

Pro Bono Practices and Opportunities in Kenya

Excerpt from: A Survey of Pro Bono Practices and Opportunities in Selected Jurisdictions

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Kenya faces significant challenges in implementing a legal aid system. The Kenyan government only provides legal aid to individuals accused of capital crimes, which leaves many Kenyans without legal representation. The majority of legal aid services are provided by non-governmental organizations (“NGOs”), which are located mainly in large cities and lack the resources and capacity to represent the large number of Kenyans in need of legal aid. Without representation, most Kenyans are unable to maneuver the legal system because of complex legal procedures, lack of education regarding the court system, financial impediments, or other time and resource constraints.

I. *Legal Services and the Legal Profession in Kenya*

Kenya’s legal system is a combination of statutory law, Kenyan and English common law, tribal law, and Islamic law.¹ Kenya has both formal courts and customary village courts. The formal courts consist of the Court of Appeal, the High Court, and several lower magistrate’s courts. In addition to the formal courts, which are mainly at the regional and national levels, Kenya has several informal customary courts at the local level. The customary courts are presided over by local chiefs and a council of elders, and have jurisdiction over limited types of criminal cases, but often exceed their powers.²

A. Legal Aid

Governmental Legal Aid: The Kenyan government only provides free legal services to individuals accused of capital crimes.³ Kenya’s Constitution guarantees the rights of a person who has been charged with a criminal offense, but limits legal aid to individuals charged with capital crimes.⁴ As a result, individuals accused of noncapital crimes, or who want to bring a civil claim, must represent themselves, hire a lawyer, or hope to receive the help of a local NGO. A new draft constitution, which would have enlarged the government’s role in providing legal aid, was recently rejected.⁵

In noncapital cases, government-funded legal aid is virtually nonexistent because poorer segments of the population are unable to afford legal representation. In addition to the lack of aid, the government withholds certain government-held evidence from defense lawyers prior to trial.⁶ The Government may declare that certain evidence is protected by the State Security Secrets Law, and local officials often classify certain documents to protect corrupt government officials.

¹ Crime and Society: A Comparative Criminology Tour of the World, *available at*: <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/kenya.html>.

² Crime and Society: A Comparative Criminology Tour of the World, *available at*: <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/kenya.html>.

³ U.S. Department of State, Country Reports on Human Rights Practices, Kenya (2006) at 7, *available at*: <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>.

⁴ Kenyan Const. ss. 77(2)(d); 77(14); *see also* Ombati, Omwanza, “Access to Legal Information: Still A Pipe Dream for Kenya?” University of Technology, Sydney Law Review (2004), *available at*: <http://www.austlii.edu.au/au/journals/UTSLRev/2004/7.html>.

⁵ Draft Bill, the Constitution of the Republic of Kenya ss. 205(1)(f); 210(4)(s. 205(1)(f) emphasizes that the function of the Judicial Service Commission is to advise the Government on how to improve access to legal aid, and s. 210(4) would have ensured that the Public Defender provided legal representation to people unable to afford it.

⁶ U.S. Department of State, Country Reports on Human Rights Practices, Kenya (2006), at 7, *available at*: <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>.

Role of NGOs: NGOs, particularly the Federation of Women Lawyers, provide legal services. However, many NGOs have resource and funding constraints and mainly operate in major cities, leaving many rural citizens with no legal recourse.

Self-representation: Many Kenyans are unable to represent themselves because of a lack of resources or a lack of understanding of the court system and its complex court procedures. High court filing and case fees prevent most citizens from access to the legal system. In order to argue a case in front of a judge, a person must pay \$28 (2,040 shillings), which is too expensive for most citizens.⁷ Many poorer individuals remain unaware of their rights, lack knowledge of the court system, or experience frustrations in accessing it. Many people have to attend court 20 to 30 times before their complaint is heard, and lack the time and resources travel to court.⁸ On average, civil matters take between two and six years, with frequent delays in court proceedings.⁹ Delays are often caused by complex court procedures or technicalities, thus preventing individuals from adequately representing themselves in court.¹⁰

Kenyan Lawyers and Courts: Many Kenyans also lack access to lawyers and courts. Kenya has a shortage of lawyers, with only 5,000 lawyers for 33 million people.¹¹ Courts also remain inaccessible to many rural villagers. The majority of Kenya's 71 districts only have one magistrate in the entire district, and the northeastern province does not have a visiting judge.¹²

II. *Pro Bono Opportunities in Kenya*

The majority of legal aid in Kenya is provided by NGOs, such as the Federation of Women Lawyers.¹³ Many of these NGOs, however, lack the resources and capacity to provide legal aid on a widespread scale.¹⁴ To help alleviate this resource concern, the Open Society Initiative for East Africa recently donated more than 70 million Kenya shillings (approximately \$1 million) to provide legal aid to HIV patients.

⁷ U.S. Department of State, Country Reports on Human Rights Practices, Kenya (2006) at 7, *available at*: <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm>.

⁸ Legal Programme Developed For Kenya's HIV patients (April 19, 2007), *available at*: <http://www.soschildrensvillages.org.uk/charity-news/legal-programme-developed-for-kenya-s-hiv-patients.htm>; *see also* Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, at 8, *available at*: www.soros.org/initiatives/osiea/articles_publications/publications/kenya_20070416/kenya_20070416.pdf.

⁹ Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, at 8, *available at*: www.soros.org/initiatives/osiea/articles_publications/publications/kenya_20070416/kenya_20070416.pdf.

¹⁰ Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, at 8, *available at*: www.soros.org/initiatives/osiea/articles_publications/publications/kenya_20070416/kenya_20070416.pdf.

¹¹ Legal Programme Developed For Kenya's HIV patients (April 19, 2007), *available at*: <http://www.soschildrensvillages.org.uk/charity-news/legal-programme-developed-for-kenya-s-hiv-patients.htm>.

¹² Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, *available at*: www.soros.org/initiatives/osiea/articles_publications/publications/kenya_20070416/kenya_20070416.pdf.

¹³ Federation of Women Lawyers Kenya website, <http://www.fidakenya.org>.

¹⁴ Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, at 8, *available at*: www.soros.org/initiatives/osiea/articles_publications/publications/kenya_20070416/kenya_20070416.pdf.

The Open Society Initiative stresses the importance of establishing a legal aid system in Kenya. Through its initiative, the Open Society Initiative has emphasized that the establishment of a legal aid system requires several steps, including education, governmental and legal capacity-building, and supporting partnerships between local legal services and national campaigns against governmental abuses.¹⁵

In addition to NGOs and international organizations, local law school clinics also provide an avenue to help provide legal aid to those who need it. Kenyan universities have established legal aid clinics that allow students to advocate in court. Fourth year clinic students at Moi University, for example, plead cases to the High Court with the permission of the Attorney General.¹⁶

III. Conclusion

Kenya currently lacks a substantial legal aid system. The Kenyan government only provides legal aid attorneys to individuals accused of capital crimes. NGOs attempt to fill the need for legal representation, but often face resource and capacity constraints. Individuals without adequate legal representation often face resource constraints, a lack of knowledge of the system, and extensive delays in the process. To help provide legal aid, international organizations, such as the Open Society Initiative, have donated funds. However, without a greater governmental commitment for legal aid or more widespread legal aid initiatives, many Kenyans will continue to lack access to justice.

¹⁵ Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services, Open Society Initiative for East Africa, at 8, *available at*: www.soros.org/initiatives/osiea/articles_publications/publications/kenya_20070416/kenya_20070416.pdf.

¹⁶ Combining Learning and Legal Aid: CLE in Africa, Open Society Justice Initiative, *available at*: <http://www.justiceinitiative.org/activities/lcd/cle/durban2003>.