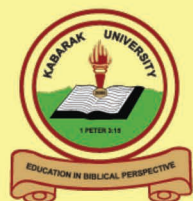


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# The Implementation of Article 12 of the Convention on the Rights of People with Disabilities in Kenya

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## Abstract

Equality and non-discrimination before the law are fundamental human rights principles enshrined in both international and regional human rights instruments. However, earlier human rights instruments did not expressly protect persons with disabilities from discrimination and, therefore, they were regarded as objects of charity, rather than subjects of human rights. Through the years, the law has developed to provide better protection for persons with disabilities, culminating in the ratification of the Convention on the Rights of People with Disabilities (CRPD). Article 12 of the CRPD provides for the right to equal recognition before the law for persons with disabilities which entails the right to legal capacity. This provision reflects a long established and non-derogable human rights principle also enshrined, for example, in article 16, as read together with article 4 (2), of the International Covenant on Civil and Political Rights (ICCPR).

Despite the significant development of legal protection, the implementation of the right to legal capacity for persons with disabilities leaves a lot to be desired. Many jurisdictions conflate legal capacity with mental capacity, the latter of which is a controversial concept. The result of such conflation

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is that persons with disabilities are denied the right to make personal decisions and to participate in judicial proceedings, on the basis that they lack the requisite mental capacity. Such denial of the right to make decisions constitutes a violation of the long established and non-derogable right to legal capacity enshrined in article 12 of the CRPD.

The paper discusses the implementation of article 12 of the CRPD in Kenya. It examines the conflation of legal capacity and mental capacity for persons with disabilities and interrogates the approaches employed in the determination of mental capacity. Furthermore, the paper examines different Acts of Parliament in Kenya and discusses their level of compliance with article 12 of the CRPD. Lastly, the paper recommends measures that maybe implemented to safeguard the right to legal capacity for persons with intellectual and/or psychosocial disabilities in Kenya.

## 1.0 Introduction

Equality before the law is one of the most fundamental principles of human rights law and is enshrined in most of the major human rights instruments. For example, article 7 of the Universal Declaration of Human Rights (UDHR) provides that: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law.’ This refers to equal treatment before the law without regard to gender, race, nationality, ethnicity, religion, colour and disability, among other criteria; and without discrimination, prejudice or bias. A similar provision is found in article 26 of the International Convention for Civil and Political Rights (ICCPR).<sup>1</sup>

Regionally, article 3 of the African Charter on Human and Peoples’ Rights (African Charter), and article 3 of the American Convention on Human Rights also provide for equality before the law and non-discrimination generally. Other human rights instruments which provide for non-discrimination include the Convention

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<sup>1</sup> Art 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It also prohibits discrimination and guarantees protection from discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>2</sup> the Convention on the Elimination of All Forms of Racial Discrimination<sup>3</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>4</sup> Equality before the law is a universally accepted principle of human rights as evidenced by the fact that about 163 constitutions of countries all over the world contain provisions on equality before the law and non-discrimination.<sup>5</sup> However, its implementation remains challenging. Discrimination based on race, gender, nationality, religion, and disability persists. In the words of Quinn, the world seems content with ‘professing one set of values and treating people in exactly the opposite manner.’<sup>6</sup>

This paper examines the implementation of article 12 of the CRPD in Kenya and will focus mainly on one aspect of equality before the law: the right to legal capacity as set out in Article 12 (3). Part one of the article, the current part, contains an introduction of the issue at hand. Part two deals with normative provisions of article 12 of CRPD and the interpretation of the same. Part three discusses the concept of mental capacity as is often conflated with legal capacity and the approaches for determining mental capacity and how these have been employed to the disadvantage of persons with disabilities. In this discussion, reference is made to various Kenyan Acts of Parliament containing provisions which seem to conflate mental capacity and legal capacity contrary to article 12 of the CRPD. Part 4 discusses mechanisms that may be adopted to safeguard the right to legal capacity of persons with disabilities in Kenya.

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<sup>2</sup> Art 15.

<sup>3</sup> Arts 1, 2, 4 and 5.

<sup>4</sup> Arts 3, 4, 5 and 16.

<sup>5</sup> For example: Arts 6 and 8 of the Afghanistan Constitution 2004, Art 21 of the Constitution of Albania, Art 1998 (rev. 2012), Art 31 of the Constitution of Algeria 1989 (reinst. 1996, rev. 2008), Arts 1, 3, 6 and 10 of the Constitution of Andorra 1993, Arts 1, 12, 21 of the Constitution of Angola 2010, Art 75 of the Constitution of Argentina 1853 (reinst. 1983, rev. 1994), Art 7 of the Constitution of Austria 1920 (reinst. 1945, rev. 2013) and Arts 25 and 127 of the Constitution of Azerbaijan 1995 (rev. 2009), just to mention a few. The complete list of the 163 Constitutions containing provisions on equality can be viewed at: ‘Read about “Equality” on Constitute’ <<https://www.constituteproject.org/search?lang=en&q=Equality>> accessed 17 June 2017.

<sup>6</sup> Gerard Quinn, ‘The United Nations Convention on the Rights of Persons with Disabilities – What Role for Philanthropy?’ (2010) <[http://www.nuigalway.ie/cdlp/staff/gerard\\_quinn.html](http://www.nuigalway.ie/cdlp/staff/gerard_quinn.html)> accessed 21 June 2017.

## 2.0 Normative Provisions and Interpretation of Article 12 of the CRPD

In 2006, at the end of the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on and Promotion of the Rights and Dignity of Persons with Disabilities, a paper containing this information was circulated among the delegates:

Imagine if someone else was making decisions for you. They could decide to take you away, lock you up, not listen to you, give you medication, block you from doing your work and living your life with your body and mind the way they are. Would you want this to happen to you? Wouldn't you have the feeling that you have lost your dignity and want it back? Wouldn't you feel like your integrity has been violated? Wouldn't you want to have support in making decisions without being taken over and to ask for help without being seen any less for it? Wouldn't you want to maintain your inherent dignity and be supported to make your own decisions? Wouldn't you want to retain your integrity and continue to be you? Would you want a Convention that allows forced interventions and does not respect your inherent dignity as a person? The principles established in this convention are universal and will apply to all human beings as much to you as to me. Let us make a Convention for a world where we can all grow and develop with mutual support. Imagine a Convention for all.<sup>7</sup>

It is reported that these words made the delegates think about the plight of people with disability and paved the way for the adoption of article 12 of the CRPD.<sup>8</sup>

The *raison d'être* of article 12 of the CRPD is to protect the dignity and integrity of persons with disabilities by ensuring they are treated equally before the law. It ensures that they are not denied the right to make decisions that affect their lives based on their disability. The article protects persons with disabilities from caregivers who may want to make decisions on behalf of persons with disabilities, and instead provides that the persons with disabilities should be supported, to the extent necessary, to make their own decisions and exercise their right to legal capacity. More importantly, the article provides for recognition before the law and equality of all persons with disabilities and stipulates that states should provide support, if required, to ensure that persons with disabilities exercise the right to legal capacity.

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<sup>7</sup> Lex Grandia, *Human Rights and Disability Advocacy* (Marianne Schulze and Maya Sabatello eds, University of Pennsylvania Press 2013) 154.

<sup>8</sup> Grandia (n 7) 155.

## 2.1 *Right to Recognition before the Law*

Article 12 (1) provides that persons with disabilities have the right to recognition everywhere as persons before the law. This reflects provisions in article 6 of the UDHR and article 16 of the ICCPR, both which provide that all persons have the right to be recognized as persons by law everywhere. The interpretation given to the word ‘everywhere’ in article 12 (1) is that: ‘there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.’<sup>9</sup> The right to recognition by the law is non-derogable.

## 2.2 *Right to Legal Capacity*

Article 12 (2) provides for the right to legal capacity for disabled persons, on an equal basis with others, in all aspects of their lives. The article obligates State Parties to recognise and take positive steps to guarantee the right to legal capacity. Legal capacity has two prongs: the first is the right to be recognized as a legal person before the law; and the second is the right to make legally binding decisions.<sup>10</sup> In other words, legal capacity involves both holding the right and acting on the right in a manner that is recognized by the law.

The first prong, holding the right, is less problematic because human rights instruments and most Constitutions in the world entitle all persons to equality before the law and to recognition as persons before the law. However, the second prong - the right to make legally binding decisions - is more problematic. This is partly because legal capacity is often conflated with mental capacity which is a controversial concept determined differently in various jurisdictions.<sup>11</sup>

There are three approaches for determining mental capacity: status approach, outcome approach and functional approach.<sup>12</sup> First, according to the status

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<sup>9</sup> UN Committee on the Rights of Persons with Disabilities, ‘General Comment on the Convention on the Rights of Persons with Disabilities’ (Committee on the Rights of Persons with Disabilities 2014) General comment No 1 (2014) CRPD/C/GC/1 para 5.

<sup>10</sup> Alison Douglass, ‘Mental Capacity Updating New Zealand’s Law and Practice’ (*The Law Foundation New Zealand*) <[http://www.aspenltd.co.nz/mc/1\\_A.html](http://www.aspenltd.co.nz/mc/1_A.html)> accessed 17 June 2017.

<sup>11</sup> Douglass (n 10); Elizabeth Kamundia, ‘How to Implement Article 12 Of Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper’ (2013) The Kenya National Commission on Human Rights and The Open Society Initiative for Eastern Africa <<http://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf>> accessed 18 June 2017.

<sup>12</sup> Dave Powell, ‘Sexual Offences and Mental Capacity House of Lords’ (2010) 74 *Journal of Criminal Law* 104, 106.

approach, a disabled person is considered to lack the cognitive ability to make their own decisions based on their disability.<sup>13</sup> Their very status as a disabled person is relied on to render them incapable of making legally binding decisions. This clearly violates article 12, which requires states to provide support for persons with disabilities which does not substitute their decision-making.

Second, in the outcome approach, the reasonableness or correctness of the decisions made by the person with disability is assessed to determine whether they are competent to make decisions.<sup>14</sup> This approach is discriminatory because it holds persons with disabilities to a high standard by not allowing them to make mistakes, or decisions that may be considered unreasonable or contrary to conventional thinking. This also goes against article 12 which provides that persons with disabilities should be supported in their decision-making, if necessary, in a manner that protects their wills and preferences.

Third, in the functional approach, the question asked is whether the person concerned is capable of making a specific decision at a specific time and in a particular context.<sup>15</sup> Therefore, their mental capacity is neither present nor absent but is dependent on the specific task at hand.<sup>16</sup> This approach is the one which is most in conformity with article 12 of the CRPD because a person's mental capacity is not permanently decided. Instead, the decision to provide support for the person is made on a case by case basis.

### **2.3 Support in Exercising Legal Capacity**

Article 12 (3) requires State Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Such support should not amount to substitute decision-making but must respect the will and preferences of the persons with disability.<sup>17</sup>

### **2.4 Safeguards to Prevent Abuse of Rights**

Article 12 (4) requires State Parties to provide safeguards to prevent abuse during the exercise of the right to legal capacity of persons with disability. These

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<sup>13</sup> Douglass (n 10).

<sup>14</sup> Eulen E Jang, 'Mental Capacity: Reevaluating the Standards Notes' (2014) 43 Georgia Journal of International and Comparative Law 531, 543.

<sup>15</sup> Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer 2017) 67.

<sup>16</sup> Purser (n 15) 67.

<sup>17</sup> General Comment No. 1 (n 9) para17.

safeguards should ensure that the rights, will and preferences of the affected persons are respected and that the exercise of the right is free of conflict of interest and undue influence. The right should be exercised in a manner that is proportional and tailored to the circumstances of the affected person. Such safeguards should apply within the shortest time possible and be subject to review by a competent and impartial authority or judicial body.<sup>18</sup>

Persons with disabilities are at a higher risk of suffering from pressure, violence, undue influence and other forms of abuse from other people, including their care providers. Therefore, States Parties should see to it that the support provided is not only proportional to the need but also takes into account the wills and preferences of the person.<sup>19</sup> In case of doubt, the focus should be on the will and preferences of the person instead of the best interest principle.<sup>20</sup>

## **2.5 Property Rights**

Finally, article 12 (5) provides that States Parties shall take measures to ensure that persons with disabilities enjoy the equal rights to own or inherit property and are not arbitrarily deprived of their property. Under the same provision, persons with disabilities also have a right to control their own financial affairs and the right to equal access to bank loans, mortgages and other forms of financial credit. The right to legal capacity cannot be enjoyed by persons with disabilities if they are prevented from making financial decisions on an equal basis with others.

Article 12 encompasses all the general principles applicable to the CPRD as outlined under article 3 of the same.<sup>21</sup> These are: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities. This right is non-derogable.<sup>22</sup> If the right to legal capacity is denied,

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<sup>18</sup> Art 12 (4).

<sup>19</sup> Anna Nilsson and others, 'Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities' <[https://works.bepress.com/anna\\_nilsson/1/](https://works.bepress.com/anna_nilsson/1/)> accessed 14 June 2017.

<sup>20</sup> Nilsson and others (n 19) 11.

<sup>21</sup> General Comment No. 1 (n 9) para 4.

<sup>22</sup> General Comment No. 1 (n 9) para 4.



other fundamental rights including: the right to vote, right to family, reproductive rights, consent to sexual intimacy, right to own and manage property, right to make decisions on medical treatment, and right to liberty - are also denied.<sup>23</sup>

### 3.0 Implementation of Article 12 of the CRPD in Kenya

#### 3.1 *The Position of the CRPD within the Laws of Kenya*

The Kenyan Constitution 2010 (the Constitution) is the supreme law in Kenya.<sup>24</sup> Article 2 (6) of the Constitution provides that any treaty or convention ratified by Kenya forms part of the laws of the Republic. Kenya ratified the CRPD in 2008 and, therefore, it forms part of the laws of Kenya. However, in some cases, Kenyan Courts have shied away from interpreting the CRPD.<sup>25</sup> The exception occurred in the case of *Wilson Morara Siringi v Republic*<sup>26</sup> where the Court reaffirmed the position of the CRPD in the laws of Kenya. The circumstances were as follows: an appeal was lodged against a decision from the lower court convicting the Appellant of the rape of a person with disability. During the proceedings in the lower court, the Prosecution and the Magistrate referred to the complainant as a 'mentally retarded' person who was unable to consent to sex by virtue of her disability. Judge Majanja held that the use of that term 'mentally retarded' was against article 12 of the CRPD. He stated as follows:

In conclusion I would be remiss if I did not mention that the approach taken by the prosecution and the learned magistrate is that the complainant is an object of social protection rather than a subject capable of having rights including the right to make the decision whether to have sexual intercourse. This approach is inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognise persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others. Kenya ratified this Convention in 2008 and by dint of Article 2(6) of the Constitution it forms part of the law of Kenya.<sup>27</sup>

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<sup>23</sup> General Comment No. 1 (n 9) para 31.

<sup>24</sup> Art 2 of the Constitution.

<sup>25</sup> This is demonstrated for example in the cases of: *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya)* [2012] eKLR and *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others* [2011] eKLR. In both cases, the Petitioners alleged violations of the CRPD, but the Court failed to deal with this issue in the judgments and instead limited itself to national law.

<sup>26</sup> *Wilson Morara Siringi v Republic* [2014] eKLR.

<sup>27</sup> *Wilson Morara Siringi v Republic* (n 26) [15].

In line with the CRPD, article 27 of the Constitution provides that: ‘Every person is equal before the law and has the right to equal protection and equal benefit of the law’. It also provides for a right to be free from discrimination based on many criteria including disability. The Constitution also provides for special entitlements for persons with disabilities for example the right to: be treated with dignity and respect; to access educational institutions and to access places, public transport and information; to use braille, sign language and other forms of communication; and, to access other material which would enable them overcome constraints arising from disability.<sup>28</sup> Furthermore, the State is required to ensure that at least five percent of the persons in elective and appointive posts are persons with disabilities.<sup>29</sup> In addition to the Constitution, the Persons with Disabilities Act also provides for many guarantees to promote and protect the rights of persons with disabilities.<sup>30</sup>

In other words, Kenyan law provides for equality before the law, the right to legal capacity, and non-discrimination for persons with disabilities in conformity with article 12 (1) and (2) of the CRPD, and other human rights instruments. However, many laws in Kenya condition the exercise of legal capacity on being ‘of sound mind’.<sup>31</sup> This is problematic for at least three reasons. First, the term ‘unsound mind’ is not defined anywhere in the laws of Kenya and therefore leaves it open to abuse.<sup>32</sup> Secondly, the laws of Kenya do not set objectively ascertainable criteria for determining whether a person is of unsound mind and there is no process for review or appeal of such decision.<sup>33</sup> Thirdly, many Acts in Kenya provide that people of unsound mind are incapable of making various legally binding decisions including getting married, which proves that the concepts of legal capacity and mental capacity are conflated.<sup>34</sup> This then leads to the denial of legal capacity based on disability in contravention with article 12 of the CRPD.

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<sup>28</sup> Art 54 (1).

<sup>29</sup> Art 54 (2).

<sup>30</sup> Persons with Disabilities Act 2003 (rev. 2016).

<sup>31</sup> United Disabled Persons of Kenya, ‘Status of the Human Rights of Persons with Disabilities in Kenya: A Shadow Report to the Initial Report on the United Nations Convention on the Rights of Persons with Disabilities (CRPD) to the UN Committee on the Rights of Persons with Disabilities’ (2015) 41 <[http://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/United\\_Disabled\\_Persons\\_of\\_Kenya\\_Shadow\\_Report.pdf](http://www.globaldisabilityrightsnow.org/sites/default/files/related-files/260/United_Disabled_Persons_of_Kenya_Shadow_Report.pdf)> accessed 4 October 2017.

<sup>32</sup> See discussions of the various applicable laws of Kenya in United Disabled Persons of Kenya (n 31) 36.

<sup>33</sup> See part 3.2 below.

<sup>34</sup> See for example the Marriage Act, the Law of Succession Act, the Penal Code, and the Criminal Procedure Code discussed in part 3.2 below.

### 3.2 *Legal Capacity as Conflated with Mental Capacity in Kenyan Law*

#### 3.2.1 The Constitution

Although article 27 of the Constitution provides for equality before the law for all, including persons with disabilities, some articles in the Constitution seem to be in contravention with this principle. To begin with, article 38 of the Constitution states *inter alia* that every adult Kenyan citizen has a right, without unreasonable restrictions, to register as a voter, to vote and to be a candidate in an election and hold office upon election. The Constitution does not define the term 'unreasonable restrictions'. However, this article may be read together with article 25 of the ICCPR, which forms part of the laws of Kenya.<sup>35</sup> The Human Rights Committee, in its interpretation of article 25 of the ICCPR stated that it is unreasonable to restrict the right to vote on the basis of physical disability but does not mention mental or psychosocial disability.<sup>36</sup>

In this regard, article 83 (1) (b) states that a person qualifies to be registered as a voter if (s)he is not declared to be of unsound mind. On a positive note, section 29 of the Persons with Disabilities Act provides that persons with disabilities can be provided with support, upon request to enable them to participate in presidential, parliamentary and county elections. The section further provides that the person who provides support is to do so strictly in accordance with the instructions of the voter. This provision seems to conform to article 12 (3) of the CRPD.

However, the Constitution provides that a person is disqualified from being voted as president, governor, senator, member of parliament, or member of county assembly, if (s)he is of unsound mind.<sup>37</sup> These provisions are problematic on at least three levels. The first, as stated above, is that the term unsound mind is not defined in the Constitution or anywhere in the laws of Kenya.<sup>38</sup> Therefore, it is not clear what it means, the category of persons covered and whether the restriction is temporary or permanent. Secondly, the Constitution does not provide what

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<sup>35</sup> Article 38 of the Constitution draws from article 25 of the ICCPR which forms part of the laws of Kenya by dint of article 2 of the Constitution.

<sup>36</sup> 'UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7' <<http://www.refworld.org/docid/453883fc22.html>>.

<sup>37</sup> Arts 99 (2) (e), 137, 180 and 193.

<sup>38</sup> Kamundia (n 11) 59.

criteria may be used to declare a person as being of unsound mind and whether such declaration may be subject to review or appeal as required by article 12 (4) of the CRPD. Thirdly, apart from the right to vote, it is not stated whether persons with mental/psychosocial disabilities may be supported to enjoy other civic rights under the Constitution. To deny a fundamental right of an adult citizen to hold office based on a disability, without providing a procedure for determining whether the disability affects one's cognitive abilities and if so to what extent, is to contravene article 12 of the CRPD. Furthermore, the United Nations High Commission recommended that laws that disenfranchise citizens and prevent them from holding elective posts based on disability should be abolished.<sup>39</sup>

### 3.2.2 The Marriage Act

The right to get married is a fundamental right under international and regional human rights principles and in the Constitution of Kenya.<sup>40</sup> However, the Marriage Act states that consent to get married is not freely given if the person who purports to give it 'is suffering from any mental condition whether permanent or temporary...so as not to appreciate the nature or purport of the ceremony.'<sup>41</sup> Furthermore, section 5 of the same Act provides that a person is not competent to act as a witness in a marriage ceremony if the person is 'otherwise not competent to enter into a contract because of mental disability rendering that person incapable of understanding what the parties are doing.' Lastly, the Act provides that a party to a marriage who proceeds with the ceremony knowing that the other party was suffering from mental disorder, whether permanent or temporary, would be liable to a three-year imprisonment, a hefty fine, or both.<sup>42</sup>

The Marriage Act fails to provide for circumstances under which people suffering from mental disability, whether temporary or permanent, may contract valid marriages. Furthermore, under Section 8 of the Matrimonial Causes Act, being of unsound mind is one of the grounds to petition for divorce. Once again there is no provision for support and both the Marriage Act and the Matrimonial

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<sup>39</sup> 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities' (2009) Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General para 46 <<http://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf>> accessed 18 June 2017.

<sup>40</sup> The Constitution of Kenya 2010, Art 45.

<sup>41</sup> Marriage Act No. 4 of 2014, s 12 (2) (c).

<sup>42</sup> S 12.

Causes Act discriminate against persons with disabilities by denying them the legal capacity to contract valid marriages or act as witnesses to a marriage. Regardless of whether such disability is temporary or permanent, the disabled person is denied the legal capacity to contract a marriage in contravention of Article 12 of the CRPD.

### 3.2.3 The Law of Succession Act

The Law of Succession Act provides *inter alia* for disposal of property by way of wills and testaments and administration of property of persons who die intestate. Section 5 of the Law of Succession Act provides that persons of unsound mind do not have the legal capacity to dispose of their property by will. There is a presumption that the person making the will is of sound mind and the burden is on a person who alleges that the maker of the will was not of sound mind, at the time of making the will, to prove the same. According to this law, therefore, a person who is considered to be of unsound mind lacks the capacity to dispose of property. This is in contravention with article 12 (5) of the CRPD which provides for the right of persons with disabilities to own and inherit property.

### 3.2.4 Penal Code and Criminal Procedure Code

Section 12 of the Penal Code states that a person is not criminally responsible for a crime if at the time of commission, he was suffering from insanity rendering him/her incapable of understanding the nature of the act or omission constituting the crime. In Kenya, this is known as the insanity defence - where the accused person presents a defence claiming that he or she was insane at the time of the commission of the offense.<sup>43</sup> According to section 166 of the Criminal Procedure Code, an accused who presents the insanity defence must produce medical evidence to show that they were, indeed, suffering from a condition rendering them incapable of comprehending the act or omission.<sup>44</sup> The section further provides that if the Court is satisfied by the evidence presented, the Court will make a special finding that the accused is guilty but is not criminally responsible for the crime by reason of insanity.<sup>45</sup>

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<sup>43</sup> Peter Kaimba, 'The Law Relating to Lunacy/ Insanity and other Incapacity in Relation to Criminal Liability in Kenya' <[https://www.academia.edu/8468563/INSANITY\\_and\\_LUNACY\\_IN\\_CRIMINAL\\_LIABILITY\\_IN\\_KENYA](https://www.academia.edu/8468563/INSANITY_and_LUNACY_IN_CRIMINAL_LIABILITY_IN_KENYA)> accessed 4 October 2017.

<sup>44</sup> Criminal Procedure Code CAP. 75 1930 s 166.

<sup>45</sup> S 166.

At first glance, it may seem that the insanity defence is an easy way to avoid liability. However, the practice in Kenya is that if this defence succeeds, the mentally ill person is committed to a mental institution, by a court order, where they have to undergo treatment.<sup>46</sup> This detention is indefinite and one may only be released at the pleasure of the President.<sup>47</sup> The defence of insanity is problematic when viewed under article 12 of the CRPD for many reasons among them the indefinite detention that follows.<sup>48</sup> This view has been upheld by Kenyan Courts in a number of decisions in Kenya,<sup>49</sup> the latest one of these was *Republic v S O M* rendered on 30 April 2018, which declared section 166 of the Criminal Procedure Code unconstitutional and against the rights and dignity of persons with disabilities.<sup>50</sup>

These decisions are in line with the position of the Human Rights Council on this issue which is that:

In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with article 13 of the Convention and implementing norms must be adopted.<sup>51</sup>

### 3.2.5 The Sexual Offences Act

Unlike the statutes discussed above, the Sexual Offences Act contains provisions which seem to be in conformity with article 12 of the CRPD. To begin with, the Act defines mental disabilities to include disability, irrespective of the cause, whether temporary or permanent, which affects the person at the time of the

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<sup>46</sup> Kamundia (n 11) 64.

<sup>47</sup> Criminal Procedure Code CAP. 75 1930 s 166.

<sup>48</sup> See Kamundia (n 11) 64–65. where the pros and cons of the insanity defence are discussed. See also Dianne Chartres, To Investigate Supported Decision-Making Practices, Capacity Building Strategies and other Alternatives to Guardianship (2010 Churchill Fellowship) < [https://www.churchilltrust.com.au/media/fellows/2010\\_Chartres\\_Dianne.pdf](https://www.churchilltrust.com.au/media/fellows/2010_Chartres_Dianne.pdf)> accessed 18 April 2018.

<sup>49</sup> See for example *Hussan Hussein Yusuf v Republic [2016]eKLR*; *B K J v Republic [2016] eKLR*; *Joseph Melikino Katuta v Republic [2016]eKLR* (in all the three cases the Court held that the indeterminate incarceration of mentally disabled persons amounted to cruel, inhumane and degrading treatment which was against the Constitution and established human rights principles).

<sup>50</sup> *Republic v S O M* [2018] eKLR [12].

<sup>51</sup> 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities' (n 39) 47.

commission of the offence in question.<sup>52</sup> The disability has to be of a kind which: prevents the affected person from appreciating the nature and consequences of the act; makes them unable to resist the commission of the act; or makes them unable to communicate their unwillingness to participate in the act.

The same meaning is implied in sections 42 and 43 (4) of the Act which define consent. It is noteworthy that the Act limits the definition to the specific time of the commission of the offence which implies that as a rule, persons with mental disabilities can consent to sex and the exception is when the mental disability affects their ability to consent at the time of commission of the sexual act. This interpretation was indeed confirmed by the High Court in the case of *Wilson Morara Siringi* mentioned above. In this case, the Prosecution alleged that the accused person had sexual intercourse with the complainant who was unable to consent due to her mental illness. The Judge held *inter alia* that:

The issue is not whether the complainant was mentally impaired generally but whether, 'at the time of commission of such act was the complainant mentally impaired.' ... The inquiry is focused on whether the complainant exercised freedom and capacity to make the choice of having sexual intercourse and whether at the time the act took place the complainant was incapable of consenting by reason of mental impairment.<sup>53</sup>

The judge found that there was no evidence to show that the complainant had no capacity to consent at the time of commission.

On one hand, this interpretation is commendable since it considers persons with mental disabilities as subjects of the law, able to make their decisions, in conformity with article 12 of the CRPD. On the other hand, it seems to shift the presumption of consent, so that the Prosecution has to prove that the person was mentally impaired at the time of the commission, which can be very difficult to prove.

### 3.2.6 Other Relevant Acts of Parliament

There are many other Kenyan Acts of Parliament which deny persons with disability the right to make decisions due to their disability. Other examples include: Sale of Goods Act which provides that persons 'who by reason of mental incapacity

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<sup>52</sup> Sexual offences Act No. 3 of 2006 s 2.

<sup>53</sup> *Wilson Morara Siringi v Republic* (n 26) [12].

are incompetent to contract' shall pay a reasonable sum for goods delivered.<sup>54</sup> This implies that people with disabilities would not have the legal capacity to enter into contracts to buy and sell goods. Secondly, the Traffic Act restricts the legal capacity of people with disabilities to receive driving licenses and makes it possible to revoke the license of a person with disability on that basis.<sup>55</sup>

#### **4.0 Conclusion and Recommendations**

Although the Constitution of Kenya provides for equality before the law, legal recognition and the right to legal capacity and non-discrimination, some laws of Kenya discussed above continue to restrict or limit legal capacity based on an amorphous concept of 'unsound mind'. As shown above, the legal capacity of persons with disability is restricted in relation to voting, vying for elective posts, marriage, disposal of property, contracting for the sale of goods, as well as acquiring driving licenses. This is in contravention of article 12 of the CRPD. The Courts in some instances mentioned above have endeavoured to rule such provisions as unconstitutional and to interpret the statutes in ways which uphold the rights of persons with disabilities; but more action needs to be taken.

One way to make the laws compliant with article 12 would be to institute mechanisms for supported decision-making and implement the safeguards provided for in article 12 (4) in dealing with the concept of 'unsound mind'. In other words, the concept of unsound mind in Kenya should be reviewed in accordance with article 12 (4) of the CRPD which requires that the action of State Parties meet the following standards: 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; and, are proportional to the degree to which such measures affect the person's rights and interests.

A practical way to implement this in the Kenyan context would be by providing a statutory definition of the concept of 'unsound mind'. This definition could entail what it means, as well as the scope, duration and other parameters. Secondly, once it is established that disability exists, there needs to be objective

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<sup>54</sup> Sale of Goods Act CAP. 31 s 3.

<sup>55</sup> Traffic Act CAP. 403 s 31.



criteria for determining if the disability renders the affected person incapable of performing a specific task. The blanket statement of unsound mind should be abolished, and the determination of mental capacity should be done on a case by case basis using the functional approach discussed in part 2.3 above.

Lastly, there should be support for persons with disabilities to make their own decisions instead of substitute decision-making. Apart from providing support to enable persons with disabilities to vote, the Acts discussed above render persons of 'unsound mind' incapable of consenting to marriage, disposing of their property or vying for elective post. To fulfil its obligations under the CRPD, Kenya needs to enact legislation mandating the provision of support, if required, to persons with disabilities enabling them to exercise their legal capacity.