

Court Records Policy Framework, Judicial Transformation in Support Criminal Justice System (CJS) in Kenyan Law Courts: Case of Kakamega County

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Abstract: *Most people seeking information from courts records in Kenya face various difficulties. These problems have continued to undermine judicial transformation particularly the role of CJS in settling disputes between the state and individuals and among individuals themselves. However, the paucity of studies in Kenya to establish how much court records can contribute to transformation of judiciary in enhancing their access and use has contributed to the state of affairs. The focus of this study therefore is on court records role in judicial transformation in support of criminal justice system in Kenya. The objective of the study to establish current policy factors determining accessibility and utilization of court records by members CJS. The study was expected to be of benefit to magistrate courts in Kenya and policy makers. The study established that members of CJS required access and utilization of court records on a daily basis for them to perform their legal and constitutional mandates however law courts in Kenya lacked relevant policy and records management infrastructure to facilitate this. As a way forward the study recommended that law courts should come up with appropriate policy and records management infrastructures to enhance accessibility and utilization of court records by members of CJS*

Keywords: Records, Courts, Transformation, Policy

1. The Problem

Criminal justice system is complex as it takes several stages and involves many stakeholders commonly referred to members of CJS (Republic of Kenya strategic plan, 2009). These stages include: arrest, interview, court, remand, bail, charge, plea, trial, sentence, appeal, and correction supervision. Whereas records created during the process are to assist members carry out their legal and constitutional mandate, various policy related factors continue to hinder their effective accessibility and utilisation by members of CJS (Ebbe, 1999) This leads to poor quality of records, inadequate records classification, weak records sharing mechanisms, and missing and lost files (Musembi 1999). This limitation affects performance of CJS members in hearing stage, execution or when litigants request for proceedings leading to delays in the disposal of matters. The Government of Kenya (GOK) and the International community have undertaken several initiatives to try and address this particular problem such as development of judiciary transformation framework (2012-16)

Members of CJS have continued to underperform or failed to effectively perform their constitutional and legal functions (Mnjama, 2007). The purpose of this study was therefore to investigate specifically those policy factors that determine accessibility and utilisation of court records by members of the CJS in rural courts in Kenya.

2. Purpose

The purpose of this study was to investigate specifically those policy factors that determine accessibility and

utilisation of court records by members of the CJS in order to possible intervention measures.

Objective of the Study

Establish the policy factors determining accessibility and utilisation of court records by members of CJS in Kenya.

3. Research Design

The study used descriptive survey approach. This research design enabled the researcher to construct questions that solicited the desired information and identified the individuals that were surveyed. It also assisted the researcher to identify the means by which the survey research was conducted, and in summarising the data in a way that provided the desired descriptive information. Descriptive design was also used to collect information about people's attitudes, opinions, habits or social issues on factors determining accessibility and utilization of court records. According to Neuman (2000) cited by Ngulube (2003), descriptive survey research is widely used by social science researchers. Purposive sampling was used to select a sample size of 60 respondents from 1 registrar, 1 chief magistrate ; 6 prosecutors, 10 probation officers ; 40 lawyers ; 40 prison officers, 40 judicial officers to participated in the study. Questionnaire was the main data collection instrument supplemented by, interview and observation. A pilot study was conducted at Bungoma law courts to test the reliability and validity of the research instruments for the study. Analysis of both quantitative and qualitative data was analyzed and presented in pie charts, and table

4. Literature Review

Policy on accessibility and utilisation of court records

A policy on accessibility and utilisation of court records by members of CJS is crucial to any successful criminal justice system. A policy enhances accessibility and utilisation of an organisation's records through addressing key records management elements. These elements include: identification, custody, security, memory, and responsibility (Harris, 1997 cited by Kemoni, 2007).

Gilbert (2002), using rebuttal theory of Laughlin (1991), argued that the absence of a policy on accessibility and utilisation of records in a department resulted to two forms of records access barriers. These barriers include: Malicious and administrative non compliance to access laws. Malicious non compliance involves a combination of actions, always intentional and sometimes illegal designed to undermine requests for access to records. Administrative non compliance, on the other hand, undermines accessibility and utilisation of records through inadequate resource allocation to records access work and through deficient record keeping.

The sources and purposes of a policy on accessibility and utilisation of court records by users vary from country to country and from one court to the other. In, U.S.A, such policies are derived from various sources such as: access and records keeping laws, judiciary strategic plans, vision and mission of records management units (US Department of Justice, 2006). In Africa policies on accessibility and utilisation are derived from public archives act, freedom of information, copyright, the right to privacy, the protection of the state and private interests (Ngulube, 2003).

Policies can either be de facto or de jure. De facto means policies are unwritten rules that guide organisations in their day to day activities. On the other hand de jure policies are written laws, rules and regulations. There is no consensus as to whether information agency are better governed by either defecto or written policies. To some scholars policy for governing an information agency need to be flexible, dynamic and responsive to changing circumstances. Other scholars arguing in favour of written policies suggest that written policies can be used as tools for staff training and evaluation (Chapman, 1990 cited by Ngulube, 2003).

Essentially a policy that governs any information agency is a planning document. In U.S.A a model policy on public accessibility and utilisation of court records has been developed (CCJ/COSCA Guidelines, 2002). The purpose of CCJ/COSCA Guidelines is to provide a comprehensive framework on public access to both paper and electronic court records. At present time, many federal and state courts in USA such as in Massachusetts and California follow the CCJ/COSCA Guidelines (Silverman, 2004). The scope of the policy include: purpose, use, and access to information, exemptions, appeal procedures, and monitoring compliance with the access policies (Barata and Cain, 2000).

The main features of a policy on accessibility and consultation of court record by members of the public have been properly identified in the model policies above. However the features of a policy on accessibility and

utilisation of court records by members of CJS in both developed and developing countries has not been clearly identified. Studies conducted in England identified some gaps in the provision of information to and between all criminal justice agencies due to lack of access policy (UK, Home Inspectorate study report of court Administration, 2000).

Tafor and Ngulube (2006), cited by Kemoni (2007), suggested that there was need to encourage research in records management and use in the East and South Africa Branch of the International Council on Archives (ESARBICA) region. Previous studies in Kenya and Ghana have highlighted the need for organisations to enact records management policies (Mnjama, 1994; Wamukoya, 1996; Akussah, 1996 cited by Kemoni, 2007).

Studies on rules and regulations of access to public records have been conducted in both developed and developing countries such as England, Japan, South Africa, and Uganda. The studies scarcely debate laws on access and use of court records by members of CJS. The studies have however shown that having access rules and regulations enabled the creation of favourable environment for access to records (Mendel, 2008). Mnjama (2005), argued that the impact of information rules and regulation in Africa has not yet been assessed.

Access to court records in Kenya is governed by different sets of laws, government circulars, and Judiciary orders issued from time to time. The laws include: the Constitution of Kenya of 2010, the Public Archives and Documentation Service Act cap 19, 1967, Official Secrets act and the Judicature Act cap 8 1967. Section 35 of the 2010 Kenyan constitution gives citizens access rights to information held by the state.

The Judiciary has issued order No C.J.69 of 28th May, 1997 on missing court files to some members of CJS. The Judicature act cap 8 1967 laws of Kenya has formed the basis of the order. The recipients of the order included: Judges of appeal, the Registrar of the high court and the Law Society of Kenya. The order sought to provide guidelines aimed at controlling the loss of court files in some records management units such as registry and typing pools (World Bank and IRMT, 2004). The Kenya Government through the office the president has issued two circulars. These circulars are: OP.39/2A of 14th November, 1999 and OP.40/1/1A of 6th June 2003 on cases of missing and lost files and documents in the public service and improvement of records management for good governance (Kuindwa, 1999). The existence of a law protecting access to some records limits effective operation of access laws (Hepplewhite, 2003). This research therefore attempted to establish whether the above rules and policies on accessibility and utilization of court records by members of CJS were applicable in Kakamega law courts

5. Data Analysis, Interpretation, and Presentation

Introduction

The previous chapter explained how the study was conducted, that is what was done in order to collect data to answer the research question. The data presented in this chapter was obtained from questionnaires, interview and direct observation. Analysis and presentation of data in this chapter has been arranged into sections and subsections according to the objectives of the study. The findings are presented as verbal descriptions presentations and analysis are in form of tables, pie charts, and graphs.

Demographic response

The first 8 items of the questionnaire for members of CJS and for judicial staff sought background information on their knowledge, skills and competencies on operations of accessibility and utilisation of court records by members of CJS at Kakamega law courts. The information that was sought included: name of institution, gender, highest academic qualification, professional qualifications, duties and responsibilities and experience in current responsibilities in years. Questionnaires were sent to 61 members of CJS and judicial staff to solicit views on factors determining accessibility and utilisation of court records by members of CJS.

Out of 53 respondents 15 (29%) were lawyers, 15 (28%) prison officers, and 15 (28%) judicial staff. The other respondents were 5 (9%) and 3 (5%) probation officers and court prosecutors respectively. The overall response rate for questionnaires received and analysed was 53 out of 61 which translates to 86%. Of those returned (30) 57% were male while (23) 43% were female as indicated in pie chart 1 below.

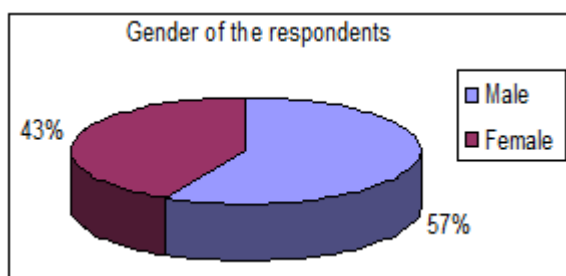


Figure 2: Pie chart 1: Response as per gender

Source: Field data

The response rate was considered adequate. According to Babbie and Mouton (1998) cited by Ngoepe (2008) survey research that has a response rate of 50% is considered adequate for analysis, while 60% is good and 70% very good. Interviews were conducted with the chief magistrate of Kakamega law court. Direct observation was done at Kakamega law courts and a pilot study at Bungoma law courts. This provided opportunity to triangulate the data in order to strengthen the research findings and conclusion.

In terms of academic qualifications for respondents ranged from O level certificate to post graduate degree. 23 (43%)

were O level certificate holders and were the majority. Out of 5 (10%) who had diplomas only 1 (2%) respondent had a diploma in archives and records management. There was no respondent with ICT qualifications. There were 14 (27%) respondents with degrees while 4 (8%) with post graduate diplomas. There were 5 (10%) respondents with A level certificates while 1(2%) had other qualifications such as certificate in forensic and criminal studies. The study showed that Kakamega law court did not have a professional trained staff to handle ICTs. Although members of CJS were professionally trained in their area of operation only majority of judicial staff were not professionally trained in access and use of court records.

In terms of age out of 38 respondents majority 12 (31%) were between 41-45 years while 30-35 years were 10 (26%). The other respondents were 36-40 years 7 (18%), other 4 (11%), 46-50 years 4 (11%), and non-response 1(3%). The study revealed that majority of the members of the criminal justice system had wide experience with accessibility and utilization of court at Kakamega law courts. In terms of experience out of 15 respondents, 8 (58%) indicated that they had work experience in their current responsibilities for between 1 and 5 years while 3 (21%) indicated that they had experience of between 11 and 15 years. This showed that the judiciary transferred its staff from one workstation to another in within a short span of time.

In terms of work assigned to judicial staff, out 15 respondents 11 (31%) were assigned duties of registration and processing of cases at every stage till they are disposed off while 10 (27%) for keeping of court diaries and allocation of hearing and mention dates and organization of files. Only 8 (19%) judicial staff were assigned duties directly related to accessibility and utilization of court records of assisting members of CJS with information about cases and dates of case. The study indicated that at Kakamega law courts there was no job specialization as judicial staff could be called upon to perform several unrelated duties at the same time Policies:

6. Rules and Regulations

There are no fixed international standards governing accessibility and utilisation of records held in public offices. However, a number of countries including Kenya have enshrined some guidelines on access and use of government held records in their constitution. There are general international principles against which a government body's access rules and regulations can be tested. Such principles include: access to information in a public body is a right of everyone, making requests for a records in a public body should be made simple, and public officials should assist requesters in making their requests.

On this section respondents were asked to indicate the primary source of authority for their organisation to access and utilise court records at Kakamega law courts. Out of 38 respondents, majority 24 (63%) indicated that their primary source of authority was the constitution, while 7 (18%) indicated that their primary source authority was a

legislation. The researcher observed that Kakamega law courts had a copy of judicature act cap 8 (1967) laws of Kenya which contains some rules and regulations on access and utilisation of court records by litigants. But during the interview with the resident magistrate it was revealed that 98% of the provisions in cap 8 dealt civil matters and that only 2% with accessibility and utilisation of court records. The study showed that there were several sources of authority for members of CJS to access and use court records. Lack of one clear primary source of authority means conditions of access and use of court records were complex since they were for different each type of court record.

7. Vision and Mission

Ideally a mission statement should contain three elements namely: purpose, business statement, and values. According to Meshanko (1996) cited by Ngulube (2003) the purpose statement clearly indicates what the organisation seeks to accomplish. Without vision and mission it is extremely hard to effectively execute an organisation's programmes. On this variable the study requested respondents to indicate whether Kakamega law courts had a mission and vision on accessibility and utilisation of court records by members of CJS. There was no clear understanding among respondents as to what a vision and mission is as shown by the varied responses in bar graph 1 below

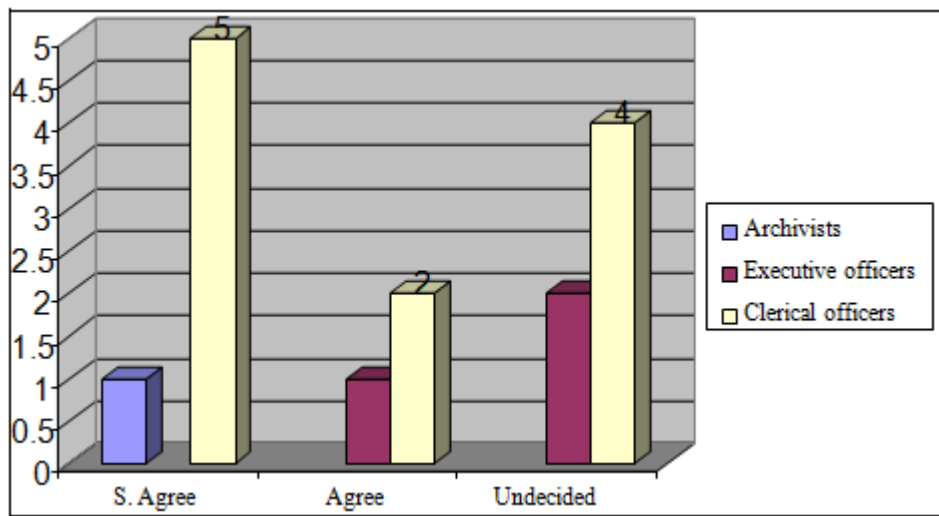


Figure 3: Judicial staff response on mission and vision

Source: Field data

Out of 15 respondents, 6 (40%) strongly agreed while 3 (20%) agreed that Kakamega law courts had a mission and vision on accessibility and utilisation of court records by members of CJS. On the other hand 6 (40%) respondents remained neutral. The researcher observed that Kakamega law courts did not have a mission and vision on accessibility and utilisation of court records by members of CJS. The high number of respondents who agreed that Kakamega law courts had a vision and mission resulted from a confusion of a mission and vision for the entire judiciary and for a vision

and mission on accessibility and utilisation of court records by members of CJC

Kakamega law court policy

Organisational policies are important because they set out goals to be achieved as well as provide guidelines for implementing them. On this variable the respondents were asked to indicate whether Kakamega law courts had a specific policy on accessibility and utilisation of court records by members of CJS. The responses are shown in bar graph 2 below.

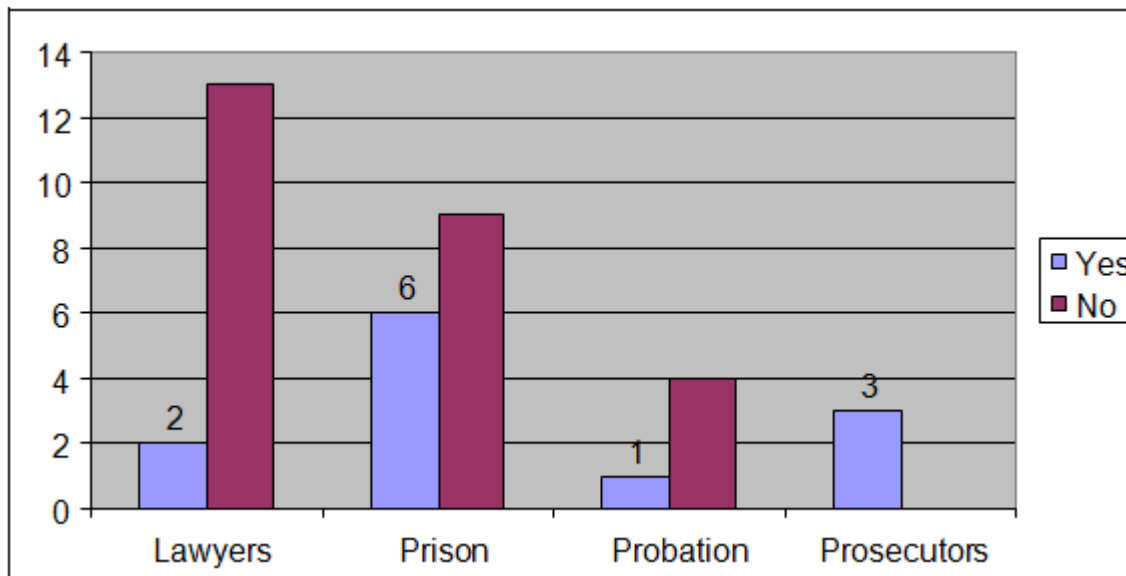


Figure 4: Respondents who either affirmed or denied that Kakamega law courts had a policy

Source: Field data

Out of 38 respondents 29 (76 %) indicated that Kakamega law courts did not have a policy on accessibility and utilization of court records by members of CJS while 9 (24%) indicated that it did. Those who affirmed that Kakamega law court had a policy could not however state the name of the policy. Observation by the researcher noted that Kakamega law courts lacked a comprehensive policy on the administration of court and on accessibility and utilization of court records by members of CJS in particular. Development and implementation of such policy will improve court registries and accessibility and utilization of court records. It will facilitate computerization of all court registries, lead to electronic recording and preservation of records and recruitment and deployment of professionally qualified staff to take charge of court registries and archives.

National policy on access and utilization of court records

A national policy on accessibility and utilization of court records by members of CJS provides a comprehensive framework on members of the public and of the CJS access and use to both paper and electronic court records. Moreover there is a body or officer who is responsible for auditing compliance to the policy. Also, such policy should have clear objectives and set standards (format, quality, content) to meet evidentiary and regulatory requirements throughout the life cycle of the court records. On this section respondents were asked to indicate whether Kakamega law

court had a national policy on accessibility and utilization of court records by members of CJS. The raw score responses on this variable are shown in table 3 below

Table 3: Raw score on judicial staff attitude on a national policy

| National Policy | Strongly Agree | Agree | Undecided | Disagree | Strongly Disagree |
|------------------------|----------------|-------|-----------|----------|-------------------|
| Clear objectives | 3 | 5 | 6 | | 1 |
| Set standards | 2 | 4 | 7 | 1 | 1 |
| Body or officer | | | 6 | 6 | 3 |
| Spell responsibilities | 2 | 10 | 3 | | |

Source: Field data

Using the likert scale or summated scales respondents were asked to indicate their attitude towards availability of certain features in the national policy in terms of five degrees of agreement and disagreement. Each point on the scale carried a score. Responses indicating the least favorable degree of agreement in relation to availability of an aspect in the national policy was assigned the least score (1) and the most favorable were given the highest score (5). The scale value for each level of response was assigned as: Strongly agree=5, agree=4, undecided =3, disagree=2 and strongly disagree =1. The raw score presented in table 3 was computed to yield a total score for attitude of respondent to each attribute as shown table 4 below.

Table 4: Judicial staff response on national policy

| National Policy on access | Strongly agreed | Agreed | Undecided | Disagreed | Strongly disagreed | Cumulative score |
|------------------------------|-----------------|--------|-----------|-----------|--------------------|------------------|
| | 5 | 4 | 3 | 2 | 1 | |
| Clear objectives | 15 | 20 | 18 | | 2 | 54 |
| Set standards | 10 | 16 | 21 | 2 | 1 | 50 |
| Body or officer for auditing | | | 18 | 12 | 3 | 33 |
| Spells responsibilities | 10 | 40 | 9 | | | 59 |

Source: Field data

The cumulative score for any attribute will fall between 15 and 75. If the score happens to be above 45 it shows there is an aspect of the national policy, which govern accessibility and utilization of court records. A score below 45

demonstrates the absence of an aspect in the national policy. A score of exactly 45 is a neutral attitude. The fact that Kakamega law courts did not have a body or officer who was responsible for auditing compliance to the policy had a

cumulative score of below 45, which was 37 (19%). This showed that Kakamega law courts had a national policy but lacked a body or officer responsible for ensuring compliance to the policy. Observation by the researcher revealed that the court did not have such national policy. This means that respondents confused general guidelines on court operations issued by the chief justice with a national policy on accessibility and utilization of court records. Such guidelines are derived from the constitutions of Kenya 2010 and the criminal and civil procedure act laws of Kenya

8. Recommendation for access Policies

Kakamega law courts as one of the court stations in Kenya should develop clear policies on accessibility and utilisation of court records by members of CJS and ensure that they are approved by the judicial rules and procedures committee in conjunction with the chief justice. Written access policies will remind the formulators and implementers the constraints they must all accept if accessibility and utilisation of court records by members of CJS must be achieved in the present and in the future. The aspects to be covered by such policies include: purpose, scope, objectives, definition of key terms, responsibilities for creating and maintaining records. Other aspects should include: setting standards (format, quality, and content) to meet evidentiary and regulatory requirements throughout the life cycle of the court record. There should be a body or officer responsible for auditing compliance to the policies. The policy should outline the obligations and responsibilities of the judicial staff to members of CJS, access fee and mode of payment, where to direct complaints, and the contact of various judicial officers and offices. The judiciary should prepare and distribute a copy of the policy to all court stations in Kenya. The policy should be availed in both superior and subordinate courts in both Kiswahili and English languages.

9. Recommendations Regulations

Given that members of CJS's relied on broad provisions of the constitution rather than a substantive legislation as the primary source of authority for accessibility and utilisation of court records, Kakamega law courts should develop rules and regulations on accessibility and utilisation of court records by members of CJS. The new rules and regulations should be in line with Freedom of Information, Data Protection acts and the Constitution of Kenya 2010. The court rules and regulation should comply with internationally recognised principles on accessibility and utilisation of public records in public bodies. The principles include: access to information is a right, access is the rule and secrecy is the exception, the right applies to all public bodies, making requests should be simple, speedy and free, officials have a duty to assist requesters, refusal must be justified, the public interest takes precedence over secrecy, everyone has the right to appeal an adverse decision, public bodies should proactively publish core information, and the right to information should be guaranteed by an independent body. Existing rules and regulations on accessibility and

utilisation of court records by members of CJS at Kakamega law courts should be harmonised with the new rules.

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