



# Policy Brief

## INSIDE

1. Introduction	1	5. The opportunity cost of Presidential judges appointment delays	6
2. Concerns on funding of judiciary	1	6. Solutions to case backlogs	6
3. Demand for the economic good of justice	2		
4. Case backlog problem	3		

## The Case Backlog Problem in Kenya's Judiciary and the Solutions

### Introduction

The case backlog is a serious policy concern in the wider justice sector. The Kenyan Judiciary classifies a case as “backlog” if it remains unresolved one year upon its filing in a court. Case backlog is a serious policy problem because it impedes access to justice as persons involved in cases will have to wait for more time to be given justice, which is the basis of the legal maxim justice delayed is justice denied. Countries with more efficient judicial systems enjoy high levels of quality justice.

In probing the issue of case backlogs, the Justice and Legal Affairs Committee of the National Assembly noted that inadequate judicial officers and lack of adequate resources are a major impediment to case resolution (National Assembly, 2019). To show the comparison between Kenya and another country of similar characteristics, the Justice and Legal Affairs Committee compared Kenya to Germany with a population of 80 million but had 20,000 judges, leading to a ratio of one judge for every 4,000 citizens. Although most arguments made on resourcing are based on benchmarks such as 2.5% of the national spending, the cardinal economics rule is resourcing courts to meet the desired efficiency outcome that the public, parliament and other actors wish to achieve.

### Concerns on Funding of Judiciary

In the financial year 2020/21, the Judiciary made a budget proposal to parliament of Ksh 37.42 billion based on its resource requirements but only Ksh 17.42 billion was allocated. This made judiciary's have a resource requirement gap of 53%. As illustrated in Table 1, the Judiciary has received a lower allocation than it desired by between 19%-51% over the four years surveyed. In that period, the budget allocation to the judiciary has been 44% below its desired level, meaning that for every 100 shillings of budget requests, parliament allocated only 56 shillings.

**Table 1: Judiciary’s Resource Requirement vis-à-vis Allocation**

Fiscal Year	Resource Require-ment (Ksh Bn)	Allocation(Ksh Bn)	The gap between Judiciary request and parliamentary allocation
2017/18	35.95	17.56	51%
2018/19	31.17	17.30	44%
2019/20	23.29	18.86	19%
2020/21	37.42	17.42	53%

Source: The Judiciary Budget Public Hearing for The FY 2021/22-2023/24 Medium Term Budget .

It is important to note that resources (Human and Financial) are scarce and should be utilized by the Judiciary and the Judicial Service Commission to achieve maximum satisfaction. Access to justice is an economic good with a quantitative measurement of Satisfaction. it is with no doubt that Judiciary underfunding problem is not the only cause of the case backlogs, they are other causes which include practicing rules, and administrative inefficiencies such as the de-layed appointment of judges. It is the role of Judicial Service Commission and the Chief Justice to make the case for budget lines itemized in the Judiciary’s budget proposal and how that will translate to reduction in case backlog and effective running of judiciary.

### Demand for the Economic good, “Justice”

An economic good is a good or service that has a benefit (utility) to society with a degree of scarcity. The scarcity creates the opportunity cost. Access to Justice has an economic value which people are willing to pay, with a degree of scarcity and opportunity cost. On the demand side, 89.90% of all cases filed in 2018/19 were filed in the Magistrate courts and 6.34% of all cases were filed at the High Court. The rest (3.76%) were filed in the Environment and Land Court, Employment and Labour Relations Court, Court of Appeal and the Supreme Court. As shown by data, the Courts with the most demand are the Magistrates Court and the High Court.

**Chart 1: Cases Filed as a share of total cases in 2018/19**

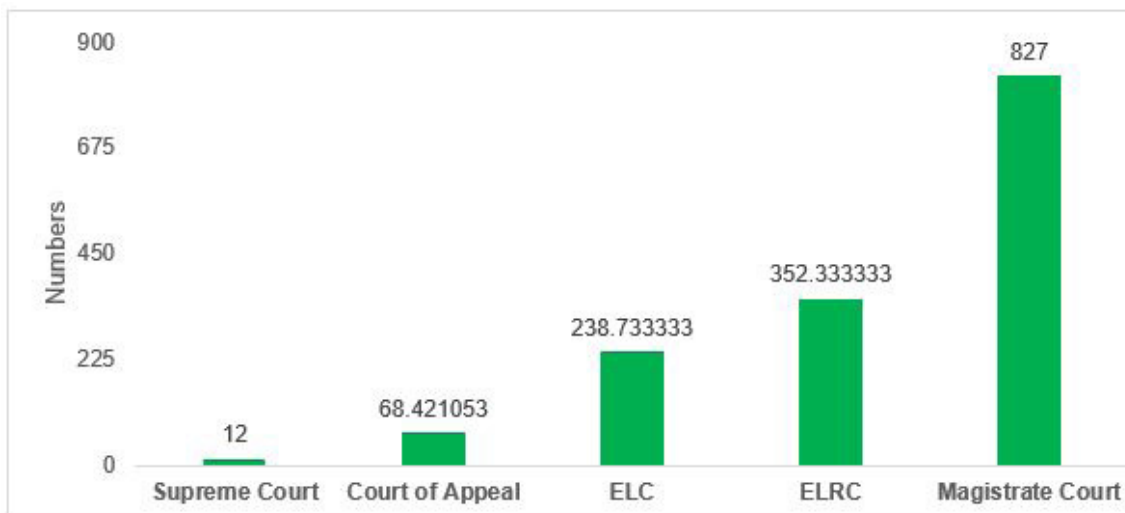


Source: SOJAR 2018/19, Authors own Calculations

On the supply side, Kenya has 706 judicial officers, out of which 503 are magistrates, 53 are Kadhis, 82 are High Court judges, 19 are the Court of Appeal judges, 30 are Environment and Land Court(ELC) Judges, 12 are Employment and Labour Relations Court (ELRC) Judges and 7 are Supreme Court judges ( Statistical Abstract 2020 , SOJAR 2018/19 )

In the year 2018/19, the magistrate’s courts resolved 413,332 cases with a workforce of 500 magistrates. On average, each magistrate annually resolved 827 cases or 5 cases every two days. Employment and Labour Relations Court solved 352 cases per judge followed by Envi-ronment and Land Court at 239 cases and the Court of Appeal at 68 cases. The supreme court resolved one case every month. The most efficient court is the Magistrates court.

**Chart 2: Resolved Cases per Judicial Officer in 2018/19**

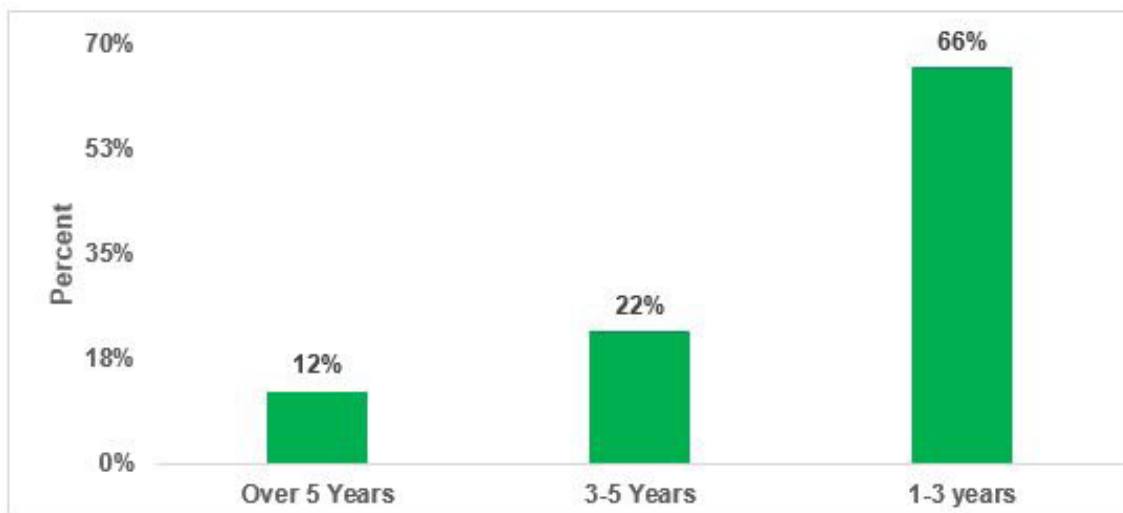


Source: SOJAR 2018/19, National Assembly Authors own Calculations

### Case Backlog Problem

Case Backlog in the Judiciary as of 30th June 2019 stood at 341,056 cases. 66% of all case backlogs are aged between 1-3 years, 22% are aged between 3-5 years and 12% of all cases are aged above 5 years. 44% of all case backlogs are aged over 3 years which is a significant number.

Chart 3: Case Backlog in the Judiciary as of June 30, 2019

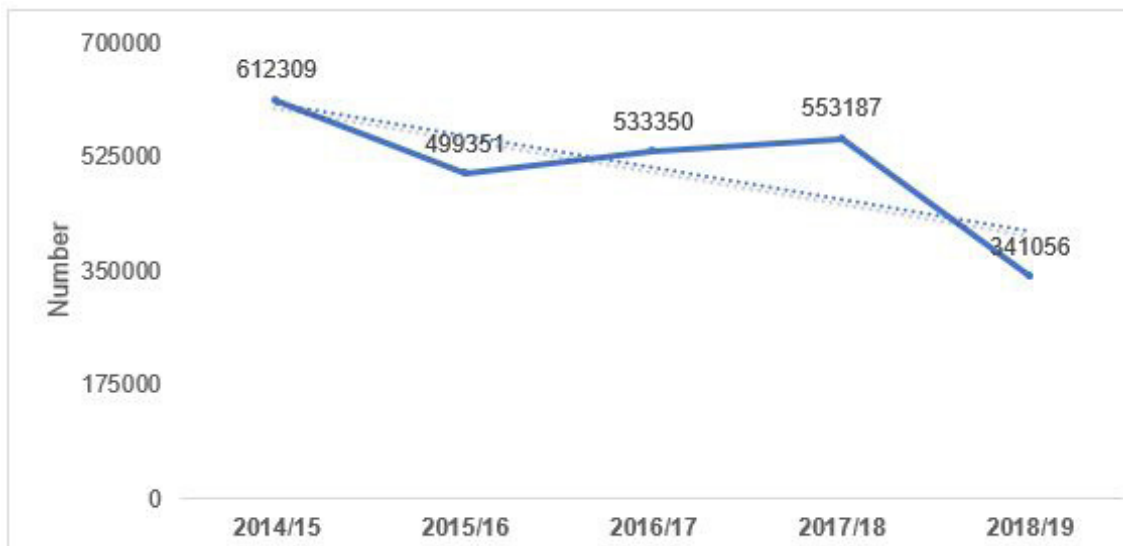


Source: State of Judiciary Annual Report 2018/19

As shown in chart 3 above, 34% of all cases are aged above 3 years which is equivalent to 150,064 cases. 66% of all the case backlogs equivalent to 225,097 cases are aged between 1-3 years. With a population of 48 million in 2019, it means that for every 146 Kenyans, there is a case pending in court. Case backlog of such nature shows the efficiency of the justice system.

The number of pending cases have averaged 507,850 in the last five years as shown in the chart below. The trends show that the number of pending cases are reducing considerably.

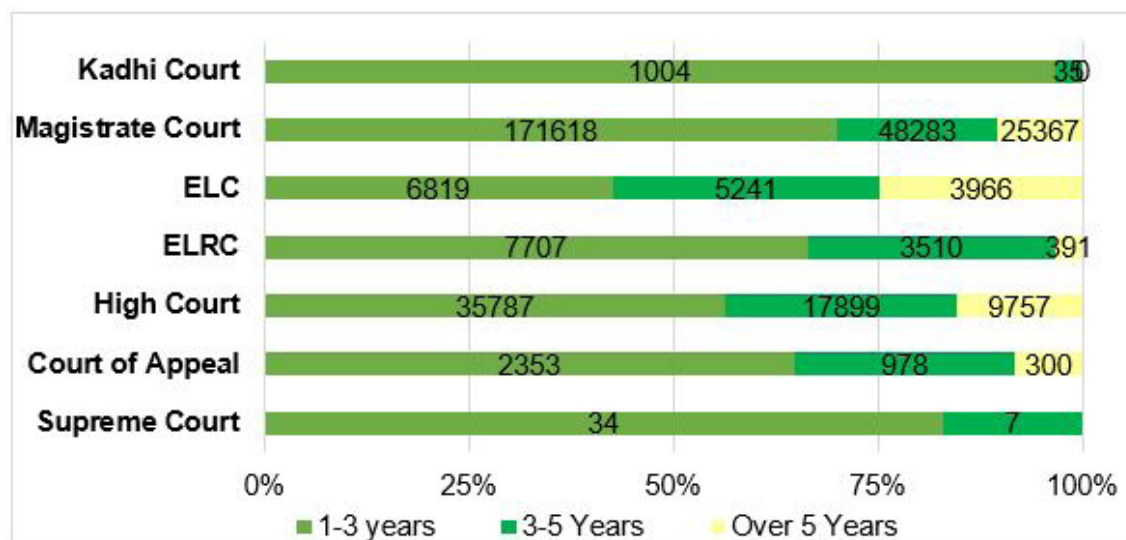
Chart 4: Trends in Number of Pending Cases (All Courts) 2014/15- 2018/19



Source: The SOJAR Report (Various issues)

A closer analysis at the court level shows the Supreme Court and the Kadhis Court bearing the fewest cases with the majority of them aged between 1-3 years. As shown in the chart 5 below, the supreme court has had no cases of 5 years or older since its inception in 2011 after the promulgation of the Constitution in the previous year. The Magistrates Court, Environment and Land Court, Environment and Labour Relations Court and the Court of Appeal have a bigger share of cases aged above 3 years. It is the same courts that the Judicial Service Commission had recommended that 41 judges and forwarded the same to the President for the appointment.

Chart 5: Case Backlog by Court as of June 30, 2019



Source: State of Judiciary Annual Report 2018/19

Of the 41 judges, 11 persons were recommended for appointment to the office of judge of Court of Appeal, 20 persons for appointment to the office of Judge of Environment and Land Court and 10 persons for appointment to the office of Judge of the Employment and Labour Relations Court as required under Article 166 of the Constitution of Kenya, 2010. It's important to note that the same courts affected by the case backlog problem are the ones that require judicial officers urgently. To show what effect the appointment of the 41 judges would have had on the Judiciary, I present the results of a basic simulation in Table 2 below.

Table 2: Case Resolution with New Judges

Court	Resolved Cases in 2018/19	Number of Judges in 2018/19	Resolved Cases per Judge	Number of Judges (With Appointment of 41 Judges)	Possible Number of Cases Solved	Capacity of the Court reduced
Court of Appeal	1,300	19	68	30	2053	58%
ELRC	4,228	12	352	22	7751	83%
ELC	7,162	30	239	50	11937	67%
Overall	12,690				21741	71%

Source: State of Judiciary Annual Report 2018/19, Authors Own Calculations

The latest available data, it shows that the Court of Appeal, Employment and Labour Relations Court and Environment and Land Court resolved 1300, 4228 and 7162 cases respectively. With 19 judges at the Court of Appeal, 12 judges at the Employment and Labour Relations Court and 30 judges at the Environment and Lands Court, the case resolved per judge stands at 68, 352, and 239 respectively. Of the three selected courts, the Employment and Labour Relations Court stands as the most effective court. It is important to note that most cases at the Court of Appeal are benched cases requiring more than 3 judges to handle cases most of the time.

## The Opportunity Cost of Presidential Judges Appointment Delays

The result of the simulation in Table 2 shows that by the President's delay in appointing the 41 Judges recommended by the Judicial Service Commission, the capability of the three courts was reduced by 71% because the 41 judges would have resolved 9051 more cases. The capacity of the Court of Appeal to resolve cases was curtailed by 58% with the same capacity for Employment and Labour Relations Court reduced by 83% and the Environment and Land court capacity was truncated by 67%. If the judges had been appointed, 753 more cases would have been heard at the court of appeal, 3,523 more cases at the Employment and Labour Relations Court, and 4,775 more cases would have been heard at the Environment and Land Court.

## Solutions to Case Backlogs

The only way to settle backlogs is for the cases filed in court to be heard to the conclusion and determined by the Judicial officers. Even though they are alternative mechanisms for obtaining Justice, the rights identified in Article 22 of the Constitution makes it mandatory for the administrative head of Judiciary and supervisory body for Judiciary to plan to ensure that all cases filed are heard and determined.

### 1. Hire more Judicial Officers and Expand Courts Access

The data compiled from the "State of Judiciary and the Administration of Justice 2019/20 report shows that the bulk of cases filed annually are at the Magistrate and the High court. In considering the report on the State of Judiciary and the Administration of Justice for the year 2017/18, the parliamentary committee on Justice and Legal Affairs observed that of the approved establishment of 1200 magistrates, there were only 500, leaving a shortfall of 700. Parliament recommended that more judicial officers should be hired to meet the shortfall, implying that the resources for hiring and keeping them in office would be made available. As discussed, the Judicial Service Commission has already recruited 41 judicial officers and recommended them to the President for the appointment.

For the lower courts and the specialized courts, there's a need to expand access to counties whose court presence is poor. To ensure the effectiveness, Judiciary resources have to be applied to courts with the most demand. In applying more resources to courts with more cases, the Judiciary would be expanding access to justice for citizens.

## 2. Efficient Court Practice Rules and Procedures

To realize this kind of efficiency, the practice rules have to be more concise and targeted at efficiency. This is the only way that the value of a judicial officer can be demonstrated in line with the principles of public finance of the Constitution of Kenya. The court's time is a resource that must be used effectively to adhere to several value for money principles in the Constitution. To demonstrate effectiveness, the court's time has to be calculated to each hour. The judicial officers have to know the opportunity cost whenever plaintiffs, defendants or the prosecutors waste court time or even judicial officers taking unnecessary time to dispense with a decision.

To illustrate this, Article 49 of the Constitution of Kenya 2010 set high thresholds on eligibility of persons before court for bail and bond. The efficiency in assessing whether to issue terms of bond or bail should be set out and known to the Judicial officers. It would be a bad trade-off for a judicial officer to use more court time to arrive at a decision which is self-evident in the first instance. It's a balance between attaining economic efficiency and ensuring that the constitutional responsibilities of Judicial officers are not infringed.

The rules that could be revised further to limit timelines on how matters before court proceed to less than 7 days include; Practice Rules, Penal Code, Evidence Act amongst others. The Chief Justice, Chief Registrar, Judicial Service Commission, Rules Committees, and the actors in the wider judicial sector and Parliament must review rules that create administrative inefficiencies in judicial process before they inadvertently affect the service delivery in the Judiciary.

## Conclusions

The case backlogs have reduced the effectiveness of the Judicial System making it a serious policy concern. This brief argues that the delayed decision by the president to appoint 41 judges has constrained the effectiveness of the Employment and Labour Relations Court, Environment and Land Court, and Court of Appeal collectively by 71%. Kenya's bicameral legislature with budget-making powers has to consciously allocate budget resources for the Judiciary which is an arm of government equal to the Executive and Parliament. On the other hand, the Judiciary must apply economic principles in allocating its resources to meet the demands of Kenyans seeking Justice. Presently, the bulk of cases are filed and dispensed with at the Magistrates Court and the High Court. Systemic case backlogs disenfranchise citizens and spontaneously create informal markets for resolution of cases like Wazee's Baraza's which don't apply the Constitution and the law effectively.

## References

---

1. Melcarne, Alessandro, Giovanni B. Ramello, and Rok Spruk. 2021. "Is Justice Delayed Justice Denied? An Empirical Approach." *International Review of Law and Economics* 65 (March): 105953. <https://doi.org/10.1016/j.irle.2020.105953>.
2. The Departmental Committee on Justice and Legal Affairs. "Report on the Consideration of the 2017/2018 Report on the Judiciary on the State of Judiciary and the Administration of Justice." National Assembly, May 2019.
3. The Judiciary. "The Judiciary Budget Public Hearing for The FY 2021/22 2023/24 Medium Term Budget," 2020.
4. KNBS, "Statistical Abstract 2020," December 22, 2020, <https://www.knbs.or.ke/?wpdmpromo=statistical-abstract-2020>
5. The Judiciary of Kenya. "State of Judiciary and the Administration of Justice: 2018/19 Annual Report," 2020. <https://www.judiciary.go.ke/download/sojar-report/>.
6. The Judiciary of Kenya, "State of Judiciary and the Administration of Justice: 2018/19 Annual Report" (2020) <https://www.judiciary.go.ke/download/sojar-report/> accessed January 11, 2021
7. Savini, Dorcas, and Dennis Kuloba. "The High Court Settles the Deadlock on the Pending Appointments of 41 Judges," February 21, 2020. <https://www.lexology.com/library/detail.aspx?g=c48bdb35-c87c-4a16-b1f8-b64bda821441>.



## NOTES

A series of horizontal dotted lines for taking notes, spanning the width of the page.

# Policy BRIEF

---

The Institute of Economic Affairs is a public policy think tank which seeks to promote pluralism of ideas through open, active and informed debate on public policy issues by conducting policy research and analysis. IEA is independent of political parties, pressure groups and lobbies, or any other partisan interests.

© 2021 Institute of Economic Affairs

## **Constitution Law and Economy Programme**

ACK Garden House, 5th Floor, 1st Ngong Avenue

P.O. Box 53989 – 00200, Nairobi~Kenya

Tel: +254 -20-2721262, +254 -20- 2717402

Fax: +254 – 20- 2716231

Email: [admin@ieakenya.or.ke](mailto:admin@ieakenya.or.ke)

Website: [www.ieakenya.or.ke](http://www.ieakenya.or.ke)

## **Written by:**

Leo Kemboi

## **Board of Directors:**

1. Charles Onyango-Obbo - Chairman
2. Geoffrey Monari
3. Albert Mwenda
4. Raphael Owino
5. Sammy Muvellah
6. Diana Brenda-Akoth