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**Summary**

*In Kenya, persons with mental disabilities have a different experience from able-bodied people in the criminal justice system. Regrettably, the rules are applied differently when persons with mental disabilities are the accused. In most cases, they are unable to afford lawyers and are forced to represent themselves. That is when their position becomes more challenging and their vulnerability more pronounced. Their right to give evidence will depend on the individual's form of disability. Article 13 of the Convention on the Rights of Persons with Disabilities provides for the right to legal capacity including the right to file complaints and to represent oneself in court. The aim of this paper is to look at the extent of Kenya's implementation record of the right to self-representation and make recommendations on the best possible ways of ensuring that persons with mental disabilities are able to represent themselves and fully participate in court proceedings.*

**1 Introduction**

Kenya's criminal justice system is adversarial in nature. Parties involved in a dispute present their case before an impartial tribunal for determination and judgement.<sup>1</sup> The system demands that testimony should be given through oral or documentary evidence. In order for witnesses to be believed, judicial practice requires that their evidence must be declared credible by the judicial officer. That fact is usually determined by the observation of their demeanour.<sup>2</sup> Witnesses are expected to have good memory coupled with quick responses if they want their testimony to be

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1 *Kenya Airports Authority v Mitu-Bell Welfare Society* [2016] eKLR.

2 Criminal Procedure Code Chapter 75 of 1930 (Laws of Kenya) sec 199.

believed by the trier of facts. This applies to everyone except people with cognitive or mental disabilities.

There is no single definition of mental disability.<sup>3</sup> It varies depending on jurisdictions and professions.<sup>4</sup> There are clinical definitions, legal definitions and sociological definitions among others. According to the American Association of Intellectual and Development Disabilities, mental disability occurs when a person has limited adaptive behaviour and understanding ability.<sup>5</sup> For the purposes of this paper, a person has a mental disability when he or she has a limited decision making capacity depending on several factors including environmental and social.<sup>6</sup> This should be contrasted with legal capacity which is the 'ability to hold rights and duties and to exercise those rights and duties.'<sup>7</sup> Therefore, the difference between mental capacity and legal capacity is that the latter is an absolute right and is not dependent on the former.<sup>8</sup>

Regrettably, persons with mental disabilities will be readily denied their right to legal capacity on an equal basis with others where it 'becomes apparent to the court' that they are 'not able to understand court proceedings or make' their defence.<sup>9</sup> Surprisingly, this denial may be determined merely by considering the circumstances surrounding the accused person such as their 'immediate preceding or immediate succeeding or even the contemporaneous conduct'.<sup>10</sup> Once that finding is reached, the court will halt the hearing and the affected party will not participate in any further proceedings unless they are declared to be of sound mind. According to the law, one is presumed to be of sound mind when he or she is declared 'to be capable of making his defence'.<sup>11</sup> In case they achieve that fit, then they will have to prove that they are telling the truth and to do this they must strive to overcome the institutionalised hurdles of the adversarial system such as cross-examination. The objective of this article is to look at the extent to which Kenya has implemented the right to self-representation for persons with mental disabilities and suggest reforms geared towards ensuring the adequate participation of persons with mental disabilities in court trials. In order to do this, the article will

3 M Karras et al *On the edge of justice: The legal needs of people with a mental illness* (2006) 2.

4 Karras et al (n 3 above) 2.

5 American Association of Intellectual and Development Disabilities 'Definition of intellectual disability' (2018) <http://aaid.org/intellectual-disability/definition> (accessed 6 November 2019).

6 CRPD Committee General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/GC/1 dated 19 May 2014 para 13.

7 Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities (African Disability Protocol) Adopted 29 January 2018, art 1.

8 M Scholten & J Gather 'Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward' (2018) 44 *Journal of Medicine and Ethics* 228.

9 *Leonard Mwangemi Munyasia v Republic* [2015] eKLR.

10 As above.

11 Criminal Procedure Code (n 2 above) secs 163(1).

mainly rely on the Convention on the Rights of Persons with Disabilities<sup>12</sup> (CRPD) which is the primary international treaty that deals with the rights of persons with disabilities and which guarantees their rights to legal capacity on an equal basis with others.<sup>13</sup>

## 2 Background

An arbiter of the facts is not expected 'to descend into the arena and give the impression of acting as advocate'<sup>14</sup> on behalf of any of the parties involved. However, in instances where the accused is 'unrepresented and seems not to understand the court procedures', the 'presiding judicial officer' will be allowed to assist.<sup>15</sup> Be that as it may, it is also noteworthy to point out that 'the court cannot act as an advisor to the accused as to various tactical possibilities open to him as the trial unfolds'.<sup>16</sup> But the court has the discretion, upon the application of either party, to allow the use of intermediaries or relevant assistive devices in court in order to facilitate the testimony of witnesses. Despite the Constitution of the Republic of Kenya, 2010 (the Constitution) making provision for the use of intermediaries, parliament is yet to pass any detailed legislation to give effect to that provision. That does not mean that judicial officers cannot assist persons with disabilities to communicate effectively and understand proceedings in court. On the contrary, they have a wide discretion when it comes to the interpretation of laws. Therefore, 'a judge or magistrate must not preside on a trial like a football match referee'.<sup>17</sup> Instead, they 'must ensure that an unrepresented party', and especially, a party with a mental disability, is assisted in order 'to present his case as fully as possible, without the court appearing to lose its impartiality'.<sup>18</sup>

From the above paragraph, it is not in dispute that persons with mental disabilities have legal rights. However, in order to bring meaning to these rights it is imperative for them to be adequately represented in court. The right to self-representation for persons with mental disabilities in court has elicited fierce debates from around the globe. In *Faretta v California*<sup>19</sup> the United States Supreme Court fundamentally acknowledged accused persons' rights to self-representation. That right requires the state to grant an accused adequate time and facilities to prepare a defence and to accord them an opportunity to adduce and challenge all the evidence which the prosecution intends to rely on.<sup>20</sup> It is aligned with article 12(3) of the

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

13 Art 12(2) CRPD.

14 *R v Hamilton* unrep 9 June 1969.

15 *Rabonko v the State* [2006] 2 BLR 166 168C-D.

16 *Sunasse v State* [1998] MLR 84.

17 *Moses Muhagama Laurence v the Government of Zanzibar* Criminal Appeal 17 of 2002.

18 As above.

19 422 US 806 (1975).

20 Art 50(2)(c) & (k) Constitution of the Republic of Kenya, 2010.

CRPD which obliges states to grant persons with mental disabilities with the relevant accommodations in order for them to understand and effectively participate in the criminal process. The concept of reasonable accommodation has been defined by the CRPD to mean:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>21</sup>

In Kenya, the issue of legal capacity has remained a pipe dream. The current evidential procedures were formulated for those without disabilities, mental or otherwise. The CRPD's aim is to radically change this position by ensuring that the fair trial rights of people with mental disabilities are respected and protected.

### 3 Right to self-representation for persons with mental disabilities under international law

The right to self-representation has been conceptualised under various international instruments. Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup> stipulates that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.<sup>23</sup>

It is clear from the above provision that every accused person has a right to self-representation. Regionally, article 8(2)(d) of the African Charter on Human and Peoples' Rights (African Charter)<sup>24</sup> and article 7 of the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities (African Disability Protocol)<sup>25</sup> ensures the rights of every accused person 'to defend himself personally'<sup>26</sup> and to 'equal recognition before the law' respectively.<sup>27</sup> In Europe, the right is

21 Art 2 CRPD.

22 International Covenant on Civil and Political Rights, adopted 16/12/1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 999 UNTS 171 (entered into force on 23 March 1976).

23 Art 14(3)(d) ICCPR.

24 The African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3/Rev.5 (1981) (entered into force on 21 October 1986).

25 Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities (African Disability Protocol) adopted 29 January 2018.

26 Art 8(2)(d) African Charter.

27 Art 7 African Disability Protocol.

contained in article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>28</sup> where all criminal defendants are guaranteed the right to defend oneself.<sup>29</sup> Finally, apart from the African Charter and the African Disability Protocol all the other international instruments have limited this right where 'the interest of justice so requires'.<sup>30</sup> Also, all of the instruments are not specific to persons with disabilities.

The main aim of the CRPD is to 'promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all person with disabilities and to promote respect for their inherent dignity'.<sup>31</sup> Kenya ratified the CRPD in 2008. By virtue of article 2(6) of the Constitution, the same now forms part of the laws in Kenya. That article stipulates that all the treaties and conventions which have been ratified by the Government of Kenya automatically form part of the country's laws even without enabling legislation. Persons with mental disabilities have a right of access to justice on an equal basis with the non-disabled. Moreover, the state has an obligation to ensure that persons with mental disabilities enjoy equal rights to legal capacity with others in all aspects of life. Article 12 of the CRPD provides at that:

- 1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- 2) States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- 3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- 4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
- 5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons

28 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 213 UNTS (entered into force 3/09/1953).

29 Art 6(3)(c) ECHR.

30 I Zavoli 'The right to self-representation in international criminal justice: Between legal fairness and judicial effectiveness' (2016) *diritto penale contemporaneo* 3.

31 Art 1 CRPD.

with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

In its 11th session, the Committee on the Rights of Persons with Disabilities (the Committee) which is the treaty-monitoring body of the CRPD, in its General Comment on Article 12 on Equal recognition before the Law defined legal capacity in the following terms;

Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise these rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.<sup>32</sup>

Simply put, 'legal capacity is the law's recognition of a person's decisions'.<sup>33</sup> By 'persons' it means both those with 'mental disabilities' which includes 'mental disorders' and those without.<sup>34</sup> The dominating attitude of judges and magistrates in the Kenyan judicial structure is fuelled by the medical model of disability which views disability as a defect which must be cured through medical intervention.<sup>35</sup> For example, in *Republic v CMW*<sup>36</sup> the court after finding the accused guilty, but insane, recommended that the country should build 'a Mental Asylum where persons with mental disabilities facing trial for various offences may be held, and consequently properly medically treated'.<sup>37</sup> Also, in *Leonard Mwangemi Munyasia v Republic*<sup>38</sup> the Court of Appeal held that 'insane' accused persons who are found guilty should 'be detained in a mental hospital, prison or other suitable place of safe custody'.<sup>39</sup> This reasoning is based on the medical model of disability. The CRPD eschews the medical model of disability and in its stead adopts the human-rights model which focuses on the diversity of PWDs and their interaction with 'attitudinal and environmental barriers'.<sup>40</sup>

32 General Comment 1 (n 6 above) par 13.

33 Mental Disability Advocacy Centre 'The right to legal capacity in Kenya' (2014) 18.

34 J Craigie 'Against a singular understanding of legal capacity: Criminal responsibility and the Convention on the Rights of Persons with Disabilities' (2015) 40 *International Journal of Law and Psychiatry* 6.

35 A Dube 'Protection of the rights of persons living with disabilities under the African human rights system' LLM Dissertation, University of Pretoria, 2007 7.

36 *Republic v CMW* [2018] eKLR.

37 *Republic v CMW* (n 36 above) para 48.

38 *Leonard Mwangemi Munyasia v Republic* (n 9 above).

39 As above.

40 Communication 22/2014, *X v United Republic of Tanzania*, CRPD Committee (31 August 2017) UN Doc CRPD/C/18/D/22/2014 para 7.6.

Regionally, one of the aims of the African Union (AU) towards the implementation of article 12 has been to encourage state parties to accord persons with disabilities their right to 'full recognition before the law' and 'effective access to justice on an equal basis with others'.<sup>41</sup> The main goal of the AU under this heading is to get member states to repeal or amend 'any guardianship and inheritance laws' which have in the past taken away the freedom to make choices for those with mental disabilities. In its place, states are urged to grant those with disabilities the requisite capacity to enter into 'legal contracts or take legal action' on their 'own behalf'.<sup>42</sup>

As seen above, the removal of barriers with regard to legal capacity enhances the right to self-representation for persons with mental disabilities. Therefore, the CRPD presupposes that by virtue of being human beings, persons with disabilities must be allowed to 'enjoy the right to access the civil and judicial system and the independence to speak on one's own behalf'.<sup>43</sup> The concept of 'universal capacity' has caused a lot of controversy within the academic community. For example, Christopher Slobogin and Tina Minkowitz support the interpretation that allows for capacity in all aspects of life while others like Michael Bach and Lana Kerzner argue for a narrow approach which should be limited to one's 'ability to express an intention'.<sup>44</sup> When it comes to the issue of self-representation in court for persons with mental disabilities, the same fierce debates have been advanced.<sup>45</sup> In most jurisdictions like the United States, defendants with 'severe mental illness' will be denied the right to self-representation since they are considered incompetent to advance any meaningful defence while in that condition.<sup>46</sup> In such a situation, the CRPD makes provision for the use of 'supported decision-making' models.

The CRPD recognises that every person is an autonomous being with the ability to choose the course of their own lives.<sup>47</sup> However, in certain instances, an individual may require some support in order to fully exercise their legal capacity. That means that they need a certain degree of assistance in order to realise their rights.<sup>48</sup> This kind of assistance is usually

41 The Kenya National Commission on Human Rights (KNCHR) 'A briefing paper on implementing article 12 of the Convention on the Rights of Persons with Disabilities regarding legal capacity in Kenya' (2016) 16.

42 As above.

43 KNCHR (n 41 above) 18.

44 C Slobogin 'Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disabilities on the insanity defence, civil commitment, and competency law' (2016) 40 *Law and Psychology Review* 319; T Minkowitz 'Rethinking criminal responsibility from a critical disability perspective: The abolition of insanity/incapacity acquittals and unfitness to plead, and beyond' (2014) 23 *Griffith Law Review* 443; Craigie (n 34 above).

45 EL Johnston 'Communication and competence for self-representation' (2016) 84 *Fordham Law Review* 2121-2126.

46 Johnston (n 45 above) 2126.

47 N Devi et al 'Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5 *European Journal of Disability Research* 254.

48 Craigie (n 34 above).

offered by a support person depending on the circumstances of the individual. In a court setting, this person will assist those with mental disability to participate fully during the proceedings. Around the globe, most countries have made an effort towards implementing and incorporating the use of support persons in their domestic laws.<sup>49</sup> Kenya is yet to do so. Some of the reasons why this is so includes the lack of political goodwill, limited understanding of the CRPD's provisions, corruption and inadequate resources.

#### **4 Implementing the right to self-representation for persons with mental disabilities in Kenya**

The laws of Kenya are structured to take away the decision-making capacity of persons with mental disabilities.<sup>50</sup> Those laws are still grounded on a 'system of substitute decision-making' where decisions are made on behalf of persons with mental disabilities.<sup>51</sup> An example of this scheme is the guardianship system which is contained in laws such as the Mental Health Act, Children's Act and the Civil Procedure Act and Rules<sup>52</sup> of 1924 (Civil Procedure Act).

The Civil Procedure Act<sup>53</sup> and the Civil Procedure Rules of 2010 (Civil Procedure Rules) provide for the procedure of filing and instituting civil proceedings in Kenya. Section 93 of the Civil Procedure Act provides that all consents and agreements made by a person with a disability should not be done without the permission of the court. An application for permission can only be made by the next-friend or guardian of the suit. With regard to the Civil Procedure Rules, Order 4 rule 1(e) requires plaintiffs and defendants of 'unsound mind' to make a written declaration to that effect. In Order 10 rule 1 the plaintiff may make an application for the appointment of a guardian where a defendant of unsound mind has failed to enter an appearance.<sup>54</sup> Lastly, order 32 rule 15 provides for the procedure of appointing a guardian or next friend on behalf of a person of unsound mind.<sup>55</sup> The position is the stark opposite of what is required under the CRPD. It requires state parties to abolish all forms of substituted decision-making regimes and ensure the restoration of legal capacity to persons with mental disabilities.<sup>56</sup>

49 Devi et al (n 47 above) 254.

50 KNCHR (n 41 above).

51 As above.

52 Chap 21.

53 As above.

54 Order 10 rule 1 Civil Procedure Rules 2010.

55 Order 32 rule 15 Civil Procedure Rules 2010.

56 General Comment 1 (n 6 above) par 7.



In criminal proceedings the situation is equally appalling. Sections 162-164 and 280 of the Criminal Procedure Code<sup>57</sup> of 1930 detail the procedure for determining whether an individual is of 'unsound mind'. Under these provisions, any person who is declared to be of unsound mind is not allowed to represent himself or herself or be represented by an advocate unless he or she is declared fit to stand trial. Instead, they will be indefinitely remanded in safe custody in serious non-bailable cases or released on bail on the condition that they will be adequately taken care of until such a time when they will be pronounced fit to stand trial. The Committee in the case of *Noble vs Australia*<sup>58</sup> (*Noble's Case*) considered a related provisions in Australia's Mentally Impaired Defendants Act of 1996 which required the detention of persons with mental disabilities who are unable to understand the proceedings indefinitely until such a time when they will be declared fit to plead.<sup>59</sup> The Committee found the provisions to be discriminatory and a violation of rights under articles 12(3) (legal capacity), 13(1) (access to justice), 14(1) (liberty), and 15 (freedom from torture) of the CRPD.<sup>60</sup>

Lastly, the Kenyan Evidence Act<sup>61</sup> of 1963 (Evidence Act) is the main legislation that regulates the procedure of giving and receiving evidence in court. Section 2(1) of the Evidence Act provides that it applies to 'all judicial proceedings in or before any court'. It is also the law that is concerned with a witnesses' competence to testify in court. With regard to those with mental disabilities, the law provides that they are 'not incompetent to testify'.<sup>62</sup> However, where the disability prevents them 'from understanding the questions put to' them 'and giving rational answers' then they will not be allowed to give evidence in court.<sup>63</sup> In short, their right to enjoy legal capacity is pegged on their ability to understand questions and give rational answers. Those provisions are in contrast to article 12 of the CRPD which requires states to recognise that persons with mental disabilities have 'the right to enjoy legal capacity on an equal basis with others in all aspects of life'. Moreover, the Constitution of Kenya mandates the state and its people to treat all persons with disabilities with 'dignity and respect'.<sup>64</sup> Therefore, in order to effectively implement the provisions of article 12 of the CRPD, Kenya should endeavour to adopt one or more types of supported decision-making methods such as the

57 Chap 75.

58 Communication No 7/2012, views adopted at its sixteenth session (2 September 2016) UN Doc CRPD/C/16/D/7/2012 (10th October 2016).

59 Concluding observations on the initial report of Kenya, CRPD Committee (30 September 2015) UN Doc CRPD/C/KEN/CO/1 (2015) para 30(b).

60 *Noble v Australia* (n 58 above) paras 8.6, 8.7, 8.8 and 8.9.

61 Chap 60.

62 Sec 125(2) of the Evidence Act Chapter 60 Laws of Kenya.

63 As above.

64 Art 54(1)(a) Constitution of the Republic of Kenya.

formal or intermediary or communication-assistant schemes<sup>65</sup> and the use of communication aids.

#### 4.1 The intermediary or communication assistants' schemes

The Constitution makes provision for the appointment of intermediaries for purposes of assisting 'a complainant or an accused person to communicate with the court'.<sup>66</sup> Unfortunately, the government is yet to formulate any guidelines relating to the appointment and qualifications of such intermediaries. Also, according to the Constitution the appointment of these intermediaries is limited to criminal proceedings. The Sexual Offences Act 3 of 2006 (Sexual Offences Act) also makes provision for the appointment of intermediaries who include any:<sup>67</sup>

[P]erson authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker.

The scheme under the Sexual Offences Act is only limited to witnesses and not accused persons. Section 31 has granted to the court the power to declare a witness 'vulnerable' where that witness is among others a 'person with mental disabilities'. Further, the court is allowed to call any intermediary who will advise it on the vulnerability of such witnesses. However, the court will not convict an accused person solely on the uncorroborated evidence of an intermediary.

The other challenge with the application of this scheme in Kenya relates to the interpretation of the role of intermediaries among different judicial officers. The judicial hierarchy in Kenya consists of superior courts and subordinate courts. The former is made up of the Supreme Court, Court of Appeal, and the High Court in the order of seniority, while the latter is made up of the Magistrates' Courts and Kadhis Courts. The decisions of the Court of Appeal are binding on the High Court. Some judges have stated that the testimony of the intermediary should be substituted with that of the witness.<sup>68</sup> According to them, intermediaries are witnesses who speak on behalf of vulnerable witnesses and not through them. For example in *Kennedy Chimwani Mulokoto v Republic*<sup>69</sup> the court held that;

When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl. Section 31(7) recognizes the fact

65 Melbourne Social Equity Institute 'Addressing the indefinite detention of people with cognitive and psychiatric impairment due to unfitnes to plead laws' (2016) 9.

66 Sec 50(7) Constitution of the Republic of Kenya.

67 Sec 2 of the Sexual Offences Act 3 of 2006.

68 *Kennedy Chimwani Mulokoto v Republic* Eldoret High Court Criminal Appeal 51 of 2011.

69 As above.

that a vulnerable witness can be allowed to give evidence through an intermediary. Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible.

Similarly in *Francis Ogoti Otundo v Republic*<sup>70</sup> the court held on the role of an intermediary that:

Article 50(7) of the Constitution provides that in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. I believe that if the complainant or accused person is unable to articulate or explain herself well, then an intermediary can be allowed to do so.

Is an intermediary simply a mouth piece of the vulnerable witness or is he or she the witness?<sup>71</sup> That question was answered by the Kenyan Court of Appeal in the case of *MM v Republic*.<sup>72</sup> The Appeals' Court faulted the positions in *Kennedy Chimwani Mulokoto v Republic* and *Francis Ogoti Otundo v Republic*. In its place the Court of Appeal responded by holding that an intermediary testifies through the witnesses and not on their behalf. That means that:

[A]n intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from an unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.

The word through is used also in subsection 4 (b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

Similarly, in the case of *Republic v Elijah Weru Mathenge*,<sup>73</sup> the accused who had been charged with the offence of murder contrary to section 203 as read with section 204 of the Kenyan Penal Code was diagnosed with psychogenic conversion disorder with aphonia which resulted in him

70 Criminal Revision 397 of 2012.

71 As above.

72 Criminal Appeal 41 of 2013.

73 [2017] eKLR.

losing his voice while in custody. The court, in an attempt to safeguard the accused person's right to participation in his trial ruled in favour of the appointment of an intermediary. Moreover, the court affirmed the position in *MM v Republic*.<sup>74</sup> How does this position stand in comparison to the intermediary schemes in England, South Australia, and New Zealand?

According to the English model, intermediaries are registered and are tasked with the function of facilitating communication between witnesses and the court.<sup>75</sup> They are used in assisting the following three categories of persons: children, adults with mental disabilities who may experience difficulties when testifying in court, and adults with other forms of physical disabilities.<sup>76</sup> Registered intermediaries may include: speech and language therapists, teachers, psychologists, occupational therapists, nurses, and social workers.<sup>77</sup> They may take part in the relevant proceedings and translate information or 'indicate to the court any questions that require rephrasing'.<sup>78</sup> Most importantly, an intermediary in this model is not a witness, supporter, or an interpreter.<sup>79</sup> Those functions are provided for in section 29(2) of the Youth Justice and Criminal Evidence Act of 1999. That legislative scheme was available only to witnesses. However, in *C v Sevenoaks Youth Court*<sup>80</sup> the High Court of England extended its applicability to defendants in order to ensure their right to a fair trial.<sup>81</sup>

In South Australia, the use of intermediaries was introduced through the enactment of the Statute Amendment (Vulnerable Witnesses) Act of 2015 (Vulnerable Witnesses Act). That scheme allowed for the assistance of those with communication disabilities in court.<sup>82</sup> In fact according to section 14A(3) of the Evidence Act of 1929, communication aids of this nature are available to all people with 'communication needs'. In this system a communication assistant is usually employed and assistance may be accorded to a witness, defendant or victims.<sup>83</sup> Communication assistants are to be appointed by the minister in charge of implementing the Vulnerable Witnesses Act.<sup>84</sup> Certain devices like the speak and spell communication gadgets may also be used to assist.<sup>85</sup> The main role of the

74 n 72 above.

75 P Bowden et al 'Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: An impossible triangulation?' (2014) 37 *Melbourne University Law Review* 539 572.

76 Tasmania Law Reform Institute 'An intermediary/communication assistant scheme for Tasmania?' (2018) 52.

77 As above, 53.

78 Bowden (n 75 above) 572.

79 As above.

80 [2010] 1 All ER 735 742.

81 Melbourne Social Equity Institute (n 65 above) 11.

82 Tasmania Law Reform Institute (n 76 above).

83 As above.

84 As above.

85 As above.

communication assistants is to act a 'quasi-interpreters' for the witnesses and defendants.<sup>86</sup>

In New-Zealand, section 80 of the Evidence Act 2006 makes provision for the use of intermediaries for both witnesses and defendants with mental disabilities. The form of assistance can take various forms which may either be oral, written or technological depending on the circumstances.<sup>87</sup> In *R v Hetherington*<sup>88</sup> the Court of Appeal in New-Zealand affirmed the use of an intermediary for a witness with Down syndrome. While doing so the court stated that;

The accused's right to a fair trial is a keystone of our criminal justice system. It is not the only keystone. People with intellectual difficulties and challenges should be able to come to our Courts and present their evidence in a way that is tailored to their needs to ensure that the trier of fact ... can be as confident as possible that the answers are true answers, that is as to what occurred, rather than the witness being confused and challenged by the questions being asked.

Therefore, the function of the interpreters is mainly to ensure that those with communication difficulties understand the proceedings and respond effectively and efficiently.

From the above brief analysis of the three jurisdictions, it is clear that intermediaries/ communication assistants only play assistive roles. What happens when an intermediary acts beyond what is lawfully accepted? In *R v Christian*<sup>89</sup> the court had an opportunity to determine this issue. There, the intermediary noticed that the witness was distressed during cross-examination. She decided to put her arm around the witness and asked counsel to lower the tone of her voice. That was done in the presence of the jury. Those comments and her actions aggrieved the accused who later argued that the intermediary had violated his right to a fair trial. However, his assertions were rejected and the court held that the actions of the intermediary were not serious enough to prejudice the rights of the accused. Every case will depend on its own peculiar circumstances. Intermediaries are not witnesses. Their work is only to explain questions to the witnesses or defendants and then state their answers back to the trier of facts. Therefore, they do not testify on behalf of the witnesses as suggested in the cases of *Kennedy Chimwani Mulokoto v Republic* and *Francis Ogoti Otundo v Republic* as seen earlier. The intermediary scheme in Kenya is still not in tandem with the requirements of article 12 of the CRPD mainly because the scope of the scheme is only limited criminal proceedings and not to civil proceedings. The position is exacerbated by a

86 As above.

87 Tasmania Law Reform Institute (n 76 above) 64.

88 [2015] NZCA 258.

89 [2015] EWCA Crim 1582.

lack of guidelines which provides for the procedure for appointment, qualifications, and functions of intermediaries.

## 4.2 Aids to communication

Aids to communication may mean the use of augmentative and alternative communication (AAC) methods such as using 'picture exchange communication systems (PECS), Makaton signing, or speech-generating devices (SGDs)'.<sup>90</sup> These methods are usually used to complement the natural speech of an individual. In Kenya, section 26 of the Evidence Act Chapter 60 (Evidence Act) stipulates that:

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open court.

Therefore, the court has been granted the discretion to adopt any special measures geared towards improving the quality of testimony for those witnesses who are unable to speak. However, that provision is limited only to those without functional speech. There is no correspondent provision for those with mental disabilities. Similarly, the country lacks an express provision for the use of alternative communication methods in order to assist those with mental disabilities. That does not mean that our courts should just lie in wait for parliament to enact one as those with disabilities continue to be marginalised and denied their rights. This is in tandem with the finding in the 1988 United States case of *People vs Miller*<sup>91</sup> where the court urged that;<sup>92</sup>

Just because a procedure is unusual does not mean that it should not take place in a courtroom. The courts today should make every effort to open their door to all who seek to come through them. We can no longer take the attitude that if it has not been done in the past, it should not be done in the future. The age-old stereotyping of people with physical or mental disabilities or a combination of both should be dispensed with as soon as possible. The courts have come out of the dark ages with respect to the treatment of the deaf and hearing impaired, and we should likewise do so with respect to other physical and mental disabilities. If the power to appoint an interpreter in cases of an unusual disability does not exist directly by statute, then it does by statutory interpretation.

Therefore, courts have a wide discretion when it comes to the interpretation of the law. They should endeavour to ensure that persons with mental disabilities receive a fair hearing as their non-disabled

90 J Doak & L Doak 'Non-verbal victims in the adversarial criminal process: Communication, competency, and credibility' (2017) 4 *Northern Ireland Legal Quarterly* 453.

91 530 N.Y.S.2d 490 (City Ct Rochester Cty 1988).

92 As above.

counterparts. Their evidence should not be disregarded or excluded merely because they are unable to understand questions or give rational answers to them. The state should employ mechanisms which will facilitate their communication in court. In the United States such technologies have been employed successfully without infringing on the rights of any other parties involved. For example in *Commonwealth v Tavares*<sup>93</sup> a witness with cerebral palsy was allowed to testify through 'a speak-and-spell communication device'.<sup>94</sup> Kenya should employ and adapt some of these procedures in its own systems. 'A fair trial cannot be realised where an accused person does not understand the import of the criminal proceedings'.<sup>95</sup> Therefore, courts must ensure that those with cognitive or mental disabilities are able to understand judicial proceedings and participate affectively.

## 5 Conclusion and recommendations

Kenya is lagging behind when it comes to ensuring the right to self-representation for those with mental disabilities. Our judicial system is ridden with some of the most egregious abuses against people with mental disabilities. Our laws are outdated and most of them are still based on the supposition that disability and lack of capacity are intertwined. The lack of guidelines and rules to protect and ensure that those with mental disabilities are adequately assisted when testifying in court has compounded the matter further. Fortunately, not everything is lost. The country has tremendous opportunity to change the present situation by giving effect to article 12 of the CRPD. The revolutionary concept of supported decision-making envisages a situation where everyone has the capacity to make decisions and participate fully in all aspect of their lives including judicial proceedings. It is the only way through which persons with disabilities will live and exercise their rights on an equal basis with the rest of the society.

Therefore, it is important for the state to repeal all substituted decision making laws and replace them with supported decision-making provisions whose aim is to enhance the legal capacity of accused persons with mental disabilities so that they are able to effectively represent themselves. In order to do this, practical measures such as the use of communication assistants, intermediaries, and assistive devices such as the speak and spell communication gadgets may be employed. The state should also promote more awareness on the provisions of the CRPD by training policymakers, judicial officers, prosecutors and police officers.

93 555 A.2d 199 (Pa. Super. Ct. 1989).

94 DN Bryen & C Wickman 'Ending the silence of people with little or no functional speech: Testifying in court' (2011) 31 *Disability Studies Quarterly*.

95 *Rabonko v The State* [2006] 2 BLR 166 168C-D.