

# **Project Title: Scaling Access to Justice Research Collaboration**

IDRC Project Number: 108787-002

Final Technical Report,  
May 2018 – November 2021

Submitted on 10<sup>th</sup> December 2021

Country where the project is being carried out: **Kenya**

## **Research Team**

Katiba Institute, Kenya - Ben Nyabira, Christine Nkonge, Jill Cottrell Ghai, Patricia Joseph, Hilda Njoki

The University of Nairobi's Institute of Development Studies (IDS), Kenya - Prof. Karuti Kanyinga, Prof. Paul Kamau, Charles Opiyo, Naomi Wang

The University of Nairobi's School of Law (UoN-SoL), Kenya – Dr. Nkatha Kabira, Dr. Sarah Kinyanjui

## **Research Institutions:**

Katiba Institute (KI)

University of Nairobi's Institute for Development Studies (IDS)

University of Nairobi's School of Law (UoN-SoL)

## Table of Contents

Abbreviations.....	3
1.0 Executive Summary .....	4
2.0 Research Problem .....	6
3.0 Progress Towards Milestones.....	8
3.1 To Bridge Evidence Gaps and Develop Improved Research Methods to Scale Basic Legal Services.....	8
3.1.1 Knowledge on Obstacles to Accessing Justice for the Marginalized and Vulnerable.....	8
3.1.2 Understanding Trends in Access to Justice Using Informal and Alternative Initiatives.....	9
3.1.3 Methodologies for Analysing Cost Effectiveness of Access to Justice Initiatives.....	10
3.1.4 Knowledge on Cost Effectiveness of Specific Access to Justice Initiatives for Policy Interventions.....	11
3.4 Contribute to Evidence-Based Policies and Better Targeted Practices to Scale Access to Justice in Kenya .....	13
4.0 Methodology.....	14
5.0 Project Outputs .....	16
5.1 Research Papers.....	16
5.2 Research Tools .....	17
5.3 Report of the Study.....	17
5.4 Contribution to Policy on Access to Justice .....	17
6.0 Problems and Challenges.....	17
7.0 Overall Assessment and Recommendations .....	18

## Abbreviations

ADR	-	Alternative Dispute Resolution
AJS	-	Alternative Justice System
CBA	-	Cost Benefit Analysis
CBO	-	Community Based Organisation
CSO	-	Civil Society Organisation
IDS	-	Institute for Development Studies
KIPPRA	-	Kenya Institute for Public Policy Research and Analysis
KNCHR	-	Kenya National Commission on Human Rights
NALEAP	-	National Legal Aid and Education Program
NCAJ	-	National Council on the Administration of Justice

## 1.0 Executive Summary

The promulgation of Kenya's 2010 Constitution provided an impetus for enhanced access to justice for Kenyans through use of alternative dispute resolution including traditional mechanisms. Existing research had shown that majority of the population does not use the formal court process to access justice. Thus, the need for more information on the initiatives used to resolve disputes was necessary to not only document them but also learn about their effectiveness and sustainability with a view making recommendations on their suitability for scaling up access to services. It was against this backdrop the project was conceived. Overall, the project sought to contribute towards catalyzing deeper and more sustained efforts, at a national and global level, to scale basic legal services and ensure access to justice for all through the building of new evidence and models of analysis. Specifically, it sought to (a) fill evidence gaps and develop improved research methods needed to scale basic legal services more cost effectively and sustainably in Kenya and (b) contribute to evidence-based policies and better targeted practices to scale access to justice in Kenya. The report responds to these objectives, giving a highlight of the outputs and outcomes that resulted from the interventions of the project.

In response to the first objective, the project carried out a multi-pronged research study that sought to understand the obstacles to access to justice in Kenya for the marginalized; identify specific access to justice initiatives that are relevant to the marginalized and vulnerable groups; and undertake an analysis of costs and benefits of the specific identified access to justice initiatives and an in-depth analysis of their potential for sustainability and scaling-up.

To this end, the project contributed to increased knowledge on access to justice in Kenya for the marginalized and vulnerable. resulting in development of three research papers on: Examination of Formal and Informal Access to Justice Initiatives in Kenya, from Past to Present; A Methodology Paper on Cost Benefit Analysis for Access to Justice in Kenya and Access to Justice for the Marginalized and Excluded Members of Society in Kenya. The papers provide a comparative analysis of the common mechanisms utilized by the public in seeking justice, explore the mechanisms that are addressing justice needs for the marginalized and vulnerable groups and methodologies for carrying out cost benefit analysis of access to justice systems. The research papers also provided a conceptual and contextual basis for the field-based research.

Field-based research was done targeting service providers and beneficiaries of their services, with a view to getting quantitative and qualitative information on their experiences in providing and accessing justice services respectively. The tools used in guiding the study are a critical output of the research that enables us to examine costs and benefits of accessing justice from both the demand and supply side.

A key result was increased knowledge on access to justice in Kenya based on an in-depth analysis of the main access to justice initiatives in Kenya. This came out of the study of experiences of users and service providers in 9 counties: Bungoma, Garissa, Kiambu, Kilifi, Meru, Migori, Nairobi, Nakuru and Turkana. A glimpse into the nature of disputes encountered revealed that the most common ones were land, spousal or partner-related disputes and child-related disputes. Others included commercial, employment, physical and sexual assault, community disputes, policy brutality, conflicts over resources, and disagreements with public bodies. These findings showed that the informal mechanisms dealt with a wide range of disputes, both of civil and criminal nature, and the seriousness of issues notwithstanding.

Another key outcome from the project was contribution to new approaches to researching on access to justice in Kenya through the cost-benefit analysis adopted in this project. This was a novel approach that sought to address knowledge and evidence gaps in access to justice from a cost-benefit perspective. The methodology paper provided a conceptual background for carrying out the cost-benefit analysis of the specific initiatives. To this end, the research adopted a cost-benefit ratio to rank the initiatives in terms of their scalability. The ratio was derived from a comparison of the total costs of an initiative with its benefits using quantifiable units. In addition, based on the information collected from the field, the project included an access to justice index as part of the considerations to guide the discussion on scalability. The index was premised on three parameters: availability; accessibility and acceptability.

From the cost-benefit ratio, initiatives were analyzed for their cost-effectiveness; the lower the ratio, the more cost effective an initiative is. CSO-based initiatives ranked highest with the lowest ratio, followed by CBO & religious based initiatives, state-based and traditional community-based mechanisms. For the court-based mechanism, the costs were found to outweigh the benefits, thus a negative CBA ratio was recorded. This finding was mainly attributable to the fact that the court-annexed mediation which was the sole focus under the court-based mechanism, is yet to be rolled out in all courts across the country. It also buttresses the literature that justice through the formal initiatives is more costly than through other mechanisms.

Using the access to justice index, CBO & religious based initiatives were ranked top, followed by traditional community-based mechanisms, state-based, court-based, and lastly CSO-based initiatives. The ranking was largely influenced by the proximity of services to the people, as well as satisfaction with the process and outcome of resolution. CBOs, religious-based institutions such as church leaders and traditional elders are more accessible and available within the community compared to courts and CSOs. Proximity of state-based mechanisms is enabled largely by the presence of chiefs, and police at the lowest administrative units. Given the overall ranking using the two approaches, high potential was demonstrated for CBO & religious-based mechanisms, traditional community-based and CSO-based initiatives. For state-based initiatives, various institutions were studied. However, as far scaling access is concerned, chiefs demonstrated high potential for scalability that needs to be supported to enhance its dispute resolution function. Court-based mechanisms are already taking root through the judiciary-led efforts to enhance court-annexed mediation and alternative justice systems.

The collective strategies employed in this project finally contributed towards policy interventions for addressing gaps in access to justice. The recommendations point towards the need to recognize and invest in the justice mechanisms whose viability as effective avenues for dispute resolution is not in question. Formal recognition and alignment in the justice stream will pave way for their inclusion in policy decision-making including allocation of resources. There are information gaps about the initiatives among the public. Awareness creation needs to be anchored on an extensive mapping and documentation for each region. This would also assist in identifying gaps in provision of services at the different localities. Institutional strengthening of informal initiatives especially CBO & religious-based mechanisms, traditional community-based institutions and state-based mechanisms is critical since most of them are unstructured in their processes. Furthermore, capacity building on documenting costs and benefits is a necessary intervention for service

providers and users for them to be conscious about specific elements of costs and benefit involved in the process of resolving a dispute.

## 2.0 Research Problem

Several studies have shown that the vast majority of Kenyans are “unreached” by the official or formal justice systems. The extent of the “unreached” is a consequence of a number of factors,<sup>1</sup> including: the expense of privately funded legal services, poverty—in a country in which about half the population live below the poverty line, illiteracy, the uneven distribution of lawyers, the geographical distances to be covered - especially in the arid and semi-arid less densely populated areas, cultural gaps between people’s understanding of what law and justice involve and the institutions and procedure of the common law,<sup>2</sup> the continued existence of traditional dispute resolution institutions in many communities which tend to offer alternatives that people are happy to use thus making them less dependent on the formal sector,<sup>3</sup> and some degree of distrust of the law,<sup>4</sup> and lawyers. In response to the gap in access to justice, there is a considerable number of initiatives, both formal/official and informal/ unofficial, (or quasi-official such as public university legal aid clinics) that seek to bridge it through the provision of access to legal services through means other than the private lawyer – court route. Some of these ‘access to justice’ initiatives have been effective in reaching sections of Kenyans who are not able to access the formal justice system. However, despite their effectiveness in enhancing access to justice, many of them have not been given sufficient attention by the government. Similarly, there has not been adequate scholarly work that documents these initiatives.

The 2010 Constitution endeavored to create major changes in the justice system particularly in the Judiciary. It, for example, strengthened the formal provisions already in service,<sup>5</sup> and it placed much emphasis on the rule of law.<sup>6</sup> It also strengthened legal aid and access to justice (mostly in

---

<sup>1</sup> Most of these are identified in the legal aid policy: Office of the Attorney General, *Draft National Legal Aid and Awareness Policy* (December 2013) section 2.2 referring particularly to the *Baseline Survey on the Status of Legal Aid Services in Kenya* by National Legal Aid And Awareness Programme, December 2011.

<sup>2</sup> For example, the work of Tanja Chopra, such as *Building Informal Justice in Northern Kenya* (Legal Resources Foundation Trust, 2008) <https://openknowledge.worldbank.org/handle/10986/12602>, and *Reconciling Society and the Judiciary in Northern Kenya* (Legal Resources Foundation Trust, 2008) [http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra\\_Reconciling\\_Society\\_and\\_the\\_Judiciary\\_in\\_Northern\\_Kenya.pdf](http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra_Reconciling_Society_and_the_Judiciary_in_Northern_Kenya.pdf).

<sup>3</sup> E.g. FIDA *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya*, Kariuki, Francis “African Traditional Justice Systems” <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf>

<sup>4</sup> “a slim majority (53%) of Kenyans believe that people are “often” or “always” treated unequally under the law, though this proportion has declined significantly since 2008 (70%)” “Facing election test, Kenya can look to popular support for the rule of law, survey shows” Afrobarometer News release September 6 2017 [http://afrobarometer.org/sites/default/files/press-release/Kenya/ken\\_r7\\_pr2\\_kenya\\_elections\\_and\\_rule\\_of\\_law\\_pr2\\_06092017.pdf](http://afrobarometer.org/sites/default/files/press-release/Kenya/ken_r7_pr2_kenya_elections_and_rule_of_law_pr2_06092017.pdf).

<sup>5</sup> Schedule 6, s. 23.

<sup>6</sup> E.g., Article 10.

relation to criminal justice, though Article 48 is general<sup>7</sup>).<sup>8</sup> The Constitution has promoted major judicial reforms, including the provision of many more formal courts in areas previously poorly served, including more Kadhi courts that are particularly relevant for Muslim women, recruitment of more and more diverse, judicial personnel, and efforts to make the system more accessible and useful through court users' committees, dealing with backlogs, and other measures.<sup>9</sup>

Apart from the reforms in the Judiciary, the Constitution also recognizes alternative forms of dispute resolution, traditional and/or otherwise, which are to be promoted.<sup>10</sup> This includes specifically "encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution".<sup>11</sup> The National Legal Aid and Awareness Policy was also enacted in 2013; a Legal Aid Act in 2016; and a Legal Aid Action Plan in 2017. Subsequently, the Judiciary has increased its efforts to promote ADR as one of the means for ensuring effective delivery of services. Most notably, the Judiciary introduced the court-annexed mediation in 2016 by piloting in a few court stations, focusing on commercial and family disputes. The program has now been expanded to include more courts in Kenya, though it is yet to be rolled out nationally. Nevertheless, use of court annexed mediation has taken root and its adoption has increased over the last five years. The adoption of the Alternative Justice Systems (AJS) Policy framework in 2020 was a significant policy development that gives further impetus for promoting access to justice through alternative mechanisms. These legal aid measures seek to provide quality, effective and timely legal assistance, advice and representation for the poor, marginalized and vulnerable.

The expected outcome is that the government would take greater responsibility for legal aid provisions including paralegal; and that the ADR would be formalized through legislation and institutionalized. Through legal aid and ADR, it can be argued that the government is already building on existing community and donor-funded initiatives and therefore, working towards the same objective as this study. This study, therefore, anticipates that if the government is committed to legal aid and ADR, and will make funding available, this official project might become a major avenue for scaling up of initiatives. In addition, the Ombudsman (Commission on Administrative Justice), the Kenya National Commission on Human Rights, the National Cohesion and Integration Commission and the National Gender and Equality Commission (NGEC) are also facilitating access to justice. NGEC says its responses include: "providing legal advice, referral to partners with better mandate to deal, employing alternative dispute resolution methods (low level), conducting field investigations on admitted complaints, holding strategic meetings with state and non-state actors, and offering psychosocial support services to petitioners."<sup>12</sup> Litigation using the

---

<sup>7</sup> "The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

<sup>8</sup> Article 48 on access to justice, Article 50(2)(h) on legal aid in criminal cases.

<sup>9</sup> See Judiciary Transformation Framework of Chief Justice Mutunga and his successor's *Sustaining Judiciary Transformation 2017-2021* <https://www.judiciary.go.ke/download/sustaining-judiciary-transformation-2017-2021/>

<sup>10</sup> Article 159(2)(c).

<sup>11</sup> Article 60(1)(g) on principles of land law.

<sup>12</sup> *Annual Report 2014-16* p. 24.

Constitution is also seeking to improve access to justice, for example by making the tribunals more effective and independent.

Despite significant progress, the advent of COVID-19 presented new challenges. Kenya's Judiciary leveraged on digital technology to ensure that provision of services could proceed. However progressive this move was, there was risk of further alienating the already disenfranchised populations that did not enjoy access to justice through the formal system. The shutdowns resulting from the pandemic posed delays and restricted movement for the people who could no longer access services from various institutions.

### **3.0 Progress Towards Milestones**

The overall objective was to contribute to catalyzing deeper and more sustained efforts, at a national and global level, to scale basic legal services and ensure access to justice for all through the building of new evidence and models of analysis. Specifically, the project sought to fill evidence gaps and develop improved research methods needed to scale basic legal services more cost effectively and sustainably in Kenya and to contribute to evidence-based policies and better targeted practices to scale access to justice in Kenya.

#### **3.1 To Bridge Evidence Gaps and Develop Improved Research Methods to Scale Basic Legal Services**

##### **3.1.1 Knowledge on Obstacles to Accessing Justice for the Marginalized and Vulnerable**

The project proceeded from the premise of Kenyans who are unreached by the formal justice process. The majority of the people in this category are marginalized due to multiple factors such as gender, geographical exclusion, disability and poverty among other factors. By considering the informal initiatives, the project intrinsically focused on those who have been denied justice who mainly included women, children, the poor, elders, rural populations, and people in areas that have been historically neglected. However, the study was limited in its scope, thus several categories of vulnerable and marginalized groups were not reached. This is an opportunity for future research, which can benefit from the lessons learnt from this study.

The study contributed to more knowledge on barriers to accessing justice. Obstacles identified varied for the different counties, access to justice initiatives and particular users of services. The findings showed that costs of accessing justice remain one of the main barriers. 41% of the respondents felt that total costs of accessing were services were expensive while 33% indicated that services were cheap and 24% found the costs to be reasonable. However, women appeared to be more disadvantaged in meeting costs such as transport a factor that is indicative of ability of initiatives closest to women being not the most preferred by them or lacking the capacity to resolve their needs.

On actual costs, the main costs encountered were transport costs, but most respondents (72%) found them to be reasonable. This is attributed to the fact that most of the services were available within communities, reachable by walking. From the service providers' perspective, the main obstacles their clients encounter include lack of information on what action to take when faced



with a dispute (59%), poverty (56.5%), corruption (50.3%), lack of good transport (42.9), absence of justice institutions within the community (22.4%), cultural barriers (9.9%), bureaucracy (9.9%) and others (5.6%).

On their part, institutions' barriers to enabling access to justice were insufficient human and financial resources, cited by 94% of respondents, lack of awareness by the public, mentioned 24%, uncooperative 21%, and cultural limitations highlighted by 14% of the respondents. Other challenges included professional malpractices, absence of government support, evidentiary gaps in resolving disputes and poor implementation.

Adverse psycho-social impacts of a dispute and the process of pursuing a resolution was a significant barrier to justice. Emotional stress was the most cited, by 68 % respondents, followed by psychological problems (52%), relationship breakdown (42%). Psycho-social effects that were mentioned included health problems, physical harm, financial constraints, and damage to property. Negative impacts on relationships were also highlighted along other factors such as patriarchal attitudes and beliefs, gender biased attitudes, gender economic dependence or power imbalances of disputants and resource inequality. Understanding obstacles from the perspectives of impact of a dispute and process of dispute resolution expanded frontiers for improving experiences of users seeking justice solutions.

### **3.1.2 Understanding Trends in Access to Justice Using Informal and Alternative Initiatives**

From the study, there is a deeper understanding of patterns of dispute resolution using the initiatives studied. Besides looking into the preference of users over certain initiatives, it also followed through with their reliability in providing solutions to disputes. 80% of the respondents indicated that they found a solution in the various alternative initiatives that they relied on. Out of this, 53% indicated that the dispute was resolved by the institution that they sought help from the first instance while the rest had to seek help from a different institution. Most service providers indicated that they usually referred clients to another institution where the issue in question was outside their mandate or they did not have the capacity to resolve complex disputes. Reporting at first instance was highest for chiefs, as reported by 16.2% of the respondents, followed by elders at 15.2%, police at 14.6% and 12.6% said community-based organisations, 10.1% faith-based organisations, non-governmental organisations at 8.6%, courts at 4.5%, children's department at 4.0%, others at 3.5%, and *nyumba kumi initiative*<sup>13</sup> at 2.5%.

Nevertheless, the choice of service providers lay with users, since in very few instances did they indicate that they had no other service provider to approach within their localities. These were influenced by reasons of physical proximity, which ranked highest at 47%; ability to resolve disputes (36%); free services (28%); fast delivery of services (26%); fairness in decision-making (26%); enhanced community cohesion (26%); and cheap (23%).

One of the interesting observations was that these informal mechanisms have capacity to handle cases of all types and despite their seriousness. This was demonstrated in a case dealt under a traditional mechanism in Mt. Elgon, Bungoma involving the killing of a young man caused by men

---

<sup>13</sup> *Nyumba Kumi* is a Swahili phrase meaning ten households. It seeks a collaboration between community members and security agencies to promote security in the community

from a different community. To avert retaliatory attacks amid rising tensions between the two communities, village elders were invited to arbitrate. They negotiated with the family of the deceased, and it was agreed that a fine of 15 cows would be paid. The families followed the direction and decision of the elders. Interventions by the council of elders in Mt. Elgon averted inter-clan war and reconciled the warring communities without the case going to court. Both families were reconciled and participated in the funeral of the deceased. Furthermore, the case is a good example of how such an intervention deals with the wider impact of a crime on the community, as opposed to the restricted the state-versus-an accused person approach used in the formal justice system.

These findings have policy implications in terms of buttressing the need to invest in the informal and alternative mechanisms as a first step; enhancing institutional capacity to deal with the cases reported to them conclusively and creating constructive linkage to benefit from complementing strengths of different institutions, without creating obstacles for users. Furthermore, we see that from user experiences in the choice of mechanism for dispute resolution, cost is a dominant factor. These considerations are useful for setting out priorities of scaling access to services.

### **3.1.3 Methodologies for Analysing Cost Effectiveness of Access to Justice Initiatives**

The project adopted two approaches for analyzing cost effectiveness of initiatives, namely a cost benefit analysis and the access to justice index. The foundation for the cost-benefit analysis was the '*Cost Benefit Analysis for Access to Justice in Kenya: Methodology Paper*'. The paper discussed the various methods that can be used in measuring costs and benefits. It provides a justification for the use of Cost-Benefit Analysis as a suitable model in line with the objectives of the study, as well as other advantages such as its use by governments and other institutions in analysis of policies, its growing popularity in the justice sector, a tool for providing evidence-based results of an investment, and useful approach to assess social benefits and costs for policy intervention such as financing legal aid, among other benefits.

The cost and benefit analysis was used to assess the cost-effectiveness of initiatives. This was done by deriving a Cost-Benefit ratio from the average of the total monetary costs incurred by the user under each initiative against the average of total benefits. The higher the ratio, the higher the benefit of the initiative to the user.

However, this approach is limited to quantifiable costs and benefits, thus, non-monetary costs and benefits were not included. These were assessed separately, through qualitative assessment from experiences of respondents. Furthermore, identification and estimation of costs and benefits is subjective, since estimates are based on past experiences or forecasting of future possibilities and could also vary for different individuals going through a similar process.

In addition to use of the CBA, the project applied the Access to Justice Index formula to enrich the ranking the initiatives using three parameters based on responses by users: (a) accessibility: using distance of travel to the initiative. A distance of less than 2km was considered reasonable thus, a higher score; (b) availability assessed by presence of an initiative to deal with disputes presented; and (c) acceptability measured using the likelihood of the user using the service again or recommending to others. **The study is alive to the fact that the ranking using the index is narrow to the extent that it was computed using responses by respondents who had used the initiatives. In any case, the computation is derived from overall experiences of users for different cases using**

the various initiatives. Elements of accessibility, acceptability, and availability go beyond the factors considered by the project. Therefore, we acknowledge that the ranking by the index is not strictly, a best-to-worst rating, for it needs to be nuanced with the peculiar benefits of each of the initiatives that are not reflected in the rating. Nevertheless, the index provides a useful reference point from which decision-makers can either leverage on the identified strengths of each initiative for purposes of scaling up or learning from the shortcomings of an initiative to seal gaps that inhibit access to justice.

### **3.1.4 Knowledge on Cost Effectiveness of Specific Access to Justice Initiatives for Policy Interventions**

The study first sought to first identify the specific access to justice initiatives that are relevant to sections of the population that are excluded or unable to access the formal justice systems or mechanisms. This entailed an examination of specific formal and informal initiatives that are intended to bridge the gap of accessing justice. The examination entailed two stages: a scoping study of the range of initiatives and an identification of those that would be suitable for a detailed study. The specific initiatives were further explored in detail in one of the research papers, *'Bridging the Justice Gap in Kenya: Examination of Formal and Informal Access to Justice Initiatives from Past to Present.'* Institutions to be studied were pre-identified through a mapping of respondents and categorized under the following 5 broad categories:

a) **Civil Society-Based Initiatives**

Under this category are mainly non-state actors, mainly not-for-profit bodies which offer a range of activities including legal aid, dispute resolution, advocacy, civic education.

b) **Traditional Community-Based Initiatives**

These are initiatives found at the community level that mostly apply traditional dispute resolution mechanisms that reflect the culture of particular communities

c) **Court-Based initiatives**

Under this category, the study looked at aspects of alternative dispute resolution facilitated by the courts, notably, the court-annexed mediation project, and alternative justice systems. For purposes of data collection, the study focused on the court-annexed mediation which was piloted in a few courts in 2016 to deal with commercial and family disputes.

d) **State-Based initiatives**

These entail initiatives by governmental institutions which have different mandates depending on the nature of institutions. Among these are commissions whose functions include: promoting human rights including rights of the marginalized, monitoring compliance with human rights obligations, handling complaints against state agencies and promoting access to justice including facilitating dispute resolution within their respective mandates. Others include police, chiefs, children office, probation among others, whose main mandate is not dispute resolution. But their presence renders them an avenue for resolving disputes.

e) **Community Based Organisations and Religious-Based Initiatives**

Under this category are institutions at the community level and include CBOs and religious organisations.

The table below shows the institutions were targeted on the basis of the five categories:

Initiative type	Frequency	Percent
Civil society-based	25	15.4
Traditional community-based mechanisms	16	9.9
Court-based	20	12.3
State-based	46	28.4
Community-based organisations and religious-based	55	34.0
Total	162	100.0

Analysis of the cost effectiveness was anchored on these categories. Costs were examined in terms of direct and indirect costs. Monetary costs were examined as direct expenses incurred while non-monetary were measured in terms of time, effort, or convenience. The most common direct incurred by users was transport (60.7%), with 42.7 indicating that they did not incur other costs. Other common costs were airtime (30.3%), elders' allowance and meals (each at 16.7%), compensation (12.1%), childcare and photocopying & printing (each at 10.6%), legal fees (7.6%) and medical expenses (6.1%). Other expenses included: issuance of P3 Form; search and process fees, court assessment fees, bribe, consultation, hosting of meetings, accommodation, arrest warrant, bail and bond. From these, some of the costs are unique to certain initiatives e.g., police: arrest warrant, P3 Form, and court: search fees, court process fees, bail and bond, consultation, legal fees. Thus, justice through such processes renders them inherently more costly than others. Other costs such as elders' allowance are unique to the traditional mechanisms; although they are not a standard cost incurred and the experience would vary for different users.

The combined analysis using the CBA ration and Access to Justice Index is illustrated below:

	Community-Faith based	Traditional based	State based	Court based	CSO- based
<b>High on Access to Justice Index</b>	94.6%	93.9%	89.2%	80.0%	76.2%
<b>CBA Ratio</b>	0.22	0.66	0.58	4.2	0.04

On the CBA ratio, only in the court-based initiative did the cost outweigh the benefit. This is attributable to inaccessibility of courts. CSO-based mechanisms were ranked highest in terms of the net benefit, followed by CBO & religious-based initiatives, while state-based and traditional community-based mechanisms ranked third and fourth respectively. In all the four initiatives, services are offered for free. Even where service providers indicated that the services offered were free, from user experiences, costs were nevertheless incurred. Furthermore, the costs would vary depending on the viability of a mechanism to resolve a dispute from the point it is reported, without a user having to resort to another mechanism.

On the access to justice index, the CBO & faith-based category ranked highest, followed by traditional mechanisms, state-based, court-based and CSO-based mechanism surprisingly ranking lowest with an index of 76.2. The high ranking of CBO/religious based initiatives was due to their

proximity to the people. Based on the above, the study recommends that priority for scaling up ought to focus on CBO and religious based initiatives, tradition-based initiatives, state-based initiatives, and civil society organization initiatives in that order.

### **3.4 Contribute to Evidence-Based Policies and Better Targeted Practices to Scale Access to Justice in Kenya**

Finally, the study sought to contribute towards policy interventions on access to justice in Kenya, for sustainability of initiatives. The first step was to identify issues from the study findings that needed to be amplified through policy-level engagement. The following key recommendations were identified, and it is hoped they will translate to development of evidence-based policies informed by this study:

- formal recognition of informal justice initiatives.
- institutional strengthening for initiatives that need to be scaled up to enable them document processes of handling a case including costing of services.
- mapping of service providers in each region to enhance access to information for justice seekers.
- enabling traditional community-based mechanisms, chiefs and elders under state-based mechanisms and CBOs and CSOs for purpose of scaling up access to services
- financing of informal justice initiatives
- documenting cost of providing services under the different initiatives to inform policy decisions on financing access to justice.
- community support and awareness
- strengthening linkages among initiatives and promoting linkages between formal and informal initiatives

Since the study findings have not been published and disseminated, the policy recommendations will be pursued beyond the project to sustain its impact. The implementation process created networks with policy makers that will ultimately benefit from the results of the study, including those who were targeted as respondents for the field study, policy makers who participated in the validation of the report and others who will be reached during the anticipated dissemination.

Additionally, the core partners pursued networks and collaborations which provide leverage for influencing policy reforms using the findings of the study; notably the Open Government Partnership (OGP) where KI sits in the Access to Justice Cluster,<sup>14</sup> participation in the forums organized by the multi-sectoral Task Force on the Traditional, Informal and Other Mechanisms for Dispute Resolution in Kenya (AJS Task Force). These opportunities and institutions are specified in the dissemination strategy discussed later in this report. Ongoing interventions under the OGP are focused on financing access to justice in Kenya with a particular focus on the judiciary, the National Legal Aid Service and implementation of the Policy Framework on Alternative Justice Systems. A further opportunity arises through the Institute for Development

---

<sup>14</sup> The Access to Justice cluster seeks to expand access to justice through the implementation of Legal Aid Act and the Alternative Justice Systems Policy. See more at <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>

Studies which is a core partner of Afrobarometer for the East African region and a national partner charged with implementing the Kenyan survey.

A policy brief will be derived from the findings, highlighting key recommendations which will be discussed with policy makers through these and other avenues, to ensure that there is impact beyond dissemination of the report. KI will also infuse strategies it has employed in policy interventions such as Access to Information requests, petitions to government agencies. KI will utilize the *Katiba Corner* in the Star Newspaper to further highlight the research findings and recommendations.

The findings of the study are yet to be disseminated; it is therefore too early to evaluate the impact of the results of the research on the target communities. Initial findings were shared with stakeholders drawn from government agencies, CSOs and other partners during the stakeholders' validation meeting. Following publication of the research findings and papers, dissemination will target policy makers, members of the public, and partner CSOs, including service providers who took part in the study. For this reason, key findings will be packaged to target different audiences. For policy makers, the findings will be highlighted in form of a policy brief, to be shared with key institutions such as the Judiciary, National Legal Aid Service, KNCHR, AJS Task Force, KIPPR, NCAJ, State Law Office, parliament and county government and Law Society of Kenya. The project will leverage on existing processes to influence support for access to justice mechanisms such as the NCAJ, implementation of the AJS Policy Framework. To reach the general public and users of services who were targeted, a simplified summary of the findings of the study will be extracted and disseminated through the service providers and other avenues for community engagement utilized by the core partners.

The project team was keen on adhering to ethical principles required in research. A research permit was obtained from the National Commission for Science, Technology and Innovation. Consent of respondents to take part in interviews and to be recorded was obtained before interviews commenced. Where consent to be recorded was declined, the interviews were not recorded. Additionally, respondents were assured that the information shared would be treated with confidentiality. Some respondents expressed concern that sharing details of their clients would breach client-confidentiality. However, with prior notice and information, researchers were able to allay their fears about the scope of the study.

#### **4.0 Methodology**

The study was conducted in 9 counties in Kenya namely: Bungoma, Garissa, Kiambu Kilifi, Meru, Migori, Nairobi, Nakuru and Turkana. It utilized both qualitative and quantitative data collection techniques.

Literature review of existing studies on access to justice in Kenya, preceded the data collection. It highlighted developments towards bridging gaps in access justice particularly for the marginalized and vulnerable groups. Data collection was guided by two research tools, a users' questionnaire, and a service providers' questionnaire. The study sought information on among others issues: types and composition of organisation, nature and type of disputes handled; initiatives sought to resolve disputes; nature of services provided and processes applied in dispute resolution; beneficiaries of services in terms of the specific marginalised groups and the community in general,



taking into account urban-rural considerations; economic status, gender etc.; direct and indirect costs and benefits of resolution of disputes from the process and outcome of dispute resolution; challenges in accessing and providing services, organizational caseload and case turnaround.

Interviews with respondents were the primary data collection technique applied. The study reached 162 service providers and 191 users of their services as highlighted below:

County	Service Providers	Users
Bungoma	22	26
Garissa	24	27
Kilifi	21	17
Kiambu	10	7
Meru	16	24
Migori	22	26
Nairobi	17	20
Nakuru	28	22
Turkana	20	15
<b>Totals</b>	162	198

Key to the study, was an analysis of the costs and benefits of specific access to justice initiatives. Cost benefit analysis was applied to measure the costs and benefits of accessing justice through the five initiatives under study. Computation of a CBA ratio enabled the ranking of initiatives to inform on their cost-effectiveness, thus guide the analysis on scalability of initiatives. Further, an access to justice index was employed to rank initiatives, guided by three parameters of: accessibility, acceptability, and availability. The use of CBA ration and access to justice index both assisted in analysing the mechanisms to identify justifications for scaling up as well as intervention needed to realize this.

Initially, the study had also sought to include key informant interviews with select decision makers and focus group discussions at the community level. However, these could not be done due to the COVID-19 restrictions prevailing during the data collection period. Furthermore, carrying out the data collection during this period occasioned additional challenges. Firstly, we limited the period the research assistants could stay in the field due to uncertainties in government responses which included closure of inter-county boundaries without sufficient notice. Secondly, some interviews could not take place due to closure of institutions particularly courts most of which operated virtually and were thus inaccessible for physical interviews. Attempts were made to hold virtual interviews where physical meetings were impossible. These, however, did not meet the full benefit of having a face-face physical meeting. In certain instances, it was impossible to conduct virtual interviews due to challenges of poor network coverage or disruptions outside the control of the interviewer.

Since this selection of respondents was purposive, service providers were identified based on the five categories of initiatives. Service providers were in turn used to identify beneficiaries of their services. It was impossible to ascertain the estimate costs and period for each area since the dynamics on the ground were very fluid, demanding constant adjustments which could not have been foreseen. Additional movements to reach clients were made increasing the costs and time needed to complete an interview. Combined with the restricted period in the field due to the

pandemic, some respondents especially users could not be reached, being too far away from where the researchers could reach.

Expectations from respondents of payment or some form of compensation for costs incurred to conduct the interview such as airtime, transport and time spent in participating in the study posed a challenge since this was not anticipated in the planning and budgeting. Some of these concerns were legitimate but had not been taken into account in the planning and budgeting. For instance, some users were initially contacted by the service providers and had incurred costs to meet with the research assistants.

## 5.0 Project Outputs

### 5.1 Research Papers

From the project, the following three research papers were developed published.

- a) Bridging the Justice Gap in Kenya: Examination of Formal and Informal Access to Justice Initiatives from Past to Present by Katiba Institute

The paper gives a conceptual and contextual background on access to justice in Kenya. It discusses how the concept of access to justice has been interpreted by different authorities including courts. It gives a historical overview of developments on access to justice in Kenya that captures key highlights in legal developments up to the adoption of Constitution of Kenya, 2010. The paper further examines lessons learned on use of ADR from decisions of the court, highlighting approaches by courts and their attitudes towards the place of ADR in the formal court process. Of note, is the unsettled issue of the extent to which ADR can be used to resolve serious criminal cases – some courts have been liberal in acknowledging decisions reached through an informal process in a case of murder, while others hold on to the position that serious offences remain the purview of formal court process.

- b) Cost Benefit Analysis for Access to Justice in Kenya: Methodology Paper', Institute for Development Studies.

This paper was the basis for the cost-benefit analysis used in carrying out the assessment of costs and benefit of the access to justice initiative under study. It discussed the various methods of measuring costs and benefits in the service sector to give a comparative overview and justification for the use of CBA approach under this project. Out of the different methods identified, namely: cost utility analysis, cost-effectiveness analysis, multi-criteria analysis and cost benefit analysis, the paper identifies the latter as the most suitable method for studying access to justice. The CBA is preferred because it makes it possible to make comparisons of policy interventions along a common scale and has been used to examine tangible and intangible benefits of policies. However, the approach is cognizant of those costs and benefits that cannot be quantified for purposes of cost-benefit analysis.

- c) Access to Justice for the Marginalized and Excluded Members of Society in Kenya by University of Nairobi's School of Law.

The paper gives a conceptual breakdown of access to justice in the context of marginalized and excluded groups in Kenya. It also gives a profile of justice mechanisms that serve the marginalized



and excluded members of society including women, children, persons with disabilities, refugees, groups in geographically marginalized areas, youth, religious communities, and others such as poor, rural-based communities, sexual minorities, and workers. The paper provided a useful framework for the mapping of institutions that preceded the data collection process.

The papers were intended to be published in journals and disseminated among researchers in institutions of higher learning, stakeholders, and policy makers. The papers have not yet been formally published. The dissemination plan will involve publishing the papers through the available forums such as the University of Nairobi's Institute for Development Studies Working Paper Series, School of Law Journal, relevant journals, and other open-source platforms.

## **5.2 Research Tools**

The data collection process was guided by research tools developed through a consultative process involving the core partners, country project partners as well as members of the CBJR group. Two sets of questionnaires were developed: one for service providers and another for users of their services. The tools were also shared with stakeholders through a validation. Cost/benefits analysis framework was developed in the methodology paper reference above. The tools will be disseminated alongside the study report.

## **5.3 Report of the Study**

The report titled, '*Alternative Approaches to Access to Justice in Kenya: A Cost – Benefit Analysis*' is a synthesis of literature review on access to justice in Kenya as well as findings from the field research that targeted service providers and beneficiaries of their services. It sets out the conceptual background behind the research and analyses the existing literature on the research issues. The methodology adopted in carrying out the research is also highlighted. The research findings are discussed in chapters covering obstacles that impede access to justice in Kenya; nature of disputes and existing initiatives for their resolution and costs and benefit analysis of access to justice initiatives that were studied. Finally, the report sets out key recommendations on scaling up access to justice initiatives.

## **5.4 Contribution to Policy on Access to Justice**

Important policy actions have been recommended from the outcome of the research study. There is opportunity for moving them forward to influence policy directions such as implementation of the AJS Policy Framework, the Legal Aid Act and lobbying for improved financing of the justice sector in Kenya. To this end, a policy brief will be drawn from the final report of the study findings. Furthermore, key findings and proposed actions from the study will be published in the weekly [\*Katiba Corner\*](#) that Katiba Institute contributes to in the *The Star* Newspaper. Engagement with policy makers will also be sought, particularly the Judiciary, legislative bodies, National Legal Aid Program, State Law Office and the National Council for the Administration of Justice among others.

## **6.0 Problems and Challenges**

One of the challenges encountered during the project life was transition of project members which brought about delays and disruptions in the smooth implementation. Eventually, the project

enlisted a project coordinator who would be responsible for following through with the project and coordinating with the core partners.

Additionally, the onset of COVID-19 and subsequent restrictions occasioned major delays just when the main data collection was set to commence. To mitigate against losing time, some of the background activities were carried out virtually, namely, the validation of research tools. Tools were sent to stakeholders in advanced, of the validation meeting which was also held virtually. This ensured that we received feedback from participants at the virtual meeting and stakeholders who could not attend.

Contractual engagement and training of research assistants was also done virtually. The training for researchers had been planned to be a central physical meeting which would be tied to the pretesting of tools. The project resorted to a two-days virtual meeting, moderated by the researchers. With prolonged delays in opening up the country, the pre-testing of tools was also coordinated virtually by assigning the research assistants to areas where they were domiciled as opposed to centralized select counties. This demanded more work of contracting respondents in different counties since the research teams had to be split.

During the data collection exercise, some institutions were hesitant to grant interviews without the authority of the headquarters in Nairobi, which occasioned delays. In such instances, formal requests were made, with some success, while in other cases, the bureaucratic approval processes especially in government offices went beyond the period slated for data collection. Another setback was the inability to access administrative data from organizations particularly on budgets committed to providing services. The study relied largely on estimates provided by respondents.

## **7.0 Overall Assessment and Recommendations**

The design of the project encouraged collaboration between the core partners. The project benefited from the strengths of each of the partners. However, the expected input by various parties informed the allocation of personnel budget but in the end, the budget allocations amount allocated was not commensurate to the contribution by each partner.

The project was flexible to approve shifts across budget lines helped to adapt the budget to the changes in the study. This was particularly useful in adapting the project to the challenges presented by COVID-19 pandemic which refocused the timelines and approaches in carrying out the research.

Given another chance, it would be important to include within the personnel budget, a monitoring and evaluation officer, preferably within the lead organization. During the data analysis, KI coopted its M & E officer, who provided technical report that guided the process of data cleaning and analysis and development of the report. The project would have benefited from M & E support from the onset, including providing technical input during development of the research tools and general process of implementation.

The project intended to influence policy reforms from the research findings. However, some of the strategies to realize this object were not included in the budgetary allocations. The project

partners will leverage on their collaborations and networks to find space for moving the policy agenda out of this project.