TOPIC FIVE

THE LEGAL SYSTEM OF KENYA

5.0 Introduction

- The Kenyan legal system consists of a mix of Kenya statutory (written) law and Kenyan and English common law, mixed with elements of tribal and Islamic law.
- Kenya's basic legal system and body of law is very similar to that found in western or European countries. This is mainly a result of Kenya being a part of the British empire for many decades until 1963.

5.1 Basic Laws of the Land

5.1.1 The Judicature Act, Cap. 8 (1967)

- An Act of Parliament to make provision concerning the jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts

- S. 3: Mode of exercise of jurisdiction
- The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with the Constitution, all other written laws, including the Acts of Parliament of the United Kingdom, the common law, the doctrines of equity and the statutes of general application in force in England, doctrines of equity and statutes of general application, Customary law not repugnant to written law

- S. 4: High Court is court of admiralty (UK Dep. Of Navy):
- The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.
- S. 6. Protection of judges and officers
- No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, ….

- S. 7 Number of Judges of Appeal and the High Court
- S. 8 Precedence of judges and of judges of appeal
- S. 9 Retirement age
- (1) Subject to subsection (2), the age at which a person holding the office of judge shall retire shall be seventy years.
- (2) Notwithstanding subsection (1), a person holding the office of Judge may elect to vacate office at any time after attaining the age of sixty-five years.

5.1.2 The Constitution

The Constitution of Kenya was enacted on 12th December, 1963.

It was amended on 12th December, 1964, in order to establish a Republic with a President as Head of State.

The further amendments were included in the Constitution of Kenya Act, 1969.

Since 1969, some more amendments have been made in Kenya Constitution which are incorporated in the annually revised editions of the volumes of the Laws of Kenya. [Saleemi, N.A, General principles of law simplified, Saleemi Publications LTD, Nairobi,2009, p. 10].

- The **Constitution of Kenya** is the supreme law of the Republic of Kenya.
- The 2010 edition replaced the 1963 independence constitution.
- The new Constitution was approved by 67% of Kenyan voters.
- The constitution was promulgated on 27 August 2010.

- The key changes provided by the new constitution are in the following areas:
- Separation of Powers between the Three arms of government i.e. Executive, Legislature and Judiciary.
- The Executive – who holds executive authority and the qualifications.
- The Legislature – the composition, and representation of the people. An introduction of an **upper** house – the **Senate**.
- The Judiciary – qualifications to hold office and appointment.

- Devolution [**delegation of power:** the transfer of power from a central to a subordinate level or organization, particularly from a central government to regional or local governments**Microsoft® Encarta® 2009. © 1993-2008 Microsoft Corporation. All rights reserved].**
- – only two levels of Government: National and Counties [47 counties].
- Citizenship – among other issues, gender discrimination was ended, and citizens who acquire foreign citizenship will not lose their Kenyan citizenship.

5.1.3 Interpretation of Laws

- The interpretation of law is the duty of the Judiciary of Kenya.
- After the promulgation of the constitution of Kenya 2010 the general public through parliament sought to reform the judiciary.
- Parliament passed the Magistrates and Judges vetting act of 2011

- A major part of reforming the judiciary was the vetting of Magistrates and Judges in an attempt to weed out unsuitable ones.
- The Judicature Act has also been amended to raise the minimum number of magistrate and Judges allowing more judicial officers to be hired.

5.2 The Sources of Law

- The Sources of Law in Kenya are contained in section 3 of the Judicature Act (Cap. 8) as follows:
- The Constitution of Kenya with subsequent amendments
- Act of the Parliament of Kenya

- Specific Acts of the Parliament of the U.K, cited in the Part I of schedule to the Judicature Act (Cap. 23). One Act of the Parliament of India.
- Subsidiary (Delegated) Legislation.
- English statutes of general application in force in England on 12th August 1897.
- African customary law.
- Case law or judicial precedent.
- Islamic law

5.3 The Institutions of Justice (Court System) and Dispute Settlement Systems

- The Judiciary of Kenya consists of Superior courts made up of the **Supreme Court**, **Court of Appeal**, **High Court**, and **courts with the status of the High Court**: Employment and Labour Relations Court, Environment and Land Court. [Constitution, Art. 162]

- The subordinate courts consist of **Magistrate** Courts, **Kadhis**' Courts, **Martial** Courts and any other court or local tribunal as may be established by an Act of Parliament other than mentioned in the Constitution. [Art. 169(1)]

Supreme Court of Kenya

- The Supreme Court is the highest court in Kenya, and all other courts are bound by its decisions.
- It was established under Article 163 of the Constitution as the final arbiter and interpreter of the Constitution.
- A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election [Art. 140].

- It comprises the Chief Justice of Kenya David Maraga, who is the President of the Court, the Deputy Chief Justice Philomena Mwilu, who is the Vice-President of the Court and five other Judges.
- It has a quorum of five judges.

Court of Appeal

- This court handles appeal cases from the High Court and as prescribed by Parliament [Const. Art. 164].
- It will constitute not less than 12 judges and will be headed by a President elected by the Court of Appeal judges among

- **High Court**
- The High court of Kenya is established under article 165 of the constitution of Kenya.
- It has supervisory jurisdiction over all other subordinate courts and any other persons, body or authority exercising a judicial or quasi-judicial function.
- The judges responsible elect one of them to act as the topmost principal judge in the court system.
- Has unlimited original jurisdiction and carries out supervisory roles.

Employment and Labour Relations Court

- Established under Article 162(2)(a) of the Constitution of Kenya 2010 as well as The Employment & Labour Relations Act of 2011 - An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.

Environment and Land Court

- An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes

The Magistrate Court

- Article 169 (1)(a) of the constitution of Kenya 2010 creates the Magistrate court.
- Magistrate courts are generally located in every district in Kenya.
- They are administered under Magistrate Courts' Act 2015.
- The Judicature Act is the statute passed by parliament detailing the varying powers and jurisdiction of

Kadhis' Court

- Article 169(1)(b) of the Constitution of Kenya 2010 creates the Kadhi's court.
- This is a court that hears civil matters relating to Islamic law.
- The parties involved must all be followers of Islam and all must agree that the matter to be decided under Islamic law.

- The matter must be civil in nature e.g. Divorce, succession etc.
- The court is headed by a Chief Kadhi and parliament is given the authority to enact laws describing the guidelines, qualification and jurisdiction of this court.
- Appeals from Kadhi Court

Martial Courts

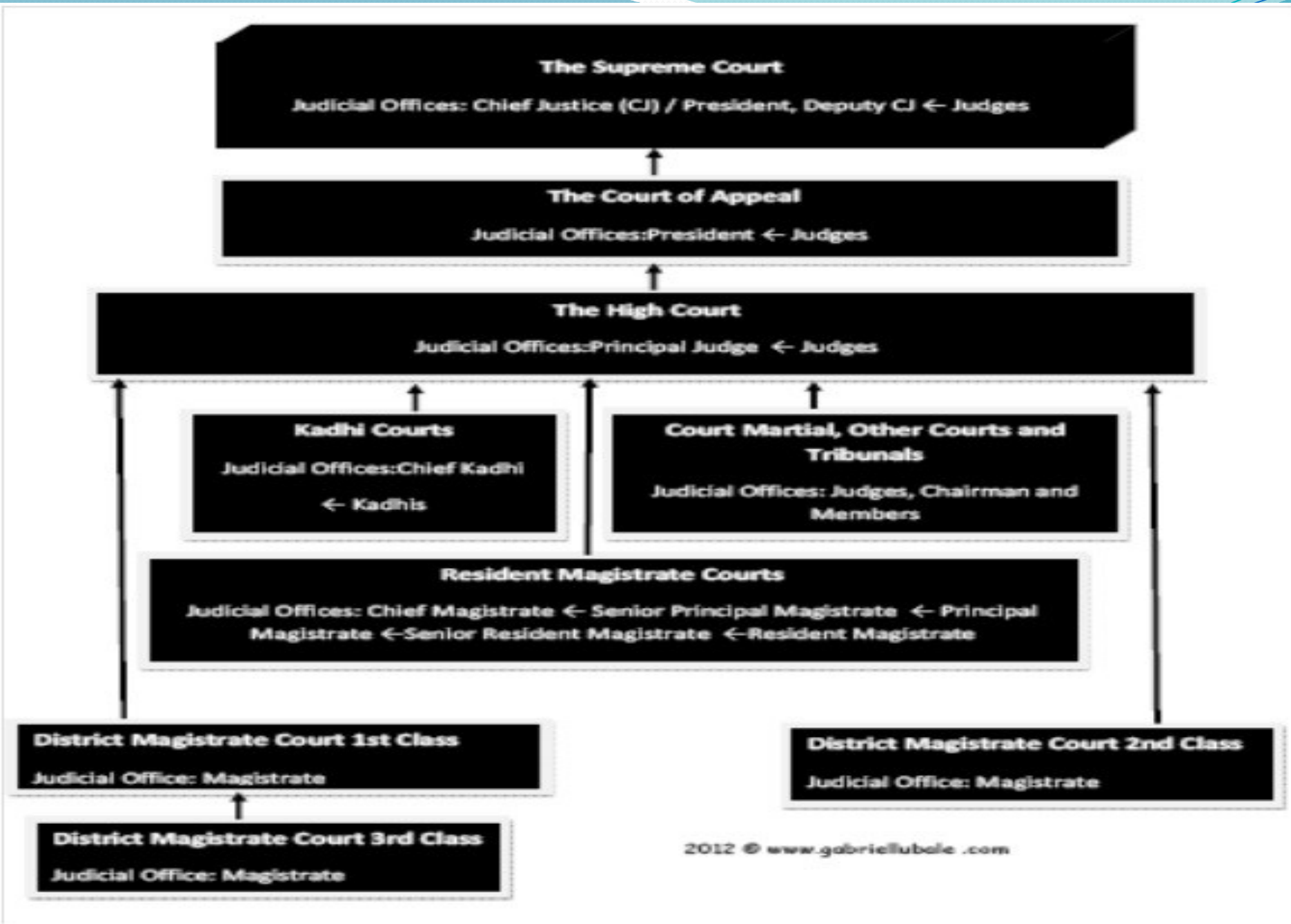
- Article 169 (1)(c) of the constitution of Kenya 2010 creates the Martial courts.
- Generally, this type of jurisdiction involves a group of law administrators, that is, the military court where matters involving members of the Kenya Defense Forces are heard.
- Appeals from this court are heard by the High Court.

Administration within the Judiciary

- The chief administrator of the Supreme court is the Chief Justice, who is the President of the supreme court.
- One of his/her responsibilities is to come up with procedures for running the courts, as well as decisions on staffing and where new courts should be opened.
- The Deputy Chief Justice is the deputy president of the Supreme Court.

Chief Justice

- The Chief Justice of Kenya is the head of the Judiciary and President of the Supreme Court.
- He or she is appointed by the country's President on the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.


The Supreme Court
Judicial Offices: Chief Justice (CJ) / President, Deputy CJ ← Judges
The Court of Appeal
Judicial Offices:President ← Judges
The High Court
Judicial Offices:Principal Judge ← Judges
Kadhi Courts
Judicial Offices:Chief Kadhi
← Kadhis
Court Martial, Other Courts and Tribunals
Judicial Offices: Judges, Chairman and Members
Resident Magistrate Courts
Judicial Offices: Chief Magistrate ← Senior Principal Magistrate ← Principal Magistrate ←Senior Resident Magistrate ←Resident Magistrate
District Magistrate Court 1st Class
Judicial Office: Magistrate
District Magistrate Court 2nd Class
Judicial Office: Magistrate
District Magistrate Court 3rd Class
Judicial Office: Magistrate
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Dispute Settlement Systems

- The main alternative dispute resolution (ADR) methods available in Kenya are negotiation, conciliation, mediation and arbitration. [Omondi, S., King G., Bowmans, "Alternative dispute resolution in Kenya" (2016), available at: https://www.africanlawbusiness.com/news/6067-alternative-dispute-resolution-in-kenya]

- There is no mandatory requirement for parties to commercial litigation to submit to ADR proceedings.
- However, in terms of the Civil Procedure Act, the courts may, either on the application of the parties or on its own motion, refer a commercial dispute to ADR mechanisms.

- A court can intervene in arbitration proceedings but the level and instances of intervention are limited.
- Under the Arbitration Act the instances in which a court may intervene in arbitration proceedings include:
- determination of the enforceability of arbitration agreements;
- granting interim measures of protection;
- setting aside the appointment of an arbitrator;
- appointing an arbitrator where none has been appointed;

- assisting in taking of evidence;
- removing an arbitrator; setting aside of arbitral awards;
- enforcement of arbitral awards; and hearing and determining appeals, where a right of appeal from the decision of an arbitral tribunal lies to the court.

GROUP PRESENTATION – GROUP NO. 1

- **THE LEGAL SYSTEM OF RWANDA:** Judicature Act

GROUP PRESENTATION – GROUP NO. 2

- **THE LEGAL SYSTEM OF RWANDA:** The Constitution