
**THE EFFICACY OF THE ‘JURISPRUDENCE OF EQUALITY
PROGRAM’ (‘JEP’) IN TRAINING KENYAN JUDICIAL OFFICERS TO
PROMOTE GENDER EQUALITY**

**BY
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**A Dissertation submitted in partial fulfilment of the requirements for a
Masters in Women’s Law, Southern and Eastern African Regional Centre for
Women’s Law,
University of Zimbabwe
2010**

Abstract

It was during her attendance on the Masters in Women's Law Program at SEARCWL that the Kenyan magistrate who wrote this dissertation decided to find out the extent to which Kenyan judicial officers, like herself, were actually implementing what they had learnt during their training on the 'Jurisprudence of Equality Program' ('JEP'). JEP is a gender and human rights teaching program which is run in several countries by the International Association of Women Judges ('IAWJ'). Its objective is to train local judicial officers (usually judges and magistrates) to apply HR instruments in cases involving vulnerable groups, especially women and children. In Kenya the JE Program is locally co-ordinated through the Kenyan Women Judges Association ('KWJA'). Using several methodologies, especially the Human Rights Approach, the writer collected and analysed a wide range of data, especially interviews with judicial officers and court judgments. She discovered that, in spite of Kenya having domesticated several regional and international human rights instruments, judicial officers lack the judicial knowledge of how to apply these instruments in order to minimise the harmful effects of various laws, customs and practices which discriminate against the women and children who appear in cases before them. As a result there are conflicting judgments between cases with similar facts which is causing undesirable uncertainty in the application and non-application of these HR instruments. Although the writer determines that sporadic JEP training is helping to make judicial officers more active in the progressive development of HR jurisprudence, she highlights several challenges to the process, especially, judicial work overload, a lack of access to legal resources (e.g., law materials, the internet, etc.) and hidden judicial bias and beliefs. In order to improve the situation, she proposes several recommendations, in particular, longer and more intensive JEP training of all judicial officers which should be carried out on a compulsory and continuous basis with a view to building up a HR data base of shared judicial intelligence at all levels of the judiciary.

Dedication

To my children

You are special. Be blessed.

Acknowledgements

I wish to appreciate and acknowledge financial support from Norwegian Ministry of Foreign Affairs which has enabled me to undertake this worthy course.

My heartfelt appreciation goes to my Supervisor Dr. Amy Tsanga for her valued guidance and patience throughout the research and writing period of this Thesis.

I would also like to thank The Chief Justice of Kenya for granting me permission to undertake this Course.

My Sincere gratitude goes to the International Association of Women Judges granting me permission to carry out this Research on JEP.

My appreciation goes to the Kenya Women Judges Association Executive Committee for the support and cooperation I received without which I would not have managed to carry out the research.

My sincere appreciation goes to all the Judges and Magistrates who attended to me during the Research.

I also wish to acknowledge Muhanji and Nafula at KWJA for their valued support throughout the field work.

I highly appreciate Linda Awuor of Kenya Law Reports for her assistance in researching for relevant cases.

To my family thank you sincerely for patience and support.

I wish to acknowledge the entire SEARCWL Staff team. May God bless and increase all of you mightily.

To Prof Julie Stewart thank you for your powerful vision.

List of Human Rights Instruments

Universal Declaration of Human Rights (1948) (UDHR)

The United Nations International Covenant on Civil and Political Rights (1966) (ICCPR)

The United Nations International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW)

The United Nations Declaration on Elimination of Violence Against Women (DEVAW)

African [Banjul] Charter on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('The African Protocol on Women's Rights')

Convention on the Rights of the Child

Fourth World Beijing Conference on Women Platform For Action

The Nairobi Forward Looking Strategies (NFLS)

Bangalore Principles

List of National Statutes

The Constitution of Kenya

The Penal Code Chapter 63 Laws of Kenya

The Law of Succession Chapter 160 Laws of Kenya

The Judicature Act Chapter 8 Laws of Kenya

Married Women Matrimonial Property Act of England 1882

Citizenship Act Chapter Laws Of Kenya

The Children's Act No. 8 of 2001

Sexual Offences Act No. 3 of 2006

List of Proposed Bills

The Marriage Bill, 200

Married Women Property Bill Of 2007

Family Protection Bill Of 2007

Equal Opportunity Bill Of 2007

Abbreviations

UN	United Nations
JEP	Jurisprudence of Equality Program
CREAW	Centre for Rights Education and Awareness
CRADLE	Child Rights Advisory, Documentation and Legal Centre
CEDAW	Convention on Elimination of all Forms of Discrimination against Women
DEVAW	Declaration on the Elimination of all Forms of Violence Against Women
UDHR	Universal Declaration of Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ICJ	International Commission of jurists
CRC	Convention on the Rights of the Child
ACHPR	African Charter on Human and Peoples' Rights
KWJA	Kenya Women Judges Association
TAWJA	Tanzania Women Judges Association
NAWJU	National Association of Women Judges Uganda
MWPA	Married Women Property Act, 1882 (England)
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IAWJ	International Association of Women Judges
NFLS	Nairobi Forward Looking Strategies
IAWJ	International Association of Women Judges
FIDA-Kenya	Federation of Women Lawyers of Kenya

List of Cases

In the matter of the Estate of Simon Njenga, Succession Cause No. 956 of 2002
In the matter of the Estate of Mugo Wandia, (Deceased) Succession C. No. 320 of 2007
Mary Rono Vs Jane Rono, Civil Appeal No. 66 of 2002
The Estate of Lerionka Ole Ntutu, (Deceased) Succession C. No.1263 of 2000
In the Estate of Andrew Muyunzyu Musyoka, (Deceased) Succession C. No. 303 of 1998
Kivuitu v. Kivuitu, Court of Appeal Civil Appeal No.26 of 1985
Muthembwa V Muthembwa, Civil Appeal No.74 of 2001
J.A.O. v. Homepark Caterers and two others, Civil Case No.38 of 2003
Echaria v. Echaria, Civil Appeal No.75 of 2001
Lord Melvin vs Lady Melvin Civil Case No. 87 of 2007
P.K. Chepkwony v Rep. Criminal Appeal No.128 of 2004
Elijah Kabi v Rep. Criminal Appeal. No. 123 of 2007
*Sawe v. Rep.*KLR 2003 p.364
Ibrahim Abdi Mohammed v. Rep., Criminal A. No. 125 of 2005
R. v. Cornelius Ekirapa Criminal Case No.910 of 2008, Kibera
Otieno v. Ougo C.A. No.31 of 1987
Mary Njeri Nyutu vs. William Kibathi Civil Case No. 53 of 2008, Githunguri
Pattni & Another V Rep (2001)KLR
Beatrice Kimani V.Evanson Njoroge (Nairobi) HCCC No.1610/9
Rep. v. Minister for Home Affairs & two others, Exparte L. Sitamze Misc. Application No.1652 of 2004, Constitutional and Review case
Ephrahim v. Pastory, 87 ILR 106 (1990) LRC High Court Tanzania
Ndossi V Ndossi C.A. No.56 of 2001 at Moshi Tanzania
Chilla v. Chilla,(2004) High Court, Tanzania
Bi. Hawa Mohamed v Ally Sefu C.A. No 9 of 1983 Dar-es-salaam
Muojekwu V. Ejikeme, (1999) Nigeria Court of Appeal Enugu
Prosecutor v. Akayesu, ICTR 96-4-T
Longwe v. International Hotels 19934LRC221

Dow v. Attorney General of Botswana (1990) L.R. C.

Dhungane v. Nepal Writ No. 3392 of 1993

Bhe v. Magistrate (October 2004) Constitutional Court of South Africa

Declaration

I JUDTH N MULAMA-WANJALA, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university

Signed-----

Date-----

This Dissertation was submitted for examination with my approval as University Supervisor

Signed-----

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CHAPTER ONE

1.0 INTRODUCTION

This study focused on judicial officers who have undergone training under the Jurisprudence of Equality Program (JEP) to assess their use of human rights instruments to advance gender equality. Human rights are basic standards which allow people to live in dignity without discrimination. Equitable justice requires both the removal of harmful laws and practices in order to ensure as far as possible that women are empowered to claim their rights.

The Jurisprudence of Equality Program uses the international and regional human instruments to sensitize judicial officers on the rights of people with particular focus on human rights of women and children. Judicial officers are equipped with knowledge and skills to help them resolve cases in accordance with the principles enshrined in the human rights treaties. They are required to critically evaluate the laws they are using to ensure that they do not perpetuate inequality and discrimination through their decisions. The judiciary is an avenue through which women can enforce their rights and it can be frustrating if it fails them to enforce their rights.

People, especially, women and children, who go to court must be assured of the efficacy of the system in enforcing their rights. Women suffer a lot of disadvantages and discrimination due to gender inequality practices. Judicial officers are thus empowered through training to address such issues.

The Universal Declaration of Human and Peoples Rights (UDHR) article 1 states that:

‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood’.

In article 7 declares:

‘All are equal before the law and are entitled without any discrimination to equal protection of the law...’

The Declaration on the Elimination of Violence against Women (DEVAW) in Article 4 requires States to:

“Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women”

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) states in Article 16 (1) that the State is to take:

“All appropriate measures to eliminate discrimination against women in matters relating to marriage and family relations...”

The Beijing Platform for Action which was adopted at the Fourth World Conference on Women held in 1995 states in part that States are to:

“Revoke any remaining laws that discriminate on the basis of sex and remove gender bias in the administration of justice”.

These provisions among others in the international law show that internationally women’s rights are taken seriously. However, equality before the law cannot be achieved simply by enacting laws. They must be implemented by authorized officials. Women’s rights through laws cannot be realized if judicial officers who enforce them are not sensitive to their needs and expectations or are not aware of their rights. Generally, society has been discriminating against women in many issues and this informs why specific laws are made to address discrimination against women. Conventions like CEDAW, DEVAW and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (‘The African Protocol on Women’s Rights), the Beijing Platform for Action and the Nairobi Forward Looking Strategies (NFLS) were proposed in order to address discrimination and gender inequality affecting women.

1.1 The Jurisprudence of Equality Program (JEP): Training and Objectives

JEP is an international program which was started by the International Association of Women Judges (IAWJ) around 1997 to build a true jurisprudence of equality based on universal principles of human rights.

IAWJ says that:

“JEP provides training to judges and allied professionals on the application of international and regional human rights conventions to cases arising in domestic courts that involve discrimination or violence against women.”

The Jurisprudence of Equality Program was started in Kenya around 2000 and since then many judicial officers have been trained. Judicial officers make law in grey areas through judgments and rulings and they can recommend that Parliament reviews the country’s laws so that they may conform with human rights standards. They are thus trained to enforce people’s rights.

JEP trains through workshops and seminars that bring judicial officers together to focus on the concrete meaning of abstract guarantees of equal protection and non discrimination in the laws and to know how to actualize them in real cases. Through case studies, problem-solving exercises and other adult learning techniques, judicial officers have opportunities to share insights with colleagues and deepen their understanding of international law as applied to domestic contexts. JEP training aims to create a group of judicial officers who are well versed in human rights laws and experienced in applying them in domestic courts.

Equality before the law is internationally recognized and guaranteed. Gender equality connotes the absence of discrimination on the basis of one’s sex in allocation of benefits, opportunities and access to resources. It means that men and women are valued equally in their varying roles. It is on this basis that judicial officers are trained under Jurisprudence of Equality Program to administer equal justice to all persons who appear before them. They must be competent to handle women and children’s issues to ensure that proper protection of the law is granted. This

can be done well when judicial officers have a proper knowledge of and are sensitive to the issues relevant to the areas they are dealing with.

The Kenya Women Judges Association (KWJA) which runs the program has carried out several seminars to train judges and magistrates with the assistance from donors and well wishers. Human rights for all people are considered but special emphasis is laid on vulnerable people in society. Women and children are considered among the vulnerable, especially, on issues of discrimination and gender based violence. This research was focused on judicial officers who have undergone the training to see whether they are promoting gender equality through their decisions by using the knowledge and skills gained from the training.

1.1.1 The Curriculum of the Jurisprudence of Equality Program

The curriculum is still in a draft form which means that it has not yet been approved. Basically, it is based on the curriculum offered by the International Association of Women Judges. According to IAWJ each country is supposed to adopt the syllabus that best suits the needs or issues that arise in their courts to help them administer justice on an equal basis. The concept of equality is supposed to be ingrained in the minds of judicial officers in their everyday work so that women or children and other vulnerable groups who appear before them are protected. The curriculum layout broadly focuses on:

- ◆ Training Methods and techniques
- ◆ Understanding Gender equality jurisprudence
- ◆ Gender /sex analysis
- ◆ Women and children's human rights in relation to issues that may affect them
- ◆ Gender equality and non discrimination in the context of human rights
- ◆ Gender equality in Kenya –the local jurisprudence, loopholes, inconsistencies, discrimination, inadequacies and the need for reform
- ◆ The role of judicial officers in promoting gender equality
- ◆ Application of international and regional human rights by judicial officers in their judicial

decisions

- ◆ Handouts on human rights instruments are given to judicial officers who are trained for them to use in their work
- ◆ Judicial decisions are analyzed and then discussed
- ◆ Case study examples on issues that affect women and children are used for analysis of issues and how to apply human rights to those issues.

As gleaned from the draft manual the aims of the training are to:

- ◆ Impart knowledge to gain awareness or additional insights or information on the issues discussed especially on human rights of women and children and how to use them in court.
- ◆ Change attitudes which means positive changes of views, opinions and or perceptions on women and children or any person or group of person. Positive attitudes would enable judicial officers to deal with influencing factors and become gender sensitive and responsive to women issues presented in courts.
- ◆ Impart skills for improvement in handling judicial work especially how to handle women and children who are victims of gender-based violence and discrimination. The skills gained determine the impact of the program

The training starts with training the trainers who are to train other judicial officers. A training seminar takes about three or four days. Normally two training seminars are held in a year. Then an evaluation of one day is held to see how those trained have used the knowledge. The trainees are supposed to submit cases they decided using the knowledge gained from the training. The cases are discussed and experiences are shared. Recommendations on improvements are made.

1.1.2 Training Methods

These include:

- ◆ Discussions to identify problems encountered in courts
- ◆ Brainstorming to encourage participants to come up with new ideas, suggestions or issues
- ◆ Role plays to dramatize women's issue to help modify attitudes
- ◆ Case studies; examples of real life situations of violation of women and children's rights are identified and analyzed.
- ◆ Questions and answers are used to maintain interest and encourage participation. Also to find out experiences and understanding of the topic
- ◆ Study of supplied materials/cases and discussion
- ◆ Evaluation on impact, use of training, compiling reports and noting areas to be corrected and to learn from each other
- ◆ The Draft manual is intended to be a guide only and can be changed to suit different trainers and needs at different circumstances of training.
- ◆ Broadly, the curriculum covers issues of gender violence, discrimination, gender imbalance and how to promote gender equality, application of human rights instruments in domestic courts, case studies on each issue and use of real cases that support or do not support women. Application of international and regional human rights instruments is discussed. JEP training is comprehensive but compressed within a short period. It is meant to equip judicial officers to offer effective justice.

Justice Omolo of the Court of Appeal in a recent Judges Colloquium said that:

“Regular training and orientation sharpens the adjudicatory skills of Judicial Officers.”

He also said:

“When we talk of justice we mean a constant and perpetual desire to render everyone his or her due. This...means that the courts must in every way find legal techniques to provide relief to the one who has been deprived of what was due to him or her...”

This means that Judicial Officers must render quality justice in all cases to all who come before them. The question then is whether judicial officers who have been trained are actually applying this training in cases to render quality justice to women.

Kenya is largely a patriarchal society where women are not treated on an equal basis with men. Major decisions are made by men. This leads to men’s rights being given precedence over those of women. That is why they are able to dictate that only men are entitled to inherit land. Society believes it. Women are disadvantaged in this set up. The training of Judicial officers through JEP is to awaken them to the disadvantages that women undergo and be able to address them effectively through the application of human entitlements in judicial decisions.

Among the Luhya people of Western Province, Kenya, traditionally, man is the head of the home and he owns everything including the wife or wives. A woman is not expected to hold property in her own name unless they agree, as it might be interpreted as undermining her husband’s authority. Even a woman who has contributed to the acquisition of family property may not have a say over management of the property. A typical Bukusu man for example, cannot agree to register his property in the names of his wife even if she is the one who bought it. On the other hand a man may insist on his names being included in any property acquired by his wife. Due to limited education, many women rarely challenge this discrimination. Judicial officers might be perpetuating this discrimination when they insist on proof of direct financial contribution by a wife in matrimonial property sharing. JEP’s objective is to train judicial officers to rise above their biases and those of the society in order administer equitable justice to women. Equitable justice requires that harmful laws and practices, biases and stereotypes are removed and women are allowed to claim their rights on an equal basis with men. Despite Kenya

having signed the Convention to Eliminate All Forms of Discrimination against Women (CEDAW), gender inequalities and discrimination against women persist in every sector of the society.

1.1.3 Targeted Group to be trained

All judicial officers are targeted to be trained. The term judicial officer refers to judges and magistrates because those are currently the ones targeted to be trained. They are magistrates at all levels, kadhis, High Court Judges and Court of Appeal Judges. I was not able to obtain statistics of all those who have been trained. I was informed that many judicial officers who had been trained were affected by a judicial purge in 2003 which affected over 100 judicial officers. Many of them left the judiciary. Others resigned. This affected the program for about two years. In Nairobi I came across some who had been trained and others who had not trained. Kenya has slightly over 250 magistrates and about 60 judges. I was informed that many Judges have been trained and quite a number of magistrates have also been trained.

1.1.4 Principles of Equality and Non-discrimination

Observing and enforcing principles of equality and non-discrimination mean that equal rights, responsibilities and opportunities of women and men, girls and boys are protected and enforced and are truly actualized. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men and ensuring they are treated equally before the law

The JEP Draft Manual, (2009) states:

“...as men and women enjoying the same status, having equal conditions for realizing their full human rights and potential to contribute to the national, political, economic, social and cultural development and to benefit on equal basis from the results.”

Gender equality implies that women and men who appear before courts are treated equally and are entitled to equitable remedies under the law. It means that judicial officers must interpret the laws using gender sensitivity to enable women access justice equally with men. The current Constitution forbids discrimination in section 82(1) and 82(3) but allows discrimination in section 82(4). Section 82(4) provides that laws applying in the area of devolution of property, marriage, burial, adoption are exempted from the provisions in section 82(1) and 82(3) implying that discrimination is allowed in those areas. Some form of affirmative action or judicial activism is, therefore, needed to realize substantive equality between men and women. The judiciary can play that role by not enforcing discriminatory laws through application of human rights instruments and the Constitution.

The laws in Kenya currently are not women friendly. A report to CEDAW Committee (2003) says that:

“Women’s property rights violations are caused by a blend of discriminatory laws, customs, and attitudes combined with ineffective institutions, official disregard, widespread ignorance of rights and other obstacles to their enforcement.”

It states:

“The law right now is not very women friendly. We are trying to come up with legislation and trying to sensitize the judiciary. I don’t think the impact is significant yet”.

1.2 Statement of the Problem

As a magistrate I was trained under JEP but I worked in a framework of legal centralism in which only Kenyan law is used. I had a narrow view of the law confining myself within laws in the Statute books. Even after the training I took an armchair approach in dealing with cases involving women. I was not alive to the needs of women who appeared before me and I enforced the law without caring how it would affect the women. I did not realize that some of my decisions were working unjustly against women. I did not enforce women's rights as enshrined in the human rights instruments and I failed to interrogate how some laws were denying women and children their rights. Due to the legal centralist approach in handling court matters I did not put into active practice what I learned. After I attended the training at the Southern Eastern Africa Research Centre in Women's Law (SEARCWL), I realized that it is important to uphold and actualize people's rights, by enforcing them. I realized that JEP is indeed a very important training program for judicial officers who make decisions that affect people's lives. It became my concern to investigate through this research whether indeed the training is helping judicial officers to change their approach to women and promote gender equality. I was concerned to find out whether judicial officers who have been trained were indeed using their 'new' knowledge and awareness to enforce women and children's rights and promote gender equality. I wanted to establish whether the judiciary as an institution can be used to promote gender equality in Kenya.

1.3 Objectives of the Research

The objective of this study is to:

- To examine how effectively judicial officers who have been trained under the Jurisprudence of Equality Program (JEP) are upholding gender equality by applying human rights instruments in their decisions.

- To examine whether judicial officers who have trained under JEP are capable of challenging laws that encourage gender discrimination.
- To examine whether judicial officers are able to overcome their personal biases and attitudes and those of the society to promote gender equality.
- To examine the extent to which judicial officers are able to use the human rights instruments which have not been domesticated.
- Whether judicial officers face challenges in the use of human rights to promote gender equality.
- To assess whether the period of training is sufficient to equip judicial officers with the required knowledge and skills to promote gender equality using human rights instruments.
- To assess whether the training materials are sufficient to equip judicial officers with knowledge and skills in human rights instruments which they need to use to address gender inequality.

1.4 Research Assumptions

- A minority of JEP trained judicial officers are being guided by Human Rights principles and instruments to interpret Kenyan laws to enforce gender equality.
- Many judicial officers who have been trained still fail to be guided by Human Rights instruments to challenge discriminatory laws and enforce gender equality.
- Many judicial officers lack time and resources to carry out legal research to effectively use human rights instruments to fight gender inequality when it arises in courts.

- Non-domestication of the human rights instruments limits judicial officers in their use of human rights instruments to enforce gender equality.
- Some judicial officers still harbour hidden biases and stereotypes that cause them to fail to challenge laws and customs which support gender discrimination and inequality.
- That the period of training is insufficient to equip judicial officers with the required knowledge and skills to appreciate and apply human rights.
- The training materials are sufficient to train judicial officers on the use of human right instruments but many judicial officers do not make use of them.

1.5 Research Questions

- To what extent are judicial officers who have been trained under JEP guided by human rights instruments and principles to interpret Kenyan laws to enforce gender equality?
- To what extent are judicial officers who have been trained under JEP failing to be guided by human rights instruments to challenge discriminatory laws and practices to enforce gender equality?
- Do judicial officers who have been trained under JEP lack time and resources to carry out legal research to effectively use human rights based approach to address gender inequality which manifests itself in cases?
- Has the failure to domesticate human rights instruments as ratified by Kenya prevented judicial officers from using them in their decisions to enforce gender equality?

- Do judicial officers who have been trained under JEP still harbour biases and stereotypical views about women and does this cause them to fail to challenge laws and practices in cases that encourage gender inequality and discrimination?
- Is the period of training of judicial officers under JEP insufficient to equip them with the required knowledge and skills to appreciate human rights and apply them in court decisions?
- Are the training materials sufficient to train judicial officers to use human rights instruments to promote gender equality and are they failing to use them in courts?

1.6 Courts in Nairobi

Courts in Nairobi are structured to handle different cases. Some handle criminal cases while others handle civil, family, children, land and environment, city council matters and public health matters. Below is a table of courts in Nairobi.

Table 1 showing Courts in Nairobi

Court	Types of cases
Court of Appeal	All appeals from the High court
High Court Constitutional and Review Division	Constitutional matters, Review of orders
High Court Land and Environment Division	Land matters, environment matters
High Court Commercial	Civil, commercial claims, election matters
High Court Criminal Division	Criminal cases such as murder
High Court Civil Division	All civil claims
High Court Civil Appeals	Civil appeals
High Court Criminal Appeals	Criminal appeals
High Court Family Division	Gender and family matters matrimonial, custody, inheritance
Milimani Chief Magistrates Courts	Running down claims and divorce
Children's Court	All children matters and maintenance and criminal cases
The City Court	City council matters and criminal cases
The Anti-corruption Courts	All anti-corruption cases
Nairobi Chief Magistrate's Court	Criminal cases
Makadara Law Courts	Criminal
Kibera Law Courts	Criminal

1.7 Limitations of the Study

The study was conducted in Nairobi, Kenya. It was not possible to reach every judicial officer in Nairobi who had been trained due to their busy work schedules. Some were not available. Some were transferred during the research period. When I informed KWJA about my intention to use

JEP materials in the research, I was told to wait for permission from KWJA and IAWJA. I was officially informed on 16/11/2009 that permission had been granted by IAWJ. That is when this research officially started.

After carrying out a few interviews I realized that it was necessary to change the focus of the study from analyzing how effective JEP training was sensitizing judicial officers to address gender based violence to the current study of the efficacy of JEP training in sensitizing judicial officers to enforce gender equality through their decisions. I had to redraft the objectives, assumptions and research questions.

In December most of the key informants were on leave and interviews were rescheduled to January 2010. Key Informants were judges and magistrates who were on vacation in December 2009 and very busy during working sessions. Some kept on rescheduling appointments until the time for research was over. Quite a number of informants requested and were given questionnaires to fill in but by the time the research time ended they had not completed and returned them. Some judgments which had been submitted to KWJA which were necessary to analyze for this study were not accessed as they were with an official who was analyzing them for KWJA.

CHAPTER TWO

2.0 METHODOLOGY AND METHODS

In this chapter I set out the methodological approaches and methods that helped in collecting the data in the field and to analyze it in line with the topic of study and the assumptions.

2.1 Methodology

This is an approach that helps a researcher to gain access to the required data. It can be likened to a procedure that one adopts to get a particular result. (Stewart, J. et al eds: 1997:17) wrote:

“The theoretical perspectives and attendant methodologies that are adopted for a research determine not only the issues to be pursued but what will be revealed through the research”.

Stewart, J. further says that the approach enables the researcher to collect data, sift, analyze, consider implications on the findings and determine what other data to collect to meet the aims of the research. The process goes on and on since the researcher is looking at a problem and how to solve it.

There are methodological principles and procedures I adapted to help me to collect data on application of human rights by judicial officers as trained by JEP to do so.

2.1.1 Grounded Theory

As a theory for research, this methodology proceeds from the point of analyzing the lived reality of women in their daily interaction with the law and their social lives. It sets out to investigate the law and its impact on women. This research was looking at how the law influences decisions that are made in cases in which women are involved. Judicial officers are trained under JEP to

critically look at the laws and determine how women are benefiting from the law. To what extent, for example, are women benefiting from the Constitution and the Law of Succession? To what extent are judicial officers protecting women's human rights through Kenyan Laws? To answer such questions one needs to go to the ground and examine the actual cases to see how the law was used to benefit or not to benefit women. The outcome of the findings determines whether human rights were applied in those cases involving women. If the outcome is negative further research is carried out to investigate what influenced the outcome and try to come up with possible solutions or make recommendations. This is therefore an interactive process. This theory has been defined by (Bentzon, et al 1998:18) as:

“an iterative process in which data and theory, lived reality and perceptions about norms are constantly engaged with each other to help the researcher decide what data to collect and how to interpret it. The interaction between developing theories and methodology is constant, as preliminary assumptions direct the data collection... then the collected data, when analysed, indicate new directions and new sources of data. In the Northern hemisphere this approach is often referred to as 'the snowball method', however in a region where there is little, if any snow, a new metaphor needed to be found. The metaphor we find most apposite is that of the dung beetle... The 'dung beetle method' that is described in this book is a grounded research process in which the researcher collects data, sifts and analysis it, considers the implications of her findings, determines what to collect next to meet her needs, and continues her collections and analysis cycle. Through these processes new methodologies, perspectives and theories are hatched...”

The purpose of using this methodology was to assess the efficacy of JEP in training judicial officers to use the national law and human rights instruments to promote gender equality. The outcome of the findings will determine whether judicial officers have effectively used the knowledge and skills gained from JEP to apply human rights in their decisions. The Methodology led to findings being discovered in the judgments showing which judicial officers had used human rights and which ones had failed to do. The process helped to discover the challenges that judicial officers face in the course of their work.

Judgments were analyzed to get the grounded views, beliefs, laws, factors, or other issues that might have influenced the outcome. This was done with a view to finding out whether the JEP

training had any impact on the way the cases were decided. For instance, in one of the cases a woman was given 50% of the matrimonial property by the High Court but the Court of Appeal reduced her share to one quarter of her husband's share. The woman who was dissatisfied took the case to the African Commission of Human and Peoples Rights. The Court of Appeal being the highest court in Kenya appeared to have sealed the woman's fate as far as her matrimonial property claim was concerned. Should Kenya have a Supreme Court for those who are not satisfied with the Court of Appeal decisions? Categories of similar decisions have also emerged. What is the basis for the current view that spouses must prove financial contribution for matrimonial property sharing? I needed to find out which judicial officers were using JEP training to enforce women's rights to equality in matrimonial property sharing and which judicial officers failed to do so and the reasons why.

I noted that in inheritance matters some judicial officers were more liberal in promoting gender equality between sons and daughters in property sharing, but they were not doing the same for women in matrimonial property sharing. I realized that there exists a clearer law in inheritance matters than in matrimonial property sharing cases. The questions raised included what ought to be done about married women's property rights. Judicial officers are encouraged to use human rights instruments where there are gaps in the local laws. In some of the cases that were studied judicial officers noted that the law was not adequate to address the issues before them, but they did not use the Constitution or human rights. This made me focus on my assumptions to see whether they were holding or not.

2.1.2 Actors and Structures

This approach is people centered and people structured. (Mbote, K: 1996) says that this approach emphasizes people's concern with gendered outcomes of the application of laws. Within different contexts structures can either enable or constrain individuals (women) and this determines the outcomes of various attempts to resolve problems. The JEP training seeks to affect the actors, mainly judicial officers, in the way they relate with issues raised in court by women and how they enforce or fail to enforce them. Women come to court because they know

that the judges and magistrates have the power and ability to protect and enforce their rights. JEP is designed to instill judicial activism into those enforcing people's rights. The world is also changing and moving towards the rights based approach in resolving disputes. Women who go to court may have tried other informal methods and failed. They want to be assured of a fair hearing by the judicial officers.

The structures are not static and the actors are encouraged to change with the times. The court represents a structure that is continually changing and judicial officers must change with them. Women litigants will keep seeking assistance from the courts and its judicial officers as long as they have rights which they seek to exercise.

This methodology informed me how to choose the Informants. I was able to sample and interview judges, magistrates and lawyers. The face to face interviews helped me to obtain their views on whether they used the human rights instruments in cases they were handling. Structures included the courts, registries, Court registers, information stored on computers, FIDA case files, ICJ library, Police, Kenya law Reports and internet. Many of the Actors were informative on what happens in actual cases and I was also assisted by the Secretaries, executive officers, research assistants, registrars and registry Staff to access judgments.

When the "Actors" express sympathy with women litigants and enforce their rights more women come forward to claim their rights and this can lead to equality. On the other hand, if the Actors and Structures are insensitive to women's needs and fail to challenge discrimination against women, they might fail to claim their rights and remain marginalized.

Many issues raised by women are gendered. JEP training targets the actors who are judicial officers to make them appreciate women's human rights and enforce them. They are supposed to look at the national laws and see which ones conform to the human rights standards and identify retrogressive laws and or judicial precedents which should be removed or amended.

(Wickler, N: 1987) who has examined issues of judicial bias asserts that:

‘... the legal system, legal literacy, access to the courts and fair treatment in the courts requires that the behaviour of judges as well as lawyers and court staff do not reflect gender based myths, biases or stereotypes.’

Judicial officers exercise a discretion on what rights to enforce and what law and facts to look at. They wield a lot of power and how they exercise that power combines with their attitudes, training, law and facts to inform the outcome on an issue. Even the court as a structure has a bearing on the outcome of a case. I found that in some instances, decisions were rushed through due to an overload of work in that the actors did not have sufficient time to reflect on the issues or to carry out proper research on the issues especially on human rights. While some courts had access to the internet, others had nothing, not even a library. At one police station I visited, there was no proper accommodation for women and children who reported domestic or sex based violence. The structures they have are uncomfortable for women and children. No wonder women who reported their cases failed to go back to follow up on their matters. As a result domestic violence is not being handled effectively. Combined with poor structures is lack of proper laws to address domestic violence.

As it was not possible to meet women who had been involved in some of the cases in court, I visited FIDA-Kenya (the Federation of Women Lawyers of Kenya) and the Centre for Rights Education and Awareness (CREAW) who deal with issues concerning women and children. I found that CREAW has set up a Radio Station to teach the public about gender issues and to advocate for gender equality through the media. If these structures worked together with JEP and Judicial officers they could assist each other to enforce human rights and gender equality. CREAW has an office near Kibera Court from where they monitor rape and defilement cases. They can help judicial officers on how to proceed with such cases to enforce human rights. They are headed by lawyers who are gender experts who can effectively raise issues of women and children in courts and help judicial officers to make just decisions for women and children. Other structures like the Kenya National Commission on Human Rights were also accessed because they monitor human rights violations in Kenya.

Police Stations as structures receive many complaints from women and children who have been abused. How they are handled and how evidence is preserved and presented in Court has a significant effect on the extent to which courts enforce human rights and promote gender equality. Law firms with lawyers who handle women and children's issues were also accessed. Lawyers who have studied human rights and represented women and children in courts were most helpful. Lawyers said that the level of sensitivity did not depend entirely on the sex of the judicial officer.

2.1.3 Human Rights Approach

The spirit of human rights provisions is to enforce people's rights and cure inequalities. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) starts by defining discrimination. It moves beyond guarantees of equality and equal protection before the law in existing legal instruments and sets out measures for the achievement of equality between men and women, regardless of their marital status, in all aspects of political, economical, social and cultural life.

State parties have an obligation to eliminate discrimination against women through legal, policy and programmatic measures in all aspects of life including marriage and family life. Hence the judiciary has a central role to play in ensuring respect for the principles of CEDAW.

I used this approach to address assumption one and two. The assumptions were about application or non application of human rights instruments by judicial officers to promote gender equality through their decisions. The approach helped to assess judicial officers who were using JEP training to address women's rights. It also helped to examine how international instruments like CEDAW and regional human rights treaties like ACHPR were used to inform judicial decisions. I examined some of the decided cases to see whether human rights principles had been adhered to. It informed the extent to which human rights instruments can be used in Kenya and the impact of JEP training on judicial decision making. This approach also helped to assess the

extent to which Kenyan National laws comply with the International human rights obligations. Kenya has ratified many human rights instruments but they do not automatically become law in Kenya. Being a common law country, Kenya follows a dualist approach to the incorporation of human rights instruments into national laws. This means that International human rights treaties must be domesticated to become part of Kenya's laws. However, Courts in Kenya can use international human rights instruments as interpretation aids in dealing with the human rights enshrined in the Bill of Rights of the Constitution. The current Constitution incorporated part of the UDHR in its chapter on fundamental rights and freedoms. In section 82(3) it outlaws discrimination on the basis of sex. In section 82(4) discrimination is allowed in the application of personal (customary) laws in marriage, property devolution, divorce and in burial disputes.

This approach helped to analyze the current curriculum of JEP to see the extent to which judicial officers are sensitized on women's human rights and the concept of gender equality. It enabled me to assess the application of human rights to give effect to women's rights. Through this methodology several judicial officers were interviewed on their knowledge of women's human rights and whether they were using them. From their responses I was able to assess their knowledge on human rights instruments such as CEDAW, ACHPR, the African Protocol on Women's Rights, UDHR, ICESCR, ICCPR, DEVAW, CRC, ACRWC, as well as the Bangalore and Harare Principles. It was found that many judicial officers had a good understanding of the international human rights instruments.

2.1.4 Legal Pluralism and Semi-Autonomous Social Fields (SASFs)

Feminist legal scholars such as Dahl, (1987) hold that in order to fully understand the impact of formal laws on gender relations, one must also examine how people interact with those laws in all spheres, how other regulatory social orders influence their operations, and what the consequences are for men and women in different circumstances. Legal pluralism refers to the coexistence of two or more legal normative orders in the same social field.

This approach therefore recognizes that law has a number of sources. It recognizes that there are other normative structures apart from written laws that also play a role in ordering people's lives. (Mbote, K2002) says that plural legalism may be divided into two categories namely juristic and diffuse. Juristic legal pluralism arises where the official legal system of a nation recognizes several other normative orders and sets out to determine which one will apply. Thus the official legal system grants an operating environment for other plural orders to operate. The Constitution of Kenya and the Judicature Act allow for other normative orders to apply in the personal laws of communities. Section 82(4) of the Constitution allows for varied customary or personal laws to apply with respect to marriage, divorce, devolution of property on death or other matters of personal law.

According to the Judicature Act, law can apply in the following hierarchy; the Constitution, written laws, statutes of general application in force in England on 12-8-1887 and customary laws which are not repugnant to justice and morality. In Kenya, the 1882 Married Women Property Act of England is used in matrimonial property disputes. It is a statute of general application adopted in Kenya in 1897 from England.

(Mbote,;2002) further states that diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose operation is neither sanctioned nor emanates from State law. This is referred to sometimes as the semi-autonomous social fields (SASF). Beyond the formal legal system people resolve their day to day problems and conflicts within the semi autonomous social fields of the family or local community where they may apply their own customs and practices or other form of regulation. Most women are regulated under this system.

It became evident in the field in some cases I analyzed that men still rely on customary laws to argue that daughters should not inherit their deceased father's land or that women cannot inherit clan land. On the other hand men have a right to inherit everything. This is dictated through the semi-autonomous social field. It would take a judicial officer who has been sensitized and liberalized to tell men that under the Constitution of Kenya, the Law of Succession Act and the International human rights instruments women are entitled to inherit just like men do.

Using the legal pluralism approach it became possible to investigate judicial officers who still hold the view that women should not inherit clan land and recommend training of other people besides judicial officers. In one case a Judicial Officer had followed tradition to deny a married daughter her right to inherit her father's land.

2.1.5 Legal Centralism-State Law

This is where the Judicial Officers rely entirely on what the State law says whether it is discriminative or not. This approach takes the state law as the starting point. It was used to assess what the law provides and what is said about women's and children's human rights. For example the researcher found that in matrimonial property division the law being used is an English Statute on 1882. How do women benefit from this law? To find out the researcher decided to carry out a case study of judgments in which the law had been used and whether women's rights were enforced through the law. (Bentzon, A. W1998:49) says:

“Within positivist school of jurisprudence which is inherently centralist in its orientation the materials selected for a critical investigation of women's legal position...will be case law, statutes, subsidiary legislation and legal theory derived from textbooks and articles.”

She states further that:

“These are studied in hierarchical orders. Thus the Constitution prevails over other statutes. Statutes prevail over decisions of the courts. The decisions of the superior courts prevail over those of the lower courts. Thus a hierarchical order is imposed on the adjudication process”

This is why I used this method to look at the laws of Kenya and the binding precedents made by the superior courts. I used it to see whether these laws and precedents comply with the requirements of human rights or whether judicial officers have used JEP training to make precedents in their judgments. Case studies showed whether women benefited or did not benefit from the laws and judgments. The Constitution was assessed to see whether it guarantees women their human rights or whether it could be interpreted to benefit women. The methodology helps a

researcher to examine the laws and judgments and to see how judicial officers interpret the laws to enforce gender equality and or outlaw discrimination.

2.2 Methods

These are the different styles that are employed in collecting data. I realized that to access the required data I had to engage different methods. For example while interviewing some informants they would say that they could not recall the cases they used human rights. I would then use internet or the law researchers to locate the cases. Listed below are the methods that were used.

2.2.1 Individual Interviews

The research was carried out mainly through individual interviews. Key informants were judicial officers who had been trained under JEP. Other judicial officers who had not been trained were also interviewed to get a view of how they handled similar cases. Four lawyers and two police officers were also interviewed. Interviews were both structured and unstructured. Informants were identified with the help of the program officer who was keeping the data of trained judicial officers who were in Nairobi. Also, key informants were identified depending on the Court they were working in. For instance, judges in the family division were targeted because they handle many women's matters. Informants were chosen on the basis of the role they played in JEP training or in KWJA activities.

Magistrates in Kibera and Makadara handle a lot of rape and defilement cases and were interviewed on the basis of sex/gender violence. Lawyers who were gender sensitive and deal with women's issues were interviewed. Respondents from the Judiciary Training Institute were targeted but were not available for interview. I was informed that Plans are underway to integrate JEP into the judiciary training Programs. This is welcome news because it means that

JEP is officially being incorporated into the judiciary training programs. Interviews helped to assess whether judicial officers who were trained were gender sensitive and whether they were enforcing the women's rights.

Table showing the nature and number of informants interviewed

Informants	Number of informants
Court of Appeal Judges	3
High Court Judges	10
Chief Magistrates	3
Senior Principal Magistrates	2
Principal Magistrates	2
Senior Resident Magistrates	4
Advocates	4
Police officers	2
Two prosecutors	2
Program officer	1
Total	33

2.2.2 Court Case Analysis

This method was relevant since the study sought to assess the efficacy of JEP training in equipping judicial officers to promote gender equality through their decisions. This requires that cases be studied to get the facts, the law, the reasoning and the decisions. It helped to locate judgments in which women and children's rights had been enforced or not. The method helped to research the first two assumptions which were focusing on application or non application of human rights instruments.

2.2.3 Observation of Court Proceedings

I observed court proceedings at Makadara Law Courts and the Children's Court. At Makadara the cases were adjourned due to a lack of witnesses. I did not find a case to follow up. The magistrate in the Children's Court used the Children's Act as well as the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child to make orders. She told me that she has not attended JEP training but has attended several training seminars on children.

2.2.4 Analysis of Data at KWJA Office on JEP Training and Evaluation

This method was important in accessing information on JEP training materials and data.

2.2.5 Focus Group Discussion

I used this method at Kilimani Police station where I interviewed two women police officers on their experiences with women and children who report violations of their rights. One is a chief inspector of police and the other is a constable.

2.2.6 Questionnaire

This method was used to get many informants into the research process to get the required data. Many informants asked for a questionnaire that to fill in and give back. This was due to the fact that judicial officers and lawyers are busy people and could only respond during free time. Many failed to respond. About twenty respondents failed to fill in and return the questionnaires.

This was only useful with those who responded to the questionnaires. A total of twelve questionnaires were filled in and returned. I also used some questionnaires to interview informants.

2.2.7 Experiential Data

As a magistrate, I used my position and experience to access information especially in Kibera Law Courts where I knew that sexual and domestic violence cases are prevalent. This method made it easy for me to identify key informant because I knew them and where I could find them. It helped to me ask them relevant questions concerning what they were doing. It also helped to identify cases to be analyzed for purposes of the research.

2.2.8 Internet Search /Library Search

This proved useful especially to access to judgments from the Kenya Law Reports and materials for the literature and law review I undertook. Some researchers posted some judgments through email.

2.3 Challenges and Limitations

Many informants were not reached. In Kibera and Makadara Law Courts the magistrates were always busy in the morning and afternoon. It was not possible to interview quite a number of them who were trainers or who had been trained. Some were not willing to be interviewed. Many asked for questionnaire which they did not fill. Others gave scanty information on questionnaires which was not really helpful. Most of the magistrates' cases were accessed at KWJA office from magistrates based outside Nairobi. Among the Nairobi magistrates only one had submitted his cases to KWJ. Most cases had been submitted by Magistrates from outside Nairobi Region. Most

of the cases from High Court and Court of Appeal were accessed through KWJA and Kenya Law Reports Personnel who gave what they were able to find. Often it would not be a case where women's rights or children's rights were analyzed.

CHAPTER THREE

3.0 LITERATURE REVIEW

3.1 Introduction

The research was undertaken to evaluate the efficacy of JEP training to equip judicial officers with knowledge in human rights instruments and how to use them to enforce women and children's rights in court cases. It is also essential to understand that training of judicial officers is an ongoing process through many fora. JEP is not the only program through which judicial officers learn about human rights and gender equality. In this chapter I intend to examine a few training fora in which Judicial Officers have been trained in human rights instruments and urged to use them in their decisions. Case studies from other jurisdictions are also included in which human rights instruments have been used to promote gender equality or to enforce women's human rights.

3.2 IAWJ Colloquia on Judicial Training

The International Association of Women Judges has held many colloquia on judicial training. One is scheduled to be held this year, 2010 in South Korea. Judicial officers from all over the world meet to exchange ideas, share experiences and brainstorm on issues touching on women, children and the judiciary. JEP Program was started by IAWJ and it is conducted in many countries including all the East African Countries. IAWJ has itself conducted successful training workshops for judges and magistrates in Africa, Asia, Europe, Latin America and Northern America. The materials used for training are designed by IAWJ or by using its model. In some training sessions in Kenya, IAWJ officials were present and led the training. Ann Goldstein who initiated the JEP program at IAWJA was in Kenya in 2007 training the trainers in Nakuru and Nairobi. Judiciaries have benefited from the IAWJ training. IAWJ is committed to the success of

JEP. The IAWJ is composed of judges who deal with women people's human rights in courts. I would say that JEP was started by law experts who are committed to improving use of human rights through judiciaries.

IAWJ says that the training is based on the premise that:

“While many countries have laws, the courts and other legal structures often reflect the same patterns of gender discrimination that are at work in societies at large. Participants examine how gender biases work against women to deny them their rights and to explore how a true “jurisprudence of equality” grounded in human rights principles would look like. They probe the concrete meaning of abstract guarantees of equal protection and non-discrimination, looking at the practical side of how these can guide court cases particularly those involving gender discrimination or violence against women.”

IAWJ conducted the initial training of trainers in Kenya, Uganda and Tanzania in the year 2000. Those who were trained took over the training to train other judicial officers to use human rights for gender equality in decision making. In Kenya this was conducted through KWJA.

3.3 Judicial Training Colloquia

Several judicial training colloquia have been held to train Judges and magistrates in the administration of justice. One such Colloquium was held last year at the Judiciary Training Institute to train judges. A number of topics were discussed including effective administration of justice. Judicial officers were urged to guarantee equality of justice. Other topics included the rule of law, judicial accountability in the performance of judicial work, legal education, judgment writing and improving judicial performance through training.

Through the Kenya Magistrates and Judges Association a number of training sessions have been held to train judicial officers on a number of issues. They have trained on environment conservation, refugee law, children's rights, human rights, money laundering and judicial accountability.

Judiciaries hold meetings at regional and international level as well as train judicial officers on application of human rights instruments and administer equal justice to women and men. One such meeting was a judicial colloquium held in Accra, Ghana in November 2008 and another held in Nairobi, Kenya in August 2001. Judicial officers from Kenya attended. They trained on the promotion of gender justice in Africa and the application of human rights instruments in local courts. Judicial officers discussed the widespread perception of gender roles causing inequality across Africa as the biggest obstacle to the promotion of gender justice. They said that:

“This is often compounded by more general capacity constraints, as well as legislative and procedural inadequacies and insufficient public legal awareness. At the same time individual and institutional biases and widespread discrimination present impediments to women seeking protection, or professional roles within the justice sector.”

The Ghana conference focused on identifying these challenges and the ways to confront and rise above biases against women in order to administer real and equal justice in accordance with the human rights requirements. Attitude change was focused on in order to improve service to women.

The Nairobi meeting was organized by KWJA and it brought together women judges and magistrates from Africa who focused on administration of gender justice. The theme was:

“Application of International and Regional Instruments at the National Level.”

At the end of the meeting recommendations emerged which urged judicial officers to adopt judicial activism as a tool for promoting observance of human rights of women and children.

They urged ...:

“... judicial officers to adopt progressive rights based approach in the interpretation of statutes and constitutions having regard where possible to the principles of the relevant international and regional human rights

instruments for the purpose of promoting human rights at the national level”.

These two conferences show that judicial training to promote gender equality is a recognized initiative across Africa. This is important in order to actualize gender equality between the sexes. Women and men have not enjoyed the same opportunities to access resources especially, land.

3.4 UN Training Sessions on Human rights Law and on Issues

The UN treaty bodies such as UNDP, UNHCR, FEMNET, UNIFEM and others have carried out judicial training in Kenya and other countries to train on various issues affecting women and children with a view to enhancing their rights. There are many international training for a which judicial officers have attended. For an example UNIFEM has funded JEP and other training seminars in Kenya.

3.5 Commonwealth Judges and Magistrates Conferences

Kenyan judicial officers are members of the Commonwealth Judges and Magistrates Association which hosts annual conferences where judicial officers learn different aspects of judicial administration of justice and this includes instructions on human rights and promotion of gender equality.

3.6 Judicial Training Institutes Plan to integrate JEP into their Curricula

When I started this research I was informed that KWJA had just handed a draft JEP curriculum to the Chief Justice and training Committee for it to be incorporated into the syllabus for the

judiciary training institute. This shows that training in the application of human rights in Kenya is a valued process. The Judicial Training Institute is set to incorporate JEP so that it can be extended to others in the administration of justice.

3.7 Judicial Training in other Countries

Almost every country trains judicial officers. At recruitment they undergo an induction course on the administration of justice. In some countries, like Tanzania, JEP trainers are invited to train magistrates at the Judiciary Training Institute on the application of human rights by judicial officers in judicial decisions.

At one meeting of IAWJ, it was announced that:

“In Kenya, Uganda and Tanzania, the Chief Justices publicly announced support for the JEP and adopted the program as an official offering of their judicial training institutes.”

JEP has been recognized and acknowledged by judicial officers in Kenya, Uganda and Tanzania. In May 2003 the Tanzania’s Minister for Community Development, Gender and Children, while opening a Jurisprudence of Equality seminar for Tanzania Women Judges Association said:

‘The thrust of JEP is very much in line with the government’s obligation, commitment and policies aimed at ensuring the equal rights of women and men...Tanzania has actively participated in a number of regional and international fora where it has been addressed on gender imbalance and especially women oppression and disempowerment...and has put a legal framework intended to address gender imbalance...’

She concluded by quoting one of the judges in Tanzania who in 2001 had said at a similar JEP seminar that:

‘We, as judicial officers, have both the ability and responsibility to make a great difference, by promoting the respect of human rights norms... The age-old customs and assumptions which always place blame on the shoulders of a female spouse or person or which regard females as being

no equals of men in the field of rights must be eradicated.’

In Uganda JEP training is active. More than 130 members from many nations across the globe assembled in Entebbe, Uganda, from May 9-13, 2004, for the IAWJ’s 7th Biennial Conference. The main theme was women’s access to justice. They made recommendations, inter alia, to continue educational programs that aid judges and other court personnel to recognize the harmful effects of gender stereotypes that underlie much legislation and judicial decision-making. They also recommended that judges should be encouraged to exercise their discretionary powers in applying the law in the interests of promoting substantive justice and equality under the rule of law and in interpreting laws in view of changing norms. They praised JEP for training judicial officers to apply international human rights principles to cases involving violence and discrimination against women and children. They said that JEP training has proved successful in bringing about changes in the law that benefits women and their families.

Apart from training, JEP organizers compile cases from different judicial officers who have been trained and who have used the knowledge to decide the cases. Cases are usually analysed in meetings to encourage others to follow suit. Below are some cases from other countries where human rights instruments have been used.

3.8 Case Studies of Cases from other Countries

3.8.1 Tanzania

In *Ephrahim v. Pastory*, 87 I.L.R. 106; [1990] L.R.C. (High Court of Tanzania) the Petitioner challenged Haya custom which forbade her as a woman to sell customary land which her father had bequeathed her in a Will. The court used CEDAW and the Tanzanian Constitution to outlaw this custom and allowed the woman to sell her land.

It was held that:

"...the principles enunciated in the above named documents (including CEDAW) are a standard below which any civilized nation will be ashamed to fall..."

In *Chilla v. Chilla*, (January 6, 2004, High Court of Tanzania at Dar es Salaam), a sister of the deceased person filed a suit objecting to the appointment of the deceased's wife as the administrator of the decedent's estate and custody of her son. The Judge rejected her claim, holding that under 'the welfare of the child' embodied in Article 3 of the Convention of the Rights of the Child (CRC), the respondent (the mother) was the best person to have custody of the child as she was his mother. The Judge further held that the appellant's argument that the widow had no right to serve as administrator because she was not chosen to do so by her husband's clan was contrary to the equality provisions of Articles 13, 19, and 26 of the Tanzanian Constitution and Articles 2 and 16 of CEDAW. The judge noted that the lower court's finding that only male children can inherit was both irrelevant and contrary to the Tanzanian Constitution, which bars gender discrimination in all respects. She dismissed the appeal.

This case shows that the Court was using women's human rights provisions and the Constitution to outlaw a custom that promoted gender discrimination and to give effect to the woman's rights. This is part of what JEP informs judicial officers to do by recognizing discrimination in the laws and dealing with them in accordance with the Constitution and the human rights instruments. The judge who decided this case is female and an active participant in JEP program in Tanzania. In *Ndossi v. Ndosi*, (February 13, 2003, Civil Appeal No.56/2001), the High Court of Tanzania heard that the brother of the deceased was appointed to administer the estate of the deceased instead of the deceased's wife. The wife was challenging the decision.

Judge Eusebia Munuo ruled that:

"...the widow was entitled to administer the estate on behalf of her children under the Constitution of Tanzania, which provides that every person is entitled to own property and has a right to the protection of that property held in accordance with the law... Article 9(a) and (f) of the Constitution recognizes human rights by requiring "that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights."

She held further that:

“The Constitution clause domesticated human rights instruments ratified by Tanzania, including the anti-discrimination principles of CEDAW, Article 2(b) & (f), and the best interest of the child principle found in Article 3 of the CRC. She found that these provisions protect widows and children from uncouth relatives prying and/or attempting to alienate the estate of deceased fathers and mothers under the shield of custom.”

The Court therefore upheld the woman’s rights as provided under the Constitution and International human rights instruments and outlawed discrimination.

3.8.2 *Uganda*

The JEP program is also active in Uganda as can be shown through some cases.

In *Uganda v. Matovu* (Criminal Session Case No. 146 of 2001, High Court of Uganda at Kampala), the judge held that a rule (which was based on the practice and notion that women are liars especially in matters involving sexual allegations) discriminated against women and was against the Constitution of Uganda and was therefore null and void. He noted that Article 21 of the Constitution proclaims the equality of all persons under the law, equal protection of the law, and prohibits discrimination on the ground of sex. The rule was found to be discriminatory in terms of Article 1 of CEDAW. The judge disregarded the rule and proceeded to examine the evidence without regard to the requirement for corroboration. The decision was made after JEP training had taken place in the country thus signifying its tangible impact on judicial officers.

In *Uganda v. Hamidu* (High Court of Uganda at Masaka, Criminal Case No. 0055 of 2002) a man claimed that he could rape a woman because he had paid a dowry to marry her without her consent. He was sent to prison for rape. Judge V. F. Kibuuka, finding no evidence that the couple had been married or that the woman had consented to sexual intercourse convicted the man of rape. The court further held that even if the couple had been married, women were

constitutionally entitled to equal rights in marriage and the right to human dignity; thus, the woman would not have been obliged to submit to sex without her consent.

In *Mukasa v. Mwebaza and Two Others* (High Court of Uganda, Civil Suit No. 203 of 1991) the court upheld a woman's right to own land. A woman bought land in partnership with a man. Later the man purported to sell her share on the mistaken belief that women cannot own land. Pursuant to article 4 of CEDAW the court recommended that the state put in place legislative measures to protect disadvantaged people. The court ordered the land to be restored to the woman.

3.8.3 South Africa

The Constitution of South Africa endorses the principle of gender equality. The court has made decisions touching on women's rights. Below are two examples.

In *Bhe vs. Magistrate*, the Court overruled a law that excluded women and children born out of extra marital affairs from inheriting property. The judge held that the roles played by women in the modern society were too important to exclude them. That CEDAW requires member states, including South Africa, to ensure among other things the practical realization of the principle of equality between men and women and to take all appropriate measures to abolish existing laws, regulations, customs and practices that constitute discrimination against women as provided by CEDAW.

In *State vs. Godfrey Baloyi*, the Constitutional Court of South Africa, used CEDAW and UDHR provisions to address domestic violence as a form of gender discrimination and urged the State to adopt anti-discrimination legislation to fulfil its obligations under the International treaties it had ratified.

3.8.4 **India**

In *Dhungana v Nepal* Writ No. 3392 of 1993, the Supreme Court of Nepal made reference to CEDAW when it ordered the Government to introduce a parliamentary bill addressing discriminatory inheritance laws. At the time, Nepalese law provided that sons were entitled to a share of their father's property at birth, but daughters were only able to obtain a share if still unmarried at the age of 35.

3.8.5 **Nigeria**

The Court of Appeal in *Muojekwa & Others vs Ejikeme and Others* found two customs that prevented female family members from inheriting property to be offensive. The Court found the customs repugnant to natural justice, equity and good sense and a violation of article 5 which calls on State Parties to modify prejudices, customs and practices that discriminate.

3.8.6 **Botswana**

In *Dow v. Attorney-General of Botswana* (1990) L.R.C the court analysed the Botswana Citizenship Act of 1984, which, in accordance with Tswana customary law, declared that the nationality of a child born in Botswana was determined exclusively by the father's nationality. Unity Dow, a Botswanan activist and lawyer who was married to an American man, challenged the Citizenship Act in the High Court in 1990. Two of her three children, were born in Botswana after the Citizenship Act was passed. They required residence permits to stay in Botswana. They could only leave on their father's passport, could not vote, and would be denied the subsidized university education. Dow argued this violated her (and her children's) constitutional rights to liberty, equal legal protection, and freedom from degrading treatment. She also argued that the Act was discriminatory. The High Court decided that the Constitution should be interpreted to prohibit discrimination on the basis of sex.

Botswana had not yet ratified CEDAW, but the Court did refer to the 1967 Declaration on the Elimination of Discrimination against Women. When Botswana was preparing to ratify CEDAW in 1995, it amended the Citizenship Act to give equal rights to men and women.

3.8.7 *Zambia*

In *Sara, H. Longwe v. International Hotels 1992/HP/765* the International Hotel had a policy of refusing women entry unless they were accompanied by a male escort. A security guard stopped Longwe when she tried to retrieve her children from a party in the hotel. On another occasion the hotel refused her entry when she wanted to meet a group of women activists in the hotel's bar. Longwe then made a claim in court arguing that the hotel's activities violated her right to freedom from discrimination. The Court held that preventing a woman from entering a hotel because she was alone was discriminatory and offended the provisions of CEDAW and Zambia's Constitution.

3.8.8 *At International Tribunal Level*

In 1998, the ICTR convicted Jean-Paul Akeyasu (ICTR-96-4-T) of rape as a crime against humanity due to the role he played in inciting violence against women during Rwanda's genocide. The accused was sentenced to life imprisonment for the crime of genocide and 15 years for the crime of rape and torture as crimes against humanity. In *Prosecutor vs Delacic* the accused was sentenced to 20 years for murder and killings and 15 years for rape and torture.

3.9 *Conclusions*

I have used the above cases to shown that JEP is also training judicial officers in these countries (as well as in Kenya) and that as a result they are using Human rights Instruments to promote gender equality or to discourage discrimination against women and children based on customs

and prejudices. The JEP is therefore an important tool to be used by the Judiciary to outlaw all forms of discrimination and to promote gender equality. It is proving itself an important tool in promoting judicial activism which is a sound alternative method of combating discrimination and inequality in countries where Parliament is sometimes moves too slowly in addressing these issues through legislation.

CHAPTER FOUR

4.0 FINDINGS

This Chapter examines the findings on the efficacy of JEP in equipping judicial officers to promote gender equality. Some judicial officers are using the JEP training to enforce human rights but others are failing to do so. Reform of the law will not achieve much for women if the underlying attitudes about women and their place in society are not addressed through the judicial system. This is important because judicial officers are implementers of the law. Their attitudes can open or create barriers to women's access to justice. Women's inequality before the law is often related to their social inequality. This inequality is often expressed in judicial pronouncements as will be seen in some of the findings discussed below.

4.1 Research Findings, Discussions, and Implications

These findings are analysed in accordance with the Assumptions and the Research questions as set out in chapter 1. For ease of reference the findings have been analysed in accordance with the following themes.

- ◆ Application of Human rights by judicial officers
- ◆ Non-application of human rights by judicial officers
- ◆ Challenges faced by judicial officers in using human rights instruments to promote equality.

They include:

- Lack of time, workload and lack of resources
- Non-domestication of human rights
- Insufficient training
- Judicial bias
- Limited use of training materials

4.2 Application of Human Rights by Judicial Officers

The first assumption I had was to examine how effectively judicial officers who have been trained were upholding gender equality by applying human right instruments in their judgments or decisions. The study was required to establish whether judicial officers who had trained were applying human rights instruments. To answer the research question and assumption I carried out a number of interviews with judicial officers in Nairobi and studied some cases that were brought to my attention in which Human rights had been applied to address women's issues. In answer to what the assumption was and its question reliance was placed on examining a few cases which were brought to my attention from interviews, to illustrate the use of human rights. These interviews sought to unearth the extent to which they were applying human rights. The cases are examined below.

Table of cases in which human rights instruments and principles were applied

Name of the case	Nature of issues	Court	Name of the judge
Mary Rono v Jane Rono Civil Appeal No 66 of 2002	Inheritance by daughters	Court of Appeal	Mr Justice Waki
Diana Ndele Wambua v Dr.PaulWambua (2004)eKLR	Right to basic education and parental responsibility	High Court Nairobi	Lady Justice M.Koome
Succession Cause No.320/2007 Estate of Mugo Wandia (deceased)	Inheritance by daughter	High Court, Nakuru	Lady Justice M.Koome
Succession Cause No.303/98 Estate of Andrew Mununzyu. Musyoka (Deceased)	Inheritance by daughters	High Court Machakos	Lady Justice R. Wendoh
In the Estate of Lerionka Ole Ntutu, Succession Cause No 1263/2000	Inheritance by daughters	High Court Nairobi	Lady Justice Rawal
T V. W (2008) 1KLR	Presumption of marriage & matrimonial property sharing	High Court Nakuru	Mr Justice L. Kimaru
Bi.Hawa Mohamed v. Ally Sefu,Civil Appeal No. 9/1983	Matrimonial property sharing	Court of Appeal Tanzania	
Kivuitu v Kivuitu Civil Appeal No.26/85	Matrimonial property sharing	Court of Appeal	Mr Justice Omolo
Muthembwa vs Muthembwa Civil Appeal No 74 of 2001	Matrimonial property sharing	Court of Appeal	Mr Justice Omolo
Succession Cause No. 956/2002 In the estate of Simon Njenga Karonge	Succession	High Court Family Division	Lady Justice Nambuye
Phillip Kipkoech Chepkwony v Republic Criminal Appeal No. 128 of 2004	Defilement	High Court Nakuru	Mr Justice L. Kimaru
J.A.O.v Home Park Caterers, Dr P. Ochieng, Metropolitan Health Services, Civil Case No.38 of 2003	Dismissal from employment	High Court Nairobi	Lady Justice Mugo

The first case that was used to illustrate use of human rights instruments was decided by Mr Justice Philip Waki, in *Mary Rono v. Jane Rono*, Civil Appeal No.66 of 2002 in the Court of Appeal at Eldoret. The deceased Stephen Rono Rongoei had two wives and a number of children. The first wife had three sons and two daughters while the second wife had four daughters.

The deceased had properties including 192 acres of land, a farm house, vehicles and machinery. The matter was filed in the High Court at Eldoret for Probate and Administration. The High Court made a decision following Kalenjin customs and gave larger shares to the sons than the daughters. According to Kalenjin customs girls have no right to inherit their father's estate. The High Court divided the estate as follows.

First wife	20 acres
Second wife	50 acres
Daughters	5 acres each
Sons	30 acres each

The sons were given more land and it meant that the first house got more land than the second house. The second house appealed to the Court of Appeal. The court of appeal judge divided the land equally between the beneficiaries. Each widow got 30 acres and each child got 14.44 acres regardless of sex. In arriving at the decision Justice Waki used the Judicature Act, the Constitution of Kenya, the Law of Succession Act and the Human rights Instruments. He held:

“Kenya subscribes to international customary laws and has ratified covenants and treaties.”

He relied upon the UDHR, ICCPR, ICESCR and CEDAW. He quoted article 1 of CEDAW which defines discrimination against women to include any form of distinction, exclusion, restriction, because of one's sex. He also used the ACHPR article 18 which enjoins member States to:

“...eliminate discrimination against women and also ensure the protection of the rights of woman and child as stipulated in international declarations and conventions.”

He used the Bangalore Principle 7 which recommends:

“...application of human rights in the domestic courts, whether or not they have been domesticated for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.”

Based on the human rights instruments and section 82(1) and 82(3) of the Constitution he ruled that the Kalenjin Customary law was discriminatory. He quoted the Zambian case of Longwe vs International Hotels 1993(LRC 221), where it was held:

“Ratification of such instruments by a nation state without reservation is a clear testimony that there is willingness... if an issue comes before this court...I would take judicial notice of that treaty convention ...in resolution of the dispute.”

The draft Constitution of 2004 was referred to where it stated that:

“Customary international law and international agreements applicable to Kenya.”

He also applied the Law of Succession Act which for equal inheritance by sons and daughters.

Justice Waki is a JEP participant and was a trainer. He used the knowledge and skills to promote equality in inheritance.

Another case to illustrate the application of human rights was decided by Lady Justice Koome. She used human rights to enforce the right to education and parental responsibility.

In *Diana Ndele Wambua V. Dr. Paul Makau Wambua (2004)eKLR*, the Applicant (the daughter of the respondent) aged 22 years was seeking leave to compel her father to pay her University

fees. She wanted to study medicine on a parallel program. Previously, when she was under 18 years and in high school, her father was compelled by the court to pay her fees. She qualified to join university but the maintenance order had lapsed.

The Respondent opposed the application on the grounds that the applicant was no longer a child and that special circumstances provided in the Children's Act did not apply to her. The Court expanded the definition of a child to accommodate her application to compel the father to pay her university fees.

The respondent was a university lecturer who was entitled to Staff Education Support Fund (SESF) which would pay up to 50% of the fees. The Applicant was seeking only 50% of her fees and wanted her father to sign the SESF forms for 50% fees. The Lady Justice Koome said:

“The preamble of the Children's Act has acknowledged the application of the United Nations Convention on the Rights of Child and the African Charter on the Rights and Welfare of the child. In article 28(c) of the Children Act makes education is accessible to all...”

She said that the applicant is the daughter of a medical doctor and that, like her father, she also wanted to belong to that elite class of professionals. She allowed the application to compel the father to pay the applicant's fees. The *Children's Act* provides for the right to basic education for all children and imposes sanctions on anyone violating this provision.

Lady Justice Koome is an active participant in the JEP training. In Succession Cause No.320 of 2007, *in the estate of Mugo Wandia (deceased)* she used human rights instruments to uphold the rights of a daughter to inherit her father's estate.

The Deceased's nephew obtained letters of administration of the estate without informing the daughter who was the only surviving heir. He informed the court that he was the only surviving heir. When he was granted the letters of administration he failed to include the deceased's daughter and registered the land in his name alone. When the daughter raised an objection he argued that she was a married daughter who was not entitled to inherit the estate of her father as

per Kikuyu customary laws. . He also argued that since the deceased had died in 1976 his estate was not subject to the law of succession which came into force in 1981. The deceased's daughter applied to the court to revoke the letters of Administration. She was blind, unmarried and with three children. They lived on that land.

The judge using section 82(1) and 82(3) of the Constitution outlawed the discrimination targeted at the Deceased's daughter. She also used the Judicature Act to hold that Kikuyu customary law discriminated against the daughter in that it prevented her from inheriting her father's land because of her sex and was repugnant to justice and morality. The Judicature Act reads:

“The High Court, Court of appeal and subordinate courts shall be guided by African customary law...in so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law...”

The judge considered article 1 of the UDHR for equality before the law which states:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

She used CEDAW article 1 which defines discrimination as:

“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field.”

She said:

“The Convention also enjoins Kenya to make periodic reports to CEDAW Committee on the efforts, laws and programs which are put in place to end discrimination against women. The government itself has also put in place programs to embrace equitable policies and programs of development for both women and men. How can a court of law on this day and age pronounce a judgment that goes against that spirit?”

She held that the daughter (applicant) was entitled to a share of her deceased father's estate, whether married or not, and revoked the Letters of Administration which had excluded her. In an interview with the judge, she said that she is gender sensitive and is well versed in women's human rights. She worked at FIDA- Kenya before joining the bench as a judge. She said that it is internationally recognized that women's rights are human rights but women continue to be discriminated against. She added:

“It is well known that women do not progress equally with men, even in the judiciary there is discrimination. Women marry early and bear many burdens but their property rights are curtailed. Therefore Judges and magistrates are trained to respect women's human rights and to enforce them.”

She said that where the law is insufficient she brings in the human rights elements to address the rights of the woman that have been violated or denied. It is heartening that a sensitized judicial officer uses women's human rights to sensitize people in courts to respect women and to help to promote gender equality.

Kenya has ratified many international instruments which guarantee women equality with men whether married or unmarried. The international human rights treaties expressly prohibit discrimination against women. Article 7 of the UDHR states:

“All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 8 provides that everyone has a right to an effective remedy from a competent tribunal and article 10 states:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.”

Articles 17, 23, 26 of UDHR are also relevant in cases of this nature.

The UDHR was adopted in the Bill of Rights in the Constitution of Kenya. The Constitution in section 82 (1) and 82(3) has outlawed discrimination on the basis of sex. But section 82(4) is a law back section which works against the spirit in section 82 (1) and section 82 (3). It provides that the Constitution allows discrimination in matters relating to burial, marriage, and divorce, devolution of property on death or other matters of personal law. Men have therefore used it to apply customary laws that discriminate against and deny women their rights especially in personal matters.

Some judicial officers have used this section also to enforce customs that deny women the right to inherit their parent's estate. Examples of such cases include the following.

In P&A No. 203/98 of *Mutio Ikonyo vs Peter Mutua Ngui*, Judge Mwera ruled that the Deceased's daughter was not entitled to inherit under customary law because she was married. The Law of Succession Act Chapter 160 of the laws of Kenya grants equal rights to sons and daughters to inherit their fathers' property, married or unmarried.

The Protocol to the African Charter on the Human and Peoples Rights on the Rights of Women in Africa, in Article 2 sets out an obligation on the state to incorporate into national Constitutions and other laws the principle of equality between sexes and to incorporate the same in national policies and other activities. Article 8 guarantees women access to justice and equal protection of the law. However the Protocol's provisions have not been domesticated which allows judicial officers to be insensitive and biased against women. Judicial officers are using the Bangalore principles to apply the human rights to promote gender equality.

The Convention on Elimination of All Forms of Discrimination against Women in article 2(f) states that the State is obliged to:

“modify social and cultural patterns of men and women with a view to achieving the elimination of prejudices and all other practices based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles of men and women” through legislation.”

Article 2(c) states:

“to establish legal protection of the rights of women on an equal basis with men and to ensure through competent tribunals... the effective protection of women against any act of discrimination.”

Lady Justice Wendoh of the Constitutional and Review Court said that she has not come across a woman who has gone to that court to claim violation of her rights. This may indicate that women are not claiming their rights or they are not aware that they could go to that court to claim their rights. It could also mean that the court is not addressing itself to the women’s rights and that its approach is not conducive to women to claim their rights. Research would reveal why women are not claiming their rights.

Lady Justice Wendoh said that she applied human rights in the Succession Cause No.303/98 of *Andrew Manunzyu Musyoka (Deceased)* in the High Court, Machakos. The applicant, a daughter of the Deceased, had been left out of the estate of her father on the ground that she was married. Under Kamba Customary law married daughters do not inherit.

The judge held that the Kamba customary law was discriminatory and was repugnant to justice and morality. She cited the Judicature Act. Section 3 states that customary laws must not be repugnant to justice or morality and must not be inconsistent with any written law. She held that the Law of Succession Act provides in section 40 that all children of the deceased are entitled to inherit. Section 29 of the Act defines that dependants include all children including daughters. Section 82 (4) of the Constitution was relied on by the Respondents to argue that the Constitution allows Kamba customary law to apply in inheritance matters.

The judge said that the provisions of section 82(4) of the Constitution cannot be used to apply Kamba Customary law to disinherit daughters and that Kenya has ratified International Conventions of human rights which include the UNDHR, the CEDAW, the ICESCR and the ICCPR. She used these conventions in the case and held that customary laws which go against the spirit of these conventions cannot be applied to cause gender inequalities in inheritance.

The Judge is a member of KWJA and has attended JEP programs. In an interview, she praised JEP for alerting her to human rights and how to use them to challenge laws that are unjust and to be bold enough to denounce such laws.

Lady Justice Rawal said that she has participated in JEP training and has decided many cases using the knowledge she acquired there. She said that she advocates for gender equality and many of her decisions enforce gender equality. She said:

“I have given many landmark decisions in the Children and Succession cases. One of them involved Masai daughters who under Masai customs don't inherit. But as per the Law of succession they are entitled and I ruled that they inherit.”

One of the cases is the estate of *Lerionka Ole Ntutu, Succession Cause No 1263/2000* in which she applied human right instruments. This was a case involving Masai daughters and sons. Their father a Masai, left a large estate in the form of land and had several wives and children who included the Applicants. The brothers had filed letters of administration proposing distribution of the estate leaving out the daughters.

The judge said that it is well established under our jurisprudence that there can never be discrimination between female and male children or between married and unmarried daughters. She cited Mr Justice Waki's case, *supra*, of *Mary Rono vs. Jane Rono* decision of the Court of Appeal as a benchmark case to rely on which it was held that the CEDAW outlaws discrimination and the country is moving in tandem with an emerging global culture particularly on gender issues and that international law standards should be applied as recommended in terms of the Bangalore Principles. The judge also relied on the Constitution, the Judicature Act and the Law of Succession Act.

She said that the parties cannot be allowed to discriminate against daughters of deceased persons when there are laws in Kenya that outlaw such discrimination. Using CEDAW and UDHR, she held that section 82 (4) of the Constitution cannot be used to apply Masai customs to deprive any person of their social or legal right. She held that all daughters of the deceased were entitled to

inherit.

This decision received wide support in Kenya. It was a clear example of the Judiciary upholding the principle of equal treatment before the law, ruling illegal discrimination based on custom and showing its support for gender justice and equality. The judge was able to use JEP training to interpret the national laws and customs that contain discriminatory provisions and to use the human rights instruments which Kenya has ratified to promote the women's rights. According to her JEP has improved the views of judicial officers about women. She said that under the Bangalore Principles courts are supposed to give effect to the human rights conventions.

The decision outlawed the stereotype view that Masai men have about women. One Masai man in 2003 told Human Rights Watch that:

“A woman and the cows are a man's property. “The Masai believe that the property within their homestead is theirs—the children, the wife, the cows, the land is all a man's property.”

Another case that illustrates application of human rights was decided by Justice Lenaola at Meru in May 2007. In the estate of Francis M'Marete Rugaru, the deceased who died in 1995 was survived by a wife and twelve children. Among the children were nine daughters and three sons. The properties he left were some pieces of land, a developed market plot, some bank savings and shares and savings in Meru Central Farmers Co-operative Union Savings Account. The properties (land) were divided only among the sons, leaving out all nine daughters.

The justification for this was that the daughters were married and under Meru customs they could not inherit their father's estate. The judge followed the case of *Rono vs Rono* and said that Kenya had ratified several international human rights conventions. He held that discrimination against married daughters has no place in our courts and he redistributed the land to include all daughters and sons.

I interviewed two judicial officers from Meru Community. One lady magistrate said that:

“If daughters are given land by the father the brothers can turn violent against the daughters. The Law of Succession is there but effecting it is a problem... You can be killed over it.”

The other one said:

“Meru is a patrilineal community, land is only owned by men...The assumption is that women would be married...My father had a brother who had only daughters. His land was inherited by his brother’s sons.”

Justice Ochieng said that when he was stationed in Kakamega he found it an uphill task to deal with the mindsets of Luhya men who would resist any move to allow married daughters to inherit their fathers ‘land. The irony is that men are against daughters inheriting land from men based on the notion that they will get land from their husbands. The husbands on the other hand do not allow their wives to inherit clan land. The Courts on the other hand insist that women must prove their financial contribution before they can share in any matrimonial property. The society is thus conspiring to deny women property rights. Women only have user rights which depend on their good relationship with the men. Justice Ochieng said that men turned hostile to the women when he tried to insist that daughters were entitled to inherit whether married or not.

Factors blocking women’s equal inheritance rights include the Constitution’s discriminatory provisions, registration of Land in the name of male and customary beliefs. *In the Estate of Simon Njenga Karonge, Succession Cause No. 956/02*, Nairobi, Lady Justice Nambuye revoked the letters of administration issued to a man who had misdirected the court to give him the letters of administration instead of the rightful heir who was the daughter of the deceased person. The man had said that he was the only heir. When the daughter discovered what he had done and objected he said that as a married daughter she was not entitled to inherit. The judge held that the law recognized the daughter as a beneficiary to her father’s estate. She revoked the letters of administration. The court saved the woman who was about to lose her right to inherit her father’s land due to discriminatory cultural practices.

In Succession Cause No. 192 of 2000, Magistrate Omondi as she then was, found that Kikuyu customary provisions discriminated against women in violation of Section 82(1) and section

82(3) of the Kenyan Constitution, which prohibits discrimination on the basis of sex. It also violated Article 18(3) of the Banjul Charter and Article 15(1)-(3) of CEDAW, which provides for legal equality between men and women. In the case it was being argued that a daughter is not entitled to inherit clan land.

Another illustration of use of human rights instruments is the case decided by Lady Justice Mary Mugo in *J.A.O. vs. Home Park Caterers and Two Others, Civil Case No. 38 of 3003*. The Plaintiff was an employee of Home Park Caterers who was dismissed from employment when she was found to be HIV positive. This was disclosed to the employer by her doctor (second defendant) without her knowledge or consent. She filed a case in the High Court to challenge her dismissal. The defendants filed an application to the High Court to strike out her case on the basis that it disclosed no cause of action arguing that the real reason for the termination was prolonged absenteeism on medical grounds. The court held that:

“To determine whether the plaintiff’s cause of action is sustainable she considered that indeed the dismissal from employment can be said to have been as a result of her being H.I.V. positive... Given the universality of H.I.V/AIDS pandemic and the development of the human rights jurisprudence together with the ongoing attempts at harmonization of the relevant treaties in domestic law, I would be most hesitant to strike out such a case...”

She dismissed the employer’s application to strike out the plaintiff’s case. This decision was significant in that employees who were being dismissed on the grounds of H.I.V./AIDS were stopped. She employed the human rights jurisprudence to dismiss the defendants’ application.

In *T V. W (2008) 1KLR*, Mr Justice Luka Kimaru applied the principle of equality in matrimonial property sharing. He did not use human rights instruments but relied on principles laid down in earlier decisions like *Kivuitu V. Kivuitu* by Justice Omollo. In the case the couple lived together without formalizing their marriage under any form of marriage law, from 1993 to 1999. In 1999, the man got another woman and decided to send away the applicant. They had acquired property in together in Nakuru where the Applicant was staying. The man instructed a lawyer to ask the wife to start paying rent to him. The wife applied under section 17 of the Married women

Property Act, 1882 for the sharing of the property they held jointly.

After hearing the evidence the judge held that there was marriage arising from long cohabitation as laid down in the case of *Yawe V. Public Trustee Civil Appeal No 13 of 1976*. In that case the late Mr Justice Madan established that:

“The concept of Presumption of marriage is an appreciation of the needs of the parties in life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage. That if a woman is left stranded either by being cast away by her husband or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestow the status of wife upon the woman to enable her to qualify for maintenance or share in the estate of her deceased husband.”

The judge then proceeded to determine the matrimonial property sharing. He held that: the property is split into two equal shares for each of them. He said in an interview that he applies the principles of equality in matrimonial cases. He does the same for inheritance matters. He attended JEP training and other programs that teach human rights. In succession cases, he said that he distributed property equally between sons and daughters. He says that he uses human rights when there is a gap in the Kenyan law.

Mr Justice Omolo of the Court of Appeal said that he applied the principle of fairness to divide property equally between a husband and wife. He made some decisions before JEP was introduced. His decisions have been used to contrast liberal and conservative judicial views in matrimonial property cases. Those with a liberal view use human rights and principles of fairness to divide matrimonial property taking into consideration the woman's indirect contribution. The conservatives insist on proof of direct financial contribution.

In *Kivuitu vs. Kivuitu Court of Appeal at Nairobi Civil Appeal No. 26/85*, Justice Omolo applied the principle of fairness in division of matrimonial property and divided it equally between husband and wife. In this case, the wife looked for an ideal house and the husband paid for it. The house was registered in their joint names. They divorced later and the husband argued that

the wife was not entitled to the property because she had not contributed financially. The judge considered non monetary contribution of a typical Kenyan Housewife and said:

“A typical housewife will not contribute financially but she would be expending energy in improving the matrimonial home and/or giving birth and taking care of the children.”

This principle was however, rejected in *Echaria vs. Echaria Civil Appeal No 75/2001*(see below) holding the decision was not based on any law.

In *Muthembwa v Muthembwa Civil Appeal No 74 of 2001*, Mr Justice Omolo divided their matrimonial property equally excluding company shares. The couple ceased to live together in 1992 and the wife filed summons for sharing of the matrimonial property. The High Court granted orders that the couple jointly owned all the properties. The husband was not satisfied and appealed to the Court of Appeal. He contended that neither the property he had acquired alone nor the property he had inherited could be shared with his wife. The Judge held that:

“Inherited property if improved upon by joint efforts of both parties can be shared.”

He ordered an equal sharing of all matrimonial properties except the company shares. The judge did not say that the wife had to prove financial contribution. He rightly assessed the wife’s contribution at 50% holding that there was no evidence given to justify the exclusion of the wife’s indirect contribution.

The judge further held that:

“In the past the wife’s contribution towards the acquisition of any matrimonial property was not recognized. But things have changed; a woman’s contribution must be recognized.”

In Tanzania, for comparative purposes, the Court of Appeal has been promoting and protecting human rights, especially in the field of family law. The court discussed the question of the

contribution of each party to the marriage in the acquisition of property. They were at first, also, divided on how to share in cases where a housewife who did not contribute to the acquisition of the property and was asking for a share. One view which was conservative held that such a wife must prove that she contributed directly. Taking care of the children and the husband for example did not constitute direct contribution. The other view was that such activities in fact amounted to direct contribution. The court moved a step further in the case of *Bi. Hawa Mohamed v. Ally Sefu*, Civil Appeal no. 9 of 1983, Dar es Salaam, where it recognized the domestic work of the housewife as a legitimate contribution to the matrimonial welfare and thus entitled the wife to a share in the property. Rwezaura, B.A (1990) says:

“There is no doubt that the decision of the Court of Appeal in this case was a major contribution in the protection of vulnerable groups of citizens and also promotion of equality which is a cornerstone of human rights.”

In *Sawe v. Sawe* Civil Appeal No. 38 of 92 the Court of Appeal in Tanzania specifically indicated that division of Matrimonial property at divorce should be on a 50/50 basis.

These cases show that judicial officers can be sensitive to women and they can effectively apply human rights instruments and principles of equality to end discrimination and empower women. The cases show that both women and female judges are applying human right principles to promote equality and fairness. Justice Githinji of the Court of Appeal in a seminar on Implementation of the Sexual Offences Act last year, 2009, said that Courts should write gender sensitive judgments.

Phillip Kipkoech Chepkwony v Republic Criminal Appeal No. 128 of 2004, in the High Court at Nakuru. Mr Justice Luka Kimaru rejected an appeal by a man who had been sentenced to life imprisonment for defiling a girl aged below 16 years.

On 9th March 2004 the appellant unlawfully had carnal knowledge of the complainant. He took the complainant to the forest where he forcefully had sexual intercourse with her. The complainant screamed and attracted the attention of the forest guards who rescued her. The

guards found the appellant in the act and arrested him. He was taken to the police station while the complainant was taken to the hospital where she was examined. The clinical officer established that the complainant's labia majora had been bruised and further that there was a whitish discharge from her vulva. The appellant claimed that the complainant consented and that she was his girlfriend. The judge held that it was no defence by an accused person that a girl who was aged less than sixteen years consented to sexual intercourse. Section 145 of the Penal Code was clear that sex with a girl aged less than sixteen years was unlawful. It was immaterial whether or not such girl consented to the sexual intercourse. The judge held further that the appellant was a danger to the children in the society. He had deliberately and without due regard for the innocent girl, sexually assaulted her and potentially infected her with the AIDS virus. The appeal was dismissed and the appellant is serving a life sentence

4.3 Non-application of Human Rights by Judicial Officers

There are some cases where the judicial officers could have applied human rights principles and laws but did not do so. The assumption was whether judicial officers who have been trained were failing to use the human rights instruments to challenge discriminatory laws and attitudes to enforce gender equality. In answering this assumption several cases were brought to my attention from the interviews with judicial officers. These interviews led to conclusion that many judicial officers were not applying human rights instruments or principles of equality. I found that there is inadequacy in matrimonial property rights and courts use their discretion to divide matrimonial property between spouses. The operating statute is the English statute of Married Women Property Act, 1882 ('MWPA'). Kenya has no matrimonial property Act of its own. The Act was found to be inadequate in Britain and new Acts were passed in 1970 and 1973. The Act is inadequate in Kenya as was aptly expressed in *Echaria v Echaria Civil Appeal No 75/2001*:

“It is now seven years since this court expressed... It is indeed a sad commentary on our law reform agenda to keep the country shackled to a 125 year old foreign legislation which the mother country found wanting more than 30 years ago!”

The Act does not give any guidance as to how matrimonial property is to be shared. It is left to the discretion of the judges to decide, which depends on their views. That is why there is divided opinion whether there should be equality in sharing matrimonial property. The current Court of Appeal position requires proof of financial contribution meaning that housewives without income stand no chance in matrimonial property sharing. The provisions of Section 17 of the MWPA in terms of which claims for the division and sharing of matrimonial are filed are inadequate to guide judges.

Table of cases considered in which human rights instruments were not used

Name of the case	Nature of issues	Court	Judge
Echaria vs Echaria, Civil Appeal No. 75/2001	Matrimonial property division	Court of Appeal	Justice Githinji
Lord Melvin John Blackburn v. Lady Kathleen Blackburn Civil Suit 87 of 2007	Matrimonial property sharing	High Court	Lady Justice Omondi
In Republic vs. Minister for Home Affairs and Two Others Ex parte Leonard Sitamze Miscellaneous Civil Application No.1652/2004 (2008) eKLR	Protection of the human rights of the applicant	Constitutional Court	Mr Justice Nyamu
Elijah Kabui Mutahi v. Republic Criminal Appeal 123 of 2007	Attempted defilement	High Court	Lady Justice Mary Kasango
Ibrahim Abdi Mohamud v Republic, Criminal Appeal 125 of 2005	Attempted defilement	High Court	Justice Makhandia
R v Cornelius Ekirapa Criminal Case No. 910/2008	Defilement	Kibera	Hon. Mr Karanja

In *Echaria vs Echaria*, Civil Appeal No. 75/2001, Nairobi, the High Court on hearing the claim for division of matrimonial property divided the matrimonial property equally between the couple. The husband appealed to the Court of Appeal. A bench of five judges was constituted who were Judges Githinji, Waki, Tunoi, O’Kubasu and Deverell. Justice Githinji wrote the judgment in 2007. Justice Waki was a JEP trainer in 2001.

The Court of Appeal reduced the wife’s share to a quarter of her husband’s share. The Court said that the wife had not shown that she had made a financial contribution equivalent to her husband’s contribution. This dispute involved a property measuring 118 acres of land on which was build the matrimonial home with a swimming pool and 100 acres of tea plantation known as Twiga Hill farm in Tigoni, Limuru. It was bought in 1972. It was contended that the husband was the one who had bought the land with a loan from AFC which he repaid.

The wife, though a graduate, was not working because when her husband was an ambassador she stayed with him and she was not allowed to work. She therefore looked after her children and husband. When they returned to Kenya she started working but due to a misunderstanding she decided to leave him. She filed for a divorce and a division of the matrimonial property. The High Court granted her 50%. On appeal to the Court of Appeal her share was reduced to one quarter of the property. The judges mentioned the Human rights instruments such as UDHR and CEDAW but did not use of them.

Article 1 of UDHR provides that all human beings are born equal in dignity and in rights. Article 7 provides that all are equal before the law and entitled without any discrimination to equal protection of the law. Article 8 says that everyone is entitled to an effective remedy. The judges showed evidence of training because they mentioned the human rights instruments but they did not use them. The woman’s share was further reduced from 30 to 25 because of the household goods and a car that she had taken when she left the matrimonial home. This was considered as unequal division of matrimonial property. The couple had lived together for over 20 years and deserved equal sharing of the property if gender equality in marriage is to be encouraged. The

wife said that she contributed equally taking into account her non-financial contributions.

The court said that disputes between husbands and wives over the sharing of matrimonial property should be handled like any ordinary suit. The woman was therefore required to produce documentary evidence to prove her financial contribution. The court said that any distribution would be made in accordance with the amount each party directly contributed financially. This raises questions about how the court considers women who are housewives who contribute through their labour and not financially to the well-being and growth of the shared matrimonial home. The decision is worrying women as family property is normally registered in the husband's name. Lesser rights for women relating to marriage and property originate in their treatment as dependents whose legal, economic and social status is derived from that of the 'head of the family' who is usually the man.

Prsicilla Echaria is a highly educated woman as the court observed. The problem was that she was not allowed to work when she was an ambassador's wife in a foreign land. In *Kivuitu v. Kivuitu Civil Appeal No 26/85*, Mr Justice Omolo observed that where property is registered in the name of the husband then his wife is entitled to apply to court under section 17 of the MWPA, 1882 so that the court can determine the extent of her interest in the property and in that case the court would have to assess the value to be put on the wife's non monetary contribution. He added that:

“Any limitation that only monetary contribution must be taken into account would do a lot of injustice to a large number of women in our country where the reality of the situation is that paid employment is very hard to come by.”

This view was also expressed by a former Judge, in *Nderitu v Nderitu* where he observed that:

“A wife's contribution and more particularly a Kenya African wife will more often than not take the form of a back up service on the domestic front rather than as a direct financial contribution. It is incumbent upon a trial judge hearing an application under section 17 of the Act to take into account this form of contribution.”

In *Echaria's* case, the judges held a spouse (usually the wife) is not entitled to a beneficial interest in a property registered in the name of the other (usually her husband) simply by virtue of the fact she is married to him or that she has performed domestic duties for the benefit of the joint household during the subsistence of the marriage. It was further held that since the parties were not jointly registered as the owners of the property it was wrong for the High Court Judge to have presumed that they had an equal beneficial interest in the property. It was held that the husband was the only party entitled to keep the property because he proved that he had paid for it by producing documentary evidence to that effect.

The wife failed to prove that she was entitled to any share of the property because she failed to provide documentary evidence of financial contribution towards its purchase. She also failed to prove that her indirect contribution equalled her husband's financial contribution. The judges made a calculation based on the rate of monthly loan repayments and divided it by two. Her contribution was assessed at Ksh.72 000/ for the 15 years of living together when the house was bought.

She has pursued her case in the African Commission on Human and Peoples' Rights. She feels that she was discriminated against as a woman. She feels that her rights under articles 2, 3, 14, 18(3) and 19 of the ACHPR were violated.

The Court of Appeal has held that a specific law has to be passed by Parliament to empowering judicial officers to divide family property equally. It is odd that the Judges did not exercise their discretion in favour of gender equality. Although they referred to various human rights instruments such as ICCPR, ICESCR, CEDAW and the ACHPR which have been ratified by Kenya, they did not make use of them.

Another case to illustrate non use of human rights is that of *Lord Melvin John Blackburn v. Lady Kathleen Blackburn Civil Suit 87 of 2007*. High Court Judge, Lady Justice Hellen Omondi, gave the husband 20% share of the matrimonial property. The husband had filed the suit under section 17 of the MWPA, claiming an equal share of insurance money, a matrimonial house in Malindi and the proceeds from a motor vehicle business. The couple got married when the defendant was

running a nursing home in England which was sold and they came to settle in Malindi, Kenya.

The matrimonial property was acquired and set up using the proceeds from the sale. The husband's contribution included only supervision of the construction of their home. The Court rejected the principles of equality laid down in earlier cases of taking into account indirect contribution of a seemingly dormant party. The Court followed what was stated by the Court of Appeal in *Echaria's* case and said that the presumption of equality in properties registered in joint names is rebuttable. Thus a party must prove equal contribution. The Judge did not refer to human rights instruments. She relied on the principle of direct contribution. She held that his indirect contribution amounted to 20%.

Another case where the judge failed to use human rights is the case of *Republic vs. Minister for Home Affairs and Two Others: Ex parte Leonard Sitamze Miscellaneous Civil Application No 1652 of 2004 (2008) eKLR*, Justice Nyamu was urged to enforce the human rights of the applicant Leonard Sitamze. He did not do so for national interest and security reasons. The Applicant who was a foreigner had been denied a renewal of his work permit on security grounds. His passport had also been taken. The applicant said that he had been running a successful company with his Kenyan wife and if deported he would lose his right to work and his right to live his life with his family. He challenged the order of the Minister for Home Affairs. He pleaded that the decision was discriminatory, unfair and unjust. He was also being constantly arrested and harassed by police which amounted to inhuman and degrading treatment contrary to article 5 of UDHR. He argued that the decision to deny him a work permit amounted to denying him the right to property contrary to Article 9 of UDHR and Article 6(2) of ICESCR.

Justice Nyamu appreciated all human rights instruments and said that the Applicant was entitled to enjoy his human rights like any other person in Kenya. He appreciated the facts that the Applicant was running a successful company and had employed many Kenyans and was entitled to enjoy his family life as his wife was a Kenyan. He however relied on a classified government document from the Minister for Home Affairs to reject the application. He said that the court had to take into account national concerns as regards security and denied him his relief. This indicates that a judicial officer may want to apply human rights instruments but the sensitive

nature of the case may deny him the opportunity to do so.

In *Elijah Kabui Mutahi v. The Republic*, Criminal Appeal 123 of 2007, Nyeri, the Appellant was charged with attempted defilement of an imbecile contrary to Section 146 of the Penal Code. Although the complainant was unable to give oral evidence relating to the offence, there were two eyewitnesses who gave clear evidence that they found Appellant lying on top of complainant and that both were undressed. The Appellant was convicted and sentenced to 10 years imprisonment. He appealed against both conviction and sentence, alleging that he had been held in custody in violation of the Constitution. It was held that by Lady Justice Kasango that:

“1. Under Section 72(3) (b) of the Constitution, the police should only hold Appellant in custody for up to 24 hours before arraigning him in court. An unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. Here, Appellant was arrested on 18 December 2005, and remained in police custody until 21 December 2005. This continued detention was a Constitutional breach of Appellant’s rights.

2. When Appellant’s constitutional rights have been breached, even if the Appellant does not raise the breach himself, the Appellate Court may raise the issue on its own motion.”

In view of this the court allowed the appeal and set free the accused person. The court did not address the issue of the breaches of the human rights of the complainant who was an imbecile. Her rights had also been violated and the interests of the public were not considered.

In *Ibrahim Abdi Mohamud v The Republic*, Criminal Appeal 125 of 2005 the Appellant and another had been charged with and convicted of the offence of attempted defilement. His co-accused who was a minor was placed on probation and committed to Getathiru Approved School for a period of 3 years. The Appellant who was not a minor was sentenced to 10 years imprisonment. He appealed to the High Court alleging discrimination in sentencing. Justice Makhandia agreed with him and set him free. The Court did not address the issue of the breaches of the human rights of the victim and failed to consider that under section 19 of the Children’s Act a minor cannot be sent to prison. Being sentenced to detention in a Borstal institution was appropriate for the minor but was not appropriate for an adult under the Penal Code.

In *R v Cornelius Ekirapa Criminal Case No. 910/2008* at Kibera a man defiled a child aged 13 years. The accused put her on a sofa set in a house and defiled her. He was acquitted because there were no eye witnesses. The doctor's evidence showed evidence of defilement. The court made no reference to the breaches of the victim's human rights. The court criticised the prosecution for not calling as a witness the watchman who assisted the victim. Yet there are precedents where the courts have ruled that it is permissible to convict on the basis of uncorroborated evidence of a victim whose testimony appears genuine.

These few cases illustrate the failure of judges to use human rights instruments. The Judicial officers have been trained and sensitized to apply Human rights instruments. Some said that the laws they were applying were sufficient to cover the issues they were considering. One said:

“I deal with criminal law and the law is clear in its provisions. It is not necessary to use International law.”

Another judicial officer said:

“I have not applied the human rights instruments because need has not arisen.”

My view is that further training of judicial officers is required.

4.4 Challenges confronting Judicial Officers in the Application of Human Rights

Challenges were identified during the research that contribute to the failure of judicial officers to use human rights instruments. A few judicial officers were found to be actively applying human rights instruments in their judgments. Listed below are some of the challenges.

4.4.1 Workload and Lack of Resources

The assumption was that many judicial officers lack time and resources to carry out legal research to effectively use human right instruments.

Many judicial officers cited pressure of work, lack of library resources and access to the internet. A library was not available at Kibera and Makadara Courts. Some magistrates did not have computers or books in their chambers. At Makadara a librarian was recently posted there and she was in the process of organizing for resource books. At Kibera there is no room to set up a library. Without access to materials on the internet or library, judicial officers are limited in human rights documents. Magistrates write proceedings and judgments in long hand which consumes a lot of time and is tiring.

The judicial officers in every court I visited seemed to be very busy and apparently overloaded. There were fewer judicial officers compared to the workload in most Courts. In Milimani Courts, Magistrates expressed that the work was too much. One said that:

“We are overwhelmed by work. When writing a judgment the human rights are at the back of your mind but unless time allows and you get to the book you do not specifically quote the instruments.”

In fact by November they were fixing cases in 2011. The diary for 2010 was already full. They have little time to do research on their own. One judge gave only 10 minutes at lunch time for interview. Magistrates are not provided with research assistance and many do not have copies of the human rights instruments. They only had a few booklets they were given at JEP training. I found some judges and magistrates in court during the lunch hour. They have limited time to research documents which also are not available.

Prosecutors and lawyers are not trained in gender issues and do not assist the courts on gender or human rights issues. Some judicial officers say that unless human rights are raised before them, they cannot consider them.

There is generally little interaction between judicial officers to learn from each other on how to use human rights instruments. There is hardly any exchange of cases between judicial officers. The lack of relevant laws in some courts hampers the use of human rights instruments. Judicial officers require specific laws. I saw few copies of books in the Chief Magistrate's Chamber at Kibera. In other offices I saw only Copies of the Law Reports and the grey book containing the national laws. The Judiciary is therefore not sufficiently equipped. In the respective courts it was difficult to trace a case where human rights instruments had been applied.

4.4.2 Non-domestication of Human Rights Instruments

The assumption was that non domestication of human rights instruments limits judicial officers in their use of them to enforce gender equality through their decisions. Judicial officers felt that their hands were tied without specific legislation or without domestication of the international instruments into national law. Some have not fully understood the meaning and effect of human rights instruments in order to be able to apply them in cases they hear. In some cases it was held that Kenya is a dualist State and that International law has no direct application in Kenya. It means that Women's human rights treaties are not applied by courts which hold this view. This is the view expressed in some cases such as *Pattni and Another vs Republic (2001) KLR page 252*. In that case it was held that Kenya is a dualist state and international law has no direct application. For that reason progressive international law treaties are not being applied by judicial officers who hold this view.

Yet as shown above other judicial officers are actively applying the instruments. In the case of *Rono vs Rono* (see above) Court of Appeal Judge, Mr Justice Waki held that international law applies. In the case of *R v. R.M.* suing through Kavindo the Court ruled that International Human Rights Instruments apply even without specific domestication. In *Rogers Mwema v. Attorney* it was appreciated that the instruments can be used. The Bangalore Principles provide that international and national jurisprudence in the interpretation of human rights is of relevance and value to judicial officers. International conventions not yet domesticated should be considered by courts where national existing law is uncertain or ambiguous. A judge shall keep informed

about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

The Harare Principles state that International human rights and regional human rights treaties must not be seen as alien to domestic laws in national courts. National courts are to have regard to these norms to resolve uncertainty in national laws or filling the gaps in common law. They also advocate for the need to have a handbook on the basic texts of relevant international and regional human rights instruments made available to judicial officers. They are to familiarize themselves with growing international jurisprudence. These are principles that were adopted by judicial officers who include Kenyan judicial officers.

4.4.3 Hidden Judicial Bias and Beliefs

The assumption that was to be investigated was that judicial offices still harbour hidden biases and have stereotyped minds that cause them to fail to challenge discriminatory laws that support gender inequality.

Socio-cultural biases in the mind-sets of judicial officers and in the law based on society's patriarchal notions and norms about women contribute to the discriminatory treatment that women are often exposed to in court processes. These biases are often reflected in decisions. Although JEP training is gradually succeeding changing judicial mindsets, cultural practices are still well entrenched in the minds of ordinary people. It takes a little longer and more exposure to human rights before people can change their mindsets.

Wickler (1987:227) says:

“The task for those who seek the goal of equal justice is to find an effective strategy for eliminating gender bias from the courts.”

Gender bias is common among judicial officers. A judicial officer said that, in his community,

daughters cannot inherit land. Thus, judicial officers are still subject to their own customs, upbringing and the society around them. Their judgments are thus influenced by the law, the evidence in a case and mostly by their perceptions, attitudes and stereotypes which might be harmful to women and children. Further training is required to deal with these biases. The JEP training is designed to assist judicial officers to avoid gender bias and to be fair, objective and impartial. In *Beatrice Kimani vs Evanson Njoroge*, the wife sued for a division of the matrimonial property. The judge, who had not been trained under JEP, used very abusive language against women and declined to give an equal share of the property to the woman on the collapse of her marriage. He seemed to be influenced by his upbringing and general gender bias against women.

He said:

“There is no presumption that every woman is an automatic asset...a wife can be a misfortune to the family...she may be a cunning waster...we should not be forgetful of the historical truths that the action of woman on our destiny has been and is unceasing and since the Great Fall in the Garden woman has continued to baffle. We recall that through woman’s incitement mankind was banished and is doomed to die...”

This case is given as an example of judicial bias which has existed before JEP was introduced. It still persists even in those who have trained under JEP.

A senior judicial officer says that:

“Men fear women assisting to run the home or taking over major projects because such a woman could easily assert independence when the man asserts his authority and the relationship can easily break up. A man wants to be in charge of things. If you get a marriage where a woman is doing everything the man is insecure and you could trace it in his talks and actions.”

He added that:

“...a court cannot sent a man out of his property it is the woman to leave...if a woman buys a car she can go anywhere and the man feels insecure. If a man buys a car he can go anywhere and the woman is not supposed to question...”

In Rep. Versus Peter Muchiri Matiru Criminal Case No 483/2008, Githunguri, the trial magistrate Mr Lorot blamed the mother of 15 year old, Form 1 student for reporting that her daughter was being defiled. He said that the girl Mary Njeri who testified before him was definitely a minor born in 1992.

Under the Children’s Act she lacked capacity to consent to sex and the mother as the guardian was justified to report. He said that:

“...the child did not complain and indeed saw nothing wrong with having sex with the man. She consented. Not even the provisions of section 44 and 45 of the Sexual offences Act can belie the intent of this girl to sleep with her lover...”

He dismissed the case not because of the law but because her mother reported it. He also faulted the Children’s Act for putting the age of majority at 18 without considering that there were exceptional cases like the girl who was mature enough to choose to have sex at 15 years. To him the man was not committing an offence under the Sexual offences Act.

Under Section 43(4) (f) of the Sexual Offences Act No. 3 of 2006, sex between a man and a girl under 18, even with the girl’s consent, is unlawful, because the girl is a child and lacks capacity to consent to any sexual activity. Any man who engages in sex with a girl under 18 commits the offence of defilement which has the option of life sentence. A judicial officer is expected to be impartial and administer justice equally without showing that he/she is influenced by personal biases, myths or stereotypes.

N. Wikler (1987:227) says:

“...despite the fact that the courts proceed upon the premise of equal treatment before the law, women are treated differently and unequally from men both in and by the courts....women as a group are affected much more severely by gender- based myths, biases and stereotypes embedded in the law itself and in the hearts and minds of those who serve as judges....the assumption that women conform to a single profile or small range of profiles, regardless of individual differences....the pervasive tendency to regard men as more credible than women....the ignorance and misinformation of many judges about the economic and social realities of most women....male identification with males....”

The Sessional Paper No 2 of 2006 on Gender Equality and Development, Kenya says:

“Social cultural beliefs and attitudes held by men and women promote gender inequality”

Another example of judicial bias is the case of *Mary Njeri Nyutu v William Ngotho Kibathi, C. C, No 53/2008* in which the plaintiff, who believed that she was still married, attempted to stop her husband from marrying another woman in a church wedding. The man argued that that they had not been validly married because they did not perform Kikuyu rites of marriage. The magistrate found that there was marriage between them. He then proceeded to pronounce that a breakdown of the marriage had occurred in order to allow the man to proceed with his wedding. He said:

“If this Court can presume a marriage then by the same strength I can presume a breakdown of the marriage irretrievably...the man has demonstrated that he does not wish to have any relationship with the plaintiff...under kikuyu customs the defendant can marry as many wives as possible...what the defendant could not do is to marry under a monogamous regime.”

He was biased towards the man. He said:

“...this court would not stop a Kikuyu husband from taking in any number of wives as he pleases or as he can afford...even I cannot stop the Defendant from taking a wife of his choice either by a monogamous setup or the Kikuyu custom.”

The woman was not given equal protection of the law as the man. The element of culture was brought in to show that a woman has no right to complain when a husband decides to marry. He did not use any human rights instrument to decide the case. Section 38 of the 2004 Draft Constitution Section 38 prohibits any “law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men.” It is however not law in Kenya. The new harmonized draft Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Women and men have the same right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

According to Wickler, N. (1987) male identification with males is an element of gender bias. We learn to think of ourselves first as males or females before we think of ourselves roles as judicial officers which may affect the administration of equal justice. The Bangalore Principles provide that a judge shall perform his or her judicial duties without favour, bias or prejudice, the behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

In *Sawe v Rep KLR (2003)*, the woman was arrested and charged when her husband died in a mysterious fire. The judge convicted her on circumstantial evidence on the basis that she had appeared jealous when her husband was in the process of marrying a second wife. The Court of Appeal acquitted her on the basis that the evidence was insufficient. A woman is not expected to complain when her husband is having extra marital affairs! That seemed to be the message from the conviction. The superior court failed to see that a woman has a right to complain where a husband intends to marry another wife. The truth is that the husband was in the process of committing bigamy and the woman had a right to complain about it.

One Informant said that the arrangement to deny women equal property rights especially land ownership is perfectly in order, given the scarcity of land and belief that a woman is to be

married elsewhere.

In *Otieno v Ougo and Others* (C.A.31/87) the Judicial officer gave precedence to customary law where a woman's wish to bury her husband at their matrimonial home was ignored. This case was decided before JEP started in Kenya and the decision has been followed in subsequent cases such as Civil Case No. 20 of 2006 at Siaya Court. In that case a man married a lady and he passed on. The lady got married to another man. She later died and the father of the first husband claimed that she was still married in his home. The current husband was denied the right to bury the deceased. These customs discriminate against women but judicial officers fail to see that due to their stereotypical view that women are merely pieces of property.

4.4.4 Insufficiency of the Training

The assumption for this was that the training period under JEP was insufficient. Many participants said that they were trained long time ago for only three or four days and that they had forgotten most of what they learned. Many wanted to be retrained. Many participants agreed that training and capacity building, across the board, was extremely important. There were those who had never attended JEP training and were asking how trainees were selected and they did not understand why they were left out. Some felt that all law students should be required to take courses on equality and gender issues. Some suggested that training programs be organized not only to inform judicial officers about the content of national, regional and international laws and human rights standards but also about the various strategies or ways of applying them to actual cases that come before them. They asked for continuing judicial education by JEP, JTI and other training fora to develop a better understanding of HR instruments and the skills necessary to apply them in judicial decision-making. They expressed the view that they were yet to bring human rights instruments into their judgments due to a limited understanding of them and how to apply them.

4.4.5 The Non-use of the Materials provided by JEP

The assumption was that training materials are sufficient to equip judicial officers with sufficient

knowledge in human rights but many were not making use of them. There are materials which are given to judicial officers when they train which contain the course content, human rights instruments and examples of cases they can rely on to promote women's rights. However, apart from a few judges who keep the materials in their chambers and use them, many did not have them in court. It means that they were not using them. One Magistrate gave me a booklet on human rights which was in her office but she said that she had not yet applied the human instruments in her judgments. Many judicial officers therefore fail to use the materials supplied to them to promote gender equality. One judge said that the materials are not conducive to carry to court since they are handouts that get easily torn. He suggested that the judiciary should assist by supplying human rights instruments in book form. In that way they will feel encouraged to use them when they see that the judiciary is involved in disseminating the information.

4.5 Emerging Issues

Unequal legal rights to matrimonial property persist in the laws and practices and therefore discriminate against women. Research should be done to establish the impact of judicial decisions on women who were denied the equal sharing of matrimonial property.

The fact that the case of *Echaria v Echaria* case is being further prosecuted in the African Court of Human Rights indicates that there is a problem with the laws on matrimonial property and the decisions that have been made pursuant thereto are not satisfactory to women.

The Kenyan Courts continue to follow old English decisions (based on the MWPA, 1882) which require proof of direct financial contribution, instead of looking at equality in marriage as provided under the current international standards.

Judicial officers who use the MWPA and interpret it strictly are not helping women. JEP encourages judicial officers to adopt judicial activism and the human rights approach in interpreting the national laws so as to benefit everyone equally. Some Judicial officers are already adopting this approach, especially in inheritance matters.

The women's right to inherit their fathers' state is still a hotly contested issue despite the passage of the Law of Succession Act in 1981. Customary laws that discriminate against women are not being fully challenged by judicial officers who have been trained. There are bills on matrimonial property, equality and marriage which appear to be women friendly.

The Magistrates Court is not a court of record and Magistrate's decisions are not exposed to public viewing. Registries are not computerized and to trace a case is still difficult. Exchange of cases is minimal and magistrates do not learn from each other. Their judgments should be properly recorded and made public for greater accountability and to learn from each other. Lack of commitment on the part of the Government to enact laws that promote women's rights has prevented the use of human rights in the promotion of gender equality. Kenya, being a dualist state, does not encourage human rights instruments to apply directly. The majority of judicial officers are only applying local laws meaning that some are still not sure when to apply human rights instruments. It is evident in sexual and children's matters that courts are willing to enforce human rights if they are incorporated into national laws.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The findings have shown that the JEP program was started to address the problem of gender inequality within the law and to address the needs of women and children and other vulnerable people in Kenya. Where the program has been used effectively it has help to transform the law in favour of women and enhance their legal status. The research has also shown that a lot still needs to be done to sensitize judicial officers. In matrimonial property sharing, the courts are still divided on use of human rights to promote gender equality. JEP training is good but is not being fully utilized by all who have been trained. The promotion of gender equality is still being hampered by discriminatory laws and customary practices, biased attitudes, unresponsive authorities, ineffective use of skills from the JEP training and general ineffectiveness in the courts.

5.2 Recommendations

- ◆ The government should domesticate all human rights instruments it has ratified.
- ◆ Judicial officers should readily apply international human rights norms especially where national laws are not in conflict with them. Relevant cases and materials on human rights can be made available to all judicial officers as guidance materials on the application of human rights.
- ◆ Many judicial officers were of the view that they should be trained again for them to internalize the concepts of human rights as contained in the Instruments and be able to use

them. Frequent training and capacity building right across the length and breadth of the entire judiciary is important. Judicial officers are expected to exercise their judicial powers effectively, responsibly and with gender sensitivity so as to help shape a society which constantly attempts to deliver true social justice to all people. They should be able to fight discrimination of any kind, uphold women's rights and protect children.

- ◆ The Judiciary should attend to the challenges experienced by judicial officers especially the supply of required resource materials. All judicial officers should undertake the JEP training. The training should be longer and made more intensive.
- ◆ Judicial officers should read the Bangalore Principles and understand them so as to be guided by them in the application of international human rights instruments.
- ◆ The Judiciary is urged to appoint women judges to the Court of Appeal.
- ◆ Judicial Officers should advocate for the enactment of women friendly laws on matrimonial property.
- ◆ JEP should include Prosecutors and lawyers in its training programs and thereby join judicial officers in the promotion of gender equality.
- ◆ JEP training should be incorporated in the Judiciary Training Institute Curriculum.
- ◆ Judges should petition for the repeal of laws that violate human rights instruments.
- ◆ Judges should use the Constitutional guarantees of equality to interpret national laws and customs. Some of the Judges have started to do so in inheritance matters and for guidance they should look to examples of judicial reasoning in case law from other jurisdictions, including international courts.

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