

RESEARCH ARTICLE

Access to Legal Aid for Accused Persons with Disabilities in Kenya's Criminal Justice System: An Outcomes-based Approach

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Abstract

In order for accused persons with disabilities to be able to access justice on an equal basis with others, equality of outcomes is important. However, in the past century, the limited approach to legal aid which focuses on processes has continually been applied by criminal justice system actors in response to legal aid challenges faced by accused persons with disabilities in Kenya. The major dilemma facing this approach is its emphasis on steps to be taken as opposed to the end result or goal. This paper seeks to explain that a shift towards an outcomes approach to legal aid for accused persons with disabilities has the potential of supporting innovation in Kenya's criminal justice system and help close access to justice gaps that may exist. To achieve this paradigm shift, the African Disability Protocol has been employed as it promotes an integral development of legal aid justice that requires states parties to put in place specific outcomes-based laws for promoting the rights of accused persons in access to justice.

Keywords: African Disability Protocol; Kenya; legal aid; outcome-based; persons with disabilities

Introduction

The main justification for legal aid in Kenya's criminal justice system emanates from the need to mitigate any palpable injustice that may result from the adversarial nature of the process.¹ The criminal justice system has been defined as a network of government and private agencies intended to manage accused and convicted persons, including those with disabilities.² The latter suffers from pervasive poverty levels in Kenya and can only turn to legal aid in order to exercise their right to access justice.³ Be that as it may, legal aid challenges for accused persons with disabilities are still front and centre in Kenya's criminal justice system.

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1 FG Boroje "Right to state appointed counsel in criminal case: The constitutional requirements and the issue of its implementation in Sidama Zone and Hawassa City Courts" (2018) 9 *Beijing Law Review* 39 at 41.

2 S Crowder and BE Turvey "Ethics in the criminal justice professions" in BE Turvey and S Crowder (eds) *Ethical Justice* (2013, Academic Press) 1.

3 "Status of disability in Kenya: Statistics from the 2019 census" (May 2020) *Development Initiatives*, available at: https://devinit.github.io/media/documents/Status-of-disability-in-Kenya__IF.pdf (last accessed 13 May 2025).

The disability rights movement in Kenya, which is the term given to various interest groups that represent persons with disabilities, has coalesced around the view that the country's legal aid framework is inadequately attentive to the needs of accused persons with disabilities.⁴ One of the reasons given for this is the limited application of the outcomes approach in Kenya's legal aid framework.⁵ The outcomes approach not only recognizes the state as a duty bearer in terms of the right to legal aid, but also aims to ensure that the right is effectively implemented in Kenya's criminal justice system.⁶ On the contrary, the process or limited model does not adequately allow for the effective management of accused persons with disabilities in the criminal justice system. As such, it is largely meant to promote superficial procedures whose aim is to ensure the efficiency and accuracy of fact-finding as opposed to preventing the state from treating persons with disabilities as objects within the country's adversarial system.⁷ The process approach does not take into account the intrinsic or substantive value of legal aid to persons with disabilities, such as that of ensuring their right to be represented by an advocate.⁸ On the contrary, its aim is largely limited to resolving legal technicalities or procedural shortcomings raised by accused persons with disabilities.

This article does not seek to answer the specific question whether legal aid should be provided. Rather, it uses the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the African Disability Protocol)⁹ to illuminate the method by which legal aid decisions should be made to best further the goal of protecting the right to access justice for accused persons with disabilities. Part one is this introduction. The nature of legal aid services for accused persons with disabilities in Kenya's criminal justice system is interrogated in the second part. It examines the country's statutory basis for the right to legal aid and the approach that Kenya has taken when it comes to implementation. Part three analyses the African Disability Protocol's emphasis on outcomes-based justice in legal aid programmes. Searching for a solution, part four examines ways in which legal aid for accused persons with disabilities can be enhanced, taking into account the outcomes approach. Part five is the conclusion.

The nature of legal aid services for accused persons with disabilities in Kenya's criminal justice system

The Constitution of Kenya, 2010 (the Constitution) defines disability from a medical perspective to include "any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long term effect on an individual's ability to carry out ordinary day-to-day activities".¹⁰ This definition situates disability within the individual as opposed to the environment.¹¹ The latter, according to the social model of disability, is responsible for imposing limitations on the participation of persons

4 *Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the Director of Public Prosecutions & another (Interested Parties)* [2021] eKLR.

5 OA Okoth "Rethinking the National Legal Aid Service" (2021) 7/1 *Journal of Conflict Management and Sustainable Development* 202 at 205.

6 H Miller and R Redhead "Beyond 'rights-based approaches'? Employing a process and outcomes framework" (2019) 23/5 *The International Journal of Human Rights* 699 at 703.

7 RJV Cole "The right to legal representation and equality before the law in criminal proceedings in Botswana" (2011) 1 *Stellenbosch Law Review* 94 at 108.

8 LH Tribe "The puzzling persistence of process-based constitutional theories" (1980) 89 *The Yale Law Journal* 1063 at 1069.

9 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol), adopted on 29 January 2018, entered into force on 5 May 2024.

10 Constitution of Kenya, 2010, art 260.

11 ST Fomekong "Article 12 of the Protocol on the Rights of Persons with Disabilities in Africa: A critical analysis" (2023) 105 *International Review of the Red Cross* 323 at 339.

with disabilities in the society, including in access to justice.¹² Particularly, it requires the diversity of persons with disabilities to be taken into account as much as possible when providing legal aid in criminal justice systems across the globe.

In Kenya, a lack of legal representation does not bar the court from continuing with legal proceedings against an accused person with disability who may otherwise be eligible to free legal aid at the state's expense.¹³ This is evidence that Kenya's legal aid framework is based on a limited version of the outcomes approach. Moreover, it minimally reiterates the African Disability Protocol's commitment to access of justice for accused persons with disabilities as will be discussed in detail below.

The process of legal aid for accused persons with disabilities in Kenya's criminal justice system

The right to legal aid in Kenya falls under fair trial rights in the Constitution. The latter is an absolute right, which cannot be limited, while representation is a qualified constitutional right.¹⁴ Article 50(2)(g-h) of the Constitution guarantees every accused person the right to a fair trial, which includes the right "(g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (h) to have an advocate assigned to the accused person by the State and at the State's expense, if substantial injustice would otherwise result, and to be informed of this right promptly".¹⁵

In practice, the foregoing provision of the Constitution is dealt with contemporaneously but with most judges and magistrates focusing on article 50(2)(g) as opposed to article 50(2)(h).

Article 50(2)(h) of the Constitution deals with instances where the state must assign an advocate to an accused person with disability while article 50(2)(g) deals with the issue of informing accused persons with disabilities of their right to be represented by an advocate of their choice.¹⁶ The latter implies that the failure to inform an accused person with disability of his or her right to legal representation may render any subsequent trial a nullity.¹⁷ However, certain scholars have stated that the failure to inform an accused person with disability of his or her right to legal representation will not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that the omission occasioned a miscarriage of justice.¹⁸ Besides, the court is not obliged to keep proceedings in abeyance pending the availability of an advocate.

According to Cole, constitutional provisions on legal aid alone, without sufficient mechanisms, do not offer protection of fundamental human rights.¹⁹ To this end, it can be argued that rights processes under article 50(2)(g-h) are vague and unreal for most accused persons with disabilities. This is mainly because they are process-orientated as opposed to outcomes-oriented. The meaning of the term "process-oriented" is very diverse. For example, in philosophy, Rescher has used the term "process-oriented" to contrast between things and processes.²⁰ In pedagogy, the phrase is applied to emphasize the process, rather than the outcome of writing.²¹ In this article, a process-oriented approach in legal aid is one that values the integrity of the system above the results it actually generates.

Procedures serve an important legitimating function, especially for judicial institutions. In terms of legal aid, the following five procedural components of adjudication are considered essential to

12 A Kanter "Let's try again: Why the United States should ratify the United Nations Convention on the Rights of People with Disabilities" (2019) 35 *Touro Law Review* 301 at 307.

13 T Ojienda "Legal aid as a human right" (2021) 2 *Egerton Law Journal* 131 at 150.

14 *NMT alias Aunty v Republic* Migori High Court Criminal Appeal 44 of 2019, para 52.

15 Constitution of Kenya, art 50(2)(g-h).

16 *NMT alias Aunty v Republic*, above at note 14.

17 *David Macharia v Republic* [2011] eKLR.

18 *NMT alias Aunty v Republic*, above at note 14.

19 Cole "The right to legal representation", above at note 7 at 94.

20 N Rescher *Process Metaphysics: An Introduction to Process Philosophy* (1996, SUNY Press) at 17.

21 F Onaka "Aspects of process theories and process-oriented methodologies in historical and comparative sociology: An introduction" (2013) 38 *Historical Social Research* 161 at 162.

the legitimacy of the final decision: (1) litigants, not courts, initiate legal aid applications; (2) the applications are presented through an adversarial system in which two or more competing parties give their conflicting views; (3) a rationale must be given for decisions; (4) decisions must refer to, and be restricted by, an identifiable body of law and (5) the decision maker must be impartial.²² However, such legal benchmarks constrain the varied legal aid needs of accused persons with disabilities due to their potential to deliver limited results.²³ This is because of their likelihood to create entry and formal barriers for accused persons with disabilities, which may impact negatively on their ability to “enjoy” or “benefit” from interactions with criminal justice systems.²⁴ The barriers limit not only the ability of accused persons with disability to use the justice system, but also their ability to contribute to it and to society generally.²⁵ As a result, the requirements for equal rights to legal aid remains limited to only ensuring access to superficial processes as opposed to realizing tangible outcomes.²⁶

Those who argue against a process-based approach to legal aid are motivated in part by the perception that it seeks to limit the entitlement of accused persons with disabilities to benefit from their legal aid rights.²⁷ Criminal justice courts are unwilling or unable to ensure the right to legal aid due to political sensitivities and biases.²⁸ As will be discussed in the next sub-section, courts appear to give little consideration to substantive legal norms, particularly how the enactment and enforcement of legal aid laws may help to reduce inaccessibility of the criminal justice system by accused persons with disabilities. The criteria, such as the ones stipulated by Allison,²⁹ have failed to sufficiently articulate the real links between disability and the right to access justice. They do not adequately address material representation barriers that prevent accused persons with disabilities from accessing the criminal justice system, such as high legal fees. Secondly, the criteria make no mention of how the state and its organs should go about protecting the right to legal aid for persons with disabilities. As such, any interventions by states may not be empowerment-specific as they do not deal with the circumstances of accused persons with disabilities. By focusing on process-oriented criteria to legal aid, judges are effectively precluding a broader enquiry into the need for more government action that is geared towards effectively realizing the end result of legal aid for accused persons with disabilities, which is greater access to justice.³⁰

Criticism of Kenya's process-oriented approach to legal aid

The processes-oriented approach has been criticized as being an abstraction and unable to facilitate the concrete experiences of accused persons with disabilities in court.³¹ For instance, in Kenya, a lack of legal representation is not a bar to the continuation of proceedings against an accused person with disability.³² This was the case in *Shaban Juma v Republic*³³ where the applicant petitioned the High Court of Kenya alleging that the state had violated his fundamental rights by failing to provide him

22 JR Allison “Ideology, prejudice, and process values” (1994) 28 *New England Law Review* 657 at 682.

23 S Ashworth-Hayes “Process-oriented politics” (7 August 2020) *Marginally Productive*, available at: <<https://marginallyproductive.com/2020/07/08/process-oriented-politics/>> (last accessed 17 January 2024).

24 D Lyons “Substance process and outcome in constitutional theory” (1987) 72 *Cornell Law Review* 745 at 750.

25 S Ortoleva “Inaccessible justice: Human rights, persons with disabilities, and the legal system” (2011) 17 *ILSA Journal of International and Comparative Law* 282 at 284.

26 S Mor “With access and justice for all” (2017) 36 *Cardozo Law Review* 611 at 614.

27 F Francioni *Access to Justice as a Human Right* (2007, Oxford University Press) at 2; J Fowkes “Transformative process theory” (2024) 1 *Global Constitutionalism* 1 at 2.

28 J Ely *Democracy and Distrust* (1980, Harvard University Press) at 136; R Nozick *Anarchy, State, and Utopia* (1974, Basic Books) at 150–82.

29 Allison “Ideology, prejudice, and process values”, above at note 22 at 682.

30 Lyons “Substance process and outcome in constitutional theory”, above at note 24 at 750.

31 M Modak-Truran “A process theory of natural law and the rule of law in China” (2008) 26/3 *Penn State International Law Review* 607 at 624.

32 Ibid.

33 [2016] KEHC 23 (KLR).

with counsel to assist him in court since he did not understand the law. The court held that it would be pointless to order the Deputy Registrar of the High Court to appoint counsel at the state expense for the applicant since there were no funds allocated for that purpose. The decision may be criticized for failing to engage with the real outcomes of legal aid, which is broader access to justice.

The Constitution has deferred the implementation of the right to legal aid for persons with disabilities to the democratically legitimate outcomes of the country's political process.³⁴ The guarantee of fair trial rights requires Parliament to enact legislation providing for the right to legal aid of everyone, including accused persons with disabilities. The Legal Aid Act (LAA)³⁵ was enacted in 2016 in order to regulate the procedural content and operation of the right to legal aid. Within this framework, legal aid includes legal advice, legal representation and assistance in resolving disputes by alternative dispute resolution, drafting of relevant documents and effecting service incidental to any legal proceedings and reaching or giving effect to any out-of-court settlement.³⁶

Moreover, the LAA defines persons eligible for legal aid to include indigent persons resident in Kenya and who are either Kenyan citizens, children, refugees, victims of human trafficking, internally displaced persons or stateless persons.³⁷ It means that legal aid is a service predominantly for the poor. Although the LAA has made provision for specific groups, there is no express mention of persons with disabilities. This gap may undermine the public's faith, especially persons with disabilities, in the operations of the scheme. It means that persons with disabilities must prove that they are unable to pay for legal services or that a substantial injustice would otherwise result if they are to qualify for free representation.³⁸

An accused person with disabilities who cannot prove that they are unable to pay for legal services or that a substantial injustice would result is not eligible for legal aid. In *David Macharia Njoroge v Republic* the court held:³⁹

"Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defense owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence."

The substantial injustice test has been expanded to include accused persons who have committed capital offences where the penalty is loss of life. In *John Sakwa v Director of Public Prosecutions and 2 others* the High Court observed:⁴⁰

"The Court of Appeal thus expanded the constitutional requirement that legal representation be provided at state expense in cases where 'substantial injustice might otherwise result' to include all situations where an accused person is charged with an offence whose penalty is death. The implication of this, in my view, would be that not just the indigent on whose behalf this petition is brought, but all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death."

34 Constitution of Kenya, fifth sch.

35 Legal Aid Act 6 of 2016.

36 Legal Aid Act, sec 2.

37 Id, sec 36.

38 *David Macharia v Republic* [2011] eKLR.

39 Ibid.

40 *John Swaka v The Director of Public Prosecutions & 2 others* [2013] eKLR, para 39.

It can therefore be argued that the substantial injustice eligibility criterion is an objective test that is intended to ensure the need of Kenya's criminal justice system to guarantee justice as opposed to the accommodation needs of accused persons with disabilities.

On the contrary, the "indigency" test involves a gross and largely subjective interpretation of whether an accused person with disability might be able to afford legal representation.⁴¹ Its purpose is to ensure that the available limited resources are allocated to the more indigent persons with disabilities. In *Charles Maina Gitonga v Republic*,⁴² the applicant filed an application before the Supreme Court in Kenya alleging among other things the fundamental issue of the right to assistance of counsel in criminal matters and the right to legal representation provided at the state's expense in cases where substantial injustice would otherwise occur.⁴³ The court dismissed that argument and held that legal representation is not an inherent right available to an accused person under article 50 of the Constitution or under section 36(3) of the LAA.⁴⁴ Further, the court said that an accused person has to first establish that he or she was unable to meet the expenses of his or her trial before a lawyer can be appointed to act on his or her behalf.⁴⁵ The authors argue that this is a "heavy handed" approach in the sense that it inevitably implies quite substantial compliance obligations on the part of accused persons with disabilities. Opponents of this approach may also argue that it promotes inequity as there are no standards to measure the level of poverty that will satisfy the granting of legal aid to those who are poorer than others.

Perhaps, a blanket inclusion of persons with disabilities in the LAA as beneficiaries may enhance self-efficacy, self-worth and a sense of community and acceptance of accused persons with disability in the criminal justice system.⁴⁶ However, it may also undermine the nature of legal aid services which historically has been pegged on financial ability as opposed to one's disability status.⁴⁷ The authors argue for a flexible legal aid standard in Kenya that is based on the needs of persons with disabilities and not the state. This is in line with the concept of distributive justice which requires that accused persons with disabilities be accommodated to the extent reasonably possible by the state as is discussed in the next section.⁴⁸

The other significant challenge to Kenya's process-based approach is that it contradicts the African Disability Protocol which recognizes the rights of accused persons with disabilities to reasonable accommodation in access to justice. As a result, it is almost impossible to undertake reasonable *ex ante* [beforehand] assessment of persons with disabilities regarding the type, level, barriers and needs both medically and psychically in order to determine a reasonable accommodation which is appropriate. In particular, under the current Kenyan legal aid regime, there is little prospect of developing a robust *ex ante* analysis on the needs of accused persons with disabilities in access to justice. This problem is particularly acute with the LAA as it does not make any provision with regards to legal aid as a form of reasonable accommodation. Instead, the LAA relies overly on the discretion of the National Legal Aid Service (NLAS) to determine who is qualified to access free legal aid services at state expense.⁴⁹

There is no law that requires accused persons with disabilities to be assessed in order to determine appropriate legal aid accommodations. The only assessments that are conducted in Kenya are ones

41 JF Smurl "Eligibility for legal aid: Whom to help when unable to help all" (1979) 12/3 *Indiana Law Review* 519 at 524.

42 [2018] eKLR.

43 *Charles Maina Gitonga v Republic* [2020] KESC 61 (KLR) 1.

44 *Id* at 2.

45 *Ibid*.

46 DS Dunn and S Burcaw "Disability identity: Exploring narrative accounts of disability" (2013) 58/2 *Rehabilitation Psychology* 148.

47 R Moorhead "Legal aid in the eye of a storm: Rationing, contracting, and a new institutionalism" (1988) 25 *Journal of Law and Society* 365 at 367.

48 JM Vande Walle "In the eye of the beholder: Issues of distributive and corrective Justice in the ADA's employment protection for persons regarded as disabled" (1998) 73 *Chicago-Kent Law Review* 897 at 931.

49 *Thomas Alugha Ndegwa v Republic* [2016] eKLR, CA (Nairobi) Cr App 2 of 2004, para 21.

that are meant to establish impairment and they evolved out of practice directions and case law.⁵⁰ The reason for the assessment was stated in *Republic v Msuya Ngolo Lewis*⁵¹ by the High Court:

“[T]he court must be certain that, the person charged, is fit to stand and understand the trial process and in turn, accord him a fair trial as envisaged under; article 50 (2) (b) of the Constitution of Kenya, 2010. That, failure to conduct the mental assessment, will prejudice the Respondent’s case and therefore the respondent is still desirous to have the mental examination carried out, on the applicant.”

Once impairment is established or perceived, section 166 of the Criminal Procedure Code⁵² requires that the accused person with disability be precluded from further participating in the proceedings.⁵³ This practice constitutes a discriminatory status-based law in violation of article 5(1) of the African Disability Protocol. Such tests for mental capacity offend the principle of indirect discrimination because of their disproportionate impact on accused persons with intellectual and psychological disabilities.⁵⁴ An assessment must take into consideration whether reasonable accommodation, or the failure thereof, may affect the accused person with disability and cause inequality in the criminal justice system.⁵⁵

Inadequate funding structure of legal aid in Kenya’s criminal justice system

One of the main barriers to the effective participation of accused persons with disabilities in access to justice is lack of funds. Kenya’s legal aid funding structure is based on an adversarial tradition that prioritizes trials.⁵⁶ It means that advocates will only be reimbursed if they take part in court proceedings. This approach has resulted in manifest and disproportionate imbalance between the prosecution and the defence in terms of resource allocation. While the Office of the Director of Public Prosecutions is well-established and funded by state resources, the NLAS has remained underfunded since it was established in 2016.⁵⁷

Part V of the LAA establishes and makes provision for the management and workings of the Legal Aid Fund (the Fund). The Fund is managed by the NLAS.⁵⁸ Currently, the Fund comprises: moneys allocated to the NLAS by Parliament for its purposes; grants, gifts, donations, loans or other endowments given to the NLAS; and moneys from any other lawful source.⁵⁹ The Fund is intended to cater for the expenses incurred by the NLAS pursuant to the LAA, including expenses incurred in the representation of persons granted legal aid, remuneration of legal aid providers for services rendered and expenses incurred in providing service.⁶⁰

However, the remuneration of advocates in respect of legal aid cases is usually low. For example, the Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services provides that advocates who enlist for pro bono services are to be paid an all-inclusive amount of Kshs 30,000.⁶¹

50 *Republic v Msuya Ngolo Lewis* [2021] eKLR, [2021] KEHC 272 (KLR), para 13.

51 *Republic v Msuya Ngolo Lewis*, id.

52 Criminal Procedure Code, Cap 75 of 1930.

53 Id, sec 166.

54 CRPD General Comment No 1 - Article 12: Equal recognition before the law (adopted 11 April 2014), 19 May 2014, CRPD/C/GC/1, para 9.

55 *Noble v Australia* Decision by the United Nations Committee on the Rights of Persons with Disabilities, 2 September 2016 at para 8.4.

56 C Nanjala “Determinants of effective legal aid service delivery in Kenya” (2013) *International Journal of Arts and Entrepreneurship* 1 at 2.

57 Ojienda “Legal aid as a human right”, above at note 13 at 154.

58 LAA 2016, sec 29(1).

59 Id, sec 29(2).

60 Id, sec 30.

61 See Kenya Gazette Notice No 370 of 2016, available at: <<http://kenyalaw.org/kl/index.php?id=6006>> (last accessed 25 November 2020).

Relatedly, section 75(4) of the LAA states that the scale of fees determined by the NLAS will be less than the legal fee applicable to persons not aided by NLAS. Such provisions have negatively affected the quality of services provided to consumers of legal aid, including accused persons with disabilities. In most cases, legal aid matters are taken up by junior counsel with limited practice experience. As a result, less time and attention are given to such cases.⁶² In certain instances, trials have been adjourned numerous due to the unavailability of court appointed advocates.⁶³

The African Disability Protocol: delivering an outcome-based approach in access to justice

As discussed above, one of the main drawbacks of Kenya's legal aid scheme in the criminal justice system is that it is not comprehensive enough to ensure equality of outcomes before the law for accused persons with disabilities. It is largely concerned with mere formalities as opposed to promoting the substantive participation of accused persons with disabilities in the justice system. For example, it does not address the economic barriers that bar accused persons with disabilities from participating in court processes.⁶⁴ To fill this gap, it is important to incorporate the provisions of the African Disability Protocol, which have adopted an outcome-based approach in all matters relating to access to justice, including in legal aid. This is so, because it seeks to address the inequalities and power imbalances that have existed between persons with and those without disabilities in criminal courts, when it comes to representation.⁶⁵

The African Disability Protocol was ratified by Kenya on 15 November 2021 and entered into force on 5 May 2024.⁶⁶ Its aim, in terms of legal aid, is ensuring equal opportunities for accused persons with disabilities in access to justice.⁶⁷ This approach ensures that the outcome for each accused person with disability is equal to those of their counterparts without disabilities as regards ensuring the right in access to justice.⁶⁸ It implies the equal ability of accused persons with disabilities to not only participate, but also enjoy and benefit from criminal justice systems as non-disabled people do.⁶⁹ The African Disability Protocol does this by focusing on four access to justice dimensions including distributive, procedural, interpersonal and informational.⁷⁰ An outcomes approach to legal aid should take into account these four access to justice benefits as discussed in the next sub-section.

The distributive justice dimension of access to justice in the African Disability Protocol

The African Disability Protocol is consistent with the concept of distributive justice. Aristotle described distributive justice as being "concerned with the distributions of honour or money or

62 Ojienda "Legal aid as a human right", above at note 13 at 156.

63 For instance, in High Court in Nakuru Criminal Case 37 of 2017, the case was adjourned ten times, two being due to the unavailability of the advocate.

64 Okoth "Rethinking the National Legal Aid Service", above at note 5 at 206; K Mbondenyi and O Ambani *Principles, Governance and Human Rights* (2012, Law Africa Publishers) at 221.

65 YT Chekera-Radu "The relevance of substantive equality in African jurisprudence to women's land and property rights" (2017) 1 *African Human Rights Yearbook* 41 at 57.

66 African Union "List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the rights of persons with disabilities in Africa", available at: <https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_PERSONS_WITH_DISABILITIES_IN_AFRICA_0.pdf> (last accessed 24 January 2021).

67 K Appiagyei-Atua "A comparative analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities" (2017) 21 *Law, Democracy & Development* 153 at 166.

68 M Priestley and A Huete-García "Developing disability equality indicators: National and transnational technologies of governance" (2022) 26/5 *The International Journal of Human Rights* 929 at 931.

69 *MEC for Education: KwaZulu-Natal & Others v Naneethum Pillay* 2008 (1) SA 474 (CC).

70 MJ Nkhata "Access to justice for persons with disabilities in Malawi: Exploring challenges and possibilities in the criminal justice system" (2020) 8 *African Disability Rights Yearbook* 124 at 132.

the other things that fall to be divided among those who have a share in the [government]”.⁷¹ It emphasizes the relationship of the acting parties to society as a whole. Distributive justice requires that things, including services, be allocated to people, including those with disabilities in accordance with a criterion of distribution.⁷²

Distributive justice begins with the selection of beneficiaries. It aims to locate the service user at the heart of assessment processes and regards their requirements as paramount.⁷³ For example, the beneficiaries of the African Disability Protocol are persons with disabilities. Disability identity is a key dimension of diversity that is distinct from one’s impairment status that “shapes a person’s ways of seeing themselves, their bodies, and their way of interacting with the world”.⁷⁴ According to the African Disability Protocol, disability is conceptualized to “include those who have long-term physical, mental, intellectual, developmental or sensory impairments which in interaction with environmental, attitudinal and other barriers hinder their full and effective participation in society on an equal basis with others”.⁷⁵ Thus, the failure to make access to justice available to accused persons with disabilities on an equal basis with others is both an act of discrimination as well as a distributive injustice issue. The right to access for accused persons with disabilities should not be inferior to that of persons without disabilities.⁷⁶ Be that as it may, the phrase “on an equal basis with others” may be problematic as a meaningful guide to policy formulation. According to Moorhead, “different sections of society have very different needs for legal aid services which cannot be measured in simple terms of equality”.⁷⁷ Simply put, there are no “others”. In this context though, “others” has been used to refer to persons without disabilities.

It means that the African Disability Protocol goes beyond mere formal justice to include an outcomes approach. The latter demands for unequal or different treatment to accused persons with disabilities who may or may not be equally situated in Kenya’s criminal justice system.⁷⁸ In other words, the African Disability Protocol does not insist on sameness in how persons with disabilities should be treated. Instead, it calls for different sorts of goods and services for persons with disabilities.⁷⁹ For instance, it identifies reasonable accommodation as one of the criteria for a disability-centred design in the delivery of justice. Reasonable accommodation, according to the African Disability Protocol, means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.⁸⁰ Simply put, reasonable accommodations are adjustments to accommodate the needs of persons with disabilities, including in access to justice.⁸¹

Particularly, the principle of reasonable accommodation aims at adjusting the criminal justice environments so as to ensure effective participation of accused persons with disabilities. It infers alternatives to overcome court barriers against accused persons with disabilities in order to enable them to be self-participating in Kenya’s criminal justice system,⁸² such as, for example, the provision

71 Aristotle quoted in RW Wright “Substantive corrective justice” (1992) 77 *Iowa Law Review* 625 at 691.

72 P Benson “The basis of corrective justice and its relation to distributive justice” (1992) 77 *Iowa Law Review* 515 at 535.

73 J Harris “Incorporating the social model into outcome-focused social care practice with disabled people” in C Barnes and G Mercer (eds) *Disability Policy and Practice: Applying the Social Model* (2004, The Disability Press) 116 at 121.

74 AJ Forber-Pratt et al “Disability identity development: a systematic review of the literature” (2017) 62/2 *Rehabilitational Psychology* 198.

75 African Disability Protocol, art 1.

76 Mor “With access and justice for all”, above at note 26 at 618.

77 R Moorhead “Legal aid in the eye of a storm: Rationing, contracting, and a new institutionalism” (1988) 25 *Journal of Law and Society* 365 at 366.

78 Kanter “Let’s try again”, above at note 12 at 319.

79 African Disability Protocol, art 3(d).

80 Id, art 1.

81 JV Velasco et al “COVID-19 and persons with disabilities in the Philippines: A policy analysis” (2021) 11/3 *Health Promotion Perspectives* 299.

82 Mor “With access and justice for all”, above at note 26 at 626.

of legal service accommodations to accused persons with disabilities when dealing with lawyers in order to overcome representation barriers in access to justice.⁸³ Accommodations may limit the discretion of advocates to improvise in a manner that may lead to violations of the human rights of accused persons with disabilities.⁸⁴ As such, it is prudent to include a statutory requirement directing that legal aid services be provided in a manner that accommodates the needs of accused persons with disabilities. Nevertheless, the right to reasonable accommodation is subject to restrictions based on a proportionality analysis. The African Disability Protocol requires states parties to provide reasonable accommodation to accused persons with disabilities, unless to do so would occasion a disproportionate or undue burden.⁸⁵

The procedural justice dimension of access to justice in the African Disability Protocol

Decision outcomes are informed by a person's perceived fairness of a system's processes and procedures.⁸⁶ The latter focuses on how subjects experience the process through which decisions regarding substantive rights, such as the right to legal aid, are made.⁸⁷ Thus, the manner in which accused persons with disabilities are treated in the criminal justice system can influence their satisfaction independently of either their absolute outcomes or the fairness of those outcomes.

Generally, the provision of legal aid enables accused persons with disabilities to have a broad understanding of the objectives and purpose of legal proceedings.⁸⁸ The African Commission on Human and Peoples' Rights buttressed the importance of legal representation in 1999: "The right to equal treatment by a jurisdiction, especially in criminal matters, means in the first place that both the defense and the Public Prosecutor shall have equal opportunity to prepare and present the pleas and indictment during the trial".⁸⁹

This means that procedural-based legal aid services have the potential of ensuring access to justice rights of persons with disabilities. The reason for this is because the use of legal aid as a procedural accommodation removes financial barriers that may hinder the effective participation of accused persons with disabilities when exercising their right to access justice.

Moreover, when legal aid is provided to accused persons with disabilities, their perception of legitimacy of the process increases. Conversely, accused persons with disabilities who do not experience procedural justice in their interactions with the criminal justice sector are more likely to feel marginalized, less valued and excluded from society.⁹⁰ Be that as it may, it is important to note that the subjective judgments of accused persons with disabilities about the criminal justice system might not accurately reflect the objective criteria of the African Disability Protocol.⁹¹ In this regard, there is a need to bridge the gap between procedural justice and the realities of disability in the context of legal aid in the criminal justice system.

The procedure employed to consider a legal aid request is not specified under the African Disability Protocol. It, however, takes into account individual differences of accused persons with

83 AT Wahyudi and S Kasiyati "Reasonable accommodations on the legal aid to persons with disabilities in the judicial process" (2022) 1 *Proceedings of the 1st International Seminar on Sharia, Law and Muslim Society* 137 at 141.

84 Nkhata "Access to justice for persons with disabilities in Malawi", above at note 70 at 142.

85 African Disability Protocol, art 1.

86 C Leineweber et al "The influence of and change in procedural justice on self-rated health trajectories: Swedish Longitudinal Occupational Survey of Health results" (2016) 42/4 *Scandinavian Journal of Work, Environment & Health* 320 at 320.

87 TR Tyler and EA Lind "Procedural justice" in J Sanders and VL Hamilton (eds) *Handbook of Justice Research in Law* (2000, Springer) 65.

88 P Weller "Legal capacity and access to justice: The right to participation in the CRPD" (2016) 5/1 *Laws* 1 at 6.

89 *Avocats Sans Frontières* (on behalf of Gaëtan Bwampamye) / Burundi, 231/99.

90 J Tomlin et al "Procedural justice and forensic mental health: An introduction and future directions" (2023) *Medicine, Science and the Law* 1 at 3.

91 M Dai et al "Procedural justice during police-citizen encounters: The effects of process-based policing on citizen compliance and demeanor" (2011) 39 *Journal of Criminal Justice* 159 at 159.

disabilities, including with regards to their participation in criminal courts. Article 13 of the African Disability Protocol requires states parties “to ensure effective access to justice for persons with disabilities on an equal basis with others”.⁹² This is to be achieved “through the provision of procedural, age, and gender appropriate accommodations” in “all legal proceedings” including in criminal proceedings.⁹³ This provision recognizes the dangers of essentialism, which seeks to categorize and generalize “disabled people” as a homogenous group.⁹⁴ It means that individual requirements for an effective participation in the criminal justice sector may vary greatly depending on a person’s age and gender. However, it must also be understood that there are some common challenges that affect persons with disabilities in Kenya in so far as their right to access legal aid is concerned.⁹⁵

The interpersonal justice dimension of access to justice in the African Disability Protocol

Interpersonal justice, sometimes also referred to as relational justice, is concerned with power imbalances within justice systems and how criminal justice actors treat accused persons with disabilities.⁹⁶ It acknowledges the extent to which accused persons with disabilities perceive that criminal justice actors treated them empathetically and acknowledged their situation, thereby validating their status as legal actors who deserve and require redress.⁹⁷ Article 7 of the African Disability Protocol invokes the proposition that accused persons with disabilities should never be excluded from participation in legal proceedings on the basis of disability. Accordingly, “denial of legal capacity must not be based on personal traits such as gender, race, or disability, or have the purpose or effect of treating the person differently”.⁹⁸ Moreover, while accused persons with disabilities may have different cognitive capabilities, a person’s lack of mental capacity must never be the basis for a denial of legal capacity.⁹⁹

Article 7(2)(c) of the African Disability Protocol requires that measures supporting legal capacity should be directed towards recognition of the “rights, wills and specific needs” of accused persons with disabilities. It contemplates the introduction of both formal and informal arrangements to monitor relationships between justice actors and accused persons with disabilities.¹⁰⁰ For example, it speaks to the quality of support in access to justice mechanisms so as to ensure that interactions between advocates and accused persons with disabilities are free “from fear, aggression, threat, deception, or manipulation”.¹⁰¹ Overall, article 7 of the African Disability Protocol is one of the important provisions that should guide the courts as they issue decisions about eligibility of accused persons to legal aid as it increases the opportunity for value judgments about who deserves what type of support and who does not.

The informational justice dimension of access to justice in the African Disability Protocol

Criminal justice actors should deliver informational justice in their interactions with accused persons with disabilities.¹⁰² In the context of legal aid, informational justice means the quality of justice treatment received by accused persons with disabilities in interpersonal communication, including accurate, sufficient and timely expression and interpretation of legal decisions

92 African Disability Protocol, art 13.

93 Ibid.

94 T Shakespeare *Disability Rights and Wrongs* (2006, Routledge) at 75.

95 Nkhata “Access to justice for persons with disabilities in Malawi”, above at note 70 at 132.

96 Mor “With access and justice for all”, above at note 26 at 633.

97 Leineweber et al “The influence of and change in procedural justice on self-rated health trajectories”, above at note 86 at 320.

98 CRPD General Comment No 1, above at note 54.

99 Id, paras 13–14.

100 African Disability Protocol, art 13(4).

101 CRPD General Comment No 1, above at note 54, para 22.

102 Mor “With access and justice for all”, above at note 26 at 641.

and actions taken by criminal justice actors.¹⁰³ Informational justice, as a specific form of legal exchange, can effectively improve acceptance and tolerance of negative information or decisions by accused persons with disabilities thus increasing their overall trustworthiness of the criminal justice system.¹⁰⁴

Legal illiteracy is rampant among accused persons with disabilities and it cannot be assumed that they know their rights including the need for legal aid.¹⁰⁵ The latter will enable accused persons with disabilities to seek remedies for injustices caused to them as they will be aware of their legal rights and how to exercise them under the law. In its Concluding Observations on the Report on Gabon, the Committee on the Rights of Persons with Disabilities (CRPD Committee) was concerned about the limited accessibility by persons with disabilities to the country's justice system, including legal aid. The CRPD Committee recommended that the state party implement informational and communicational accessibility and ensure the training of court staff, judges, police officers and prison staff so as to uphold the rights of persons with disabilities, including the right to a fair trial.¹⁰⁶

The African Disability Protocol obligates state parties to ensure that accused persons with disabilities have access to information, including legal aid information.¹⁰⁷ Regardless of the type of disability, criminal justice actors should first assume that an accused person with disability has the capacity to make decisions, and second, find the best way of providing information and checking understanding. This includes making appropriate provisions related to legal aid and remembering that accused persons with disabilities in low-resource settings have limited access to legal information as opposed to their counterparts in urban areas.¹⁰⁸

Towards an outcome-based approach to legal aid in Kenya

Legal aid reform is one of the mainstays of access to justice rights for persons with disabilities in Kenya. The principal justification of differential treatment to legal aid is the historical marginalization of persons with disabilities in the Kenyan society. Criminal justice actors should be aware of the importance of legal aid in the country; particularly to accused persons with disabilities. There is a need for the judiciary to treat the issue of legal representation with much weight, otherwise accused persons with disabilities will lose faith in the system. Also needed is a more careful regulatory design and development that takes account of the circumstances of persons with disability. The African Disability Protocol sets out a number of measures that make it possible to achieve these aims.

Inclusion of persons with disabilities in Kenya's legal aid framework

Applying the LAA's equally to all approach, without having regard to the peculiar circumstances of accused persons with disabilities, could lead to discriminatory outcomes.¹⁰⁹ This is because Kenya's legal aid framework is at its core distributionist. Therefore, one of the ways of truly protecting the fundamental interests of accused persons with disabilities in access to justice is by recognizing their right to legal aid.

103 JA Colquitt "On the dimensionality of organizational justice: A construct validation of a measure" (2001) 86 *Journal of Applied Psychology* 386.

104 J Greenberg "Employee theft as a reaction to underpayment inequity: The hidden cost of pay cuts" (1990) 75 *Journal of Applied Psychology* 561.

105 *Jane Wanjiku Wamugunda v Kenya Tea Development Agency Ltd* (2016) eKLR.

106 CRPD/C/GAB/CO/1, paras 30–31.

107 African Disability Protocol, art 16.

108 E Onsomu, V Mose and P Munene "Enhancing inclusivity by empowering persons with disabilities (PWDs)" (2022, Special Paper No 32/2022, Kenya Institute for Public Policy Research and Analysis, available at: <<https://repository.kippira.or.ke/bitstream/handle/123456789/3722/SP32.pdf?sequence=1&isAllowed=y>> (last accessed 24 January 2024).

109 *HM v Sweden* Communication 3/2011, CRPD Committee (19 April 2012) CRPD/C/7/D/3/2011, para 8.2.

However, conservatives across the globe, including in Kenya, have argued for a need to differentiate between “real” human rights from mere interests in welfare. For instance, Wellman has stated:

“The most obvious, and perhaps the most important, lesson to learn is that one should not conceive of our fundamental ethical rights to welfare benefits as human rights. These are not moral rights the individual has simply as a human being, for they cannot be grounded in human nature or the general aspects of human existence per se. Our most fundamental welfare rights are at best civic rights, moral rights of the individual as a citizen holding against his or her state. Only in this way can the problems of scarce resources and pointless duplication be solved in theory and the responsibility for meeting human need fixed in practice.”¹¹⁰

It means that legal aid rights are not human rights but welfare benefits that accused persons with disabilities have acquired by virtue of being citizens in Kenya.¹¹¹ As a result, they cannot be classified as “real” human rights.

In Africa, legal representation for accused persons with disabilities at trial is guaranteed by the African Disability Protocol.¹¹² This means that the right to legal aid for persons with disabilities in access to justice is a fundamental right and should not be considered a mere misnomer for a welfare scheme of government-funded representation.¹¹³ No doubt, demands on the public purse have limited the availability of funds for legal aid rights in Kenya. According to Wellman:

“The problem of scarce resources arises if one insists that the individual’s right to have his or her life sustained is a universal human right. This virtually guarantees that the many demands imposed upon each agent will exceed the available resources or those that can be morally demanded of that party. Such excessive demands cannot be admitted as genuine ethical claims holding against that second party.”¹¹⁴

To this end, those who oppose legal aid rights argue that countries should meet these obligations to the extent that they can. More than that, they are not obliged to do so.¹¹⁵ In Kenya, accused persons with disabilities still hold little legal sway in the country’s legal aid framework as this right has not been equally distributed. Although they are poorer than other groups, they have received only minimal attention under the LAA.

Besides, there is no certainty that the NLAS will always, if ever, have sufficient funds with which to provide legal aid in criminal cases, even where an applicant with disability satisfies the requirements. To resolve this, the authors suggest that in cases involving serious criminal charges, for example where there is a risk of imprisonment, a judge or magistrate should grant a request for an adjournment or stay proceedings when, through no fault of her or his own, the accused person with disability is unable to obtain legal representation.

That was the holding in the case of *Dietrich v The Queen (Dietrich)*¹¹⁶ where Mason CJ and McHugh J stated:

“In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused

110 C Wellman *Welfare Rights* (1982, Rowman and Allanheld) at 181.

111 J Griffin “Welfare rights” (2000) 4 *The Journal of Ethics* 27 at 30.

112 African Disability Protocol, art 13.

113 A Gruber “A distributive theory of criminal law” (2010) 52 *William & Mary Law Review* 1 at 43.

114 Wellman *Welfare Rights*, above at note 110 at 163.

115 Griffin “Welfare rights”, above at note 111 at 35.

116 (1992) 177 CLR 292.

by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.”¹¹⁷

The purpose of this recommendation is to put pressure on the NLAS to make funding available for legal representation of accused persons with disabilities who have been charged with serious criminal offences. However, it is important to note that when the process of securing legal representation results in unnecessary delays, the right to a trial within a reasonable time may be violated.

Providing for legal aid as a form of reasonable accommodation

The LAA is a piece of general legislation that applies to everyone in Kenya. As a result, the LAA is not specific enough to provide the needed guidance in situations involving persons with disabilities. For instance, it makes no provision for a general duty on the part of the state to provide for legal aid as a form of reasonable accommodation to accused persons with disabilities. From the foregoing discussion, it is clear that there is need for a mandatory legislative framework that regulates the duty to reasonable accommodation in form of legal aid. In the context of article 13 of the African Disability Protocol, free legal assistance is an appropriate accommodation necessary to ensure effective access on an equal basis with others.

Article 13 of the African Disability Protocol mandates the state to enact a range of procedural and substantive accommodations that are necessary to remove financial barriers to the participation of accused persons with disabilities in access to justice. According to the African Disability Protocol, legal aid legislation should explicitly require the government to provide legal aid services up to the point at which the costs became disproportionate to the benefit obtained in ensuring the right to access justice for persons with disabilities.¹¹⁸ For example, it has been argued that restrictions to an accused person with disabilities’ rights to legal aid is permitted where there are compelling reasons that relate to the circumstances of the individual case and the restriction do not unduly prejudice their rights.¹¹⁹ In *Director of Public Prosecutions (Ireland) v Gormley*,¹²⁰ the Irish Supreme Court suggested that the need to protect other major constitutional rights such as the right to life may be considered an exceptional circumstance that may warrant the limit of the right to legal aid. The cases may be viewed as examples of what is referred to as an “outcome based” approach to legal aid, which is in the best interests of substantive justice.¹²¹

Legal capacity

The issue of legal capacity has remained a challenge in Kenya’s legal aid framework, particularly to accused persons with intellectual and psychosocial disabilities. The law allows for the full deprivation, or partial restriction, of an accused person’s right to legal capacity, based on their disability. For example, section 41 of the LAA provides the criteria for eligibility of legal aid. Specifically, it provides that applications for legal aid may be made on behalf of persons with “mental incapacity”. In short, decisions are made on their behalf without their participation. Article 7(2)(c) of the African Disability Protocol stipulates that accused persons with disabilities should be provided with effective legal protection and support they may require in enjoying their legal capacity consistent with their rights, will and specific needs. This wording is reiterated in article 12(3) of the Convention on the

¹¹⁷ Id at 297–98.

¹¹⁸ African Disability Protocol, art 1.

¹¹⁹ *Salduz v Turkey* [2008] V Eur Court HR 59; *Cadder v Her Majesty’s Advocate (Scotland)* (2010) 1 WLR 2601 at 2623.

¹²⁰ [2014] 1 ILRM 377 at 405.

¹²¹ A Flynn et al “Legal aid and access to legal representation: redefining the right to a fair trial” (2016) 40 *Melbourne University Law Review* 207 at 239.

Rights of Persons with Disabilities (CRPD).¹²² Therefore, Kenya's legal aid framework needs to move beyond substituted to supported decision making.

To date, Kenyan practitioners have been reluctant to raise legal capacity arguments under the CRPD and African Disability Protocol to challenge the LAA's limitations. Having an advocate in some cases has robbed accused persons with disability of their personal agency. According to Muringa's research, some courts in Kenya deny accused persons with disabilities audience if there is an advocate on record.¹²³ This amounts to a violation of the right to legal capacity. To guard against this, the Committee on the Rights of the Child has emphasized that the right to representation should not take away the right of accused persons, including those with disabilities to participate in person.¹²⁴

Another challenge relates to the "distinct under-utilisation of the courts in the courts" through judicial avoidance strategies that have been identified as some of the reasons for the minimization of the participation of persons with disabilities in access to justice.¹²⁵ The authors contend that judicial officers should apply provisions of the CRPD and the African Disability Protocol on supported decision making in order to challenge the domestic limitations on legal capacity. In addition, judicial decision-makers should be upraised on the use of international human rights jurisprudence to inform fundamental domestic due processes, such as legal aid.

Resource allocation

As discussed earlier, inadequate funding for legal representation to accused persons with disabilities has resulted in disproportionality between the competing interests of the law expert prosecutor and the law ignorant accused person with disability. Ensuring the provision of adequate legal aid funding for accused persons with disabilities would adhere to the spirit of an outcome-focused access to justice.¹²⁶ In order to develop a comprehensive legal aid system, the national government needs to budget for the NLAS the same way it does for the Office of the Director of Public Prosecution.

However, a model which relies entirely on state funding for the NLAS may not be feasible in the circumstances of Kenya. Thus, partnership with non-state actors supporting or providing legal aid services for persons with disabilities is strategic.¹²⁷ The NLAS should endeavour to establish and co-ordinate networks with disability rights movements in Kenya that offer legal aid services to accused persons with disabilities as envisaged by the LAA.¹²⁸ The system should be rationalized in such a way that it takes into consideration the remuneration of legal aid advocates, considering issues like their experience and complexity of each case. This will bring in skilled advocates, thus enhancing the quality representation of accused persons with disabilities in Kenya. Ultimately, this distribution of funds and skills will ensure equality of outcomes for accused persons with disabilities as regards representation and level of resources.

122 Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006) UN Treaty Series vol 2515, UN Doc A/61/611 (entered into force on 3 May 2008).

123 SK Muringa "Child lives matter too: Prioritising the realisation of the right to legal aid for children in conflict with the law" (2021) 2 *Egerton Law Journal* 176 at 186.

124 Committee on the Rights of the Child, General Comment No 10 (2007): Children's rights in juvenile justice, 25 April 2007, CRC/C/GC/10, para 44.

125 PO Juma and B Orao "To what extent is global and regional jurisprudence on the right to health for persons with disabilities reflected in Kenyan courts?" (2021) 9 *African Disability Rights Yearbook* 72 at 82.

126 Harris "Incorporating the social model into outcome-focused social care practice with disabled people", above at note 73 at 121.

127 "National Action Plan Legal Aid 2017-2022, Kenya".

128 LAA, sec 7(1)(g-o).

Training

Generally, limited knowledge reflects the distance between criminal justice actors and accused persons with disabilities.¹²⁹ The disability arena is an area in which law reform authorities may themselves have limited expertise and understanding. To this end, there is a need for significant development activity, both through research of the relevant literature and, potentially, through working cooperatively with criminal justice authorities in the development and implementation of the African Disability Protocol's outcomes model of access to justice.

Article 13 of the African Disability Protocol imposes a duty on the state to offer training to all law enforcement and personnel working in the field of administration of justice in order to ensure the realization of the right to legal aid. Staff training and reflective practices should be informed by a comprehensive outcomes approach to legal aid. Legal aid providers should also be trained on how to work with accused persons with disabilities. Such awareness on the needs of accused persons with disabilities will greatly influence the successful handling of their cases in Kenya's criminal justice system.¹³⁰ The net effect will be reduction in cost to accused persons with disabilities and increase in the number of those getting legal aid services.¹³¹

Conclusion

Kenya is under constitutional and international obligations to ensure that the right to legal aid is realized in theory as well as in practice. Article 26 of the African Charter on Human and Peoples' Rights instructs states to improve appropriate institutions responsible for dispensing human rights, including in legal aid. In Kenya, the duty to provide legal aid for persons with disabilities is set out in the LAA. However, there is still a need for legal reforms that guarantee both the appearance and reality of the right to legal aid in the country. Whether these reforms are initiated by Parliament, professional associations such as the Law Society of Kenya, or by the judiciary is not significant. What matters is that procedures be developed so that legal aid laws fulfil their goal of promoting equality of outcomes in access to justice in criminal courts. Particularly, there is need for the exploration of alternatives so as to ensure effective implementation of the right to legal aid for accused persons with disabilities.

The African Disability Protocol provides for an integrative outcomes approach that considers legal aid both as a general issue of entitlement and as a reasonable accommodation measure. According to the African Disability Protocol, persons with disabilities have a right to participate in the governance of legal aid programmes that affect them. The African Disability Protocol's outcomes approach goes beyond the needs or objectives of Kenya's criminal institutions to reflect the wishes of accused persons with disabilities. Legal aid regulation in Kenya should amount to a fairly uncritical endorsement of the adoption of the African Disability Protocol. The latter should inform individual criminal justice agencies to re-evaluate their practices and processes on legal aid.

Competing interests. None

129 ICJ Kenya "A cost benefit analysis of legal aid in Kenya" (2022, ICJ) at 38.

130 African Disability Protocol, art 13(2).

131 ICJ Kenya "A cost benefit analysis of legal aid in Kenya", above at note 129.