




REPUBLIC OF KENYA

# THE COURT OF APPEAL OF KENYA


## 2019-2020





**THE COURT OF APPEAL  
OF KENYA**

**2019-2020**



Published by  
The Judiciary of Kenya  
**P.O. Box** 30041 - 00100, Nairobi,  
Kenya  
**Tel:** +254 20 2221221

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Kenya: Court of Appeal Published in  
Nairobi, Kenya

*Developed with support of the Directorate of Public Affairs and Communication (DPAC)*

## **OUR VISION**

The ultimate custodian of appellate justice delivered with fairness, integrity, ease of access, effectiveness, responsiveness, transparency and accountability to all.

## **OUR MISSION**

To uphold the Constitution of Kenya, the rule of law, advance indigenous and robust Jurisprudence that can be bench marked regionally and globally and provide access to appellate justice for all.

## **OUR CORE VALUES**

- Independence
- Professionalism
- Integrity
- Collegiality
- Commitment
- Transparency
- Accountability

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# FOREWORD



I am indeed delighted to write the foreword for this 2nd edition of the Court of Appeal Booklet 2019/2020. During the launch of the Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021 in 2017, I stated that the Judiciary in Kenya bears the distinction of being the arm of government that has consistently made efforts to reform. One of the key components of the Performance Management and Measurement Understanding (PMMU) appraisal parameters is the innovation incentives scheme which encourages judges, judicial officers and staff to cultivate a performance culture that focuses on results, excellence and professionalism.

This Booklet initiative by the Court of Appeal is laudable and goes a long way in contributing to enhanced stakeholder engagement and communication. I am gratified to note that the booklet offers a glimpse into the very rich history of the Court of Appeal, dating back to pre-independence days through the post 1977 East African Community break up, up-to the present time. It is also instructive to note that the Lady Judges of the Court, who are personalities of many firsts, have also been prominently highlighted. This history is critical given that for a clear understanding of the present, and to enable focused planning for the future, knowledge of our past is vital.

This booklet will thus go a long way in serving as a practical guide to persons interested in understanding the Court of Appeal better, demystifying the Court and allowing our stakeholders have insights not only on the court room hearings but also on the Corporate Social Responsibility (CSR) activities that the Judges and staff engage in to give back to society.

**THE HON. MR. JUSTICE DAVID K. MARAGA, EGH  
CHIEF JUSTICE/PRESIDENT OF THE SUPREME COURT OF KENYA**



## NOTE FROM THE PRESIDENT

I am delighted to write the forwarding note for the 2019/2020 Court of Appeal Information Booklet now on its second edition. The first edition published in 2018 was well received based on the reviews expressed by the recipients. The booklet provides useful information on the history and background of the Court, the composition of the Courts, activities, events, performance and jurisprudential contributions during the year.

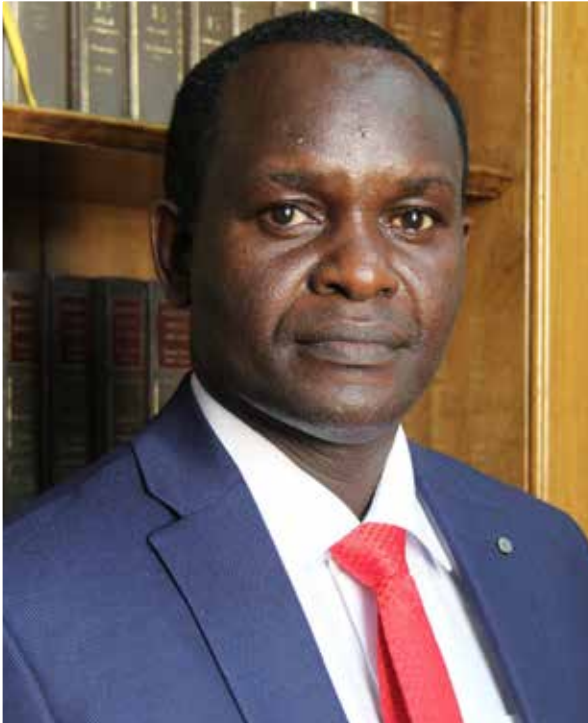
During the period covered by this booklet, the Court of Appeal has been steadfast in implementing its Vision that is predicated on the tenets of the Judiciary's transformation blueprint: Sustaining Judiciary Transformation (SJT) 2017- 2021, with specific emphasis on providing a structured, responsive and accessible leadership; improving court operations and efficiency; building a robust and more harmonious jurisprudence; improving the Court infrastructural environment and ensuring that the welfare of Judges and staff is catered for.

The booklet is designed in easy to follow chapters that provide insights into the Court's activities during the years under review, in an easy to read format, and is intended to provide a communication tool between us and our internal and external stakeholders.

It is my sincere hope and expectation that this booklet will provide a useful guide on the Court and offer an effective learning experience and reference resource.

Feedback from the readers will be much appreciated to enable us develop a shared vision and understanding of the workings of the Court and for improvement of the booklet in its subsequent editions.

**THE HON. MR. JUSTICE WILLIAM OUKO, EBS  
JUDGE/PRESIDENT, COURT OF APPEAL**



## ACKNOWLEDGMENT

It has been the vision of the Honourable President of the Court of Appeal to demystify the Court of Appeal and extend its renowned collegiality to all its users and the general public. This second edition of the Court of Appeal Booklet seeks to continue this agenda in presenting to the readers *Who We Are? What We Do?* and *Who We Aspire To Be* every year.

The development of the Second Edition of the Court of Appeal Booklet (2019-2020) would not have been complete without the leadership of the President of the Court, **the Honourable Mr. Justice William Ouko** whose vision and guidance ensured its production captured the essence of the Court.

Special recognition goes to the **Hon. Joane Wambilyanga, the Hon. Harrison Adika, the Hon. Lorraine Ogombe, Mr. Benjamin Kinuthia, Mr. Peter Kamau, Ms. Muthoni Njungé, Ms. Lucy Waweru, Mr. Peter Nderitu, Mr. John Muriuki** and **Mr. Anthony Sissey** whose immeasurable input and editorial workings helped in contextualizing the objective of this booklet.

I also acknowledge with gratitude the financial support provided by the **International Development Law Organization (IDLO)**, towards development of this booklet. The net result of these combined efforts is an enjoyable read on the Court of Appeal of Kenya.

**HON. MOSES K. SEREM**  
**REGISTRAR, COURT OF APPEAL**



# 1

## THE EVOLUTION OF THE COURT OF APPEAL OF KENYA



# THE EVOLUTION OF THE COURT OF APPEAL OF KENYA

Sixty-eight years ago, The Court of Appeal for Eastern Africa (EACA), was born. It was originally set up in 1950 by the 1902 order-in-Council as a regional court.

Establishment in response to the demand for institutions to help administer colonies, EACA is arguably one of the oldest shared resources among various East African countries and other British protectorates.

EACA was created amid the complex colonial and African traditional setting. There was a dual system of courts where one court was to administer the general law established by the colonial administration and the other, to settle disputes arising among members of the indigenous African population.

Initially, the court's jurisdiction was limited to the three East African territories but later, it was extended to other British colonies.

Ultimately, it covered the colony and the protectorate of Tanganyika, the Uganda and Zanzibar protectorates, the colony of Aden, the colony of Seychelles and the Somaliland protectorate.

The court consisted of a president, vice president, one or more justices of appeal and the superior courts of the territories. They were appointed by the Queen of Great Britain and served at her pleasure.

After the independence of most of these countries, the EACA became the highest court as far as determining appeals was concerned. At one time, it was the highest court in the land as well as a court where all appeals were filed and determined.

For instance, appeals from the High Court ended in the Judicial Committee of the Privy Council (a sovereign's or Governor General's private counselors). Direct appeals to the Privy Council in the UK were not allowed except through EACA where one had to first make his/her appeal.

Although domiciled in Nairobi Law Courts Building, the court was administered independently of the Judiciary of Kenya. The disintegration of the East African community resulted in the establishment of the Court of Appeal of Kenya on October 28th, 1977 as the highest court in Kenya after the constitution of Kenya Amendment Act (1977).

From this time, the court was permanently stationed in Nairobi and operated as a circuit court when hearing appeals from its other sub-registries.

The court was fully decentralized in 2012 to Mombasa, Nyeri and Kisumu. It has sub-registries in Nakuru, Eldoret, Malindi, Meru, Busia, Kakamega, Kisii and Garissa.

The Court of Appeal boasts of a rich history that has seen it grow jurisprudence, shaping the legal-political as well as socioeconomic dynamics underpinning the East African region and beyond.

## THE LEADERSHIP: THE EACA AND COURT OF APPEAL OF KENYA

The Court of Appeal for Eastern African was headed by Presidents between 1957 and 1975. Sir Newnham A. Worley was the first President in 1957, followed by Sir Kenneth K.

O'Connor from 1958 to 1961, and Sir Ronald O. Sinclair from 1962 to 1963.

From the inception of the court, its Justices were of European origin until November 1963, when Hon. Mr. Justice Samuel Azu Crabbe a Ghanaian, joined the bench. Hon. Mr. Justice



*Sir Samuel Okai Quashie-Idun*

Crabbe was followed by Sir Samuel Okai Quashi-Idun, also a Ghanaian, who became the President of the Court of Appeal.

The era of Presidents of the Court of Appeal for Eastern Africa ended in 1977.

From 1977 to 2012, the Court of Appeal was headed by a Presiding Judge. The Hon. Mr. Justice Chunlal Madan was the court's first Presiding Judge who served between 1977 and 1985 while the Hon. Mr. Justice Riaga S. C. Omolo was its last, serving from 2003 to 2012.

The Hon. Mr. Justice Erastus Githinji served in an acting capacity as the President Court of Appeal having been appointed by the Chief Justice in 2012. The Hon. Mr. Justice Paul Kihara Kariuki was the first to be elected by his colleagues as President Court of Appeal of Kenya under Article 164(2) of the constitution of Kenya and served from 2013 until his appointment as the Attorney General of Kenya in 2018.

The Hon. Mr. Justice Philip Waki served in an acting capacity as the President of the Court until the current President of the Court of Appeal the Hon. Mr. Justice William Ouko was elected by his colleagues in March 2018.



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**COURT OF APPEAL  
AND CHIEF JUSTICES OF KENYA**



# THE COURT OF APPEAL JUDGES WHO ROSE TO BECOME CHIEF JUSTICES OF KENYA

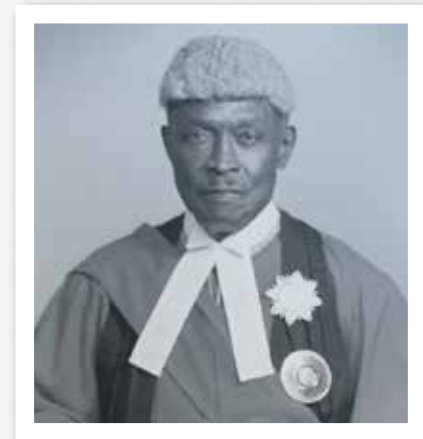
The Court of Appeal has been the single-most contributor of judges to the seat of the Chief Justice of Kenya. Court of Appeal judges who rose to become Chief Justices of Kenya after independence include:

1. The Hon. Mr. Justice Chunilal B. Madan, CJ from 1985-1986 (6th CJ)
2. The Hon. Mr. Justice Cecil Henry Ethelwood Miller, CJ from 1986- 1989 (7th CJ)
3. The Hon. Mr. Justice Allan Robin Winston Hancox, CJ from 1989 -1993 (8th CJ)
4. The Hon. Mr. Justice Fred Kwasi Apaloo, CJ from 1993-1994 (9th CJ)
5. The Hon. Mr. Justice Abdul Majid Cockar, CJ from 1994 – 1997 (10th CJ)
6. The Hon. Mr. Justice Zaccheus Richard Chesoni, CJ from 1997-1999 (11th CJ)
7. The Hon. Mr. Justice Johnson Evan Gicheru, CJ from 2003 – 2011 (13th CJ)
8. The Hon. Mr. Justice David Kenani Maraga, CJ from 2016 (incumbent and 15th CJ)

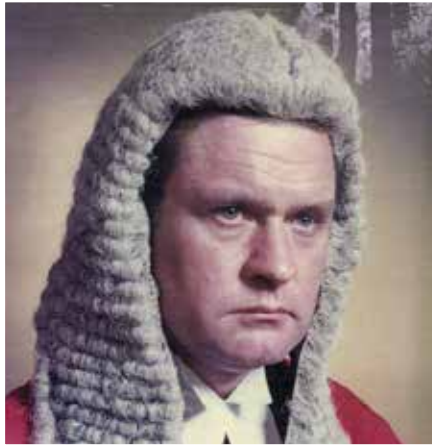
Other Chief Justices of independent Kenya who were not recruited from the Court of Appeal include Sir John Ainley (1962 – 1968); Justice Dennis Farrel (May-July, 1968). Justice Kitili Mwendwa (1968-1971); James Wicks (1971-1982); Sir Alfred Simpson (1982- 1985); Justice Chunilal B. Madan (1985-1986); Justice Bernard Chunga (1999- 2003); Justice Willy Mutunga (2011-2016).



***The Hon. Mr Justice  
Chunilal B. Madan  
(Rtd) Chief Justice (1985-1986)***



***The Hon. Mr Justice  
Cecil H.E. Miller, E.B.S.E.G.H  
(Rtd) Chief Justice (1986 -1989)***



***The Hon. Mr Justice  
Robin Allah W. Hancox, E.G.H  
(Rtd) Chief Justice (1989 -1993)***



***The Hon. Mr Justice  
Fred Kwasi Apaloo, E.G.H  
(Rtd) Chief Justice (1993 -1994)***



***The Hon. Mr Justice  
Abdul Majid Cockar, E.G.H  
(Rtd) Chief Justice (1994 -1997)***



***Hon. Mr. Justice  
Zaccheus Richard Chesoni,  
(Rtd) Chief Justice 1997-1999***



***The Hon. Mr Justice  
Johnson E. Gicheru, M.B.S, E.B.S  
(Rtd) Chief Justice (2003 - 2011)***



***The Hon. Mr Justice  
David K. Maraga, E.G.H  
(2016 to date)***

## PRESIDENTS OF THE COURT OF APPEAL OF EAST AFRICA (1957-1975)

---

**The Hon.  
Sir Newnham A. Worley  
1957**

**The Hon. Mr Justice  
Sir Kenneth K. O'Connor  
1958-1961**

**The Hon. Mr Justice  
Sir Ronald O. Sinclair  
1962 -1963**

**The Hon. Mr Justice  
Samuel Okai Quashie-Idun  
1964 - 1965**

---

**The Hon. Mr Justice  
Sir Charles Newbold  
1966 -1969**

**The Hon. Mr Justice  
Sir William Duffus  
1970 -1974**

**The Hon. Mr Justice  
S.W.W Wambuzi  
1975**

## PRESIDING JUDGES OF THE COURT OF APPEAL (1977-2012)



***The Hon. Mr. Justice  
C.B. Madan  
1977 -1985***



***The Hon. Mr Justice  
J.O. Nyarangi  
1985 - 1991***



***The Hon. Mr Justice  
J.M. Gachuhi  
1991 -1993***



***The Hon. Mr Justice  
J.E. Gicheru  
1993-2003***



***The Hon. Mr Justice  
R.O. Kwach  
2003***



***The Hon. Mr Justice R.S.C Omolo  
Presiding Judge, Court of Appeal  
2003 – 2012***

**PRESIDENTS OF THE COURT OF APPEAL  
(2012 TO DATE)**



**The Hon Mr Justice  
P. Kihara Kariuki  
2013 - 2018**



**The Hon Mr Justice  
William Ouko  
Incumbent**

**COURT OF APPEAL JUDGES WHO ROSE TO  
BECOME DEPUTY CHIEF JUSTICES**



**The Hon Lady Justice  
Kalpana H Rawal (Rtd)  
Deputy Chief Justice  
2013-2016**



**The Hon Lady Justice  
Philomena M Mwilu, MGH  
Deputy Chief Justice  
2016- to date**

The Office of the Deputy Chief Justice has also been occupied by Justices recruited from the Court of Appeal. Retired Lady Justice Kalpana Rawal was recruited in 2013 to serve as Deputy Chief Justice of the Republic of Kenya.

Lady Justice Mwilu is currently the Deputy Chief Justice of Kenya, a Supreme Court Judge and a member of the Judicial Service Commission (JSC).



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OFFICE OF THE PRESIDENT OF  
THE COURT OF APPEAL



# OFFICE OF THE PRESIDENT OF THE COURT OF APPEAL

The Office of the President of the Court of Appeal is established by Article 164 (2) of the Constitution. The President is elected in accordance with Article 164 (2) of the Constitution. He/she is expected to serve for a non-renewable term of five years.

In the absence of the President of the Court or in the event of a vacancy in the office of the President of the Court, Section 10(2) of the Court of Appeal (Organization and Administration) Act 2015, stipulates that the Chief Justice shall appoint one Judge from among the Presiding Judges in Nairobi, to act as the President of the Court for a period not exceeding 21 days, with effect from the date of appointment.

Further, in section 13 (3), the Act indicates that in the absence of the President of the Court, his or her functions shall be exercised by the senior-most Judge of the Court for the time being stationed at the Office of the President of the Court.

Currently, the Court of Appeal is headed by the Hon. Mr. Justice William Ouko who was elected to serve as President of the Court in March 2018. The Hon. Mr. Justice William Ouko took over from the Hon. Mr. Justice Kihara Kariuki who had served as the Courts' President since 2013. The Hon. Mr. Justice William Ouko is a long serving judicial officer who has worked in the Judiciary since 1987.

The functions of the President of the Court are outlined in Section 13 of the Court of Appeal (Organization and Administration) Act 2015

## The President of the Court shall:

- (a) Be the head of the Court and shall, in that regard, oversee proper management and administration of the Court
- (b) Be responsible for the allocation of cases and the constitution of benches, including ordinary and extraordinary benches, of the Court; and
- (c) In consultation with the Chief Registrar, be responsible for giving general directions for the administration of the Court.
- (d) Without prejudice to subsection (1) (b) and (c), the President of the Court shall, in consultation with the Chief Justice, be responsible for:
- (e) Issuing practice directions on conduct of litigation in the Court;
- (f) Developing guidelines that ensure the expeditious disposal of cases;
- (g) Approval of leave and absence from duty of a Judge;
- (h) Determination, in consultation with the Chief Justice, of the location of the sittings of the Court; and
- (i) The maintenance of the honour and dignity of the Court.



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**Sustaining Judiciary  
Transformation**



# SUSTAINING JUDICIARY TRANSFORMATION

The Court of Appeal under the leadership of the Hon. Mr. Justice William Ouko has prioritized the advancement of the service delivery agenda of Sustaining the Judiciary Transformation (SJT).

This agenda, seeks to enhance access to justice to all court users; employ new strategies to clear case backlog; mainstream integrity in service delivery; restructure and strengthen the complaints office; develop a digital strategy and drive a high performing, independent and accountable judiciary.

The court has prioritized improvement of court operations and efficiency, building of a robust and more harmonious jurisprudence, improvement of the work environment, improvement of the welfare of Judges and staff, enhancement of stakeholder engagement and participation and implementation of a digital strategy.

To achieve the vision of SJT, the court is focusing on improving court efficiency and interventions that seek to address the current case backlog that stands at over 1,607 cases. It intends to strictly implement the existing case management and practice directions and adopt the policy of first-in first out to ensure orderly disposal of cases. The Court has also adopted a 'no adjournment policy' except in exceptional circumstances to ensure timely disposal of cases.

Despite operating way below its optimal level, the Court still strives to embrace case clearance through service weeks, digitization and implementation of individual and court performance standards. For instance, at the advent of the Covid-19 Pandemic, the Court embraced electronic filing and virtual hearings to ensure continuity in service delivery in a safe manner for the Judges, staff and litigants.

The Court intends to ensure a full complement of legal researchers for each Judge and develop modalities to ensure the researchers provide relevant and timely input to the work of Judges. Additionally, the court will endeavor to provide researchers with tools, resources and a conducive environment to facilitate their work.

The court plans to enhance availability of legal information and material including comparative legal material by providing a Stable, reliable and faster internet to all court stations; subscribing to international legal databases and libraries (Lexis Nexis/ Hein online Westlaw/D-space for Court of Appeal decisions) and ensuring physical libraries are well stocked and easy to use.

The court in conjunction with the Judiciary Training Institute, shall promote continuous learning and personal improvement of the Judges and staff to appropriately equip them to discharge their functions. This will be realized through the promotion of tailor-made courses, participation at external training programs and sponsoring of benchmarking study tours to other jurisdictions.

To encourage feedback that is key in planning and identifying of areas for improvement, the court seeks to build a strong stakeholder engagement to facilitate efficient administration of justice.



**“E-filing of cases will ensure better recording and faster processing. The electronic filing system will enable electronic submission, registration, service notification and access to Court documents.”**

Court of Appeal President,  
The Hon. Mr. Justice  
William Ouko



4

JUDGES OF  
THE COURT OF APPEAL





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**The Hon. Mr. Justice William Ouko,  
President, Court of Appeal**

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**The Hon. Lady Justice  
Roselyn Naliaka  
Nambuye**



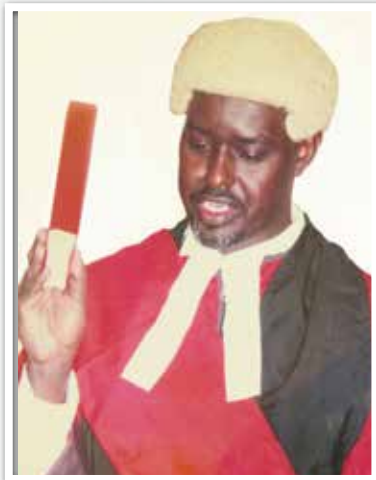
**The Hon. Lady Justice  
Wanjiru Karanja**



**The Hon. Lady Justice  
Martha K. Koome**



**The Hon. Lady Justice  
Hannah Magondi  
Okwengu**



**The Hon. Mr. Justice  
Mohamed Abdulahi  
Warsame**



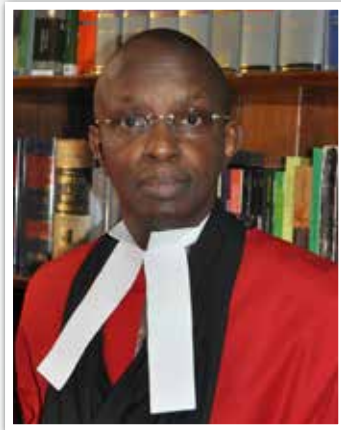
**The Hon. Mr. Justice  
Milton S. A. Makhandia**



**The Hon. Mr. Justice  
Daniel Kiiro Musinga**



**The Hon. Mr. Justice  
Patrick Omwenga Kiage**



**The Hon. Mr. Justice  
Gatembu Kairu,**



**The Hon. Mr. Justice  
Kathurima M'Inoti,**



**The Hon. Lady Justice  
Agnes Murgor**



**The Hon. Lady Justice  
Fatuma Sichale**



**The Hon. Lady Justice  
Jamila Mohammed**



**The Hon. Mr. Justice  
Sankale Ole Kantai**



The Hon. Chief Justice David Maraga, The Hon. Deputy Chief Justice Philomena Mwilu, Court of Appeal President, The Hon. Mr. Justice William Ouko and Attorney General, The Hon. Mr. Justice (Rtd) P. Kihara Kariuki with Court of Appeal Judges.

# HONOURABLE JUDGES WHO HAVE SERVED IN THE COURT OF APPEAL FROM 1957- TO DATE

1. Hon. Mr. Justice Sir Samuel Okai Quashie-Idun
2. Hon. Mr. Justice Sir Ronald O. Sinclair
3. Hon. Mr. Justice F A Briggs
4. Hon. Mr. Justice R S Bacon
5. Hon. Mr. Justice Sir Newnham A Worley
6. Hon. Mr. Justice Sir Kenneth K. O'Connor
7. Hon. Mr. Justice Sir Alastair G Forbes
8. Hon. Mr. Justice Sir Trevor J Gould
9. Hon. Mr. Justice Sir Ralph Windham
10. Hon. Mr. Justice Sir Daniel Crawshaw
11. Hon. Mr. Justice Charles Newbold
12. Hon. Mr. Justice S A Crabbe
13. Hon. Mr. Justice Sir Clement DE Lestang
14. Hon. Mr. Justice William A H Duffus
15. Hon. Mr. Justice J F spry
16. Hon. Mr. Justice E. J. E Law
17. Hon. Mr. Justice B C W Lutta
18. Hon. Mr. Justice C. B Madan
19. Hon. Mr. Justice S. W. W Wambuzi
20. Hon. Mr. Justice A Mustafa
21. Hon. Mr. Justice A Musoke
22. Hon. Mr. Justice C. H. E Miller
23. Hon. Mr. Justice K D Potter
24. Hon. Mr. Justice A H Simpson
25. Hon. Mr. Justice A. A Kneller
26. Hon. Mr. Justice A R W Hancox
27. Hon. Mr. Justice J. O Nyarangi
28. Hon. Mr. Justice H. G Platt
29. Hon. Mr. Justice Z R Chesoni
30. Hon. Mr. Justice J. M Gachuhi
31. Hon. Mr. Justice F. K Apaloo
32. Hon. Mr. Justice J R O Masime
33. Hon. Mr. Justice Johnson Evans Gicheru
34. Hon. Mr. Justice Richard Otieno Kwach.
35. Hon. Mr. Justice Z R Chesoni
36. Hon. Mr. Justice Riaga S C Omolo
37. Hon. Mr. Justice Philip Kiptoo Tunoi
38. Hon. Mr. Justice A. M. Akiwumi
39. Hon. Mr. Justice A. B. Shah
40. Hon. Mr. Justice A.A. Lakha
41. Hon. Mr. Justice Samuel E O Bosire
42. Hon. Lady Justice Effie Owuor
43. Hon. Mr. Justice Emmanuel O'kubasu
44. Hon. Mr. Justice A. M. Cockar
45. Hon. Mr. Justice M. G Muli
46. Hon. Mr. Justice M Ole Keiwua
47. Hon. Mr. Justice J G Nyamu
48. Hon. Mr. Justice D. K. S Aganyanya
49. Hon. Lady Justice Joyce Aluoch
50. Hon. Mr. Justice Erastus M. Githinji
51. Hon. Mr. Justice Philip N Waki
52. Hon. Mr. Justice John Walter Onyango Otieno
53. Hon. Mr. Justice A Ringera
54. Hon. Mr. Justice W. S Deverell
55. Hon. Mr. Justice Alnashir R M Visram
56. Hon. Lady Justice Kalpana Rawal
57. Hon. Mr. Justice Festus Azangalala
58. Hon. Mr. Justice G B M Kariuki
59. Hon. Mr. Justice Paul Kihara Kariuki,
60. Hon. Lady Justice Philomena Mwilu
61. Hon. Mr. Justice David Kenani Maraga
62. Hon. Mr. Justice William Ouko
63. Hon. Lady Justice Roselyn Nambuye
64. Hon. Lady Justice Wanjiru Karanja
65. Hon. Lady Justice Martha Koome
66. Hon. Mr. Justice John Wycliffe Mwera
67. Hon. Lady Justice Hannah Okwengu
68. Hon. Mr. Justice Mohamed Warsame
69. Hon. Mr. Justice Milton Asike Makhandia
70. Hon. Mr. Justice Daniel Musinga
71. Hon. Mr. Justice Patrick Kiage
72. Hon. Mr. Justice Gatembu Kairu
73. Hon. Mr. Justice Kathurima M'inoti
74. Hon. Lady Justice Agnes Murgor
75. Hon. Lady Justice Fatuma Sichale
76. Hon. Lady Justice Jamila Mohammed
77. Hon. Mr. Justice (Prof.) James Otieno Odek
78. Hon. Mr. Justice Sankale Ole Kantai



5

**Women Judges of the Court of  
Appeal**



# WOMEN JUDGES OF THE COURT OF APPEAL

The struggle for inclusion of women in leadership positions has not been an easy one even in the Judiciary much the same as other arms of government.

Although today, the Court of Appeal prides itself as having complied with the 2/3 gender rule provided under Article 27 (8) of the Constitution, it has not been a walk in the park to achieve gender parity. It started with the ardent determination and singleness of mind by our first woman magistrate, Judge of the High Court and Court of Appeal the retired Hon Lady Justice Effie Owour who was closely followed by Lady Justice Joyce Aluoch. Judge Aluoch went on to become a Judge in the International Criminal Court at the Hague.

The Hon. Lady Justice (Rtd) Owuor and The Hon. Lady Justice (Rtd) Aluoch were the first two members of the Kenya Women's Judges Association, an affiliate of the International Women Judges Association, formed in 1993 when they were the only two female judges in the country.

They were followed almost a decade later by the third woman to be appointed Judge of Appeal, Hon. Lady Justice Roselyn Nambuye. These were the pioneers who gave women lawyers hope by paving a pathway which made it possible for many women from magistracy, private practice and academia to join the judiciary as Judges.

We celebrate them and we are eternally grateful for their leadership and mentorship.

## Gender Parity

Currently, the Court of Appeal is in compliance with the gender parity principle as stipulated by the 2010 Constitution.

## THE HONOURABLE LADY JUSTICE (RTD) EFFIE OWUOR, EBS



The Hon. Lady Justice (Rtd) Effie Owuor is a woman of many firsts. She was Kenya's first female State Counsel (1967), Magistrate (1970), High Court Judge (1981) and Court of Appeal Judge (1998).

In 1983, she was appointed alongside Cecil Miller and Chunilal Madan to the Judicial Commission of Inquiry into the allegations against the former Attorney General Charles Njonjo.

In 1993, the Hon. (Rtd) Lady Justice Owuor was also appointed as a goodwill ambassador to UNICEF and Chair of the Task Force on Laws Relating to Women, which resulted in the passage of the Sexual Offences Act in 2006.

She also served as a Commissioner of the Kenya Law Reform Commission from 1984 until 2000.

The Hon. Lady Justice (Rtd) Owuor retired from the Court in 2003.

**THE HONOURABLE LADY (RTD) JUSTICE  
JOYCE ALUOCH, EBS**



In 1974, the Hon. Lady Justice (Rtd) Joyce Aluoch was appointed a District Magistrate II (Prof.) in the Kenyan Judiciary. In 1993, she was appointed a Judge of the High Court where she later pioneered the establishment of the High Court Family Division and served as the inaugural head. The creation of the division greatly enhanced service delivery in family matters.

She was appointed as the second female Judge of the Court of Appeal in 2007. The Hon. Lady Justice (Rtd) Aluoch was elected to the International Criminal Court in 2009 by the court's Assembly of States Parties and her nine-year term expired in 2018.

Between 2009 and 2016, she served as member of the trial chamber for the case of Jean-Pierre Bemba, a head of militia in the Democratic Republic of Congo, the first case in which the ICC found a senior official directly responsible for the crimes of his subordinates, as well as the first to focus primarily on crimes of sexual violence committed in war. She also served as the Presiding Judge of Trial Chamber IV, where she presided over the prosecution of Abdallah Banda and Saleh Jerbo who were indicted for war crimes in Darfur among many others.

**THE CURRENT SENIOR MOST FEMALE JUDGE OF  
THE COURT OF APPEAL**



**DR. (HON. CAUSA) LADY JUSTICE  
ROSELYN NAMBUYE, EBS**

The Hon. Lady Justice Nambuye was appointed to the Court of Appeal in 2011. She was the third woman to be appointed as Judge of Appeal.

She was the inaugural head of the Criminal Division of the Court of Appeal and also served as a Presiding Judge of the Court of Appeal at Nyeri in 2018. She is currently serving as Chair of the Bar - Bench and Court Users Committee of the Court of Appeal.

The Hon. Lady Justice Nambuye is currently the longest serving Judge of the Court of Appeal.

Out of the current establishment of fifteen (15) Judges, seven (7) are women with the four senior most Judges being women.

## **WOMEN JUDGES WHO HAVE SERVED IN THE COURT OF APPEAL SINCE ITS ESTABLISHMENT**



1. Hon. Lady Justice (Rtd) Effie Owuor – 1998-2003
2. Hon. Lady Justice (Rtd) Joyce Aluoch – 2007 -2009
3. Hon. Lady Justice (Rtd) Kalpana Rawal – 2011 -2013
4. Hon. Lady Justice Philomena Mwilu – 2012 -2016 (The current Deputy Chief Justice)



## **CURRENT WOMEN JUDGES OF THE COURT OF APPEAL**



1. Dr. (Hon Causa) Lady Justice Roselyn Nambuye – 2011 to date
2. Hon. Lady Justice Wanjiru Karanja – 2012 to date (The Head of the Civil Division)
3. Hon. Lady Justice Martha Koome – 2012 to date (The Head of the Criminal Division)
4. Hon. Lady Justice Hannah Okwengu – 2012 to date
5. Hon. Lady Justice Agnes Murgor – 2012 to date
6. Hon. Lady Justice Fatuma Sichale – 2012 to date
7. Hon. Lady Justice Jamila Mohammed – 2012 to date



6

**Court of Appeal Judges who  
retired in 2019**

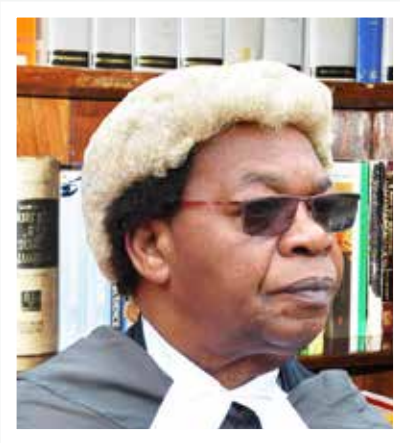


# COURT OF APPEAL JUDGES WHO RETIRED IN 2019

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The following Court of Appeal Judges retired from the Judiciary in 2019 after several years of illustrious careers on the bench.



***The Hon. Mr. Justice  
Erastus Githinji  
High Court- 1987-2003  
Court of Appeal - 2003-2019***



***The Hon. Mr. Justice  
Philip Nyamu Waki  
High Court- 1995-2003  
Court of Appeal - 2003-2019***



***The Hon. Mr. Justice  
Alnashir R. M. Visram  
High Court- 1999- 2012  
Court of Appeal - 2012-2019***



# 7

## Providing Leadership In The Administration Of Justice



The Court of Appeal judges have been privileged to provide leadership in the justice sector as follows;

S/NO.	NAME OF THE JUDGE	ROLE
1.	Hon. Mr Justice William Ouko	<ul style="list-style-type: none"> <li>• President of The Court of Appeal</li> <li>• Chairs The Judges' Retirement Benefits Inter-Ministerial Committee</li> <li>• Chairs the NCAJ Sub-Committee on Covid-19 Response</li> <li>• Chairs the Greening the Judiciaries Symposium 2020 Core Organizing Committee</li> <li>• Chairs the Judiciary Training and Development Policy Committee</li> </ul>
2.	Hon. Mr. Justice Erastus Githinji (Rtd)	<ul style="list-style-type: none"> <li>• Chaired The Judiciary Code Of Conduct and Ethics Committee</li> </ul>
3.	Hon. Mr Justice Philip Waki (Rtd)	<ul style="list-style-type: none"> <li>• Alternate Judge of Appeals Chamber in The UN Special Court sitting in The Hague Netherlands</li> <li>• President of the Residual Special Court of Sierra Leone</li> </ul>
4.	Hon. Mr Justice Alnashir Visram (Rtd)	Chaired the Judiciary Mediation Accreditation Committee(MAC)
5.	Hon.Lady Justice Roselyn Nambuye	Chairs the Bar Bench and Court Users Committee
6.	Hon. Lady Justice W. Karanja	<ul style="list-style-type: none"> <li>• Current Head of the Court of Appeal Civil Division</li> <li>• Chairs the Court of Appeal Sub-Committee on Building</li> </ul>
7.	Hon. Lady Justice Martha Koome	<ul style="list-style-type: none"> <li>• Current Head Of the Court of Appeal Criminal Division</li> <li>• Chairs the NCAJ Special Task Force on Children Matters</li> </ul>
8.	Hon. Lady Justice Hannah Okwengu	Chairs The Committee On Criminal Procedure Bench Book
9.	Hon. Mr. Justice Mohammed Warsame	Member of the Judicial Service Commission
10.	Hon. Mr. Justice Asike Makhandia	Chair of the Human Resources Policies and Procedures Manual Review Task Force
11.	Hon. Mr. Justice Daniel Musinga	Chairs the Judiciary Rules Committee
12.	Hon. Mr Justice Patrick Kiage	<ul style="list-style-type: none"> <li>• Chairs The Judiciary Security Committee</li> <li>• Chairs Sheria Sacco Ltd-The National Savings And Credit Society For Judicial Officers, Staff And Others</li> </ul>
13.	Hon. Mr Justice Gatembu Kairu	Chairs The Integrated Court Management System Committee(ICMS)
14.	Hon. Mr Justice Kathurima M'inoti	<ul style="list-style-type: none"> <li>• Director of The Judiciary Training Institute (JTI)</li> <li>• Chair Of The Judiciary Working Committee Transition Of Tribunals</li> </ul>
15.	Hon. Lady Justice Agnes Murgor	Chairperson of the Performance Management and Measurement Steering Committee(PMMSC)
16.	Hon. Lady Justice Fatuma Sichale	Member, The National Committee On Law Reporting
17.	Hon. Lady Justice Jamila Mohammed	Chairperson of the Kenya National Committee on The Prevention And Punishment Of Genocide, War Crimes, Crimes Against Humanity and all forms of Discrimination



**The Hon. Lady Justice Martha Koome, second from right, receives a Runner-up Award as UN Kenya Person of The Year 2020 on October 28,2020.**

The Hon. Lady Justice Martha Koome, on October 28,2020, received a Runner-up Award as UN Kenya Person of The Year 2020 in recognition for her advocacy for the rights of children in conflict with the law as well as child victims.

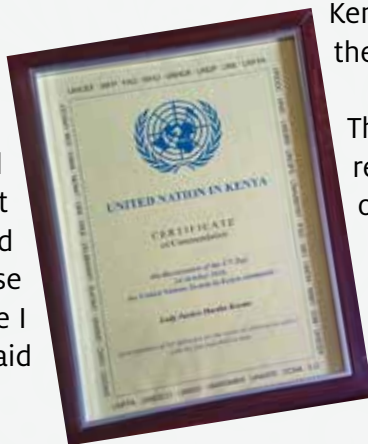
“In accepting this nomination, I do so to celebrate and affirm that our children are indeed a gift from God, our bridge to the future and we owe them a duty of care. All of us stand in a position of local parents for a child be it a child in the streets, in a remand home, in schools and everywhere if a child is not in a good place, it is because of failure of a system in the society. This is the message I spread that our “children our collective responsibility”. Said Lady Justice Koome.

The Hon. Lady Justice Martha Koome chairs the NCAJ Special

Task Force on Children Matters that has highlighted the plight of children in the Justice system. The Task Force mobilized and coordinated other stakeholders and reviewed the Children’s Act to align it with the Constitution of Kenya and developed practice directions to deal with children during the Covid-19 Pandemic.

The Task force sourced for laptops which were supplied to Children’s remand homes to enable them conduct virtue hearing of cases without having to transport children to Courts.

The Award was introduced in 2002 as the collective UN family of agencies honour to an individual and/or institution for succeeding to bring to public notice significant issues related to the Sustainable Development Goals, to serve as an inspiration to all Kenyans and in keeping with the ideals of the UN.





9

OFFICE OF THE REGISTRAR,  
THE COURT OF APPEAL



# OFFICE OF THE REGISTRAR, THE COURT OF APPEAL

The Office of the Registrar of the Court of Appeal is established by Section 10 (2) of Judicial Service Act. The Act indicates that the Registrar shall be responsible to the Chief Registrar in the performance of his/her duties.

The functions of the Registrar are outlined by Section (1) of the Court of Appeal (Organization and Administration) Act 2015. It stipulates that the Registrar shall perform such duties as the Chief Registrar or the President of the Court may direct, and in particular be responsible for::

- (a) The day-to-day administration of the Court;
- (b) The management of the Registry of the Court and ensuring the management of the sub-registries of the stations of the Court;
- (c) The acceptance, transmission, service and custody of documents in accordance with the Rules;
- (d) Preparation of the cause list;
- (e) Facilitating the enforcement of the decisions of the Court;
- (f) Certifying that any order, direction or decision is an order, direction or decision of the Court, the President of the Court or of a Judge, as the case may be;
- (g) The maintenance of the registers of the Court;
- (h) Causing to be kept records of the proceedings and minutes of the meetings of the Court and such other records as the Court may direct;
- (i) Managing and supervising the staff of the Court;
- (j) Managing the library of the Court;
- (k) Facilitating access to judgments and records of the Court;
- (l) Undertaking maintenance of the equipment of the Court;
- (m) In liaison with the relevant agencies, ensuring adequate security within the Court premises;
- (n) Undertaking taxation of bills of costs; and
- (o) Undertaking any other duties assigned by the President of the Court or by the Chief Registrar.
- (p) In relation to the proceedings before the Court, the Registrar may consider and dispose of procedural or administrative matters in accordance with the Rules or on the direction of the President of the Court.



**Hon. Moses Kosgei Serem, Registrar, Court of Appeal**

The current Registrar of the Court of Appeal is Hon. Moses Kosgei Serem. He joined the Court of Appeal as a Deputy Registrar in 2007 and became the first Registrar of the Court in 2012. Hon. Serem joined the Judiciary in 2001 and rose through the ranks to become a Senior Principal Magistrate. As a magistrate, he served in Kitale, Muhoroni and Kehancha Law Courts before moving to Nyeri High Court to serve as a Deputy Registrar.

Hon. Serem has attended many courses including one on Judicial Administration in London in 2012. He has served in various committees of the Judiciary both as a chair and member and is currently the Chair of the Judiciary Mortgage Committee. He holds a Bachelor of Laws (LLB) degree from the University of Nairobi and a postgraduate diploma in Law from the Kenya School of Law. Hon. Serem was admitted as an Advocate of the High Court of Kenya in, 1998. He has 19 years of judicial service.

# DEPUTY REGISTRARS



## Hon. Joane N. Wambilyanga

- Joined the Judiciary in July, 2009.
- Started working as Deputy Registrar in the Court of Appeal in April 2013.
- Has worked in the Court of Appeal at Nyeri and Kisumu.
- Currently stationed in the Court of Appeal at Kisumu.



## Hon. Harrison Adika

- Joined the Judiciary in July, 2010.
- Started working as Deputy Registrar in the Court of Appeal in April 2013.
- Has worked in the Court of Appeal at Kisumu and Nyeri.
- Currently stationed in the Court of Appeal at Nyeri but also acts as Deputy Registrar in Mombasa.



## Hon. Lorraine Ogombe

- Joined the Judiciary in July, 2012.
- Has worked in several court stations. She also served in the office of the former Chief Justice Dr. Willy Mutunga.
- Started working as Deputy Registrar in the Court of Appeal in April 2019.
- Currently stationed in the Court of Appeal at Nairobi.
- Holds a Masters of Law Degree (LLM) from University of Washington (USA).

### Previous Deputy Registrars of the Court of Appeal

1. Hon. Tom Luvuga
2. Hon. Hellen Onkwani
3. Hon. Paul Rotich
4. Hon. Anne Nyoike



10

STAFF OF THE COURT OF APPEAL



# STAFF OF THE COURT OF APPEAL



The Court of Appeal has 132 staff serving in the various registries and sub-registries of the Court.

The staff consists of Court Administrators, Office Administrators, Legal Researchers, Court Assistants, Records Managers, Librarians, ICT Officers, Court Bailiffs, Process Servers, Office Assistants, Security Aides and Drivers.

The renowned collegiality of the Court of Appeal is attributed to the staff embracing team work and harmony in their day to day duties. This has resulted in longevity of service with some staff serving up to thirty years. Some of the staff with outstanding service to the Court of Appeal and deserve a special mention include;

- The Late Charles Okumu Pacho
- The Late Gideon Atsibilwa
- The Late Esther Gathigia
- Sammy Kimburi (Rtd)
- Meshack Okwengu (Rtd)
- Aggrey 'Papa' Luseno (Rtd)
- Sally Bogon (Rtd)
- Jane Baraza
- Peter Kamau
- John Wamalwa
- Augustine Ngugi
- Priscilla Wangari

<b>COURT OF APPEAL NAIROBI</b>
Moses K. Serem
Lorraine Ogomba
Benjamin Kinuthia
Muthoni Njung'e
Peter W. Kamau
Lucy Waweru
Lilian Nyabando
Joyce W. Njui
Catherine Sogomo
Joy Keyonzo
Phylis Ngugi
Yvette Iwande
Paula Nyamweya
Prudence D. Shabuye
Leah A. Mosoni
Joan Waruguru
Wendy Othim
Angeline Mwakuwa
Regina M. Gathigia
Lorna O. Mecha
Mary G. Murungi
Damaris Manjari
Harriet Gaceri
Doreen M. Kiende
Olivia W. Ndururu
Martha W. Njuguna
Esther W. Maina
Christal Wadegu
Treza W. Abala
Annred Johnson
Margaret Ngugi
Mary N. Ngigi
Adelaide M. Shilaho
Rael Mueni
Purity Gacheri

Peter Nderitu
Thomas K. Tarus
Margaret Muriithi
Josephine Kamoni
Janet Kadenyi
Catherine Majale
Eunice Wangare
Anne Mbogo
Kenneth Otieno
Barnabas Kosgei
Millycent Chepchumba
Arnold Mutisya
Jane N. Mbutia
Roselyn Khamala
Ego C. Kipkurui
Sharon Laibuch
Justine C. Cherop
Maryline Jepkorir
Esther N. Mumo
Antony Mwangi
Irene M. Mumbi
Angela O. Ayieko
Millicent Mukami
Christine K. Riithi
Samuel Kamunya
Lynn Achieng
Cyrus Chiira
Alex Kipelian
Emmanuel K. Kasaine
Peter T. Gachomo
Ambrose Towett
Gordon Omondi
Steven Muli
Patrick Ndungu
Griffin M. Muzembi
Leonard Munene

Steven Wanyoike
Ann Gitonga
Jacktone Mwendwa
Augustine Ngugi
Euna Muciru
Beatrice N. Kabugi
Isaac P. Gakoi
Antony K. Kasina
Peter M. Mwakulomba

<b>COURT OF APPEAL- MALINDI/ MOMBASA</b>
Agnetta Kero
Thomas F. Yaah
Daniel Engoet
Daniel Kipngetch Kering
Burton Kulundu
Mary Mahiri
Jacinta Mutua
Charles Nduna
Abel Gichana
Samuel Kamunya
Josphat Ting'a Ntupusat
Esther W. Jaika
Jackline Jemngut Barckesian

<b>COURT OF APPEAL KISUMU / ELDORET</b>
Hon. Joanne Wambilyanga
John Wamalwa
Wilfred M. Bibu
Recho A. Ouko
Emily Isiaho
Adelaide Shilaho -
Winfred Shimeka -
Dolphine A. Odiwuor
Raymond Okumu
Quincy O. Shisia
Maurice Simiyu
Anne A. Odaro
Parklea Koskei
Solomon Tulel

Dennis Opio
Susan Awino
Mary M. Asava
Alloys O. Obaje
Larsen O.Ochola
Mary Habwe
Griffin M. Muzembi -
Phoebe A. Odhiambo -
Joshua Okongo
Victor Ogone
Sally Borgon
Ambrose Mutai
Derick Omolo
Victor Murei
Jane Bii
Rose Jepchirchir
Evaline Akinyi
Timothy Kamau
Moses Echanet
Julia Jepkosgei

<b>COURT OF APPEAL NYERI/ NAKURU</b>
Hon. Harrison Adika
Jane N. Barasa
Alex Njeru
Ruth M. Kanogo
Justine Lengo Kazungu
Samuel Githinji Wanjohi
Kenstorer Mugendi Njagi
Antony K. Kasina
Harriet Ndubi
Priscilla W. Mwangi
Ruth Kosgei
Mzee Kennedy Oguma
Vincent K. Chemitei
Nelly J. Sirgoi

# STAFF OF THE COURT OF APPEAL



**The Court of Appeal Staff Retreat at the Great Rift Valley Lodge, Naivasha on 12th September, 2019.**



# 11

## A Collegial Court



# A COLLEGIAL COURT



“ Collegiality is the manner in which **“appellate judges”** overcome their individual predilections in decision making.”

***Judge Harry Edwards of the D.C Circuit***



# A COLLEGIAL COURT



The Court of Appeal of Kenya is a collegial court, meaning it operates through multi-member decision-making process. The bench usually comprises an odd number of three Judges. However, situations may arise where the Court may comprise five, seven, nine or eleven Judges.

Benches comprising of five Judges were empanelled in the cases of

- Peter Mburu Echaria v Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001 and;
- Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2007] eKLR

To date, the highest number of Judges empaneled to sit in a bench has been seven in the following cases;

- Abu Chiaba v Electoral Commission of Kenya (ECK) & 2 Others Civil Appeal No. 238 of 2003
- Republic v Tony Gachoka & Another Criminal Application No. 4 of 1999

After hearing of a case, the bench holds a conference to deliberate on its decision. The Judgement of the court is determined by the majority. In the event that there are dissenting views, the dissenting Judge(s) write their individual judgment.

It is argued that besides its authoritative nature, plurality of decisions emerging from a collegial approach in decisions is preferable because appellate courts have the most control and influence over legal doctrine.



# CASE MANAGEMENT IN THE COURT OF APPEAL

The court has adopted practices that enhance efficiency in case management. This is to avoid unnecessary applications and adjournments that delay the dispensations of justice.

The court lists all pending appeals before the registrar or the deputy registrar for a case management conference. During this conference, directions and timelines on filing submissions are given. Once the Registrar is satisfied that the appeal is ready for hearing, a hearing date is issued.

In the wake of the Covid-19 pandemic, case management directions are issued to parties electronically. A notice of Appeal should be filed within 14 days of the delivery of the judgment in the high court. The high court forwards the notice of appeal to the Court of Appeal.

## **Filing Guidelines for Civil Appeals**

The notice of appeal should be served upon the other party within seven days of filing it.

Proceedings should be requested from the high court within 30 days of the decision appealed against.

The letter requesting for proceedings should be copied and served to the other party.

After receipt of the proceedings, the record of appeals should be filed within 60 days of filing the notice of appeal.

The time for filing the appeal stops running when a request for

proceedings has been made and commences once the proceedings are ready.

Whenever a litigant delays in filing the Record of Appeal due to the delay in the preparation of proceedings by the high court, he/she ought to request for a certificate of Delay from the registrar of the high court. The certificate of delay explains the period of time taken by the high court in preparing the proceedings.

## **Filing Guidelines for Criminal Appeals**

A notice of appeal should be filed within 14 days of delivery of judgment in the high court. The high court then forwards the notice of appeal to the Court of Appeal.

The high court will prepare and forward the proceedings to the Court of Appeal.

The Court of Appeal fixes appeals (criminal and civil) on first-in-first-out basis. In civil appeals, the appeals are prioritized based on the date which the Record of Appeal is filed while in criminal appeals, they are prioritized according to the date the proceedings are received from the high court.

## **E Filing in the Court of Appeal**

The Court of Appeal has adopted electronic filing of cases to improve operational efficiency in filing of cases and payment of court fees.

The guidelines of E-filing are contained in the Electronic Case Management Practice Directions.



# 12

**Emerging Jurisprudence  
from the Court**



# EMERGING JURISPRUDENCE FROM THE COURT

## 1. COURT OF APPEAL JURISDICTION IN RESPECT OF ELECTIONS OF MEMBERS OF COUNTY ASSEMBLIES.

*Orange Democratic Movement @ another v Independent Electoral And Boundaries Commission (IEBC) @ another; Speaker-Nairobi County Assembly (Interested Party) Civil Appeal No. 31 OF 2018*

### Issue for determination

Whether the Court of Appeal had jurisdiction to entertain second appeals from election petitions in respect of Members of County Assemblies (MCA).

### Held

There was no right of appeal from elections arising from an election for MCA. Appeals in that respect end at the High Court level.

## 2. THE THRESHOLD FOR DETERMINING UNEXPLAINED ASSETS IN CORRUPTION CASES.

*Stanley Mombo Amuti v Kenya Anti-Corruption Commission Civil Appeal No. 184 of 2018*

### Issues for determination

- What is the threshold for determining unexplained assets where a public servant had assets disproportionate to legitimately known sources of income?
- Who bears the burden of proof for assets disproportionate to legitimate sources of income?

### Held

- An individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset.
- That the context of Article 40 (6) of the Constitution provides that protection of the right to property does not extend to property that had been unlawfully acquired.

## 3. COURT OF APPEAL JURISDICTION IN RESPECT TO UNLAWFUL REMOVAL FROM OFFICE

*George Kingi Bamba Vs National Police Service Commission Civil Appeal No 149 of 2017*

### Issues for determination

- Whether the appellant was accorded a fair hearing before the termination of his services?
- Whether the grounds of misconduct warranting his removal were sufficiently proved?
- Whether the vetting panel was properly constituted.

### Held

- The appellant was not accorded a fair hearing during the vetting process.
- The appellant did not receive fair administrative action and the appeal was allowed.
- The appellant be reinstated to his position.

# EMERGING JURISPRUDENCE FROM THE COURT

## 4. ELEMENTS OF THE DEFENCE OF DECEPTION (ON THE AGE OF A COMPLAINANT) UNDER THE SEXUAL OFFENCES ACT

*Eluid Waweru Wambui vs. Republic,  
Criminal Appeal No. 102 of 2016*

### **Issues of determination**

- Whether it is proper for courts to enforce with mindless zeal that which offends all notions of rationality and proportionality.
- Whether a court of law can declare itself powerless in the face of obvious injustice.
- Further consideration of the appellant's defence that he believed that the complainant was over 18 years old for an offence under the Sexual Offences Act where the age of the victim determines the nature of the offence and the sentence.

### **Determination**

- It is a matter of the greatest importance that age of the complainant be proved to the required standard, which is beyond reasonable doubt.
- In the circumstances of this case, the Appellant reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of the appellant's subjective view of the facts.
- *(in Obiter) in many jurisdictions only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age.*
- *A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue.*

## 5. ARBITRATION IN MARITAL DISPUTES AND CUSTODY OF CHILDREN

*TSJ v SHSR – Civil Appeal 119 of 2017*

### **Issue:**

Whether disputes of personal nature, including marital disputes and custody of children, are precluded from being resolved under the framework of Arbitration Act?

### **Held:**

- Despite that background and the consideration that informed the enactment of the Arbitration Act 1995, there is nothing in the Act itself that limits the application of arbitration process to commercial disputes.
- Furthermore, the constitution of Kenya, 2010 has extended the application of arbitration beyond the traditional (in a western sense) commercial sphere.
- Beyond the command under Article 159(2) of the Constitution that courts should promote arbitration and other dispute resolution mechanisms when exercising judicial authority, there is for instance recognition, under Article 189 of the Constitution, of arbitration and other alternative dispute resolution mechanisms in settlement of inter governmental disputes."



# 13

**Reflections on the decisions of  
the Court of Appeal and  
The Supreme Court Judgement In The Muruatetu Case**



# DEVELOPING ROBUST AND HARMONIOUS JURISPRUDENCE: REFLECTIONS ON THE DECISIONS OF THE COURT OF APPEAL OF KENYA ON SELECTED TOPICAL AREAS OF LAW

## A. Efforts to promote robust and harmonious jurisprudence

The Court of Appeal, as the second highest court in the Kenyan judicial hierarchy and the apex court in matters that neither involve an interpretation or application of the constitution nor which are certified as raising issues of general public importance, is cognizant of its role not just as a court of justice on a case by case basis, but also as a court of jurisprudence - shaping and reshaping the law and the law's landscape.

Through deliberate efforts, the Court of Appeal continuously seeks to enhance coherence and predictability of its decisions with a view to creating robust and harmonious jurisprudence. The Court of Appeal continues to engage within and without for purposes of interrogating its jurisprudential trajectory.

### **Special session to reflect on Court of Appeal decisions on topical areas**

On invitation of the President of the Court of Appeal, Mr. Justice William Ouko, Mr. Elisha Ongoya addressed the distinguished justices of the Court of Appeal of Kenya on 2<sup>nd</sup> August 2019 on the sidelines of their special sitting at Kisumu.

The President of the Court of Appeal, in the invitation letter to Mr. Ongoya wrote as follows:

“The Court of Appeal is in many instances the final court in many cases. This scenario, therefore, presents an opportunity for the court to develop jurisprudence based on a common and interpretation of the law. I deliberately underscore the latter sentence. In this regard, it has been found necessary to have an internal system in which judges can review their decisions to shape and develop jurisprudence and avoid contradictory decisions. It is in this respect that the court wishes to engage with you to assist in this process of introspection by presenting to the judges a paper on the following topical issues.”

The following three areas were highlighted for consideration and discussion:

- a) General conflict or divergence of opinions, if any, between different benches of the Court of Appeal on the same or similar cases
- b) Whether the decision of the Supreme Court of Kenya in Petition Number 15 of 2015 (as consolidated with Petition Number 15 of 2015) Francis Karioko Muruatetu and Wilson Thirumbu Mwangi vs. The Republic and 5 Others is applicable to offences under the Sexual Offences Act No 3 of 2006;
- c) Whether the Environment and Land Court has jurisdiction in Mortgages and Charges and the Jurisprudence developed around this area.

## B. Topical areas of law

The topical areas presented to and discussed by the Justices of Appeal include:

1. The position of the Court of Appeal on the administrative law issue of whether the court's jurisdiction is limited to the legality of the decision or it extends to the merits of the decision in the face of the prescriptions of the Constitution of Kenya 2010

The Court of Appeal in a number of decisions has embraced the shift embraced by article 47 of the Constitution that envisages that courts are to review both 'merits and legality of the decision' as well as 'process and procedure' adopted by an administrative body. However, in some decisions, the Court of Appeal has maintained that judicial review is concerned only with the decision making process and not the merits of the decision in respect of which the application for judicial review is made.

Court of Appeal decisions considered and discussed:

- *Suchan Investment Limited vs. Ministry of National Heritage & Culture [2016] eKLR*
- *Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium vs. The Public Procurement Administrative Review Board & Another, Civil Appeal No. 24 of 2017*
- *Kenya Revenue Authority & 2 others vs. Darasa Investments Limited [2018] eKLR*

2. **The position of the Court of Appeal on the effect of failure to obtain the consent of the Land Control Board for a controlled transaction in land.**

Differently constituted benches of the Court of Appeal have taken divergent views on the question of the effect of the failure to obtain Land Control Board consent to a transaction related to agricultural land within the time stipulated in **Section 6(1)** Land Control Act, Cap 302 and

whether the transaction becomes void. In some decisions, it has been held that the failure to obtain consent from the land control board renders the transactions void and unenforceable. In others, the Court has held that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act.

Court of Appeal decisions considered and discussed:

- *Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri [2014] eKLR,*
- *David Sironga Ole Tukai vs. Francis Arap Muge & 2 Others (2014) eKLR*
- *Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR*

3. **The position of Court of Appeal on whether there is a right of appeal under Section 35 of the Arbitration Act**

In some decisions, the Court has held that there is no right of Appeal under Section 35 of the Arbitration Act, Cap. 49 of the Laws of Kenya. While in others, it has held that an appeal lies to the Court of Appeal.

Court of Appeal decisions considered and discussed:

- *Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR*
- *Anne Mumbi Hinga vs. Victoria Njoki Gathara [2009] eKLR*
- *Nyutu Agrovet Limited vs. Airtel Networks Limited [2015] eKLR*

4. **The position of the Court of Appeal on effect of filing a Notice of Appeal that does not strictly comply with the prescription of the Court of Appeal (Election Petition) Rules, 2017**

**Two different benches of the Court of Appeal gave divergent opinions on the same issue.**

In one bench, the Court of appeal declined to dismiss the appeal on grounds that no notice of appeal was filed at the Registry of the Court under Rule 6 or service affected under rule 7 of the Court of Appeal

(Election Petition) Rules 2017. The appeal was heard and determined it on its merits. A differently constituted bench in another appeal held that an appeal without a compliant Notice of Appeal, was a nullity. The appeal was dismissed.

Court of Appeal decisions considered and discussed:

- *Owino Paul Ongili Babu vs. Francis Wambugu Mureithi & 2 others* [2018] eKLR
- *Apungu Arthur Kibira vs. Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR,
- *Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others* [2015] eKLR

#### **5. The position of the Court of Appeal on direct right of access to court for injuries suffered from wildlife under the under the Wildlife (Conservation and Management) Act.**

One bench has held that Section 62 (1) of the Act is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by any animal, through the District Committee and appellate process provided for under the Act. A different bench of the Court held that the respondent could either lodge his claim through the procedure prescribed under Act, or pursue the remedy under common law through the courts.

Court of Appeal decisions considered and discussed:

- *Peter Muturi Njuguna vs. Kenya Wildlife Service, Nakuru Civil Appeal No. 260 Of 2013*
- *Kenya Wildlife Service Versus Joseph Musyoki Kalonzo Court Of Appeal At Nairobi Civil Appeal No. 306 of 2015*

#### **C. Other topical areas of law highlighted and discussed:**

- a) Whether the decision of the Supreme Court of Kenya in Petition Number 15 of 2015 (as consolidated with Petition Number 15 of 2015) *Francis Karioko Muruatetu and Wilson Thirimu Mwangi vs. The Republic and 5 Others* is applicable to offences under the Sexual Offences Act No 3 of 2006;
- b) Whether the Environment and Land Court has jurisdiction in Mortgages and Charges and the Jurisprudence developed around this area.

#### **D. Recommendations for developing robust and harmonious jurisprudence**

It was proposed that the Court adopts an internal system for judges of appeal to review their decisions to shape, develop jurisprudence and avoid contradictory decisions. Further, it has also been suggested that the court commissions a full study on the full scope of conflicting and emerging decisions of the court on the various topical areas of law.

Additional systematic approach for development of robust and harmonious jurisprudence also proposed and discussed include:

- a) Deliberate certification of subsequent decisions as raising general questions of public importance for purposes of giving the Supreme Court an opportunity to finally streamline the law.
- b) Empaneling of larger benches of the court in subsequent appeals raising similar questions to give this court an opportunity to streamline the law.
- c) Backroom conversations between judges, their law clerks/researchers on the state of the law, whether the law serves its intended purpose, whether there is need for growth, to govern evolution of coherent jurisprudence moving forward.

**\*The Court of Appeal acknowledges and appreciates Mr. Elisha Ongoya - Advocate of the High Court of Kenya and Senior Lecturer in the Department of Public Law, Kabarak University Law School.**

# SENTENCING POST THE SUPREME COURT JUDGEMENT IN THE MURUATETU CASE

It is generally agreed that crime prevention is the task of the State in any modern democracy. It is also the role of the democratically elected leaders to decide what conduct should be treated as criminal and the consequential penal sanctions. And it is the role of the Judiciary through courts to try offenders and mete out appropriate and proportionate sentence for each offence. It is a desire of every citizen to live in a safe and secure environment where they can go about their business without worrying about their safety. Thus crime prevention is recommended as one of the means of enhancing quality of life of all citizens as it can effectively reduce the long term costs associated with criminal justice system. Crime impacts negatively on social, economic and even political development of a country.

If one is a victim of crime, they suffer financial loss of the items stolen, or damages in the process thereof. They may have to nurse injuries inflicted and some may be debilitating, incur hospital bills and even lost time and opportunity attending police stations and court to give evidence. When a person is killed, the loss is irreparable. When a person is raped especially a child, the physical, emotional and psychological trauma suffered will be lifelong. The suffering notwithstanding, it is accompanied by the many trips one has to make to report the matter to the police, follow up with investigations, recording statements, if there are injuries follow up with police and doctors to complete medical records. This is not to mention the many times a victim will be required to attend court for hearing of the case as a witness to give evidence. That whole economic cost, inconvenience, physical and physiological trauma that is borne by a victim is a matter of concern not only to those charged with ensuring an effective criminal justice system but cuts across the whole society. Crime burdens the victims, health sector, police, judicial services and leads to absenteeism.

That said, the question of whether sentencing is a judicial or legislative function is an argument that has been at the core of criminal justice for a long time here in Kenya. This is in relation to offences where the law provides for mandatory sentences. The offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code, and attempted robbery with violence contrary to section 297 (2) of the Penal Code

carry a mandatory death sentence and the minimum mandatory sentences provided under the Sexual Offences Act, to name what is commonly a daily fare in the courts. **Article 50 (6)** of the Constitution, gave a window of opportunity to persons who were charged and convicted with a criminal offence(s) to petition the High Court if new and compelling evidence was available.

As the High Court was grappling with what constitutes ‘**new and compelling evidence**’, a case filed in the Supreme court is what kicked the hornet’s nest that gave rise to an avalanche of applications before all the courts. This is in the case of; **Francis Karioko Muruatetu v Republic & 3 Others**, Petition No 15 & 16 of 2015 (consolidated). In that judgement which was delivered

on 14th December, 2017, the Supreme Court held that although the death penalty per se is not unconstitutional, however its mandatory nature as the only sentence took away the discretion of a Judge in determining an appropriate sentence and declared the mandatory nature of the death penalty unconstitutional. This was the key holding;

“Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, **this decision does not outlaw the death penalty**, which is still applicable as a discretionary maximum punishment”.

In arriving at the above conclusion, the Court was persuaded that taking the totality of the provisions of Sections 216 and 329 of the Criminal Procedure Code, mitigation was an essential prerequisite of a fair trial process that is guaranteed under Article 50 (2) of the Constitution. Section 216 provides:

“The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

Section 329 of the Criminal Procedure Code provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed”.

Having found that trial Judges had a role in applying the mitigation offered by an accused person to the circumstances of the matter and to hand in a proportionate sentence, the Court proceeded to give sentencing guidelines to be considered along the sentencing guidelines in the policy guidelines as follows;-

“It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. **For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein.** In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

Orders..

- a) **The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.**
- b) **This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.**
- c) **The Attorney General, the Director of Public Prosecutions and and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment**

**to give a progress report to this Court on the same.**

- d) **We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment”.**

The above judgment was hailed as a great milestone in the promotion and protection of human rights as the people of Kenya decidedly pronounced themselves in the Referendum and the attendant promulgation of the Constitution of Kenya 2010 by providing in the Bill of Rights “**access to justice**” and “**right to a fair hearing**” which are non derogable rights. The Attorney General, the Director of Public Prosecutions and other stakeholders were directed to develop a framework to deal with sentence re- hearings within 12 months. As of now, it is almost three years and no framework for sentencing re-hearing has been set up. Meanwhile persons who were convicted and they had been sentenced under the minimum mandatory sentences, including robbery with violence and sexual offences, have jammed the courts seeking sentence re-hearing. There is no system in place to deal with this incredible challenge of sentences for the various kinds of offences and the degrees of aggravated violence which can be graduated to various categories.

Sentencing in Kenya has always been problematic, and to address the concerns regarding public misconceptions some levelled fairly and others not, the Judiciary working through a Judicial Taskforce on sentencing launched a policy Guidelines in January, 2016. In its report, it was noted there were disparities in the length of imprisonment of offenders committing same offences in more or less similar circumstances. It was indicated that there is lack of uniformity and certainty in the sentences imposed or likely to be imposed. The Taskforce found this lack of certainty contributed to the negative perception against the Judiciary and lends credence to claims of corruption and unprofessionalism. This uncertainty was also identified as a key hindrance to prosecutors and accused persons negotiating plea agreements.

The “**one size fit all**” nature of the mandatory sentences is the problem because we all recognize that not all murders are committed the same way, with the same aggression or violence and aggravating circumstances. Also, all robberies with violence are not the same. There are degrees in variation as some of them are mere muggings or theft but because the perpetrators are armed with something that pass a description of a dangerous weapon, or they are more than one, once found guilty, the sentence is one, notwithstanding that they only stole items of negligible value and they did not injure the victim. Also as heinous as sexual offences are, there are some offences that so gruesome; so grotesque and committed by pedophiles against children as young as a few months. Others are divided by a thin line of the age difference where the victim is under age and the perpetrator is a few years older but the victim lacks capacity to consent and in some cases no violence is involved like the legendary Romeo and Juliet.

The fixed sentences that deny a trial court the opportunity to evaluate evidence of mitigation, coupled with the inherent problems of ‘**one size fits all**’ brings out the reality of the opposite that ‘**not everyone fits the mode**’. This is true even in the clothing industry where there is a one free size, it is common knowledge that there are petite and extra-large who may never fit in the one size. This is the dilemma that faced the Court of Appeal, in other cases other than murder cases and the learned justices found the reasoning in the **Muruatetu case** could not only apply to murder cases but other offences with minimum mandatory sentences including those under the Sexual Offences Act.

Therefore, the Court of Appeal in dealing with sentences post **Muruatetu case has applied the** principles set out across board. For example, in cases of robbery with violence, the trend that cut across the majority of cases that have successfully been re-sentenced show that there was a glaring injustice because most of the robberies were not accompanied by aggravating circumstances to warrant a death sentence. The Court has therefore applied the sentencing principles liberally by holding that sentencing is the same, be it in a murder case or any other and by parity of reasoning, any provision of the law that shackles and interferes with the Magistrates’ and Judges’ discretion to factor in evidence of mitigation before sentencing, was an impediment to a fair trial and access to justice that are ordained in the Constitution.

Accordingly, the same principles have been applied to the mandatory minimum sentences provided under the **Sexual Offences Act**. This Court in **Jared Koita**

**Injiri vs. Republic [2019] eKLR**, found the appellant who was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, was not subjected to a fair trial and the sentence was considered to be unconstitutional given that the trial magistrate was not able to exercise discretion after considering mitigation to determine a proportionate sentence. The Court of Appeal set aside the mandatory life sentence and substituted it with 30 years.

Although these principles have been applied liberally, the Court has been very cautious in sexual offences, stating categorically that the courts should never lose sight of the objectives of sentencing and the intentions of Legislature in enacting the minimum sentences under the Sexual Offences Act which were made out of good intentions of protecting the society from sexual predators. This was well stated in the case of **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act. In applying the Muratetu decision, in an offence of defilement, it was emphasized that the courts should always be conscious that the society takes sexual offences very seriously. That, that in exercising discretion, the courts should bear in mind the responsibility to protecting the society and more so not to undermine the good intentions of the Legislature which was to rid the society of sexual predators. This is how the Judges expressed;

“Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

The problem that has dogged the courts is lack of guidelines, as set out in

the Muratetu case, which calls for revision of the Sentencing guidelines to guide the courts on the range of sentences to apply in the event that there are mitigating circumstances that render a mandatory sentence unjust. We have not seen any guidelines almost 3 years down the line and no one knows when they will be issued. Meanwhile, lack of guidelines has not barred persons who were sentenced before the **Muruatetu** case from accessing the courts seeking re-sentencing. They have flocked the courts in droves including some applicants who were sentenced and their sentences were confirmed by the High Court and the Court of Appeal. A glimpse of some of the sentences that were revised also show a worrying trend as there is no rhythm or rhyme in the way these applications are made nor the sentences. Some are before the trial court, and others in the High Court. The variance in sentences given are equally incoherent as they range from commutation to the period served, probation and reduction of sentences to some number of years while others have maintained the maximum death and life sentences.

Recently during the month of September, 2020 the Court of Appeal allowed 120 applicants who were mainly on death roll or facing life or other maximum sentences to withdraw their appeals. These applicants indicated that they wished to withdraw the appeals in the Court of Appeal so as to pursue re-sentencing. In total since the **Muratetu case**, statistics show more 500 appeals have been withdrawn. I believe even a higher number of appeals have been withdrawn from the High Court. What has concerned the Court and other stakeholders in the criminal justice system are

the disparities in re-sentencing due to lack of guidelines. It will be remembered this issue was discussed at the Judges 2019 Annual Colloquium and arising from the heated debate, it was clear the sentencing principles in **Muruatetu case** will continue to guide the courts. The other issue that emerged was a legitimate concern due to a spike in criminal cases especially defilement cases that there is a likelihood that courts especially the magistrates' courts may revert to the old practice where persons convicted with offences of defilement and rape were getting off with a mere sentence of community service or few years or what judges called a 'slap on the wrist'.

## **WHAT IS THE WAY FORWARD?**

Having interacted with the issue of sentencing as a Judge and also as Presiding Judge, Criminal Division of the Court, I am convinced since sentencing is a judicial function, the Judiciary should revise the sentencing guidelines to factor in the new jurisprudence. The revised guidelines will factor in the various degrees of offences that an accused person has been convicted of. If it is murder, guidelines will be given on sentencing while considering the various categories within the 1st 2nd or 3rd degree. The same with robbery with violence and also sexual offences Act. I would propose the 1st degree category is where the offence is seriously aggravated to attract the mandatory sentence. If the circumstances are not so aggravated, the sentence can be stepped down but the Judge or Magistrate should never miss to mention the mandatory sentence and give reasons for handing a different sentence.

On re-sentencing, where a convicted person wishes to opt for re-sentencing and had lodged an appeal say in the High Court or in the Court of Appeal, my humble recommendation is that the appeal should be withdrawn so that there is no abuse of process and there is orderliness and a coordinated approach within the justice system. We have had cases in the Court of Appeal where some appellants filed an appeal, the appeal was fixed for hearing, only to be told on the day of the hearing that the appellant was released from prison upon re-sentencing by the trial court. This obviously raised some red flags of how the trial court ignored the decision of the High Court and proceeded to set it aside and substitute with its own decision. An application to withdraw an appeal is provided under Rule 68 (1) of the Court of Appeal Rules, it should be filed and served upon the DPP. The application for re-sentencing should be made to the court that issued the order of sentence being served by the applicant. In other words, a person whose conviction is confirmed by the High Court cannot by pass it and go back to the trial court as if the High Court was never involved.

My plea is for an urgent revision of the sentencing guidelines as the Judiciary being the wearer of the shoe knows where it hurts and cannot wait for the Executive indefinitely.

**By The Hon. Lady Justice Martha Koome, JA**



**14**

**Court Of Appeal Annual  
Caseload Statistics Report  
2018/2019 & 2019/2020**



# COURT OF APPEAL ANNUAL CASELOAD STATISTICS REPORT 2018/2019 & 2019/2020

Case backlog clearance remains the Court of Appeal's top priority. The Court has endeavoured to hear and determine appeals despite operating at half (15 Judges) its full complement of Judges. With effect from January 13, 2020, the Court recalled to Nairobi all the judges in Mombasa and Kisumu due to lack of enough judges. During the 2019/2020 Financial Year the Court had accumulated **7,598** pending cases (**Table 1.0**). It is instructive to note that during the period between 2012 and 2015, when the Court had twenty-five (25) Judges, the overall pending cases were

greatly reduced. In FY 2012/13, **4,329** cases were pending while at the end of FY 2014/15, the pending cases had dropped to **2699** (**Table 1.6**). The overall Case Clearance Rate (CCR) for the entire Court at that time was at 90%.

The appointment of the eleven (11) nominated candidates as Judges of Appeal will go a long way in ensuring the Court achieves its goal of clearing case backlog and operate in real-time.

## 2019/2020 FINANCIAL YEAR

**Table 1.0 : Pending Cases for COA Stations by type, FY 2019/20**

Court Name	Criminal Appeal	Criminal Application	All Criminal Cases	Civil Appeal	Civil Applications	All Civil Cases	All Cases
Kisumu	1.211	71	<b>1.282</b>	694	245	<b>939</b>	<b>2.221</b>
Malindi	1	101	<b>102</b>	122	345	<b>467</b>	<b>569</b>
Nairobi	67	80	<b>147</b>	1.819	661	<b>2.480</b>	<b>2.627</b>
Nyeri	533	5	<b>538</b>	905	738	<b>1.643</b>	<b>2.181</b>
<b>All Courts</b>	<b>1.812</b>	<b>257</b>	<b>2.069</b>	<b>3.540</b>	<b>1.989</b>	<b>5.529</b>	<b>7.598</b>

**Table 1.1: Filed Cases in COA Stations by type, FY 2019/20**

Court Name	Criminal Appeal	Criminal Application	All Criminal Cases	Civil Appeal	Civil Application	All Civil Cases	All cases
Kisumu	337	19	356	298	195	493	849
Malindi	10	0	10	106	120	226	236
Nairobi	24	2	26	574	335	909	935
Nyeri	161	4	165	268	167	435	600
<b>All Courts</b>	<b>532</b>	<b>25</b>	<b>557</b>	<b>1.246</b>	<b>817</b>	<b>2.063</b>	<b>2.620</b>

**Table 1.2 : Resolved Cases in COA Stations by type, FY 2019/20**

Court Name	Criminal Appeal	Criminal Application	All Criminal Cases	Civil Appeal	Civil Applications	All Civil Cases	All Cases
Kisumu	178	13	191	99	78	177	368
Malindi	21	0	21	67	13	80	101
Nairobi	88	6	94	332	121	453	547
Nyeri	23	0	23	8	27	35	58
<b>All Courts</b>	<b>310</b>	<b>19</b>	<b>329</b>	<b>506</b>	<b>239</b>	<b>745</b>	<b>1.074</b>

## 2018/2019 FINANCIAL YEAR

**Table 1.3: Filed cases in COA stations by type, FY 2018/19**

Court Name	Criminal Appeal	Criminal Application	All Criminal Cases	Civil Appeal	Civil Application	All Civil Cases	All cases
Kisumu	293	67	<b>360</b>	163	113	<b>276</b>	<b>636</b>
Malindi	26	0	<b>26</b>	156	109	<b>265</b>	<b>291</b>
Nairobi	33	3	<b>36</b>	367	183	<b>550</b>	<b>586</b>
Nyeri	144	4	<b>148</b>	293	219	<b>512</b>	<b>660</b>
<b>All Courts</b>	<b>496</b>	<b>74</b>	<b>570</b>	<b>979</b>	<b>624</b>	<b>1,603</b>	<b>2,173</b>

**Table: 1.4 Resolved Cases in COA stations by type, FY 2018/19**

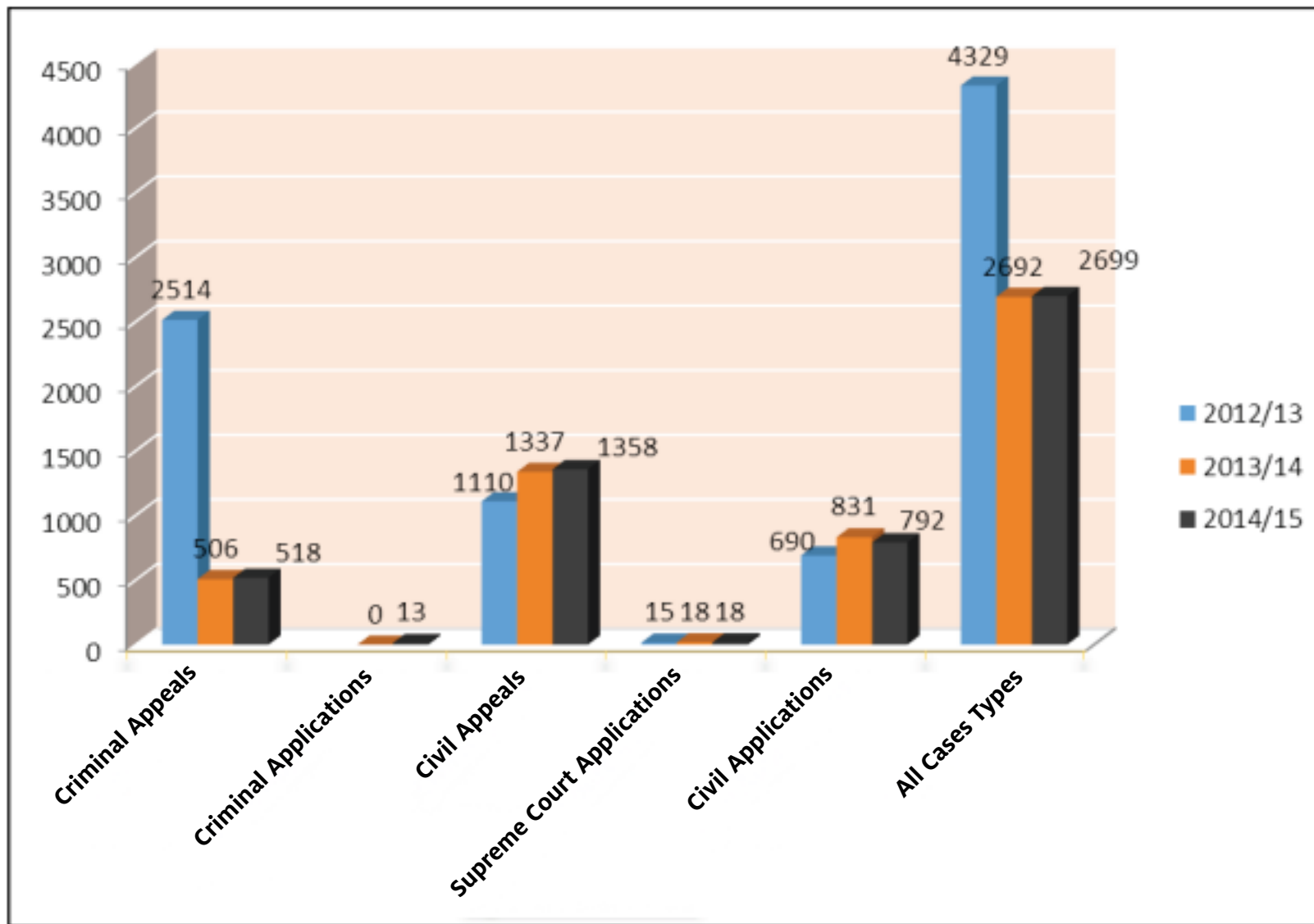
Court Name	Criminal Appeal	Criminal Application	All Criminal Cases	Civil Appeal	Civil Application	All Civil Cases	All Cases
Kisumu	101	7	<b>108</b>	61	43	<b>104</b>	<b>212</b>
Malindi	40	0	<b>40</b>	94	82	<b>176</b>	<b>216</b>
Nairobi	129	7	<b>136</b>	324	105	<b>429</b>	<b>565</b>
Nyeri	50	12	<b>62</b>	50	54	<b>104</b>	<b>166</b>
<b>All Courts</b>	<b>320</b>	<b>26</b>	<b>346</b>	<b>529</b>	<b>284</b>	<b>813</b>	<b>1,159</b>

**Table 1.5: Trend of pending cases for COA stations by type, FY 2018/19**

	Criminal Appeal	Criminal Application	All Criminal Cases	Civil Appeal	Civil Application	All Civil Cases	Total Pending
Kisumu	1,052	65	<b>1,117</b>	495	128	<b>623</b>	<b>1,740</b>
Malindi	10	101	<b>111</b>	83	238	<b>321</b>	<b>432</b>
Nairobi	101	80	<b>181</b>	1,473	354	<b>1,827</b>	<b>2,008</b>
Nyeri	395	1	<b>396</b>	645	598	<b>1,243</b>	<b>1,639</b>
<b>All Courts</b>	<b>1,558</b>	<b>247</b>	<b>1,805</b>	<b>2,696</b>	<b>1,318</b>	<b>4,014</b>	<b>5,819</b>



Trend of pending cases by type, Court of Appeal (2012 to 2015)





•—————15—————•

**Nominated Candidates for Appointment as  
Court of Appeal Judges**



## CANDIDATES NOMINATED FOR APPOINTMENT AS COURT OF APPEAL JUDGES

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The Legal Framework governing the appointment of Judges in Kenya is provided for in the Constitution and in the Judicial Service Act, 2011. Under the Constitution, the Judicial Service Commission (JSC) is mandated in Article 172(1)(a) to recommend to the president persons for appointment as Judges. The JSC nominated the following candidates for appointment as Court of Appeal Judges in July 2019.



**Hon. Mr. Justice  
Tuiyott Francis**



**Hon. Lady Justice  
Omondi Hellen Amollo**



**Hon. Lady Justice  
Nyamweya  
Pauline Nyaboke**



**Hon. Mr. Justice  
Korir Weldon Kipyegon**



**Hon. Mr. Justice  
Msagha Amraphael  
Mbogholi**



**Hon. Mr. Justice  
Muchelule  
Aggrey Otsyula**



**Dr. Kibaya Imaana  
Laibuta**



**Hon. Lady Justice  
Lesiit Jessie Wanjiku**



**The Hon. Lady Justice  
Ngugi Grace Mumbi**



**The Hon. Justice George  
Vincent Odunga**



**The Hon. Mr. Justice Joel  
Mwaura Ngugi**



16

Court Of Appeal Buildings



# THE PROPOSED COURT OF APPEAL BUILDING AT NAIROBI



The Court of Appeal headquarters are currently housed in the Supreme Court Building at Nairobi which has resulted in inadequate space for the Court in terms of Court rooms, Judges' chambers, registries, board rooms and administrative offices for the Court. The Judiciary has planned to construct a Court of Appeal Complex at Milimani Nairobi that will exclusively house the Court of Appeal to enable it run its day to day duties efficiently. The President of the Court of Appeal has appointed a Court of Appeal Sub-Committee on Building, chaired by the Honourable Lady Justice Wanjiru Karanja to

ensure that in the designing of the complex, the building is in line with its user requirements.

The building will comprise of adequate chambers, court rooms, registries and archives, advocates rooms and litigants waiting areas and shall be equipped with modern facilities such as digital audio-visual recording, media centre, banking hall, lactating rooms as well as facilities that allow accessibility by persons with disabilities, among others.

# THE REFURBISHED OLD MOMBASA COURT BUILDING



The refurbished Old Mombasa Court building is one of Kenya's richest in historical significance, with some artifacts dating back to the occupation of the Kenya coast by the Portuguese, centuries ago. It was built in 1902 and launched by the then Commissioner of British East Africa Protectorate, Sir Charles Eliot. The structure is part of other buildings constructed by the British in the early 20th Century, as the new administrative Centre of Mombasa.

The Court of Appeal moved from Malindi to Mombasa and the first bench of the Hon. Mr. Justice Daniel Musinga, Hon. Mr. Justice Gatembu Kairu and the Hon. Lady Justice Agnes Murgor sat in November 2019.



**The Hon. Chief Justice & President of the Supreme Court opening the refurbished Court of Appeal at the Mombasa Old Court.**



**Court of Appeal Judges celebrating with traditional dancers during the opening of the refurbished Court of Appeal at the Mombasa Old Court.**



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Events and Activities 2019-2020





**His Excellency the President of the Republic of Kenya and Commander In Chief of Kenya Defence Forces, H.E. Uhuru Kenyatta, paid a courtesy call on the President of the Court of Appeal at His Lordship's Chambers at the Supreme Court Building, Nairobi during the day of the launch of the State of the Judiciary and Administration of Justice Annual Report (SOJAR) 2017/2018 held on Thursday 28th February 2019,**



**The Hon. Chief Justice & President of the Supreme Court presents a Certificate for the award of the Best Court of Appeal Registry to the then head of the Civil Division, Hon. Mr. Justice (Rtd) Philip Waki during the launch of the 2017/2018 The Performance Management Measurement and Understanding Evaluation Report**



**The Hon. Chief Justice & President of the Supreme Court presents a Certificate for the award of the Best Court of Appeal Station to the Hon. Mr. Justice Daniel Musinga, the Presiding Judge, Court of Appeal at Malindi during the launch of the 2019/2020 Performance Management Measurement and Understanding Evaluation Report**



**A visit to Mama Ngina Childrens Home, Kisumu by the Judges of Appeal.  
~July 2019**



**Dr. (Hon Causa) Lady Justice Roselyne Nambuye while attending a conference in Rome had the rare occasion to meet His Holiness Pope Francis.**

**“The true measure of any society can be found  
in how it treats its most vulnerable members”,  
Mahatma Gandhi.**



**Judges of the Court of Appeal socializing away from work.**



**Judges of the Court of Appeal planting trees as part of environmental conservation and beautification**



# 18

**Digitization of the Court of Appeal  
(E-Filing and Virtual hearings)**



# DIGITIZATION OF THE COURT OF APPEAL (E-FILING AND VIRTUAL HEARINGS)

Kenya confirmed its first case of the Coronavirus disease (COVID-19) in Nairobi on 12th March, 2020. The following day 13th March, 2020 the Government suspended all public gatherings and events. Subsequently, on March 15, 2020, the National

Council on the Administration of Justice (NCAJ) held a meeting that resolved to scale down operations across the entire justice sector to reduce interaction and act as a way of minimizing the spread of COVID-19. This led to reduced court activities and a raft of measures being undertaken by other stakeholders in the Justice sector in compliance with the guidelines issued by the Covid-19 National Emergency Response Committee.

These guidelines led to the adoption of Court of Appeal virtual hearing of cases and has now become the hallmark of the court's sessions.

The Court initially invited advocates and litigants to file urgent applications online to mitigate the effects of the pandemic where more than 100 urgent applications and appeals were filed within the first four months. Upon the parties' compliance to laid down guidelines, the President of the Court of Appeal empaneled a bench or benches to hear the cases virtually.

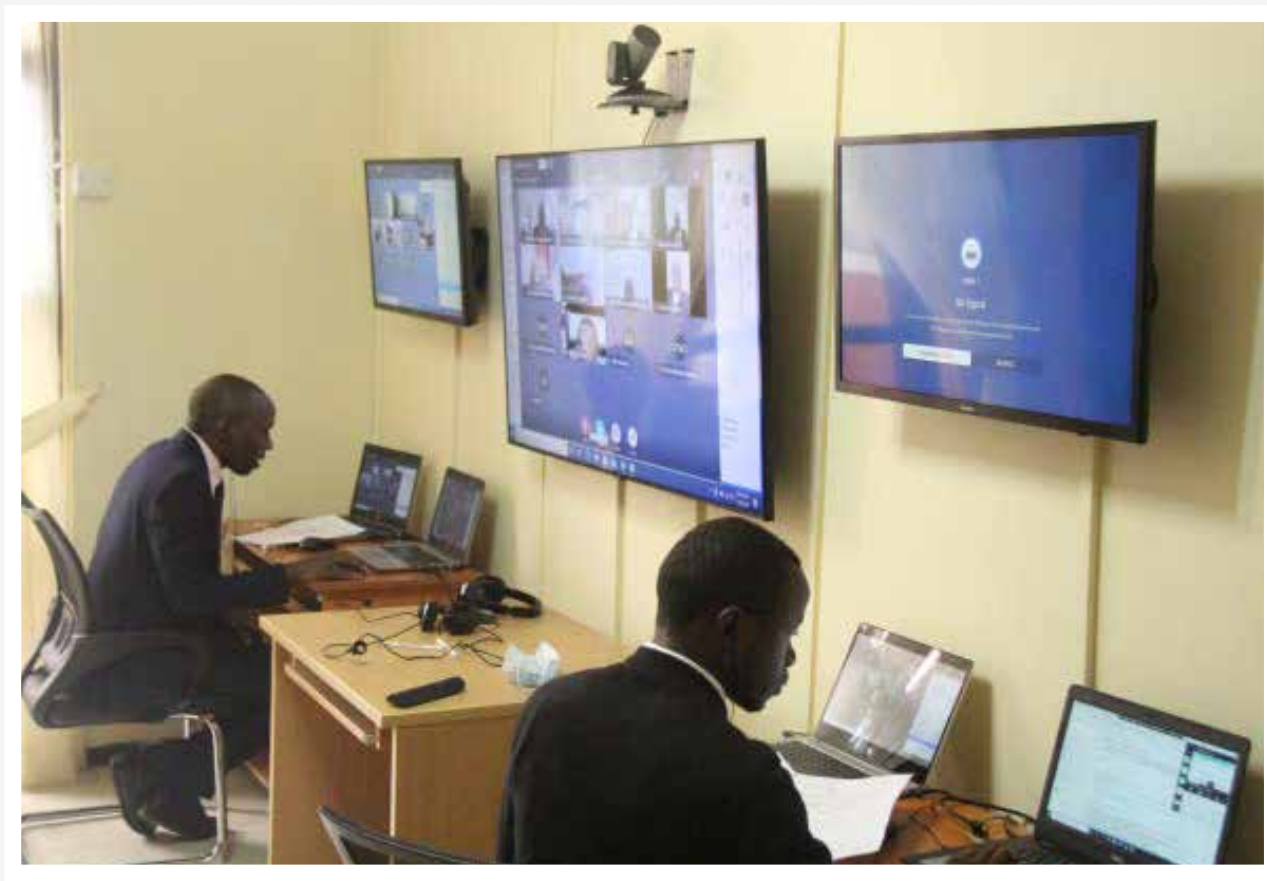
Between 16th March 2020 and 29th July 2020 a total of 659 appeals and applications had been filed in the Court. Upon commencement of virtual hearings on 27th April 2020 up to 4th September 2020 the Court had heard and concluded 529 cases and delivered 483 judgments and rulings. Judgments and rulings continue to be delivered via email, in civil cases, and through video link in criminal cases to appellants held at various prisons in Kenya without requiring any physical appearance in Court. The wheels of justice are moving despite the current situation.



***The Hon. Judges proceeded to conference on the video link and wrote rulings which were relayed to the parties online, through the already provided email addresses.***

The implementation of the virtual hearings in the Court of Appeal was achieved through the immense dedication of the following staff who worked through the Covid-19 pandemic to operationalize this;

- Court of Appeal at Nairobi – Hon. Moses K. Serem, Hon. Lorraine Ogombe, Samuel Kimunya, Anthony Mwangi, Jacktone Mwendwa, Catherine Majale, Harriet Gacheri and Janet Kadenyi
- Court of Appeal at Nyeri – Hon. Harrison Adika and Alex Njeru
- Court of Appeal at Kisumu – Hon. Joan Wambilyanga, Quincy Shisia and Raymond Okumu
- Court of Appeal at Eldoret – Derrick Omollo
- Court of Appeal at Mombasa - Josphat Ting’ a



***Court of Appeal staff supporting virtual court sessions***

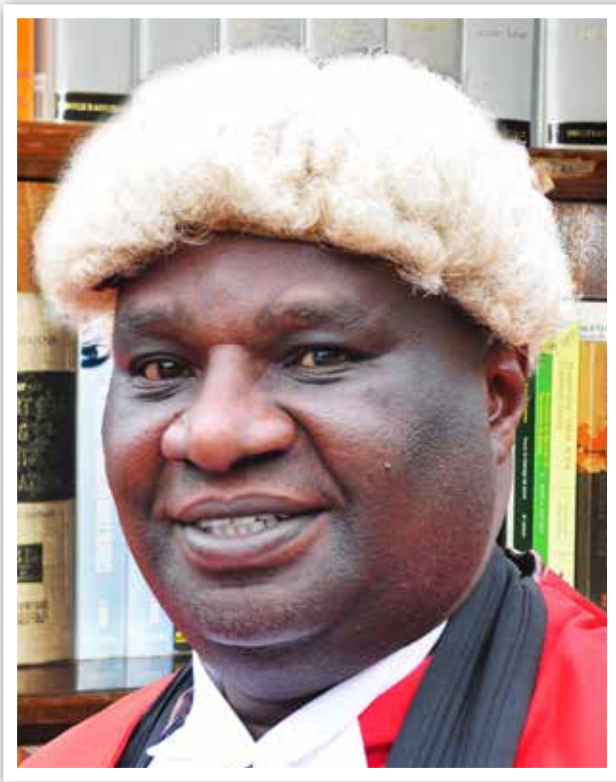


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**TRANSITIONING OF A CELEBRATED JUDGE**



# THE LATE HON. MR JUSTICE (PROF) OTIENO ODEK



The Court of Appeal lost an illustrious, brilliant and distinguished Judge; one of the greatest minds of our time. A Judge who was driven by a deep passion for justice and enduring love for judicial work.

The Late Justice (Prof) Odek was admitted to the Roll of Advocates in 1988 and appointed as a Judge of Court of Appeal in 2012. He served as a Judge of the Court of Appeal and as the immediate former Director of the Judiciary Training Institute (JTI).

He held a Bachelor of Laws Degree (LLB) from the University of Nairobi, a Masters of Law Degree (LLM) from Yale University, U.S.A and a Doctoral Degree in Juridical Science (SJD) from the University of Toronto in Ontario, Canada.

He had a vast working experience having previously served as the Dean of the School of Law, University of Nairobi, Managing Director-Kenya Industrial Property Institute and the chief legal consultant and practitioner in his law firm Otieno-Odek & Co. Advocates.

Internationally, the Late Justice (Prof) Odek served as the Chairman of the Paris Union of the World Intellectual Property Organization (WIPO) in Geneva, the Chairman of Madrid Union of WIPO, the Chair of the Berne Executive Committee of WIPO and the President of the Main Committee II of WIPO Singapore Diplomatic Conference on The Law of Trademarks which concluded the Singapore Treaty on Trademarks.

The Late Justice (Prof) Odek had undergone various professional trainings and courses and won several academic awards as well as recognitions and honors both nationally and internationally. In 2007, he was conferred Elder of the Burning Spear Award (EBS) by the President of the Republic of Kenya in recognition of distinguished service to the country.

He gave lectures in several national, regional and international conferences on different aspects of the law and published several articles and journals that are internationally renowned and revered.

The Late Hon. Mr. Justice (Prof) Otieno-Odek rested on the 16th of December 2019.

# TRIBUTES BY THE JUDGES OF THE COURT OF APPEAL



**1. Hon. Mr. Justice William Ouko, President Court of Appeal**

“A fine legal scholar with admirable clarity of mind, an icon and astute jurist with unparalleled passion for his job. The nation has lost immensely and the Court of Appeal and the Judiciary are poorer without him”.

**2. Dr. (Hon. Causa) Lady Justice Roselyn Nambuye Judge Of Appeal**

My late brother Judge as I knew him, was a stickler with time as there is no way the late Judge would come to court late or unprepared. He was always thorough in his research, reasoning and neat in the preparation of drafts. Each point was tackled separately followed by supportive facts, law and principles. A respecter of the law and the attendant procedures all of which were at his fingertips. On the Bench, he practiced utmost courtesy to all court users. This art of professionalism earned our late brother great admiration from us as his colleagues. A man of exceptional brilliance and unmatched industry, collegial, a team player, ever happy, always ready to take on other colleagues’ work load to ease their burden. A rising star destined for greater heights within the Judiciary now suddenly dimmed by the cruel hand of death. Will miss the many dances we engaged in together after completion of a tough exercise. When my turn comes, I hope to meet my brother at St. Peter’s Chambers clad in a white garment washed in the precious blood of Jesus with a green reed in his hand to face off with me as to who between us should be St. Peter’s preferred choice for the position of Chief Clerk directing who to go to the left and who to the right. May perpetual light ever shine upon you till we meet.

Fare thee well BROTHER. WE SHALL SURELY MISS YOU.

**3. Hon. Lady Justice Wanjiru Karanja, Judge of Appeal**

“Judge has left an indelible mark in our jurisprudence. Outside Court he was humorous and would not shy away from enjoying a good laugh. RIP Prof.”

**4. Hon. Lady Justice Martha K. Koome, Judge of Appeal**

My tribute to our dear departed Brother.

“A talented team worker and a strategic thinker. Prof operated from the future and worked backwards in planning his work. In Nyeri we had case backlog and data crisis, he personally went to the court registry and taught the staff how to maintain accurate records and prepared a strategy that led us to clear the backlog of cases in Nyeri in 2013-2015. He was a philanthropist, while in session in Meru he accompanied me to my primary school where he inspired many children and offered some financial support. I have received many messages of condolences from the County of Meru. Rest in eternal peace my Brother. May God guide and protect your dear wife, children and your entire family”.

**5. Hon. Lady Justice Hannah Okwengu, Judge of Appeal**

“You challenged and inspired me through your brilliance, speed and excellent dispensation of justice. Your short but distinguished and impactful career in the Judiciary is a testament to your acumen and appreciation of legal issues. Though absent in body your voice remains loud and clear in the jurisprudence that you have contributed to. Fare thee well my brother Judge”.

**6. Hon. Mr. Justice Mohamed A. Warsame, Judge of Appeal**

“Justice Odek touched my heart with his intellectual sophistication yet remained humble and caring. A man who was always positive in life. He dealt with my faults as gently as his own. Above all he expanded the horizon of our jurisprudence. Justice Odek left footprints in our hearts”.

**7. Hon. Mr. Justice Milton S.A. Makhandia, Judge of Appeal**

“Justice Odek was scholarly, hardworking and industrious. Through his steadfast nature, he understood the meaning of the word “team”. The Court of Appeal is poorer without him. He was a selfless mentor to many, ‘what we once enjoyed, we can never lose’. Go well Judge”



# TRIBUTES BY THE JUDGES OF THE COURT OF APPEAL



**8. Hon. Mr. Justice Daniel K. Musinga, Judge of Appeal**

“In our Judiciary there has never been a Judge as efficient and industrious as the Hon. Justice (Prof) Odek, and I doubt whether there will ever be. Our departed brother epitomized the best combination of a scholar and a Judge, yet remained humble to the end”.

**9. Hon. Mr. Justice Patrick Kiage, Judge of Appeal**

“It is only fitting that the Hon. Justice James Odek, a man of many firsts, should have been the first Ph.D. and the first Professor to grace the bench of the Court of Appeal. He taught many in his day, including myself, who was privileged to be appointed with him straight from bar to bench some seven years ago.

I enjoyed sharing the bench at Kisumu with him for a memorable six months, alas his last, He was witty, and engaging with a knack for the unexpected- as counsel would testify. But the most unexpected of all was his sudden departure from this life to which he had dedicated so much of intellectual rigour, and a passion for excellence and results. He was a warm, humble, sociable, amiable and generous soul despite his towering achievements. His work ethic was unmatched and will long be the reference point as an exemplar of industry and expedition.

Most of all, he was a good man.

I will sorely miss him, and shall we all. May God’s abiding grace strengthen us all and teach us to make our each day count.”

**10. Hon. Mr. Justice S. Gatembu Kairu, Judge of Appeal**

“There are many lessons to learn from the life of Justice Odek. Two stand out for me: One, is not to put off to tomorrow what I can do today. Procrastination was alien to Justice Odek. Two, is to remove clutter, in every sense of the word, from one’s life”.

**11. Hon. Mr. Justice Kathurima M’Inoti, Judge of Appeal /Director Judiciary Training Institute**

“You leave behind a solid and secure legacy in the administration of justice and academia, built in a short time, without breaking a sweat. Your name will forever be etched in glittering letters in our psyche. Fare thee well, gentle giant.”

**12. Hon. Lady Justice Agnes K. Murgor, Judge of Appeal**

“My brother Judge Odek’s industry and creativity has left an indelible mark on our Court. He was social and mindful of all he came into contact with. He will be greatly missed”.

**13. Hon. Lady Justice Fatuma Sichale, Judge of Appeal**

“An illustrious Judge and jurist who has left behind a huge body of judgments that will adorn our law reports. He was an epitome of efficiency. RIP”.

**14. Hon. Lady Justice Jamila Mohammed, Judge of Appeal**

A Tribute to a Scholar, Wise Jurist and Colleague:

“I have known Judge Odek for decades, having been classmates in the Faculty of Law. He was an intellectual giant from a young age. As a colleague on the Bench, Judge Odek was a scholar and a wise jurist. He developed rich jurisprudence, exemplified collegiality and was extremely hardworking and efficient. He was kind and supportive and often went beyond the call of duty. May his great legacy live on and May He Rest in Peace.

**15. Hon. Mr. Justice Sankale Ole Kantai, Judge of Appeal**

Tribute to my Brother Prof. Odek:

“I refuse to think about you in the past tense! A man, a friend, a scholar, able lawyer, a good Judge. Always ahead of time-we must all learn from and emulate you. My family joins yours in this terrible loss. May you rest in Heavenly Bliss.”





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## SUPREME COURT BUILDING

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*Developed with support of the Directorate of Public Affairs and Communication (DPAC)*