

12-2019

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Teddy J.O. Musiga

High Court of Kenya; Kenya Law; University of Nairobi

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Recommended Citation

Musiga, Teddy J.O. (2019) "Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya," *Southern African Journal of Policy and Development*. Vol. 4 : No. 2 , Article 7.

Available at: <https://scholarship.law.cornell.edu/sajpd/vol4/iss2/7>

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Reflections on Emerging Practices and Developments in the Field of Law Reporting: Lessons from Kenya

Teddy J.O. Musiga

(High Court of Kenya, Kenya Law & University of Nairobi)

Many users and/or consumers of law reports grapple with two major questions. The first question revolves around the issue why some judicial decisions are referred to as reported decisions, while others are referred to as unreported decisions. This question therefore deals with the dichotomy between reported judicial decisions and unreported judicial decisions. The second question flows from the first and relates to which categories of decisions appear in law reports (and therefore are classified as 'reported') and which ones do not (and therefore are classified as 'unreported'). Put the other way around, that second question becomes: what are the criteria for selecting the judicial decisions that appear and do not appear in law reports? This article therefore attempts to make a modest contribution to the field of law reporting by providing answers to those two questions. It does so by providing some reflections from the perspective of a practising law reporter based in Kenya. The paper uses various cross-cutting thematic areas to demonstrate why some judicial decisions are reported while others are not. The views provided hereunder are therefore merely an introductory note based on the emerging practices and developments in the field of law reporting in Kenya as used by the National Council for Law Reporting (the official state agency mandated to publish the Kenya Law Reports).

1. Introduction

The practice of law reporting refers to the technique of recording, preserving and documenting judicial decisions from the superior courts of records. It does so by collecting, collating, compiling, indexing and publishing judicial decisions in law reports. Law reporting thus facilitates the doctrine of precedent which is otherwise captured in the Latin expression of "*stare decisis et non quieta movere*" (hereafter referred to simply as *stare decisis*). In simple language, it can be translated as "let the decision stand." Therefore, what *stare decisis* means in practice is that when a court makes a decision in a case then all other courts of equal or lower status must follow that previous decision if the case before them is similar to the earlier case. This is only possible where an accurate system of recording those cases through law reports exists.

The doctrine of stare decisis flows from common law which in itself is a subset of English law. English law comprises two sets of laws which are: the written and unwritten English laws. English law is widely accepted as part of Kenyan law by virtue of the reception clause found at section 3(1) of the Judicature Act of 1967. The effect of that reception clause was to import a broad spectrum of English law to supplement Kenyan legislation.

The written English laws refer to pieces of legislation/statutes, while the unwritten English laws comprise a set of laws such as (i) the common law; (ii) the doctrines of equity; (iii) the law merchant (*lex mercatoria*); and (iv) the practice and procedure of English courts. However, the scope of this article will only look at the common law because it solely relies on the doctrine of precedent. The hallmark of the common law system is the importance it accords to the decisions of judges of the superior courts of record. Reported decisions refer to only those decisions which carry precedential value. Thus, a precedent is a judgement or decision of the court which establishes a legal principle or rule and is usually recorded in a law report. The import of the doctrine of precedent is that similar cases involving similar circumstances should be decided by the application of similar principles of law.

The doctrine of precedent also applies in a hierarchical manner in that decisions of superior courts are binding to the other courts below. Courts below the superior courts of record are bound to apply the decisions from the superior courts of record. It follows, therefore, that decisions from the subordinate courts and those of tribunals inferior to the High Court and courts of equivalent status to the High Court are not binding. Over the years, the superior courts of record in Kenya have rendered some decisions which are of jurisprudential value (decisions of high legal and practical importance) and those decisions have been reported in the various editions of the Kenya Law Reports. The main objective of law reporting is therefore to extract the essence of juristic thought and to present it as one of the beacons of the legal path. It is not to inform the public of all that happens in a court of law. Hence the overriding consideration in law reporting is to only report judicial opinions which make a contribution to the development of jurisprudence.

The reporting of such cases is done through the physical print publications/hard copy law reports (such as the Kenya Law Reports) or sometimes they are published in digital platforms or in online legal databases (such as www.kenyalaw.org). Mostly, the publication of judicial decisions happens in both concurrently. That is to say that some decisions appear both in the physical law reports and at the same time in the digital online legal database/platform. It is the concurrent publishing of the law reports on physical law reports and online legal databases that brings the challenge of the blurred dichotomy between unreported decisions and reported decisions.

2. Distinction Between Reported Judicial Decisions Versus Unreported Judicial Decisions

Traditionally, judicial decisions were classified as either reported or unreported judicial decisions. The reported decisions referred to those decisions which appeared in the physical published law reports. They referred to decisions of legal and practical importance (Bryan, 2009). On the other hand, the unreported decisions fell into two categories. The first category referred to those decisions which remained uncollected by the law reporters and therefore did not appear, or those that did not make it to the law reports due to other reasons that could not be accounted for. In some instances, the second category of unreported decisions referred to those decisions that were outright deemed to be dross. Such decisions included those which were considered (by the law reporter) as not having any legal or practical importance and were therefore deliberately left out when compiling the law reports. In that sense, the law reports referred to the physical printed books containing a compilation of judicial decisions from the superior courts of record. Thus, the reported decisions in the physical law report books referred to the finest collection of judicial decisions that were also of high legal and practical importance. That was because such judicial decisions aided in the development of the law.

Attempts to distinguish judicial decisions that are of high legal importance from those which are not of high legal and practical importance have led to the emergence of terms like 'reported decisions' and 'unreported decisions' in contemporary legal parlance. These two terms have existed side by side without a proper understanding of the dichotomy between those two terms. The overarching argument that this paper seeks to advance is that there ought to be a proper distinction between those two terms. The proper distinction between the two terms is that a reported decision refers to only those decisions that appear in a law report, whereas an unreported decision refers to a judicial decision that does not appear in a law report.

The big question is, how do we end up concurrently with both categories of decisions: the reported and unreported decisions? There are many possible answers to this question, which this paper will not all explore. Most importantly, the era of technological advancement has immensely contributed to the increasingly blurred dichotomy between reported judicial decisions and unreported judicial decisions.

Advancements in technology have ushered in the publishing of judicial decisions on digital platforms or online legal databases. Publishing judicial decisions on digital platforms has advantages and disadvantages. Since this paper is concerned with the need to distinguish between reported and unreported judicial decisions, it will only mention the disadvantage that arises from publishing judicial decisions on digital platforms. There could be many disadvantages, but the most glaring danger is that by publishing judicial decisions on digital platforms both categories of decisions that have legal and practical importance as well as those that do not have any legal and practical importance end up being published. When that

happens, it becomes increasingly difficult to determine whether such decisions meet the criteria for law reporting.¹

The conflation of judicial decisions that have high legal and practical importance with those decisions which do not have any legal and practical importance further contributes towards the blurred dichotomy between the reported and the unreported judicial decisions. One of the main reasons contributing to the blurred dichotomy are the divergent approaches used in determining which decisions to publish. The approach used in the traditional physical law reports usually makes reference to only those decisions that are of high legal and practical importance. In doing so, some of the decisions collected from superior courts of record are sieved out and they do not appear in the final physical publications of law reports. On the other hand, judicial decisions appearing in online databases hardly pay regard to their jurisprudential value (legal and practical importance) but rather all decisions made by the superior courts of record and which are received by the law-reporting publishing house are published in the online/digital databases.

Perhaps, the major reason for this approach is determined by the storage capacity levels of each. Traditional physical law reports such as the Kenya Law Reports follow strict selection criteria for reporting judicial decisions from the superior courts of record. Those law reports (books) also have limited capacity in terms of the number of pages each book/law report should have. This has the effect of only selecting the very finest of decisions that appear in law reports.² On the other hand, digital platforms have unlimited capacity for publishing judicial decisions in terms of space and therefore as much decisions as possible can be published online. The challenge with this is that regrettably some of those decisions ending up in the online platforms/databases may not have any legal and practical value at all. Ultimately, if both sets of decisions (those that have legal and practical importance and those that do not) are published in the digital platforms, it becomes increasingly difficult to distinguish between which decisions from the superior courts of record are the 'reported' ones and which ones are the 'unreported' ones.

3. Reported Decisions from the Superior Courts of Record

In Kenya, the legal mandate of publishing the official law reports for the Republic lies with the National Council for Law Reporting (Kenya Law). This organisation is mandated to perform the law reporting functions under section 3 of the National Council for Law Reporting Act.³ In a nutshell, section 3 (a) and (b) of the National Council for Law Reporting Act provides that the organisation shall be "responsible for the preparation and publication

¹ The criteria for law reporting are discussed in the subsequent sections of this paper.

² Major law reporting entities have their editorial guidelines that provide selection criteria to be used when choosing the decisions that should appear in law reports. These criteria will be discussed in detail in the subsequent sections of this paper.

³ National Council for Law Reporting Act, Act No. 11 of 1994.

of the reports to be known as the Kenya Law Reports, which shall contain judgements, rulings and opinions of the superior courts of records; and to undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports.”

The secretariat of the National Council for Law Reporting has been in existence for about two decades.⁴ In the process, the organisation has been able to publish numerous volumes of law reports each year and it has maintained a vibrant online database for law reports.⁵ As a result thereof, some decisions from the superior courts of record in Kenya have become popularly known as reported decisions while others have become known as unreported decisions.

At the same time, there are many other decisions that cannot be classified as outright reportable or unreportable. This category of judicial decisions has emerged as a result of digital publishing of all decisions without paying regard to their legal or practical importance. Such decisions are therefore ambivalent in character. They are ambivalent because it is hard to discern whether or not they have any legal or practical value. Yet at the same time they remain available for citation through research. That is so because, in one way, they may be viewed as reportable decisions for the simple reason that they have been published and are easily accessible for all. Yet, in another way, they may also be viewed as 'unreportable' cases for the simple reason that they do not advance any new jurisprudence that can be used for the development of the law.

4. Unreported Decisions from the Superior Courts of Record

During this same period, some judicial decisions have curiously remained unreported. Nonetheless, some of these have over time proven to be of jurisprudential or precedential value owing to the fact that they are often cited in legal research, notwithstanding the fact that they do not appear in any law report.

In this regard, one of the most cited decisions that has never found its way to the law reports is the 1976 celebrated case of *Hottensiah Wanjiku Yawe versus Public Trustees*.⁶ That decision laid down the principles for determining the test for presumption of marriage in Kenya's family law. It is important to give a brief background of the relevant facts and holdings of that decision for the obvious reason that this particular decision has never been reported in any of the official law reports of Kenya. Yet at the same time, this particular decision has remained a *locus classicus* when determining the test for the presumption of marriage in Kenya.

⁴ Despite the fact that the secretariat for the National Council for Law Reporting was established pursuant to the 1994 NCLR Act, there is sufficient evidence to suggest that Kenya Law Reports existed even as early as 1897. For a detailed history of the Kenya Law Reports, see <http://kenyalaw.org/kl/index.php?id=125>

⁵ See generally www.kenyalaw.org

⁶ *Hottensiah Wanjiku Yawe versus Public Trustees*, Court of Appeal Case No. 13 of 1976.

The relevant brief facts and holdings were that Mr. Yawe was a Ugandan born pilot, who was also ordinarily resident in Nairobi, Kenya. Sometime in 1972, he died in a road accident somewhere in Uganda. Upon his death, the appellant (Ms. Wanjiku) claimed to be his widow and also claimed that she had four children with the deceased. Those claims were however contested by some respondents. They argued that Ms. Wanjiku was not the deceased's wife, neither was the deceased a married man. However, during trial, evidence was adduced which revealed that the deceased lived with the appellant as a wife and also that when he applied for a job at the East African Airways as a pilot, he had named the appellant as his wife.

Further evidence showed that the deceased and the appellant were also reputed as living as husband and wife owing to their long cohabitation of approximately nine years. The court held that long cohabitation as husband and wife gave rise to the presumption of marriage and only cogent evidence to the contrary could rebut such a presumption.

Incidentally, neither the trial court decision nor the appellate court decision in *Hottensiah Wanjiku Yawe v Public Trustee* was ever reported in any law report. Curiously, it is still largely missing even on digital platforms.⁷ However, the decision in *Hottensiah Wanjiku Yawe v Public Trustee* has been quoted in several other jurisprudential and reported cases. For instance, as early as 1984 and 1985 the decision was quoted in the reported decisions of *Kituu v Nzambi*⁸; *Machani v Venoor*⁹ and *Njoki v Muthuru*.¹⁰ And even recently, it has been quoted in the 2018 decision of *B C C v J M G*.¹¹

Similarly, the case of *Aaron Gitonga Ringera & 3 others versus Paul K Muite & others*,¹² is another famous decision that can be classified as an unreported case. It is classified as unreported because to date it has never been reported in any law report. That notwithstanding, the case is often cited among cases dealing with the law on contempt of court proceedings.¹³ Yet, it is still missing from the records of any law reports.

Broadly, in that case, the court held that it had powers to coerce or to punish contemnors in the following words, "so all in all, the above exposition says what is all about committal proceedings for contempt of court namely, that a court order has been issued; the person to whom it is directed disobeys it and so the court in order to assert its authority,

⁷ Efforts are being made by the National Council for Law Reporting to conduct a campaign that will see some of such decisions (containing lost jurisprudence) that were never collected to be published in special editions in the future.

⁸ *Kituu v Nzambi* [1984] KLR 411

⁹ *Machani v Venoor* [1985] KLR 859

¹⁰ *Njoki v Muthuru* [1985] KLR 874

¹¹ *B C C v J M G* [2018] eKLR; other recent decisions citing *Hottensiah Wanjiku Yawe v Public Trustee* include; *Mary Wanjiku Githatu v Esther Wanjiru Kiarie* [2010] eKLR; *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR;

¹² *Aaron Gitonga Ringera & 3 others versus Paul K Muite & others*, Nairobi HCCC No. 1330 of 1991

¹³ see *Viktar Maina Nginjiri & 4 others v Director of Public Prosecutions & 5 others*, Miscellaneous Civil Application No. 189 of 2014 [2014] eKLR; *Kabuito Contractors Limited v Nairobi City Council*, Miscellaneous Application No. 607 of 2004 [2004] eKLR; *Copos Limited v Maalim & 23 others*, Civil Case No. 2088 of 2001 [2004] eKLR

maintain its dignity and contribute to the rule of the law and good order in the society, it deals with the disobeying party – all for the greater goal of keeping the course of administration of justice clear always. It would be a chaotic society where the court orders were disobeyed and that was left at that. There were other aspects of contempt e.g. disobeying a court process; attacking a court officer e.g. while serving/involved in matters of court; insulting judicial officers etc. But those aspects are not of concern here. However, for whatever aspects of contempt of courts, a court through history and in every jurisdiction exercises the power to coerce or punish contemnors.”

The two decisions discussed above demonstrate that the jurisprudential content/value of some decisions remains, notwithstanding the fact that some of those decisions do not appear in the law reports (neither physical nor digital). This further confounds the need to create a dichotomy between reported judicial decisions and unreported judicial decisions. However, the overarching argument that this paper has attempted to advance is that there is need to understand that ‘reported’ judicial decisions refer to only those that have been published in the physical law reports, to the exclusion of those published in other platforms, such as the digital platforms. As a result, it is important to discuss the salient features of digital publishing of judicial decisions versus the classical approach to law reporting.

5. Digital Publishing of Judicial Decisions

Digital publishing of judicial decisions refers to the publishing of judicial decisions on digital platforms/online platforms/databases as opposed to physical law reports. Judicial decisions published in digital platforms are therefore accessed from websites in soft copy.¹⁴ Digital publishing of judicial decisions has the advantage of unlimited volumes of space or capacity. This enables more and more publishing of judicial decisions in the digital platform without worrying about the size of the publications. Consequently, nearly all decisions passed by the superior courts of record have been ‘reported’ through the digital platform.

As a result, the classical dichotomy between reported and unreported decisions is becoming increasingly blurred. The practice of publishing judicial decisions in digital platforms also offends one of the greatest principles in law reporting that provides that law reporting should not be about informing the public of all that happens in a court of law but rather to only provide decisions that have high legal and practical importance.

Another twist is introduced when certain decisions are reported on digital platforms, yet are left out in physical publications of law reports. Admittedly, it is arguable whether the physical publications of law reports are the official copies of the law reports or whether the

¹⁴ Leading examples of websites that publish judicial decisions in Africa include; www.kenyalaw.org; www.abysinnialaw.com; www.ghalii.org; www.lesotholii.org; www.malawilii.org; www.namiblii.org; www.nigeriialii.com; www.sierralii.org; www.saflii.org; www.seylii.org; www.swazilii.org; www.ulii.org; www.zimlii.org

judicial decisions published on digital platforms carry the same weight as physical law reports. In recent years, it is increasingly becoming acceptable for users of law reports to either cite the physical law reports or cite the digital versions of the same case.¹⁵

Arguably, at the time the National Council for Law Reporting Act was enacted in 1994 it only envisaged physical print publications of law reports and not electronic/digital versions of law reports. Curiously, however, the National Council for Law Reporting Act, No. 11 of 1994 has never undergone any major amendments since it was enacted. Therefore, most of the ideas behind its provisions reflect the position of law reporting as at 1994.

For instance, section 19 of the National Council for Reporting Act requires judges of the superior courts of record to supply as soon as practicable after delivering a judgement, ruling or an opinion a written report to the editor of the Council for Law Reporting. Section 20 of the said act also requires the registrars of the superior courts of record to file monthly returns to the editor in the form of a list of all judicial decisions delivered by the superior courts of record. Section 21 of the said act provides that the Kenya Law Reports are the official law reports to be cited in all proceedings in all the courts of Kenya. Currently, the Kenya Law Reports comprise judicial decisions published in the physical law reports (popularly known as the Kenya Law Reports) as well as judicial decisions published on the digital platform which can be accessed at the web domain of www.kenyalaw.org.

The conflation of the reported judicial decisions and unreported judicial decisions on the digital platform of the Kenya Law Reports thus presents the challenge of isolating precedential decisions from those which are not precedential. This paper has attempted to argue that, first, there is need to have a proper distinction between reported judicial decisions and unreported judicial decisions. In this case, reported judicial decisions refer to only those that have been published in the official and physical Kenya Law Reports.¹⁶ Secondly, all other decisions that have been published in the digital platform of the web domain of www.kenyalaw.org remain part of unreported decisions. Thirdly, and without doubt, the fact that some decisions remain classified as unreported does not in any way impute that they lack high legal or practical importance.

¹⁵ By way of practice, decisions published on the online platforms are often cited with the suffix 'eKLR' at the end. Examples of such a citation in a case include: *Kiplagat v Law Society of Kenya* [2000] eKLR or *Speaker of the National Assembly v Karume*, [1992] eKLR; or *Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille* [2017] eKLR etc. On the other hand, decisions reported in the physical law reports are cited showing the parties to the case, year of publication and page numbers in which they appear. An example of a case reported in the physical law reported is cited as follows *Muruiki & 2 others v Republic* [2005] KLR 443 or *Munene v Republic* [1978] KLR 181 etc. In this case, 'KLR' refers to Kenya Law Reports and 'eKLR' refers to electronic Kenya Law Reports.

¹⁶ An emerging practice within the Kenyan courts is that whenever one is confronted with the challenge of which decisions to cite then primacy ought to be given to judicial decisions appearing in the official Kenya Law Reports in preference to judicial decisions appearing on the digital platform www.kenyalaw.org otherwise cited with the suffix 'eKLR'. Notably, both the Kenya Law Reports and the digital database www.kenyalaw.org are run by the National Council for Law Reporting which is the official state run agency for law reporting.

To illustrate the complexity that is posed by having a system that publishes the official Kenya Law Reports alongside publishing judicial decisions in the digital platform, we shall use two recent decisions from the High Court of Kenya (*Republic v Leraas Lenchura*¹⁷ and *Republic v Mohamed Abdow Mohamed*¹⁸). Notably, neither of these two decisions was reported in the Kenya Law Reports. However, they were both published on the digital platform www.kenyalaw.org.

For ease of comprehension, it is important to provide the facts of both cases which are very similar. The brief facts to those two cases are that in both instances, the accused persons were charged with the offence of murder of the respective deceased persons. However, by the end of the trials, both courts determined the matters in a similar way.

In the *Leraas Lenchura* case, the court sentenced the accused person to a five-year suspended sentence (because of his advanced age, 89 years) as well as requiring the accused person to pay one female camel to the family of the deceased person. In the *Mohamed Abdow* case, the court allowed the parties to record a 'consent' which had the effect of withdrawing the matter from Court. The details of the 'consent' included,

...The two families have sat and some form of compensation has taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family. Actually, one of the rituals that have been performed is said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families have performed the said rituals, the family of the deceased is satisfied that the offence committed has been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they do not wish to pursue the matter any further be it in court or any other forum.

It appears that both decisions emanated from different benches of the High Court of Kenya sitting at Nakuru. Ordinarily, decisions from the High Court are of a binding nature to courts below it and they are also highly persuasive to courts of equal status. However, both of these two decisions elicited a lot of discussions and commentaries from legal scholars and the general public.¹⁹

¹⁷ *Republic v Leraas Lenchura*, Criminal Case No. 19 of 2011, High Court of Kenya at Nakuru by Justice Anyara Emukule delivered on 19th July 2012, <http://kenyalaw.org/caselaw/cases/view/81686/>

¹⁸ *Republic v Mohamed Abdow Mohamed*, Criminal case No. 86 of 2011, High Court of Kenya at Nakuru delivered on 2nd May, 2013 by Justice R Langat-Korir. <http://kenyalaw.org/caselaw/cases/view/88947/>

¹⁹ For further reading on the academic debates that ensued as a result of those decisions see, Teddy Musiga "Integration of Customary Law Concepts into Kenya's Criminal Justice System: a Commentary on *Lenchura & Mohamed Abdow* cases" (2016) *Law Society of Kenya Journal*, pp 139-149; Francis Kariuki, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed*", (2014) *Alternative Dispute Resolution Journal* Vol.2; Francis Kariuki "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems" (2015) *University of Nairobi Law Journal*, volume 8, pp. 72-88; Kariuki Muigua & Kariuki Francis, "Alternative Dispute Resolution, Access to Justice and Development in Kenya"(2015) *Strathmore Law Journal*, volume 1, pp. 1-21; Emily Kinama, "Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of

Those discussions and commentaries led to a number of issues being raised about the 'reportability' (legal and practical importance) of those two decisions. First, at face value, the *Leraas Lenchura* case and the *Mohamed Abdow* cases can be deemed to have some legal or practical importance (depending on how one looks at it), therefore making those cases 'reportable', because they were determined by superior courts of record under the doctrine of precedent. Secondly, depending on how someone approaches those cases, they can also be deemed as cases of high legal and practical value because they raised novel issues in the administration of justice.²⁰ However, both cases do not appear in the physical print of the Kenya Law Reports of their respective years – 2012 and 2013. Instead, they appear on the digital platform www.kenyalaw.org.

These two cases therefore demonstrate the big challenge posed by having a system of concurrent publishing of judicial decisions on the digital platform as well as in physical law reports. Admittedly, both decisions raised a lot of public outcry at the time when they were determined (and published). At the time they were decided, it was largely unheard of to terminate formal criminal trials by fining accused persons to provide camels, goats and other traditional ornaments. Perhaps that public outcry could have contributed to the decision of the law reporters to not publish those decisions in the physical publications of the Kenya Law Reports and instead only to publish them in the online database. Perhaps, such a decision was arrived at under the impression that the 'official law reports' refer only to the physical Kenya Law Reports and not the digital platform. And therefore, the subsequent elaborate discussions that ensued after the publication of those decisions were unforeseen when making the decision to publish those decisions in the digital platform.

The other way of looking at the decision not to publish those decisions in the physical publication of the Kenya Law Reports is that both of those decisions were determined *per incurium* and therefore they were not of any precedential value worthy of reporting. Under the common law system, decisions rendered *per incurium* are those decisions which are made through lack of care.²¹ They also refer to those decisions which ignore contradictory statutes or binding authority and are therefore wrongly decided and of no force.²²

Be that as it may, those two decisions have also attracted substantial debates in the academic arena by way of eliciting journal articles and commentaries.²³ This demonstrates that notwithstanding the fact that some decisions may be regarded as 'unreportable' in the opinion of the law reporters, the era of publishing judicial decisions on digital platforms is

Kenya, 2010" (2015) *Strathmore Law Journal*, volume 1, pp. 22-40; John Osogo Ambani & Ochieng Ahaya, "The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era" (2015) *Strathmore Law Journal*, volume 1, pp. 41-58.

²⁰ Ibidem.

²¹ *Morelle Ltd v Wakeling* [1955] 2 QB 379

²² Ibidem.

²³ For further comprehensive readings on the academic debates that ensued as a result of those decisions see, (Musiga, 2016; Kariuki, 2014; Kariuki, 2015; Kariuki & Kariuki, 2015; Kinama, 2015; Osogo Ambani & Ahaya, 2015).

increasingly opening the space for such kinds of decisions which were previously regarded as unreported. Publishing such decisions in online databases has therefore made them easily available and accessible for purposes of research and other reasons.

The era of publishing judicial decisions on digital platforms therefore calls for interrogation and introspection of the criteria used when determining 'reportable' judicial decisions *strictu sensu*. The next section of the paper will discuss emerging criteria that are being used by the National Council for Law Reporting when selecting which decisions to publish in the official Kenya Law Reports.

6. The Emerging Criteria for Determining Reportable Decisions in the Kenya Law Reports

Like every other publication, law reports also go through various editorial processes. Those processes are put in place to ensure that only the finest decisions from the superior courts of record are reported. From the time of Sir Edmund Plowden (arguably the first official law reporter)²⁴ to date, the criteria for reporting judicial decisions have evolved over centuries. At the time of Sir Edmund Plowden, the criterion was simply to report decisions that raised questions of legal principle.²⁵ The fact that a decision attracted public interest and newspaper comment did not justify its publication if it raised no issue of legal principle.²⁶ So far in Kenya, the following criteria are emerging to determine the categories of judicial decisions that are selected for purposes of reporting in law reports.²⁷ They include:

- i. Decisions making new laws by dealing with a novel situation or extending the application of an existing principle of law;
- ii. Decisions tending to materially settle a point over which the law has been doubtful;
- iii. Decisions interpreting the language of legislation;
- iv. Decisions in which a judge restates or abrogates an existing principle of law or restates the principle in terms of a particular applicability to local jurisdiction;
- v. Decisions in which the court sets out deliberately to clarify the law for the benefit of lower courts and the teaching of law;
- vi. Others include; First, decisions in which a judge applies a principle which although well established, has not been applied for many years and may be regarded as obsolete; Second, decisions where a court states its review on a point of practice or procedure; Third, occasional judgements interpreting clauses found in contracts, wills, articles and other documents; Fourth, occasional judgements indicating the measure of awards with regard to quantum of damages for personal injury, death,

²⁴ Michael Bryan, "Early English law reporting" (2009) *University of Melbourne Collections*, issue 4, https://law.unimelb.edu.au/_data/assets/pdf_file/0010/1529632/Early-English-Law-Reporting.pdf

²⁵ Michael Bryan, "The Modern History of Law Reporting" (2012) *University of Melbourne Collections*, issue 11, https://library.unimelb.edu.au/_data/assets/pdf_file/0010/1379026/07_Bryan-LawReport11.pdf

²⁶ *Ibidem*.

²⁷ See the Editorial Policy of the National Council for Law Reporting (Kenya Law) at www.kenyalaw.org

defamation, etc.; Fifth, appeals from decisions of lower courts which had been previously reported; Sixth, judgements delivered in cases raising a matter of public interest or those which are for some other reason particularly instructive.²⁸

7. Conclusion

This paper set out to clarify two main things: first, whether there exists a distinction between reportable judicial decisions and unreportable judicial decisions. Secondly, in the event that there actually is a distinction between reportable judicial decisions and unreportable judicial decisions, then there is need to establish the criteria for determining/selecting the reportable judicial decisions from the unreportable judicial decisions.

To begin with the distinction between reported and unreported judicial decisions. The paper has sought to make an argument that indeed there is a distinction between reported judicial decisions and unreported judicial decisions. In this case, it established that reported judicial decisions refer to only those that have been published in the official and physical law reports. In the case of Kenya, that refers to the Kenya Law Reports.²⁹ To that end, all other decisions that have been published in the digital platform of the web domain www.kenyalaw.org remain part of unreported decisions. The paper also established that without doubt, the fact that some decisions remain classified as unreported does not in any way impute that they lack high legal or practical importance. Examples to that effect were drawn from the *Hottensiah Wanjiku Yahweh* case,³⁰ *Mohamed Abdow* case³¹ and the *Leraas Lenchura* case.³²

The paper also revealed that the advent of technology ushered the practice of law reporting into publishing judicial decisions on digital platforms/databases. As a result, the traditional distinction between reported judicial decisions and unreported judicial decisions increasingly became blurred. That is because using technology allows all the good and dross judicial decisions to be published in one medium or the other. Further, the paper also revealed that the era of digital publishing of judicial decisions has presented a platform for publishing judicial decisions which would otherwise be considered as unreported decisions for the reason that such decisions do not accord any legal or practical importance.

²⁸ Ibidem.

²⁹ An emerging practice within the Kenyan courts is that whenever one is confronted with the challenge of which decisions to cite, then primacy ought to be given to judicial decisions appearing in the official Kenya Law Reports in preference to judicial decisions appearing in the digital platform www.kenyalaw.org. Notably, both the Kenya Law Reports and the digital database www.kenyalaw.org are run by the National Council for Law Reporting which is the official state run agency for law reporting.

³⁰ *Hottensiah Wanjiku Yawe versus Public Trustees*, Court of Appeal Case No. 13 of 1976

³¹ *Republic v Mohamed Abdow Mohamed*, Criminal case No. 86 of 2011, High Court of Kenya at Nakuru delivered on 2nd May, 2013 by Justice R Langat-Korir. <http://kenyalaw.org/caselaw/cases/view/88947/>

³² *Republic v Leraas Lenchura*, Criminal Case No. 19 of 2011, High Court of Kenya at Nakuru by Justice Anyara Emukule delivered on 19th July 2012. <http://kenyalaw.org/caselaw/cases/view/81686/>

Having established that indeed there is a distinction between reported judicial decisions and unreported judicial decisions, the paper looked at the emerging criteria used in selecting judicial decisions to be reported in law reports. Admittedly, the criterion used by the National Council for Law Reporting (Kenya Law) is an internal policy which can help all researchers to understand why certain decisions are reported while others are not. That criterion also helps in supporting the argument favouring the need for a proper comprehension of the distinction between reportable judicial decisions and unreportable judicial decisions.

References

Bryan, M. 2012. "The Modern History of Law Reporting." *University of Melbourne Collections*, 11, https://library.unimelb.edu.au/data/assets/pdf_file/0010/1379026/07_Bryan-LawReport11.pdf

Bryan, M. 2009. "Early English Law Reporting." *University of Melbourne Collections*, http://law.unimelb.edu.au/data/assets/pdf_file/0010/1529632/Early-English-Law-Reporting.pdf

Kariuki, F. 2015. "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems." *University of Nairobi Law Journal*, 8, pp. 72-88.

Kariuki, F. 2014. "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed*." *Alternative Dispute Resolution Journal*, 2(1), pp. 202-228.

Kariuki, M. & Kariuki, F. 2015. "Alternative Dispute Resolution, Access to Justice and Development in Kenya." *Strathmore Law Journal*, 1, pp. 1-21.

Kinama, E. 2015. "Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010." *Strathmore Law Journal*, 1, pp. 22-40.

Musiga, T. 2016. "Integration of Customary Law Concepts into Kenya's Criminal Justice System: A Commentary on *Lenchura & Mohamed Abdow* cases." *Law Society of Kenya Journal*, pp. 139-149.

Osogo Ambani, J. & Ahaya, O. 2015. "The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era." *Strathmore Law Journal*, 1, pp. 41-58.