

**STRENGTHENING JUDICIAL  
REFORMS IN KENYA**

**PROGRESS ASSESSMENT FROM  
2000 TO 2003**

**VOLUME VIII**

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## **ACKNOWLEDGEMENT**

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**Philip Kichana**  
**Executive Director**

## **FOREWORD**

Since 2000, ICJ Kenya has conducted surveys on the Judiciary with the objective of gathering information that would enable effective public interest in and demand for judicial reform. Under this project, ICJ Kenya continued to conduct internal analysis of the Judiciary as well as content analysis of its reform proposals and their implementation vis-à-vis ICJ Kenya's and other stakeholders' demands. This is done by seeking public perceptions to interpret reform needs and leverage reform demand.

This eighth publication in '*Strengthening Judicial Reforms*' series of publications<sup>1</sup> assesses the progress that has been made on judicial reform as well as the judicial performance between 2000 and 2003. It also examines various administrative and institutional reforms that have been proposed and implemented in the Judiciary during the three year period. This includes in-house reform initiatives and those by other key stakeholders including the on-going constitutional review process; the implementation of those approved, and their impact on the administration of justice so far.

At the inception of this project, it had just been revealed by a Committee on the Administration of Justice led by Justice Kwach that the public had lost trust and confidence in Judiciary. Further, the report indicated that corruption was rampant in the Judiciary at all levels. All these factors were a clear testimony that the Judiciary was performing below par. The level of efficiency, effectiveness and corruption are some of the key indicators of a functioning or malfunctioning Judiciary. Whether there have been improvements or further deterioration in the Judiciary is what this report seeks to establish.

**Philip Kichana**  
**Executive Director**

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<sup>1</sup> - Strengthening Judicial Reforms, Volume I – Performance Indicators: Public Perceptions of the Kenya Judiciary, 2001  
- Strengthening Judicial Reforms in Kenya, Volume II: The Role of the Judiciary in a Patronage System, 2002  
- Strengthening Judicial Reforms in Kenya, Volume III : Public Perceptions and Proposals on the Judiciary in the new Constitution, 2002  
- Strengthening Judicial Reforms in Kenya, Volume IV : Public Perceptions of the Court Divisions, Children's Court and the Anti-Corruption Court, 2002  
- Strengthening Judicial Reforms in Kenya, Volume V : Public Perceptions of the Magistrate's Court, 2003  
- Strengthening Judicial Reforms in Kenya, Volume VI: Public Perceptions of the Administrative Tribunals in Kenya, 2003  
- Strengthening Judicial Reforms in Kenya, Volume VII : Public Perceptions of Chapter Nine of the Draft Constitution of Kenya

## **INTRODUCTION**

In this era of accountability and transparency, the Judiciary, like other arms of government is coming under increasing pressure to provide information that will enable the public to assess its effectiveness and use of public resources.

For along time, the Kenyan Judiciary was impenetrable and information on this important institution was difficult to come by, making its accountability to the public minimal if any at all. Save for the 1999 report by a Committee on the Administration of Justice popularly referred to as the Kwach Committee, there was lack of information in the public domain on the Judiciary that would facilitate objective assessment of its performance. ICJ Kenya identified this vacuum and sought to open up this institution by sourcing information from the judiciary itself and from the general public. This it did through joint activities with the Judiciary and also through surveys whose findings are widely disseminated with a view of demanding certain reforms that would guarantee efficiency, accountability, transparency and foster integrity in the Judiciary.

ICJ Kenya can proudly say that remarkable strides have been made towards the achievement of its objectives under this project in the last three years. ICJ Kenya has carved a niche for itself as a premier organization as far as judicial reform and other matters on the Judiciary are concerned. As a result of this, ICJ Kenya is the foremost external information and reflection resource base of the judicial arm of government and matters judicial.

Due to its advocacy efforts in conjunction with other organizations, the Judiciary has partially opened itself up to public scrutiny and criticisms but it must be acknowledged that much more remains to be done to fully open up the Judiciary and make it a truly independent arm of government where integrity and accountability to the public thrive.

In May 2002, ICJ Kenya facilitated the work of a panel of eminent judicial experts from the Commonwealth on behalf of the Constitution of Kenya Review Commission in collating and compiling a comprehensive report on the Judiciary and the administration of justice in Kenya as a whole. In addition to facilitating the fore-mentioned process, ICJ Kenya also submitted its own memorandum to the panel and the Constitution of Kenya Review Commission. It is gratifying to note that over 80% of its recommendations were incorporated in the draft constitution.

One of the key pledges that the ruling NARC made during the campaigns prior to the last elections was to undertake comprehensive judicial reforms, aimed at restoring public and investors' trust and confidence in this important institution which probably has been at its lowest ebb in the history of independent Kenya. Upon its election and creation of the Ministry of Justice and Constitutional Affairs, ICJ Kenya has continued to work closely with the ministry on judicial matters.

ICJ Kenya took lead in the agitation for the removal of the former Chief Justice Bernard Chunga. This was a vital step towards the desired clean-up. However, ICJ Kenya recognizes that Chunga's departure alone was not enough and has therefore remained steadfast in its call of having the entire Bench resign and re-apply for their positions under new, transparent criteria known to all. This stand has continued to receive strong backing from many quarters, and the latest report by a Committee that was led by Justice Aaron Ringera on judicial corruption which indicated that half of the judges are corrupt<sup>2</sup> gives further validity to this call. The latest revelations by the Ringera Committee leave no doubt in the minds of many that the clean-up in the Judiciary from within is almost impossible and therefore, the best way to deal with the matter and ensure that only men and women of integrity are appointed judges is to send the current Bench without exception, packing.

In spite of numerous pledges made by the government and the Judiciary, there still remains a lot of tangible judicial reform that must be undertaken if the Judiciary is to reclaim its rightful place as the guarantor of the rule of law and human rights. On its part, ICJ Kenya will continue to push for such an ideal Judiciary through the on-going constitutional review process, and in its current and future activities. However, ICJ Kenya recognizes that this is a feat that cannot be achieved single-handedly and therefore extends a hand to all players including the government, the Judiciary itself and other interested parties to join in the struggle. The slumping economy and social degradation can only be lifted by having a judicial system that guarantees fairness and justice in its work, hence creating an environment where investors and ordinary citizens feel secure.

Lastly, let it be known from the onset that the findings in this report are based on the survey that was carried out between August and September 2003. Therefore, the new developments that have taken place as from October 2003 may not be reflected in this report. Nonetheless, we have tried as much as we can to highlight and ventilate some of those new developments at least up to October 2003 at the time of publishing this report.

**Philip Kichana**  
**Executive Director.**

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<sup>2</sup> The original Integrity and Anti-Corruption report that was released indicated that 5 Court of Appeal Judges out of 12 (including the CJ) and 18 judges of the High Court out of the 44 were corrupt. However, upon the setting up of tribunals to investigate the judges, 6 Court of Appeal judges and 17 High Court judges were named. Further media reports (Daily Nation 15/10/03) stated that two more judges who were not on the original list were notified by the Chief Justice.

# SURVEY FINDINGS AND ANALYSIS

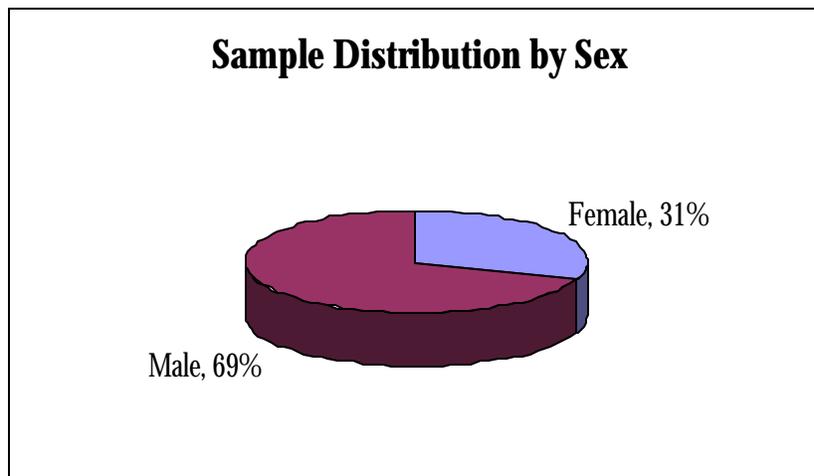
## I. GENERAL SAMPLE

### a) Sample Distribution by Sex

69% of the respondents were male compared to 31% female. This has been a consistent trend all through our surveys in the last three years. There are various reasons that contribute to this trend which include;-

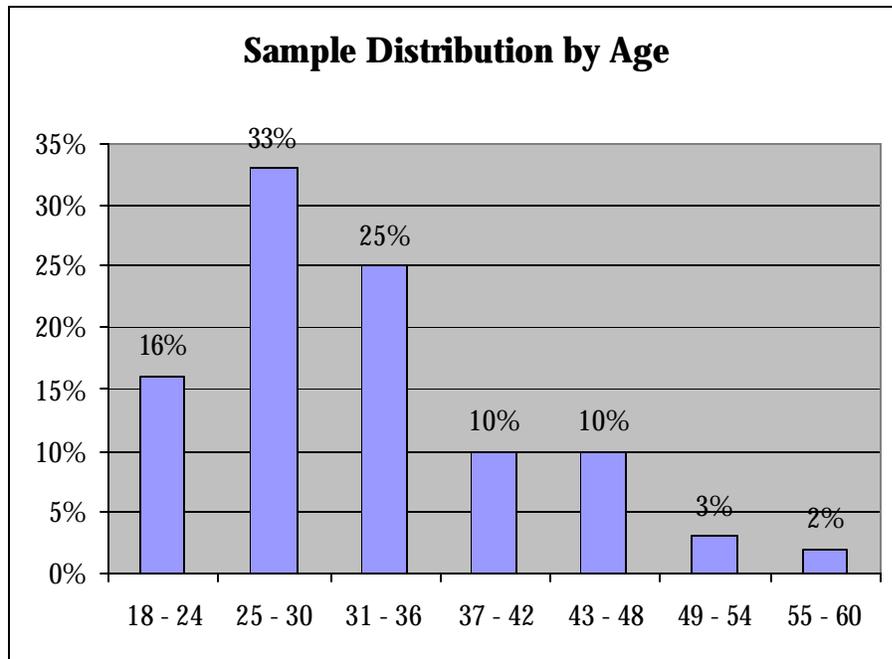
- Male have the resources to access formal courts and therefore form a bigger portion of consumers of justice.
- Most of the key stakeholders in judicial reform comprise of professionals and people from other sectors that are male dominated. For example, the legal profession which is a key component to judicial reform is male dominated, both on the Bar and the Bench.

This explains the high probability of interacting with males during our surveys as compared to females.



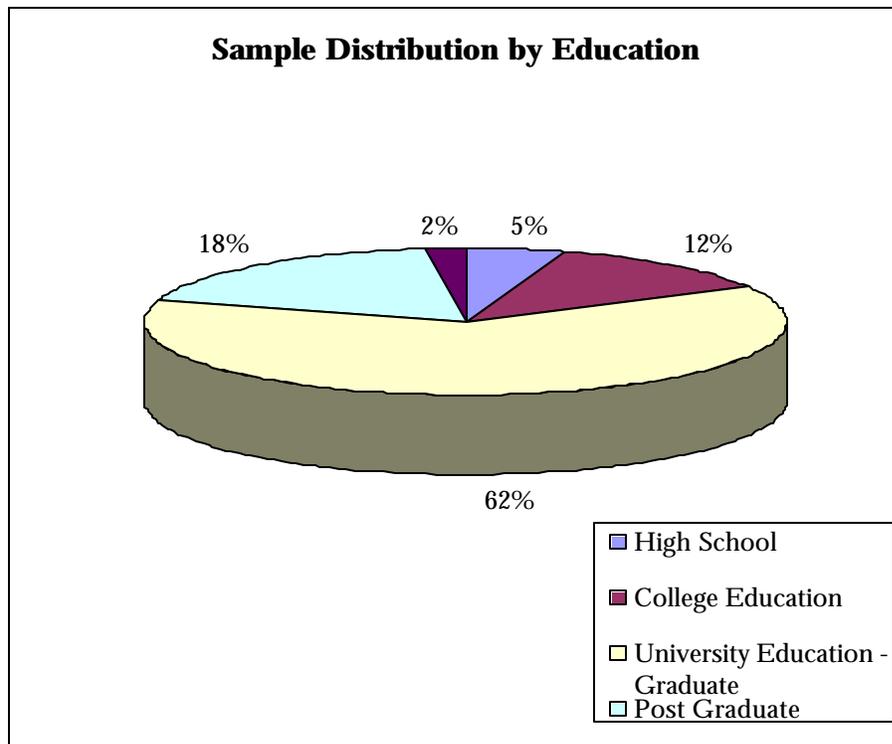
### b) Sample Distribution by Age

Majority of the respondents were between the ages of 25 and 36. Respondents below the age of 18 and those above the age of 60 accounted for less than 1% of the total sample. Again, this has been the trend throughout the survey since inception. The youth between the ages of 25 and 36 showed more enthusiasm to participate in the surveys than all the rest. In Kenya, the youth between the ages of 25 and 36, who are in legal practice are mostly associates in already established firms or have just opened their own firms and therefore are likely to be found along the court corridors attending to matters much more than the senior lawyers, who seldom make court appearances unless in 'crucial' matters.



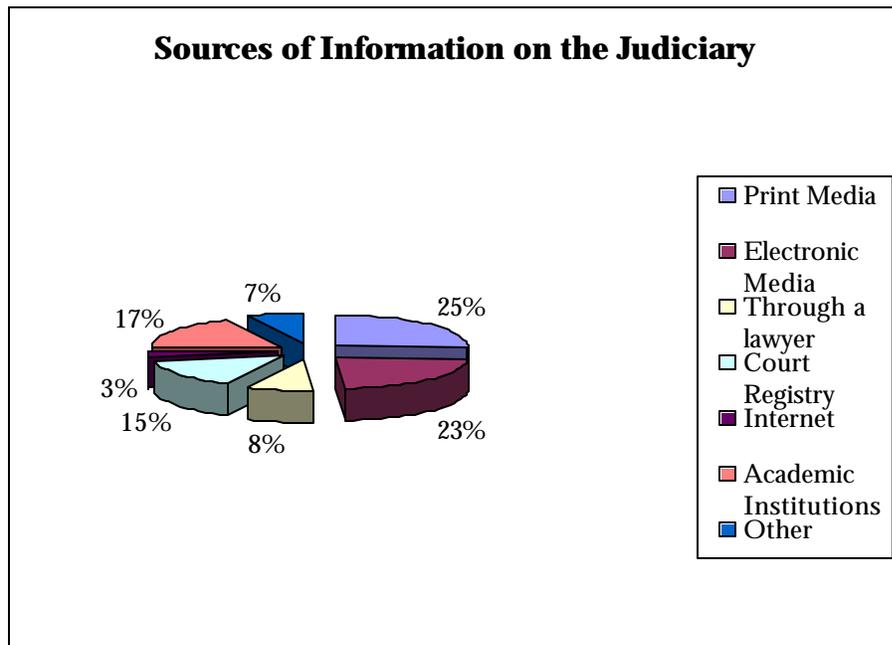
### c) Sample Distribution by Education

Majority of the total sample were University graduates. Out of the 82% who had attained degrees, 62% had attained at least the first degree, 18% had acquired a second degree and 2% had doctorate degrees. Primary school leavers and people with no formal education constituted less than 1% of the total sample. This disparity is attributed to the fact that ICJ Kenya's survey adopted a qualitative approach as opposed to quantitative, and therefore a specific group with specific interest and expertise in judicial reform was targeted.



#### d) Sources of Information

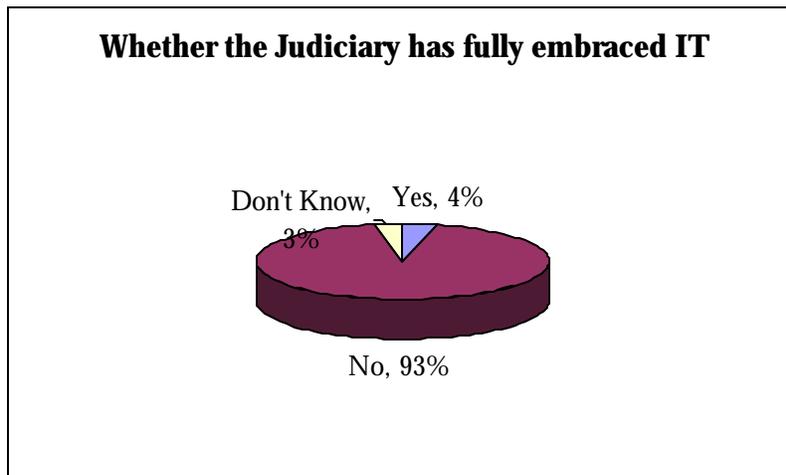
Throughout our surveys, the media has remained the most important source of information on the Judiciary. For instance, in recent past the media played an important role of informing the public on what was happening in the Judiciary since the tabling of the Ringera Committee. ICJ Kenya's efforts to get an authentic copy of this report from the Judiciary have been fruitless<sup>3</sup>. In this survey, print and electronic media accounted for 48% of the total sample. Unlike in the past, there was a slight improvement in the access to information from the court registries at least in regard to records of the cases. This trend could partly be attributed to the fact that the Judiciary has partially opened up to the public. However, the most certain reason for this improvement is that majority of the respondents were lawyers whose accessibility to the court registries is easier compared to the general public.



<sup>3</sup> Our numerous inquiries on the availability of this report from the Registrar's, Chief Court Administrator's and Public Relations Officer's offices have hit a snag. Therefore, we have had to rely on press reports. As a result, we shall not be held responsible for any misrepresentation that may arise from the report specifically on the Integrity and Anti-Corruption Committee's report.

### e) Information Technology

93% of the respondents stated that the Judiciary had not fully embraced the use of information technology. This has to a certain extent hampered judicial efficiency.

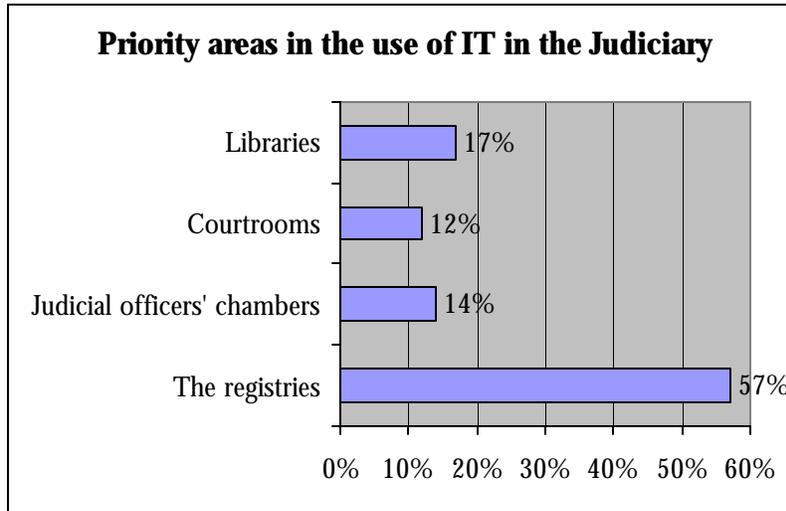


However, this does not necessarily mean that there is lack of facilities (computers) in the Judiciary, especially within the High Court Buildings. What there is, is under-utilization of the available resources. With the exception of judgments and proceedings being typed and printed there is no evidence of any other utilization of information technology. For instance, all the judges of the Court of Appeal were presented with computers in 2002. It is also the position that each High Court judge should have access to computers. Other judicial officers such as the Registrar of High Court, Chief Court Administrator, librarians and secretaries also use computers. However, the situation is different in virtually all the court stations outside Nairobi. .

The returns from the available computers can be maximized by;-

- Computerization of the registry, accounts office, courts and chambers.
- Networking the judges and magistrates' computers
- Providing internet linkages especially to legal web sites
- Encouraging actual usage in court and chamber.
- Launching of an interactive web site, among others.

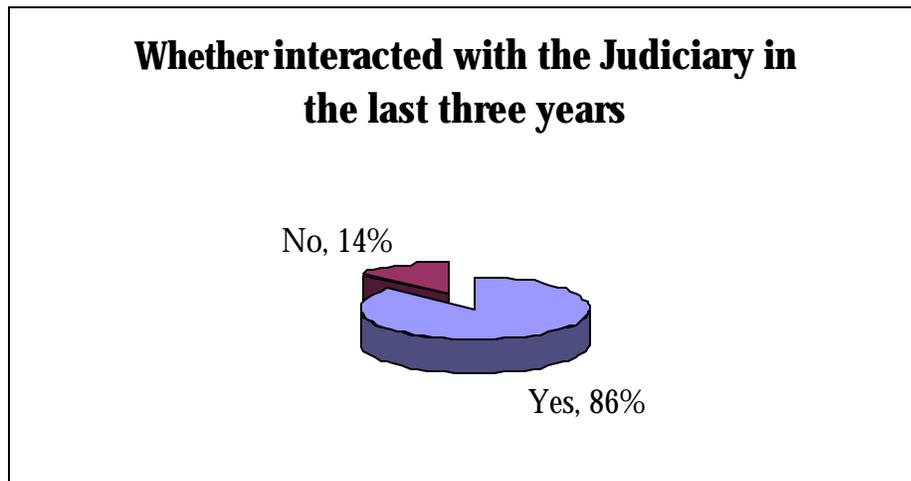
In the order of priority, majority of the respondents stated that the Registries should be given the first priority. This will increase efficiency and accountability in this department and the entire Judiciary as a whole. Loss of files and money in this department can be curbed with the effective use of information technology.



## II. SPECIFIC FINDINGS

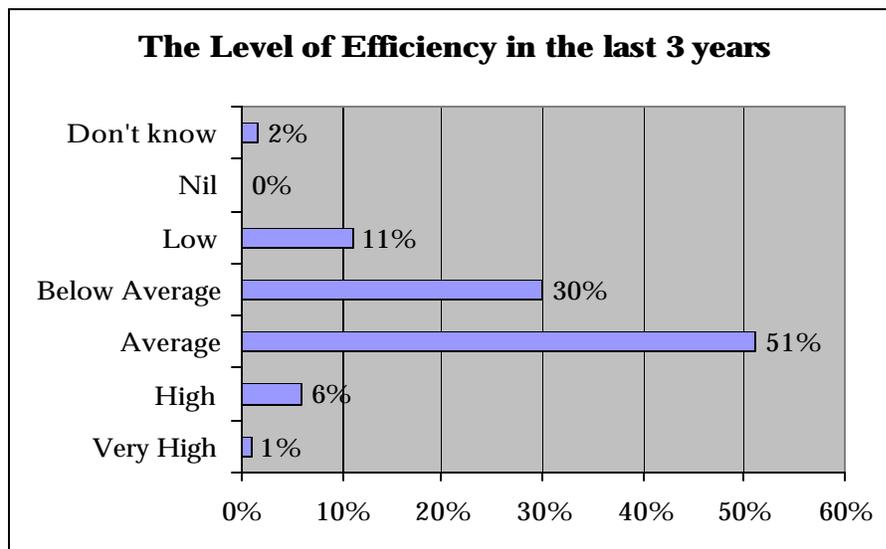
### i) Interaction with the Judiciary

86% of the respondents had interacted with the Judiciary in the last three years. This is largely attributed to the fact that most of the respondents were practicing advocates. For the same reason, majority of the respondents indicated that they had visited the courts countless times. Only 3% of the respondents had not visited the courts in the last three years.



## ii) Judicial Efficiency

51% of the respondents thought that the level of efficiency in the Judiciary across the different levels since the year 2000 was average.



41% of the respondents indicated that the level of efficiency had increased in the last three years compared to the last decade. 28% thought efficiency had decreased, while 18% thought it had remained unchanged. At the onset of our surveys in 2000, this level was said to be below average owing to chronic case backlogs. However, in the last three years measures have been put in place albeit in a small way, to address this problem. These include *inter alia*,

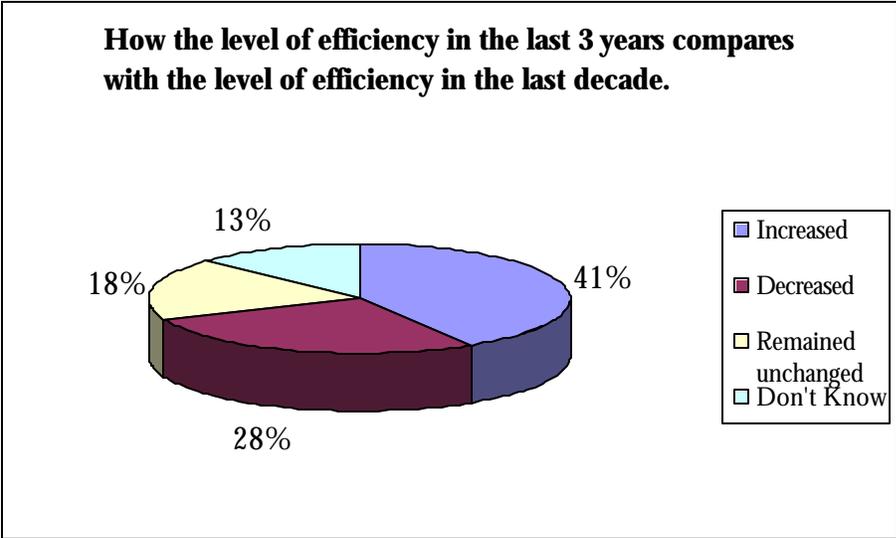
- Creation of court divisions<sup>4</sup>
- Appointment of more judges and magistrates<sup>5</sup>.
- Enhancement of pecuniary jurisdiction of magistrates<sup>6</sup>.

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<sup>4</sup> Four divisions have been created at the High Court in the last three years. These are the Family, Commercial, Criminal and Civil Divisions.

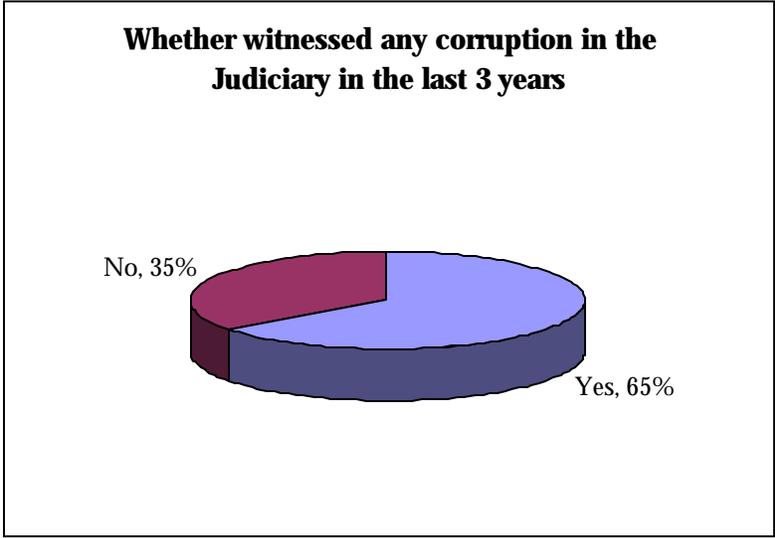
<sup>5</sup> Since 2000, 4 judges have been elevated to the Court of Appeal, while 21 have been appointed as High Court judges. To date, there are 12 Court of Appeal Judges (including the CJ) and 44 High Court judges, making it the biggest Bench ever in Kenya. The number of magistrates has also increased by about 100 new officers in the course of the three years period to almost 300 officers.

<sup>6</sup> Chief Magistrate's Pecuniary Jurisdiction is Kshs 3m; Senior Principal Magistrate, Kshs 2m; Principal Magistrate, Kshs 1m and Senior Resident Magistrate, Kshs 800,000/-



**iii) Judicial Corruption**

65% of the respondents stated that they had actually witnessed corruption in the Judiciary in the last three years.



This is an alarming percentage and what it insinuates is that there is rampant and open corruption in the Judiciary<sup>7</sup>. On his appointment as Chief Justice,

<sup>7</sup> Recent report by Justice Ringera’s Committee confirmed this chilling truth when it stated that there was recorded evidence of a judge(s) receiving bribe.

Hon. Justice Evans Gicheru promised Kenyans a radical surgery of the Judiciary. This was in line with NARC government's stand on zero-tolerance on corruption. In this light, Justice Gicheru appointed the Integrity and Anti-corruption Committee headed by Justice Aaron Ringera. After six (6) months of investigations, the Ringera Committee presented their findings to the Chief Justice on the 30<sup>th</sup> of September 2003. The report was based on submissions from various actors across the society.

In a nutshell, the report which was produced in two volumes, the first one detailing the extent of corruption, the reasons for it and the recommendations; while the second volume contained the list of shame, revealed that 23 out of the 56 judges of the High Court and Court of Appeal were involved in corrupt practices, unethical conduct and other forms of misbehaviour. In addition, 82 out of the 254 magistrates are substantially corrupt and unethical while 43 out of the 2,910 paralegals are tainted with corruption, unethical behaviour and other forms of misbehaviour.

According to the committee, corruption included:

- Demanding and accepting cash bribes
- Sexual favours, free transport, hospitality and other gifts in return for partisan judgments
- Fraud through not accounting for money received, fiddling official receipts and stealing exhibits
- Abuse of office by doctoring evidence and giving promotions through patronage rather than merit

The Committee made the following recommendations:-

- Improvements of the terms and conditions of service for magistrates and paralegal staff
- Institutional governance measures including meritocratic recruitment and promotions
- Discontinuation of practice of retaining retired officers on contract
- A corruption hostile deployment and transfer policy

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Other allegations of corruption against judicial officers include, Ochieng Oduol's assertion that Justice Kuloba received Kshs. 5 million bribe from businessman Kamlesh Pattni in a case that involved Ibrahim Ali (Ochieng's client) and Pattni over the ownership of Kenya Duty Free Complex. Justice Kuloba has since sued Oduol for defamation (matter still pending in court). The assertion was published in a daily newspaper and is apparently based on an affidavit sworn by Ali and drawn and filed by Oduol.

Tony Gachoka was also jailed for contempt of court after some serious allegations of bribery and impropriety against the Late Chief Justice Chesoni.

In 2002, in the matter of Express (K) Ltd versus Manju Patel, Court of Appeal, Civil Appeal No. 158/2000, Justice Kwach, J.A. alleged corruption against his brother judges, Justice Tunoi and Justice Shah, J.J.A, while dissenting in his ruling.

- Elimination of conflict of interest situations through the medium of an enforceable code of conduct
- Elimination of minimization of delay in hearing and determination of cases
- Effective supervision of judicial staff
- A transparent and corruption free allocation of judicial work
- Ready availability of files and records by expansion of and computerization of court registries and automation of proceedings
- Creation of a corruption hostile legal regime and an enabling environment
- Expansion of court facilities countrywide.
- The recruitment of more judges and magistrates
- A reduction in the cost of litigation and the strengthening of judicial independence

The report further stated that it was based on credible and substantial evidence which even included a video tape.

Upon receipt of the report, the Chief Justice issued a two weeks ultimatum to all the accused judges to either resign or face disciplinary tribunals. Originally, the deadline was October 17, 2003. However, on October 15, 2003, the President set up two tribunals to investigate the judges<sup>8</sup>, in spite of the fact that, the deadline issued had not expired and two judges named in the report had made an application to stop the Chief Justice from petitioning the President on the setting up of the tribunals, on the grounds that the rule of natural justice was ignored in the process when the Chief Justice failed to meet representatives of the Kenya Magistrates and Judges Association to hear their grievances on the findings of the report.

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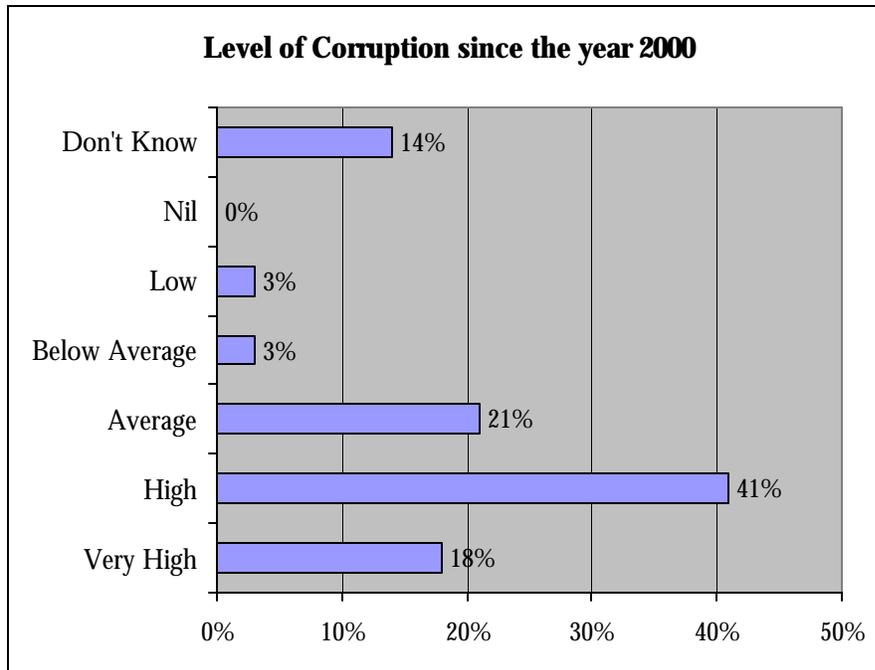
<sup>8</sup> Members of the tribunal to investigate Court of Appeal judges are; Justice (Rtd) Akilano Akiwumi as the Chairman, Justice (Rtd) Abdul Majid Cockar, Justice Benjamin Kubo, Nzamba Kitonga and W.S. Deverell. Mbuthi Gathenji will serve as the Counsel and Margaret Nzioka the Secretary.

Lee Muthoga is the Chairman of the tribunal to investigate High Court judges. Other members are, Justice John Mwera, Justice Leonard Njagi, Daniel Musinga and Isaack Lenaola. Philip Murgor is the assisting Counsel and Muchai Lumatete the Secretary.

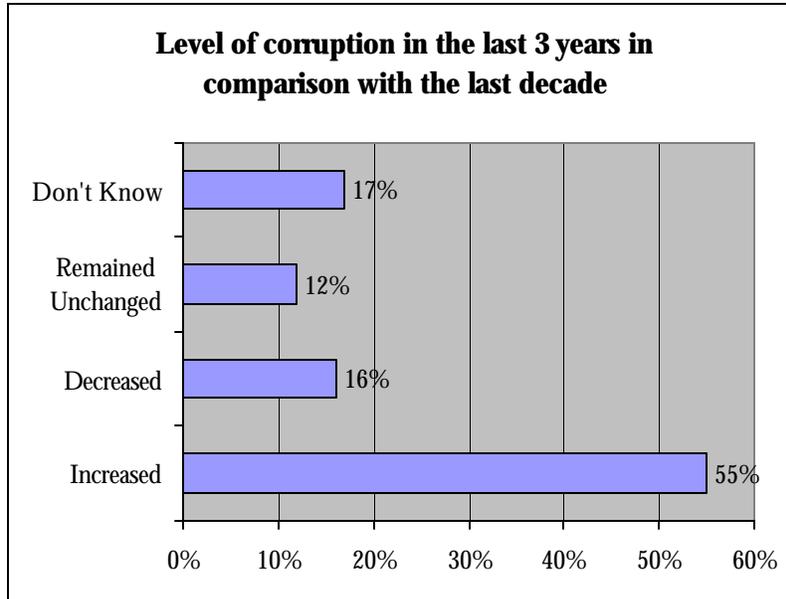
### Judges on the List of Shame

<b>Name</b>	<b>Court</b>	<b>Date of Appointment and years in Service</b>
Justice Richard Kwach	Court of Appeal	(1988) 15 years
Justice Amritlal Shah	<ul style="list-style-type: none"> <li>▪ Court of Appeal</li> <li>▪ High Court</li> </ul>	<ul style="list-style-type: none"> <li>▪ (1994) 9 years</li> <li>▪ (1993) 1 year</li> </ul>
Justice Abdul Lakha	Court of Appeal	(1994) 9 years
Justice Effie Owuor	<ul style="list-style-type: none"> <li>▪ Court of Appeal</li> <li>▪ High Court</li> </ul>	<ul style="list-style-type: none"> <li>▪ (1998) 5 years</li> <li>▪ (1982) 16 yrs</li> </ul>
Justice Moijo Ole Keiwua	<ul style="list-style-type: none"> <li>▪ Court of Appeal</li> <li>▪ High Court</li> </ul>	<ul style="list-style-type: none"> <li>▪ (2001) 2 years</li> <li>▪ (1993) 8 years</li> </ul>
Justice Philip Waki	<ul style="list-style-type: none"> <li>▪ Court of Appeal</li> <li>▪ High Court</li> </ul>	<ul style="list-style-type: none"> <li>▪ (2003) 4 months</li> <li>▪ (1995) 8 years</li> </ul>
Justice Daniel Aganyanya	High Court	(1983) 20 years
Justice Tom Mbaluto	High Court	(1986) 17 years
Justice Mbogholi-Msagha	High Court	(1987) 16 years
Justice Gideon Mbito	High Court	(1988) 15 years
Justice Roselyn Nambuye	High Court	(1991) 12 years
Justice I.C.C. Wambilyanga	High Court	(1992) 11 years
Justice Richard Kuloba	High Court	(1992) 11 years
Justice D.M. Rimita	High Court	(1993) 10 years
Justice Sarah Ondeyo	High Court	(1994) 9 years
Justice Andrew Hayanga	High Court	(1994) 9 years
Justice Alex Etyang	High Court	(1995) 8 years
Justice J.V.O. Juma	High Court	(1995) 8 years
Justice Johnson Mitey	High Court	(1998) 5 years
Justice Kasanga Mulwa	High Court	(1998) 5 years
Justice Omondi Tunya	High Court	(2001) 2 years
Justice Robert Mutitu	High Court	(2001) 2 years
Justice Lawrence Ouna	High Court	(2001) 2 years

In assessing judicial corruption in the last three years, 41% of the respondents thought that it was still high. The Ringera Committee report confirmed this statistics.



Majority of the respondents thought that judicial corruption had increased in the last three years compared to the status in the 1990s. This can partly be blamed on the government's and Judiciary's inability to fight this menace even when it became apparent that it was a serious problem. For a long time now, judicial officers have engaged in corrupt practices with impunity and the stakes have always been on the increase. Despite the fact that NARC government promised to carry out a radical surgery as soon as it takes over power, there was very little that happened in its first six months. This created room and offered ample time for the corrupt judicial officers to soak themselves in the effluence of corruption. However, it is encouraging to note that finally the big hammer has fallen on the Judiciary and 23 judges are bound to face tribunals for various inconsistent practices.



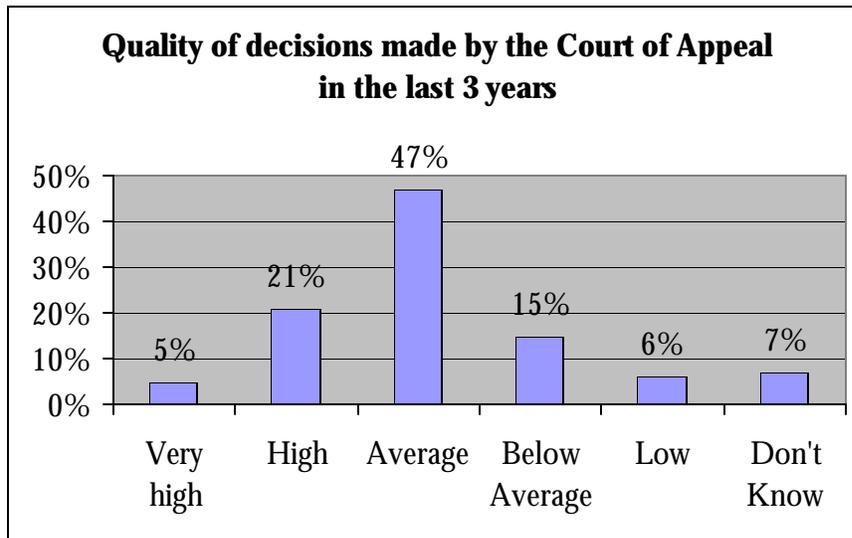
**iv) Quality of Decisions**

68% of the respondents stated that the quality of decisions by the Court of Appeal was between average and low. A mere 26% indicated that the decisions were of high quality. The process of appeal itself was heavily criticized for being too expensive and cumbersome. For instance, the requirement that persons who wish to lodge an appeal prepare the record of proceedings by themselves, whereas these records are kept in the courts, makes the whole process unfriendly for many consumers of justice. Therefore, it was proposed that the record of proceedings be done by the courts, which will then leave the appellants with the task of presenting their memoranda and grounds of appeal

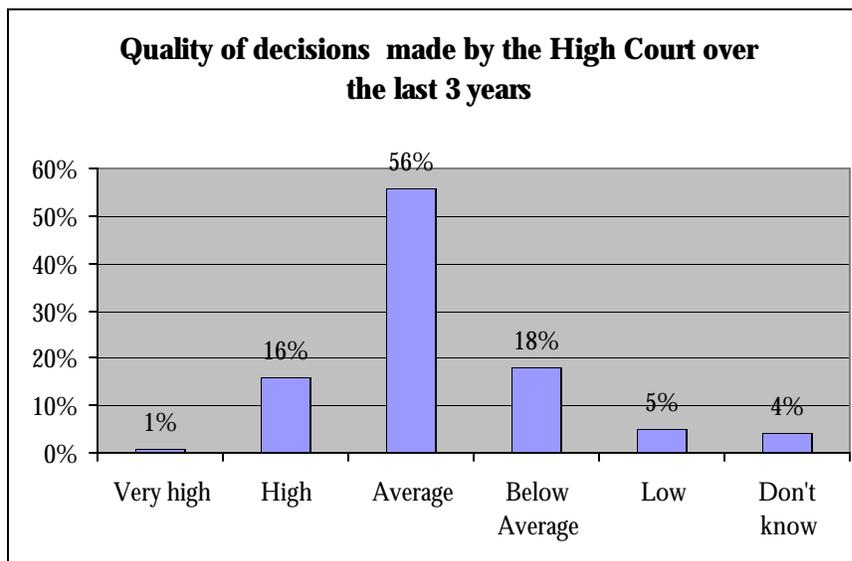
On the other hand, 17% of the respondents stated that the quality of decisions made by the High Court was high, while a staggering 78% rated the High Court decisions between low and average.

The ratings were even worse for the Subordinate Courts, where 89% of the respondents thought that the quality of decisions was between average and low, with just 5% indicating that the quality was high. This perhaps explains why there is poor or no development of jurisprudence in Kenya through the courts today.

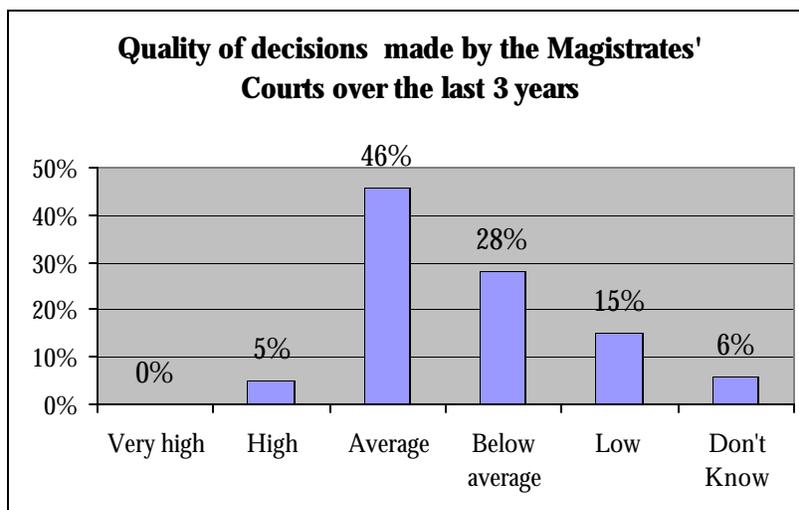
**(a) Decisions of the Court of Appeal**



**(b) Decisions of the High Court**



**(c) Decisions of the Subordinate Courts**



**(d) Consistency**

The most alarming aspect about these decisions has been the level of inconsistency in similar matters. This has led to confusion both in the legal profession and the general public on the position of law on various matters. During our last survey, 81% of the respondents stated that the decisions of the courts at all levels were inconsistent.

There are various instances where the Court of Appeal and High Court have made decisions that totally contradict with the written law as well as other precedents. For instance, on 30 January 2003, the Court of Appeal (Kwach, Bosire and O'Kubasu JJA) sitting in Mombasa in the case of *Mukungu v Republic* found that there was no basis for requiring corroboration of the victim's story in rape cases. In this matter, both the Subordinate Court and the High Court found the accused guilty. On a second appeal to the Court of Appeal, the only point raised by the appellant was that his conviction was based on uncorroborated evidence.

The Court of Appeal considered various case law and considered at length the provisions of section 82 of the Constitution which provides for the right not to be discriminated against. It then held that:

*“The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls”.*

In what shall remain a landmark decision and a jewel in this murky area of criminal practice, the court went ahead and pronounced that,

*“We think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the Constitution”.*

What this decision has done in essence is to shift the onus of proving a criminal case beyond reasonable doubt from the prosecution to the accused.<sup>9</sup>

This is not the only case that has totally thrown the law in disarray. Between 2000 and 2003 alone, there have been numerous decisions by the Court of Appeal that have completely contradicted the law as well as previous decisions of the same court. For example,

1. In **Gachiengo -vs- Republic, reference no. 302 of 2000**, it was held albeit wrongly, that the Commissioner of Police is given power to investigate and prosecute crimes by the Constitution; that the power to prosecute is limited to the Attorney General; that the exercise of prosecutorial powers by the Kenya Anti-Corruption Authority was unconstitutional; that the doctrine of separation of powers has force of law in Kenya.
2. In **Albert Ruturi & Another -vs- Attorney General & Another, High Court Misc. Civil Application no. 908 of 2001**, it was held correctly, that the retrospective criminal provisions of the Central Bank of Kenya (Amendment) Act 2000 (Act No. 4 of 2001) were unconstitutional. But in the decision held wrongly, that the entire Act was *ultra vires* the Constitution and null and void.
3. a) In **Anna A. Owino -vs- Republic, Court of Appeal, Criminal Appeal no. 172 of 2000**, it was decided that: “ It is trite law that the question relating to severity of sentence is a matter of fact [and] under section 361(1)(b) of the Criminal Procedure Code a second appeal against sentence does not lie.”  
  
b) In **Changawa K. Katenga -vs- Republic, Court of Appeal, Criminal Appeal no. 64 of 2000** (MOMBASA), in a three paragraph judgment dated 18th January 2001 and in circumstances similar to the Owino case, it was held that the Court could under s. 3(2) of the Appellate Jurisdiction Act exercise the power, authority and jurisdiction vested in the High Court and interfere with the decision of the High

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<sup>9</sup> See annex 1: A critique of the decision by Kibe Mungai, Advocate.

Court, as a result, the Court arrived at a different conclusion and interfered with the sentence. Therefore, the Court of Appeal acted contrary to s. 361(1)(b) of the Criminal Procedure Code, which did not allow a second appeal against sentence.

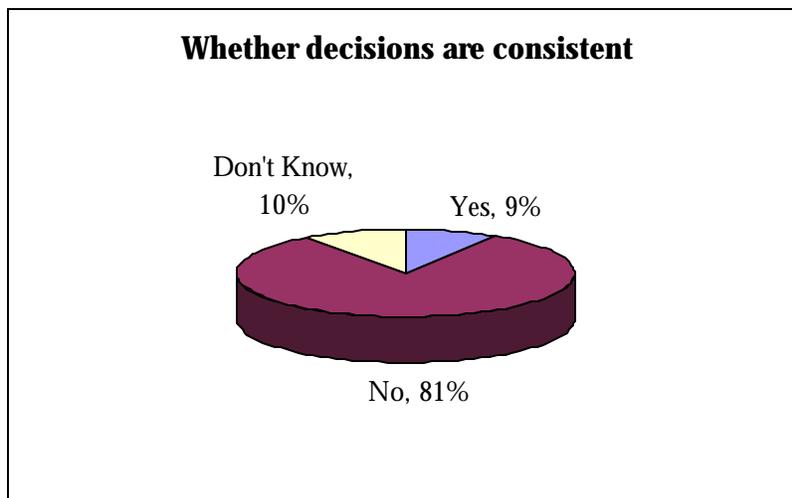
c) The Owino position was reinstated in **Ruwa Nzai –vs- Republic, Court of Appeal, Criminal Appeal no. 74 of 2000**, and also in **Mwalimu Kadzagamba & Another –vs- Republic, Court of Appeal, Criminal Appeal no. 77 of 2000**

4. a) **Republic & The Communications Commission of Kenya & Others, ex parte, East African Television Network, Court of Appeal, Civil Appeal no. 175 of 2000** it was held that: the Notice of Motion filed pursuant to leave granted originates proceedings under Order 53 of the Civil Procedure Rules.

b) **Commissioner of VAT -vs- Nakumatt Holdings Ltd. & 2 Others Court of Appeal, Civil Appeal (application) no. 191 of 2000**, it was held that Proceedings under Order 53 of the Civil Procedure Rules are initiated by the Chamber Summons application for leave.

5. a) **Vipin Maganlal Shah –vs- I&M Bank Ltd & 2 Others, Court of Appeal, Civil Application no. Nairobi 32 of 2000 Coram: Omolo, Shah, Bosire, JJA**, it was held that, failure to sign a Plaintiff is not such an omission as would affect the merits of a case or jurisdiction of a court and any application to strike out the claim on this ground is an abuse of the process of the court (Shah JA dissenting)

b) **Vipin Maganlal Shah VS. I&M Bank Ltd & 2 Others COA Civil Appeal no.13 of 2001, Coram: Omolo, O’Kubasu, Bosire, JJA**, it was held that any pleading that is not signed is incurably defective and liable to be struck out.



## JUDICIAL REFORM

From our recent survey, as well as the previous surveys, political interference has been cited as the major obstacle to judicial reform in Kenya. This interference starts from the appointment of judges which has a major political connotation. In the past regime (not sure about the current one), all the judges were appointed by the President with little or no consultation at all, including snubbing the Judicial Service Commission which is supposed to propose the names of such candidates. As a result of this, patronage was rife in the Judiciary, and most judges began serving the interests of their 'godfathers' without fear or shame<sup>10</sup>. Cases that involved government official however grave they were always went their way. Some commentators have said that this was a deliberate move by the former government to weaken the Judiciary so as to achieve their selfish interests.

Owing to the patronage that was a product of the political interference, most judges became a major obstacle to judicial reform that would make the Judiciary better. They fought every inch to retain the *status quo* lest they lose out if the reforms are undertaken and they are thrown out either on corruption, incompetence, partiality and/or other charges that are inconsistent with the office of a judge. This wouldn't have been expressed better than the suit that was filed by two judges on behalf of their colleagues against the Constitution of Kenya Review Commission, seeking to stop it from making proposals on the Judiciary in the new constitution<sup>11</sup>. Incidentally, both judges have been named in Ringera's list of shame.

Other major obstacles include inadequate budgetary allocation since the Judiciary lacks fiscal autonomy. As a result of this, the Judiciary is not in control of its funds and therefore, cannot undertake any meaningful reforms especially those that involve financial backing.

Others obstacles are,

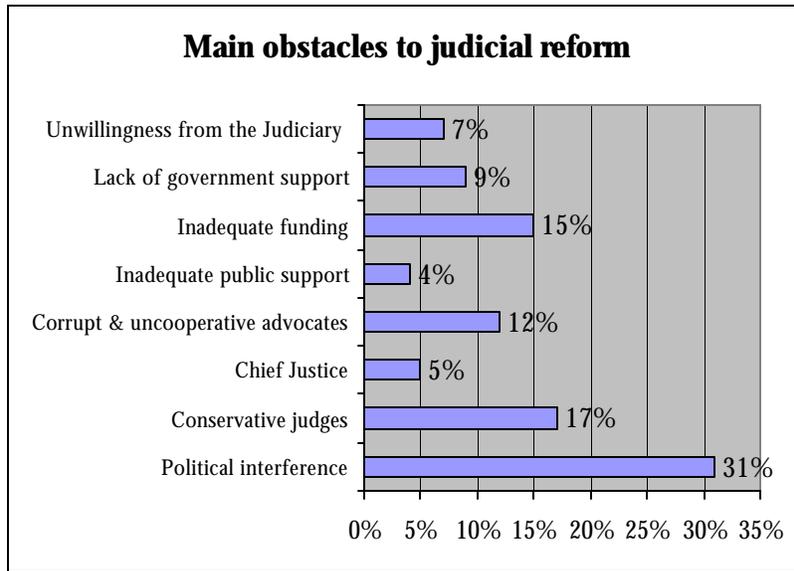
- Lack of political will
- The office of the Chief justice
- Lack of public support

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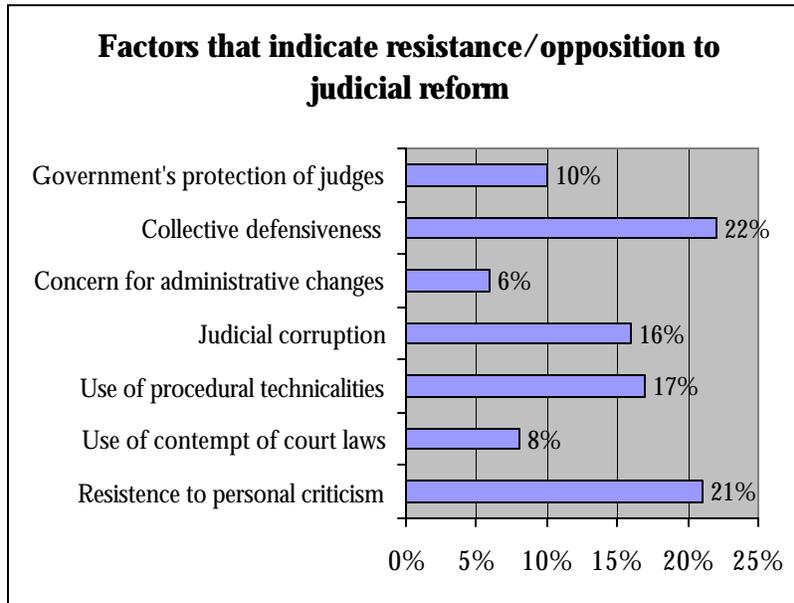
<sup>10</sup> Under KANU regime and prior to December 2002, cases that involved powerful and top officials in the government always ended up either being stopped by the Attorney General or simply being dismissed by the courts. Some of the key figures involved in such cases includes, Kipng'eno arap Ng'eny then a Minister who was facing abuse of office and corruption charges, Julius Sunkuli, Minister, who was facing rape charges, among many others.

<sup>11</sup> High Court Miscellaneous Application Case No. 1110 of 2002 Mr. Justice Moijo Ole Keiwua and Mr. Justice J. V. Odero Juma –vs.- In the Matter of Professor Yash Pal Ghai the Chairman of the Constitution of Kenya Review Commission and two others

- Corruption, etc



Collective defence and resistance to personal criticism by judges are the key indicators of the judges' unwillingness to pursue judicial reform. Others are use procedural technicalities and judicial corruption.

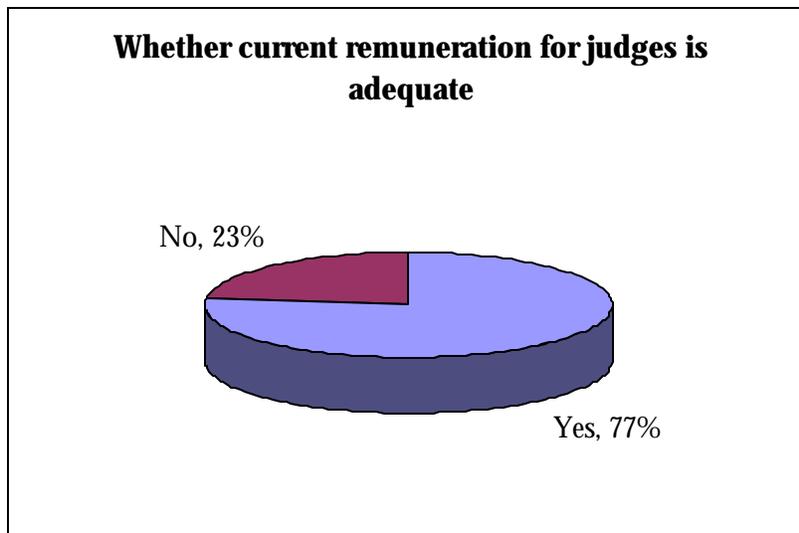


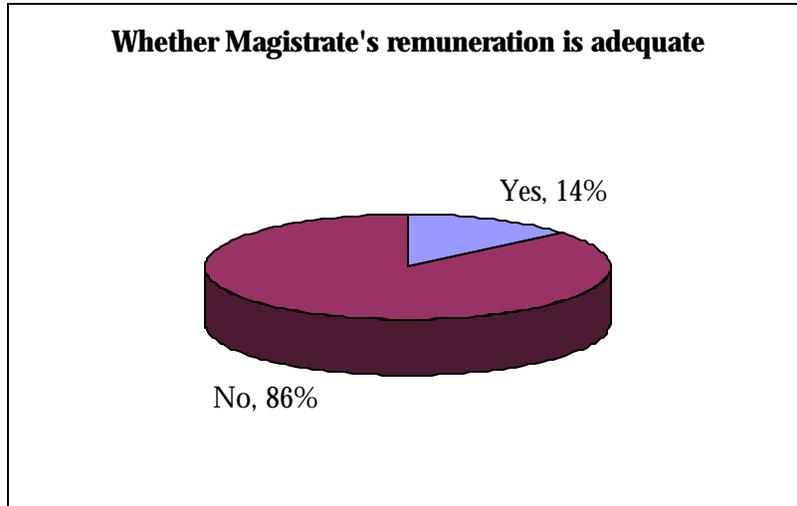
#### a) Working Conditions of Judicial Officers

Majority of the respondents (77%) perceived the current remuneration for judges as adequate. This therefore, rules out low salaries as a reason for rampant judicial corruption and inefficiency currently being experienced in the highest courts in Kenya. However, the same cannot be said of the Subordinate

Courts. 86% of the respondents stated that the current remuneration for magistrates was not adequate. This therefore, calls for review of Magistrates' working conditions and other judicial staff if inefficiency, ineffectiveness and corruption are to be eradicated in the Judiciary. Enhancing working conditions for one class of judicial officers is not an appropriate move because it leads to demoralization of the other members hence resulting into malfunctioning institution. Here is the current remuneration scale for judicial officers from the Chief Justice to the support staff.

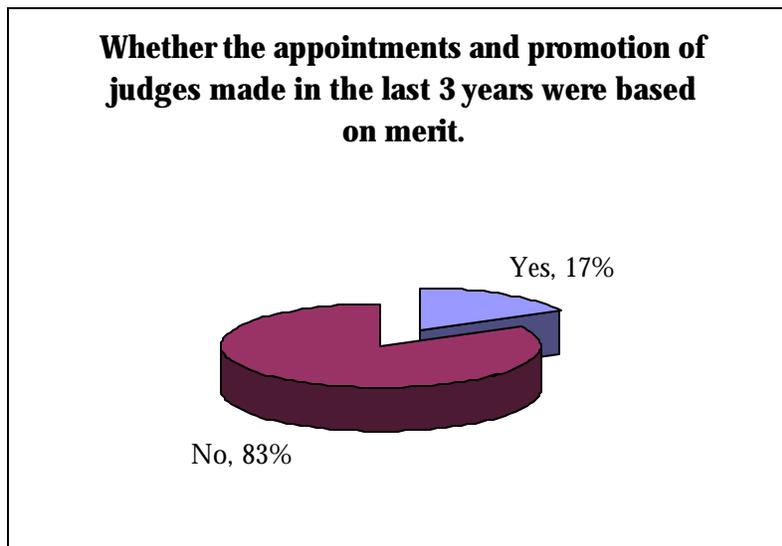
		<b>Salary</b>	<b>Allowances</b>
i)	Chief Justice	531,650	452,990
ii)	Judges of Appeal	214,635 277,950	287,590
iii)	High Court judges	130,314 333,320	227,290
iv)	Magistrates salaries between	18,960 and 84,055	
v)	Paralegal	4,425 and 71,365	





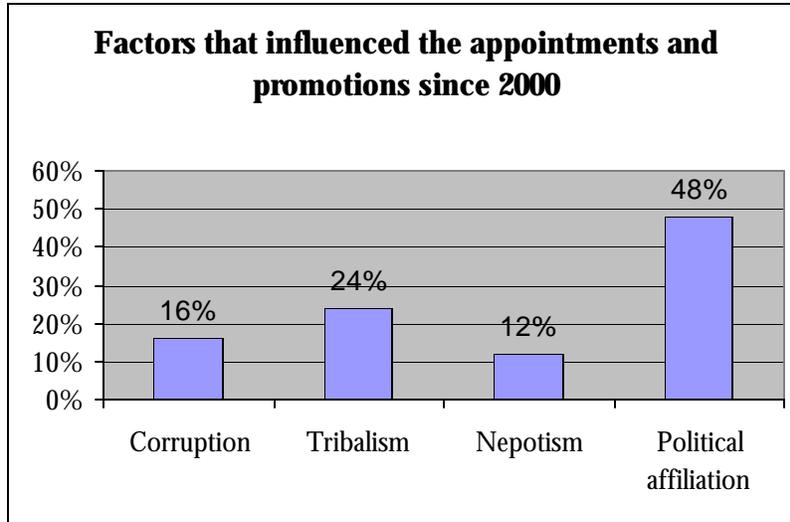
**b) Appointment and Promotion of Judicial Officers**

83% of the respondents observed that the appointments and promotions of judges made in the three years were not based on merit.

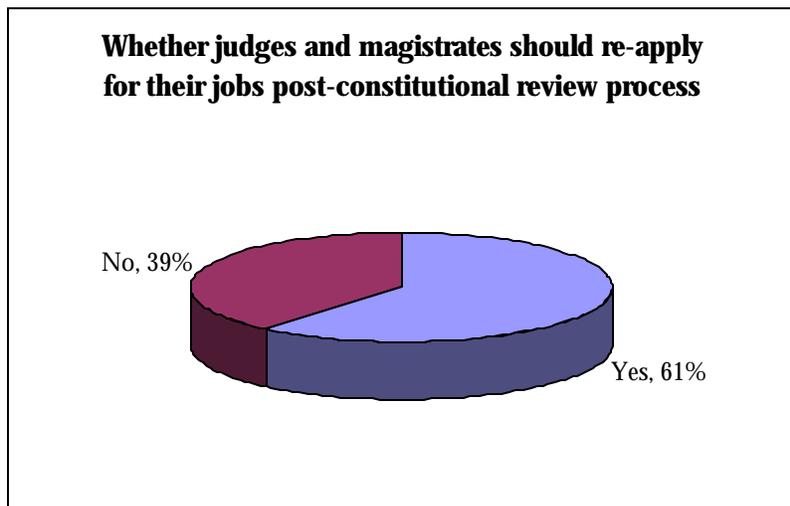


Political affiliation was identified as the main factor that was considered in the appointment and promotion of judges in the last three years. This was the genesis of political interference in regard to the functioning and independence of the Judiciary. This is largely attributed to the fact that the powers to appoint judges are vested in the President. The former President rarely consulted other stakeholders including the Judicial Service Commission before making the appointments. In a bid to balance the equation usually for political gain, nepotism and tribalism were the other main factors for consideration in the

appointment and promotion of judges. Many Kenyans are hopeful that the new regime will discard this practice and exercise utmost transparency and accountability in the appointment and promotion of judges which must be based on merit over any other consideration.



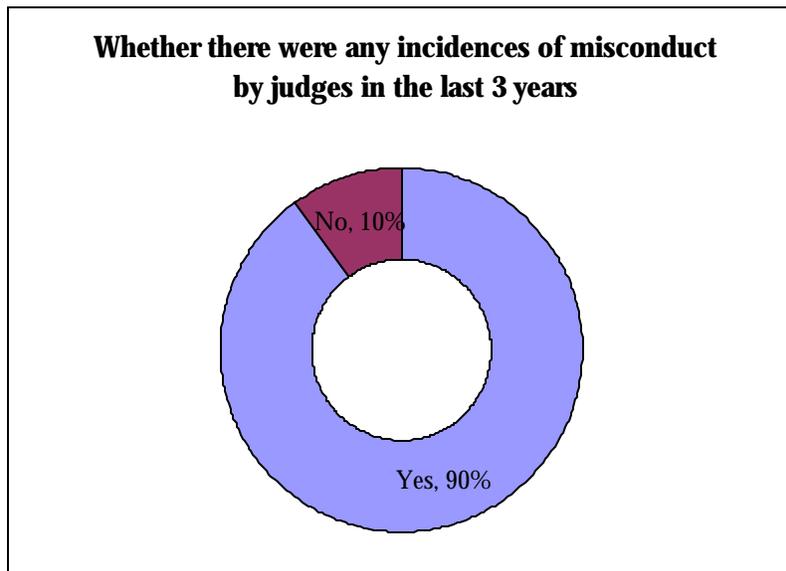
Majority of the respondents stated that all judges and magistrates must re-apply for their positions once the new constitution comes into effect. This will ensure that only competent, corrupt-free and persons of integrity are appointed as judicial officers.



### c) **Professional Misconduct**

An overwhelming majority of the respondents stated that there were various incidences of misconduct by judges in the last three years. However, majority of the respondents indicated that no action was taken against such judges. However, it is worth noting that early this year, the former Chief Justice Bernard Chunga was forced to resign after he was accused of high handedness, incompetence among other things. A High Court judge Samwel Oguk followed suit soon thereafter, after he was accused of involvement in corrupt practices. At the time of his resignation, he was facing a suit in connection with the allegations<sup>12</sup>.

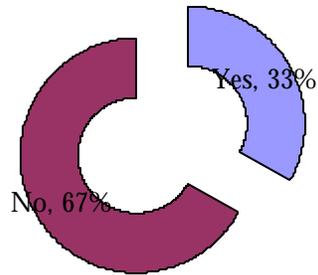
However, upon the release of the Ringera Committee's report, other than corruption charges facing the named judges and magistrates, some of them are charged with misconduct on the basis of partiality, incompetence, sexual harassment among others.



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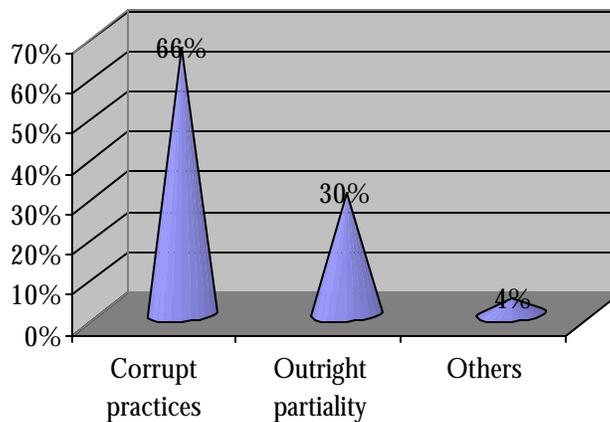
<sup>12</sup> The suit has since been withdrawn.

**Whether any action was taken against errant judges in the last 3 years**

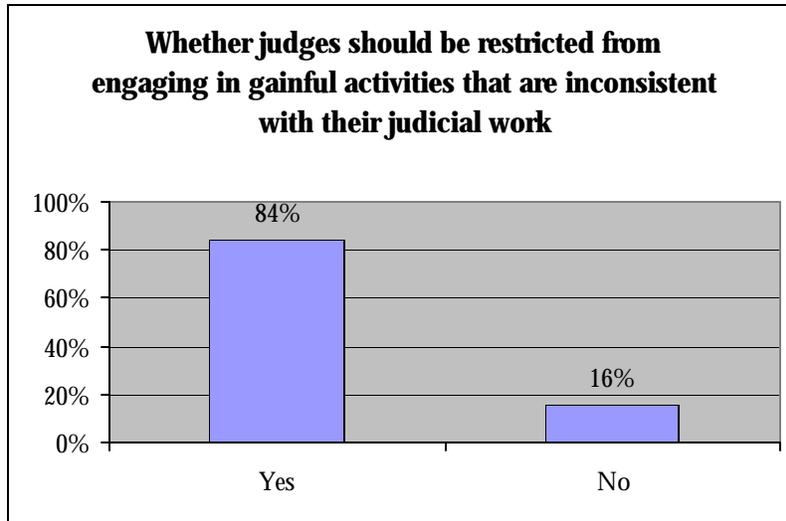


Corrupt practices and outright impartiality were voted as the most common practices that constituted professional misconduct on the part of judicial officers. Others included sexual harassment and non delivery of services through absconding duty, unnecessary adjournments among others.

**Grounds for the misconduct**

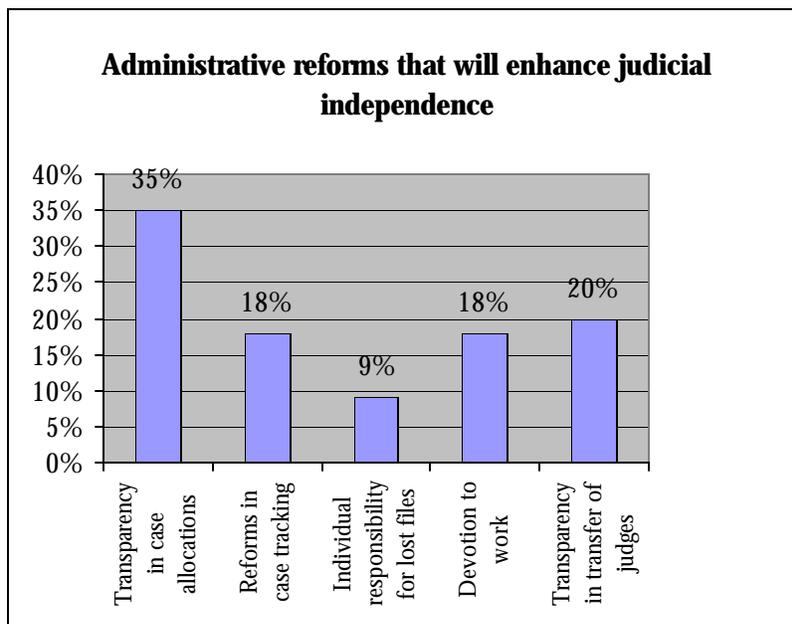


In line with the fore-stated findings, majority of the respondents stated that judges should not be allowed to engage in any gainful activities that are inconsistent with their work so as to curb corruption and partiality which are bound to occur if such officers are allowed to carry out businesses whether as sole proprietors or in partnership or shareholders in companies. The recent report by the Ringera Committee has numerated several incidences where some judicial officers have been accused of bias due to their interests and relationship with some parties to the suits before them.

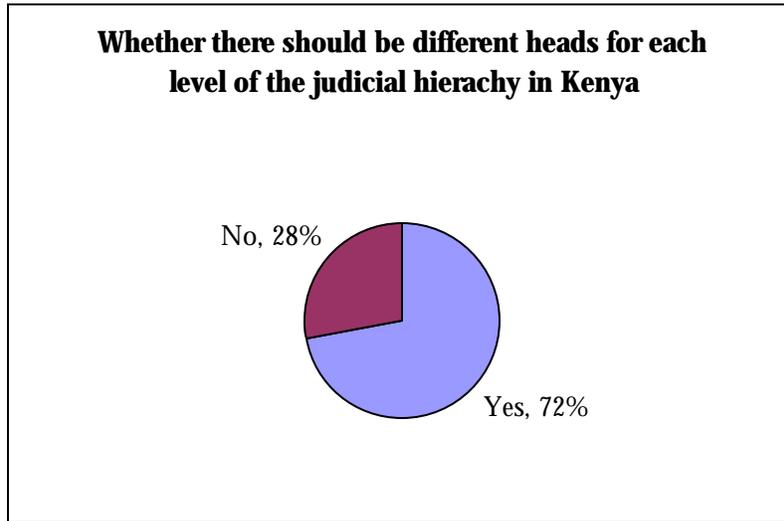


#### d) Administrative Reforms

Various administrative reforms have been proposed aimed at strengthening judicial independence within the Judiciary itself. From the survey, 35% of the respondents called for transparency in allocation of cases so as to avoid situations whereby some judicial officers are over-worked while others do nothing; 20% called for transparency in transfer of judicial officers especially judges and magistrates. This power has been abused by the former Chief Justices' who used it as victimization tool upon those officers who did not comply with some with their bent orders and rules. 36% called for reform in case tracking mechanisms and other means that will ensure judicial officers devote most of their time to judicial work.

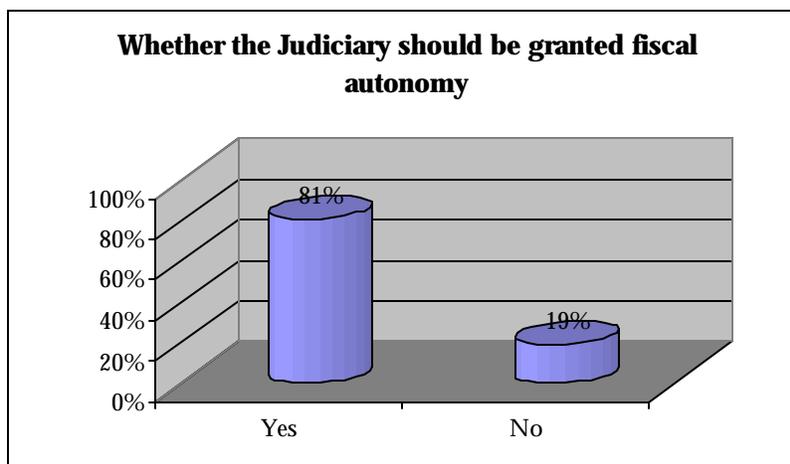


There was an overwhelming support (72%) to the proposal that there should be separate heads for each level of our judicial structure. Majority stated that the Chief Justice should remain the overall head of the Judiciary but there should be a different judge to head the Court of Appeal, and another one to head the High Court. Also, majority of the respondents said a different officer other than the Chief Justice be appointed to head the magistracy<sup>13</sup>.



#### e) Fiscal Autonomy

Majority of the respondents said that it was time the Judiciary was granted fiscal autonomy. This will help the institution to fully control its income and expenditure needs that will ensure it delivers quality services to the citizens.



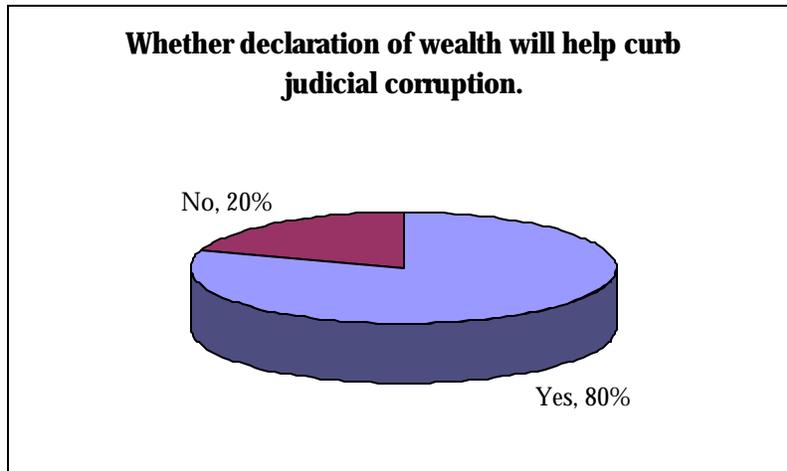
<sup>13</sup> In March 2003, the new Chief Justice Evans Gicheru appointed Justice Richard Kwach, J.A as the Presiding Judge of the Court of Appeal and Justice Daniel Aganyanya, J as the Principal Judge of the High Court. However, the Magistracy was not affected with these changes.

80% of the respondents stated that declaration of wealth will immensely help in the fight against judicial corruption as well as other public sectors. However, this alone was said not to be enough. Some respondents noted that there are ways of going round this requirement. For instance, corrupt judicial officers could register illegally acquired property in other people's names such as wife, children, family and friends. Others stated that there are many forms that corruption takes place and that it is not just limited to money and property hence making the declaration alone inadequate. They said corruption could be through allocation of intellectual property and trusts, favours and other benefits.

Other respondents were cautious about the requirement, warning that the declaration alone should not be used as a yardstick to measure the level of corruption of a given judicial officer, for there could be some judges who are rich not necessarily through corruption.

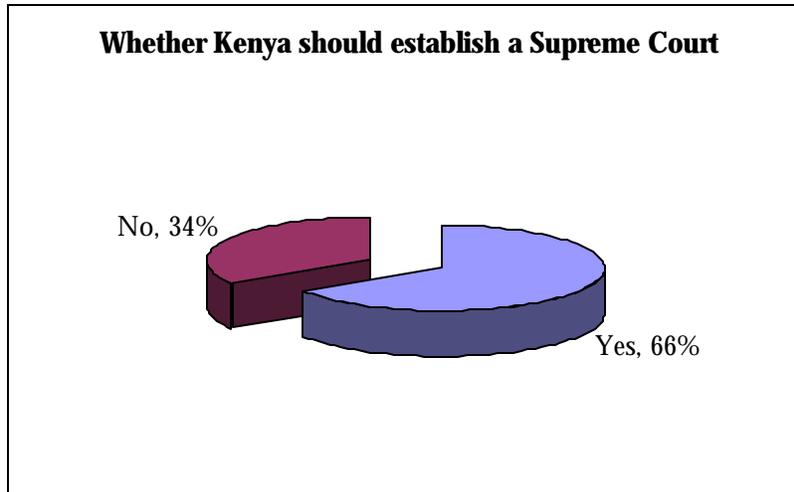
Other faults identified in this process include;

- There is no clear follow-up mechanism after the declaration
- No clear mechanism to ensure honesty in the declaration

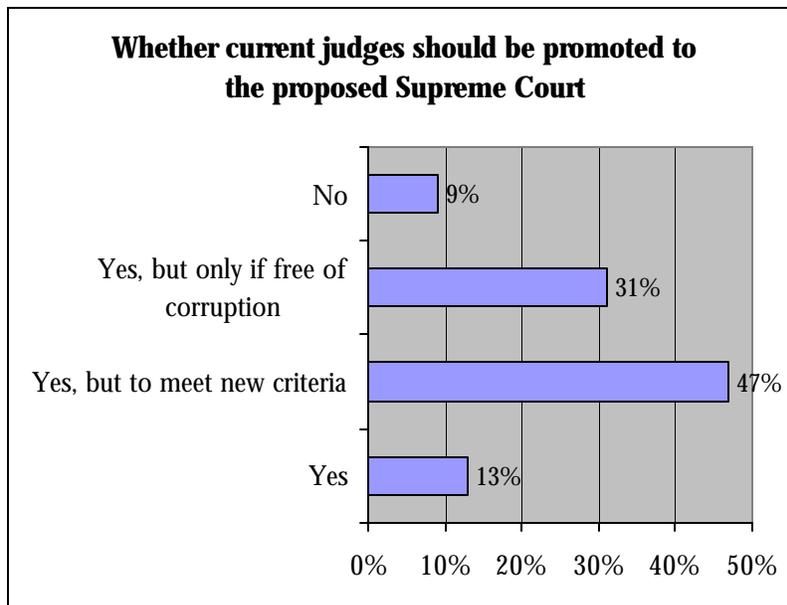


### f) The Supreme Court

66% of the respondents called for the establishment of a Supreme Court in Kenya. They said this court will be beneficial to the legal system as a whole by streamlining the operations and decisions of the lower courts. This will give the current Judiciary the much desired leadership on matters of the law in the view of numerous contradicting judgments being delivered by the current judges both in the High Court and the Court of Appeal.

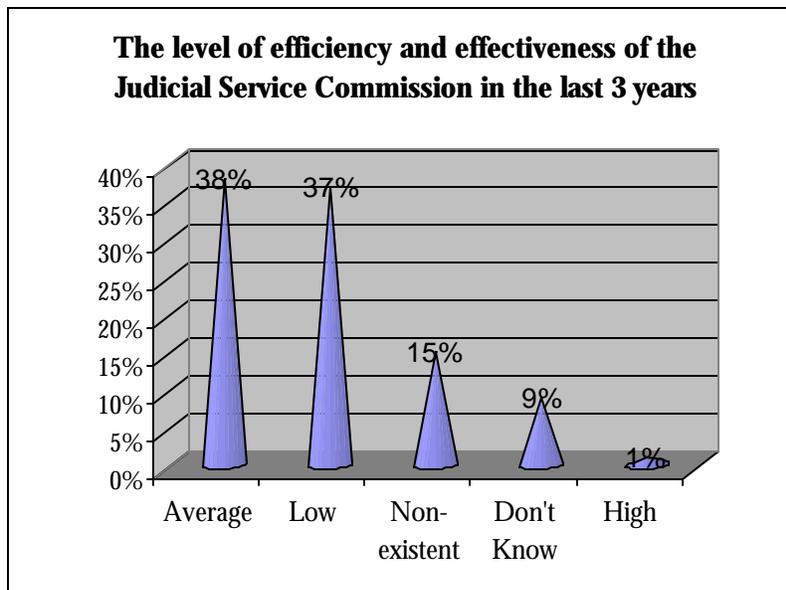


Majority of the respondents were not categorically opposed to having the current crop of judges being elevated to the proposed Supreme Court upon establishment. But they said such judges must be subjected to new appointment criteria which should include passing the corruption test.



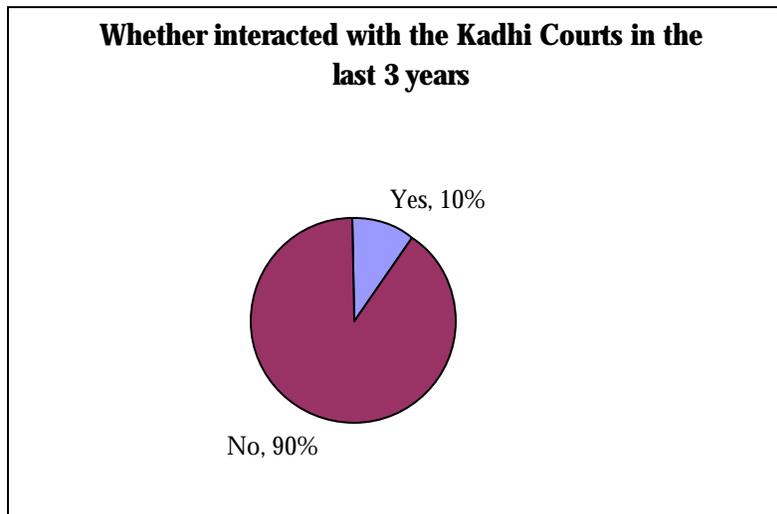
### **g) The Judicial Service Commission**

75% of the respondents thought that the Judicial Service Commission's performance in the last three years was between average and low, whereas 15% thought it did not exist at all. Many commentators including ICJ Kenya have called for the restructuring of this body to enhance its efficiency. For instance, many are of the view that since the Judicial Service Commission is an administrative body, members of the Judiciary itself should not play a crucial role in its functioning and as such, they want the Chief Justice to cease his role as the head of this body. By so doing, the Judicial Service Commission will enjoy the independence to discuss and make appropriate administrative decisions on the Judiciary as a whole including the office and the person of the Chief Justice and judges without fear and influence. An efficient and effective Judicial Service Commission will help in eradicating patronage that is rampant in the Judiciary at the moment. As a result of this patronage, the Judiciary is jammed with incompetent and incapable officers whose appointment and promotion were based on other considerations much more than merit. This has led to high level of inefficiency, corruption and misconduct in the Judiciary.



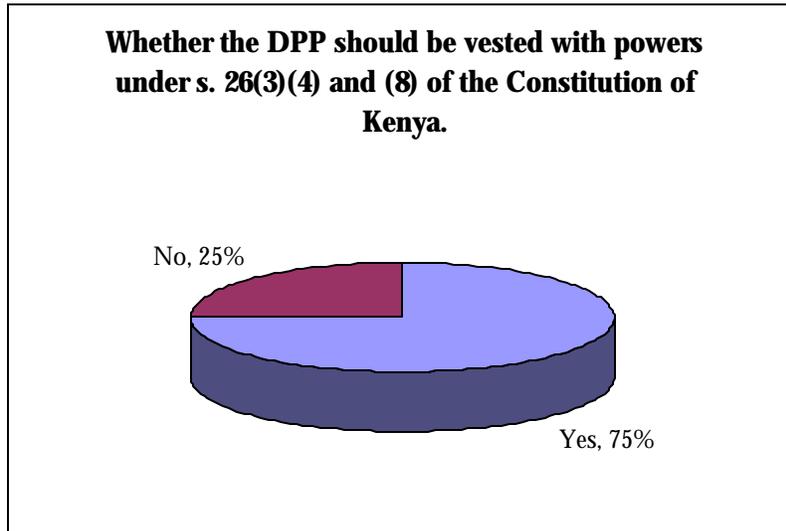
## h) Kadhi Courts

A mere 10% of the respondents had interacted with the Kadhi Courts in the last three years. This is largely attributed to the fact that majority of Kenyans profess the Christian faith and therefore our sample was largely dominated by non-Muslims who have no business with the Kadhi courts. There is concerted resistance towards the inclusion of this court in the constitution with most non-Christians saying that it contradicted the preamble of the constitution which states that Kenya shall not be a religious state. They therefore argue that inclusion of these courts in the constitution gives prominence to one religion and therefore makes the constitution discriminatory on the basis of religion. However, proponents of this provision argue that, it is the only way that minority rights would be protected and promoted. 53% of the respondents stated that should the court be retained in the constitution then non-Muslims who are proficient in Islamic law should be allowed to preside over matters in this court. This remains one of the hottest issues in our constitution making process.



**i) Office of the Director of Public Prosecutions**

75% of the respondents want the powers under s. 26(3)(4) and (8)<sup>14</sup> of the Constitution to be vested with the Director of Public Prosecutions as opposed to the Attorney General. It was further proposed that prosecutions should be handled by trained lawyers as opposed to the police officers.



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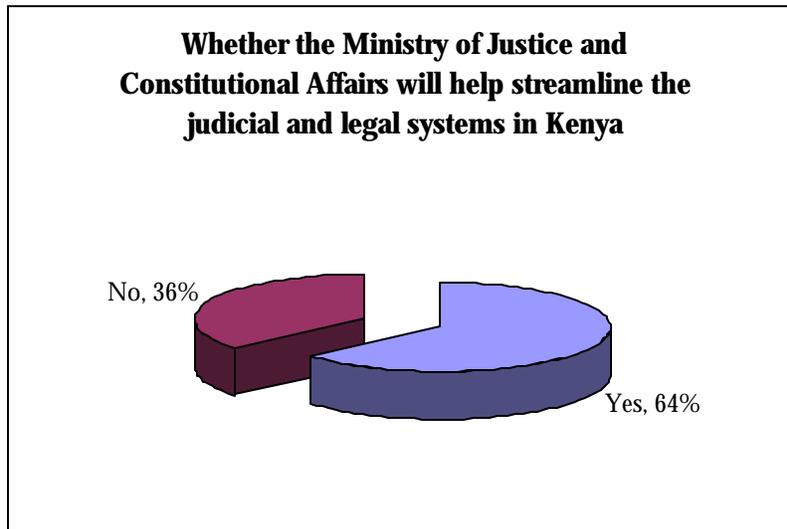
<sup>14</sup> S. 26 (3) The Attorney-General shall have power in any case in which he considers it desirable so to do:-  
(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person  
(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and  
(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority

S. 26 (4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the A-G's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the A-G upon the investigation.

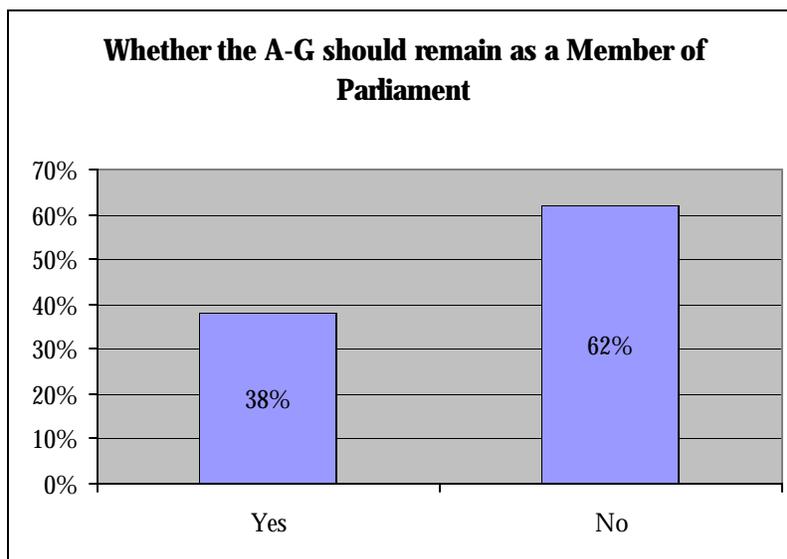
S. 26 (8) In exercise of the functions vested in him by sub-sections (3) and (4) of this section and by sections 44 and 55, the A-G shall not be subject to the direction or control of any other person or authority.

**j) Ministry of Justice and Constitutional Affairs**

Majority of the respondents supported the establishment of the Ministry of Justice and Constitutional Affairs stating that it will help streamline the judicial and legal systems in the country. However, 56% of the respondents expressed fears that if the operations of the ministry are not well outlined, it could pose a threat to the independence of the Judiciary through administrative interference.



With the creation of the Ministry of Justice and Constitutional Affairs, majority of the respondents said that the Attorney General should not continue serving as a Member of Parliament neither should he remain a member of the cabinet because the doctrine of collective responsibility may impair his function of advising the government as the Chief Legal Advisor.

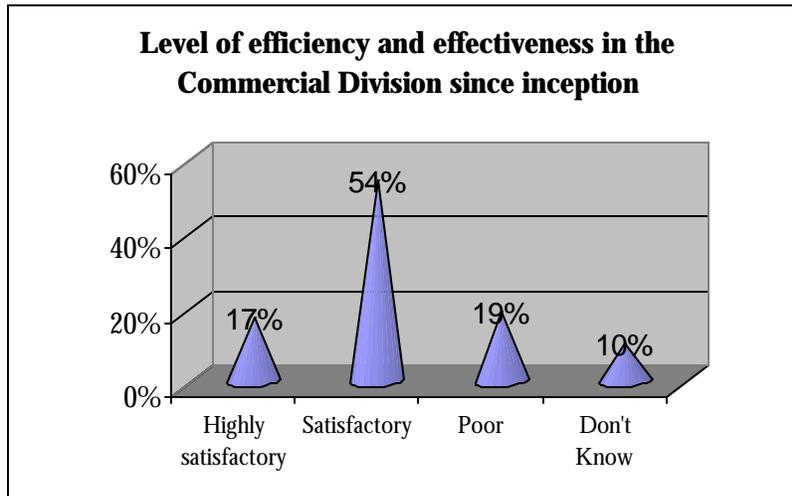


### **k) Court Divisions**

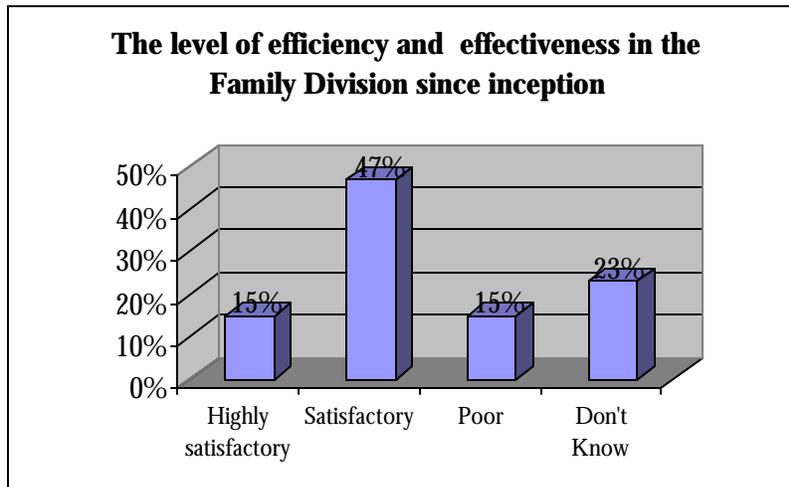
Creation of court divisions was seen as a positive move towards fighting the chronic problem of case backlogs. It must be acknowledged that there has been some improvement in this direction. However, since matters in these divisions are handled by the same judges and magistrates as before, it must also be acknowledged that not much has been achieved as would have been ordinarily desired due to inefficiency and corruption.

We carried out a survey to find out what Kenyans think of each one of these divisions since inception in terms of efficiency and corruption.

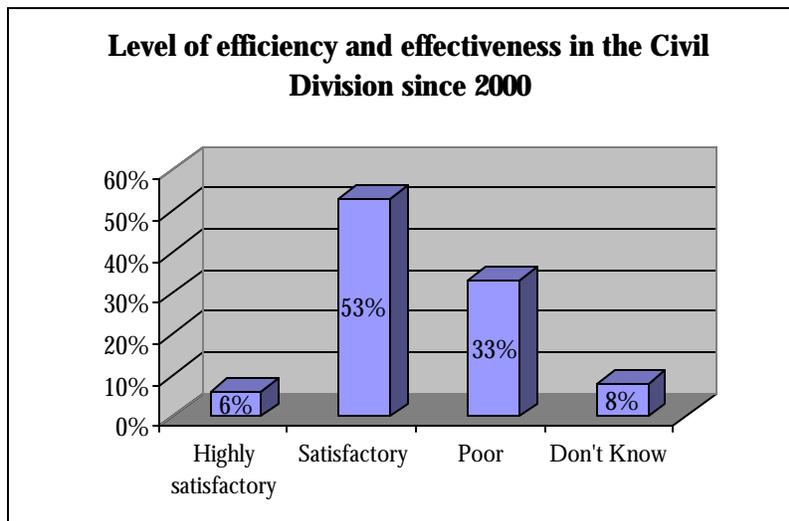
Majority of the respondents thought the Commercial division was the most effective and efficient of all the four divisions. 71% of the respondents liked the level of efficiency in the Commercial Division rating its level between satisfactory and highly satisfactory.



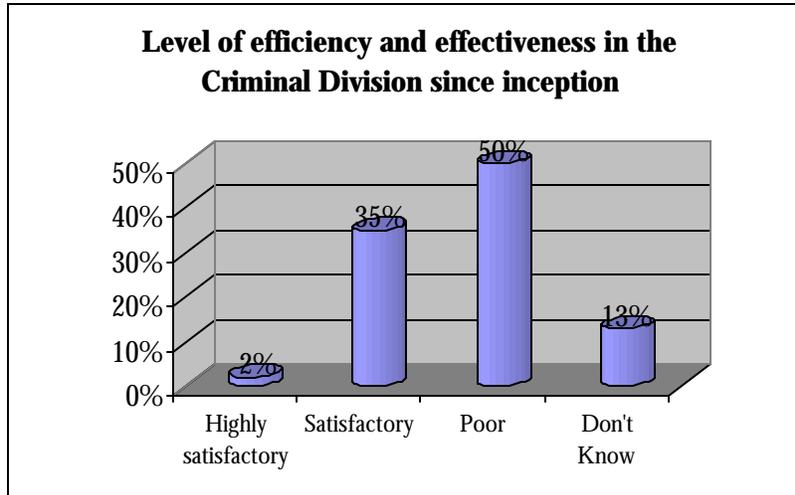
62% of the respondents rated its level of efficiency between highly satisfactory and satisfactory.



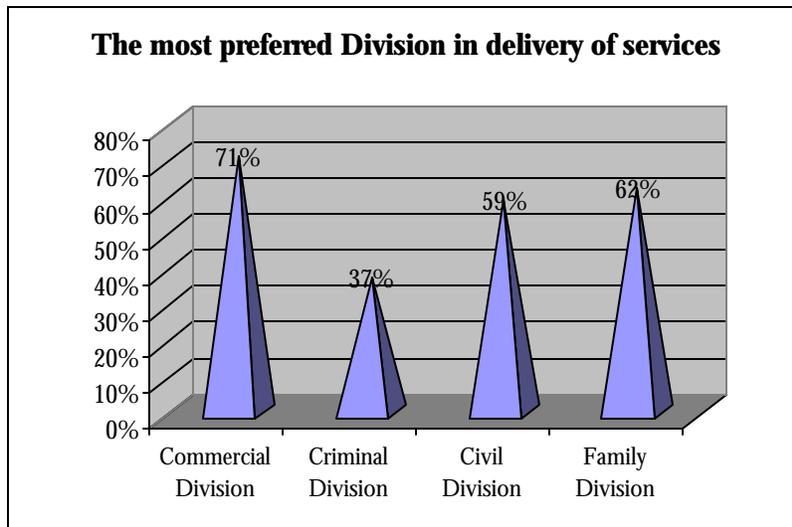
59% of the respondents rated the level of efficiency in the Civil Division between highly satisfactory and satisfactory. However, a remarkable 33% of the respondents thought the level of service in this division was poor.



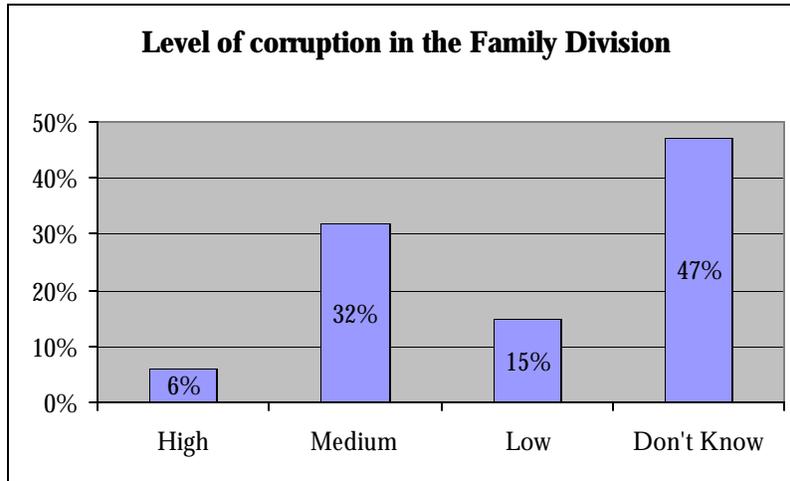
50% of the respondents stated that the level of service in the Criminal Division was poor, with a mere 37% stating that this level of service was satisfactory and above.



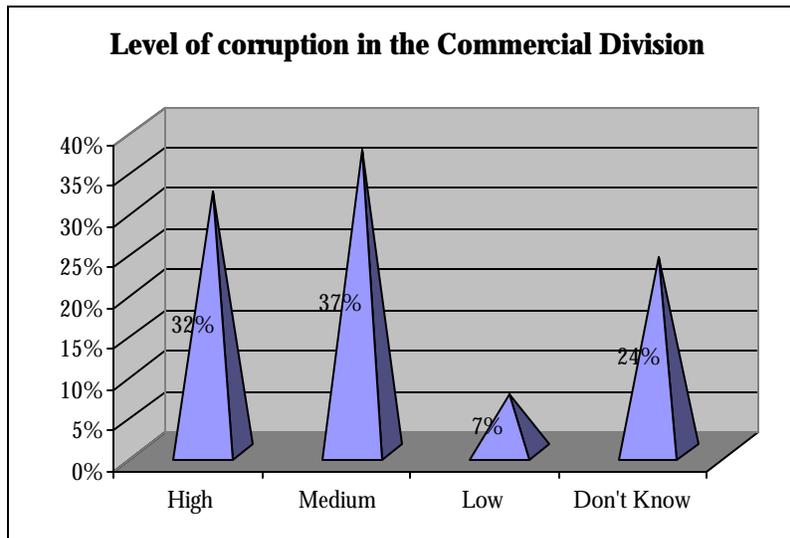
From these findings, the Commercial Division was the most preferred division while the Criminal Division was the least preferred Division.



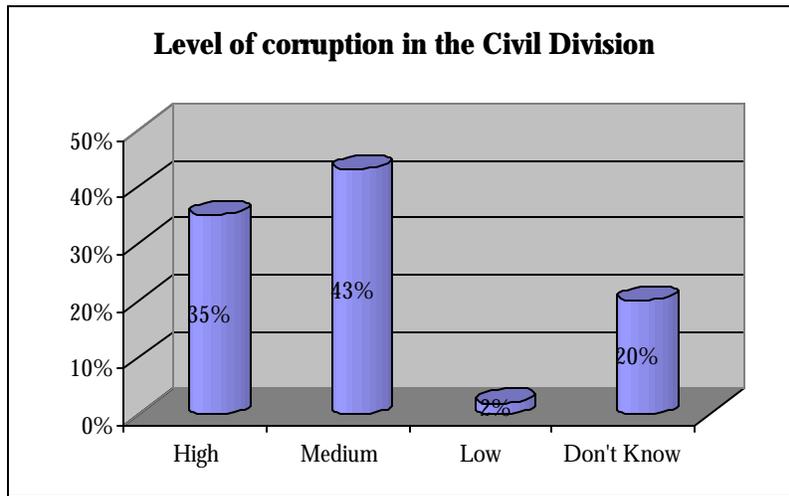
38% of the respondents stated that corruption in the Family Division was between high and medium. The level of business in this division compared to the other divisions is low and this was evident in the number of the people who stated that they did not know the level of corruption in the division owing to their minimal or no contact at all with the division.



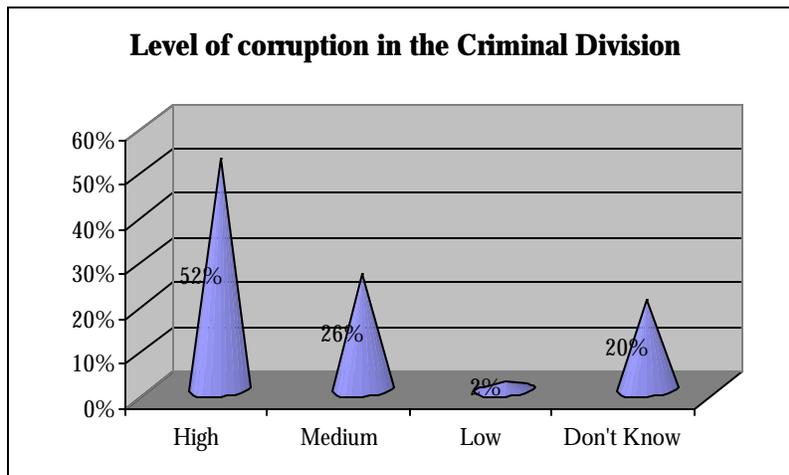
With 69% of the respondents rating corruption in the Commercial Division between high and medium, it was the second least corrupt division among the four. This is a clear testimony of how corruption is grave in our Judiciary.



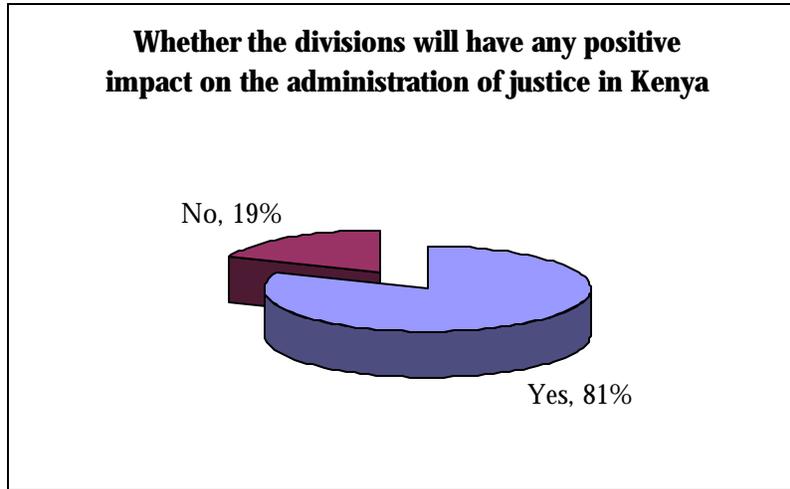
78% of the respondents stated that corruption was between high and medium in the Civil Division.



Like in the Civil Division, 78% of the respondents stated that the level of corruption in the Criminal Division was between high and medium.

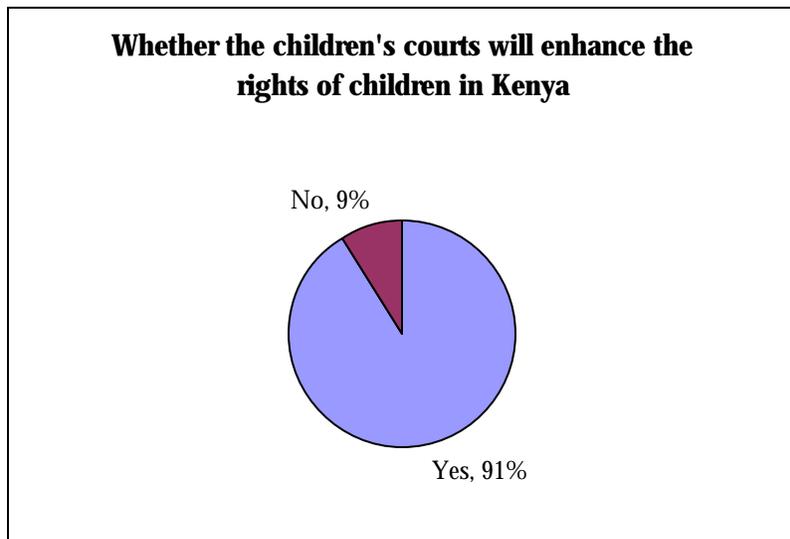


Majority of the respondents stated that these divisions if well implemented and managed, will enhance the administration of justice in the country.



#### 1) **Children's Courts**

An over whelming majority believed that the newly established children's courts will enhance the rights of children in Kenya.



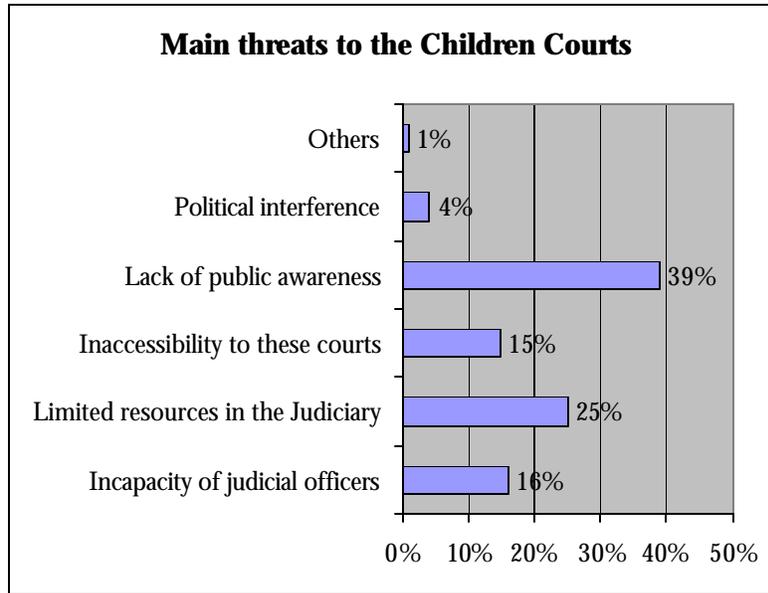
In order to achieve its objectives and foster children rights in Kenya, there are obstacles that must be overcome. From our sample, chief among these obstacles include:-

- Lack of public awareness of the existence of these courts
- Limited resources in the Judiciary

- Incapacity on the part of presiding judicial officers.
- Limited access to these courts

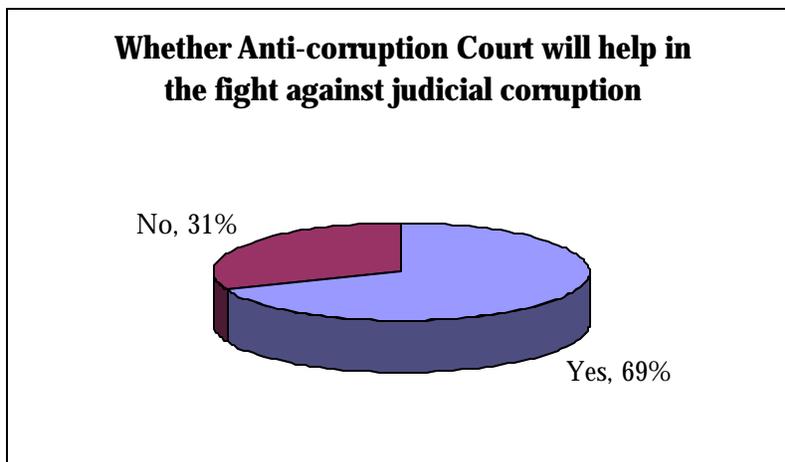
Other minor factors include;-

- Political interference
- Lack of public support due to lack of interest and cultural attitudes towards children issues by majority of Kenyans.
- Lack of adequate resources to ensue enforcement
- Lack of legal aid in Kenya



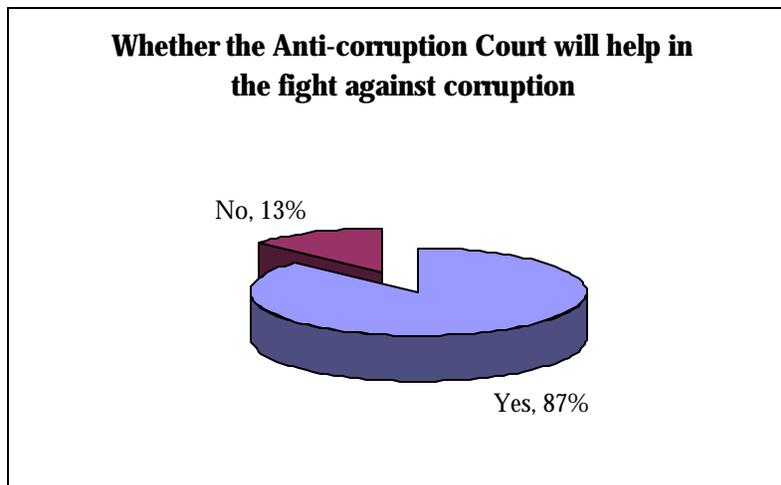
**m) Anti-Corruption Court**

69% of the respondents said that the Anti-corruption Court would help in the fight against judicial corruption in the country.



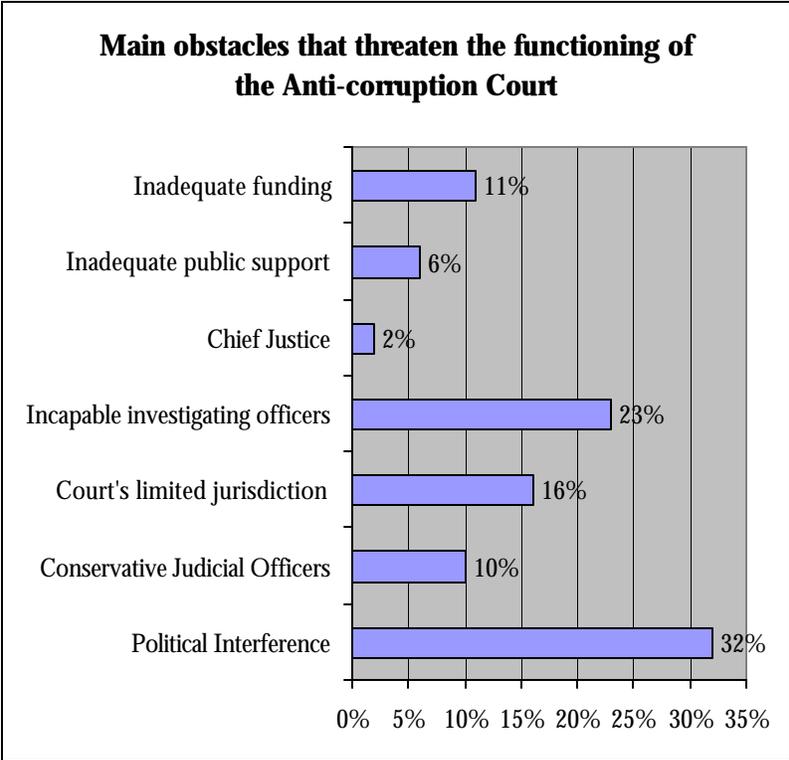
Even though majority of the respondents stated that the Anti-corruption court will help in the fight against corruption generally, some expressed fears that it might not help as much when in regard to judicial corruption. The doubt on the court's ability and commitment to fight judicial corruption are due to the following reasons;

- Judicial conspiracy to protect each other
- The court lacks constitutional backing hence faces numerous legal challenges as far as its establishment and functions are concerned.
- Corruption is a moral problem which can only be effectively fought through attitudinal change.
- Most cases handled in this court are perceived as already conceived and have a political connotation.
- Faces threat of interference from the executive arm of government.
- The courts are inadequate. They are only based in Nairobi, among others.

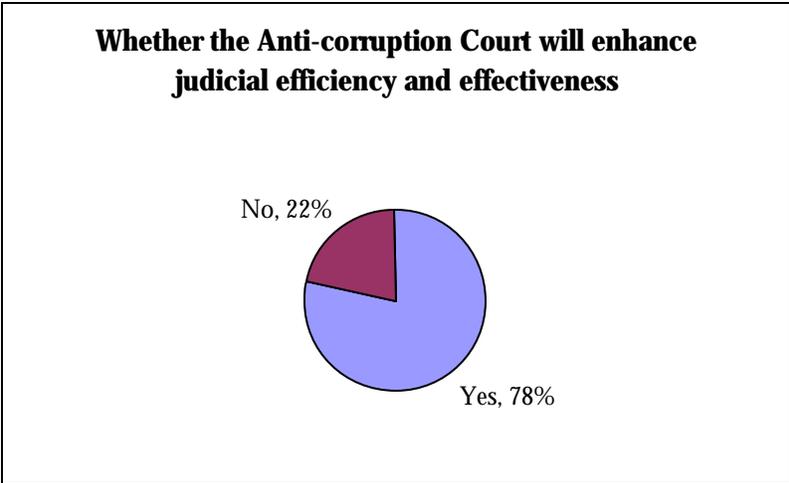


The functioning of this court faces numerous threats, such as

- Political interference
- Ill-equipped investigating officers
- The court has limited jurisdiction. The matters are currently being handled by magistrates who do not enjoy security of tenure and their positions and functions are not constitutionally protected.
- Inadequate resources especially, financial resources, among others.

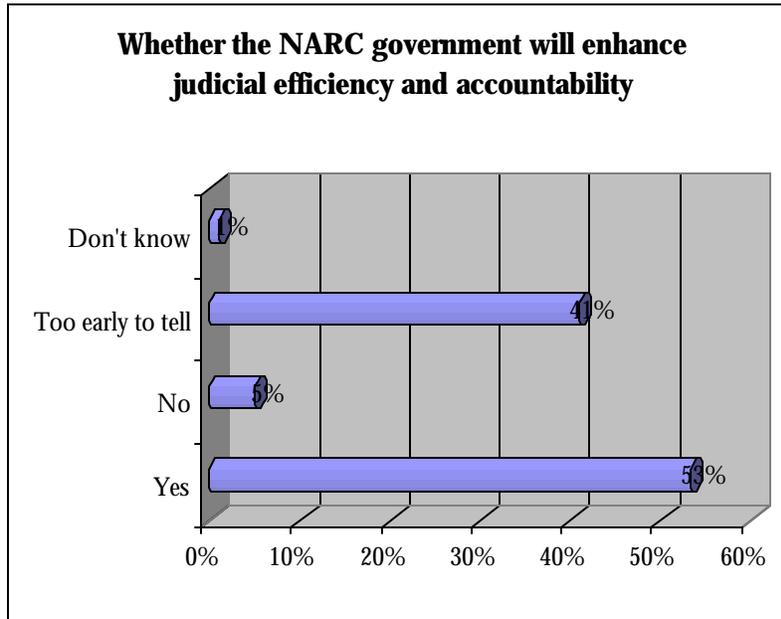


Majority of the respondents stated that if the Anti-corruption Court is well established and given constitutional recognition and protection, it is going to help in restoring judicial efficiency and effectiveness by fighting judicial corruption and therefore, upholding the integrity that is key in the administration of justice.



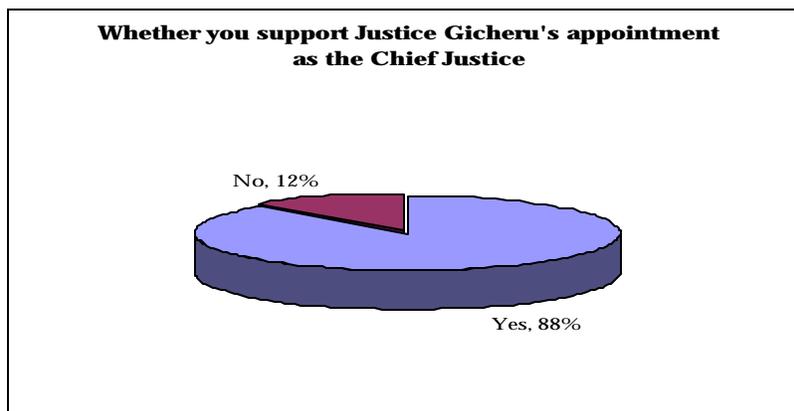
### n) New Government and Judicial Reform

53% of the respondents believed that the new government will help in fostering efficiency, effectiveness and accountability in the Judiciary. Although 41% of the respondents said it was too early to give an objective analysis of the new government's ability.

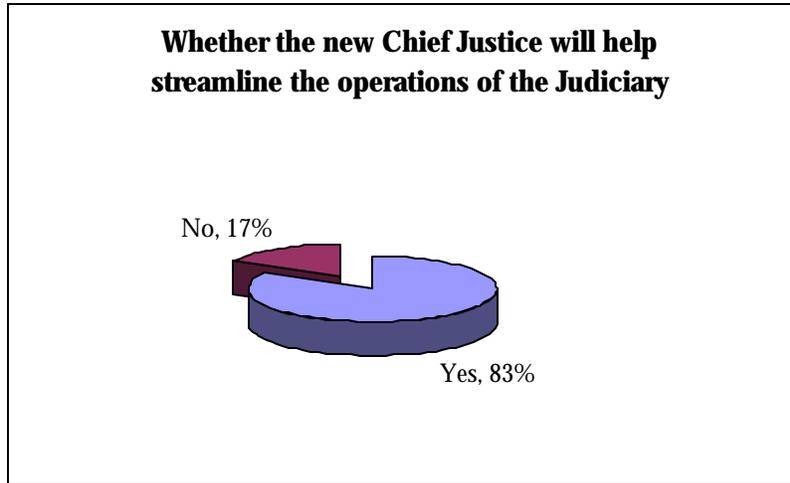


### o) The Chief Justice and Judicial Reform

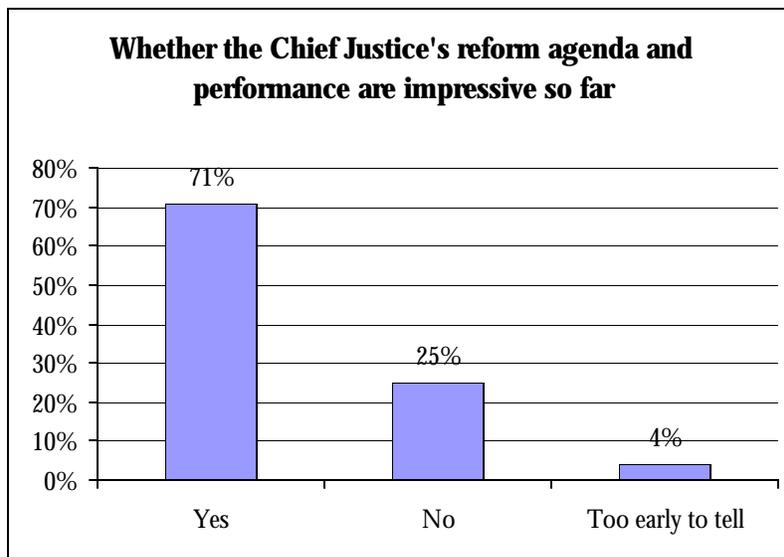
An over whelming majority (88%) of the respondents supported the appointment of Justice Evans Gicheru as the new Chief Justice. Justice Gicheru was up to the time of his appointment, the senior most judge of the Court of Appeal having served in this court since 1988. He was first appointed to the Bench as a High Court judge in 1982. In total, Justice Gicheru has served the Kenyan Judiciary for 21 years, making him the right candidate for the post based on seniority and experience.



83% of the respondents had faith in the ability of the new Chief Justice to streamline the operations of the Judiciary.



71% of the respondents were impressed with the new Chief Justice's reform agenda and performance in his first six months in the office. The Integrity and Anti-Corruption Committee that was headed by Justice Ringera was one of the strong pointers of the new Chief Justice's commitment to fighting judicial corruption and restoring judicial integrity<sup>15</sup>.



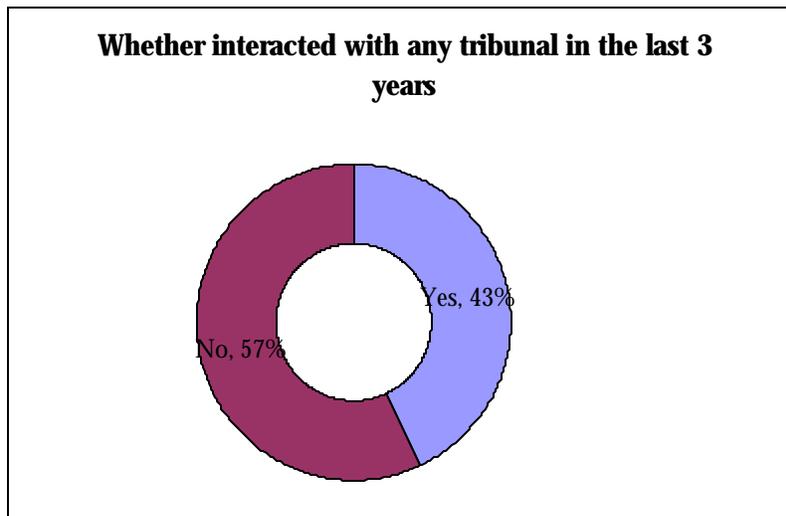
<sup>15</sup> Unlike in the past when findings of such committee's were never implemented, Justice Gicheru has moved and taken drastic action against 23 judges and 82 magistrates who were implicated in the report, raising hopes that he is committed to weeding out corrupt and undesirable judicial officers.

However, from our survey, there are those who are opposed to this appointment stating that Justice Gicheru will not offer anything new since he belongs to the group of judges that served in the old regime faithfully even when it was obvious that the system had failed and the independence of the Judiciary compromised.

Further, they said the new Chief Justice had no judicial jurisprudence to his credit since his appointment as a judge 21 years ago. Justice Gicheru's detractors allege that his appointment was effected on tribal and political basis since the Judicial Service Commission was not consulted. Asked about who was the best alternative, they suggested that a person from the Bar would have been better. Dr. John Khaminwa topped the list of potential candidates from the Bar. Others said that there were more deserving judges from the current Bench with Richard Kwach<sup>16</sup>, J.A and Aaron Ringera, J. leading this list.

#### p) **Tribunals**

43% of the respondents stated that they had interacted with at least one tribunal in the last three years.



Of the 43% who stated that they had interacted with the tribunal, majority (60%) appeared as advocates, and 21% as spectators. Majority of the matters that were being handled in these tribunals involved,

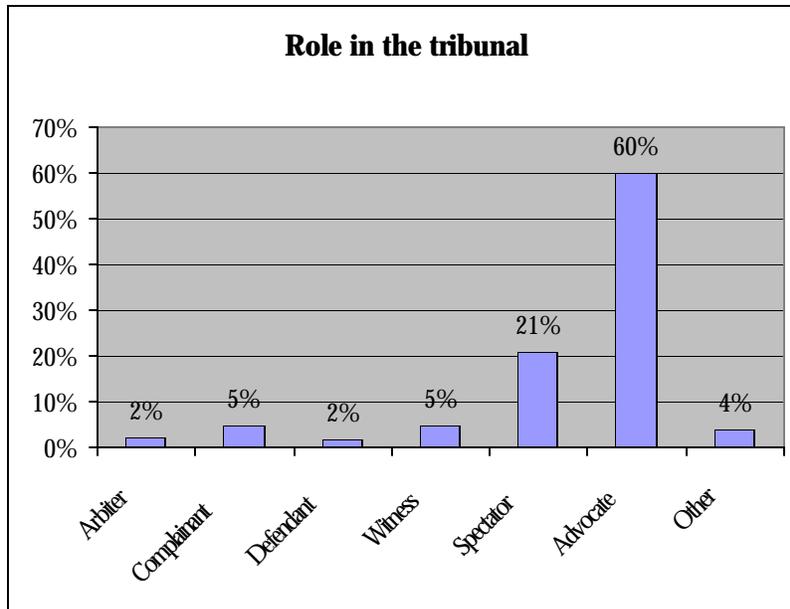
- Rent disputes both in the Rent Tribunal and Business Premises Rent Tribunal
- Land disputes

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<sup>16</sup> He has since been named in the list of shame. Although he has not been found guilty of the charges leveled against him, a mere mention of his name in the list of shame has certainly dented his image as an ideal candidate for the office of the Chief Justice as is for the office of a judge.

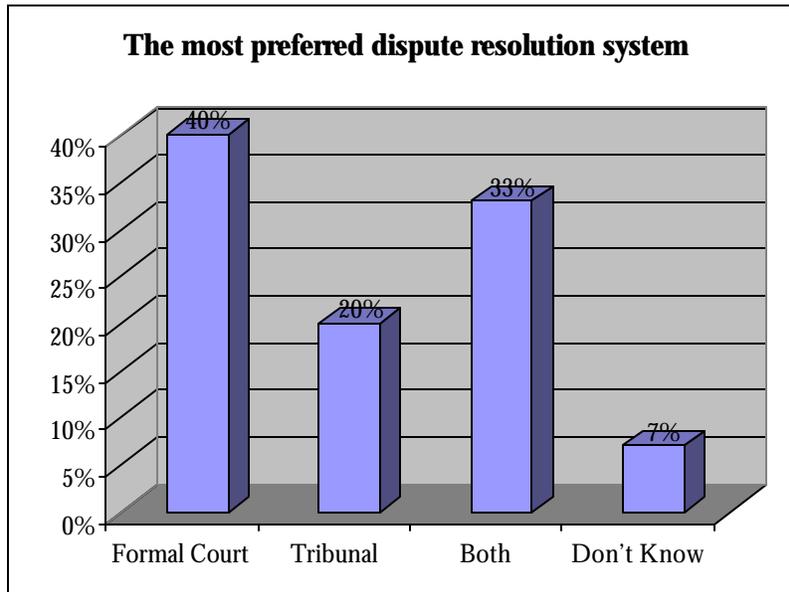
Others were,

- Labour (employment) disputes
- Goldenberg inquiry
- Tender award disputes
- Co-operative society disputes, among others



Asked about what system they would prefer, 40% of the respondents indicated that they prefer formal courts; 20% preferred tribunals while 33% stated that they would use both institutions depending on matters in question. The following were some of the reasons that people prefer tribunals to formal courts in order of preference,

- Simpler proceedings
- Faster
- Cheaper
- Less corrupt



## CONCLUSION

Over the years, ICJ Kenya's surveys have targeted the enlightened population as opposed to targeting the general public, this was to ensure that the information gathered was objective, progressive and had depth. Further, since most of the legal and judicial issues are technical, it was prudent for ICJ Kenya to target a section of the population that understood and could quickly comprehend the key judicial reforms necessary for our Judiciary in order to regaining its integrity and strip it off corruption. In this survey alone, ICJ Kenya interviewed a total of 187 practicing advocates, 5 judges and other key judicial officers.

As we reviewed the progress made over the three years, we found out that there have been slight improvements in some quarters but what was left to be done was far much more. The Judiciary continues to sag under the weight of corruption and inefficiency. As a result of this, the public has lost its trust and confidence in this important institution a situation that has worsened over the years.

Over the three years, one of the key administrative reform undertaken was the creation of court divisions in a bid to ease the problem of case backlog. This move has had a positive impact but as earlier mentioned until and unless corruption and inefficiency are uprooted, then nothing much can be expected from the Judiciary.

It is heart warming to note that the big hammer to fight corruption has finally fallen on the Judiciary. We hope the commitment and zeal that has been shown by the current Chief Justice to fight corruption and inefficiency will continue until the Judiciary has been completely cleaned. At this juncture, we must state that owing to the big numbers of judicial officers that were implicated in the Integrity and Anti- Corruption report, ICJ Kenya's stand that all judges must step down and re-apply for their jobs ought to be considered seriously. As is, it is very difficult to be convinced that there is any judicial officer that is clean, and that the current Chief Justice will be able to weed all corrupt judges. In as much as we do not wish to undermine the new Chief Justice abilities, it must be said that he faces a very tall order considering the fact he has been part of the system for so long.

It is our hope that the tribunals appointed by the President will move quickly in their tasks so as to avoid a bigger crisis in the administration of justice owing to the vacuum left by the named judges and magistrates. It is our hope and our appeal to the President that the next group of judges that he will appoint will be men and women of integrity and honour, qualified and fit to occupy such an important office. We hope that this is just the beginning of better things to come for the Judiciary and the administration of justice in Kenya.

## Annex 1

### **ADMINISTRATION OF CRIMINAL JUSTICE IN SEXUAL OFFENCES – PUBLIC OPINION AND JUDICIAL INDEPENDENCE \* A paper presented at the Jurists Conference on “Legal Protection of Women’s Rights in Kenya,” Mombasa 19<sup>th</sup>-23<sup>rd</sup> August, 2003**

*The criminal justice system deals in a criminal trial of rape as if the victim is on trial. The law provides overwhelming protection to the suspect and almost none to the victim. The suspect is allowed by the Constitution to be represented as of right. Yet the victim is not represented nor supported... legislation should allow the prosecutrix protection too by including provision in the Evidence Act and the Penal Code. This would reduce the overwhelming attacks by the defence on the Character of the complainant as they do not anticipate the same. Secondly, the victim should be allowed to adduce such relevant evidence against the accused. , **Margaret Muigai (Magistrate)***

Rape is one of the most abominable crimes anywhere in the world. The crime is largely perpetrated behind the curtains of darkness and out of sight of civilized society. And so often the victim has to suffer the atrocity in silence. The US Supreme Court has said that short of homicide rape is the “ultimate violation of self”. And Amnesty International in a report on Kenya entitled **Rape – the invisible crime** states that rape “is a crime that shocks and traumatizes the victim, and undermines the status of women in society.” In contemporary language one would even say that rape is a form of terrorism perpetrated through the penis rather than missiles. Indeed some gender activists already describe the penis as a weapon of mass destruction (WMD) – Even George W. Bush has his admirers!

In recent years the crime of rape has come under unrelenting public spotlight either because our society is badly infested with rapists or because of increased rights consciousness and awareness campaigns – the crime is rightly but controversially considered a form of violence against women. The singular result of those developments has been to shock our patrimonial society out of denial about rape. One horrifying ordeal after another have convinced the Kenyan society that urgent measures should be taken to curb, even eradicate, this vicious crime of rape.

In a statement issued to mark the UN Human Rights Day on 10<sup>th</sup> December, 1999, Attorney General Amos Wako observed that “violence against women pervades all social and ethnic groups. It is a societal crisis that requires concerted action to stem its scourge... culture does influence the relationship between the various groups in society and some cultural practices, beliefs and traditions have had the tendency to relegate women to a second class status in society thereby not only violating their rights as human beings but leading to discrimination against women. Some customs and cultural practices have

found their way not only into law but are used as justification for violence against women”.

Amnesty International quoted this statement in its aforementioned report but hastened to add that “despite its moral and legal obligations the government has not reformed Kenya’s law to make all acts of violence against women criminal offences, nor has it addressed the discriminatory practices of the police force, prisons services and court system.”

The view that Kenyan courts are corrupt and inefficient is widespread. The perception is particularly acute with regard to administration of justice in sexual offences described in the Penal Code under the heading **offences against morality**. Rape is one of those offences and this paper focuses on it because it is the better known and widespread. Given the low public confidence in the Kenyan courts there is a growing trend among the general public – courtesy of the print and electronic media – that every reported acquittal of a rape suspect either amounts to miscarriage of justice or was not fairly decided.

To prove that the judiciary shares no track with suspected rapists former Chief Justice Bernard Chunga started or rather popularized an interesting practice. Newspapers would report that a rapist has been acquitted or gotten away with a light sentence. Gender activists, editorialists and FM radio presenters would cry out for justice to be done and seen to be done. The CJ would call for the file and the Attorney General would, on his part, promise to either apply for revision of judgment or appeal against the sentence. In many cases the High Court would deliver a decision that comports with public opinion. Chunga is no longer Chief Justice but his legacy lives on – his successor Chief Justice Evans Gicheru continues the practice.

The provisions of the Criminal Procedure Code allows the High Court (the CJ is deemed a High Court Judge) to do so. Yet this practice poses a real threat to the rule of law and judicial independence. In the first, place outrage against a particular judicial decision is seldom based on objective and full appreciation of the merits and demerits of the decision. Secondly, this practice is not universal – the recent Chief Justices have not called for the files when robbery suspects are convicted, say, for stealing 50 shillings or a loaf of bread. Hence the impression is that rape cases are being given special attention to the detriment of accused persons because, upon revision, rulings agreeable to the public and gender activists are invariably made.

The society has an undoubted right to demand that the state should mete out proper punishment against criminals. Lord Denning spoke to this effect before the British Royal on Capital Punishment:

Punishment is the way in which society expresses its denunciation of wrong-doing: and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the

revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it irrespective of whether it is a deterrent or not.

This argument can be taken further. The possibility of innocent suspects being wrongfully executed should give way to the innate demands of society that criminals should be dealt with ruthlessly. In the murky province of rape law it may be said that the risk of convicting an innocent rape suspect is a small price to pay in the war against rape. This view may not be right in principle but they are perfectly normal and understandable.

What is not really normal or understandable is whether judges should share – without justification and regardless of principles – the revulsion of society against certain categories of crimes and criminals. Cast differently as a question we may pose: should judges use the instrumentality of the law to comport to or express public revulsion against certain crimes and criminals?

A decision of the Kenyan Court of Appeal delivered eight months ago has removed this question from the realm of theory with regard to the offence of rape. The case in question is **Mukungu -vs- Republic** (2002) LLR 2073 (CAK) in which the Court of Appeal declared that the requirement for corroboration in sexual offences affecting adult women and girls as unconstitutional to the extent that the requirement is against them as women or girls.

In brief the facts of the case were as follows. “The appellant John Mwashighadi Mukungu, was charged before the Senior Resident Magistrate at Voi with the offence of rape contrary to Section 139 of the Penal Code (Cap 63). The alleged offence was committed on 20<sup>th</sup> October 2000 at about 7:30 p.m. at Mwakingali Estate in Taita Taveta District of the Coast Province. Clemence Wawuda, the complainant, was returning home from Voi Township after some national celebrations, when she was accosted by the Appellant who dragged her into a nearby house, forcibly stripped her naked, threw her onto a mattress which was on the floor and forcibly had sexual intercourse with her. She screamed for help, but no one came to her assistance. After the act, the Appellant left her inside the house and went away after bolting the door from outside to prevent the Complainant from escaping. Shortly later the Appellant returned accompanied by another man who also forcibly had sexual intercourse with her. She did not identify him.

It was the Complainant’s testimony that several people saw the Appellant pulling her to the house where he raped her, but when the Complainant talked to them they did not bother to go to her assistance. Her effort later to make a telephone report of the incident to the police was fruitless. She then decided to report the matter to a village elder who on account of ill health could not assist

her. He however asked his wife and children to escort her to her house, which they did. She made a report the next day, to Phoebe Nanzala, a police constable, at Voi police station, who later arrested the Appellant and charged him with the offence. Phoebe testified that the Complainant reported to her that she had been raped by two men. Her evidence is however silent as to how she was able to know that the Appellant was one of the two men who raped the Complainant. It is, however, a matter from which an inference can be drawn that the complainant identified him to her. The Complainant testified that the Appellant was known to her before although not by name.

The Complainant was medically examined. Her urine and a vaginal swab were analyzed. Some pus cells and spermatozoa were noted. Those confirmed she had recently had sexual intercourse. The appellant was not however, medically examined. So medical evidence did not connect him to the alleged offence.

The trial magistrate believed the Complainant, looked for and found corroboration in the medical evidence and the testimony of Jenta Kwaze (Jenta) and Nyange Kwanze (Nyange). Jenta testified that someone knocked at her door on the material night seeking help. It was the Complainant whom she only knew by appearance. She observed that the Complainant appeared distraught and shaken, and was carrying her skirt and blouse in her hand. She had tied a sweater round her waist, and with her assistance they tried in vain to call the police. The Complainant allegedly gave her the Appellant's name but which she could not recall. Nyange corroborated Jenta's story on the Complainant's appearance on the material night. Those were circumstances which supported her story that she had been raped".

The appellant was convicted and sentenced to 10 years imprisonment with hard labour and was ordered to receive two strokes of the cane. He appealed to the High Court but his appeal was dismissed.

The appellant then lodged a second appeal on the ground that his conviction was based on uncorroborated evidence. The Court of Appeal (Kwach, Bosire and O'Kubasu JJA) noted that corroboration is "any other evidence to give certainty or lend support to a statement of fact. In sexual cases, corroboration is necessary as a matter of practice, to support the testimony of the complainant." The Court rightly agreed with the trial magistrate that the complainant by "her conduct and appearance at the time she was explaining her ordeal to the two witnesses was consistent with a person who had left in a hurry and who had been sexually assaulted. No doubt that material corroborated the complainant's story that she had been raped".

The Court however was of the view that on the basis of existing authorities the corroborative evidence in this case fell short of that required to support a conviction for rape, thereby implying that the conviction of the rapist could not otherwise stand (on proper scrutiny of the evidence this opinion is not correct).

And so, perhaps to ensure that the appellant did not get away with the offence it declared:

We think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases. Such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the Constitution.

And so on the sole ground that the requirement for corroboration in sexual offences offends section 82 of the Constitution an important pillar in criminal jurisprudence has been brought down. The trouble is that the constitutionality of the requirement for corroboration in sexual offence is not exactly obvious or self evident after the scantiest of analysis.

The law governing sexual offences was clearly stated by the Court of Appeal in **Chila –vs- R** (1967) EA; 722 as follows: “The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellant court is satisfied that there has been no failure of justice.”

There are three elements in the offence of rape which the prosecution must prove. These are, that there had been penetration of the victim’s vagina, that the sexual act which resulted in the penetration was without the consent of the victim and lastly that it was the accused who in fact committed the offence. Corroboration is required in respect of the offence as a whole and not in respect of separate ingredients. Thus in **Katumba –vs- Uganda** [2002]2 E.A. (SCU) the Ugandan Supreme Court held: Corroboration was additional independence evidence which connected the accused with the crime, confirming in some material particular not only the evidence that the crime had been committed, but also that the accused had committed it. Corroboration was therefore in relation to the offence of rape as a whole and not the ingredient of penetration only.

In the **Mukungu Case** the C.A. gives the impression that unless the requirement for corroboration was removed the accused person would have gotten away with a heinous crime. With all due respect, this view is wrong for at least three reasons. First, medical evidence and two witnesses corroborated that the complainant had been raped. Secondly, the complainant testified that she knew the Appellant before, although not by name, and that the accused was with her long enough in a room with ample light and was therefore able to

recognize him as one of the two men who raped her. In fact she was able to point him out to the police. These two reasons show that the complainant's testimony was corroborated at least in part. The requirement to show that it is the appellant who raped her need not be corroborated if he was sufficiently identified, as he was, as the person who committed the offence.

The third, and most important reason why the C.A. was wrong is that the prosecution case in this instance was so compelling that if the C.A. deemed the corroboration was deficient, under the **rule-in -Chila** all that the trial magistrate needed to do in order to safely convict was to warn herself of the dangers of convicting on uncorroborated evidence of the complainant. An objective analysis of the facts in the **Mukungu case** clearly show that the appellant could have been safely convicted, as he was, by the evidence before the trial court. Hence it is difficult to resist the conclusion that the polemic about unconstitutionality of the **Chila rule** was introduced in order to justify a quick and ill-advised trip to the Sea of Legal Mysticism.

It is said that when you want to hang a dog you first give it a bad name to justify its hanging. It seems to me that in **Mukungu** the C.A. projects the requirement for corroboration as an impediment to punishment of "guilty" rape suspects in order to strike it out on fairly flimsy ground that it is unconstitutional for being discriminatory of women within the meaning of Section 82 of the Constitution of Kenya.

Again the **Chila Rule** is not unconstitutional in any way. In the case of **George Kamau Ng'ang'a vs. Republic** Misc. Criminal Application No. 61 of 1981, Justice Z. R. Chesoni, held that the fact that the applicant's first co-accused was out on bail did not constitute a discriminatory treatment against the applicant whose application for bail was rejected by the same magistrate because the meaning of the phrase "discriminatory" in Section 82 subsection (2) of the Constitution is not the same as the natural or ordinary meaning of the word "discriminatory". The word has been "assigned a special meaning... and is used in a special restrictive manner." Section 82 (3) reads as follows:

in this Section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description."

This meaning would rightly apply where a law stipulated, say, that members of community A could not be enrolled in a certain public school to which members of community B could be admitted to. But it is not clear how the **Chila Rule** is discriminatory of women.

All that the Rule states is that depending on the particulars of each case the prosecution would be required to corroborate the rape testimony of the complainant whilst in another case corroboration of the (female) complainant's testimony would not be necessary in order for the trial court to consider whether to convict the accused person. It bears noting that in **Chila's Case** the Court speaks not of the "testimony of a complainant" in a sexual case, but the "testimony of the complainant" before the court. What this means is that the Rule-in Chila does not predetermine that a female complainant must have her evidence corroborated – all it says is that depending on circumstances such corroboration may be necessary.

Apparently in **Mukungu's** case the C.A is not clear precisely why and how the Chila Rule offends Section 82 of the Constitution. In the event, its endeavour to justify itself fails in two ways. First, the C.A. says that the caution administered in rape cases in the absence of corroboration "is not required of the evidence of women and girls in other offences." Of course it cannot be required because the requirement is based on the nature of the offence of rape and not on the gender of the witness. The only linkage of gender in rape cases is that as defined in Section 139 of the Penal Code the offence can only be committed against women and girls. The requirement of corroboration would be no less prudent if Section 139 was broad enough to cover the rape of men.

In the second place the C. A. states that the "Constitution has no provision authorizing any discriminatory treatment of witnesses with regard to matters of credibility". Again that is a matter of course. The Constitution could not make such provision because the makers of the Constitution knew that credibility of witnesses depend on specific circumstances in a given case and therefore the matter was not amenable to general statements of principle. Moreover, something is unconstitutional on the basis of what the Constitution ought to have stipulated or provided for!

The wrong notion in sexual offences revolving around the burden of female complainants requires to be debunked sooner rather than later. This notion indeed provided part of the inspiration in **Mukungu**. For instance the C.A. states that "the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women and girls."

It is certainly not true that judge-made law requires adult women and girls to prove corroboration. In criminal trials the duty to discharge the burden of proof – that the accused person is guilty beyond reasonable doubt – lies on the prosecution and not on the complainant. In rape cases, as in murder and robbery, the burden of proof lies on the prosecution and not on the complainant or the witness(es). And so for purposes of discharging the burden of proof the gender of the complainant or witness(es) is completely immaterial.

Perhaps the question that should be asked is whether the requirement for corroboration in sexual offences has any impact on and whether it serves any useful purpose in administration of criminal justice. The impact of the requirement is easy to discern – fewer rape suspects are convicted on account of it. The converse of the argument is that more victims of rape are impeded from achieving justice in the sense of the rape suspect getting convicted on account of the requirement for corroboration.

The second argument is one of principle namely that a) the requirement is a critical element of the burden of proof that the prosecution must discharge in sexual offences cases, and b) the requirement is a practical expression of the accused's right to the protection of law. The reasoning is really basic. Rapes cases from the standpoint of the complainant and the accused person may be cast as a case of an oath against another – the complainant says there was no consent while the accused insists there was consent. The requirement of corroboration then operates as an evidential device to tilt the balance against giving the accused the benefit of doubt. Additionally, it helps to ensure that guilt is determined through an objective rather than a subjective process – that is who between the accused and the complainant looks credible to the trial magistrate.

It is important to emphasize that in criminal law jurisprudence we talk about the rights of the accused person and the power of the state to prosecute. The so-called rights of the victim are strictly speaking not rights. For instance the “right of a rape victim” to have the suspect punished is subsumed in the power of the state to prosecute. Of necessity the right/power to prosecute is a radical and drastic power. The accused, not the victim or complainant, requires the protection of law. In the words of Lord Macdermott, Lord Chief Justice of Northern Ireland:

“The discovery and punishment of crime are functions which produce a dramatic preponderance of power on the part of the State. Against the wealth and resources of the prosecution the accused stands relatively poor and alone and far more often than not his case and its personal problems arouse little general interest or concern. In such circumstances the urge to get at the truth and to convict the guilty which excites most prosecutors may be armed with a great variety of weapons. The choice of these is important for it cannot but throw light on the nature of the system to which it belongs, on the extent to which that system recognizes the dignity and worth of man and on the place which it accords to the Rule of Law.”

In the famous case of **Stanley Munga Githunguri -vs- Republic** Nairobi High Court Misc. Application No. 271 of 1985 the High Court (Madan, Acting CJ, Gicheru and Aganyanya JJ) rejected an argument by Bernard Chunga, then DPP, that the applicant had acquiesced in his prosecution by participating in the criminal proceedings against him. Referring to the awesome powers of the

State to prosecute the learned Judges said: “The applicant appeared in Court in answer to the summons, perhaps he was taken there under escort. He pleaded not guilty to the charges. No accused person acquiesces in his own prosecution on a criminal charge, not even for riding a bicycle without light. An accused person goes into a criminal court trembling. He comes out somewhat shredded and shorn. He has no other option. It is not acquiescence, it is submission to the power of the law.”

The Constitution, statute and judge-made law seek to protect the accused person from state power through the instrumentality of rights and freedoms. Any attempt to chip away the rights of an accused person effectively makes him more vulnerable to injury and abuse of power. And the rights and freedoms of the accused are not mere platitudes to be waived whenever convenience dictates.

The Court of Appeal should guard against giving the impression that it has declared unconstitutional the requirement for corroboration in rape cases in order to make it easier to convict rape suspects. For the moment such a gimmick would turn out to be very popular but in the long run it will be counter-productive.

Let us remember the dictum, “the road to hell is paved with good intentions.” In the 1980s hundreds of people were badly tortured in the name of preserving national stability and the security of the State. The Nyayoists ended up erecting a terrible dictatorship. The Americans, too, started by asserting their right to torture Al Qaeda combatants in Guantanamo Bay. No sooner, they are now imposing draconian anti-terrorist legislation on us.

In blunt terms, the decision in the **Mukungu Case** has effectively changed the burden of proof in rape cases from proof beyond reasonable doubt to proof on a balance of probabilities. For without the requirement for corroboration trial magistrates would have to decide rape cases on the basis of whom between the complainant and the accused appears more credible. This sorry development is not without antecedence.

A couple of years ago, Mrs. Margaret Muigai, a Nairobi magistrate, in a paper titled **The Law of Sexual Offences in Kenya: A Review from the Bench** wrote: “The burden of proof imposed on the prosecution in matters of rape as in all criminal matters is fairly high; beyond reasonable doubt. Unlike the other offences, rape or defilement is an act that takes place in private, whereby more often such not the carnal act is by one known to the victim, either as a friend, relative or neighbour. Therefore, hardly is there any independent witness’s evidence that is adduced apart from the victim’s and when there is lack of medical evidence due to a myriad of reasons stated elsewhere the matter is dismissed. The burden of proof on this aspect should be on a balance of probabilities as the assailant is normally “recognized” not “identified”. If not, then the requirement for corroboration should not centre around only medical

evidence of the government analyst but any other medical evidence tendered to show consistency with a rape or defilement injury.”

The C.A. decision in **Mukungu Case** has finally answered Mrs. Muigai’s plea but it does so in a round-about way – it has changed the burden of proof without stating so in as many words. The decision is a real threat to the integrity of our criminal justice system. For unless the war against crime is underpinned by principle we may not be able to, for instance, resist the temptation to take “hard core” criminals to **kichinjio** (torture chambers) and for that matter to castrate rapists!

In a constitutional democracy, criminal suspects can only be convicted after being found guilty beyond reasonable doubt. Even when they are caught red-handed the law requires that they should be presumed innocent. The law even protects hardcore criminals from self-incrimination and being subjected to torture and ill-treatment. Want of resources on the part of the State cannot justify shortcuts for apprehension and conviction of criminals whether such short-cuts are stated in plain terms or seemingly learned legal jargon.

By its decision the Court of Appeal has made a negative contribution to the noble war against the scourge of sexual offences. For in disturbing the still waters of jurisprudence without exhibiting the profound reflection expected of it, the C.A. has succeeded in not only mistaking the law and confusing magistrates but in whittling down constitutional guarantees for rape suspects despite having no jurisdiction to do so. The ICJ-Kenya Section would do well to publicly express its displeasure at the latest adventure in jurisprudence by the highest court in our justice-thirsty land.

***The writer is a lawyer with the People Against Torture (PAT)***