movement in the form of curfews.<sup>154</sup> Increased redundancies and job losses have raised tensions in homes where men as the principal breadwinners face increasing pressure to provide although their earnings have decreased or ceased completely. Local actors, such as Community Health Volunteers (CHVs), are important because they have insights into, and access to, the slums that other actors would not have. Therefore, they are great sources of information for the PA officers and the Chiefs and Assistant Chiefs who serve at these grassroots levels. These are important links in nuancing access to justice in informal communities and that fit into the situations communities and individuals face.

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