


Southern African Journal
of
Policy and Development

Vol. 4 No. 2

December 2019

 SOUTHERN AFRICAN INSTITUTE *for* POLICY AND RESEARCH

Southern African Journal of Policy and Development

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Bottlenecks or Growth Zones? A Study of the Chirundu and Beitbridge Border Economies

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Land borders in the Southern African Development Community (SADC) region are critical zones for unlocking regional value chains, trade and economic development. The Beitbridge and Chirundu border posts represent important links in the North–South Corridor. They are vital in both regional development and bilateral initiatives. It is at these borders that many issues related to regional integration intersect. Understanding the major complications that prevent competitive trade and undermine trade facilitation initiatives is, therefore, essential. This policy brief examines the causes of standing time – a major contributor to transport costs in sub-Saharan Africa – and discusses the softer issues such as driver behaviour and border operations. We further discuss the economic development opportunities for border economies. These are intimately linked to the operation of border posts. Various complex linkages are considered. These include the potential disruptive impact that trade facilitation measures may have on firms operating at the border. A failure to improve border efficiency can similarly undermine the existing industries at the border. We also review challenges and economic opportunities at the Beitbridge and Chirundu border posts with a focus on women and youth. We conclude by providing policy recommendations.

1. Introduction

Substantial evidence suggests that trade costs remain one of the major impediments to increased intra-African trade. In particular, poor trade facilitation, inefficient and costly transport services and trade barriers have been shown to impede cross-border intra-African trade flows (Njinkeu, et al., 2008; Portugal-Perez & Wilson, 2009). The border effects literature shows that in addition to restricting trade, political borders segment product markets and cause price gaps of similar products to escalate beyond what is explain by distance (Nchake, et al., 2017; Rodrik, 2018). Studies on Africa show that national borders cause prices to deviate from the law of one price by 7 to 30 percent (Balchin, et al., 2015; Aker, et al., 2014; Brenton, et al., 2014).

These studies infer the border effect based on observed systematic discontinuities of prices across national borders, while controlling for distance and other factors, such as tariffs

and exchange rates. However, few studies explore the effect of standing time on exacerbating the border effect. It is clear that border delays, particularly standing time, increase transport costs the most and not the lack of backhaul opportunities, as others have argued. Softer operational issues rather than hard infrastructure constraints contribute most to standing time (Lowitt, 2017). The growth and development of intra-regional value chains in Sub-Saharan Africa will continue to be constrained by the weakest link in the chain – transport and logistics.

The biggest constraint to logistics performance is border functioning. That is border delays and standing time at the border. The two components most critical to efficient logistics, time taken and costs to transport, are very unfavourable in the Southern African region. The uncompetitive logistics environment continues to stifle growth and the development of regional value chains. The grassroots issues negatively affecting efficient logistics are well understood. A substantial body of work is available to guide decision makers on what needs to be addressed. It has been noted that “what appears to be lacking is appropriate prioritisation, political will and the operational ability to implement necessary changes” (Lowitt, 2018). Therefore, a bottom-up, value-chain-by-value-chain implementation strategy should be the focus.

Standing time increases transport costs substantially. This is dependent on the type of cargo being transported. Regardless of the various initiatives by the private sector, logistics companies currently attribute 60% of the high and uncompetitive logistics costs to standing time. They identify poor management at borders as the major culprit. It can be observed from the available literature that the problems arise mainly from operations and less related to physical infrastructure. This study of the Chirundu and Beitbridge borders seeks to explore these softer, operational issues.

2. Methodological Framework

The survey of the operations at the Chirundu and Beitbridge borders were conducted by a team of researchers. Interviews were conducted with various stakeholders and agencies on both sides of the Musina and Beitbridge borders and at the Chirundu border using a qualitative research technique. Beitbridge and Chirundu were selected because of the high amount of traffic that passes through them. The interviews were conducted using a semi-structured open-ended questionnaire. This was used as a guide for data collection, with the open-ended structure of responses allowing in-depth interviews. Some insights from the stakeholders' workshop in Harare and Pretoria are included in the analysis.

The respondents were chosen using a multistage cluster sampling technique. After selecting the survey sites in the first stage, the customs officials – the Zimbabwe Revenue Authority (ZIMRA) and the Zambia Revenue Authority (ZRA), were purposely selected as key stakeholders in border management. On the Beitbridge side, additional respondents from the Zimbabwe National Road Administration were also purposely selected for

interviews. A total six government officials in total was interviewed on immigration control and customs procedures. In the third stage, a number of randomly selected stakeholders were interviewed. These included 25 male truck drivers; one medical service volunteer from Trucking Wellness; eight local business owners, including three truck park owners; 12 clearing agencies; 24 cross-border traders; and five touts and vendors willing to engage.

On the Chirundu side, the respondents included: 19 clearing agents; 23 cross-border traders; 17 transit cross-border traders; 15 truck drivers; six bus drivers; the district economic planner; the district social planner; and the district HIV/AIDS coordinator.

Customs officials on both sides of the border, ZIMRA and the Zambia Revenue Authority (ZRA), were also engaged. The number of interviews depended on the respondents' availability and willingness to answer. The study was undertaken in June 2018 and was limited by the short time period available.

3. Results and Analysis

It is estimated that on average 400 trucks passed through Beitbridge every day in the first half of 2018. The truck drivers indicated that the average waiting time for a truck whose documents were in order was 48 hours. At the Chirundu border, we found that an average of 280 north-bound (into Zambia) and 140 south-bound (into Zimbabwe, loaded) commercial vehicles crossed the border every day. This is approximately 7,000 commercial vehicles every month and an average of 12 passenger buses every day. Customs officials observed that south-bound trucks took between two and 16 hours to complete border formalities, while some drivers estimated their waiting time at 36 hours.

It was observed that there are four main causes of longer standing times at both borders. These were poor signage and a lack of disaggregated lanes for offloading trucks, transit trucks, buses, commercial vehicles and passengers. A lack of risk management processes for scanning and inspections, leading to numerous inspections and a duplication of efforts among border agencies, causing longer queues; too few customs officials and inadequate inspection bays; and driver behaviour, where drivers remain at the border despite having been cleared.

Poor information and communications technology (ICT), weak interagency coordination owing to the lack of ICT connectivity, inappropriate infrastructure, ASYCUDA¹ system failures, badly trained and tardy clearing agents and shorter operational periods (on the Chirundu side) were also listed by stakeholders as extending standing time. The other major issues that were mentioned by about a dozen stakeholders were the numerous documents required and delays because of inadequate border and internal coordination. This underlines the importance of inter-agency coordination at borders.

¹ Automated System for Customs Data.

Table 1 captures some responses from Chirundu and Beitbridge on the reasons for border delays.

Table 1: Interviewees' summary of causes of long standing times – Chirundu and Beitbridge

Reasons for delays	Number of times mentioned (Chirundu)	Number of times mentioned (Beitbridge)
Staff shortages and inadequate inspection bays	9	5
System failures ²	6	15
Multiple inspections	2	9
Too many documents and delays resulting from other border and internal coordination issues (OSBP* specific)	11	not applicable
Slow and tardy agents / clearing agents' errors on declarations	2	7
Delays in remitting duties by consignment owners	5	5
Inadequate infrastructure / lack of separate transit lanes	3	20
Delays in bills of entry for the other side of the border (OSBP specific)	4	not applicable
Submission of declarations without import licences where required	no information	10

* One-stop border post

Source: Compiled by authors

3.1 Driver Behaviour

It was observed that truckers generally face poor working conditions. This tends to undermine driver well-being and contributes to the slow movement along the corridor. Truck drivers reported a litany of workplace challenges. These included serious labour rights concerns that have the potential to slow the movement of goods at the border. They complained about a lack of downtime between trips. Consequently, they preferred to spend more time at the border to rest, even once clearance is completed. They did not have enough funds for necessities, as many were not given adequate stipends by their employers. As a

² The researchers were delayed for two hours crossing into Zambia with a private vehicle, owing to the system delays. Officials have to wait for authorisation from Lusaka to initiate a manual capturing process for the issuing of toll fees.

result, they were more likely to act as conduits for smuggling for cross-border traders. Other complaints included poor treatment by certain state officials; the lack of amenities at border posts; downsizing of support teams such as escorts and co-drivers; concerns over harassment in the Democratic Republic of Congo and xenophobia in South Africa; and reports of union-busting during attempts to organise. It is thus doubtful that drivers have any incentive to reduce standing time.

Drivers contribute to standing time by remaining at the border despite the complete clearance of their documentation. Drivers said that they preferred to stay within the border area to undertake errands, to rest and for entertainment purposes, such as the use of commercial sex workers. Some drivers go home, to nearby towns such as Harare, and wait until the completion of their clearance documents. The additional time spent commuting back to the border adds to standing time. On average, a driver can spend an additional day or two at the border after having been cleared by customs.

The survey showed that driver behaviour is an important cause of extended standing time. This insight reinforces the fact that broad engagement with stakeholders is required when new trade facilitation measures are introduced. The implementation of new border procedures to reduce waiting time may be compromised if the source of the constraints and challenges causing drivers to remain at borders is not addressed. Driver behaviour must thus be incorporated into trade facilitation initiatives.

3.2 Risk Management Processes

Improved risk management processes are needed at both borders. This would contribute to the reduction of unnecessary queues. At Beitbridge, drivers reported that the Vehicle Inspectorate Department officers failed to issue receipts to truck drivers immediately after they paid for road transit coupons. This was later done, but at times as much as three hours later. At the Chirundu border, it was noted that a lack of coordination and cooperation among border agencies often resulted in multiple inspections. This increased standing time. Consignments were offloaded for physical inspection by customs, by agricultural experts for import and export permits and by standards officers, among others, before reloading. Additionally, queuing for the electronic scanner can take up to two hours per truck. A randomised scanning procedure could be considered to reduce standing time during such procedures.

3.3 Staffing Policies

A review of staffing policies at both borders is required to ensure they are well staffed, especially during peak traffic flows. Long queues cause unnecessarily increased waiting times. Truck drivers also attributed the extended border standing time to Zimbabwean customs officers who serve clients while accessing social media on their cell phones. In

addition, respondents reported that some clearing agents were tardy, mixed up procedures and made errors on documents that then had to be corrected. This is caused by the lack of appropriate training in clearing and forwarding for most clearing agents. It was observed on the Zambian side that the submission of incorrect documentation by customs agents caused a disconnect in procedural expertise. To ensure gender mainstreaming among government staff, an official staffing audit should be conducted to ensure officials are equally represented. This would also help female cross-border traders to report harassment or seek legal recourse with more ease, by being able to approach a female official.

3.4 Poor Signage

As a result of poor signage, touts are needed at borders to assist travellers. This creates an enabling environment for corruption and unnecessary middleman interactions. This results in added waiting time. Despite the Chirundu border being a one-stop border post (OSBP), there is insufficient signage and poor coordination between agencies. This increases waiting time at the border. The Beitbridge border requires a serious border re-design to simplify its time-consuming crossing processes by including sufficient signage and reducing the multiple steps taken by trucks, commercial vehicles and passengers. Modernisation plans are currently under way. It would be interesting to analyse the economic implications of this. The difficulties with the Beitbridge crossing procedures have caused the volumes of freight using the border post to decrease, especially in 2018. Drivers prefer to use other routes such as Grobler's Bridge or Pont Drift (borders between South Africa and Botswana).

3.5 Trade Facilitation Measures

Trade facilitation measures may have a disruptive impact on firms operating at the border. A lack of improvement in efficiency at the border can also undermine industries at the border. For example, Beitbridge is now open 24 hours a day. This has led to the closure of major hotels in the area. Travellers prefer to continue with their journey rather than seek accommodation. In examining the current economic activities at these borders, it is clear that while some level of border activity will likely remain regardless of trade facilitation changes, the current structure of border economies does not seem sustainable if improvements to facilitate border crossings are made without the creation of new economic opportunities in the long term.

Additionally, resistance from local industry could undermine trade facilitation reforms, as could firms' failure to take advantage of these reforms. For example, while the Beitbridge border now operates on a 24-hour schedule, most clearing agents do not, which undermines the impact of such reforms. Similarly, clearing agents require training and capacity building to ensure they comply with new and existing procedures, and that the benefits of the government-introduced facilitation measures are realised.

It was observed that firms were also concerned about the risk of trucks choosing alternative routes because of difficulties at the Beitbridge crossing, as mentioned earlier. This can be explained in the reported 16% decrease in traffic since 2016 at Beitbridge. There is, therefore, a need for broad engagement with stakeholders when new trade facilitation measures are introduced. This public–private interaction is necessary to ensure the tension between trade facilitation measures and stakeholders engaged in border activities is minimised and that the needs of the various stakeholders are incorporated in such measures.

3.6 Border Economy

The Beitbridge's border economy can broadly be divided into four segments: largely informal cross-border trade; a formal retail network that serves both traders and those crossing the border; a logistics industry largely serving the movement of freight through several clearing agencies; and, theoretically, manufacturing, which has potential for further development through the Musina-Makahdo special economic zone. Stakeholders that serve the border area need to be included in planning processes on trade facilitation initiatives, as a lack of coordination can undermine otherwise useful reforms.

The Chirundu border economic activity consists predominantly of small-scale or informal cross-border traders, mainly women and youth. Small-scale traders bear the brunt of many of the inefficiencies at the border post. There is a need to educate cross-border traders on official customs procedures, particularly on using the Common Market for Eastern and Southern Africa's information desks and the Simplified Trading Regime. The inadequate supply of amenities such as showers, toilets on the Zambian side (costing ZMW³ 2/\$0.20 per use) and low-cost accommodation are among the constraints experienced by cross-border traders, women and those travelling with children. With increased investment in the district, however, such as the recent construction of a Shoprite shopping mall, there have been positive spill-over effects, e.g. the opening up of neighbouring markets to Chirundu's agricultural products.

4. Policy Recommendations

To address the growth and bottlenecks of border economies such as Chirundu and Beitbridge, the state must pursue policies on trade facilitation that reduce waiting time with the consultation of stakeholders. Figure 1 depicts an example of key policy options from an action plan. The plan highlights beneficiaries that would benefit from these initiatives.

³ Currency code for the Zambian kwacha.

Figure 1: Border Action Plan

Recommendation	Border firms	Travellers	Truckers	Border towns
Single point of communication for complaints and issues	Dark Blue	Dark Blue	Dark Blue	Light Grey
Regional trucker federation	Light Grey	Light Grey	Dark Blue	Light Grey
Development of qualifications and support for training	Dark Blue	Light Grey	Light Grey	Dark Blue
Construction of secure, low-cost accommodation	Light Grey	Dark Blue	Light Grey	Light Grey
Construction of logistics parks	Dark Blue	Light Grey	Dark Blue	Dark Blue
Accreditation of vendors and guides at border posts	Dark Blue	Dark Blue	Dark Blue	Light Grey
Special processes and support to cross-border traders	Dark Blue	Light Grey	Light Grey	Dark Blue
Long-term: Centralised warehousing for cross-border traders?	Dark Blue	Light Grey	Light Grey	Dark Blue
Long-term: Cross-border economic zones?	Light Grey	Light Grey	Light Grey	Dark Blue

Source: Compiled by authors

Secondly, while trade facilitation initiatives are gradually being implemented, the state and private sector should institute coping strategies that involve better and transparent communication mechanisms between border agencies and the public. They should provide amenities at the border targeting women and youth, such as low-cost accommodation. The education of cross-border traders on trade processes should be prioritised. There is an incentive for the state to coordinate policy implementation to ensure trade facilitation measures are aligned with private sector interests.

Thirdly, the states of both countries should re-engineer border processes by redesigning the border, deploying efficient signage, disaggregating traffic lanes, reviewing staffing policies, especially during peak traffic flows, conducting joint inter-agency inspections including implementing procedures to reduce duplication of efforts, and introducing better risk management and sampling procedures for inspections and scans.

Fourthly, driver wellbeing must be a priority. The public sector should support the formation of a national or regional association to advocate for better conditions and ensure that drivers are represented in policy design. Driver behaviour should also be factored into trade facilitation initiatives.

Lastly, border firms need support to ensure clearing agencies provide training and capacity building to existing clearing agents (especially with youth on the Zambian side). This will reduce operational errors. The industry should look to standardise clearing agents' qualifications in the SADC region.

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Youth in Africa: Between Marginalisation and Demographic Dividend

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Since the 1980s, most African countries have experienced demographic shifts that have resulted in young populations, creating the possibility of youth marginalisation, but also a potential demographic dividend. The lack of social and economic opportunities generates unease about youths' future and anger and loathing towards society and government, heightening the risk of uprisings as witnessed during the Arab Spring. Governments have become aware of the inefficacy of existing policies designed to advance the welfare of the ever-increasing youth population, and look to change this by formulating inclusive policies, often with support from the international community, to harness youth potential. The African Youth Charter defines youth as those aged between 15-35 years, encompassing groups with different social, economic and political needs. The heterogeneity of this group makes policy formulation complex, resulting in poorly designed and ill-suited policies that fail to address the diverse and multi-faceted causes of youth violence. While SSA governments express concern about escalating youth violence, their macroeconomic policies are not well targeted at youth needs and create further agitation among the youth demographic. Some youths see contesting for political office as a solution to these challenges. However, the social, political and economic diversity of young voters hampers such solutions, as youthful candidates do not appeal to all young voters. Looking ahead, to harness the demographic dividend will require reforms and investments, especially targeted at the youth, including in ICT, youth empowerment programmes, quality education and healthcare. The goal is to better equip the youths for present and future challenges.

1. Introduction¹

Africa's youth are today caught between political and economic exclusion and the hope of an effervescent, globalised and affluent future that everyone, including government leaders, says awaits them (Lopes, 2013). Unencumbered by the trappings of political power, the youth have not desisted from rattling the existing order – as indicated by the Arab Spring and similar, if lower scale, insurrections in the rest of Africa. Although youth disaffection with the status quo currently runs deep, the young people's relative marginalisation and lack of influence are today providing a greater degree of youthful solidarity and political activism

¹ This discussion note draws on the lecture I gave at Cornell University, Ithaca, on 21 March 2019 as part of the Spring 2019 seminar series of the Institute for African Development, where I am also a Visiting Fellow. I thank participants for their comments and the Institute's Director, Prof. Muna Ndulo, for his support.

than in the past. This has emerged in spite of the amorphous nature of the youth as a group and the broad differences in their age composition, status, upbringing (i.e. rural, urban, poor, rich) and gender.

While the youth are seen as the custodians of Africa's future (African Union, 2006), they are at the same time derided by governments for their 'disruptive' behaviour and 'threats' to political stability (The Independent, 2016) – restiveness, armed rebellion, and gender-based violence have indeed become part of the continent's youth narrative. The recent growth surge and modernisation drive have not translated into jobs for the youthful population and a return to agriculture, which many young people have long deserted, is sometimes seen, by governments and development agencies, as the solution to the unemployment problem, although the level of skepticism is rising (Economic Commission for Africa, 2009; Johnston, Ives & Lobo, 2011).

Africa's policy debate has been enlivened, even as youth disgruntlement has escalated in recent years, by the prospect of a substantial demographic dividend emanating from the strategic deployment of its young people (Economic Commission for Africa, 2013). It is feared, however, that a broad youth insurgency might disrupt social harmony and reverse the size of the dividend. This could be countered by thoughtful and inclusive public policies, ensuring a better future for Africa's young people.

This discussion note looks at how African countries have responded to youthful political and economic demands, in light of their political economy and capacity constraints.

2. Youthful Ambiguity

The term 'youth' is today associated with a range of socially-tinged attributes in Africa, i.e. 'social malcontents'; 'rebels in search of a cause'; and, in the opposite direction, 'young nationalists' and 'the continent's future' (Ukeje & Iwilade, 2012). Some domestic observers have gone as far as blaming the youth insurrection on foreign interference, and the ease with which 'unAfrican' ideas and values are disseminated in the 24/7 media world of today (Abanyam, 2013).

The dichotomy is also partly to blame on differences in official conceptions of the youth, with some African countries underlining the importance of keeping the notion of rites of passage in mind when designating cut-off points for the various age cohorts. The African Youth Charter, launched by the African Union in 2006, set the youth age bracket at 15-35 years, while the UN, for statistical purposes, defined the 'youth' as those aged 15-24 years. Nigeria's national youth policy from 2009 set the bracket at 18-35 years, while Benin set it at 12-35 years in 2001. On the other hand, Angola, in 2005, eschewed the age bracket altogether in proposing its youth policy, focusing instead on the group's composition, i.e. students, unemployed youth, sex workers, etc.² Typically, the youth bracket not only includes

² For an overview of national youth policies from around the globe, see: www.youthpolicy.org

minors but also household heads, seasoned professionals and/or budding politicians. Hence, while the 'youth' moniker suggests a well-defined and homogeneous group within the broader population, it has proven too fuzzy a concept for the mobilisation of young people or the design and targeting of public interventions. The wide age variance suggests, in spite of appearances, that the youth's claim to homogeneity is scantier than assumed. It is sensible, as suggested by Goldstone & Day (2012), to consider age-cohorts within the larger youth group as the relevant point of departure, as they would have more political and economic affinity, and hence be more amenable to the coming-of-age sentiment.

If the African Union definition above is used, the African youth population is about 35 percent of the total population of some 1.29 billion (but only about 20 percent if the narrower UN definition is used instead). In terms of region, given that the median ages of low-income Sub-Saharan African (SSA) countries lie between 15 and 18 years, an unprecedented youth boom is expected there in the next decade. The middle-income countries of north and southern Africa have median ages above 25 years and the youth expansion will not be as dramatic. The fact that the youth-cohort in the latter region is older, employed and/or transcending into family life, and hence more politically alert and impactful, could explain why the Arab Spring happened there and not in SSA, where poverty is more acute, but where there might not be enough 'youth', in the right age bracket, to sustain a rebellion.

3. Youth Violence

Youth violence, though closely associated with today's young people, is not new in Africa (Waller, 2006). Sharp increases in rural-urban migration in the 1960s, as colonial-era restrictions to urban residence were revoked, led to spikes in petty crimes and urban thuggery in the face of high unemployment, lack of housing and poor access to social services (de Lemos and Moore, 1965; Leys, 1965). Still, in retrospect, youth violence was more of a social irritant at the time than a threat to social and political stability as it is today.

Recent years have seen youth violence achieve a greater disruptive potency across the continent (Heilbrunn, 2006; Blattman, 2009). Besides the 'youth bulge' itself, the causes include: rapidly expanding and unplanned urbanisation, leading to the ghettoisation of most large cities; mass unemployment and economic informalisation; the rise of religious fundamentalism; the paucity and declining quality of social services; frictions arising from rising poverty and inequality, including gender gaps; a greater sense of insecurity and victimisation related to small-arms proliferation in SSA, and related illicit drug activities; and the de facto pauperisation of the state owing to feeble finances, etc. There is hence a multifaceted link between socioeconomic factors and youth violence in Africa, i.e. involving personal, situational, socioeconomic, political, psycho-cultural and historical factors that require an equally multidimensional approach from governments. The endogeneity of the above factors raises formidable analytical and policy hurdles in assessing the impact of

discretionary public policy on the well-being of the youth in Africa (Boudreaux, et al., 2015; Marsh, 2007).

However, youth policies are often poorly designed and ill-suited for addressing the many-sided challenges of development (Muthee, 2010). In many cases, youth violence is seen as an isolated challenge, with specific socioeconomic demands, rather than as part of the broader challenge of social inclusion. Gender-based violence, while in many cases involving the youth – as both perpetrators and victims – is often seen as another policy challenge altogether and not as part of the discourse on youth violence (Douglas, 2000). A more nuanced discussion of youth violence requires a good understanding of the 'micro-macro' linkages and the nature of power structures – that, for example, enable the use of gender-based violence as a weapon of war (Sommers, 2015).

On the other hand, governments do not wish youth violence to escalate – as it affects tax income streams and the development agenda more broadly. In the SSA context, few governments could survive the persistent onslaught of well-mobilised youth groups. Governments have expended substantial effort in trying to prevent the escalation of youth violence – even eliciting the support of the international community. However, examples from Uganda (Swahn, et al., 2015), Cote d'Ivoire (Kayizzi-Mugerwa, 2018; Daddieh, 2016) and South Africa (Schuld, 2013) indicate that policies to address youth violence cannot be of the cookie-cutter variety. They must employ local knowledge and innovation and be inclusive to succeed. In Northern Uganda, for example, elaborate ritual cleansing ceremonies enabled the youth, even those that committed egregious acts of violence in the past, to return to their families and communities and lead normal lives.

The complexity of the causes of youth violence in Sub-Saharan Africa in turn complicates the design of public policy responses more generally – notably the decisions on where policymakers, given resource constraints, should make their entry points and focus resources. For example, the choice of whether to intervene at the level of infant and maternal health (improving mother's health and nutrition) or that of skills development at post-primary school levels; focusing on addressing youth mental health issues on an extensive scale; strengthening the implementation of the penal code and increasing the size of the police force; or creating job opportunities, including public works programmes for the restive youth.

Lastly, youth violence is prevalent in poor macroeconomic policy environments, as young people see a rapid diminution of their earnings, rising insecurity and a dimmer view of the future. Good economic policies that promote growth and provide employment opportunities are important preconditions for the success of anti-youth violence policies.

4. Youth and Politics: Not Too Young to Run

It has been argued that political parties based on the youth concept are implausible because 'youth' is not a social class *à la* the peasantry, but a microcosm of the total population –

among them are farmers, students, teachers, soldiers, prisoners, slum dwellers, politicians, etc. However, commensurate with their superior numbers, the youth have been demanding more influence on social, economic and political issues in their countries than ever before. Predictably, governments and civil society have sought to contain youth disaffection by appealing to young people's nationalism and love of country, urging them to desist from acts of destabilisation and violence as they await their 'turn', i.e. recent youth disgruntlement has largely been interpreted in political terms. Music has been a particularly effective medium for expressing political discontent and mobilising the youth (Perullo, 2011).

In many African countries, electoral cycles have tended to fan youth violence as a matter of course, with politicians using young people as their foot soldiers during elections, but abandoning them when the job is done. This breeds a level of cynicism among the youth that could have (and indeed has had) debilitating consequences (Musya, et al., 2017; Collier & Vicente, 2012).

To address youth restiveness, policymakers have responded with a wide variety of policies, emphasising social inclusion and economic empowerment. However, the political economy has been stark, with youth rights provisions and inclusive policies in social service provision hampered by the paucity of jobs and adverse legislation targeted at the freedom of the press and social media. The questions what role the youth should play in their countries and how the generational communication deficit should be addressed remain largely unanswered.

Governments have sought to contain youth disaffection by appealing to young people's nationalism and love of country and by formulating new national youth policies or refurbishing older ones. The latter have borrowed from the African Youth Charter mentioned above, including its emphasis on youth rights and freedoms. It urges state parties to ensure that "every young person should have the right to social, economic, and political and cultural development" and that all planning and decision-making should integrate and mainstream a youth perspective.

Political admonitions aside, national youth policies have thus far had limited impact on youth welfare or their attitude toward governments. Given resource constraints, governments, development partners and NGOs have tended to focus on more tractable subgroups, i.e. rural youth, ex-combatants, unskilled workers, sex workers, slum dwellers, school dropouts, etc. while leaving others, considered better-endowed, such as university students, to fend for themselves. On their own, such piecemeal interventions have limited traction at the macro-level, underlining the danger of seeing the youth challenge as not part of broader social and political inclusion.

With respect to youth in politics, a potent question is the extent to which effective youth coalitions could coalesce around common grievances and influence government policies (Goldstone & Day, 2012). In Nigeria's recently concluded federal elections, the youth expressed their consternation at being virtually excluded from vying for top office (top

candidates were all above 70) by using the hashtag #Not Too Young to Run.³ As there have been similar outcomes in many other countries in recent years, the youth think that establishing their own political vehicles might be the way out of their present quandary.

The example of South Africa's Economic Freedom Fighters (EFF) shows, however, that it is easier to establish a political foothold in a vibrant democracy than in a country where youthful ambition could be misconstrued for an attempt to overthrow the established order (Daniel, 2018). A political challenge for the youth in many African countries will therefore be how to transform their movements from pushing the causes of the moment, such as anti-corruption and anti-poverty, into effective political party structures, with manifestos that transcend the grievances that helped launch the movement in the first place.

5. Harnessing the Demographic Dividend

Africa's demographic dividend will be determined by how well countries are able to harness the social and technical capabilities of their young populations (Swaniker, 2017; Republic of South Africa, 2011; Williams, 2012). It will require reforms that generate sustainable growth, adoption of new technologies, and the provision of quality education and health services to boost productivity. The demographic dividend cannot be harvested in a vacuum and strategies are needed to create a conducive environment for youth participation.

However, youth expansion is happening in an environment of institutional weakness and fiscal fragility in many countries, with high rates of unemployment and a paucity of social services. While these constraints also affect other groups in the economy, the youth, lacking assets and steady sources of income, and often with limited access to credit and financial networks, feel quite marginalised and exceptionally vulnerable. Although recent youth cohorts are much better educated than their elders, their ability to contribute to growth is often severely constrained. Because youth concerns are sometimes seen as targeting a narrower section of the population, youth policies are often drafted in proforma fashion – partly intended to impress the international community that finances a portion of the youth portfolio – but with little budgetary traction. Success requires more domestic stakeholder involvement and heightened participation by civil society, including the youth themselves, and better integration with the much broader national development plans.

While Africa's youth, like their counterparts elsewhere, have been fervent at adopting social media and other ICT-related technologies, African governments have been much more restrained in their response, in some cases imposing taxes on social media.⁴ In contrast, the East Asian economies used the youth's enthusiasm for ICT to create information and knowledge generating platforms that helped them leapfrog to the frontier in research, health

³ In 2018, President Buhari of Nigeria signed the legal provision for reducing the lower age limit for presidential contenders to 40 years in 2018. It did not affect the final line-up of candidates for the 2019 election much.

⁴ For example, President Museveni (2018) of Uganda introduced a tax on social media, partly because he is of the view that it is too gossipy and partly because it was a convenient way to raise revenue.

and education service provision, logistics, and environmental protection, and to create modern jobs for their people.⁵ While this approach is being promoted in some of the recent national development plans on the continent (Republic of Uganda, 2016), the East Asian enthusiasm and focus on technology is still lacking. However, Africa's youth are much better educated and more tech-savvy today than ever before and the diaspora is beginning to do for the continent, in terms of remittances and transfer of technology, what the Asian one has done for its region for decades. There is thus room for optimism.

6. Conclusions

While there is not a country in Africa today that has not tried to respond to youth demands in one form or the other, in reality few African governments envision the youth challenge as a labour of love, rather as an exogenous threat to the body politic that must be eliminated. Experience suggests that there is a tendency for youth-targeted policies to be generic, poorly funded and lacking in operational concreteness and finesse. Few countries attempt to assess whether the policy targets they set in their youth policy frameworks are achieved. The political inclusion that the youth are demanding is often not forthcoming.

Thus, in spite of the creation of youth forums, ministries of youth and special-purpose vehicles focused on youth matters, the level of youth disgruntlement in many African countries is on the increase with ripple effects on the rest of the population. This is mostly because 'youth matters' such as unemployment, poverty and hunger are also affecting the rest of the population. You cannot realistically deal with youth concerns, without addressing them in the broader population. In this regard youth pressure is good for public policy, but destabilising for domestic politics.

The youth are adamant that real change can only happen when they access real power. However, while the youth have proven effective in pushing national causes, including anti-corruption, traditional party politics require the creation of formal structures – and hence a transition from largely voluntary activities to political contestation (and horse trading). The traditional parties consider the youth perceptibly 'too young to run' and will not help. Establishing their own political vehicles will not be easy, however.

With regard to the demographic dividend, it is ironical that Africa's youth 'bulge', considered a policy headache today, is actually the result of the continent's success in reversing the triple curse of 'poverty, ignorance and disease' inherited at independence. Notably, child and maternal mortality were radically decreased in subsequent decades, thanks to better education, health services and nutrition. Nothing suggests that such positive impacts will not recur in the future, enabling Africa to harvest the demographic dividend on a sustainable basis.

⁵ South Korea has been a leader in this regard. The Korean Education Research and Information Service (KERIS) has spearheaded the country's transformation into an information-based society.

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Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya

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Many users and/or consumers of law reports grapple with two major questions. The first question revolves around the issue why some judicial decisions are referred to as reported decisions, while others are referred to as unreported decisions. This question therefore deals with the dichotomy between reported judicial decisions and unreported judicial decisions. The second question flows from the first and relates to which categories of decisions appear in law reports (and therefore are classified as 'reported') and which ones do not (and therefore are classified as 'unreported'). Put the other way around, that second question becomes: what are the criteria for selecting the judicial decisions that appear and do not appear in law reports? This article therefore attempts to make a modest contribution to the field of law reporting by providing answers to those two questions. It does so by providing some reflections from the perspective of a practising law reporter based in Kenya. The paper uses various cross-cutting thematic areas to demonstrate why some judicial decisions are reported while others are not. The views provided hereunder are therefore merely an introductory note based on the emerging practices and developments in the field of law reporting in Kenya as used by the National Council for Law Reporting (the official state agency mandated to publish the Kenya Law Reports).

1. Introduction

The practice of law reporting refers to the technique of recording, preserving and documenting judicial decisions from the superior courts of records. It does so by collecting, collating, compiling, indexing and publishing judicial decisions in law reports. Law reporting thus facilitates the doctrine of precedent which is otherwise captured in the Latin expression of "*stare decisis et non quieta movere*" (hereafter referred to simply as *stare decisis*). In simple language, it can be translated as "let the decision stand." Therefore, what *stare decisis* means in practice is that when a court makes a decision in a case then all other courts of equal or lower status must follow that previous decision if the case before them is similar to the earlier case. This is only possible where an accurate system of recording those cases through law reports exists.

The doctrine of stare decisis flows from common law which in itself is a subset of English law. English law comprises two sets of laws which are: the written and unwritten English laws. English law is widely accepted as part of Kenyan law by virtue of the reception clause found at section 3(1) of the Judicature Act of 1967. The effect of that reception clause was to import a broad spectrum of English law to supplement Kenyan legislation.

The written English laws refer to pieces of legislation/statutes, while the unwritten English laws comprise a set of laws such as (i) the common law; (ii) the doctrines of equity; (iii) the law merchant (*lex mercatoria*); and (iv) the practice and procedure of English courts. However, the scope of this article will only look at the common law because it solely relies on the doctrine of precedent. The hallmark of the common law system is the importance it accords to the decisions of judges of the superior courts of record. Reported decisions refer to only those decisions which carry precedential value. Thus, a precedent is a judgement or decision of the court which establishes a legal principle or rule and is usually recorded in a law report. The import of the doctrine of precedent is that similar cases involving similar circumstances should be decided by the application of similar principles of law.

The doctrine of precedent also applies in a hierarchical manner in that decisions of superior courts are binding to the other courts below. Courts below the superior courts of record are bound to apply the decisions from the superior courts of record. It follows, therefore, that decisions from the subordinate courts and those of tribunals inferior to the High Court and courts of equivalent status to the High Court are not binding. Over the years, the superior courts of record in Kenya have rendered some decisions which are of jurisprudential value (decisions of high legal and practical importance) and those decisions have been reported in the various editions of the Kenya Law Reports. The main objective of law reporting is therefore to extract the essence of juristic thought and to present it as one of the beacons of the legal path. It is not to inform the public of all that happens in a court of law. Hence the overriding consideration in law reporting is to only report judicial opinions which make a contribution to the development of jurisprudence.

The reporting of such cases is done through the physical print publications/hard copy law reports (such as the Kenya Law Reports) or sometimes they are published in digital platforms or in online legal databases (such as www.kenyalaw.org). Mostly, the publication of judicial decisions happens in both concurrently. That is to say that some decisions appear both in the physical law reports and at the same time in the digital online legal database/platform. It is the concurrent publishing of the law reports on physical law reports and online legal databases that brings the challenge of the blurred dichotomy between unreported decisions and reported decisions.

2. Distinction Between Reported Judicial Decisions Versus Unreported Judicial Decisions

Traditionally, judicial decisions were classified as either reported or unreported judicial decisions. The reported decisions referred to those decisions which appeared in the physical published law reports. They referred to decisions of legal and practical importance (Bryan, 2009). On the other hand, the unreported decisions fell into two categories. The first category referred to those decisions which remained uncollected by the law reporters and therefore did not appear, or those that did not make it to the law reports due to other reasons that could not be accounted for. In some instances, the second category of unreported decisions referred to those decisions that were outright deemed to be dross. Such decisions included those which were considered (by the law reporter) as not having any legal or practical importance and were therefore deliberately left out when compiling the law reports. In that sense, the law reports referred to the physical printed books containing a compilation of judicial decisions from the superior courts of record. Thus, the reported decisions in the physical law report books referred to the finest collection of judicial decisions that were also of high legal and practical importance. That was because such judicial decisions aided in the development of the law.

Attempts to distinguish judicial decisions that are of high legal importance from those which are not of high legal and practical importance have led to the emergence of terms like 'reported decisions' and 'unreported decisions' in contemporary legal parlance. These two terms have existed side by side without a proper understanding of the dichotomy between those two terms. The overarching argument that this paper seeks to advance is that there ought to be a proper distinction between those two terms. The proper distinction between the two terms is that a reported decision refers to only those decisions that appear in a law report, whereas an unreported decision refers to a judicial decision that does not appear in a law report.

The big question is, how do we end up concurrently with both categories of decisions: the reported and unreported decisions? There are many possible answers to this question, which this paper will not all explore. Most importantly, the era of technological advancement has immensely contributed to the increasingly blurred dichotomy between reported judicial decisions and unreported judicial decisions.

Advancements in technology have ushered in the publishing of judicial decisions on digital platforms or online legal databases. Publishing judicial decisions on digital platforms has advantages and disadvantages. Since this paper is concerned with the need to distinguish between reported and unreported judicial decisions, it will only mention the disadvantage that arises from publishing judicial decisions on digital platforms. There could be many disadvantages, but the most glaring danger is that by publishing judicial decisions on digital platforms both categories of decisions that have legal and practical importance as well as those that do not have any legal and practical importance end up being published. When that

happens, it becomes increasingly difficult to determine whether such decisions meet the criteria for law reporting.¹

The conflation of judicial decisions that have high legal and practical importance with those decisions which do not have any legal and practical importance further contributes towards the blurred dichotomy between the reported and the unreported judicial decisions. One of the main reasons contributing to the blurred dichotomy are the divergent approaches used in determining which decisions to publish. The approach used in the traditional physical law reports usually makes reference to only those decisions that are of high legal and practical importance. In doing so, some of the decisions collected from superior courts of record are sieved out and they do not appear in the final physical publications of law reports. On the other hand, judicial decisions appearing in online databases hardly pay regard to their jurisprudential value (legal and practical importance) but rather all decisions made by the superior courts of record and which are received by the law-reporting publishing house are published in the online/digital databases.

Perhaps, the major reason for this approach is determined by the storage capacity levels of each. Traditional physical law reports such as the Kenya Law Reports follow strict selection criteria for reporting judicial decisions from the superior courts of record. Those law reports (books) also have limited capacity in terms of the number of pages each book/law report should have. This has the effect of only selecting the very finest of decisions that appear in law reports.² On the other hand, digital platforms have unlimited capacity for publishing judicial decisions in terms of space and therefore as much decisions as possible can be published online. The challenge with this is that regrettably some of those decisions ending up in the online platforms/databases may not have any legal and practical value at all. Ultimately, if both sets of decisions (those that have legal and practical importance and those that do not) are published in the digital platforms, it becomes increasingly difficult to distinguish between which decisions from the superior courts of record are the 'reported' ones and which ones are the 'unreported' ones.

3. Reported Decisions from the Superior Courts of Record

In Kenya, the legal mandate of publishing the official law reports for the Republic lies with the National Council for Law Reporting (Kenya Law). This organisation is mandated to perform the law reporting functions under section 3 of the National Council for Law Reporting Act.³ In a nutshell, section 3 (a) and (b) of the National Council for Law Reporting Act provides that the organisation shall be "responsible for the preparation and publication

¹ The criteria for law reporting are discussed in the subsequent sections of this paper.

² Major law reporting entities have their editorial guidelines that provide selection criteria to be used when choosing the decisions that should appear in law reports. These criteria will be discussed in detail in the subsequent sections of this paper.

³ National Council for Law Reporting Act, Act No. 11 of 1994.

of the reports to be known as the Kenya Law Reports, which shall contain judgements, rulings and opinions of the superior courts of records; and to undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports.”

The secretariat of the National Council for Law Reporting has been in existence for about two decades.⁴ In the process, the organisation has been able to publish numerous volumes of law reports each year and it has maintained a vibrant online database for law reports.⁵ As a result thereof, some decisions from the superior courts of record in Kenya have become popularly known as reported decisions while others have become known as unreported decisions.

At the same time, there are many other decisions that cannot be classified as outright reportable or unreportable. This category of judicial decisions has emerged as a result of digital publishing of all decisions without paying regard to their legal or practical importance. Such decisions are therefore ambivalent in character. They are ambivalent because it is hard to discern whether or not they have any legal or practical value. Yet at the same time they remain available for citation through research. That is so because, in one way, they may be viewed as reportable decisions for the simple reason that they have been published and are easily accessible for all. Yet, in another way, they may also be viewed as 'unreportable' cases for the simple reason that they do not advance any new jurisprudence that can be used for the development of the law.

4. Unreported Decisions from the Superior Courts of Record

During this same period, some judicial decisions have curiously remained unreported. Nonetheless, some of these have over time proven to be of jurisprudential or precedential value owing to the fact that they are often cited in legal research, notwithstanding the fact that they do not appear in any law report.

In this regard, one of the most cited decisions that has never found its way to the law reports is the 1976 celebrated case of *Hottensiah Wanjiku Yawe versus Public Trustees*.⁶ That decision laid down the principles for determining the test for presumption of marriage in Kenya's family law. It is important to give a brief background of the relevant facts and holdings of that decision for the obvious reason that this particular decision has never been reported in any of the official law reports of Kenya. Yet at the same time, this particular decision has remained a *locus classicus* when determining the test for the presumption of marriage in Kenya.

⁴ Despite the fact that the secretariat for the National Council for Law Reporting was established pursuant to the 1994 NCLR Act, there is sufficient evidence to suggest that Kenya Law Reports existed even as early as 1897. For a detailed history of the Kenya Law Reports, see <http://kenyalaw.org/kl/index.php?id=125>

⁵ See generally www.kenyalaw.org

⁶ *Hottensiah Wanjiku Yawe versus Public Trustees*, Court of Appeal Case No. 13 of 1976.

The relevant brief facts and holdings were that Mr. Yawe was a Ugandan born pilot, who was also ordinarily resident in Nairobi, Kenya. Sometime in 1972, he died in a road accident somewhere in Uganda. Upon his death, the appellant (Ms. Wanjiku) claimed to be his widow and also claimed that she had four children with the deceased. Those claims were however contested by some respondents. They argued that Ms. Wanjiku was not the deceased's wife, neither was the deceased a married man. However, during trial, evidence was adduced which revealed that the deceased lived with the appellant as a wife and also that when he applied for a job at the East African Airways as a pilot, he had named the appellant as his wife.

Further evidence showed that the deceased and the appellant were also reputed as living as husband and wife owing to their long cohabitation of approximately nine years. The court held that long cohabitation as husband and wife gave rise to the presumption of marriage and only cogent evidence to the contrary could rebut such a presumption.

Incidentally, neither the trial court decision nor the appellate court decision in *Hottensiah Wanjiku Yawe v Public Trustee* was ever reported in any law report. Curiously, it is still largely missing even on digital platforms.⁷ However, the decision in *Hottensiah Wanjiku Yawe v Public Trustee* has been quoted in several other jurisprudential and reported cases. For instance, as early as 1984 and 1985 the decision was quoted in the reported decisions of *Kituu v Nzambi*⁸; *Machani v Venoor*⁹ and *Njoki v Muthuru*.¹⁰ And even recently, it has been quoted in the 2018 decision of *B C C v J M G*.¹¹

Similarly, the case of *Aaron Gitonga Ringera & 3 others versus Paul K Muite & others*,¹² is another famous decision that can be classified as an unreported case. It is classified as unreported because to date it has never been reported in any law report. That notwithstanding, the case is often cited among cases dealing with the law on contempt of court proceedings.¹³ Yet, it is still missing from the records of any law reports.

Broadly, in that case, the court held that it had powers to coerce or to punish contemnors in the following words, "so all in all, the above exposition says what is all about committal proceedings for contempt of court namely, that a court order has been issued; the person to whom it is directed disobeys it and so the court in order to assert its authority,

⁷ Efforts are being made by the National Council for Law Reporting to conduct a campaign that will see some of such decisions (containing lost jurisprudence) that were never collected to be published in special editions in the future.

⁸ *Kituu v Nzambi* [1984] KLR 411

⁹ *Machani v Venoor* [1985] KLR 859

¹⁰ *Njoki v Muthuru* [1985] KLR 874

¹¹ *B C C v J M G* [2018] eKLR; other recent decisions citing *Hottensiah Wanjiku Yawe v Public Trustee* include; *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR; *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR;

¹² *Aaron Gitonga Ringera & 3 others versus Paul K Muite & others*, Nairobi HCCC No. 1330 of 1991

¹³ see *Viktar Maina Nginjiri & 4 others v Director of Public Prosecutions & 5 others*, Miscellaneous Civil Application No. 189 of 2014 [2014] eKLR; *Kabuito Contractors Limited v Nairobi City Council*, Miscellaneous Application No. 607 of 2004 [2004] eKLR; *Copos Limited v Maalim & 23 others*, Civil Case No. 2088 of 2001 [2004] eKLR

maintain its dignity and contribute to the rule of the law and good order in the society, it deals with the disobeying party – all for the greater goal of keeping the course of administration of justice clear always. It would be a chaotic society where the court orders were disobeyed and that was left at that. There were other aspects of contempt e.g. disobeying a court process; attacking a court officer e.g. while serving/involved in matters of court; insulting judicial officers etc. But those aspects are not of concern here. However, for whatever aspects of contempt of courts, a court through history and in every jurisdiction exercises the power to coerce or punish contemnors.”

The two decisions discussed above demonstrate that the jurisprudential content/value of some decisions remains, notwithstanding the fact that some of those decisions do not appear in the law reports (neither physical nor digital). This further confounds the need to create a dichotomy between reported judicial decisions and unreported judicial decisions. However, the overarching argument that this paper has attempted to advance is that there is need to understand that ‘reported’ judicial decisions refer to only those that have been published in the physical law reports, to the exclusion of those published in other platforms, such as the digital platforms. As a result, it is important to discuss the salient features of digital publishing of judicial decisions versus the classical approach to law reporting.

5. Digital Publishing of Judicial Decisions

Digital publishing of judicial decisions refers to the publishing of judicial decisions on digital platforms/online platforms/databases as opposed to physical law reports. Judicial decisions published in digital platforms are therefore accessed from websites in soft copy.¹⁴ Digital publishing of judicial decisions has the advantage of unlimited volumes of space or capacity. This enables more and more publishing of judicial decisions in the digital platform without worrying about the size of the publications. Consequently, nearly all decisions passed by the superior courts of record have been ‘reported’ through the digital platform.

As a result, the classical dichotomy between reported and unreported decisions is becoming increasingly blurred. The practice of publishing judicial decisions in digital platforms also offends one of the greatest principles in law reporting that provides that law reporting should not be about informing the public of all that happens in a court of law but rather to only provide decisions that have high legal and practical importance.

Another twist is introduced when certain decisions are reported on digital platforms, yet are left out in physical publications of law reports. Admittedly, it is arguable whether the physical publications of law reports are the official copies of the law reports or whether the

¹⁴ Leading examples of websites that publish judicial decisions in Africa include; www.kenyalaw.org; www.abysinnialaw.com; www.ghalii.org; www.lesotholii.org; www.malawilii.org; www.namiblii.org; www.nigerialii.com; www.sierralii.org; www.saflii.org; www.seylii.org; www.swazilii.org; www.ulii.org; www.zimlilii.org

judicial decisions published on digital platforms carry the same weight as physical law reports. In recent years, it is increasingly becoming acceptable for users of law reports to either cite the physical law reports or cite the digital versions of the same case.¹⁵

Arguably, at the time the National Council for Law Reporting Act was enacted in 1994 it only envisaged physical print publications of law reports and not electronic/digital versions of law reports. Curiously, however, the National Council for Law Reporting Act, No. 11 of 1994 has never undergone any major amendments since it was enacted. Therefore, most of the ideas behind its provisions reflect the position of law reporting as at 1994.

For instance, section 19 of the National Council for Reporting Act requires judges of the superior courts of record to supply as soon as practicable after delivering a judgement, ruling or an opinion a written report to the editor of the Council for Law Reporting. Section 20 of the said act also requires the registrars of the superior courts of record to file monthly returns to the editor in the form of a list of all judicial decisions delivered by the superior courts of record. Section 21 of the said act provides that the Kenya Law Reports are the official law reports to be cited in all proceedings in all the courts of Kenya. Currently, the Kenya Law Reports comprise judicial decisions published in the physical law reports (popularly known as the Kenya Law Reports) as well as judicial decisions published on the digital platform which can be accessed at the web domain of www.kenyalaw.org.

The conflation of the reported judicial decisions and unreported judicial decisions on the digital platform of the Kenya Law Reports thus presents the challenge of isolating precedential decisions from those which are not precedential. This paper has attempted to argue that, first, there is need to have a proper distinction between reported judicial decisions and unreported judicial decisions. In this case, reported judicial decisions refer to only those that have been published in the official and physical Kenya Law Reports.¹⁶ Secondly, all other decisions that have been published in the digital platform of the web domain of www.kenyalaw.org remain part of unreported decisions. Thirdly, and without doubt, the fact that some decisions remain classified as unreported does not in any way impute that they lack high legal or practical importance.

¹⁵ By way of practice, decisions published on the online platforms are often cited with the suffix 'eKLR' at the end. Examples of such a citation in a case include: *Kiplagat v Law Society of Kenya* [2000] eKLR or *Speaker of the National Assembly v Karume*, [1992] eKLR; or *Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille* [2017] eKLR etc. On the other hand, decisions reported in the physical law reports are cited showing the parties to the case, year of publication and page numbers in which they appear. An example of a case reported in the physical law reported is cited as follows *Muruiki & 2 others v Republic* [2005] KLR 443 or *Munene v Republic* [1978] KLR 181 etc. In this case, 'KLR' refers to Kenya Law Reports and 'eKLR' refers to electronic Kenya Law Reports.

¹⁶ An emerging practice within the Kenyan courts is that whenever one is confronted with the challenge of which decisions to cite then primacy ought to be given to judicial decisions appearing in the official Kenya Law Reports in preference to judicial decisions appearing on the digital platform www.kenyalaw.org otherwise cited with the suffix 'eKLR'. Notably, both the Kenya Law Reports and the digital database www.kenyalaw.org are run by the National Council for Law Reporting which is the official state run agency for law reporting.

To illustrate the complexity that is posed by having a system that publishes the official Kenya Law Reports alongside publishing judicial decisions in the digital platform, we shall use two recent decisions from the High Court of Kenya (*Republic v Leraas Lenchura*¹⁷ and *Republic v Mohamed Abdow Mohamed*¹⁸). Notably, neither of these two decisions was reported in the Kenya Law Reports. However, they were both published on the digital platform www.kenyalaw.org.

For ease of comprehension, it is important to provide the facts of both cases which are very similar. The brief facts to those two cases are that in both instances, the accused persons were charged with the offence of murder of the respective deceased persons. However, by the end of the trials, both courts determined the matters in a similar way.

In the *Leraas Lenchura* case, the court sentenced the accused person to a five-year suspended sentence (because of his advanced age, 89 years) as well as requiring the accused person to pay one female camel to the family of the deceased person. In the *Mohamed Abdow* case, the court allowed the parties to record a 'consent' which had the effect of withdrawing the matter from Court. The details of the 'consent' included,

...The two families have sat and some form of compensation has taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family. Actually, one of the rituals that have been performed is said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families have performed the said rituals, the family of the deceased is satisfied that the offence committed has been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they do not wish to pursue the matter any further be it in court or any other forum.

It appears that both decisions emanated from different benches of the High Court of Kenya sitting at Nakuru. Ordinarily, decisions from the High Court are of a binding nature to courts below it and they are also highly persuasive to courts of equal status. However, both of these two decisions elicited a lot of discussions and commentaries from legal scholars and the general public.¹⁹

¹⁷ *Republic v Leraas Lenchura*, Criminal Case No. 19 of 2011, High Court of Kenya at Nakuru by Justice Anyara Emukule delivered on 19th July 2012, <http://kenyalaw.org/caselaw/cases/view/81686/>

¹⁸ *Republic v Mohamed Abdow Mohamed*, Criminal case No. 86 of 2011, High Court of Kenya at Nakuru delivered on 2nd May, 2013 by Justice R Langat-Korir. <http://kenyalaw.org/caselaw/cases/view/88947/>

¹⁹ For further reading on the academic debates that ensued as a result of those decisions see, Teddy Musiga "Integration of Customary Law Concepts into Kenya's Criminal Justice System: a Commentary on *Lenchura & Mohamed Abdow* cases" (2016) *Law Society of Kenya Journal*, pp 139-149; Francis Kariuki, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed*", (2014) *Alternative Dispute Resolution Journal* Vol.2; Francis Kariuki "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems" (2015) *University of Nairobi Law Journal*, volume 8, pp. 72-88; Kariuki Muigua & Kariuki Francis, "Alternative Dispute Resolution, Access to Justice and Development in Kenya"(2015) *Strathmore Law Journal*, volume 1, pp. 1-21; Emily Kinama, "Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of

Those discussions and commentaries led to a number of issues being raised about the 'reportability' (legal and practical importance) of those two decisions. First, at face value, the *Leraas Lenchura* case and the *Mohamed Abdow* cases can be deemed to have some legal or practical importance (depending on how one looks at it), therefore making those cases 'reportable', because they were determined by superior courts of record under the doctrine of precedent. Secondly, depending on how someone approaches those cases, they can also be deemed as cases of high legal and practical value because they raised novel issues in the administration of justice.²⁰ However, both cases do not appear in the physical print of the Kenya Law Reports of their respective years – 2012 and 2013. Instead, they appear on the digital platform www.kenyalaw.org.

These two cases therefore demonstrate the big challenge posed by having a system of concurrent publishing of judicial decisions on the digital platform as well as in physical law reports. Admittedly, both decisions raised a lot of public outcry at the time when they were determined (and published). At the time they were decided, it was largely unheard of to terminate formal criminal trials by fining accused persons to provide camels, goats and other traditional ornaments. Perhaps that public outcry could have contributed to the decision of the law reporters to not publish those decisions in the physical publications of the Kenya Law Reports and instead only to publish them in the online database. Perhaps, such a decision was arrived at under the impression that the 'official law reports' refer only to the physical Kenya Law Reports and not the digital platform. And therefore, the subsequent elaborate discussions that ensued after the publication of those decisions were unforeseen when making the decision to publish those decisions in the digital platform.

The other way of looking at the decision not to publish those decisions in the physical publication of the Kenya Law Reports is that both of those decisions were determined *per incurium* and therefore they were not of any precedential value worthy of reporting. Under the common law system, decisions rendered *per incurium* are those decisions which are made through lack of care.²¹ They also refer to those decisions which ignore contradictory statutes or binding authority and are therefore wrongly decided and of no force.²²

Be that as it may, those two decisions have also attracted substantial debates in the academic arena by way of eliciting journal articles and commentaries.²³ This demonstrates that notwithstanding the fact that some decisions may be regarded as 'unreportable' in the opinion of the law reporters, the era of publishing judicial decisions on digital platforms is

Kenya, 2010" (2015) *Strathmore Law Journal*, volume 1, pp. 22-40; John Osogo Ambani & Ochieng Ahaya, "The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era" (2015) *Strathmore Law Journal*, volume 1, pp. 41-58.

²⁰ Ibidem.

²¹ *Morelle Ltd v Wakeling* [1955] 2 QB 379

²² Ibidem.

²³ For further comprehensive readings on the academic debates that ensued as a result of those decisions see, (Musiga, 2016; Kariuki, 2014; Kariuki, 2015; Kariuki & Kariuki, 2015; Kinama, 2015; Osogo Ambani & Ahaya, 2015).

increasingly opening the space for such kinds of decisions which were previously regarded as unreported. Publishing such decisions in online databases has therefore made them easily available and accessible for purposes of research and other reasons.

The era of publishing judicial decisions on digital platforms therefore calls for interrogation and introspection of the criteria used when determining 'reportable' judicial decisions *strictu sensu*. The next section of the paper will discuss emerging criteria that are being used by the National Council for Law Reporting when selecting which decisions to publish in the official Kenya Law Reports.

6. The Emerging Criteria for Determining Reportable Decisions in the Kenya Law Reports

Like every other publication, law reports also go through various editorial processes. Those processes are put in place to ensure that only the finest decisions from the superior courts of record are reported. From the time of Sir Edmund Plowden (arguably the first official law reporter)²⁴ to date, the criteria for reporting judicial decisions have evolved over centuries. At the time of Sir Edmund Plowden, the criterion was simply to report decisions that raised questions of legal principle.²⁵ The fact that a decision attracted public interest and newspaper comment did not justify its publication if it raised no issue of legal principle.²⁶ So far in Kenya, the following criteria are emerging to determine the categories of judicial decisions that are selected for purposes of reporting in law reports.²⁷ They include:

- i. Decisions making new laws by dealing with a novel situation or extending the application of an existing principle of law;
- ii. Decisions tending to materially settle a point over which the law has been doubtful;
- iii. Decisions interpreting the language of legislation;
- iv. Decisions in which a judge restates or abrogates an existing principle of law or restates the principle in terms of a particular applicability to local jurisdiction;
- v. Decisions in which the court sets out deliberately to clarify the law for the benefit of lower courts and the teaching of law;
- vi. Others include; First, decisions in which a judge applies a principle which although well established, has not been applied for many years and may be regarded as obsolete; Second, decisions where a court states its review on a point of practice or procedure; Third, occasional judgements interpreting clauses found in contracts, wills, articles and other documents; Fourth, occasional judgements indicating the measure of awards with regard to quantum of damages for personal injury, death,

²⁴ Michael Bryan, "Early English law reporting" (2009) *University of Melbourne Collections*, issue 4, https://law.unimelb.edu.au/_data/assets/pdf_file/0010/1529632/Early-English-Law-Reporting.pdf

²⁵ Michael Bryan, "The Modern History of Law Reporting" (2012) *University of Melbourne Collections*, issue 11, https://library.unimelb.edu.au/_data/assets/pdf_file/0010/1379026/07_Bryan-LawReport11.pdf

²⁶ *Ibidem*.

²⁷ See the Editorial Policy of the National Council for Law Reporting (Kenya Law) at www.kenyalaw.org

defamation, etc.; Fifth, appeals from decisions of lower courts which had been previously reported; Sixth, judgements delivered in cases raising a matter of public interest or those which are for some other reason particularly instructive.²⁸

7. Conclusion

This paper set out to clarify two main things: first, whether there exists a distinction between reportable judicial decisions and unreportable judicial decisions. Secondly, in the event that there actually is a distinction between reportable judicial decisions and unreportable judicial decisions, then there is need to establish the criteria for determining/selecting the reportable judicial decisions from the unreportable judicial decisions.

To begin with the distinction between reported and unreported judicial decisions. The paper has sought to make an argument that indeed there is a distinction between reported judicial decisions and unreported judicial decisions. In this case, it established that reported judicial decisions refer to only those that have been published in the official and physical law reports. In the case of Kenya, that refers to the Kenya Law Reports.²⁹ To that end, all other decisions that have been published in the digital platform of the web domain www.kenyalaw.org remain part of unreported decisions. The paper also established that without doubt, the fact that some decisions remain classified as unreported does not in any way impute that they lack high legal or practical importance. Examples to that effect were drawn from the *Hottensiah Wanjiku Yahweh* case,³⁰ *Mohamed Abdow* case³¹ and the *Leraas Lenchura* case.³²

The paper also revealed that the advent of technology ushered the practice of law reporting into publishing judicial decisions on digital platforms/databases. As a result, the traditional distinction between reported judicial decisions and unreported judicial decisions increasingly became blurred. That is because using technology allows all the good and dross judicial decisions to be published in one medium or the other. Further, the paper also revealed that the era of digital publishing of judicial decisions has presented a platform for publishing judicial decisions which would otherwise be considered as unreported decisions for the reason that such decisions do not accord any legal or practical importance.

²⁸ Ibidem.

²⁹ An emerging practice within the Kenyan courts is that whenever one is confronted with the challenge of which decisions to cite, then primacy ought to be given to judicial decisions appearing in the official Kenya Law Reports in preference to judicial decisions appearing in the digital platform www.kenyalaw.org. Notably, both the Kenya Law Reports and the digital database www.kenyalaw.org are run by the National Council for Law Reporting which is the official state run agency for law reporting.

³⁰ *Hottensiah Wanjiku Yawe versus Public Trustees*, Court of Appeal Case No. 13 of 1976

³¹ *Republic v Mohamed Abdow Mohamed*, Criminal case No. 86 of 2011, High Court of Kenya at Nakuru delivered on 2nd May, 2013 by Justice R Langat-Korir. <http://kenyalaw.org/caselaw/cases/view/88947/>

³² *Republic v Leraas Lenchura*, Criminal Case No. 19 of 2011, High Court of Kenya at Nakuru by Justice Anyara Emukule delivered on 19th July 2012. <http://kenyalaw.org/caselaw/cases/view/81686/>

Having established that indeed there is a distinction between reported judicial decisions and unreported judicial decisions, the paper looked at the emerging criteria used in selecting judicial decisions to be reported in law reports. Admittedly, the criterion used by the National Council for Law Reporting (Kenya Law) is an internal policy which can help all researchers to understand why certain decisions are reported while others are not. That criterion also helps in supporting the argument favouring the need for a proper comprehension of the distinction between reportable judicial decisions and unreportable judicial decisions.

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