



ACCESS

The Role of Courts in Shaping Access to Asylum

KENYA NATIONAL REPORT

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INTRODUCTION: OBJECTIVES OF ACCESS

The research project “Gatekeepers to International Refugee Law? – The Role of Courts in Shaping Access to Asylum” [ACCESS](#) investigates the role of courts in shaping access to asylum. It seeks to understand how courts globally interpret State-developed barriers in light of the Refugee Convention (RC) and other international norms, what socio-legal factors influence asylum access adjudication, and how the emerging jurisprudence shapes international refugee law (IRL) and migration governance.

ACCESS adopts a comparative approach as it relies on data collected from 19 countries, theoretically selected to cover all geographical regions, various legal systems and adjudication models, and different forms of participation in the international refugee law regime.¹

Given the comparative and socio-legal approach of the project, our goal is to collect data through multiple methods that guarantee comparability, comprehensiveness, and reliability of the data.

The data collection template, along with the explanatory guidance used for the preparation of this National Report, can be found at: Lacchei, Alice; Lambertini, Sara Mariella; McDonough, Paul; Moraru, Madalina; Reyhani, Adel-Naim; Scissa, Chiara (2026) National Report ACCESS Project Template. DOI: 10.6092/unibo/amsacta/8984

In addition, the summaries of the judicial decisions analysed in Part II of this National Report and cited throughout this document can be found at: Lacchei, Alice; Lambertini Martinez, Sara Mariella; McDonough, Paul; Moraru, Madalina; Reyhani, Adel-Naim; Scissa, Chiara; Jesudoss, Loretta Mary (2026) ACCESS Mid-Term Dataset: The Role of Courts in Shaping Access to Asylum. University of Bologna. DOI 10.6092/unibo/amsacta/8962. [Dataset]

DEFINING TERMS

‘Asylum’ denotes the protection a state grants on its territory to non-citizens who seek it. It includes a legal status that protects against refoulement and provides a right to stay. In several jurisdictions, e.g. those that do not have domestic asylum legislation, this status might not be labelled ‘asylum’. The research nevertheless includes such equivalent protection under the term ‘asylum’. Similarly, if a national system that includes an asylum status provides additional protection statuses that include a set of rights closely similar to those the 1951 Convention provides for refugees lawfully staying, the research includes those statuses under ‘asylum’.

‘Accessing asylum’ describes using legal and practical avenues to move towards the territory of potential host states, or to enter procedures and other arrangements for obtaining such status (labelled as asylum or not) implemented by a state or on its behalf. Territorial asylum processing (sometimes referred to as refugee status determination or RSD) itself or equivalent practices, however, are not studied here.

‘Barriers to accessing asylum’ refers to measures, arrangements, approaches, implementation practices, or structures that impede access to asylum. They can be implemented by state actors and others (if tolerated by the state); be of a practical or legal character; incorporate socioeconomic and cultural elements; and pertain to administrative or judicial spheres. Barriers implemented after the formal start of territorial asylum processing can be considered, if the processing is conducted as a sham or pretence rather than allowing effective access to asylum.

‘Pushbacks’ denote the removal or non-admittance of individuals trying to access asylum, without a substantive assessment of risks or potential rights violations. They can occur both on land and sea, including on international waters.

¹ Australia; Kenya, Nigeria, South Africa, Tunisia (Africa); Austria, Greece, Italy, Poland, Spain (Europe); India, Malaysia, Pakistan, Türkiye (Asia); Argentina, Brazil, Chile, Ecuador, Mexico (Latin America), USA.

‘Pullbacks’ are the dragging back of individuals approaching a destination state to the territory of a state from which they had departed without a substantive assessment of risks or potential rights violations. Such practices are often implemented in cooperation between two or more countries. While typically practiced at sea, such as in the territorial waters of the state of departure, pullbacks can also occur on land.

‘Walls and fences’ include physical barriers that prevent access to territory at or near borders, irrespective of the specificities of the construction or the materials used.

‘Detention’ is the imprisonment or other limitations of the right to liberty and security of person of individuals, territorially or extraterritorially, in connection with their asylum accessing.

‘Externalization of asylum processing’ denotes outsourcing procedures and transferring individuals to other jurisdictions to assess protection claims. Under such a practice, for example, potential destination states disallow asylum procedures on their territory, dismiss the corresponding applications, and deport individuals to cooperating countries. Externalized asylum processes can be based on formal and informal agreements between states.

‘Procedural barriers’ refers to any administrative practice or arrangement which, after individuals (attempt to) claim asylum, impedes the formalization of the application or the commencing of a procedure for obtaining asylum. This barrier can, for example, take the form of sham processes or (fast-track) processes based on the safe third country or safe country of origin concept, or a lack of mechanisms for ensuring appointments at registration offices.

‘Judicial or quasi-judicial body’ is the body that reviews/assesses the legality of the decisions, actions, or omissions of state authorities. This term encompasses the wide range of institutions adjudicating asylum barriers, including government/executive bodies, UNHCR, etc.

‘First instance judicial or quasi-judicial body’ is a court, tribunal, or other quasi-judicial body that hears appeals against administrative or executive decisions. **‘Second instance judicial or quasi-judicial body’** is a court or tribunal or other body that hears appeals against decisions made by a first instance judicial or quasi-judicial body. **‘Third instance judicial or quasi-judicial body’** is a court or tribunal (possibly a constitutional court) or another body that hears onward appeals, i.e., appeals against decisions already made by a judicial or quasi-judicial body of at least a second instance. In some jurisdictions there might be further levels of appeal.

‘Legal system’ refers to deeply rooted, historically conditioned attitudes about law’s nature and role, the legal system’s organization and functioning, and how the law is developed, applied, and interpreted (Merryman, 1985). The most common legal systems are the common law, civil law, Islamic, indigenous and socialist legal traditions (idem).

‘Asylum access adjudication’ refers to judicial examination and review by courts or quasi-judicial bodies of administrative decisions made by executive or immigration authorities regarding asylum.

‘Socio-legal factors’ refer to macro, meso, and micro factors influencing asylum access adjudication in the selected jurisdictions. They can originate at the macro level (state), at the meso level (judicial or quasi-judicial body), and at the micro level (individual). For example, adjudication may be influenced by the level of independence of the judiciary (macro factor) or the specialization of the asylum adjudication system (e.g., specialized courts); or availability of judicial or quasi-judicial bodies resources such as time, funds, human resources (meso factors); or individual characteristics of the actors involved, such as background or gender of adjudicators (micro factors).

‘Judicialization of politics’ refers to the increasing reliance on courts and judicial means for addressing core moral, political, and public policy questions (Hirschl 2013). For an overview of the meanings of judicialization, please refer to Hamlin and Sala (2018), who trace various forms in which judicialization of politics can occur (e.g., expanding the jurisdiction of courts, judicial activism, or due to the large number of cases decided by courts).

‘Forced migration’ refers to ‘a migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion’ (IOM, 2019:77). Although it is not an international legal concept and the use of the term is debated because of the controversial dichotomy of voluntary/forced movements, in this report we refer to forced migration including the movement of refugees and asylum seekers, as well as other displaced persons (including those displaced by disasters or victims of human trafficking) who will not attempt to lodge an asylum application. When referring to ‘other displaced persons’, we mean those forced migrants who are not registered as asylum seekers or refugees, etc., despite being present in the country.

1. **Functioning:** What is the barrier’s specific functioning? How does it prevent individuals from accessing asylum?
2. **Time:** What is the implementation period of the barrier? Is it still in use? Is there a time frame for its planned termination?
3. **Place:** Where is the barrier implemented?
4. **Actors:** Who are the key institutional and other actors implementing the barrier? Are there relevant actors from other jurisdictions or international actors?
5. **Interaction:** How does the barrier interact with other barriers and the country’s asylum system?
6. **Development:** What has been the historical and political context for introducing the barrier, and how have its implementation and its character developed over time? (Please consider e.g. corruption, economic or human resources available to implement the barrier, resistance or support by local actors - officials or local community)
7. **Rationale:** What are the stated purposes (e.g., in legislative preambles, government/executive, or judicial statements) the barrier is designed to serve?
8. **Legal Status:** What legal status does the national legal framework provide to individuals prevented by this barrier from accessing asylum? For example, do they fall under a specific (protected or unprotected) category within national law, such as asylum seekers or refugees before formal recognition, or are they treated under the general framework for non-citizens?
9. **Specific Impact:** What is the impact of the barrier on specific groups, such as children, women, LGBTQ+ individuals, or people with disabilities? How does it differ from the barrier’s general impact?
10. **Reach:** How many individuals have been affected by this barrier since 2010, both in absolute numbers and relative to the number of procedures for determining protection status in the same period? Has the barrier contributed to less movement of displaced persons towards the country? Please provide an informed estimate if reliable statistics or studies are unavailable.
11. **Source:** What is the legal basis or source of the barrier? Is it grounded in or approved by domestic, international, or supranational law (even if its legality might be contested)?
12. **Justification:** What justifications have the government/executive branch provided for the barrier? Are there official statements or documents that outline these justifications?
13. **Domestic and International Reactions:** What have been the reactions or interventions from domestic actors, international bodies, or other countries?
14. **Externalization:** How does the barrier outsource migration control functions to actors outside the jurisdiction?
15. **Technology:** How does the barrier draw on technological infrastructure or tools to fulfil its functioning?
16. **Other:** Any further information considered crucial for understanding this barrier to accessing asylum and its relevance.

PART 1: BARRIERS TO ACCESSING ASYLUM

I. IDENTIFYING BARRIERS

This section identifies the barriers to accessing asylum relevant to Nigeria between 2010 and 2024.

A. Barriers of general relevance

Pushbacks: ☒

Detention: ☒

Procedural barriers: ☒

II. UNDERSTANDING BARRIERS

A. Barriers of general relevance

Pushbacks

1. Functioning: The authorities implement target *refoulement* of Somalian asylum seekers and refugees, which is often attributed to national security concerns. In 2007, in response to escalating security issues and other challenges associated with managing a complicated situation exacerbated by an influx of Somali asylum seekers fleeing conflict in their homeland, as well as the necessity to deter supporters of the Council of Somali Islamic Courts (COSIC) fighters ousted from South-Central Somalia from entering Kenya, the country decided to close its borders with Somalia. This action effectively barred Somali asylum seekers from entering its territory, raising concerns that individuals affiliated with the COSIC may try to enter Kenya under the guise of seeking asylum.² This marked the beginning of the securitisation of refugee management in Kenya, especially with regard to Somali refugees and asylum seekers.

According to reports by Amnesty International³ and UNHCR, despite the ongoing crisis and continued influx of asylum seekers fleeing the conflict and trying to gain access to Kenya, the authorities resorted to forcibly returning asylum seekers both at the border and of those already in the country, in gross violation of the principle of *non-refoulement*. There were widespread reports of law enforcement agents intercepting buses carrying asylum seekers and taking them to Dadaab police station, from where they were later escorted back to Dole, near the Somali border with Kenya.⁴ The deportations do not only affect asylum seekers, but they also affect individuals recognised as refugees,⁵ as hundreds of thousands of asylum seekers and refugees have reportedly been forcibly returned since the closure of the border in 2007.⁶

² Amnesty International, 'Kenya: Thousands of Somali refugees and asylum-seekers denied refuge' Public Statement 2 May 2017. p.2.

³ *Ibid.*

⁴ UNHCR, 'Kenya: Refoulement of Somali asylum seekers' Briefing notes. Available at: <[https://www.unhcr.org/news/briefing-notes/kenya-refoulement-somali-asylum-seekers#:~:text=On%20Wednesday%2C%2031%20March%2C%2031%20asylum%20seekers%2C,asylum%20seekers%20to%20Dadaab%20police%20station%20then](https://www.unhcr.org/news/briefing-notes/kenya-refoulement-somali-asylum-seekers#:~:text=On%20Wednesday%2C%2031%20March%2C%2031%20asylum%20seekers%2C,asylum%20seekers%20to%20Dadaab%20police%20station%20then>)>

⁵ Library of Congress, 'Refugee Law and Policy: Kenya'. Available at: <<https://maint.loc.gov/law/help/refugee-law/kenya.php>>

⁶ Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). p.5

Furthermore, according to a report commissioned by the EU Trust Fund for Africa,⁷ since 2013,⁸ in response to the increasing security concerns posed by the presence of *Al Shabaab* in the refugee camp, the Government of Kenya has severally attempted to shut down the Dadaab camp and facilitate the return of Somali refugees to their homeland, mostly stating national security concerns.⁹

It has been observed that the 'humanitarian obligations (of Kenya) are superseded by the security threat that it perceives to be epitomised by Somali refugees. It thus situates its refugee policy within the context of national interest, regional geopolitics, foreign policy, and bilateral relations with Somalia.'¹⁰ There are hardly any reports of Sudanese asylum seekers or asylum seekers and refugees from other countries, at least not to the same degree as the Somalis, facing restrictive measures, abuses and profiling both at the Kenyan border and in towns.¹¹

2. *Time*: Since 2007, hundreds of thousands of asylum seekers and refugees have reportedly been forcibly returned lined to the closure of borders.¹² Although the borders are currently open, Kenya has repeatedly closed its borders with Somalia on several occasions since 2007, even as recently as 2023.¹³ The closures often attributed to security concerns are perceived as a guise to keep Somali asylum seekers away.¹⁴

3. *Place*: The pushbacks and *refoulement* mostly happen at the border locations and with some reports in towns and cities. There have been many instances of the authorities forcibly returning asylum seekers at the border and of those already in the country, including from Nairobi.¹⁵ Law enforcement agents have also been reported to intercepting buses carrying Somali asylum seekers, taking them to Dadaab police station from where they are escorted back to Doble, near the Somali border with Kenya.¹⁶

4. *Actors*: Immigration and other law enforcement agencies.

5. *Interaction*: The implementation of (discriminatory) pushbacks and *refoulement* interacts with various other barriers to asylum such as arbitrary arrest and detention. It also interacts with the 30-day deadline to apply for asylum after entry, which authorities sometimes cite as justification for pushbacks; including with delayed or denied access to DRS; and arbitrary interpretation of rules, thereby exacerbating the difficulties encountered by Somali asylum seekers. The deliberate *refoulement* of Somali refugees illustrates how national

⁷ 'Migration and Conflict in the Horn of Africa: A Desk Review and Proposal for Research'. Submitted by staff of the Research and Evidence Facility for the EU Trust Fund for Africa Horn of Africa Window 15 March 2017. Available at: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://blogs.soas.ac.uk/ref-hornresearch/files/2020/02/Migration-and-Conflict-desk-review.pdf>

⁸ A similar threat to close the camp was made in 2021, when the government gave UNHCR until the end of June 2022 to close the camps See Aljazeera, 'Kenya says Dadaab, Kakuma refugee camps to close next year' 29 April 2021 <<https://www.aljazeera.com/news/2021/4/29/kenya-says-dadaab-kakuma-refugee-camps-to-close-next-year#:~:text=The%20announcement%20follows%20a%20meeting,from%20Somalia%20and%20South%20Sudan.>>

⁹ HRW, 'Kenya: Reverse Move to Close Refugee Camp: No Forced Returns of Refugees' 27 March, 2019.

¹⁰ Muhumad, Abdirahman A., and Rose Jaji. "Somali refugees, informality, and self-initiative at local integration in Ethiopia and Kenya." *Journal on Migration and Human Security* 11, no. 1 (2023): 75-88 at p.80

¹¹ See Kirui, Peter, and John Mwaruvie. "The dilemma of hosting refugees: a focus on the insecurity in north-eastern Kenya." *International Journal of Business and Social Science* 3, no. 8 (2012): 161-171.

¹² Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). p.5

¹³ See Dominic Omondi, 'What re-opening of Kenya, Somalia border points means' Business Daily. Monday, May 15, 2023. Available at: <<https://www.businessdailyafrica.com/bd/economy/what-re-opening-of-kenya-somalia-border-points-means--4235854?utm=>>; See also Aljazeera News, 'Kenya delays reopening border with Somalia: All the details' 6 July 2023. Available at: <<https://www.aljazeera.com/news/2023/7/6/kenya-delays-reopening-border-with-somalia-all-the-details?utm=>>

¹⁴ IRIN, 'Kenya's security act threatens refugees', 5 January 2015, available at: <<https://www.refworld.org/docid/54aba2624.html>>

¹⁵ See Wycliffe Muia, 'We live in fear - forced expulsions taint Kenyas safe haven image' BBC New. 7 November 2024. Available at: <<https://www.bbc.co.uk/news/articles/clyv2610n6qo>>

¹⁶ UNHCR, 'Kenya: Refoulement of Somali asylum seekers' Briefing notes. Available at: <<https://www.unhcr.org/news/briefing-notes/kenya-refoulement-somali-asylum-seekers#:~:text=On%20Wednesday%2C%2031%20March%2C%2031%20asylum%20seekers%2C,asylum%20seekers%20to%20Dadaab%20police%20station%20then>>

security priorities can take precedence over humanitarian obligations, resulting in the biased application of asylum regulations.

Another barrier it interacts with is arbitrary arrests and detention. Somali asylum seekers who successfully enter Kenya may still be arbitrarily arrested and detained before deportation. The profiling of Somali asylum seekers at borders and in urban settings further increases their susceptibility, as law enforcement disproportionately enforces restrictive measures against them.

6. Development: In response to the escalating security situation in the country, prompted by the potential infiltration of threats posed by the Council of Somali Islamic Courts (COSIC) fighters, who were ousted from South-Central Somalia, Kenya decided in 2007 to close its borders with Somalia. This action effectively prohibited Somali asylum seekers from entering Kenya,¹⁷ marking the beginning of the securitisation of refugee management in Kenya, especially with regard to Somali refugees and asylum seekers.

The Somali group, *Al Shabaab* was blamed for the attacks on Westgate Mall in 2013 and Garissa University College in 2015, among others.¹⁸ Even before Westgate (attack), some politicians had blamed Somalis in the country's Dadaab refugee camp for attacks inside Kenya.¹⁹ The conflation of Somali refugees and terrorists has effectively securitised refugee politics in Kenya. According to Amnesty International, after the Westgate attack, 'the Somali community in Kenya [became] scapegoats in Kenya's counter-terror operation known as 'Usalama Watch'. Thousands of Somalis have been subjected to arbitrary arrest, harassment, extortion and ill-treatment since Operation Usalama Watch began in early April 2014. Over a thousand individuals have been forcibly relocated to overcrowded, insecure refugee camps.'²⁰ A similar report published by Amnesty International in 2014 indicates that between 2011 and 2014, the registration of Somali refugees in Kenya was suspended. This interruption hindered many asylum seekers who are eligible for refugee status from acquiring the necessary documentation.²¹ Security concerns thus play a central role in Kenya's decisions on matters relating to refugees, especially Somalis.²² However, over the years, Kenya's official policies regarding refugees seem to lack consistency, as evidenced by the varying treatment of Somali and Sudanese refugees.²³

Due to alleged security concerns and the economic burden of hosting Somali refugees, in 2013 the so-called tripartite agreement was signed between Kenya, Somali and UNHCR for the voluntary repatriation of Somali refugees.²⁴ In addition, in 2016, the government of Kenya attempted to implement a cessation of the status of Somalian refugees. This was challenged in the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017).²⁵ In that case, the High Court of Kenya examined the matter of cessation of refugee status for individuals of Somali descent. The court determined that the conditions in Somalia had not significantly changed to justify invoking the invoke the cessation clause

¹⁷ Amnesty International, 'Kenya: Thousands of Somali refugees and asylum-seekers denied refuge' Public Statement 2 May 2017. p.2.

¹⁸ See Mwangi, Oscar Gakuo, "The 'Somalinisation' of Terrorism and Counterterrorism in Kenya: The Case of Refoulement." Critical Studies on Terrorism 2018 12 (2): 298–316; BBC News, 'Westgate attack: Kenya sacks immigration officer' 25 October 2013. Available at: <<https://www.bbc.co.uk/news/world-africa-24679133?utm=>>

¹⁹ BBC News, 'Westgate attack: Kenya sacks immigration officer' 25 October 2013 *Ibid.* Brackets mine.

²⁰ Amnesty International, 'Somalis are Scapegoats in Kenya's Counterterrorism Crackdown' 2014 p.4.

²¹ Amnesty International 'Kenya: Somalis trapped in 'catch-22' amid crackdown on refugees' 11 April 2014.

²² Jacobi, Milan, and Rose Jaji. Refugee policy and selective implementation of the comprehensive refugee response framework in Kenya. No. 9/2022. IDOS Policy Brief, 2022. p.4.

²³ Muhumad, Abdirahman A., and Rose Jaji. "Somali refugees, informality, and self-initiative at local integration in Ethiopia and Kenya." Journal on Migration and Human Security 11, no. 1 (2023): 75-88 at p.80.; See also Michael Owiso, 'Incoherent policies and contradictory priorities in Kenya.' Forced Migration Review 70 (2022) pp. 71-73 at 71.

²⁴ See Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013.

²⁵ Kenya Constitutional Petition 227 of 2016 (Case No: 227 OF 2016). Available at: <<https://kenyalaw.org/caselaw/cases/view/131173#:~:text=This%20petition%20brings%20into%20sharp,can%20legally%20cease%20to%20exist>>>

outlined in Articles 1C(5) and 1C(6) of the 1951 Refugee Convention. While emphasising that any change in the country of origin must be substantial, stable, and enduring to merit the cessation of refugee status, the court concluded that the revocation of the *prima facie* status of Somali refugees constituted discrimination. Furthermore, the court pointed out that the government's decision was not supported by relevant specialised organisations, such as the UNHCR, and highlighted that the only credible evidence presented was from Amnesty International, which expressed concerns regarding the situation in Somalia.²⁶

Before 2016, Somali refugees had mostly been recognised on a *prima facie* basis, but by May 2016, the Kenyan government removed the *prima facie* recognition for Somalis.²⁷ Additionally, the government dissolved the Department of Refugee Affairs (DRS) and announced plans to expedite the repatriation of Somali refugees and to shut down the Dadaab camp by November of the same year, but this was later extended to May 2020, but have been suspended since 2020 with occasional reference to the planned shutdown. Amnesty International's investigative report suggested that Kenyan government officials deliberately coerced Somali refugees to return to Somalia, where they risk being injured or killed.²⁸

7. *Rationale*: The Kenyan government associates Somali refugees with the terrorist incidents it has faced, including the coordinated attacks on the US embassies in Nairobi and Dar es Salaam (Tanzania) in 1998. Additionally, it attributes the attacks on Westgate Mall in 2013 and Garissa University College in 2015, among other incidents, to Somali individuals.

As for the repeated closure of the border with Somalia, the government have stated that the actions are taken from genuine security concerns, especially the possible use of refugee camps as launch grounds by the *Al Shabaab*. However, concerns have been raised that the practices of arbitrary arrests and detention of Somali asylum seekers, along with border pushbacks and the ongoing threat to close the Dabaab refugee camp since 2013 all suggest that the government may be exploiting the tensions between itself and Somalia for political purposes,²⁹ especially in light of the disclosure made by then Interior Cabinet Secretary, Joseph Nkaissery³⁰ about the government's plans to building a wall along the Kenya border with Somalia to restrict access to the territory.³¹ Notably, these threats of closure of camps are often made referencing Dadaab camp rather than Kakuma camp, which primarily accommodates refugees from South Sudan.³²

8. *Legal Status*: Migrants and asylum seekers alike are classified as 'illegal immigrants' by authorities to justify the pushbacks.

9. *Specific Impact*: The specific impact of the foregoing is that Somali asylum seekers do not receive equal access to procedures as asylum seekers of other nationalities. They often face security profiling, arbitrary arrests, detentions and forcible return.

10. *Reach*: Despite that the borders are currently open, Kenya has frequently closed its borders with Somalia multiple times since 2007, including as recently as 2023.³³ While the official number of asylum seekers and

²⁶ *Ibid*

²⁷ The *prima facie* recognition process, though not a legal process under international law, is an expedited form of RSD, which is often used for individual or group recognition, provided the individuals meet the expanded definition. See Albert, Matthew. "Governance and *Prima facie* refugee status determination: clarifying the boundaries of temporary protection, group determination, and mass influx." *Refugee Survey Quarterly* 29, no. 1 (2010): 61-91.

²⁸ Amnesty International, 'Somalis are Scapegoats in Kenya's Counterterrorism Crackdown' 2014.

²⁹ Ibrahim Abdirahman Mukhtar, 'Somali refugees in Kenya are victims of strained relations'. *Daily Sabah*. 7 April 2021. Available at: <<https://www.dailysabah.com/opinion/op-ed/somali-refugees-in-kenya-are-victims-of-strained-relations>>

³⁰ Oscar Nkala, 'Kenya Begins Building Wall Along Somali Border' *Defense News*. Available at: <<https://www.defensenews.com/global/mideast-africa/2016/04/26/kenya-begins-building-wall-along-somali-border/>>

³¹ Antonia Sohns, 'Somali Refugees: Between Shelter and Discrimination' *United Nations University*. Available at: <<https://ourworld.unu.edu/en/somali-refugees-between-shelter-and-discrimination>>; BBC News, 'Scandal over Kenyas border fence that cost \$35m for just 10km'. 14 March 2019. Available at: <<https://www.bbc.co.uk/news/world-africa-47574463>>

³² Ikanda, F.N., Muhumad, A.A. & Kuhnt, J. Refugee securitization and the challenges of formal integration: case of Somali refugees in Kenya and Ethiopia. *Ibid* p.10

³³ See Dominic Omondi, 'What re-opening of Kenya, Somalia border points means' *Business Daily*. Monday, May 15, 2023. *Op cit*.

refugees affected by the border closures and pushbacks cannot be ascertained, according to Human Rights Watch, in 2007, about 60,000 Somalis crossed into Kenya despite the border being officially closed. Most of these individuals sought refuge in the Dadaab refugee camps, which were initially intended to accommodate 90,000 people now sheltering over 260,000 as of the end of 2008, rendering it the largest refugee settlement globally at that time.³⁴

According to reports by Human Rights Watch (HRW)³⁵ and UNHCR, despite the ongoing crisis in Somali and the continued influx of asylum seekers fleeing the conflict and trying to gain access to Kenya, the authorities resorted to forcibly returning asylum seekers both at the border and of those already in the country, preventing thousands of asylum seekers from accessing the territory. This continues to remain the situation along Kenya-Somali border.

11. *Source*: There are no legal justification for the barrier. As stated earlier, Kenya's humanitarian obligations are eclipsed by the perceived security risks it links to Somali refugees. Consequently, the state's approach to refugee policy is shaped by considerations of national interest, regional geopolitics, foreign relations, and its turbulent bilateral ties with Somalia.³⁶ This is particularly so given the scarcity of documentation regarding the restrictive measures or abuses directed at Sudanese asylum seekers at the Kenyan border. Additionally, there are hardly reports of Sudanese refugees and asylum seekers undergoing the same level of profiling by law enforcement as their Somali counterparts. In other words, while the refugee crisis in South Sudan is acknowledged as a humanitarian emergency, drawing considerable attention and support from the international community³⁷, Somali refugees are frequently perceived primarily in terms of security, resulting in more stringent policies and diminished humanitarian involvement.³⁸

12. *Legitimization*: The Kenyan government is legitimising *refoulement* or pushbacks, and other restrictive measures by portraying Somali asylum seekers as security threats. This is due to current refugee 'protection fatigue' coupled with inefficiencies in refugee processing and management, as well as limited resources. Official statements in this regard were made by William Ruto, the Deputy President of Kenya, as he then was, stated that 'the Dadaab Refugee Complex (hosting mostly Somali refugees and asylum seekers) has lost its humanitarian character and has been appropriated by terrorists and their agents, transforming it into a centre of radicalisation, terrorist training, planning and launching of attacks. It is also a hub for illicit movements of small arms and light weapons.'³⁹ Other similar statements are attributed to Ruto, for instance, he stated that 'Kenya has been faithful to her international obligations of humanitarian assistance but no country can shoulder humanitarian responsibilities at the expense of the security of her people and the refugees themselves [...] we have been steadfast and unparalleled despite the huge cost to the country in monetary, security, environmental and ecological spheres. He further stated that 'Kenya has used its own resources for many years to support refugees and help stabilise Somalia. The country spends 100 million US dollars annually to support military intervention in Somalia.'⁴⁰

This securitisation of the asylum process has fostered a biased narrative that depicts Somali asylum seekers as potential dangers instead of individuals deserving of protection. By reinforcing this viewpoint, the

³⁴ Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). pp.1 – 27.

³⁵ *Ibid*.

³⁶ Muhumad, Abdirahman A., and Rose Jaji. *Op cit*. p.80

³⁷ USA for UNHCR, 'South Sudan Refugee Crisis'. Available at: <https://www.unrefugees.org/emergencies/south-sudan/>; UN News, Global perspective Human stories, 'New \$1.4 billion plan to support South Sudanese refugees'. 28 March 2024. Available at: <<https://news.un.org/en/story/2024/03/1148101>>

³⁸ See Kirui, Peter, and John Mwaruvie. "The dilemma of hosting refugees: a focus on the insecurity in north-eastern Kenya." *International Journal of Business and Social Science* 3, no. 8 (2012): 161-171.

³⁹ Paul Ilado, 'Ruto defends Dadaab Refugee Camp closure at United Nations Assembly' Hiiraan Online. September 20, 2016. Available at:<https://hiiraan.com/news4/2016/Sept/117750/ruto_defends_dadaab_refugee_camp_closure_at_united_nations_assembly.aspx?utm>

⁴⁰ Mustafa Awale, 'Decision to close Dadaab refugee camp final, Ruto tells UN summit' Qaranimo Online. May 24, 2016. Available at: <<https://www.qaranimo.com/2016/05/24/decision-to-close-dadaab-refugee-camp-final-ruto-tells-un-summit/?utm>>

government has been able to rationalise border closures, forced repatriations, and arbitrary detentions, framing these actions as essential for maintaining national stability.

13. Domestic and International Reactions: There is considerable public backing for the government's approach to refugee management, especially the use of pushback and systematic *refoulement* of Somali asylum seekers. However, the government has been unable to execute the large-scale repatriations due to opposition to the idea by some local and mostly international human rights organisations, which have emphasised that the move would amount to a violation of the non-*refoulement* principle.⁴¹ The approach has encountered legal challenges within the country and has drawn criticism from both local and international human rights organisations.⁴² Nevertheless, the government defends these actions on the grounds of national security.⁴³ International organisations, including Amnesty International and UNHCR, have denounced these practices.⁴⁴

On the pushbacks and *refoulement* of Somali refugees and asylum seekers, UNHCR expressed 'its concern about the increasing trend by the Kenyan authorities to forcibly return Somali asylum seekers to their country [...] UNHCR reiterates that the Kenyan government must adhere to and show full respect for the principle of non-refoulement, as enshrined in Kenya's Refugees Act and International Law, with regard to Somali asylum seekers in particular.'⁴⁵ Similarly, Amnesty International in a press release stated that 'continued fighting and horrendous abuses in Somalia pose a very real threat to the lives of tens of thousands of children, women and men. No Somali should be forcibly returned to southern and central Somalia.'⁴⁶

Despite judicial decisions and advocacy initiatives, Kenya persists in enforcing stringent measures against Somali individuals seeking asylum. For instance, in the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017),⁴⁷ the High Court of Kenya ruled that the government's measures against Somali refugees, including the revocation of their *prima facie* refugee status and attempts to shut down the Dadaab Refugee Camp, which mostly hosts Somali refugees and asylum seekers, were discriminatory and infringed their rights to international protection. The Somali asylum seekers were unjustly categorised as security threats, indicative of racial and ethnic prejudice, and the sudden disbandment of the Department of Refugee Affairs resulted in many Somali asylum-seekers being left unregistered and without protection. The court further ruled that the plans for forced repatriation of the Somalis contravened the principle of *non-refoulement*, as they did not guarantee that returns would be voluntary, safe, and dignified.

14. Other: The suspension of refugee registration from 2011 to 2014 resulted in numerous individuals being denied legal pathways to seek asylum, thereby increasing their susceptibility to unlawful repatriation.⁴⁸ Pushbacks have been systematically executed without a thorough evaluation of individual protection requirements, which undermines fundamental tenets of refugee law and international protection. These

⁴¹ 'Migration and Conflict in the Horn of Africa: A Desk Review and Proposal for Research'. *Op cit* p.14.; J.J. Wangui, 'Proposed Closure of Kenya Refugee Camp Condemned'. Institute for War and Peace Reporting 15 October 2013, ACR Issue 366. Available at: <https://www.refworld.org/docid/526115fd4.html> See also Tripartite Agreement between the Government of the Republic of Kenya, The Government of the Federal Republic of Somalia, And the United Nations High Commissioner for Refugees (UNHCR) - Joint Communique. Available at <<https://www.refworld.org/legal/agreements/unhcr/2013/en/122614>>

⁴² See also Abdelaaty, Lamis Elmy, *Refugee Debates in Kenya, Discrimination and Delegation: Explaining State Responses to Refugees* (New York, 2021; online edn, Oxford Academic, 18 Mar. 2021)

⁴³ See Mogire, Edward, '*Victims as security threats: Refugee impact on host state security in Africa*.' Routledge, 2016.

⁴⁴ See Amnesty International, 'Kenya: Denied Refuge.' May 2007 AI Index: AFR 32/002/2007; See also UNHCR Press releases, 'UNHCR issues urgent appeal to Kenya to halt refoulement of Somali refugees' 3 Nov 2010. Available at: <<https://www.unhcr.org/uk/news/news-releases/unhcr-issues-urgent-appeal-kenya-halt-refoulement-somali-refugees>>

⁴⁵ UNHCR, 'Kenya: Refoulement of Somali asylum seekers' Briefing notes. *Op cit* (n4)

⁴⁶ Amnesty International, 'Kenya: Somali refugees need protection not abuse' Press Release 8 Dec 2010. Available at: <<https://www.amnesty.org/en/latest/press-release/2010/12/kenya-somali-refugees-need-protection-not-abuse/?utm>>

⁴⁷ [2017] KEHC 8086 (KLR)

⁴⁸ Amnesty International 'Kenya: Somalis trapped in 'catch-22' amid crackdown on refugees' 11 April 2014.

actions transpire in a context devoid of a clear procedural framework, with enforcement frequently conducted through informal methods, such as intercepting buses and escorting individuals to border regions, bypassing established deportation protocols.⁴⁹ This ambiguity in legal standards and lack of institutional oversight permit law enforcement to operate with considerable discretion and minimal accountability. Moreover, the government's rationale for these pushbacks often fluctuates between concerns of national security and economic strain, indicating a politicisation of refugee management. Disturbingly, this practice does not differentiate between asylum seekers and recognised refugees, both of whom face forced returns.

Detention

1. Functioning: In Kenya, the legal framework governing the arrest and detention of migrants and asylum seekers is established by the Citizenship and Immigration Act of 2011⁵⁰ and the Refugees Act of 2021.⁵¹ Individuals who enter and/or stay in the country without proper authorisation are considered to be violating immigration laws and may be subject to detention while awaiting deportation, as stipulated by the Citizenship and Immigration Act.⁵² Although the Citizenship and Immigration Act of 2011 and the Refugees Act offer protection to asylum seekers, explicitly prohibiting their penalisation for immigration-related matters such as irregular entry and (absence) documentation,⁵³ including prohibiting their detention, per the principle of *non-refoulement*,⁵⁴ asylum seekers often find themselves detained due to various administrative and procedural obstacles. This is further compounded by the provision of Sec 24(1) of the Refugee Act, which requires asylum seekers to apply for asylum procedure within thirty days of entry into the country.⁵⁵ Those who enter Kenya irregularly and are either unaware of or unable to navigate the asylum process are frequently categorised as illegal immigrants.⁵⁶ Furthermore, delays in the registration of refugees leave asylum seekers without official documentation, making them vulnerable to arrest and detention.⁵⁷ Additionally, individuals whose asylum applications have been rejected and who have exhausted all avenues of appeal may also face detention and deportation, especially if they do not depart voluntarily.

Detainees are typically not brought before a court, and when they are, it often occurs beyond the constitutionally mandated 24-hour period following their arrest, thereby infringing upon their rights.⁵⁸ The justifications provided for most arrests and detentions are primarily linked to security issues. While there are legitimate security concerns, particularly regarding the potential exploitation of refugee camps by *Al Shabaab* as operational bases, it is important to note that many of the arbitrary arrests and detentions involve Somali asylum seekers at the border areas in enforcement of forced returns.⁵⁹ Despite the presence

⁴⁹ UNHCR, 'Kenya: Refoulement of Somali asylum seekers' Briefing notes. *Ibid.*

⁵⁰ Kenya Citizenship and Immigration Act, 2011, Sec. 49.

⁵¹ Law enforcement relies on Refugee Act, 2011 for the arrest and detention of asylum seekers who do not report to the authorities within 30 days of entry.

⁵² See *Ibid* Sections 33 (5); 34; 53; 54; 55; particularly at 64.

⁵³ Kenya Citizenship and Immigration Act, 2011, Sec. 33 (3); 34, & 48(1c).

⁵⁴ Refugee Act 2021, Sec 29 (1).

⁵⁵ There have been reported cases of persons arrested and detained for violating Sec 24(1) of Refugee Act 2021 which provides 'any person entering Kenya to seek asylum shall make his or her intention known immediately upon entry or within thirty days by reporting to the nearest reception centre or the nearest government administrative office.'

⁵⁶ See the cases of *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR; *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic* (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022) (Ruling).

⁵⁷ Nation, 'Refugees act, 2021: Progress or pitfalls?' 31 March, 2025. Available at: <<https://nation.africa/kenya/blogs-opinion/blogs/refugees-act-2021-progress-or-pitfalls--4985080>>

⁵⁸ Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers.' Available at: <<https://www.fmreview.org/fr/kiama-likule/#:~:text=Instances%20of%20arbitrary%20arrests%20and,thus%20denying%20them%20their%20rights.>>

⁵⁹ Ibrahim Abdirahman Mukhtar, 'Somali refugees in Kenya are victims of strained relations'. Daily Sabah. 7 April 2021. Available at: <<https://www.dailysabah.com/opinion/op-cd/somali-refugees-in-kenya-are-victims-of-strained-relations>>

6. *Development*: Kenya's approach to refugee management has evolved over the years, shifting from the 'open door' policy approach to a more restrictive approach.⁶⁶ In the early years following independence (1963–1991), the country hosted approximately 15,000 refugees from neighbouring countries, such as Uganda, Somalia, and Ethiopia. 'Due to their low numbers, the government adopted an open-door policy which enabled free movement and access to employment opportunities including those considered formal such as teaching.' Beginning in the 1990s, like in other parts of Africa, Kenya's dedication to sharing responsibilities for refugee protection was replaced by a sense of 'protection fatigue.'⁶⁷ The early 1990s represented a significant shift in Kenya's refugee policy, prompted by a surge of refugees fleeing civil conflicts in Somalia and Ethiopia. This sudden surge in refugee populations put a huge strain on the

⁶⁷ Nicolosi, Salvatore F., and Solomon Momoh. "International Solidarity and the Global Compact on Refugees: What Role for the African Union and the European Union?" *Op cit.* 23-45 p.35; B Rutinwa "The End of Asylum? The Changing Nature of Refugee Policies in Africa" (2002) 21 *Refugee Survey Quarterly* 12.

government's resources, resulting in the 'temporary' creation of the Dadaab refugee camp in 1991 and the Kakuma camp in 1992.⁶⁸

According to Alexander Betts,⁶⁹ during this time, the government of Kenya began the implementation of *de facto* encampment policy that mandates refugees to reside in designated camps, sometimes referred to as 'designated areas', such as Dadaab and Kakuma refugee camps, while also imposing restrictions on their mobility unless they obtain special permits. This approach, referred to as "humanitarian containment," allowed Kenya to accept a substantial influx of refugees, yet it severely limited their rights to movement and opportunities for livelihood. Those residing in the camps endure significant overcrowding, insecurity, and restricted access to essential resources, resulting in many individuals remaining in a state of prolonged uncertainty. This policy shift was driven by a combination of national security issues, political factors, and international pressures aimed at managing migration within the region. The position of the government was, '[...] while it has been prepared to allow refugees on its territory, they should be the primary responsibility of the international community rather than the government of Kenya.'⁷⁰ During this time, there was a notable rise in the detention of refugees and asylum seekers, particularly for those found outside of camps or designated areas.

However, the use of detention and securitisation of refugee policy in Kenya reached its peak after several terrorist attacks, notably the 2013 Westgate Mall attack, which the government linked to *Al-Shabaab's* incursion through its porous borders.⁷¹ According to a report published by Amnesty International, 'between April and July 2014, the Government of Kenya undertook a security operation after criminal attacks in Nairobi's Eastleigh neighbourhoods and on the Kenyan coast. The operation was characterised by arbitrary arrests and detentions in inhumane conditions as well as police abuse, targeted harassment, extortion and the ill-treatment of thousands of individuals. The operation disproportionately targeted the Somali community, including refugees and asylum-seekers.'⁷²

Further reports suggest that between September 2023 and August 2024, law enforcement apprehended a total of 1,455 undocumented migrants, some of whom were asylum seekers, reflecting an increase from the 1,219 arrests recorded in the prior year.⁷³

7. Rationale: The detention of migrants and asylum seekers in Kenya is influenced by a combination of legal, security, and administrative factors. Individuals who enter or remain in the country irregularly often find themselves detained while awaiting deportation, despite legal prohibitions against penalising asylum seekers. The stipulation that asylum applications must be submitted within thirty days, coupled with delays in the Refugee Status Determination (RSD) process, frequently results in asylum seekers remaining undocumented and at risk of arrest.

The stance of the Kenyan government regarding detention can be clearly understood from the remarks made by Dr Karanja Kibicho, the former Principal Secretary for the Interior, who stated that 'Kenya has stood on the front lines of challenging terrorism, upholding humanitarianism, and pursuing global peace and security. We, however, have no grounds to keep compromising the security of our citizens in the face

⁶⁸ Halakhe, A. B., and S. Omondi. "Lessons and recommendations for implementing Kenya's new refugee law." *Refugees International* 1 (2024). p.4.

⁶⁹ Betts, Alexander. *Survival Migration: Failed Governance and the Crisis of Displacement*. Cornell University Press, 2013. pp. 136 - 150

⁷⁰ *Ibid* pp.144-146.

⁷¹ See Emma Hurlbert, 'Kenya and the Securitization of Refugees' *Security Distillery* 14 Feb 2020. Available at: <<https://thesecuritydistillery.org/all-articles/kenya-and-the-securitization-of-refugees#:~:text=The%20Kenyan%20government%20has%20experienced,few%20isolated%20cases%20since%202000>>

⁷² Amnesty International, 'Op-ed: Kenya cannot be allowed to gloss over serious human rights failures' 12 November 2015. Available at: <<https://www.amnesty.org/en/latest/news/2015/11/op-ed-kenya-cannot-be-allowed-to-gloss-over-serious-human-rights-failures/>>

⁷³ See Eastleigh Voice, 'Illegal migrants surge as Kenya arrests 1,455 individuals in 12 months' 27 November 2024. Available at: <Illegal migrants surge as Kenya arrests 1,455 individuals in 12 months>

of foot-dragging, double standards and lack of commitment in the rapid resettlement of Somali refugees in their homeland.’⁷⁴

Concerns regarding national security significantly contribute to the rationale for detention, with authorities citing potential threats associated with irregular migration, such as terrorism, trafficking, and smuggling.

8. *Legal Status*: Most migrants in detention are considered ‘prohibited immigrants and inadmissible persons’⁷⁵ who, under the Citizenship and Immigration Act, should be subject to deportation.⁷⁶ As mentioned earlier, asylum seekers are by law exempted from such detentions and deportations,⁷⁷ as per the principle of *non-refoulement*.⁷⁸ In practice, law enforcement relies on Section 24(1) of the Refugee Act, which requires asylum seekers to make themselves available to the asylum authority within thirty days of entry into the country, to arrest, detain and sometimes deport asylum seekers.

9. *Specific Impact*: Asylum seekers and migrants who are detained often experience violations of their human rights, endure harsh treatment during their apprehension, encounter discrimination while incarcerated, and face significant deficiencies in access to appropriate legal, medical, social, or psychological support, particularly those who are victims of trafficking.⁷⁹ Apart from the individuals who are detained, detention has an impact on children. The detention or forced relocation of asylum-seeking and refugee children significantly undermines their well-being and development. During the 2014 counter-terrorism operation known as “Operation Usalama Watch,” many parents were suddenly apprehended and detained, leaving their children without necessary care. This situation resulted in serious disruptions to their lives, including instances of interruptions in their education and malnutrition among infants. The Refugee Consortium of Kenya and others suing on behalf of the children in the case of *Refugee Consortium of Kenya & another v Attorney General & 2 others (2015)*⁸⁰, the High Court of Kenya criticised these actions, highlighting that the separation of children from their parents, without regard for the child's best interests, contravenes both national and international legal frameworks.

10. *Reach*: The deportations do not only affect migrants, but they also affect asylum seekers and refugees,⁸¹ as hundreds of thousands of asylum seekers and refugees have reportedly been forcibly returned since the closure of Kenya’s border with Somalia in 2007.⁸² The Eastleigh Voice reported that ‘between September 2023 and August 2024, a total of 1,455 undocumented migrants were arrested, marking an increase from 1,219 during the previous year,’ with Somalis accounting for ten per cent of the total population of undocumented migrants arrested within the period.⁸³

11. *Source*: Authorities mostly rely on the provisions in Sections 33(5), 34(2), 53(1j), 54, 55, and 64 of the Citizenship and Immigration Act, along with Section 24(1) of the Refugee Act to detain individuals pending trial and/or deportation. By law, a person detained under the Act should be brought before a judicial officer within 24 hours following their arrest to review the reasons for the continued detention.⁸⁴

⁷⁴ Karanja Kibicho, ‘As the Kenyan minister for national security, heres why Im shutting the worlds biggest refugee camp’. Independent News 10 May 2016. Available at: <<https://www.independent.co.uk/voices/as-the-kenyan-minister-for-national-security-here-s-why-i-m-shutting-the-world-s-biggest-refugee-camp-a7020891.html?utm=>>

⁷⁵ Citizenship and Immigration Act of 2011, Sec 33.

⁷⁶ *Ibid* Sec. 43

⁷⁷ *Ibid* Sec 33(3) & 34(1)

⁷⁸ Refugee Act 2021, Sec 29 (1).

⁷⁹ EU Emergency Trust Funds for Africa, ‘Kenya faces a lack of human rights protection – Report on migrants in detention launched’ 23 December 2020. Available at: <[Kenya faces a lack of human rights protection – Report on migrants in detention launched - European Union](https://www.eutfafrica.europa.eu/en/kenya-faces-a-lack-of-human-rights-protection-report-on-migrants-in-detention-launched-european-union)>

⁸⁰ [2015] KEHC 8005 (KLR)

⁸¹ Library of Congress, ‘Refugee Law and Policy: Kenya’. Available at: <<https://maint.loc.gov/law/help/refugee-law/kenya.php>>

⁸² Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). p.5

⁸³ Eastleigh Voice, ‘Illegal migrants surge as Kenya arrests 1,455 individuals in 12 months’ 27 November 2024. Available at: <<https://eastleighvoice.co.ke/national/92870/illegal-migrants-surge-as-kenya-arrests-1455-individuals-in-12-months>>

⁸⁴ Citizenship and Immigration Act, Sec. 49(1); 2010 Constitution of Kenya 49(1)(f).

In practice, the detainees are brought before a competent court beyond the allowable 24 hours, thereby violating their constitutional rights.⁸⁵

12. Legitimation: Although not much has been said by officials to justify the continued use of detention of asylum seekers and refugees, the use of detention remains a fundamental element of the state's broader strategy for managing irregular migration.⁸⁶ The official narrative frequently portrays detention as an essential mechanism for upholding border security and national stability, especially in light of worries regarding irregular entry and perceived security risks and threats to public safety. Despite objective 13 of the Global Compact for Safe, Orderly and Regular Migration (GCM) calls for using immigration detention as a measure of last resort, Kenya, like many countries across the world has no alternative to detention.⁸⁷ The absence of such a mechanism has resulted in the frequent restriction of freedom for individuals seeking international protection, typically without individual assessment or the consideration of alternative, less restrictive measures.

13. Domestic and International Reactions: In its 2018 report titled '*Kenya: Crackdown on Irregular Migrants Risks Sparking Xenophobia*,' Amnesty International urged the Kenyan government to cease its current campaign against undocumented migrant workers, including refugees and asylum seekers. This crackdown has resulted in home raids and the arrest of hundreds of migrants, refugees, and asylum seekers across the nation. Furthermore, in 2020, amid the COVID-19 pandemic, there was a notable surge in the arrests and detention of migrants, refugees and individuals seeking international protection. Research examining the vulnerabilities faced by urban refugees in Nairobi during the COVID-19 pandemic revealed that before the crisis, 75% of the refugees surveyed had experienced arrest and detention by law enforcement. The findings indicated that the police capitalised on the circumstances created by the pandemic and the associated lockdown measures to intensify arrests and exploitation of the vulnerable refugee population.⁸⁸ In response, the UNHCR Assistant High Commissioner for Refugees for Protection urged the Kenyan government, stating that 'refugees fleeing war and persecution should not be punished or criminalised simply for exercising their fundamental human right to seek asylum.'⁸⁹

14. Other: Officials detain refugees, asylum seekers and other offenders in the same facilities and in the same conditions in violation of the rights of those seeking international protection. According to Forced Migration Review, 'asylum seekers end up being treated as criminals, an issue that clearly goes against the concept of asylum being of a civil character. Prison conditions expose asylum seekers and refugees to assault, sexual abuse, torture, ill-health, lack of counselling support, limited legal assistance and a poor diet. The situation is often made worse by lack of translation services in the prisons which means that asylum seekers are not able to talk about the challenges they are facing or report any violations to authorities.'⁹⁰

Procedural barriers:

Requirement to Present Asylum Application Within 30 Days of Entry.

1. Functioning: The requirement that asylum seekers must file their applications within 30 days of their arrival in Kenya presents an unjust limitation. Many asylum seekers escape from conflict and tumultuous situations, which complicates their ability to adhere to this timeframe. The 30-day rule although provided

⁸⁵ Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers.' Available at: <<https://www.fmreview.org/fr/kiama-likule/#:~:text=Instances%20of%20arbitrary%20arrests%20and,thus%20denying%20them%20their%20rights.>>>

⁸⁶ Kenya National Commission on Human Rights (KNCHR), 'A Survey Report on The Status Of Migrants In Places Of Detention.' October 2020. p.2.

⁸⁷ P.3 & 10

⁸⁸ Charles Chapman, 'The Urban Displaced: An analysis of the asset vulnerabilities and livelihood strategies of refugees and the Kenyan urban poor during the Covid-19 crisis in Nairobi, Kenya.' Master thesis at Wageningen University. Sep 2021 pp.79-81. Available at: <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://edepot.wur.nl/557736>>

⁸⁹ UNHCR, 'UNHCR stresses urgent need for States to end unlawful detention of refugees and asylum-seekers, amidst COVID-19 pandemic.' Press releases 24 July 2020. Available at <<https://www.unhcr.org/news/news-releases/unhcr-stresses-urgent-need-states-end-unlawful-detention-refugees-and-asylum>>

⁹⁰ Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers. *Op cit.*

in Sec. 24(1) of the Refugee Act, it is enforced with broad discretion. Asylum seekers not applying within this specified period may have their applications deemed inadmissible or denied, thereby pushing individuals into an irregular status and heightening their susceptibility to exploitation, arrests, detention, and even deportation.

The asylum procedure in Kenya continues to be predominantly manual and centralised, necessitating physical registration at the Department of Refugee Services (DRS) offices located in Nairobi, Dadaab, Kakuma, Nakuru, Mombasa, or Eldoret.⁹¹ Asylum seekers frequently encounter significant obstacles in accessing designated registration centres, primarily due to long distances, inadequate infrastructure, and high transportation expenses. Furthermore, they are at risk of arrest or exploitation during their journey, especially since they are often undocumented before the registration process.

These challenges coped with the manual registration process requiring the physical presence of asylum seekers in designated offices and locations are often exacerbated by the asylum procedure itself, which is plagued by delays and significant backlogs. Therefore, this 30-day rule remains hindered by delays in the registration process for new asylum seekers, which may extend to three months. Even when an asylum seeker notifies the authorities of their intent to register within the mandated 30-day timeframe, any delays in registration expose them to the risks of arrest, detention, and potential *refoulement*.⁹²

2. *Time*: Officially from 2006 through the Refugee Act 2006, now repealed by the Refugees Act of 2021.

3. *Place*: Nationwide

4. *Actors*: Department of Refugee Services (DRS), Immigration and other law enforcement agencies.

5. *Interaction*: The 30-day limit for submitting asylum applications in Kenya interacts with other barriers, including the risk of arrest, detention and deportation. Asylum seekers who do not comply with this stringent procedural requirement risk having their claims rejected, pushing them to an irregular status. This situation heightens their exposure to arrest and detention as undocumented migrants, thereby increasing their susceptibility to *refoulement* and violations of human rights.

6. *Development*: In 2021, the government enacted the Refugees Act of 2021, the Act also retained the 2006 Refugee Act's stringent criteria for asylum applications, mandating that individuals submit their applications within thirty days of their arrival in Kenya. This new legislation brought about substantial changes to the refugee protection framework in Kenya. In addition to guaranteeing the right to gainful employment and enterprise, access to documentation, education, and own property;⁹³ in keeping with the provision of Art. 33 of the 1951 Convention, it retained the principle of *non-refoulement*, guaranteeing that no asylum seeker is sent back to a nation where they could face persecution,⁹⁴ and *prima facie* recognition of refugees, which is especially pertinent in cases of mass influx. The Act also retained the stringent criteria for asylum applications, mandating that individuals submit their applications within thirty days of their arrival in Kenya.⁹⁵

Law enforcement has frequently relied on the thirty-day rule to arbitrarily arrest and detain asylum seekers who did not submit their applications within the designated period. These infractions are often attributed to a stringent interpretation of the law, insufficient training of enforcement personnel, and the politicisation of refugee matters in the context of national security. Numerous asylum seekers, particularly in urban centres, encounter bureaucratic delays and restricted access to the Department of Refugee Services, complicating their ability to comply with the law. Despite these systemic obstacles, enforcement

⁹¹ See UNHCR Kenya Help Website. Available at: <<https://help.unhcr.org/kenya/applying-for-asylum-in-kenya/>>

⁹² Victor Nyamori & Abdullahi Boru Halakhe, 'Refugees act, 2021: Progress or pitfalls?' Daily Nation, March 31, 2025. Available at: <<https://nation.africa/kenya/blogs-opinion/blogs/refugees-act-2021-progress-or-pitfalls--4985080?utm=>>

⁹³ Kenya Refugee Act 2021, Part 1 - Preliminary on the definition of 'essential services', and Art. 28.

⁹⁴ *Ibid* Art. 29.

⁹⁵ *Ibid*, Sec 24 (1).

actions have persisted, leading to legal disputes.⁹⁶ This provision has been challenged severally by affected asylum seekers arrested by officials for violating this provision, and the courts in Kenya have vehemently opposed the arrest of asylum seekers in a plethora of cases, affirming in several rulings that asylum seekers should not be penalised for delays, particularly when caused by circumstances beyond their control.⁹⁷

7. *Rationale:* Kenya's decision to establish a 30-day limit for asylum applications is motivated by the need to effectively regulate and manage asylum requests, curb fraudulent claims, and maintain national security.⁹⁸ As Kenya's approach to refugee management continues to be influenced by security considerations,⁹⁹ one can infer that by implementing this stringent deadline, the government seeks to swiftly identify persons genuinely seeking asylum while deterring economic migrants and possible elements from the *Al Shabaab* terrorist organisation from exploiting the asylum process.¹⁰⁰ Furthermore, given the significant number of refugees residing in Kenya, this procedural barrier may be aimed at ensuring easier administration of the asylum process. Nonetheless, this strategy poses a risk of compromising international protection standards by emphasising administrative efficiency at the expense of the rights and needs of asylum seekers, many of whom may find it challenging to comply with the strict deadline due to trauma, lack of information, or logistical obstacles upon their arrival.

8. *Legal Status:* Asylum seekers who do not comply with this strict thirty-day requirement risk having their asylum claims rejected, pushing them to an irregular status.

9. *Specific Impact:* The impact on applicants who are unaware of the 30-day deadline or who apply after the deadline is the risk of irregular status, which subjects them to risks of detention, deportation, and the denial of critical services. This situation heightens their susceptibility to exploitation, such as forced labour and human trafficking. This leaves persons vulnerable groups or persons with specific needs who cannot easily access government offices vulnerable to exploitation.

10. *Reach:* Although precise statistics regarding the number of asylum seekers impacted by the 30-day requirement are not easily accessible, it is significant to note that, as of January 2024, more than 168,000 asylum seekers in Kenya were still pending a decision on their refugee status.¹⁰¹ Moreover, the historical of sporadic refugee registration in Kenya, especially after the 2016 mandate to shut down refugee camps, has resulted in a significant backlog of no fewer than 100,000 unregistered refugees. This scenario highlights the risk that very many asylum seekers may suffer negative consequences from the 30-day application deadline, whether due to delays in the registration process or insufficient knowledge regarding the established timelines.¹⁰²

11. *Source:* The 30-day deadline is stipulated in Sec. 24(1) of the Refugee Act 2021.

12. *Legitimization:* As stated earlier, the rule seems to be shaped by security considerations, particularly the objective of differentiating genuine asylum seekers from economic migrants, including speedy

⁹⁶ See Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers. *Op cit.*; Human Rights Watch. "Welcome to Kenya: Police Abuse of Somali Refugees." (2010) at p.29.

⁹⁷ See Rada Haile & Another V Republic [2012] KEHC 5484 (KLR); Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022) (Ruling); Majid Ali Abdu & another v Republic [2021] KEHC 7486

⁹⁸ Emma Hurlbert, 'Kenya and the Securitization of Refugees' Security Distillery 14 Feb 2020. Available at <https://thesecuritydistillery.org/all-articles/kenya-and-the-securitization-of-refugees?utm_>; Oscar Gakuo Mwangi. 'Securitisation, Non-Refoulement and the Rule of Law in Kenya: The Case of Somali Refugees.' The International Journal of Human Rights 22, no. 10 (2018): p. 1321.

⁹⁹ Nalule, Caroline. "Refugee Recognition Regime Country Profile: Kenya." (2023). p.39

¹⁰⁰ See Republic of Kenya, Report of the Joint Committee on Administration and National Security; and Defence and Foreign Relations on the Inquiry into the Westgate Terrorist Attack, and other Terror Attacks in Mandera in North-Eastern and Kilifi in the Coastal Region, Nairobi, December 2013, pp. 16-17.

¹⁰¹ UNHCR, 'Refugee Status Determination' Kenya. Available at <https://www.unhcr.org/ke/refugee-status-determination?utm_>

¹⁰² Halakhe, A. B., and S. Omondi. "Lessons and recommendations for implementing Kenya's new refugee law." Refugees International 1 (2024). p.19.

identification and filtering of the *Al Shabaab* elements to ensure the civilian character of asylum. Nonetheless, there are no formal government declarations that explicitly justify the 30-day rule based on these factors. Instead, the reasoning appears to be derived from more extensive security-focused migration management strategies, indicating that the rule is influenced more by perceived risks and deterrent goals.

13. Domestic and International Reactions: Courts in Kenya have often opposed the arrest of asylum seekers under the 30-day rule in a number of cases.¹⁰³ In *Rada Haile & Another V Republic* (2012) KEHC 5484 (KLR), the High Court examined the legality of detaining asylum seekers in relation to the 30-day rule stipulated in Section 11(1) of the Refugees Act, 2006. The court underscored the importance of adhering to the principle of *non-refoulement* as outlined in Section 18 of the Act, Article 33 of the 1951 UN Refugee Convention, and Article 2 of the 1969 OAU Convention. It was determined that the applicants, who were Eritrean nationals and had admitted to ‘unlawful presence’, were not given the chance to assert their asylum claims as mandated, and their entry dates were not verified to ascertain any breach of the 30-day requirement. The court concluded that asylum seekers should not face penalties for illegal entry without a thorough evaluation of their claims, subsequently ordering their release and referral to the UNHCR, thereby reinforcing that the enforcement of immigration regulations should not compromise refugee rights.

14. Other: Considering that most asylum seekers arrive through irregular or unofficial border entry points, frequently lacking proper documentation, the implementation of the 30-day rule for submitting an asylum application presents significant challenges. The absence of definitive entry records hinders the determination of when this 30-day timeframe commences. Such uncertainty results in a considerable legal and procedural void that may be manipulated by law enforcement authorities. Consequently, asylum seekers face the risk of arrest and arbitrary detention for failing to comply with this regulation, despite the inherent difficulties in objectively evaluating compliance. This scenario raises profound concerns regarding due process, potential infringements of the principle of non-penalisation for irregular entry as stipulated in international refugee law, especially Article 31 of the 1951 Refugee Convention, and the overall protective framework for asylum seekers.

¹⁰³ See *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic* (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022) (Ruling); *Majid Ali Abdu & another v Republic* [2021] KEHC 7486

PART 2: CASE LAW ANALYSIS

I. IDENTIFICATION OF BARRIERS IN THE CASE LAW

A. Description of the barriers in the case law

Pushbacks: Forced returns of Somali asylum seekers and refugees, primarily at the Kenya-Somalia border, often justified by the authorities on national security grounds. Number of decisions: Approximately 7-10 reported judgments since 2010.

Type of body: Predominantly the High Court of Kenya (first instance), with some cases subsequently heard by the Court of Appeal.

Detention of asylum seekers for irregular entry or presence in Kenya, notwithstanding statutory and constitutional safeguards protecting asylum seekers from penalisation on these grounds. Number of decisions: Approximately 10-15 decisions addressing detention practices and violations of procedural safeguards.

Type of body: Primarily Magistrates' Courts, with a smaller number of cases reviewed by the High Court.

Procedural barriers: Application of the requirement that asylum claims be submitted within 30 days of entry into Kenya, including cases where delayed submission resulted in adverse legal consequences for applicants. Number of decisions: Approximately 3-5 reported cases. Type of body: Mainly Magistrates' Courts, with a limited number of appeals before the High Court.

Other barriers: Discriminatory arrests, ethnic profiling, and denial of access to asylum procedures, particularly affecting Somali nationals and persons perceived to be of Somali origin. Number of decisions: At least three significant rulings. Type of body: High Court of Kenya.

B. Institutional settings

Pushbacks:

- **First instance judicial or quasi-judicial body**: Magistrates' Courts, in cases involving immigration-related offences, detention, or removal proceedings. However, where applicants challenge the lawfulness of pushbacks as violations of constitutional rights, refugee law obligations, or the principle of non-*refoulement*, proceedings are frequently initiated directly before the High Court of Kenya through constitutional petitions or judicial review applications.
- **Second instance judicial or quasi-judicial body**: The High Court exercises appellate jurisdiction over decisions of subordinate courts and has original jurisdiction to determine violations of constitutional rights and fundamental freedoms, including rights relevant to asylum seekers and refugees. The Court therefore plays a central role in litigation concerning pushbacks, *refoulement*, and access to asylum procedures.
- **Third instance judicial or quasi-judicial body**: The decision of the High Court may be appealed in the Court of Appeal, which reviews questions of law and constitutional interpretation arising from refugee and asylum-related disputes.
- **Constitutional Court**: Kenya does have a separate Constitutional Court. However, under sec 165(3)(d) of the Constitution of Kenya 2010, the High Court is vested with jurisdiction to interpret the Constitution and determine whether any law, policy, administrative action, or governmental conduct is inconsistent with constitutional provisions. Therefore, challenges to pushbacks, *refoulement* practices, arbitrary detention, and restrictions on access to asylum procedures are adjudicated by the High Court in its constitutional jurisdiction.

Detention:

- **First instance judicial body**: Magistrate

- **Second instance judicial body:** High Court
- **Third instance judicial or quasi-judicial body:** Court of Appeal
- **Constitutional Court:** High Court, depending on complexity, could go up from the Court of Appeal up to the Supreme Court of Kenya

Procedural barriers:

- **First instance judicial body:** Magistrate
- **Second instance judicial body:** High Court
- **Constitutional Court:** High Court, depending on complexity, could go up from the Court of Appeal up to the Supreme Court of Kenya

Executive bodies involved in asylum access adjudication

There are two executive bodies or quasi-judicial bodies within the Department of Refugee Services (DRS) for asylum adjudication in Kenya:

- i. The Refugee Status Eligibility Panel (RSEP).¹⁰⁴
- ii. The Refugee Status Appeals Committee (RSAC).¹⁰⁵

The Refugee Status Eligibility Panel, established under Sec 13 of the Act, is responsible for assessing individual asylum applications and providing recommendations to the Commissioner for Refugee Affairs. Applications for recognition as a refugee are presented to the Commissioner either directly or via an authorised officer. Upon receiving the application, the Commissioner or a designated officer interviews the applicant and sends the file to the Eligibility Panel for additional evaluation.¹⁰⁶

The Panel consists of a chairperson and a minimum of four members selected from within the Department, all of whom have expertise in refugee matters. It may also include technical advisors, such as representatives from UNHCR.¹⁰⁷ After its deliberations, the Panel presents a recommendation to the Commissioner, who subsequently makes the final decision and is obligated to inform the applicant of the outcome along with the reasons, especially in cases of denial.¹⁰⁸

Where an application is denied, or refugee status is cancelled or revoked, the applicant possesses the right to appeal to the Refugee Status Appeals Committee.¹⁰⁹ The Appeal Committee operates as a quasi-judicial entity, consisting of representatives from relevant government ministries and agencies, along with individuals who have proven expertise in refugee law and protection.¹¹⁰ The Committee reviews appeals against decisions made by the Commissioner. An appeal against the decision of the Commissioner must be made within thirty days of receiving the negative decision, and a subsequent appeal against the decision of the Appeal Panel can be made to the High Court within thirty days of being notified of the negative decision.¹¹¹

International or regional organizations involved in asylum access adjudication

The UNHCR and other relevant bodies are invited to join in the sittings of the committees as observers and to provide technical advice where necessary. UNHCR is explicitly authorised to engage in both the initial and appellate processes for determining refugee status. The Act empowers the Refugee Status

¹⁰⁴ Sec 13, Kenya Refugee Act 2021.

¹⁰⁵ *Ibid*, Sec 14.

¹⁰⁶ *Ibid*, Sec 12(1 - 6).

¹⁰⁷ *Ibid*, Sec 13(1 - 3).

¹⁰⁸ *Ibid*, Sec 12(5 - 7).

¹⁰⁹ *Ibid*, Sec 11(4).

¹¹⁰ *Ibid*, Sec 11(2).

¹¹¹ *Ibid*, Sec 14(1-2)

Eligibility Panel to invite representatives from the UNHCR or other relevant agencies to offer technical advice during the evaluation of asylum applications.¹¹²

Similarly, the Act permits the Refugee Status Appeals Committee to invite a UNHCR officer to guide the appeal process.¹¹³ Although the UNHCR does not possess decision-making authority, it functions as an observer and technical advisor, supplying country-of-origin information, ensuring that the adjudication processes adhere to international standards.

C. Legal context and legal system

Kenya adopted its common law system as a legacy of British colonial governance. The common law decisions by Kenyan courts, along with British judicial precedents established before independence, still play a significant role in shaping Kenya's legal landscape.¹¹⁴

Kenya's common law system remains consistent in substance across different regions.¹¹⁵ However, its implementation may vary due to customary practices,¹¹⁶ religious considerations,¹¹⁷ local court practices, and socio-economic as well as administrative factors.¹¹⁸

Legal Sources and Grounds Used in the Assessment of Asylum Barriers

The international legal frameworks that judicial and quasi-judicial bodies commonly reference when evaluating the legality of asylum barriers are the 1951 Convention Relating to the Status of Refugees; the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; the 1948 Universal Declaration of Human Rights (UDHR); the 1966 International Covenant on Civil and Political Rights (ICCPR); the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).¹¹⁹ The (quasi) judicial bodies sometimes apply other relevant human rights treaties and laws, including the 2010 Kenyan Constitution.

These instruments enhance the adjudication process by setting legal standards that limit state discretion and strengthen the adjudication process. Nevertheless, their effectiveness may be hindered by interpretative challenges, inconsistent enforcement, or national security concerns, which weaken their protective impact. Despite these limitations, they continue to be essential resources for overcoming barriers to asylum and fostering state accountability under both international and domestic law.

Furthermore, although the instruments are commonly referenced, various international frameworks, such as the CRC and the African Charter on Human and Peoples' Rights, are often overlooked or inadequately utilised in asylum adjudication, even though they are relevant to vulnerable groups such as children, women, and migrants.

¹¹² *Ibid*, Sec 11(8) & 13 (3)

¹¹³ *Ibid*, Sec 11(8)

¹¹⁴ See Wabwire, Michael Nyongesa. "The place of English law in Kenya." *Oxford University Commonwealth Law Journal* 3, no. 1 (2003): 51-80; Okubasu, Duncan M. "Common law in Kenya." *The Routledge Handbook of African Law* (2021): 114-128; Fullerton Joireman, Sandra. "The evolution of the common law: Legal development in Kenya and India." *Commonwealth & Comparative Politics* 44, no. 2 (2006): 190-210.

¹¹⁵ See Sec 3(1), Kenya Judicature Act.

¹¹⁶ See, Sec 2(1), Constitution of Kenya, 2010.

¹¹⁷ *Ibid*, Sec 170(5).

¹¹⁸ See Cotran, Eugene. "The Development and Reform of the Law in Kenya1." *Journal of African Law* 27, no. 1 (1983): 42-61.

¹¹⁹ See *Attorney General v Kituo Cha Sheria & 7 others* [2017] KECA 773 (KLR)

Influence of Regional Treaties on Asylum Access Adjudication

Membership in both regional and international treaties, such as the 1951 Refugee Convention,¹²⁰ the 1969 OAU Convention,¹²¹ the 1984 Convention Against Torture (UNCAT),¹²² the UDHR, and the ICCPR,¹²³ has profoundly influenced asylum adjudication in Kenya. The Kenyan judiciary frequently interprets domestic law considering these instruments, thereby reaffirming Kenya's commitments under the principle of non-refoulement and the right to seek asylum. The following case examples demonstrate how judicial and quasi-judicial bodies have incorporated treaty standards into their decisions:

i. Strengthening Non-Refoulement via Regional and International Law

In *Rada Haile & Another v Republic* [2012] KEHC 5484 (KLR), involving Eritrean asylum seekers accused of unlawful presence in Kenya, the High Court referenced Sec. 18 of Kenya's 2006 Kenya's Refugees Act, Art. 33 of the 1951 Refugee Convention, and Article 2 of the OAU Convention. These legal frameworks highlight the obligation of non-refoulement. The Court determined that procedural errors (such as failing to submit an asylum application within the 30-day timeframe) could not supersede the responsibility to safeguard individuals from being sent back to a nation where they face the threat of persecution. Consequently, the court mandated their release and transfer to UNHCR, emphasising the primacy of international protection responsibilities.

ii. Protecting Asylum Seekers Against Criminalisation

In *Espoir Ndarubuya & another v Director of Public Prosecution & another* E002 OF 2022, two Congolese individuals seeking asylum were found guilty of unlawful entry. However, the Court overturned these convictions, emphasising that Kenya's international commitments, particularly those outlined in the 1951 Convention and the OAU Convention, prohibit the prosecution of asylum seekers for irregular entry, provided they report to authorities promptly. This decision is consistent with the Refugee Act of Kenya and Art. 31 of the 1951 Convention, which the court expressly referred to in its ruling.

iii. Prohibiting Limitations on Refugee Numbers in Accordance with International Commitments

In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others*,¹²⁴ the Court invalidated Sec. 48 of the 2014 Security Laws (Amendment) Act, which imposed a limit of 150,000 refugees in Kenya. Expressly referring the 1951 Convention and other relevant international and regional treaties, the court determined that this limit contravened the non-refoulement principles.

iv. Condemning Forced Repatriation and Unilateral Government Actions

In *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] Constitutional Petition 227 of 2016; and *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR), the court in both cases examined governmental efforts to repatriate Somali refugees and to close the Dadaab Refugee Camp. Referencing the 1951 Convention,¹²⁵ the OAU Convention,¹²⁶ and UNCAT,¹²⁷ the court emphasised the inviolable and absolute nature of the principle of non-refoulement, particularly concerning areas characterised by instability and persecution. Additionally, the courts cited the 2010 Constitution (Articles 28, 47, 51) to underscore the rights to dignity, fair administrative procedures, and protection against cruel or degrading treatment.

¹²⁰ Acceded to the Convention on 16 May 1966.

¹²¹ Ratified the Convention 4 February 1993.

¹²² Acceded to the Convention on 21 February 1997.

¹²³ Acceded to the Convention on 1 May 1972.

¹²⁴ Petition 628, 630 of 2014 & 12 of 2015 (Consolidated)

¹²⁵ Art. 33, 1951 Convention.

¹²⁶ Art. II(3), OAU Convention.

¹²⁷ Art. 3, CAT

v. Using Treaties to Enforce and Ensure Protection and Procedural Safeguards

In the case of *Majid Ali Abdu & another v Republic* [2021] KEHC 7486 (KLR), two Yemeni asylum seekers faced charges for illegal entry without a valid pass or permit contrary to section 53 (1)(j) of the Kenya Citizenship and Immigration Act No.12 of 2011. They pleaded guilty to the charges and were convicted by the Magistrate Court. They were thereafter discharged unconditionally under the provisions of section 35(1) of the Penal Code but ordered to be repatriated to Djibouti, where they had applied to be registered as refugees. The High Court deemed their prosecution to be premature per Section 11(1) of the Refugees Act and subsequently annulled the ruling of the Magistrate Court. It cited treaty protections that prohibit penalisation for unlawful entry (Article 31, 1951 Convention) and mandated a 30-day grace period, demonstrating an approach to adjudication that is consistent with international law.

In summary, the judicial and quasi-judicial bodies in Kenya interpret asylum-related rights in a comprehensive manner, taking into account both international and regional agreements. The non-refoulement principle, provided by the 1951 Convention,¹²⁸ the OAU Convention,¹²⁹ UNCAT,¹³⁰ and civil rights and liberty provided by ICCPR, has emerged as a fundamental benchmark in the realm of Kenyan asylum law. These treaties are not merely persuasive; they are progressively regarded as obligatory interpretive instruments, particularly in light of the 2010 Constitution, which acknowledges the direct applicability of international law.¹³¹

The judicial and quasi-judicial bodies involved in asylum adjudication typically do not reference foreign cases. Nevertheless, there exists a preference for international and regional instruments, which include the use of soft law and guidelines such as those provided by the UNHCR. The Courts demonstrate a greater dependence on the UNHCR Handbook and conclusions from the Executive Committee.

The national judicial and quasi-judicial bodies involved in asylum adjudication typically do not reference decisions from international or supranational Courts. The national judicial and quasi-judicial bodies involved in asylum adjudication typically do not cite human rights standards established by international or supranational Courts.

D. Laws and norms at the domestic level

Kenya is a signatory to the 1951 Refugee Convention, its 1967 Protocol, and the 1969 OAU Refugee Convention. These international legal instruments constitute the foundation of Kenya's legal responsibilities regarding the protection of asylum seekers and refugees.

Domestically, these obligations are implemented through the 2021 Refugees Act,¹³² which establishes the legislative framework for refugee status determination (RSD), access to rights, and protection mechanisms in accordance with international standards. Within the Kenyan asylum framework, the Department of Refugee Services (DRS) is tasked with carrying out RSD procedures, which include the registration and interviewing of asylum seekers.¹³³ This process concludes with an administrative decision,¹³⁴ which can be contested before the Refugee Status Appeals Committee¹³⁵ and subsequently appealed to the High Court.¹³⁶ This multi-tiered adjudication system guarantees procedural fairness and judicial oversight, providing crucial safeguards against arbitrary decisions and violations of the principle of *non-refoulement*.

¹²⁸ Art. 33(1), 1951 Refugee Convention.

¹²⁹ Art. 2(3), OAU Convention.

¹³⁰ Art. 3, UNCAT.

¹³¹ See Sec. 2(6), 2010 Constitution of Kenya.

¹³² This Act repeal, and revised (re-enacted) the 2006 Refugee Act.

¹³³ See Sec 8 & 12 of the 2021 Refugee Act.

¹³⁴ 12(5) (7)

¹³⁵ Sec 11 (4) (9), & 14(1) *Ibid*

¹³⁶ Sec 11(10), *Ibid*

Kenyan courts have been instrumental in reinforcing the country's international commitments. Through their rulings, the judiciary has confirmed the constitutional and statutory protections afforded to refugees, upheld the prohibition against refoulement established in the internal legal instruments, and clarified that individuals entering irregularly possess the right to seek asylum. Judicial rulings have also highlighted the necessity of balancing national security concerns with individual protection needs mandating evidence-based evaluations before any removal.

Consequently, Kenya's dual commitment, evidenced by treaty ratification and domestic implementation establishes it as a jurisdiction where access to asylum is legally established, with functioning asylum institution, and with judicial oversight. The interaction of international legal obligations, statutory regulations, and judicial involvement illustrates a dynamic framework that, despite facing challenges, is essential for safeguarding the rights of asylum seekers in the country.

The principle of non-refoulement

The principle of *non-refoulement* is recognised in Kenya at the constitutional, legislative, and judicial levels. It serves as a key safeguard in asylum adjudication, preventing the return of individuals to countries where they may face persecution, torture, or other serious harm. Kenyan courts regularly rely on this principle when assessing the legality of deportations, removals, pushbacks, and other barriers to accessing asylum procedures.

i. Constitutional Recognition

The 2010 Constitution of Kenya explicitly incorporates international law, which comprises customary international law and treaties ratified by Kenya. Sec 2(5) of the Constitution provides that 'the general rules of international law shall form part of the law of Kenya,' while Sec 2(6) further elaborates that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya [...].' Kenya is a signatory to the 1951 Refugee Convention and its 1967 Protocol, both of which uphold the principle of *non-refoulement* as provided in Art. Article 33 of the 1951 Convention. Furthermore, Kenya is also a state party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which presents an even more expansive interpretation of non-refoulement in Art. 2(3). Consequently, through Art. 2(6) of the Constitution, the principle of non-refoulement is recognised at the constitutional level, albeit indirectly, but effectively.

ii. Recognition in Domestic Law

The 2021 Refugees Act contains explicit provisions regarding non-refoulement. In particular, Sec. 29 of the Act states thus, 'no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where - (a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country.' This provision integrates the *non-refoulement* principle directly into Kenyan statutory law, reflecting the language of the 1951 Convention.

iii. Recognition by Jurisprudence

Kenyan courts have confirmed the relevance of *non-refoulement* in the context of asylum adjudication. In the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others*,¹³⁷ the court in examining the government's decision to close the Dadaab refugee camp and forcibly return Somali refugees, held that these actions contravened the principle of *non-refoulement* as established by both national and international law, emphasising that Kenya is prohibited from sending refugees back to countries where

¹³⁷ [2017] eKLR

they could face threats to their life or liberty. Similarly, in *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic*,¹³⁸ involving Congolese asylum seekers, the High Court annulled the convictions and deportation orders that had been issued against the asylum seekers in accordance with immigration law. This ruling reaffirmed the principle that asylum seekers are entitled to protection and emphasised that their removal without a proper evaluation of their status violates Kenya's commitments under international refugee law.

iv. The Role of the Principle of Non-Refoulement in the Asylum Adjudication

In Kenya, the principle of non-refoulement is fundamental in facilitating access to asylum. It acts as both a procedural safeguard and a substantive right, forbidding the expulsion or return of individuals to a country where their life or freedom may be at risk. It guarantees that no asylum seeker is sent back before their claim has been thoroughly evaluated.

In practical terms, the principle obliges border authorities to *inter alia* allow entry to individuals who express a fear of persecution; prohibits the removal of an asylum seeker from Kenya throughout the asylum adjudication process; establishes a non-derogable obligation, taking precedence over immigration control in favour of international protection. Courts and quasi-judicial entities, such as the Refugee Appeals Board, have depended on this principle when assessing asylum claims, especially in cases where deportation orders have been issued without due process. See *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic*. In conclusion, Kenya acknowledges and enforces the principle of *non-refoulement* across various legal frameworks i.e., constitutional, legislative, and judicial, rendering it a fundamental aspect of asylum access adjudication within the nation.

The right to asylum

The right to seek asylum is recognised in Kenya at the constitutional, statutory, and jurisprudential levels. Although the 2010 Constitution does not expressly guarantee a right to asylum, it incorporates international law into the domestic legal order, enabling courts and administrative authorities to rely on Kenya's international refugee law obligations. Through legislation and judicial interpretation, asylum seekers are afforded a range of procedural and substantive entitlements that facilitate access to asylum procedures and refugee protection.

i. Constitutional Recognition

The right to seek asylum in Kenya is deeply embedded within various layers of the national legal framework, which includes the constitution,¹³⁹ statutory law, and judicial interpretation. As discussed earlier, the constitution acknowledges international treaties and conventions such as the 1951 Refugee Convention and the 1969 OAU Convention, as integral components of Kenyan law. This constitutional integration of international instruments establishes a robust legal basis for the acknowledgement and protection of asylum seekers.

ii. Recognition in Domestic Law

As discussed previously, the principal domestic legal framework regulating asylum in Kenya is the 2021 Refugees Act. This Act¹⁴⁰ provides for the right to seek asylum and outlines the processes for recognising refugee status. It outlines the rights and responsibilities of refugees and asylum seekers and sets up institutions tasked with determining refugee status, including the Refugee Affairs Secretariat and the

¹³⁸ (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022)

¹³⁹ As noted in the introductory sections and various discussions, the right to pursue asylum is not explicitly stated in the 2010 Constitution. Nevertheless, it can be deduced from Sec. 2(5) and (6), which assert, *The general rules of international law shall form part of the law of Kenya. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.* This implies that the 1951 Convention and other relevant international treaties ratified by Kenya may be considered integral to the Constitution itself.

¹⁴⁰ Sec 3, Refugee Act 2021.

Refugee Status Appeals Committee. Additionally, the law domesticates and enforces international and regional refugee conventions and reaffirms Kenya's commitment to the principle of *non-refoulement*. Importantly, Sec 29 of the Refugees Act forbids the expulsion or return of individuals to a country where their life or freedom may be at risk.

iii. Recognition by Jurisprudence

Kenyan jurisprudence has significantly contributed to the enhancement of refugee rights. In the case of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others*,¹⁴¹ the court declared that a legislation that limited the number of refugees in Kenya and required their transfer to specific camps was null and void, determining that these actions were unconstitutional. The courts in Kenya have consistently defended the constitutional rights of refugees, which include access to justice and protection from arbitrary detention. These rulings have clarified the range of entitlements available to asylum seekers and refugees in Kenya.

Refugees and asylum seekers in Kenya are entitled to various rights and protections under both domestic and international law. These rights encompass protection from refoulement, the right to legal residency and documentation, and freedom of movement, though the latter is frequently restricted by administrative encampment policies. The Refugees Act explicitly grants refugees the right to pursue gainful employment and self-employment and other essential services.¹⁴² The Constitution's assurance of socio-economic rights under Article 43 further strengthens these entitlements. Legal aid is accessible under the Legal Aid Act, 2016, and the constitutional right to a fair trial I (Sec 50(2)(h)) applies to asylum seekers, particularly in cases that may lead to detention or deportation.

In conclusion, Kenya acknowledges the right to asylum through a comprehensive legal and institutional framework, bolstered by constitutional provisions, domestic legislation, and judicial interpretation. The 2021 Refugees Act, in particular, establishes a progressive legal framework that affirms Kenya's international obligations. Nevertheless, despite these strong legal protections, the practical implementation remains inconsistent, with ongoing challenges in the realms of freedom of movement, access to legal aid, and the overall integration of refugees into Kenyan society.

Sources of international refugee law that are relevant to asylum access adjudication

The adjudication of asylum access and the protection of refugees in Kenya is complemented by international, including customary international law and regional legal frameworks. At the forefront of international refugee law that is relevant to asylum access adjudication in Kenya is the 1951 Convention Relating to the Status of Refugees, along with its 1967 Protocol, which collectively establish the foundation of the international refugee protection system. At the regional level and in the context of Africa, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa assumes a notably important role. This regional instrument expands the definition of a refugee to include individuals escaping generalised violence, situations that severely disrupt public order, or foreign domination, conditions that are frequently observed in African displacement scenarios.¹⁴³ In contrast to the 1951 Convention, the OAU Convention places a proactive duty on states to accept refugees and provide them with asylum, thus presenting a more comprehensive and contextually aware framework for refugee protection within the African continent.

Complementing these instruments are broader international human rights treaties such as the African Charter on Human and Peoples' Rights (ACHPR)¹⁴⁴ and the UDHR that indirectly influence asylum adjudication. The UDHR, while not legally binding, asserts the right to seek and enjoy asylum.¹⁴⁵ The

¹⁴¹ *Supra*

¹⁴² Sec 28, Refugee Act

¹⁴³ Art I(2) of the 1969 OAU Convention

¹⁴⁴ Art 12(3), ACHPR

¹⁴⁵ Art 14, UDHR

ICCPR, to which numerous states are signatories, strengthens procedural safeguards essential for fair asylum processes, including the rights to liberty, due process, and protection from torture and ill-treatment. Likewise, the CAT enshrines an absolute ban on returning individuals to a country where they are likely to endure torture,¹⁴⁶ a principle that is often invoked in the determination of refugee status. Beyond treaties, customary international law also plays a crucial role, especially in upholding the principle of non-refoulement, which is now broadly acknowledged as a peremptory norm of general international law (*jus cogens*).¹⁴⁷ Furthermore, soft law instruments such as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status offer compelling interpretative guidance for asylum adjudicators and are frequently referenced by courts and refugee authorities globally.

The integration of international norms into national legal frameworks differs based on a country's constitutional methodology. In monist nations like Kenya, international treaties are automatically incorporated into domestic law upon their ratification. On the other hand, dualist systems require the passage of implementing legislation before international treaties can be legally effective within the domestic sphere. As stated earlier, any treaty or convention ratified by Kenya is considered part of the national law. As a result, international refugee instruments such as the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention are directly applicable within the Kenyan legal framework. These instruments are also incorporated through the Refugees Act, 2021, which codifies Kenya's international responsibilities and establishes a legal structure for the reception, protection, and adjudication of asylum claims. The Act outlines procedures for determining refugee status,¹⁴⁸ prohibits refoulement,¹⁴⁹ and guarantees refugees access to fundamental rights, including gainful employment.¹⁵⁰ Furthermore, Kenyan courts have actively engaged in interpreting and enforcing refugee rights, frequently referencing international law to bolster constitutional protections and statutory provisions.

Other human rights obligations

As discussed above, in addition to the obligations established by the 1951 Refugee Convention and the 1969 OAU Convention, a wide array of international and regional human rights instruments applies to refugees and asylum seekers in Kenya. These human rights frameworks not only enhance the refugee protection system but also play a vital role in facilitating access to asylum and ensuring procedural fairness in the refugee status determination process. Their incorporation into Kenya's domestic legal framework via constitutional, statutory, and judicial channels, has fostered a more holistic and rights-based approach to asylum adjudication.

Among these instruments, the ICCPR stands out, as Kenya is a state party to the convention. The ICCPR safeguards essential procedural and substantive rights pertinent to asylum seekers, such as protection against arbitrary detention, the right to a fair hearing, freedom of movement, and the prohibition of torture and inhumane treatment. These rights are fundamental in shaping the conditions under which asylum applications are submitted, assessed, and decided. For instance, the availability of interpreters, legal counsel, and the right to appeal unfavourable asylum decisions are all rooted in the ICCPR's guarantees of a fair trial. The Covenant's focus on non-discrimination guarantees that asylum seekers, irrespective of their nationality or legal status, receive equal treatment under the law.

In addition to civil and political rights, the economic, social, and cultural rights outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) serve as essential complements. Kenya is obligated under the ICESCR to guarantee access to education, healthcare, and a sufficient standard of living for all individuals within its borders, including asylum seekers and refugees. These rights hold

¹⁴⁶ Art. 3, CAT

¹⁴⁷ Janis, Mark W. "The nature of *jus cogens*." *Conn. J. Intl L.* 3 (1987) p. 359

¹⁴⁸ Sec 13, Refugee Act

¹⁴⁹ Sec 29, *Ibid*

¹⁵⁰ Sec 28, *Ibid*

particular importance during the period of awaiting an asylum claim's adjudication, as they ensure a fundamental level of human dignity and social protection. The Constitution of Kenya, specifically in Sec 43, embodies these assurances by recognising the right of "every person" to health, housing, food, water, social security, and education—rights that are crucial for the survival and integration of asylum seekers.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is also pivotal in the context of asylum adjudication, especially through Art 3, which forbids the return (*refoule*) of individuals to a State where they may face torture. This obligation is absolute and applies regardless of whether the individual qualifies as a refugee under the 1951 Convention. Consequently, it offers a vital layer of additional protection for those who may not fit the refugee criteria but are still at risk of significant harm upon repatriation. Likewise, the Convention on the Rights of the Child (CRC), which Kenya has ratified, stipulates that the best interests of the child must be a primary consideration¹⁵¹ in all matters affecting children, including decisions related to asylum.¹⁵² The CRC further guarantees children's rights to education, healthcare, and protection from exploitation, rights that must be preserved throughout the asylum process.

At the regional level, the African Charter on Human and Peoples' Rights (ACHPR) strengthens numerous protections. It acknowledges the right to pursue and secure asylum¹⁵³ and ensures dignity, equality, access to justice, and safeguards against discrimination and torture.¹⁵⁴ Consequently, the ACHPR strengthens the obligation already established by global instruments and provides a regionally contextualised understanding of refugee rights in Africa.

As discussed earlier, Kenyan courts have often utilised international human rights law to interpret constitutional provisions, especially in cases concerning the detention of asylum seekers, access to legal remedies, and the rights of urban refugees. In practice, these human rights instruments are essential in enhancing the refugee protection framework. They provide procedural safeguards during asylum procedure, establish criteria for complementary protection when the refugee definition is not satisfied, and offer a legal foundation for socio-economic rights pending or following status determination. Importantly, they also guide the interpretation of Kenya's non-refoulement obligations, which encompass broader risks of torture, inhuman treatment, or other forms of irreparable harm.

Other obligations stemming from general public law, criminal law, humanitarian law, civil law

In Kenya, individuals seeking asylum are governed by and benefit from a comprehensive array of legal obligations and protections that extend beyond those established by the 1951 Refugee Convention and associated refugee instruments. This includes norms from various legal domains, including general public law, criminal law, civil law, administrative law, and elements of international humanitarian law (IHL). Collectively, these legal frameworks have a significant impact on the treatment of asylum seekers within the legal system and are instrumental in shaping the adjudication of asylum access, as well as the overall protection environment.

i. General Public and Constitutional Law

The Constitution of Kenya serves as a fundamental legal instrument that regulates the rights and treatment of all individuals within its borders, including those seeking asylum. The Bill of Rights in Chapter Four of the Constitution offers extensive protections applicable to every person in Kenya, irrespective of nationality or legal status. These rights include dignity,¹⁵⁵ equality and non-discrimination¹⁵⁶ access to

¹⁵¹ Art 3, CRC

¹⁵² Art 22, CRC

¹⁵³ Art. 12(3), ACHPR

¹⁵⁴ Preamble, Art 5 & 28, *Ibid*.

¹⁵⁵ Sec 28, Constitution of Kenya 2010

¹⁵⁶ Sec 27, *Ibid*.

justice,¹⁵⁷ fair administrative action,¹⁵⁸ and the freedom and security of the individual.¹⁵⁹ These constitutional rights play a vital role in the processes of asylum adjudication. For instance, Sec 47 of the Constitution mandates that all administrative actions, including those made by the DRS or immigration officials, must adhere to principles of legality, reasonableness, and procedural fairness. Consequently, asylum seekers are by law entitled to fair hearings, notifications of decisions, and opportunities to appeal or seek review, even outside the specific context of refugee law instruments. The enforcement of these public law principles could enhance due process in the determination of refugee status and ensure governmental accountability in the management of asylum claims.

ii. *Criminal Law*

Kenya's Penal Code and the criminal justice system have implications for asylum seekers, especially in cases of irregular entry or undocumented presence. While the Refugees Act, 2021, in line with Article 31 of the 1951 Convention upholds the principle that asylum seekers should not face penalties for irregular entry or presence if they report to authorities within a reasonable timeframe, in reality, asylum seekers can be arrested, detained, or prosecuted under criminal law before the regularisation of their status. See the case of *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR). Nevertheless, the courts in Kenya have increasingly acknowledged the necessity of balancing the rights of asylum seekers with enforcement priorities. The principle of non-penalisation for irregular entry, coupled with constitutional safeguards against arbitrary detention, shapes judicial interpretation and prosecutorial discretion, particularly in cases involving vulnerable individuals or those who exhibit a credible fear of persecution.

iii. *Administrative Law*

Norms of administrative law play a significant role in shaping the adjudication of asylum access. The Fair Administrative Action Act 2015 implements Sec 47 of the Constitution, mandating that all administrative decisions be fair, reasoned, and subject to review.¹⁶⁰ In the context of asylum, this legislation dictates the process by which refugee status decisions are made, ensuring that asylum seekers are entitled to be heard, to receive written explanations for decisions,¹⁶¹ and to pursue judicial or quasi-judicial remedies.¹⁶² These procedural safeguards are essential for preventing arbitrary denials of asylum claims and for ensuring access to effective remedies. For example, if the DRS denies an application for refugee status, the applicant must be informed of the reasons for the denial and granted access to the Refugee Status Appeals Committee (RSAC) or the courts for redress. Thus, administrative law establishes the legal framework for fairness and accountability in asylum procedures.

iv. *Civil Law*

Civil law regulations apply to asylum seekers, especially concerning family law, contracts, and torts. For instance, asylum seekers are permitted to engage in employment contracts, rental agreements, or civil actions related to custody, property, or personal injury. Their rights and responsibilities remain intact regardless of their immigration status. Sec 28(5) of the Refugees Act provides for the right of asylum seekers and refugees possess the right to work and engage in business, which inherently involves civil and commercial legal frameworks.¹⁶³ In cases of disputes or enforcement actions stemming from these relationships, asylum seekers have the right to access civil courts under the same conditions as citizens.

¹⁵⁷ Sec 48, *Ibid*

¹⁵⁸ Sec 47, *Ibid*

¹⁵⁹ Sec 29, *Ibid*

¹⁶⁰ Sec 4, The Fair Administrative Action Act 2015.

¹⁶¹ *Ibid*

¹⁶² Sec 6 & 9, *Ibid*

¹⁶³ Although in reality, this right to work is severely restricted by Kenya's approach of restricting refugees to 'designated areas' as provided in Sec 28(2)(5) of the Refugee Act.

v. *International Humanitarian Law (IHL)*

During armed conflicts, particularly in border areas or where refugees are escaping from ongoing hostilities, international humanitarian law (IHL) may overlap with refugee protection.¹⁶⁴ Although Kenya is not presently experiencing armed conflict, its geographical proximity to conflict-affected States such as Somalia, South Sudan, and the Democratic Republic of the Congo (DRC) results in many asylum seekers fleeing violence related to war into Kenya.¹⁶⁵ IHL standards, particularly those outlined in the Geneva Conventions, establish protection criteria for individuals who may not meet the refugee definition under the 1951 Convention but are still entitled to protection from return based on complementary protection principles.¹⁶⁶ In these instances, asylum adjudicators are required to evaluate not only individual persecution but also the wider context of indiscriminate violence or significant threats to life,¹⁶⁷ as acknowledged by the OAU Convention and customary IHL.

iv. *Role of these Legal Frameworks in Asylum Adjudication*

Collectively, these legal obligations serve multiple essential roles in the adjudication of asylum access:

- a) **Procedural Safeguards:** Public and administrative law guarantees that decisions impacting asylum seekers are rendered in a fair and transparent manner, with available remedies as provided in the Fair Administrative Action Act 2015.
- b) **Substantive Protections:** Criminal, civil, and constitutional law safeguard rights related to liberty, family life, employment, and property, which can affect the evaluation of an asylum seeker's credibility, vulnerability, or potential for integration.
- c) **Preventing Misuse of State Power:** Legal limitations on detention, deportation, or the denial of services avert arbitrary or discriminatory treatment of asylum seekers.
- d) **Complementary Protection:** In instances where refugee status is not conferred, humanitarian and constitutional principles may still mandate protection based on human rights or humanitarian considerations.

In Kenya, asylum seekers are situated within a comprehensive legal framework that transcends refugee-specific regulations. The interaction of public, criminal, administrative, civil, and humanitarian law with refugee law guarantees that asylum adjudication occurs within a legally informed context. These supplementary legal obligations arguably enhance procedural fairness, guard against rights infringement, and offer additional protective measures, thereby fostering a more integrated and rights-oriented approach to asylum adjudication.

Membership in a regional or other international organization

Kenya is a member of various regional and international organisations that establish legally binding regulations and human rights commitments pertinent to asylum, most notably the AU and the UN system. These affiliations have significantly shaped the evolution, interpretation, and enforcement of asylum law and practices within Kenya.

Kenya, being a longstanding member of the African Union and has ratified several vital AU instruments related to refugee protection. The most notable of these is the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The Convention has been directly integrated into Kenya's domestic legislation through the Refugees Act, 2021, which acknowledges the wider OAU refugee

¹⁶⁴ See Gieseken, Helen Obregón. "The protection of migrants under international humanitarian law." *International Review of the Red Cross* 99, no. 904 (2017): 121-152.

¹⁶⁵ CSIS, 'Kenya and the Democratic Republic of the Congo: Where Is the Security Partnership?' Available at <<https://www.csis.org/analysis/kenya-and-democratic-republic-congo>>

¹⁶⁶ Common Article 3 of the Geneva Conventions

¹⁶⁷ Additional Protocol II (1977), Art 17: Forbids the coercive relocation or repatriation of civilians amidst non-international armed conflicts.

definition in Sec 3. Practically, this has enabled Kenya to offer protection to a significant number of individuals fleeing widespread violence, particularly from Somalia, South Sudan, and the Democratic Republic of the Congo (DRC), who may not fulfil the more restrictive criteria outlined in the 1951 Convention.

Furthermore, Kenya is obligated to adhere to the ACHPR, which was also established within the framework of the African Union. This Charter ensures a comprehensive array of civil, political, and socio-economic rights that are applicable to all individuals,¹⁶⁸ including refugees and asylum seekers. Notably, the ACHPR emphasises the right to seek and obtain asylum,¹⁶⁹ protection against torture and inhumane treatment.¹⁷⁰ Although the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights are not directly involved in cases concerning refugees in Kenya, they establish jurisprudential standards that significantly impact both regional and national practices regarding refugee protection.

Kenya is also a member of the United Nations and a signatory to the 1951 Convention concerning the Status of Refugees and its 1967 Protocol, both of which serve as binding instruments that constitute the foundation of international refugee law. The adherence of Kenya to these instruments is complemented by the United Nations High Commissioner for Refugees (UNHCR), which plays a significant role in determining refugee status, providing policy guidance, and overseeing protection conditions within Kenya. UN human rights treaties further impose obligations pertinent to asylum. Kenya is a signatory to the ICCPR, the ICESCR, the CAT, and the CRC, among others. These instruments ensure rights such as protection from torture, due process, non-discrimination, and access to essential services, which are applicable to all individuals within Kenya's jurisdiction, including those seeking asylum. These human rights instruments impact asylum adjudication in Kenya by emphasising the necessity for equitable procedures, access to justice, and the principle of non-refoulement. They also constitute part of Kenya's domestic law by virtue of its Constitution, which asserts that all ratified treaties are integrated into the law of the land.

The responsibilities arising from these regional and international organisations have significantly influenced Kenya's asylum framework. For instance, these international and regional frameworks have contributed to the formulation of legal definitions regarding refugee status within Kenyan legislation,¹⁷¹ and ensure a broad interpretation of non-refoulement, extending its application not only to Convention refugees but also to individuals facing the threat of torture, inhumane treatment, or widespread violence.¹⁷² Furthermore, they mandate that Kenya uphold procedural protections in the processes of refugee status determination,¹⁷³ detention, and deportation;¹⁷⁴ and direct Kenya's institutional collaboration with UNHCR and regional human rights entities, especially concerning policy formulation, oversight, and capacity building.¹⁷⁵

Kenya's membership of the African Union and the United Nations, coupled with its ratification of their fundamental human rights and refugee instruments, establishes a strong normative framework for asylum protection. These binding commitments not only influence Kenya's domestic asylum legislation and procedures but also act as a standard for evaluating the legality and equity of governmental actions impacting asylum seekers and refugees.

¹⁶⁸ Preamble, Art. 20, 22, ACHPR.

¹⁶⁹ Art 12(3), *Ibid*

¹⁷⁰ Art 5, *Ibid*

¹⁷¹ Sec 3(1)(c), Refugee Act.

¹⁷² Sec 29, *Ibid*

¹⁷³ Sec 13-15, *Ibid*

¹⁷⁴ Art. 2(3), OAU Convention; & Art 33, 1951 Convention.

¹⁷⁵ Sec 13(3), 36 Refugee Act; and Art 8 & 11 OAU Convention.

The role of soft law in asylum access adjudication

Soft law, comprising UNHCR guidelines, handbooks, policy recommendations, and institutional circulars, holds a crucial interpretive and procedural function in the adjudication of asylum access in Kenya, despite its non-binding nature. These instruments serve to elucidate legal standards, influence administrative practices, and guide judicial reasoning, particularly in situations where statutory or treaty provisions are either silent, ambiguous, or inadequately developed. The asylum system in Kenya has significantly utilised UNHCR's soft law resources to implement its international and domestic responsibilities, particularly in the absence of comprehensive implementing regulations under the Refugees Act.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*,¹⁷⁶ along with its *Guidelines*¹⁷⁷ represents some of the most frequently referenced soft law materials in the context of refugee adjudication. Kenyan adjudicators, including the Refugee Advisory Committee and the Refugee Status Appeals Committee commonly depend on these resources to interpret essential and complex legal concepts.

For instance, in the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR), the High Court cited the UNHCR's 'soft law' instruments, including the UNHCR Handbook, Policy Papers, and position documents as highly persuasive authorities, even though these instruments do not constitute legally binding treaties. Similarly, in the case of *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR, the High Court made a ruling through a comprehensive *amicus curiae* brief by UNHCR. While not legally binding, the UNHCR's involvement offered authoritative interpretations regarding Kenya's international obligations as outlined in the 1951 Refugee Convention and the principle of non-refoulement. UNHCR's intervention through *amicus* emphasised how the government's encampment directive infringed upon the rights of refugees to dignity, freedom of movement, and fair administrative action. The Court utilised the submissions and soft laws and standards cited to interpret constitutional provisions in accordance with international human rights standards, ultimately deeming the directive unconstitutional.

E. Legal standing

In Kenya, individuals seeking asylum are afforded various judicial and quasi-judicial avenues and remedies to contest obstacles to accessing asylum. These mechanisms are rooted in constitutional protections, statutory regulations, and principles of administrative justice, allowing litigants to pursue redress against unlawful denials of asylum access, procedural infringements, detention, or removal orders that contravene refugee protection standards. The remedies available demonstrate a relatively robust legal framework that supports the justiciability of asylum-related claims, despite inconsistent implementation of practical access to justice.

i. Administrative Remedies: Refugee Status Appeals Committee (RSAC)

According to the Refugees Act, 2021, individuals whose asylum applications have been denied by the Refugee Status Eligibility Panel possess the right to appeal to the RSAC.¹⁷⁸ This represents the initial formal remedy for disputing unfavourable decisions within the refugee status determination process. The grounds of appeal could include denial of refugee status, cessation, and revocation of status.¹⁷⁹

¹⁷⁶ HCR/1P/4/Eng/REV.2

¹⁷⁷ HCR/GIP/02/01; HCR/GIP/02/02; HCR/GIP/03/03; HCR/GIP/03/04; HCR/GIP/03/05; HCR/GIP/04/06; HCR/GIP/06/07; HCR/GIP/12/08; HCR/GIP/12/09; HCR/GIP/13/10/Corr. 1; HCR/GIP/15/11; & HCR/GIP/20/12.

¹⁷⁸ Sec 14(1), Refugee Act.

¹⁷⁹ Sec 11(4), Refugee Act.

ii. *Judicial Review Before the High Court*

If unsatisfied with the decision of the RSAC, within thirty days of being notified of the decision of the RSAC, an asylum seeker is entitled to submit an appeal to the High Court for a judicial review of the decision.¹⁸⁰ In addition to asylum grounds, this right is rooted in Sec 47 of the Constitution of Kenya 2010, which ensures that every individual is entitled to fair administrative action that is prompt, efficient, lawful, reasonable, and procedurally just. Moreover, Sec 7 of the Fair Administrative Action Act (2015 offers additional procedural support by implementing Sec 47, enabling individuals affected to contest administrative decisions that infringe upon their rights or legitimate expectations.

iii. *Other remedies*

Kenya's legal framework offers various remedies for asylum seekers, especially in cases of arbitrary detention, threats of deportation, or the absence of procedural protections. One notable remedy is the *habeas corpus* application, which is accessible to all, including asylum seekers who are detained without charges or who have not been presented before a court within the constitutionally mandated 24 hours. This procedure is aimed primarily at contesting unlawful detention and facilitating the release of the applicant.¹⁸¹ This legal mechanism is frequently utilised in situations involving detention at border checkpoints, police stations, or immigration detention centres, where asylum seekers have not been allowed to engage in asylum procedures. Its significance is particularly evident in the protection of vulnerable populations, including unaccompanied minors, trafficking victims, and individuals at risk of imminent deportation.

Another significant remedy is the application for injunctions and interim relief, which can be requested from the High Court to suspend deportation or removal while an asylum application or appeal is ongoing. This form of relief is based on the Civil Procedure Rules¹⁸² and the inherent jurisdiction of the High Court.¹⁸³ It is predominantly employed to stay removal orders in situations where there is a danger of refoulement or violation of constitutional and international obligations.

Moreover, beyond formal judicial processes, national human rights and oversight institutions offer vital quasi-judicial pathways for seeking redress. Organisations such as the Kenya National Commission on Human Rights (KNCHR)¹⁸⁴ and the Commission on Administrative Justice (Office of the Ombudsman)¹⁸⁵ are tasked with investigating complaints, providing recommendations, and performing systemic monitoring.

F. The influence of international Courts

Although Kenya is not directly bound by the judgments of most international and supranational courts, Kenyan courts frequently draw on their jurisprudence as persuasive authority when interpreting refugee rights, non-refoulement obligations, and procedural safeguards in asylum cases. Decisions of the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and international human rights bodies have influenced judicial reasoning on access to asylum, protection from arbitrary detention, due process, and the prohibition of refoulement. Kenyan courts have generally relied on such jurisprudence to support a rights-based interpretation of constitutional and statutory protections applicable to asylum seekers and refugees.

¹⁸⁰ Sec 14(2), *Ibid*

¹⁸¹ See Sec 49 & 51, Constitution of Kenya

¹⁸² See Order 40 (on temporary Injunctions and interlocutory orders) *Civil Procedure Rules*. Legal Notice 151 of 2010

¹⁸³ See Sec 165, Constitution of Kenya.

¹⁸⁴ See Sec 8, 26, & 29, KNCHR Act 2011

¹⁸⁵ See 19, 21, 22, & 26, Commission on Administration of Justice Act 2011

G. Comparative insights

Kenya's judiciary has been instrumental in determining the legality of various barriers to asylum, revealing a complex and sometimes inconsistent approach. Although judicial decisions have largely supported the protection of asylum seekers, variations arise in the interpretative methods, legal reasoning, and procedural priorities of the courts. These divergences are particularly pronounced in cases related to the requirement to submit an asylum application within thirty days of arrival, penalties for unauthorised entry, and government-imposed restrictions on the number of refugees.

A notable instance of this judicial inconsistency is found in the interpretation of Sec 11(1) of the Refugees Act 2006 (Now Sec 24(1) Refugee Act 2021), which requires the filing of an asylum application within thirty days. In *Rada Haile & Another v Republic*,¹⁸⁶ the High Court upturn the decision of the Magistrate, which convicted the asylum seekers for unlawful presence in Kenya for not submitting their application within the prescribed period. The High Court permitted the asylum seekers a 90-day extension, referencing international law obligations, including the principle of non-*refoulement* as outlined in Article 33 of the 1951 Refugee Convention. Similar scenario played out between the Magistrate Court and the High Court in *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR. However, unlike in the *Rada Haile's* case, the High Court went further in *Espoir Ndarubuya's* case, highlighting procedural deficiencies, such as the lack of legal representation and language barriers, as fundamental to the miscarriage of justice.

Additional divergence is evident in judicial reactions to the interplay between refugee law and immigration enforcement. In *Majid Ali Abdu & another v Republic*,¹⁸⁷ the High Court annulled the decision of the Magistrate Court that convicted the applicants for unauthorised entry,¹⁸⁸ affirming the applicants' entitlement to seek asylum during the thirty-day grace period and stressing protection from penalties associated with irregular entry. This decision demonstrates judicial inclination to interpret immigration law through the lens of refugee protection principles, often at odds with administrative practices that merge the two legal frameworks.

The most significant judicial interventions have primarily focused on legislative and executive measures that limit access to asylum. In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015],¹⁸⁹ the High Court ruled that a statutory limit on the number of refugees and a policy requiring encampment were unconstitutional, stating that these actions breached Kenya's constitutional and international obligations. Likewise, in *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017]¹⁹⁰ and *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017],¹⁹¹ the judiciary criticised the decision to forcibly repatriate Somali refugees, the cancellation of *prima facie* refugee status for Somalis, and the dissolution of the Department of Refugee Affairs, labelling these actions as discriminatory and contrary to the principles of non-*refoulement*, the right to dignity, and fair administrative processes.

These administrative, quasi-judicial and judicial divergences are not simply procedural; they highlight conflicting perspectives, i.e., the state's responsibilities under international law, and the balance between national security and human rights. Divergences are also apparent within the judiciary, as Magistrate Courts frequently make rulings that impose penalties on asylum seekers for immigration violations, while the High

¹⁸⁶ [2012] KEHC 5484 (KLR)

¹⁸⁷ [2021] KEHC 7486 (KLR)

¹⁸⁸ Offence of entering Kenya without a valid pass or permit contrary to section 53 (1)(j) of the Kenya Citizenship and Immigration Act No.12 of 2011

¹⁸⁹ Petition 628, 630 of 2014 & 12 of 2015 (Consolidated)

¹⁹⁰ Constitutional Petition 227 of 2016

¹⁹¹ KEHC 8086 (KLR))

Court typically embraces a more protective stance, emphasising refugee rights and international legal responsibilities.

Divergences among judicial bodies

There are no major or systematic divergences among Kenyan judicial bodies in relation to asylum access adjudication. The High Court and Court of Appeal have generally adopted a consistent approach grounded in constitutional principles, international refugee law, and the principle of *non-refoulement*. While lower courts, particularly Magistrates' Courts, have occasionally adopted more formalistic approaches in cases involving immigration offences and irregular entry, appellate courts have generally corrected such decisions where they conflict with refugee protection standards. Overall, Kenyan jurisprudence demonstrates a high degree of consistency across judicial levels, particularly in leading cases concerning non-refoulement, refugee rights, and access to asylum procedures.

Divergences between national courts and supranational rulings

Kenya's national asylum decision reflects both conformity with and divergence from the broader principles established by international organisations such as the UNHCR and the Committee Against Torture (CAT). Although Kenyan courts have increasingly demonstrated a commitment to adhering to international refugee law, inconsistencies persist, especially in the areas of administrative enforcement and procedural protections.

Kenyan courts have progressively aligned their rulings with fundamental principles of *non-refoulement*, due process, and dignity, as mandated by the 1951 Refugee Convention, the 1969 OAU Convention, and the Convention Against Torture.

In *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017],¹⁹² the High Court ruled that the government's order to close the Dadaab refugee camp was unconstitutional. It determined that mass repatriations contravened the principle of *non-refoulement*, which is embedded in both international and regional refugee frameworks. The court specifically referenced the UNHCR Handbook and Guidelines and reaffirmed the state's obligation to evaluate individual risk before deportation. This is consistent with the 1951 Convention, the OAU Convention, and the CAT¹⁹³ which forbids expulsion in cases where torture or inhumane treatment is probable.

Similarly, in *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022],¹⁹⁴ the High Court annulled a criminal conviction of asylum seekers who did not regularise their status within 30 days of arrival, asserting that the 30-day stipulation in Sec. 11(1) of the Refugees Act, cannot override the principle of non-penalisation outlined in Art. 31 of the 1951 Convention.

There are however some divergences in certain administrative practices or judicial rulings which create procedural or legal obstacles that hinder effective access to asylum in Kenya, often placing national security or immigration control above the necessity for protection.

Best practices or lessons learned from the adjudication of asylum barriers

One notable good practice is the Kenyan judiciary's willingness to accept public interest litigation initiated by civil society organisations such as *Kituo Cha Sheria* and the Refugee Consortium of Kenya, which has facilitated access to justice for vulnerable asylum seekers. These judicial decisions have established protection against refoulement and the right to dignity as rights that are constitutionally protected and non-derogable, thus enhancing their enforceability.

¹⁹² *Supra*

¹⁹³ See the CAT General Comment No. 1 (1997)

¹⁹⁴ *Supra*

H. Role of expert testimony

Expert testimony provided by medical professionals, psychologists, and analysts specialising in country-of-origin issues has increasingly shaped the decisions made by Kenyan judicial and quasi-judicial bodies regarding asylum obstacles. In the case of *Kituo Cha Sheria & 8 others v Attorney General* [2013],¹⁹⁵ the judiciary rejected the government's plan to forcibly relocate urban refugees, relying on expert reports that indicated the absence of concrete security threats and the disproportionate impact on independent refugees.

Furthermore, the contributions of human rights organisations, such as the Kenya National Commission on Human Rights, were pivotal in the case of *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others* [2017],¹⁹⁶ the documentary evidence presented by experts highlighted instances of arbitrary pushbacks at the Kenya-Somalia border, as well as breaches of the *non-refoulement* principle, prompting the court to stress the importance of individualised security evaluations and constitutional protections rather than relying on blanket policies.

In conclusion, expert testimony in Kenya plays a crucial role in validating risk and credibility, influencing a systemic examination of asylum barriers, thereby ensuring that decisions are consistent with both international standards and constitutional protections.

I. Future Directions

Emerging trends or evolving issues in asylum law

As of July 2026, no major legislative or institutional reforms are expected to substantially alter the adjudication of asylum-access barriers in Kenya. The principal developments concern the implementation of the Refugees Act 2021, the Refugees (General) Regulations 2024 and the Shirika Plan, which are likely to generate litigation over their application rather than fundamentally changing the existing legal framework. The Shirika Plan is the Kenyan Government's long-term policy framework (2025–2036) for transitioning from a camp-based refugee system to integrated settlements that promote refugee self-reliance, inclusion in national systems and shared development with host communities.¹⁹⁷

II. IDENTIFICATION OF LEADING DECISIONS

Pushbacks: (1) *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR); (2) *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR (Constitutional Petition 227 of 2016); *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*; KNCHR & another (Interested Parties) [2024] KEHC 2973 (KLR); *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR; *Attorney General v Kituo Cha Sheria & 7 others* [2017] KECA 773 (KLR).

Detention: *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR (High Court at Kisumu, Criminal Revision No E002 of 2022; *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic* [2022] KEHC 2827 (KLR)

Procedural barriers: (1) *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic* [2022] KEHC 2827 (KLR) (2) *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR (Criminal Revision E002 of 2022); *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR); *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*.

Other barriers (Restrictions on refugee registration): *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others* [2015] eKLR (Petition 628, 630 of 2014 & 12 of 2015 (Consolidated)

¹⁹⁵ *Supra*

¹⁹⁶ *Supra*

¹⁹⁷ Government of Kenya, Department of Refugee Services, *Shirika Plan for Refugees and Host Communities* (March 2025); Department of Refugee Services, *Government Launches Shirika Plan to Enhance Refugee and Host Communities Inclusion* (2 April 2025) accessed <<https://refugee.go.ke/node/381>>

A. Description of the barriers in the selected decisions

Pushbacks: The barrier was informally established by the executive through its counter-terror operation known as ‘Usalama Watch’. Through the operation, ‘thousands of Somalis have been subjected to arbitrary arrest, harassment, extortion and ill-treatment since Operation Usalama Watch began in early April 2014. Over a thousand individuals have been forcibly relocated to overcrowded, insecure refugee camps.’¹⁹⁸ The operation targets to refole Somali asylum seekers and refugees, attributing the implementation to national security concerns. There have been instances where the authorities have forcibly returned asylum seekers both at the border and of those already in the country. Notably, there are reports of law enforcement agents intercepting buses carrying asylum seekers and taking them to Dadaab police station, from where they were later escorted back to Doble, near the Somali border with Kenya.¹⁹⁹ The actors involved in its establishment include immigration officials, police, and other law enforcement agencies.

Detention: The detention of asylum seekers in Kenya, while not endorsed by judicial or quasi-judicial bodies in the majority of cases, is established by the legal framework governing the management of immigration, established by the Citizenship and Immigration Act of 2011²⁰⁰ and the Refugees Act of 2021.²⁰¹ These legislations permit the arrest, detention, and even deportation of migrants and asylum seekers who stay in the country without proper authorisation are considered to be violating immigration laws.²⁰² As discussed in Part 1, although the Citizenship and Immigration Act of 2011 and the Refugees Act offer protection to asylum seekers, prohibiting their penalisation for immigration-related matters,²⁰³ including prohibiting their detention, per the principle of *non-refoulement*,²⁰⁴ asylum seekers often find themselves detained due to various administrative and procedural obstacles.

While the actors involved in the enforcement of this barrier are the Police, the Immigration Service, the Military and other law enforcement agencies, they are not necessarily involved in its establishment.

Procedural barriers: The establishment of the barrier by law,²⁰⁵ was acknowledged in the cases of *Serogo Alex & Others v Republic* [2022] KEHC 2827 (KLR) and *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR. In both cases, the 30-day requirement for submitting an asylum application was recognised as a formally established barrier rooted in Kenya’s Refugee Act²⁰⁶ and its associated regulations. The judicial authorities acknowledged the statutory character of this deadline while also emphasising that the right to seek asylum constitutes a fundamental human right under both the 2006 Kenya Refugee Act (Repealed and reenacted by the 2021 Refugee Act) and the 1951 Refugee Convention. Consequently, the courts interpreted the 30-day requirement not as an insurmountable barrier but rather as a procedural guideline that allows for flexibility in specific circumstances.

The actors involved in its establishment of the barrier comprise of the Kenyan legislature, which enacted the Refugee Act, the Department of Refugee Services, which serves as the administrative body responsible for managing asylum applications, and the Office of the Director of Public Prosecutions, which initiated legal actions against individuals who did not comply with the deadline.

¹⁹⁸ Amnesty International, ‘Somalis are Scapegoats in Kenya’s Counterterror Crackdown’ 2014 p.4.

¹⁹⁹ UNHCR, ‘Kenya: Refoulement of Somali asylum seekers’ Briefing notes. Available at: <<https://www.unhcr.org/news/briefing-notes/kenya-refoulement-somali-asylum-seekers#:~:text=On%20Wednesday%2C%2031%20March%2C%2031%20asylum%20seekers%2C,asylum%20seekers%20to%20Dadaab%20police%20station%20then>>>

²⁰⁰ Kenya Citizenship and Immigration Act, 2011, Sec. 49.

²⁰¹ Law enforcement relies on Refugee Act, 2011 for the arrest and detention of asylum seekers who do not report to the authorities within 30 days of entry.

²⁰² See Kenya Citizenship and Immigration Act, 2011 Sec 34; 43 (5); 53; 54; 55; particularly at 64.

²⁰³ *Ibid*, 2011, Sec. 33 (3); 34, & 48(1c).

²⁰⁴ Refugee Act 2021, Sec 29 (1).

²⁰⁵ See Sec 11(1) 2006 Kenya Refugee Act (Now Sec 24(1) 2021 Refugee Act)

²⁰⁶ *Ibid*

Administrative Barriers and Their Impact on Asylum Adjudication and Access to Protection

Pushbacks: In the consolidated cases of *Kenya National Commission on Human Rights & another v Attorney General & 3 others*,²⁰⁷ the applicants, acting in the public interest for asylum seekers and refugees, contested the legality and constitutionality of state practices concerning the treatment and deportation, and proposed the repatriation of asylum seekers and refugees. The cases brought to light significant administrative challenges, particularly the lack of clear procedural safeguards for status determination and the arbitrary arrest and deportation of asylum seekers and refugees without access to legal representation or a fair hearing. The state's inability to establish an effective status determination process, particularly at entry points and in detention facilities, highlighted systemic deficiencies within the asylum system.

These administrative deficiencies were exacerbated by delays in the processing of asylum claims and a lack of institutional coordination among security and immigration authorities and the Department of Refugee Affairs. The High Court observed that the state's reliance on national security justifications, without individualised assessments, resulted in collective expulsions, a practice that contravenes Kenya's obligations under both national and international refugee law. These procedural flaws deprived applicants of the opportunity to assert their rights under Article 33 of the 1951 Refugee Convention (non-refoulement) and Articles 47 and 50 of the Constitution of Kenya, which pertain to fair administrative action and the right to a fair trial. The issues raised before the courts did not end with the 2017 litigation. In *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*,²⁰⁸ *Kenya National Commission on Human Rights & another (Interested Parties)* [2024],²⁰⁹ the High Court reaffirmed that executive action affecting refugees remains subject to constitutional and international human rights standards. The judgment demonstrates the courts' ongoing role in safeguarding access to asylum and protecting vulnerable groups from measures that, although framed as matters of national security or public policy, may undermine fundamental rights and procedural fairness.

The impact of these barriers was significant. The court determined that the absence of procedural clarity and the variable application of immigration laws not only infringed upon constitutional rights but also weakened Kenya's obligation to protect asylum seekers. The adjudication process was obstructed by executive overreach and the lack of independent mechanisms for refugee determination, consequently undermining the rule of law and placing asylum seekers at risk of refoulement.

Detention: The applicants in *Rada Haile & Another v Republic*²¹⁰ encountered significant administrative barriers that impacted their ability to seek asylum. The two Eritrean nationals, who were fleeing persecution as asylum seekers, were arrested and detained for unlawful presence after they failed to file their asylum applications within the 30-day limit outlined in Sec 11(1) of the Refugees Act, 2006. Their failure to meet this procedural obligation was due to the fact that they were on their way to the UNHCR offices in Nairobi to commence their asylum claims at the time of their arrest.

The rigid enforcement of the 30-day rule-without taking into account their intention to apply for asylum-led to their criminal prosecution, conviction, and the imposition of fines. Their detention and subsequent conviction not only delayed their access to asylum procedures but also undermined essential international and domestic legal protections, including the principle of non-refoulement as outlined in Sec 18 of the 2006 Refugees Act (now sec 29 of the 2021 Refugee Act) and Article 33 of the 1951 Refugee Convention.

However, upon appeal, the High Court recognised these legal protections and the practical difficulties that asylum seekers encounter in accessing the asylum procedure. Relying on relevant sections of the 1969 OAU Refugee Convention and the Refugees Act, the Court mandated their release from detention and provided a 90-day period for them to regularise their immigration status with the Department of Refugee

²⁰⁷ [2017] KEHC 8086 (KLR) and [2017] eKLR (Constitutional Petition 227 of 2016)

²⁰⁸ [2024] KEHC 2973 (KLR)

²⁰⁹ KEHC 2973 (KLR)

²¹⁰ [2012] KEHC 5484 (KLR)

Affairs and UNHCR. The same difficulties emerged in *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic (Supra)* and *Espoir Ndarubuya & another v Director of Public Prosecution & another (Supra)*. In both cases, the High Court recognised that the applicants had been arrested and prosecuted before they had a genuine opportunity to access Kenya's refugee status determination procedure. Rather than treating them simply as immigration offenders, the Court accepted that their intention to seek asylum and Kenya's obligations under international refugee law required proper consideration before criminal sanctions could lawfully be imposed.

Procedural barriers: In both cases, the applicants encountered administrative barriers that hindered their capacity to meet the 30-day asylum application deadline. These barriers included delays in accessing refugee status determination processes, insufficient guidance or assistance upon arrival, and complex bureaucratic requirements that were challenging for newly arrived asylum seekers who were not familiar with Kenya's legal and administrative frameworks.

These constraints had a considerable effect on the adjudication process. In the case of *Serogo Alex*, for instance, the court acknowledged that the applicants' inability to submit their application within the 30-day timeframe was not necessarily a result of intentional non-compliance but rather could be linked to a lack of awareness and barriers to institutional access. Likewise, in the case of *Espoir Ndarubuya*, the court observed that procedural inflexibility could not supersede fundamental rights, highlighting the necessity of a rights-based approach rather than a purely procedural one.

Legal Standing and Capacity to Bring Asylum-Related Claims

Pushbacks: In *Kenya National Commission on Human Rights & another v Attorney General & 3 others*,²¹¹ the applicants did not face challenges related to their legal standing or capacity to bring the case; KNCHR filed the cases as public interest litigation.

The Court implicitly acknowledged the standing of the KNCHR and its co-petitioner without any challenge, affirming their role in promoting constitutional rights and protection of vulnerable groups. From the ruling, there is no indication that there were any objections regarding legal standing of the applicants, which demonstrates the Kenyan judiciary's progressive stance under Sec 22(2) and Sec 258(2) of the 2010 Constitution, which clearly allows for public interest litigation and empowers individuals or organisations to initiate cases on behalf of others.

Detention: In *Rada Haile's* case, the applicants did not face any direct legal challenges concerning their standing or capacity to bring the case before the High Court. They successfully appealed their convictions with the assistance of private legal representation. Nevertheless, practical and procedural obstacles influenced the initial handling of their claims and hindered their access to protection under refugee law.

At the Magistrate court level, the applicants admitted guilt to the charge of unlawful presence, as outlined in Sec 11(1) of the Refugees Act 2006, which mandates that asylum claims must be filed within thirty days of entering Kenya. Their conviction and sentencing took place without a thorough examination of their refugee status or the details surrounding their arrival. This suggests a neglect to address their potential protection needs as outlined in the Refugees Act and pertinent international agreements to which Kenya is a signatory. The plea and subsequent conviction likely stemmed from a lack of access to legal representation and/or refugee status determination procedure, which indirectly restricted their capacity to mount an adequate defence.

While their legal standing was not explicitly challenged, the applicants' ability to assert their rights was undermined by the rigid procedural interpretation of immigration law at the Magistrate Court level. Upon appeal, the High Court acknowledged these deficiencies and, referencing Sec 18 of the Refugees Act 2006, alongside Art 2 of the OAU Refugee Convention, mandated their release to the UNHCR and the

²¹¹ *Supra*

Department of Refugee Affairs to undergo the asylum procedure. The same concern arose in *Serogo Alex & Others (supra)* and *Espoir Ndarubuya (supra)*, where the applicants' criminal prosecution effectively prevented them from relying on refugee protection until the matters reached the High Court on revision. Although their legal standing before the High Court was not disputed as well, the earlier criminal proceedings had significantly limited their practical ability to assert rights available under the Refugees Act and international refugee law.

Procedural barriers: In the cases, the applicants encountered difficulties concerning their legal standing and representation. In the case of *Espoir Ndarubuya*, the applicants were initially without legal representation and did not fully comprehend their legal rights, which hindered the effective presentation of their asylum claims. Likewise, in the matter of *Serogo Alex & Others*, the applicants were categorised as illegal immigrants instead of asylum seekers, which raised concerns regarding their legal status and their ability to bring an action for claims for international protection.

These challenges influenced the cases by redirecting the emphasis towards criminal liability for immigration violations rather than acknowledging their potential refugee status.

Applicant Participation in Proceedings and Format of Hearings

Pushbacks: In *Kituo Cha Sheria & 8 others v Attorney General (supra)*, *Kenya National Commission on Human Rights & another v Attorney General & 3 others (supra)* and *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others; Kenya National Commission on Human Rights & another (Interested Parties) (supra)*, the applicants were heard in person before the High Court in accordance with the procedures governing constitutional petitions.

Detention: The applicants, comprising a political coalition and civil society organisations, presented their case before the High Court of Kenya. The hearings took place in person, in accordance with the established procedures for constitutional petitions concerning public interest.

Procedural barriers: The applicants were presented before a judicial authority. The hearings took place in person, first at the Magistrate Court and later at the High Court in Kenya. In *Serogo Alex & Others (supra)* and *Espoir Ndarubuya (supra)*, the High Court also examined whether the applicants had meaningfully participated in the proceedings before the Magistrates' Courts. Particular attention was paid to language barriers, the absence of legal representation and the applicants' limited understanding of the consequences of pleading guilty to immigration offences before their protection claims had been properly assessed.

Access to Legal Aid and Its Influence on the Adjudication Process

Pushbacks: There is legal aid, not through the government, but through public interest litigation by KNCHR.

Detention: Legal aid was provided, but not through government legal aid, but through public interest litigation by a political coalition and civil society organisations.

Procedural barriers: There is no indication that the applicants in *Serogo Alex (supra)* or *Espoir Ndarubuya (supra)* received government-funded legal aid. At first instance before the Magistrates' Courts, they were unrepresented, limiting their ability to raise their intention to seek asylum or challenge the criminal charges effectively. Legal representation became available only after the matters reached the High Court on appeal. Once represented, the cases were no longer treated simply as immigration prosecutions. Instead, the High Court considered them within the wider framework of the Refugees Act, the Constitution and Kenya's international refugee obligations, giving greater weight to the applicants' protection needs and the principle of non-refoulement.

Vulnerability of the Applicant(s) and Its Influence on the Adjudication Process

Pushbacks: In *Kituo Cha Sheria & 8 others v Attorney General [2013] (supra)*, the applicants were considered vulnerable. They were a group of Somali asylum seekers, a demographic that has been disproportionately

targeted. Their vulnerability played a significant role in the Court's decision. The court in considering their vulnerability, stated *inter alia*, 'refugees are a special category of persons who are, by virtue of their situation, considered vulnerable. Article 21(3) therefore imposes specific obligations on the State in relation to vulnerable persons. It is against the background of these broad principles that the government's decision needs to be examined.' The court took a similar position in *Kenya National Commission on Human Rights & another v Attorney General & 3 others (supra)*, where the Court recognised that refugees and asylum seekers constitute a particularly vulnerable group requiring enhanced constitutional protection.

Detention: In *Rada Haile & Another v Republic*,²¹² the applicants, two Eritrean individuals seeking asylum, were not explicitly categorised as 'vulnerable'. Nevertheless, the court implicitly recognised their precarious situation as asylum seekers escaping persecution. The circumstances surrounding their irregular entry into Kenya and their inability to submit their asylum application within the stipulated 30-day period were essential to the case. The court referencing the assertion of the counsel to the applicants, emphasised that 'the applicants at the time of their arrest, were asylum seekers who were running away from their country to evade forceful recruitment in the militia fighting against the Government and are entitled to due process of their status to be determined as provided for by Section 11(3) of the Refugee Act 2006' highlighting Kenya's international responsibilities under the 1951 Refugee Convention. Therefore, while vulnerability was not formally acknowledged, it nonetheless played a role in the court's decision-making process.

Procedural barriers: In both cases of *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic*²¹³ and *Espoir Ndarubuya & another v Director of Public Prosecution & another*,²¹⁴ the applicants were implicitly considered as vulnerable, which had a substantial impact on the High Court's adjudication process.

In *Serogo Alex's case*, the High Court assessed various factors indicative of the applicants' vulnerability, i.e., their status as asylum seekers, the language barrier they faced, and their absence of legal representation. These factors compromised the fairness of the lower court proceedings, particularly as the applicants had entered guilty pleas without fully comprehending their rights or the legal ramifications.

Similarly, in *Espoir Ndarubuya's case*, the Court recognised the applicants' vulnerability arising from their status as asylum seekers and the imminent threat of refoulement following their prosecution and sentencing. The second applicant had even been detained while trying to adhere to the asylum application timeline, highlighting the procedural and administrative barriers that impeded lawful compliance. By overturning the convictions and fines, the Court acknowledged that prosecuting asylum seekers under immigration law was at odds with Kenya's legal and international obligations. Therefore, the applicants' vulnerability as individuals fleeing persecution was fundamental to the Court's decision to rectify the lower court's miscarriage of justice and protection of the applicants' rights under the Refugees Act and international law.

B. Impact of the judicial body's decision

Pushbacks: *Kituo Cha Sheria & 8 others v Attorney General (supra)* laid the foundation for Kenya's refugee jurisprudence by affirming that executive measures affecting refugees must comply with constitutional guarantees and Kenya's international refugee obligations. Building on that approach, *Kenya National Commission on Human Rights & another v Attorney General & 3 others (supra)* held that collective measures exposing refugees and asylum seekers to refoulement without individual assessment were inconsistent with those obligations. The principles developed in these decisions were subsequently affirmed by the Court of Appeal in *Attorney General v Kituo Cha Sheria & 7 others (supra)*, which reinforced the authority of the earlier

²¹² *Supra*

²¹³ (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022) (Ruling)

²¹⁴ Criminal Revision E002 of 2022

High Court judgments and confirmed that executive measures affecting refugees remain subject to constitutional safeguards.

The influence of this jurisprudence extended beyond refugee litigation. For example, in *Nubian Rights Forum & 2 others v Attorney General & 6 others*; *Child Welfare Society & 9 others (Interested Parties)* (*supra*), the High Court relied on similar constitutional principles to protect another vulnerable group from state action that lacked adequate procedural safeguards. Most recently, in *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*; *Kenya National Commission on Human Rights & another (Interested Parties)* (*supra*), the High Court reaffirmed that refugee-related executive action remains subject to constitutional scrutiny. The decision confirms that the principles developed in the earlier refugee cases continue to guide judicial review of executive measures affecting refugees, including those capable of restricting access to asylum procedures.

Detention: There are no clear indications to suggest that the decision in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015]* (*Supra*) has influenced subsequent case law or legal practice in Kenya.

Procedural barriers: The decision in both cases has significantly impacted subsequent case law and legal practices in Kenya. Since then, courts have demonstrated increased flexibility in their interpretation of the 30-day rule, stressing the necessity of evaluating individual circumstances and maintaining non-refoulement obligations.

For instance, in the case of *Machumu & 15 Others v Republic*,²¹⁵ the High Court referenced both *Serogo Alex* (*supra*) and *Espoir Ndarubuya* (*supra*) to reinforce the principle that asylum seekers should not face criminal charges for not meeting the 30-day rule. These principles have continued to influence the High Court's approach in subsequent criminal revision proceedings involving asylum seekers.

C. Consistency with previous jurisprudence

Consistency of the Decision with the Adjudicating Body's Previous Jurisprudence

Pushbacks: Although *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (*supra*) is one of the leading authorities on barriers to asylum in Kenya, it did not establish a new line of jurisprudence. Rather, it built upon the approach adopted earlier in *Kituo Cha Sheria & 8 others v Attorney General* (*supra*), where the High Court held that executive measures affecting refugees must comply with constitutional guarantees, including fair administrative action, equality and Kenya's international refugee obligations. The *Kenya Human Rights*' case decision reinforced and further developed those principles, while remaining consistent with Kenya's obligations under the 1951 Refugee Convention, the 1969 OAU Refugee Convention and the constitutional principle of non-refoulement.

Others: The cases of *Serogo Alex* (*supra*) and *Espoir Ndarubuya* (*supra*) diverge from previous decisions on the same. Before the cases, Kenyan courts typically employed a stringent enforcement strategy regarding asylum seekers who entered the territory irregularly. For example, in the cases of *Abush Tamaske & 15 Others v Republic* [2021],²¹⁶ the courts determined that a failure to apply for asylum within the stipulated 30-day period, or to provide credible evidence of refugee status, warranted prosecution under immigration statutes.

Nevertheless, the decisions in *Serogo Alex* (*supra*) and *Espoir Ndarubuya* (*supra*) represented a significant shift from this previous stringent approach. In these instances, the courts emphasised international protection obligations and the principle of non-refoulement, acknowledging the precarious situation of asylum seekers and the various administrative or legal obstacles they encounter.

²¹⁵ (Criminal Revision E063 & E064 of 2023 (Consolidated) [2023] KEHC 23822 (KLR) (19 October 2023) (Ruling)

²¹⁶ KEHC 7020 (KLR)

Detention: In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others (supra)*, the High Court affirmed the constitutionality of specific provisions within the Security Laws (Amendment) Act 2014, while declaring others unconstitutional, especially those that have to do with pegging the number of refugees in the country to 150,000, and requiring urban refugees to relocate to designated camps, due to their infringement on fundamental rights.

The court's rationale was consistent with the established jurisprudence in Kenya, which emphasises the supremacy of the Constitution and the necessity for legislation to align with the Bill of Rights. The decision notably followed the precedent established in *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR,²¹⁷ which upheld the principle that the judiciary possesses the authority to assess legislation for its adherence to constitutional standards.

Consequently, the CORD case reinforced the judicial approach of balancing national security concerns with the constitutional protections afforded to individual rights

Reasons for Divergence and Areas of Differing Interpretation

Pushbacks: There are no divergences.

Procedural barriers: The divergences noted in the cases of *Serogo Alex* and *Espoir Ndarubuya* compared to previous rulings such as *Abush Tamaske*'s primarily arose from a transformation in judicial interpretation regarding the treatment of asylum seekers who enter Kenya without authorisation. The previous legal framework, including the *Abush Tamaske* case, strictly adhered to immigration law stipulations, particularly the mandate that asylum seekers must apply for refugee status within 30 days of their arrival. Courts placed significant emphasis on procedural compliance and frequently prosecuted individuals for unlawful presence if they did not comply with these stipulations, regardless of their vulnerability or their intention to seek asylum.

In contrast, the cases of *Serogo Alex* and *Espoir Ndarubuya* represented a shift towards a more protection-focused perspective. The primary factors contributing to this shift include an increased acknowledgement of Kenya's responsibilities under international refugee law, specifically the 1951 Refugee Convention, the OAU Refugee Convention, and the principle of non-refoulement. These cases also demonstrated a judicial recognition of the practical challenges encountered by asylum seekers, such as language difficulties, lack of legal awareness, detention upon arrival, and administrative delays, which could hinder timely asylum applications.

The degree of divergence is evident in how the courts interpreted the objectives and limitations of domestic immigration law in the context of international obligations. While earlier decisions concentrated on legal formalism and procedural compliance, the more recent cases prioritised substantive protection rights, human dignity, and assessments of vulnerability. The courts in *Serogo Alex* and *Espoir Ndarubuya* evaluated asylum claims more comprehensively, taking into account the intent to seek protection, the conditions in the asylum seekers' countries of origin, and the state's obligation not to penalise refugees for illegal entry, as outlined in Article 31 of the 1951 Refugee Convention.

Binding Effect of Divergent Higher-Court Decisions

Pushbacks: As a decision from the High Court, it acts as a binding precedent for lower courts. Until the decision is set aside by a court of current or higher jurisdiction, lower courts in Kenya are bound to follow the precedent set in the case.

Detention: As a decision of the High Court, it acts as a binding precedent for lower courts. Until the decision is set aside by a court of current or higher jurisdiction, lower courts in Kenya are bound to follow the precedent set in the case.

²¹⁷ [2013] KEHC 6313 (KLR)

Procedural barriers: Same as above

Alignment with or Divergence

Pushbacks: The decision aligns with the decision on similar barriers issued by courts of the same jurisdiction.

Detention: The decision aligns with the decision on similar barriers issued by courts of the same jurisdiction.

Procedural barriers: The decision aligns with the decision on similar barriers issued by courts of the same jurisdiction.

Consistency of the Decision with the Current Judicial Approach to Asylum Barriers.

Pushbacks: The *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (supra)'s decision fits well in the current evolutive approach to asylum barriers by the judiciary, facilitating the advancement of legal changes that emphasise the protection of refugees over governmental discretion in national security issues. This approach has been reaffirmed more recently in *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*; *Kenya National Commission on Human Rights & another (Interested Parties)* (supra). The judgment confirms that Kenyan courts continue to subject refugee-related executive measures to constitutional scrutiny, particularly where such measures may restrict access to asylum procedures or undermine procedural safeguards guaranteed by domestic and international law.

Detention: The decision fits well in the current evolving rights-based approach to asylum barriers that is increasingly supported by judicial and quasi-judicial bodies in Kenya and beyond. By emphasising substantive protection requirements over strict procedural adherence, particularly by easing the 30-day asylum application rule, the High Court showed a forward-thinking interpretation of the Refugees Act, as well as international standards, including the non-refoulement duty in the Refugee Act and the 1951 Refugee Convention. This forward-thinking approach is consistent with subsequent Kenyan rulings such as *Serogo Alex & Others v Republic* [2022] KEHC 2827 (KLR), where the court likewise dismissed criminal penalties against asylum seekers who failed to meet procedural timelines, acknowledging the realities of forced displacement.

Other barriers: The decision in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR fits well in the current evolutive approach to asylum barrier, especially with its focus on the constitutionality of certain provisions within the Security Laws (Amendment) Act 2014 through its examination of sections that affect the rights of refugees and migrants, including restrictions on the number of refugees and asylum seekers.

For instance, in the case of *Nubian Rights Forum & 2 others v Attorney General & 6 others*; *Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR,²¹⁸ the court referenced the CORD case in evaluating the constitutionality of governmental actions that impact identity and registration processes, matters pertinent to asylum seekers and marginalised communities.

²¹⁸ Petition 56, 58 & 59 of 2019 (Consolidated)

PART 3: SOCIO-LEGAL FACTORS

This third part of the Report is divided into four sections: I) Procedures in asylum access adjudication; II) Judicial or quasi-judicial bodies in asylum access adjudication; III) Other actors in asylum access adjudication; IV) Socio-political context.

I. PROCEDURES IN ASYLUM ACCESS ADJUDICATION

A. Access to judicial or quasi-judicial bodies

Barriers Whose Legality Cannot Be Assessed by Judicial or Quasi-Judicial Bodies.

Pushbacks: The pushbacks are frequently rendered effectively non-justiciable in practice. While the Constitution of Kenya²¹⁹ and the Refugees Act 2021 formally establishes provisions for judicial oversight concerning rights violations; however, the actual situation is that pushbacks, such as interception, denial of entry, or immediate return of asylum seekers at or near the border without the opportunity for registration or legal evaluation, typically transpire outside any established administrative or judicial framework.

Although Kenyan courts have, in specific cases, scrutinised the overarching legality of refoulement and state refugee policies, illustrated by the Dadaab closure litigation in *Kenya National Commission on Human Rights v. Attorney General & 3 Others* [2017].²²⁰ These instances serve as systemic reviews rather than mechanisms for individual redress. In practice, the majority of pushback occurrences are extrajudicial, thus evading formal legal examination. The discretion exercised by law enforcement, coupled with the informal characteristics of numerous returns and limited access to evidence and witnesses, complicates the judicial review process in various cases.

Detention: Formally, the detention of asylum seekers and irregular migrants in Kenya is subject to legal review, as mandated by the Constitution of Kenya,²²¹ which stipulates that any individual who is arrested must be presented before a court within 24 hours. Additionally, the Refugees Act 2021²²² affirms the right of asylum seekers to access judicial systems and fair administrative processes. Nevertheless, in practice, the scrutiny and review of such detentions are often inadequate. Numerous asylum seekers find themselves detained beyond the 24-hour threshold without any charges,²²³ particularly in police stations located near border regions or within the Kakuma and Dadaab camps, where judicial personnel are either scarce or completely unavailable.²²⁴ The law enforcement officials frequently categorise asylum seekers as immigration violators rather than individuals seeking protection, leading to their detention without proper registration or notification of their rights.²²⁵

Various practical and systemic challenges further compromise the oversight provided by judicial or quasi-judicial bodies. Detainees seldom have the opportunity to consult with legal representatives or interpreters due to the significant costs and distances involved in reaching courts. Furthermore, judicial review is sporadic, as High Court interventions typically arise only when organisations such as *Kituo Cha Sheria* or the Refugee Consortium of Kenya become aware of a case and can mobilise resources for legal

²¹⁹ Sec 22, 23, and 51, Kenya Constitution, 2010.

²²⁰ *Supra*

²²¹ Sec 49, Kenya Constitution, 2010.

²²² 11(10), and 14, Refugee Act 2021.

²²³ Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers. *Op cit*.

²²⁴ See Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). pp.1, 18 & 45.

²²⁵ See the cases of *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR; *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic* (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022) (Ruling).

representation.²²⁶ Consequently, the vast majority of detentions, especially those involving unregistered asylum seekers or individuals accused of breaching the 30-day rule, evade formal examination entirely.

Furthermore, the overlapping responsibilities of immigration and refugee agencies obscure accountability. Although the DRS is tasked with the protection of refugees, the Kenya Police Service and the Immigration Services maintain authority over decisions related to arrest and detention. This division of administrative responsibilities leads to circumstances where no single entity is accountable for ensuring judicial review or adherence to constitutional protections. The absence of a legal requirement for automatic judicial scrutiny of detention in asylum situations, in contrast to criminal proceedings, exacerbates the issue of impunity and prolongs detention durations. As a result, while detention is theoretically subject to legal review, its legality is infrequently evaluated in practice, leaving numerous asylum seekers without liberty and lacking effective judicial recourse or oversight.

Procedural barriers: Examples are the 30-day rule and the delay in the registration process. The 30-day rule, though formally justiciable; however, enforcement practices presents numerous challenges that complicate litigation. Courts have intervened in cases such as *Rada Haile & Another v Republic* [2012]²²⁷ and similar instances, yet the centralised and manual registration framework and the absence of clear entry records can render it practically challenging to secure timely judicial relief in specific cases.

In practice, procedural obstacles, including registration delays, the absence of written decisions, and inadequate communication between the DRS and asylum seekers, hinder access to judicial scrutiny.²²⁸ Since appeals must be submitted within a defined timeframe, asylum seekers who are not swiftly notified of rejection decisions or who live far from Nairobi may forfeit their appeal rights before they are even aware of them.²²⁹ The lack of electronic or decentralised systems means that all appeals rely on physical delivery, often facilitated by NGOs or UNHCR, resulting in delays that the law does not account for. Moreover, many asylum seekers do not have legal support to navigate the intricate procedural requirements or to contest administrative oversights, such as failure to issue receipts or notifications. As a result, while the legality of these procedural barriers is theoretically subject to judicial review, bureaucratic opacity, centralisation, and logistical limitations effectively shield these barriers from regular judicial scrutiny, limiting access to justice to those cases that are backed by NGOs or pursued through public interest litigation.

Other barriers: Practices such as ethnic profiling,²³⁰ arbitrary arrests, intimidation, or bureaucratic refusal to register, can be both systemic and informal, making it challenging to pursue legal action on an individual basis unless non-governmental organisations initiate public interest litigation.

These practices frequently arise from the discretionary enforcement actions of local immigration or police officials rather than being rooted in established administrative policies. For example, Somali nationals and refugees from border areas are often disproportionately subjected to additional scrutiny or denied registration, with such actions being rationalised by purported “security” concerns.²³¹

Due to the infrequent documentation of these decisions, those affected are unable to prove any wrongdoing to warrant legal action in most cases, thus making it hard to litigate on a case-by-case basis unless NGOs bring public interest litigation.

²²⁶ See Forced Migration Review, ‘Detention in Kenya: Risks for Refugees and Asylum Seekers. *Op cit.* See also Forced Migration Review, Limitations to accessing legal representation in Kenya’s RSD processes. FMR 65. Nov 2020.

²²⁷ *Supra*

²²⁸ See DRC, ‘Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Proving Identity and Status’, November 2017.

²²⁹ See Sec 14(2), Refugee Act 2021.

²³⁰ Use Of Data Collection Methodologies to Inform Protection Activities: Case Studies. Available at <<https://www.unhcr.org/in/sites/en-in/files/legacy-pdf/4ce532309.pdf>>

²³¹ Amnesty International, *Somalis are Scapegoats in Kenya’s Counterterrorism Crackdown*, 27 May 2014, available at <https://www.amnesty.org/en/documents/afr52/003/2014/en/>

Time as a challenge

Pushbacks: Pushbacks are critically time-sensitive, and the rapidity with which they occur effectively eliminates the possibility of judicial or quasi-judicial oversight. Typically, asylum seekers are apprehended at or near the border and are returned summarily within hours or days, frequently without formal registration or written documentation of their apprehension.²³² This immediacy implies that by the time legal representatives or humanitarian organisations become aware of the situation, the individual has already been removed from Kenyan jurisdiction, rendering it nearly impossible to initiate a case or seek interim relief.

Furthermore, the swift actions of the authorities and the absence of timely documentation result in courts often being unable to provide effective *ex post* remedies. There is seldom administrative documentation, such as rejection letters, detention records, or deportation orders for pushbacks, which deprives courts of the necessary evidence for review. Even when NGOs endeavour to litigate such occurrences, the lack of identifiable claimants and verifiable records undermines standing and admissibility. Consequently, judicial intervention is systematically delayed, shifting the courts' function from preventive protection to retrospective condemnation of state practices, often long after the damage has been inflicted.

In practice, the disconnect between border enforcement and legal access undermines constitutional guarantees as outlined in the 2010 Kenyan Constitution.²³³ By the time these constitutional remedies can be activated, the individual has frequently been expelled beyond reach or subjected to refoulement, making relief merely symbolic. This exemplifies a temporal asymmetry of power: state authorities act with immediacy, while legal redress mechanisms function at a slower pace, leaving pushbacks largely outside the effective temporal jurisdiction of Kenyan judicial institutions.

Detention: Detention is a significant and ongoing issue the Kenyan asylum process. The legal stipulation of a 24-hour timeframe in the Constitution²³⁴ and the Criminal Procedure Code, which requires that any individual who has been arrested be brought before a court within one day of their arrest,²³⁵ is frequently violated in practice. Asylum seekers and refugees who are detained due to irregular entry, insufficient documentation, or overstaying often find themselves in police custody or immigration holding facilities for extended periods, sometimes lasting days or even weeks, before they can appear before a judicial officer. In many instances, detainees are not made aware of their right to pursue legal recourse or contest the legality of their detention.

Furthermore, delays are exacerbated by inadequate inter-agency collaboration among the DRS, the Immigration Department, and the police, who often lack a clear understanding of which agency is responsible for processing or releasing detained asylum seekers. As highlighted in Part 2 through the case of *Serogo Alex & Others v Republic (2022)*,²³⁶ asylum seekers have been unjustly charged and convicted prior to the consideration of their refugee claims, illustrating that procedural timelines are often disregarded.

Additionally, geographical distance amplifies time-related obstacles. Detention facilities located in Kakuma, Dadaab, and remote border regions are situated far from judicial bodies and legal aid organisations. It can take several days for NGOs like the Refugee Consortium of Kenya (RCK) or *Kituo Cha Sheria* to identify detained asylum seekers, gain access, and submit court applications. This delay significantly undermines the efficacy of constitutional remedies such as *habeas corpus* or Sec 22 (Constitution) petitions aimed at enforcing fundamental rights.

²³² See UNHCR, *Kenya: Refoulement of Somali asylum seekers' Briefing notes*, available at <https://www.unhcr.org/news/briefing-notes/kenya-refoulement-somali-asylum-seekers#:~:text=On%20Wednesday%2C%2031%20March%2C%2031%20asylum%20seekers%2C,asylum%20seekers%20to%20Dadaab%20police%20station%20then>

²³³ Sec 22, 49 & 51, Constitution of Kenya, 2010.

²³⁴ *Ibid*, Sec 49

²³⁵ Sec 36, Kenya Criminal Procedure Code Cap.75 of 2012.

²³⁶ *Supra*

Another significant time constraint stems from bureaucratic lethargy and the limited capacity of the judiciary. Even after a detainee is presented in court, hearing dates are frequently postponed due to backlogs, incomplete case files, or the unavailability of interpreters.²³⁷ Consequently, asylum seekers may find themselves in a state of administrative *limbo* long after their detention has become unlawful. In certain cases, courts have mandated releases only following extensive litigation, by which point the individuals have already endured unnecessary deprivation of liberty and psychological distress.

In conclusion, the delays in presenting detainees to a court, the absence of timely legal representation, and the isolation of detention facilities together render the right to prompt judicial review largely ineffective. These systemic delays not only contravene Kenya's constitutional and international obligations under the 1951 Refugee Convention and Article 9 of the ICCPR but also undermine the judiciary's preventive function in protecting against the arbitrary detention of asylum seekers.

Procedural barriers: The 30-day requirement and the cumbersome manual registration procedures result in a continual timing discrepancy within Kenya's asylum framework. Asylum seekers who enter irregularly, typically escaping conflict or persecution, are mandated by Sec 24(1) of the Refugees Act 2021 and the 2024 Refugee Regulations to register and seek recognition within 30 days of their arrival. However, in reality, the interplay of travel delays, insufficient information, language obstacles, and extensive waiting times at the DRS offices means that many individuals are unable to comply with this deadline. Once the designated period lapses, these individuals are classified as 'illegal migrants',²³⁸ facing the threat of arrest or deportation prior to having the chance to pursue judicial review. Consequently, the legal timeframe that is meant to promote order instead acts as an exclusionary mechanism, obstructing access to asylum adjudication before it even commences.

Furthermore, the sluggish nature of administrative processing exacerbates the timing issue. The initial registration, status interviews, and decision issuance can extend over several months or even years in camps like Dadaab and Kakuma.²³⁹ While the RAB is headquartered in Nairobi, it conducts appeal hearings in the Kakuma and Dadaab camps, as stipulated by its regulations.²⁴⁰ However, the necessity for appellants to travel, secure appointment slips, and manage procedural requirements may create considerable practical obstacles for asylum seekers located outside Nairobi, which could hinder their ability to meet appeal deadlines or engage fully in the process. Even when applicants submit judicial review petitions, the scheduling of hearing dates is also hindered by a substantial backlog in the judiciary,²⁴¹ resulting in judicial remedies that may take months or years to be realised, during which time applicants are left without legal status or protection.

Kenyan courts have acknowledged these challenges and have modified jurisprudence to alleviate the strictness of procedural timelines, particularly when fundamental rights are involved. In cases such as *Rada Haile & Another v Republic* (2012)²⁴² and *Espoir Ndarubuya v Attorney General* (2021),²⁴³ the courts stressed that the principle of *non-refoulement* and the right to fair administrative action as stipulated in Sec 47 of the Constitution should take precedence over procedural technicalities. These decisions illustrate the judiciary's readiness to interpret time limits in a more flexible manner to favour substantive justice.

²³⁷ See Wangui, Grace. 'Factors influencing performance of the judicial system in Kenya, the case of delayed court rulings.' *International Journal of Law and Policy* 1, no. 1 (2017): 64-72. See also Ooko, Peter O. "The Implication of Case Backlog on the Right to Access to Justice In Kenya; A Case Study Of Mavoko Law Courts." PhD diss., University of Nairobi, 2018.

²³⁸ See the cases of *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR; *Serogo Alex, Mumuporeze Ann, Kezia Alice & Munyarugamba Erick v Republic* (Criminal Revision E001 of 2022) [2022] KEHC 2827 (KLR) (25 January 2022) (Ruling).

²³⁹ See Garlick, Madeline, E. Guild, C. Procter, and M. Salomons. "Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya." *UNHCR: PDES/2015/01* (2015). p.25

²⁴⁰ See Ministry of Interior and National Administration website. Available at: <<https://refugeeappeals.go.ke/faqs?utm=>

²⁴¹ See Kemboi, Leo Kipkogei. "The Case Backlog Problem in Kenyas Judiciary and the Solutions." Available at SSRN 3841487 (2021).

²⁴² *Supra*

²⁴³ *Supra*

However, such concessions are specific to individual cases and are significantly reliant on litigation supported by NGOs. The absence of a formal mechanism to extend appeal deadlines on humanitarian grounds results in many asylum seekers being left without legal protection simply because they failed to meet procedural timelines, of which they were either unaware or unable to comply with.

Other barriers: Administrative delays and police operations, such as *Usalama* Watch, can inflict immediate damages that are challenging to rectify post-occurrence.

On numerous occasions, extensive security operations have resulted in mass arrests, forced displacements, and the deportation of refugees and asylum seekers without prompt judicial review.²⁴⁴ These actions transpire swiftly, often within a matter of days, leaving no feasible chance to lodge individual appeals or secure interim court orders. Consequently, the element of time emerges as a significant obstacle, by the time courts or NGOs manage to step in, the individuals affected have frequently been relocated, detained in distant facilities, or deported, thus rendering judicial remedies ineffective or merely declarative.

Costs for legal representation

Pushbacks: Individual claimants seldom have the means to hire private legal counsel; in the absence of NGOs or public interest litigators, effective legal action against pushbacks is limited. Most asylum seekers who experience pushbacks are apprehended at border locations, such as Dadaab, Liboi, Mandera, or Moyale,²⁴⁵ where the availability of lawyers, interpreters, or paralegals is nearly non-existent. Given that these individuals are generally undocumented, newly arrived, and financially impoverished, the expenses associated with obtaining private legal representation, travelling to Nairobi to access the High Court, or even submitting constitutional petitions are completely unaffordable.

Moreover, the characteristics of pushbacks-being rapid, informal, and frequently extra-legal, result in affected individuals being expelled from Kenyan territory before they can obtain legal counsel or commence legal proceedings. Only NGOs or human rights organisations, notably *Kituo Cha Sheria*, Refugee Consortium of Kenya (RCK), and the Kenya National Commission on Human Rights (KNCHR) possess the financial and logistical resources necessary to document such incidents and pursue strategic or public interest litigation on behalf of the impacted groups. Even in these cases, litigation remains expensive, protracted, and heavily reliant on donor-funded initiatives rather than established state legal aid.

Furthermore, the Legal Aid Act of 2016 in Kenya does not provide automatic free legal assistance for cases related to asylum that are administrative or constitutional in nature, and the Legal Aid Fund seldom addresses issues concerning cross-border or irregular entry. This deficiency indicates that, apart from interventions by NGOs supported by donors, there exists no enduring framework to fund legal disputes against unlawful returns or border denials. As a result, the majority of pushback incidents remain unchallenged, not due to their legality, but because asylum seekers do not have the financial resources and institutional backing necessary to contest these actions in judicial or quasi-judicial forums.

Detention: The absence of state-funded legal assistance for asylum detainees results in many individuals lacking representation; courts have consistently highlighted the lack of government legal aid and have depended on NGOs in documented instances.²⁴⁶

In reality, detained asylum seekers encounter numerous overlapping financial obstacles that collectively hinder their access to justice. The majority are impoverished, confined in police cells or immigration facilities without any income or external assistance. The Legal Aid Act 2016 grants indigent individuals,

²⁴⁴ Amnesty International, *Somalis are Scapegoats in Kenya's Counterterrorism Crackdown*, 27 May 2014, available at <https://www.amnesty.org/en/documents/afr52/003/2014/en/>

²⁴⁵ See Human Rights Watch, 'Welcome to Kenya: Police Abuse of Somali Refugees.' (2010). Available at <https://www.hrw.org/report/2010/06/17/welcome-kenya/police-abuse-somali-refugees#:~:text=The%20police%20said%2C%20%E2%80%9CYou%20are,Then%20they%20let%20us%20go> See also All Africa, Kenya: Immigration Officers on the Spot Over Influx of Illegal Foreigners. Available at <https://allafrica.com/stories/201903060087.html>

²⁴⁶ See *Serogo Alex & Others v Republic* [Supra] and *Rada Haile & Another v Republic* [Supra]

including refugees, the right to state-funded support,²⁴⁷ yet in practice, the National Legal Aid Service (NLAS) and other organisations that provide legal aid services primarily function in urban areas,²⁴⁸ seldom extending its services to refugee-hosting regions like Turkana or Garissa, where the Kakuma and Dadaab camps are situated. Consequently, detainees are compelled to depend on lawyers funded by NGOs or *pro bono* legal representation.

Moreover, court filing fees,²⁴⁹ logistical expenses, such as transportation, translation, and document certification, create additional barriers. Asylum detainees seeking to contest unlawful detention or deportation orders frequently lack the financial means to submit *habeas corpus* petitions or other constitutional grounds, which most times necessitate payment of prohibitive court fees. The lack of interpreters further exacerbates the situation,²⁵⁰ increasing dependence on paid translation services and consequently elevating costs.

These economic obstacles have immediate procedural implications. Detainees without legal representation often plead guilty to immigration violations due to a lack of understanding or in an attempt to achieve early release, as illustrated in the case of *Serogo Alex & Others v Republic* [2022],²⁵¹ where asylum seekers were convicted without comprehending their entitlement to seek asylum. Subsequent court rulings annulled these convictions, underscoring how the absence of affordable legal counsel results in miscarriages of justice and infringements on the right to liberty as stipulated in Sec 49 of the Constitution and Art. 9 of ICCPR.

In conclusion, the financial burden of legal representation and procedural costs effectively bars the majority of detained asylum seekers from obtaining judicial review. Only those who receive assistance from NGOs or possess exceptional knowledge of their rights can contest detention or removal orders. The prohibitive cost of legal aid thus perpetuates inequality and creates a bifurcated justice system, one that is accessible to individuals supported by NGOs and another that remains inaccessible to the overwhelming majority lacking external assistance.

Procedural barriers: Challenging administrative refusals or detentions due to late applications necessitates the involvement of lawyers; however, the associated costs discourage many individuals, resulting in lower courts frequently encountering unrepresented applicants. As discussed in the above session, many asylum seekers are unable to pay for private legal services, as they are predominantly unemployed or reliant on limited humanitarian aid. Engaging legal representation before the RAB or the High Court typically incurs expenses related to filing fees, transportation, translation services, and necessary documentation, costs that are prohibitive for those residing in remote camps like Dadaab or Kakuma.²⁵² Although the Legal Aid Act of 2016 is designed to assist indigent individuals, it does not effectively cover cases related to asylum or migration, thereby leaving applicants reliant on NGO-provided legal aid, which is both scarce and unevenly available across different regions.

Furthermore, the complex nature of asylum appeals, characterised by requirements for written submissions, stringent deadlines, and the necessity to reference legal statutes or include supporting documentation, creates an implicit financial barrier. A significant number of asylum seekers find themselves dependent on lawyers or legal officers from NGOs to draft coherent appeals. In the absence of complimentary legal representation, those who attempt to file independently often submit incomplete or improperly formatted documents, which may be rejected by the RAB or courts on procedural grounds.

²⁴⁷ Sec 36, Legal Aid Act, 2016.

²⁴⁸ Nanjala, C. 'Determinants of effective legal Aid service delivery in Kenya.' *International Journal of Social Sciences and Entrepreneurship* 1, no. 5 (2013): 271-288. p.10.

²⁴⁹ Business Daily, 'Kenyans face expensive justice as court fees rise' 8 Sept, 2021. Available at <<https://www.businessdailyafrica.com/bd/economy/kenyans-face-expensive-justice-as-court-fees-rise-3542322?utm=>

²⁵⁰ See Chelule, Emmie C. "Access to Justice by Refugees in Kenya." PhD diss., University of Nairobi, 2023. pp 49 -72.

²⁵¹ *Supra*

²⁵² See Chelule, Emmie C. "Access to Justice by Refugees in Kenya." PhD diss., University of Nairobi, 2023. pp 49 -72.

This situation effectively converts financial barriers into indirect procedural exclusions, as only those who can afford or access legal assistance can successfully navigate the appeal process.

Moreover, legal aid organisations encounter challenges related to capacity and funding.²⁵³ For example, the RCK and Kituo Cha Sheria are only able to assist a limited number of rejected asylum seekers or detainees at any given moment. Consequently, legal assistance is predominantly allocated to strategic litigation or significant test cases, leaving numerous ordinary applicants without support.²⁵⁴ This selective representation results in a situation where many asylum seekers are effectively excluded from effective review due to financial limitations.

Additionally, the absence of government-funded interpretation and translation services incurs hidden expenses in the process. A significant number of asylum seekers communicate in Somali, Arabic, Amharic, or French, necessitating the hiring of interpreters to complete RSD, appeal forms or affidavits.²⁵⁵ The total expenses associated with translation, document certification, and travel are usually prohibitive, thereby reinforcing financial exclusion. As a result, the combination of procedural obstacles and cost burdens perpetuates inequality in asylum adjudication: only those with institutional backing can effectively engage with judicial mechanisms, while others remain subject to administrative discretion without access to a meaningful remedy.

Spatial and geographical issues

Pushbacks: Returns to border areas or out of the country remove the foundation for domestic claims, significantly complicating enforcement and the collection of evidence. Frequently, asylum seekers are turned away at the Somalia-Kenya border,²⁵⁶ and the Kenya-Ethiopia borders,²⁵⁷ before reaching an official registration or screening location. Due to the remoteness and inadequate monitoring of these areas, it becomes nearly impossible for victims or witnesses to document evidence or reach out to legal representatives promptly. Pushbacks typically happen through informal police operations or collaborative border patrols, lacking any written documentation of arrest or denial of entry. Consequently, there is no administrative decision that can be subjected to judicial review, and by the time human rights organisations are informed of the incident, the individuals have already been expelled beyond the jurisdiction of Kenya.

Moreover, the geographical isolation of Kenya's Eastern and Northern border areas²⁵⁸ worsens this issue. Numerous regions, such as Liboi, Mandera, and Lokichogio, are situated hundreds of kilometres away from the nearest High Court or Refugee Appeals Board office.²⁵⁹ There are no judicial or quasi-judicial bodies located near border points,²⁶⁰ and internet connectivity is scarce, hindering remote filing or digital communication with legal aid providers.²⁶¹ The spatial divide between border enforcement and legal oversight thus establishes a zone of *de facto* impunity, where executive actions transpire without effective judicial scrutiny.

²⁵³ Forced Migration Review, Limitations to accessing legal representation in Kenya's RSD processes. FMR 65. Nov 2020.

²⁵⁴ DRC, 'Recognising Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status', November 2017. pp. 26, 40 & 45, note 105.

²⁵⁵ See Forced Migration Review, 'Parlez-vous l'anglais ou le swahili?' The role of interpreters in Refugee Status Determination interviews in Kenya' <<https://www.fmreview.org/odhiamboabuya/?utm=>

²⁵⁶ Amnesty International, 'Denied Refuge: The effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees, *AI Index: AFR 32/002/2007*, May 2007. pp. 2-9

²⁵⁷ ACAPS, 'Kenya (Moyale) Displacement from Ethiopia' Briefing note – 22 March 2018. p.3. Available at: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.acaps.org/fileadmin/Data_Product/Main_media/20180322_a_caps_start_briefing_note_kenya_displacement.pdf?utm=

²⁵⁸ See Haider, Huma. "Conflict analysis of North Eastern Kenya." (2020).

²⁵⁹ See Hadley, Lance, and Edith Aoko. "How Far are Kenya's Courts? Distance as a Barrier to Justice in Kenya." *Journal of African Law* (2025): 1-10.

²⁶⁰ UNHCR Kenya, 'Annual Results Report' 2023 p.5.

²⁶¹ See Techfugees and GSR Foundation collaborate to "Connect the Unconnected" program in Kenya. Available at: <https://techfugees.com/all_news/techfugees-and-gsr-foundation-collaborate-to-connect-the-unconnected-program-in-kenya/?utm=

These geographical barriers also limit the ability of NGOs to monitor and document activities, which are essential for presenting systemic pushbacks in court. Humanitarian access to specific border areas is curtailed for 'security reasons,' allowing local police and immigration officials to operate without independent oversight.²⁶² As a result, the geographical isolation of pushback areas significantly diminishes the oversight function of Kenyan judicial and quasi-judicial institutions, thereby compromising access to justice and the right to seek asylum as protected under Sec 3 of the Refugees Act 2021 and Art. 14 of the Universal Declaration of Human Rights.

Detention: As discussed earlier, individuals detained in remote locations, police holding facilities, camps, or border regions encounter significant obstacles in reaching out to legal counsel, obtaining necessary documentation, and filing timely *habeas corpus* or constitutional petitions. Numerous detention centres, especially those in Kakuma, Dadaab, and Mandera, are situated in geographically isolated areas, characterised by inadequate communication infrastructure and sporadic visits from legal aid organisations or UNHCR protection representatives. These circumstances severely hinder detainees' ability to prepare appeal documents, secure translation services, or even inform courts of unlawful detention within the mandated 24-hour timeframe stipulated by Sec. 49 and 51 of the Constitution.

Moreover, the challenges posed by remoteness and a lack of administrative bottlenecks exacerbate the situation. Asylum seekers held on immigration charges are frequently mixed with regular criminal detainees and are kept in police custody instead of specialised refugee facilities. The absence of interpreters and written communication from officials further alienates individuals who do not speak English or Swahili, leaving them uninformed about their rights to contest their detention.²⁶³

As a result, both spatial and geographical issues effectively undermine the constitutional right to access justice, making detention one of the most significant obstacles for judicial or quasi-judicial entities to assess in real time.

Procedural barriers: The requirement for centralised, manual registration, restricted to a select number of designated offices in Dadaab, Kakuma, Nairobi, Eldoret, Nakuru, and Mombasa, imposes significant travel burdens on many asylum seekers,²⁶⁴ compelling them to undertake lengthy journeys to submit claims or appeals; such travel is both expensive and fraught with danger. The majority of asylum seekers reside in refugee camps or border areas where movement is constrained by encampment policies,²⁶⁵ necessitating the issuance of travel permits that are often challenging to secure.²⁶⁶ Consequently, many individuals find themselves effectively unable to reach the DRS or the RAB within the legally mandated timeframes for appeals.

Furthermore, the asylum system in Kenya remains predominantly centralised, with both the RAB and primary legal aid organisations situated in Nairobi.²⁶⁷ To access judicial remedies, refugees located in remote camps, such as Dadaab and Kakuma, must navigate the difficulty of obtaining an exit permit and travel several hundred kilometres outside of the camp.²⁶⁸ The challenges associated with obtaining an exit permit, the geographic remoteness of camps, compounded by the absence of digital filing systems, necessitate dependence on NGO intermediaries for document delivery, frequently resulting in missed deadlines or incomplete submissions. This geographical distance thus converts a procedural right into a

²⁶² See The New Humanitarian, 'Kenya halts Somali asylum seekers' 3 January 2007. Available <<https://www.thenewhumanitarian.org/report/62925/kenya-somalia-kenya-halts-somali-asylum-seekers?utm=>

²⁶³ See Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers. *Op cit*.

²⁶⁴ See UNHCR Kenya website. Available at: <<https://www.unhcr.org/ke/what-we-do/refugee-status-determination>>

²⁶⁵ Agwanda, Billy, 'Securitization and forced migration in Kenya: a policy transition from integration to encampment.' *Population and Development Review* 48, no. 3 (2022): 723-743.

²⁶⁶ Betts, Alexander. *Survival Migration: Failed Governance and the Crisis of Displacement*. Cornell University Press, 2013. pp. 136 - 150

²⁶⁷ See UNHCR Kenya Help Website. Available at: <<https://help.unhcr.org/kenya/applying-for-asylum-in-kenya/>>

²⁶⁸ Sytnik, Svetlana. "Rights displaced: The effects of long-term encampment on the human rights of refugees." *Refugee Law Initiative* (2012) p.20.

logistical obstacle, compromising the equitable access promised under sections 48 and 50 of the Constitution.

Additionally, this spatial inequality exacerbates systemic disparities within the asylum process: urban asylum seekers in Nairobi, who are situated closer to courts and NGOs, are significantly more likely to obtain legal counsel or utilise appeal mechanisms compared to refugees based in camps or border regions.²⁶⁹ The absence of transportation assistance,²⁷⁰ coupled with the insecurity prevalent in northern counties, discourages many from pursuing appeals altogether.²⁷¹

Other barriers: As mentioned earlier, the differences between urban and camp locations have a profound impact on the ability of asylum seekers to engage with judicial or quasi-judicial entities. Urban refugees, particularly in Nairobi, experience unique policing and administrative enforcement dynamics²⁷² that differ significantly from those encountered by individuals in the Dadaab and Kakuma camps. In urban settings, refugees are subjected to frequent document inspections, arbitrary detentions, and extortion; however, they benefit from being in closer proximity to courts and legal aid organisations such as Kituo Cha Sheria and the Refugee Consortium of Kenya.²⁷³

Furthermore, Kenya's spatial governance framework, which confines refugees to designated camps unless they obtain movement permits, establishes a significant geographical barrier to judicial access. Camp inhabitants who attempt to travel to Nairobi for legal matters face the risk of arrest under immigration or security regulations. Even when NGOs operate within the camps, they encounter logistical obstacles in collecting evidence, filing appeal documents, and maintaining timely communication with judicial authorities.

Practices to overcome these challenges

Pushbacks: The UNHCR, along with NGOs and human rights entities such as the KNCHR, Kituo Cha Sheria, the RCK, and Amnesty International Kenya, has implemented proactive measures to document and contest pushbacks.²⁷⁴ They actively monitor border areas, especially the Garissa, Liboi and Mandera regions,²⁷⁵ where Somali and Ethiopian asylum seekers are frequently intercepted and returned without due process. These organisations gather testimonies, compile incident reports, and leverage this evidence to pursue strategic public interest litigation, as shown in the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017),²⁷⁶ aimed at securing systemic remedies and injunctions against *refoulement* and unlawful deportations. Such initiatives are vital for addressing mass or strategic pushbacks that generally occur beyond the purview of formal judicial oversight.

²⁶⁹ See Nanjala, C. 'Determinants of effective legal Aid service delivery in Kenya.' *International Journal of Social Sciences and Entrepreneurship* 1, no. 5 (2013): 271-288. p.10.

²⁷⁰ See Chelule, Emmie C. "Access to Justice by Refugees in Kenya." PhD diss., University of Nairobi, 2023. pp 49 -72.

²⁷¹ See Kirui, Peter, and John Mwaruvie. "The dilemma of hosting refugees: a focus on the insecurity in north-eastern Kenya." *International Journal of Business and Social Science* 3, no. 8 (2012): 161-171; Kumssa, Asfaw, John F. Jones, and James Herbert Williams. "Conflict and human security in the North Rift and North Eastern Kenya." *International Journal of social economics* 36, no. 10 (2009): 1008-1020.

²⁷² Pavanello, Sara, Samir Elhawary, and Sara Pantuliano. *Hidden and exposed: Urban refugees in Nairobi, Kenya*. London: Overseas Development Institute, 2010. p.7.

²⁷³ Nanjala, C. 'Determinants of effective legal Aid service delivery in Kenya.' *International Journal of Social Sciences and Entrepreneurship* 1, no. 5 (2013): 271-288. p.10.

²⁷⁴ Amnesty International, 'From Life Without Peace to Peace Without Life the Treatment of Somali Refugees and Asylum-Seekers in Kenya' 8 December 2010. p.5.

²⁷⁵ See Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). p.23; NRCREACH, 'Dadaab comprehensive intentions and cross border movement monitoring; Dadaab Refugee Complex, Garissa County, Kenya,' 31 July 2019. Available at: <<https://reliefweb.int/report/kenya/dadaab-comprehensive-intentions-and-cross-border-movement-monitoring-dadaab-refugee>>;

Kenya Red Cross, 'Kenya: Mandera Refugee Influx Updates' News and Press Release, 11 Mar 2011. Available at: <<https://reliefweb.int/report/kenya/kenya-mandera-refugee-influx-updates>>

²⁷⁶ [2017] KEHC 8086 (KLR)

In addition to litigation, NGOs have established collaborative monitoring frameworks with international entities, focusing on early warning systems and documenting human rights abuses along migration pathways.²⁷⁷ These networks contribute evidence to broader regional advocacy efforts, including submissions to the African Commission on Human and Peoples' Rights and the UN Special Rapporteur on the Human Rights of Migrants.²⁷⁸ This multi-tiered strategy facilitates internationalisation of accountability in situations where domestic courts encounter jurisdictional or evidentiary challenges.

At the community level, UNHCR and partners have also undertaken capacity-building and awareness initiatives aimed at border officials, local administrators, and refugee populations to enhance understanding of the non-refoulement obligation as stipulated in both domestic and international law. These educational efforts are designed to avert violations before they transpire and to foster local reporting mechanisms.²⁷⁹

Nonetheless, these practices continue to be reactive instead of proactive. The majority of pushback incidents are identified after the fact, once the impacted asylum seekers have either been deported or have gone missing. Consequently, strategic litigation mainly aims to achieve declaratory relief and policy modifications, rather than providing immediate solutions for individual victims. Despite this constraint, ongoing NGO oversight and legal action have been instrumental in revealing the unlawfulness of executive pushbacks, influencing judicial discussions on non-refoulement, and strengthening Kenya's duty to uphold lawful asylum access.

Detention: Habeas corpus petitions, referral networks, and NGO bail and representation have emerged as the primary methods to address the legal and practical challenges encountered by detained asylum seekers. Organisations such as *Kituo Cha Sheria*, the RCK, and the KNCHR play a crucial role in facilitating the release of detainees,²⁸⁰ ensuring their appearance in court and providing legal representation during appeals.²⁸¹ These organisations frequently act based on referrals from UNHCR field personnel,²⁸² family members, or other detainees. This collaborative effort allows cases to be escalated to the High Court, which has repeatedly issued orders that uphold the rights to liberty, humane treatment, and due process for asylum seekers in detention.

Furthermore, strategic litigation has resulted in significant rulings that curtail arbitrary detention practices. Courts have referenced constitutional protections under Sections 49 and 51 pertaining to the rights of arrested and detained individuals and the Refugees Act 2021 to assert that asylum seekers should not face penalties for irregular entry or presence. In landmark cases such as *Serogo Alex & Others v Republic* [2022]²⁸³ and *Rada Haile & Another v Republic* [20120],²⁸⁴ courts have annulled wrongful convictions and underscored that detention for immigration-related offences must adhere to international protection obligations. These

²⁷⁷ See Refugee International, 'Human Rights Council: 51 Groups Urge Action on Global Pattern of Pushbacks and Expulsions' 23 June 2021. Available at: <<https://www.refugeesinternational.org/advocacy-letters/human-rights-council-51-groups-urge-action-on-global-pattern-of-pushbacks-and-expulsions/?utm=>>; See also Amnesty International, 'HRC47-Joint Advocacy Letter Calling for Human Rights Council to establish an Independent Monitoring Mechanism on Pushbacks' 25 June 2021. Index Number: IOR 40/4331/2021

²⁷⁸ See Human Rights Council, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea: Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales' Forty-seventh session 21 June–9 July 2021 Agenda item 3; Human Rights Watch, 'Human Rights Watch Submission to the Africa Regional Review on Implementation of the Global Compact for Safe, Orderly and Regular Migration - RE: Challenges to Implementation of GCM Objectives #4, 10, 13, 15, 17, 21 in Cameroon, Mauritania, Nigeria, Senegal, South Africa, and Tanzania, December 2018 – June 2021' July 6, 2021. Available at: <<https://www.hrw.org/news/2021/07/06/human-rights-watch-submission-africa-regional-review-implementation-global-compact?utm=>>

²⁷⁹ See UNHCR Kenya, 'Annual Results Report 2024.' pp. 5, 11, 12 15 & 16

²⁸⁰ See Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). p.20

²⁸¹ See *Serogo Alex & Others v Republic* [2022] KEHC 2827 (KLR); *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); and *Espoir Ndarubuya & another v Director of Public Prosecution & another* [2022] eKLR

²⁸² See UNHCR Kenya, 'Annual Results Report 2024.' p. 5.

²⁸³ *Supra*

²⁸⁴ *Supra*

legal precedents, often pursued by NGO legal teams, have fostered a gradual judicial acknowledgement that the detention of asylum seekers should be a measure of last resort and subject to immediate judicial review.

In addition to their courtroom advocacy, NGOs have established multi-tiered response mechanisms to tackle barriers related to detention. For instance, hotline services and mobile legal aid clinics in locations such as Dadaab, Kakuma, and urban areas like Nairobi and Mombasa enable detainees or their relatives to report instances of arbitrary arrests.²⁸⁵ Following such reports, legal officers collaborate with police and immigration authorities to confirm identities and facilitate early releases before cases progress to court.

Procedural barriers: The courts have been requested to interpret the 30-day rule considering the principles of *non-refoulement*, proportionality, and reasonableness. Case law such as *Rada Haile & Another v Republic [2012]*,²⁸⁶ *Serogo Alex & Others v Republic [2022]*,²⁸⁷ and *Espoir Ndarubuya & another v Director of Public Prosecution & another [2022]*²⁸⁸ illustrates how NGOs and public interest lawyers have effectively obtained judicial relief and established precedents that alleviate the most severe consequences of procedural rigidity. In these instances, courts acknowledged that a strict failure to adhere to the 30-day asylum registration rule should not invariably lead to detention or deportation when an individual's intention to seek protection was sincere but obstructed by administrative challenges or insufficient information. This body of jurisprudence has fostered a more rights-oriented interpretation of asylum access, even in the absence of legislative changes.

In practice, civil society organisations such as RCK and Kituo Cha Sheria have formulated adaptive legal-aid strategies aimed at assisting asylum seekers in navigating procedural obstacles. RCK provides legal-aid services and mobile clinics in Kakuma and Dadaab, operates a toll-free legal hotline, and engages pro-bono lawyers and paralegals.²⁸⁹ *Kituo Cha Sheria* manages a Refugee Justice Centre in Dadaab, staffed with trained refugee paralegals who assist with documentation, referrals, and advocacy.²⁹⁰ Concurrently, HIAS Kenya delivers legal support and community-based protection for refugees, emphasising empowerment, integration, and rights.²⁹¹

To address language and literacy challenges, these NGOs employ paralegals and community outreach initiatives to offer guidance and support with legal processes, although publicly accessible data regarding the translation of all forms or the extent of appeal-preparation efforts remains limited.

Furthermore, civil society organisations have been actively involved in ongoing advocacy and policy discussions with the DRS and other governmental entities to foster more flexible and protection-focused administrative practices. These organisations have engaged in collaborative training sessions with UNHCR and government representatives on refugee law and procedural fairness, aiding in the gradual integration of international protection standards into local processes.²⁹² RCK has also developed legal rights manuals and educational materials for law enforcement personnel to enhance institutional comprehension of refugee legislation.²⁹³ *Kituo Cha Sheria* has furthered policy engagement through strategic litigation,

²⁸⁵ See Asylum Support Group, 'Kenya: Refugee consortium of Kenya's asylum support and legal aid representation'. Available at: <<https://acsg-portal.org/tools/asylum-support-and-legal-aid-representation-by-the-refugee-consortium-of-kenya/?utm=>>. See also UNHCR Kenya Help webpage on legal assistance.

²⁸⁶ *Supra*

²⁸⁷ *Supra*

²⁸⁸ *Supra*

²⁸⁹ UNHCR Kenya help website – Legal Assistance. Available at: <<https://help.unhcr.org/kenya/helpful-services/legal-assistance/?utm=>>

²⁹⁰ See Kituo Cha Sheria, 'Kituo Expands Its Reach to Northern Kenya'. <<https://kituochasheria.or.ke/kituo-expands-its-reach-to-northern-kenya/?utm=>>

²⁹¹ See HIAS website, <<https://hias.org/where/kenya/?utm=>>

²⁹² UNHCR Kenya, 'Kenya/Somalia Forced Migrants Rights Training,' <<https://www.unhcr.org/ke/262-kenyasomalia-forced-migrants-rights-training.html>>

²⁹³ Pavanello, Sara, Samir Elhawary, and Sara Pantuliano. *Hidden and exposed: Urban refugees in Nairobi, Kenya*. London: Overseas Development Institute, 2010. p.31.

including constitutional petitions that contest administrative actions impacting refugees and asylum seekers.²⁹⁴

At the judicial level, NGOs frequently file *amicus curiae* briefs or serve as representatives in strategic litigation to elucidate procedural uncertainties. This strategy has expanded judicial comprehension of the systemic nature of procedural obstacles and underscored the disproportionate effects on vulnerable populations, including women, children, and unaccompanied minors. Although these efforts have not eradicated the issue, they have promoted gradual institutional reform, enhanced awareness of procedural rights among asylum seekers, and equipped courts with a more robust foundation to hold administrative entities accountable for fairness and due process.

Implications of Barriers to Accessing Justice in Asylum Access Adjudication

Selective judicial protection: Due to constraints related to time, cost, and geography, judicial protection tends to be selective, primarily accessible to individuals with NGO backing or those capable of engaging in strategic public interest litigation. Consequently, systemic practices such as informal pushbacks and short-notice mass operations) may continue to exist even when courts have established clear legal standards.

Uneven case mix: The cases that make it to the courts are disproportionately focused on constitutional, public-interest, and high-profile issues; for instance, the closure of Dadaab and statutory limitations on refugee numbers, while routine violations occurring on the frontlines, like bus interceptions and short-term detentions, seldom undergo judicial examination.

Dilution of procedural protections in practice: Although laws are in place, such as the 24-hour rule and 30-day rule protections, practical challenges, including delays, shortages of legal representation, and geographical remoteness, result in these safeguards not being consistently upheld, thereby undermining the rule of law.

Judicial oversight versus compliance: Kenyan courts have demonstrated a trajectory that favours rights protection in significant rulings, such as reinforcing the principle of non-refoulement and protection of vulnerable individuals. Nevertheless, their impact is limited by enforcement challenges and resistance from the executive branch, indicating that judicial victories often necessitate ongoing monitoring and follow-up by NGOs.

Divergences by barrier: Formal or legal barriers, such as statutes and limitations, are generally more susceptible to judicial review; in contrast, informal and operational barriers, like *ad hoc* pushbacks and routine arrests, are the most difficult to litigate, allowing them to persist despite advancements in jurisprudence.

B. Legal aid

Procedural Framework for Obtaining Legal Representation in Asylum Access Adjudication

Pushbacks: There is currently no defined statutory framework for legal representation in instances of pushbacks or *refoulement*. Although the Refugees Act 2021 and the Legal Aid Act 2016 seemingly provide access to justice for all individuals within Kenya's jurisdiction, including asylum seekers, there are no active provisions that offer immediate legal assistance during border interceptions or instances of *refoulement*.

In Practice, pushbacks generally take place in informal and extrajudicial settings, such as at land borders or during police operations, where asylum seekers lack the opportunity to reach out to legal counsel before their removal. Legal representation is only available retrospectively, contingent upon NGOs documenting the incident and initiating public interest litigation. The KNCHR, *Kituo Cha Sheria*, and the RCK sometimes engage through strategic petitions or advocacy efforts, but such interventions are infrequent and rarely occur in real-time.

²⁹⁴ Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others

Detention: In law, the Constitution of Kenya²⁹⁵ and the Criminal Procedure Code²⁹⁶ ensure the right to legal counsel upon arrest, while the Refugees Act²⁹⁷ upholds the right of asylum seekers to access judicial systems and fair procedures. The Legal Aid Act permits indigent individuals, including refugees, to obtain free legal assistance in criminal cases.²⁹⁸

In practice, asylum seekers held in police or immigration detention seldom receive legal aid unless non-governmental organisations intervene. As discussed earlier, many individuals are either unaware of their right to legal counsel or encounter language barriers. Detention in isolated locations such as Kakuma or Dadaab further hinders communication with legal aid providers. As highlighted in Part 2 analysis, cases such as *Serogo Alex & Others v Republic [2022]*²⁹⁹ and *Rada Haile & Another v Republic [2012]*³⁰⁰ exemplify wrongful convictions and unlawful detentions resulting from inadequate representation. Although courts frequently acknowledge this deficiency, a systemic solution remains elusive.

Procedural barriers: In law, the Refugee Act, 2021 stipulate that asylum seekers must submit their applications for recognition within a period of 30 days. Although the Legal Aid Act theoretically encompasses civil administrative issues,³⁰¹ there is no specific provision for legal aid to facilitate this process.

In Practice, numerous asylum seekers fail to meet the 30-day deadline due to factors such as misinformation, illiteracy, language obstacles, or insufficient access to accredited legal aid providers. The DRS possesses limited resources to inform or assist new arrivals regarding their legal rights in the first instance or the appeal process. In these situations, NGOs such as RCK and Kituo Cha Sheria intervene to submit late applications or judicial actions. Courts have utilised these instances to interpret the 30-day requirement with flexibility, prioritising substantive rights over strict procedural adherence.

Other barriers: In law, Kenya's Constitution³⁰² ensures that individuals have access to justice without unnecessary obstacles, while upholding the principle of equality before the law,³⁰³ which encompasses the right to legal counsel.

In Practice, the prevalence of discriminatory enforcement and corruption, with law enforcement agents frequently compels asylum seekers to pay unofficial fees or bribes to facilitate release from detentions,³⁰⁴ to access the administrative procedures. Furthermore, the insufficiency of legal aid and the financial burden of obtaining private legal practitioners discourage individuals from seeking legal representation or lead to delays in their cases. NGOS strive to bridge this gap; however, they often lack the resources to assist all those in need.³⁰⁵

Availability and Eligibility Criteria for Legal Aid

Pushbacks: As mentioned earlier, there is no legal aid funded by the government available for border enforcement or refoulement situations. Assistance is solely provided by NGOs through donor-funded initiatives. The UNHCR and its legal project partner, RCK, ensure the presence of legal officers at Dadaab and Kakuma for immediate interventions targeted primarily at documentation and status determination.³⁰⁶

²⁹⁵ Sec 49, Kenya Constitution 2010.

²⁹⁶ Sec 193, Criminal Procedure Code Cap. 75 2023.

²⁹⁷ Sec 12(4) - (6), 14(1) - (5), 22(1)(b) - (c), Refugee Act 2021.

²⁹⁸ Sec 35(1) - (2), 36(1)(c), 42(4) - (5), Legal Aid Act No. 6 of 2016.

²⁹⁹ *Supra*

³⁰⁰ *Supra*

³⁰¹ See Sec 35(2), & 36(1), Legal Aid Act No. 6 of 2016.

³⁰² Sec 48, Kenya Constitution 2010.

³⁰³ Sec 27, *Ibid*.

³⁰⁴ See Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009); See also Amnesty International, 'From Life Without Peace to Peace Without Life: The Treatment of Somali Refugees and Asylum-Seekers in Kenya' 8 December 2010

³⁰⁵ See Forced Migration Review, Limitations to accessing legal representation in Kenya's RSD processes. FMR 65. Nov 2020.

³⁰⁶ See UNHCR Kenya Help website, legal assistance section.

Detention: The Legal Aid Act of 2016 provides for complimentary legal assistance in criminal cases for financially disadvantaged individuals.³⁰⁷ Nevertheless, in reality, the availability of legal aid for asylum seekers held in detention is restricted. Assistance is only granted to detainees involved in high-profile cases or those monitored by NGOs.

Procedural barriers: Legal assistance is effectively accessible via NGOs instead of government provision. RCK, Kituo Cha Sheria, and the Law Society of Kenya offer complimentary support in registration, filing appeals, and constitutional petitions, especially for refugees who are unable to meet procedural deadlines or are at risk of deportation.³⁰⁸

Other barriers: Access to free legal assistance is contingent upon the outreach efforts of NGOs and the availability of financial resources. Numerous urban asylum seekers are excluded from these support networks, resulting in a lack of representation during administrative or judicial processes.

Main Challenges to Securing Legal Representation in Asylum Proceedings

Absence of institutionalised state legal aid: The Legal Aid Act of Kenya addresses the needs of general indigent individuals but fails to provide specific implementing frameworks for cases related to asylum or immigration detention.³⁰⁹

Over-reliance on NGOs: The provision of legal aid is heavily reliant on donor funding and is primarily concentrated in urban areas such as Nairobi, as well as in Dadaab and Kakuma. Refugees residing outside these regions face significant challenges in accessing reliable legal assistance.³¹⁰

Language and documentation barriers: There is a scarcity of interpretation services,³¹¹ and numerous asylum seekers struggle to read or fill out necessary forms without help, which consequently delays their access to legal aid.

Spatial barriers: The geographical distance between refugee camps and border areas from courts and legal offices poses significant challenges.³¹² Detainees frequently find it difficult to reach out to NGOs promptly, compounded by limited internet access.

Lack of specialisation among lawyers: There is a notable shortage of Kenyan lawyers who possess expertise in refugee and asylum law,³¹³ which inevitably leads to considerable variability in the quality of legal representation.

Court delays and bureaucracy: Even when legal representation is obtained, systemic delays, such as slow scheduling of hearings or protracted appeal processes, significantly undermine the effectiveness of legal aid.³¹⁴

³⁰⁷ Sec 35(1) - (2), 43(1)(a) - (c), Legal Aid Act No. 6 of 2016.

³⁰⁸ See Forced Migration Review, Limitations to accessing legal representation in Kenya's RSD processes. FMR 65. Nov 2020; See also *Serogo Alex & Others v Republic* [2022] KEHC 2827 (KLR); *Rada Haile & Another V Republic* [2012] KEHC 5484 (KLR); and *Espoir Ndaruhuya & another v Director of Public Prosecution & another* [2022] eKLR

³⁰⁹ See Sec 35(1) - (2), 43(1)(a) - (c), Legal Aid Act No. 6 of 2016.

³¹⁰ See Turton, Danny. "Analysis of refugee protection capacity: Kenya." Retrieved June 15 (2005): 2011. p.43; See also UNHCR Kenya Help website, legal assistance section.

³¹¹ See Kasili, Joyce, and Lydia Anyonje. "Foreign language speakers, migrants, and refugees in Kenyan courts." In *Discrimination and Access to Justice in Africa*, pp. 184-201. Routledge, 2025; See also Forced Migration Review, 'Detention in Kenya: Risks for Refugees and Asylum Seekers. *Op cit*.

³¹² See Hadley, Lance, and Edith Aoko. "How Far are Kenya's Courts? Distance as a Barrier to Justice in Kenya." *Journal of African Law* (2025): 1-10; UNHCR Kenya, 'Annual Results Report' 2023 p.5.

³¹³ Forced Migration Review, Limitations to accessing legal representation in Kenya's RSD b processes. FMR 65. Nov 2020.

³¹⁴ See Wangui, Grace. 'Factors influencing performance of the judicial system in Kenya, the case of delayed court rulings.' *International Journal of Law and policy* 1, no. 1 (2017): 64-72. See also Ooko, Peter O. 'The Implication of Case Backlog on the Right to Access to Justice In Kenya; A Case Study Of Mavoko Law Courts.' PhD diss., University of Nairobi, 2018.

Implications of the Availability, Quality, and Accessibility of Legal Aid

Selective Access and Disparate Outcomes: Because only cases supported by NGOs or those that are high-profile make it to the courts, a significant number of asylum seekers' claims go unrepresented, resulting in unequal adjudication results. This creates a situation of *de facto* discrimination between individuals in camps where NGOs are present and those residing in urban areas.

Effects on Judicial and Quasi-Judicial Institutions: The DRS suffers from severe under-resourcing and lacks rules mandating representation.³¹⁵ Consequently, judicial setting, cases are frequently adjudicated without legal counsel, which undermines procedural fairness and leads to inconsistent rulings.³¹⁶

Procedural Fairness and Decision Quality: The lack of legal representation during initial phases, such as interviews and appeals, results in incomplete testimonies, inadequate documentation, and elevated rejection rates. Courts that review these cases often observe insufficient reasoning stemming from the absence of representation for applicants.³¹⁷

Erosion of Constitutional Protections: In the absence of legal aid, the constitutional rights to access justice,³¹⁸ to a fair hearing,³¹⁹ and to equality before the law,³²⁰ become practically ineffective for asylum seekers.

Beneficial Impact of NGO Legal Assistance: In instances where NGOs provide support, success rates improve and legal precedents are established, as seen in the case of *Rada Haile, Serogo Alex, KNCHR v Attorney General*. This has contributed to the development of progressive jurisprudence that upholds *non-refoulement* and guarantees of fair trials. Nevertheless, these achievements remain confined and lack a systematic approach.

Divergences Among Institutions: While the Judiciary, especially the High Court, is more protective of rights, inclined to broaden constitutional protections and accept *amicus* briefs from NGOs, the quasi-judicial entities, i.e., the RSEP and RSAC, are inflexible and procedural. Furthermore, the law enforcement agencies, such as the Police and the Immigration Service, operate in a largely opaque way, with minimal legal oversight or monitoring.

Kenya's framework for asylum legal aid is characterised by fragmentation, reactivity, and a reliance on NGOs. Despite the assurances of the Constitution and the Legal Aid Act regarding access to justice, the lack of a specific asylum legal aid programme leads to systemic disparities.

C. Lodging the appeal

Procedural Requirements for Lodging Appeals in Asylum Access Adjudication: Law and Practice

Pushbacks: In law, there exists no established administrative or judicial appeal process for individuals who are either denied entry or summarily returned at the border. The Refugees Act 2021 affirms the right to pursue asylum within Kenya.³²¹

In practice, individuals who fail to apply within 30 days of entry into the territory and are intercepted before registration are usually not treated as formal 'asylum seekers' within the governmental framework, thereby lacking the standing necessary to file appeals,³²² except through a judicial entity. Additionally, pushbacks occur before the official submission of asylum claims. As these incidents occur outside the established procedural framework, there is no viable means to appeal or reassess the decision. Only NGOs

³¹⁵ See Sec 12(4), Refugee Act, 2021.

³¹⁶ See the case of *Espoir Ndaruhuya & another v Director of Public Prosecution & another* [2022] eKLR, where the applicants were initially without legal representation.

³¹⁷ *Ibid*

³¹⁸ Sec 48, Constitution of Kenya 2010.

³¹⁹ Sec 50, *Ibid*

³²⁰ Sec 27, *Ibid*

³²¹ Sec 24 & 29, Refugee Act 2021.

³²² Sec 24(1) *Ibid*.

or human rights entities can subsequently initiate constitutional petitions or public interest litigation to contest *refoulement* as a breach of policy.³²³

Detention: In law, asylum seekers who are detained due to irregular entry or insufficient documentation possess the right to contest their detention or removal via *habeas corpus* or constitutional petitions, which specify the rights of detained persons.³²⁴ In instances where an asylum claim has been either rejected or remains unprocessed, detainees are entitled to file an appeal with the RSAC within a period of 30 days following the receipt of the DRS decision.³²⁵

In practice, a significant number of detainees are often unaware of their rights to appeal and frequently do not have access to legal support. Information regarding deadlines is seldom communicated effectively. The process of appealing from detention facilities is further complicated by the absence of interpreters, necessary forms, and limited access to postal or electronic submission methods.

Procedural barriers: In law, Sec 14(1) of the Refugees Act 2021 provides rejected asylum seekers with the opportunity to appeal to the RAB within 30 days following the notification of the decision. Appeals are required to be submitted in writing, either in person or via a representative. The Refugees (General) Regulations, 2024 specify that the DRS is responsible for maintaining written records and conveying decisions in writing; however, they do not establish a digital or online submission process.³²⁶

In practice, appeals are paper-based and centralised.³²⁷ Asylum seekers located in Dadaab or Kakuma are dependent on NGOs or UNHCR to send forms, which sometimes results in submissions being made after the deadline.

Implications of Appeal Procedures in Law and Practice for Asylum Access Adjudication

An examination of the procedural framework for lodging asylum appeals in Kenya reveals a significant gap between legal provisions and practical implementation, highlighting how procedural design influences both access to justice and the range of cases ultimately considered by judicial and quasi-judicial bodies. The following analysis outlines key procedural implications, barriers, and institutional divergences.

Limited Access to Review and Legal Remedies: Due to the requirement that only formally registered asylum seekers may file appeals, individuals who are denied entry or informally deported are barred from seeking legal review. This situation renders pushbacks and border denials effectively non-justiciable under domestic asylum law, thereby transferring accountability to broader human rights litigation.

Centralised Appeals System and Spatial Disparities in Access to Justice: Despite the RAB, which was established under the Refugees Act 2021, functioning on a national level, its administrative operations are predominantly based in Nairobi.³²⁸ Considering that a substantial majority of refugees, around 85 percent, live in isolated camps like Kakuma and Dadaab, this centralisation results in considerable geographical and socio-economic obstacles to meaningful engagement in the appeals process.³²⁹ Refugees who receive legal support from NGOs, particularly the RCK, or from UNHCR's protection partners, are more capable of navigating the appeals procedures,³³⁰ underscoring persistent spatial and resource-related disparities in access to justice within Kenya's asylum framework.

³²³ See *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR)

³²⁴ Sec 51, Kenya Constitution 2010.

³²⁵ Sec 14, Refugee Act 2021.

³²⁶ See Sec 21(2)-(3), Refugee Act 2021.

³²⁷ See details of the appeal process on the government website, available at: <<https://refugeeappeals.go.ke/appeal-process?utm>>

³²⁸ See Sec 6-11, Refugee Act 2021.

³²⁹ UNHCR, *Kenya Statistics Package, 30 April 2024*. Available at: <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2024/05/Kenya-Statistics-Package_30-April-2024.pdf>

³³⁰ See PILnet, 'Spotlight on the Refugee Consortium of Kenya' 2023. Available at: <<https://www.pilnet.org/spotlight-refugee-consortium-of-kenya>>; See also UNHCR Kenya help website, 'Legal Assistance'

Strict Deadlines versus Practical Delays: While the 30-day deadline is legally mandated, it is often impractical in numerous situations. Courts, such as those in *Rada Haile*³³¹ and *Espoir Ndarubuya*,³³² have started to interpret these procedural deadlines with greater flexibility, influenced by the principle of non-refoulement and the pursuit of substantive justice. Nevertheless, in the absence of consistent administrative reforms, late appeals are frequently dismissed.

Influence on Case Selection: Due to procedural barriers that eliminate the majority of potential appeals, the RAB and the courts are only exposed to a limited range of asylum cases, typically those supported by NGOs. This skews jurisprudence, as systemic administrative issues, for instance, the arbitrary denial of registration, seldom undergo judicial scrutiny.

Impact on Judicial Independence and Fairness: While courts have sought to enhance procedural fairness through constitutional interpretation, the enforcement of these measures remains inadequate. Consequently, the system is fragmented, with formal rights acknowledged but the procedural avenues to exercise them being hindered.

Consequently, the implication is that the adjudication of asylum access in Kenya is characterised by procedural exclusion; only a small, well-supported minority can successfully navigate the appeal process. In the absence of necessary structural reforms, such as decentralisation, digitisation, and guaranteed legal assistance, the concept of procedural fairness will continue to exist more as an ideal than as a reality.

D. Hearing

Pushbacks: In law, Kenyan legislation, encompassing the Constitution³³³ and the Refugees Act 2021,³³⁴ ensures the right to access justice and the ability to apply for asylum. Nevertheless, there is no established hearing process for individuals facing pushbacks or summary returns. Those who are refused entry at the border do not receive legal recognition as asylum seekers, which means that no administrative or judicial hearing is initiated. Instead, cases are brought forth through constitutional or public interest litigation, typically by NGOs such as KNCHR or RCK.

In practice, pushbacks occur without hearings, often resulting in immediate or next-day returns at border locations such as Mandera or Doley.³³⁵ Individuals affected by this situation are not afforded the chance to present their claims, secure legal representation, or receive interpretation services. When these matters are contested in court, the proceedings take place in person before the High Court, which is generally open to the public and conducted orally, overseen by a single judge. The hearings concentrate on the legality and constitutionality of the actions taken, with NGOs advocating for the affected groups, as the individuals are often already expelled.

The High Court carries out oral hearings;³³⁶ appeals, when they arise, are directed to the Court of Appeal, comprised of not less than a three-judge panel.³³⁷ Quasi-judicial refugee bodies lack jurisdiction since pushbacks often occur before registration.

Detention: In law, detained asylum seekers in Kenya possess the right to contest the legality of their detention in a court of law, as stipulated by Sec 49 and 51 of the Constitution, along with Sec 3(2) of the Refugees (General) Regulations, 2024 on the treatment of detained asylum seekers. This process necessitates a judicial hearing, typically presided over by a magistrate or a High Court judge, to ascertain

³³¹ *Supra*

³³² *Supra*

³³³ Sec 22, 23, & 51, Constitution of Kenya 2010.

³³⁴ Sec 11(10) & 14, 24(1), Refugee Act 2021.

³³⁵ Amnesty International, 'Kenya: Somali refugees need protection not abuse' Press Release 8 Dec 2010. *Op cit*; HRW, 'Kenya: Stop Deporting Somalis Fleeing Conflict-Government Closing Refugee Camps, Forcing People Back Into War-Zone' 31 March 2011. Available at: <<https://www.hrw.org/news/2011/03/31/kenya-stop-deporting-somalis-fleeing-conflict?utm=>>

³³⁶ See Sec 31, High Court (Organization and Administration) Act, 2016; Sec 20(3) The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

³³⁷ See Sec 5(3)(i), Appellate Jurisdiction Act, 1977.

the lawfulness and necessity of the detention. Hearings are predominantly oral and conducted in person,³³⁸ allowing the detainee or their legal representative to present their arguments and evidence. However, in reality, these hearings are rarely held or are delayed, often because of police complicity or scheduling conflicts within the court system, which also includes the necessary resources for accommodating individuals with disabilities.³³⁹ Additionally, many detainees either do not have legal representation or are unaware of their right to challenge their detention.

In quasi-judicial settings, such as administrative reviews conducted by the RAS or interventions by UNHCR, the law does not require hearings, and they often take place through written submissions or informal representations instead of public oral hearings.³⁴⁰ These procedures are not open to the public; however, the courts do hold hearings in open court, open to the general public. While the law allows for oral and judicial hearings to review detention, access to these hearings in practice remains limited, sporadic, and reliant on the facilitation of NGOs or UNHCR.

Procedural barriers: In law, asylum and related protection procedures in Kenya guarantee the right to be heard, both at the RAS and during appeals to the RSAC or higher judicial authorities. The Refugees Act 2021, along with its associated regulations, anticipates an oral hearing as a component of fair administrative and judicial processes, enabling applicants to present evidence and address inconsistencies. In principle, these hearings are to be conducted in person, allowing for the involvement of the applicant, a legal representative, and, when necessary, interpreters.³⁴¹

However, in practice, procedural obstacles significantly influence the manner in which these hearings are carried out. At the RSAC level, interviews by caseworkers frequently act as the primary form of 'hearing,' yet these can be short, bureaucratic, and at times conducted without sufficient interpretation or legal support.³⁴² Typically, they occur behind closed doors and are not accessible to the public. Applicants are often compelled to present their cases to a single officer rather than a panel, with limited chances to contest credibility determinations or submit additional evidence.

At the judicial level, specifically in the High Court or other superior courts, judicial reviews related to asylum or constitutional petitions are typically conducted in open court, generally presided over by a single judge.³⁴³ These proceedings are formal oral hearings that permit the involvement of lawyers and, at times, interpreters. Nevertheless, the high costs associated with legal representation and the complexities of procedures restrict the direct engagement of asylum seekers.³⁴⁴

In summary, although the law ensures the right to hearings, the actual practice highlights procedural inconsistencies between the administrative and judicial tiers, spanning from informal interviews led by officers at the RAS to more formal yet less accessible court hearings. This lack of consistency results in considerable procedural obstacles to justice and compromises the uniformity and fairness of the asylum adjudication process.

Implications of Hearing Procedures in Law and Practice for Asylum Access Adjudication

The regulations governing asylum hearings in Kenya have profound effects on access to justice and the fairness of results. According to the Refugees Act 2021, the right to be heard is a fundamental procedural

³³⁸ See Sec 31, High Court (Organization and Administration) Act, 2016; Sec 20(3) The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

³³⁹ United States Department of State, '2022 Country Reports on Human Rights Practices: Kenya' Country Reports on Human Rights Practices for 2022. pp. 11 & 43.

³⁴⁰ 12, 14(1), & 44(2)(g), Refugee Act 2021; See UNHCR Kenya Help website - What happens after I apply?

³⁴¹ See 12(3)(4) & 14, Refugee Act 2021.

³⁴² See Amka Africa Justice Initiative. "A False Safe Haven: The Registration and Documentation Woes of Intersex, Transgender and Gender Non-Conforming Asylum Seekers and Refugees in Urban Kenya." (2022). P.25; Asylum Support Group, 'Kenya: Refugee consortium of Kenya's asylum support and legal aid representation'. *Op cit.*

³⁴³ Sec 9(1), The High Court (Organization and Administration) Act No. 27 of 2015.

³⁴⁴ United States Department of State, '2022 Country Reports on Human Rights Practices: Kenya' Country Reports on Human Rights Practices for 2022. p.21.

safeguard that aligns with Sec. 47 of the Constitution regarding fair administrative action. Nevertheless, the limited implementation of this right, especially at the levels of the RAS and the RAB, creates inequalities that impact both procedural integrity and substantive results.

Firstly, the lack of or informality of oral hearings at the administrative level undermines the applicant's capacity to clarify inconsistencies or provide corroborative testimony. Decisions frequently depend heavily on written statements or brief interviews conducted under time constraints and without sufficient interpretation.³⁴⁵ This diminishes the opportunity for asylum seekers to thoroughly present their claims, heightening the risk of incorrect credibility evaluations or hasty rejections.

Secondly, when the law mandates that appellants must attend hearings in person, particularly before the RAB or judicial entities,³⁴⁶ practical obstacles such as long distances, insecurity, or lack of transportation from refugee camps e.g., Dadaab or Kakuma, frequently impede attendance. This geographic and logistical challenge disproportionately impacts refugees residing in remote locations, leading to appeals being resolved in absentia or postponed indefinitely.³⁴⁷ Such obstacles violate the right to an effective remedy as guaranteed under Art. 32 of the Refugee Convention and Sec 47 of the Kenyan Constitution.

Thirdly, the disparity between administrative and judicial processes also affects decision-making. Administrative hearings are generally informal and private, with outcomes frequently swayed by resource limitations rather than the actual merits of the case. On the contrary, judicial reviews, while more procedurally equitable, are less accessible and expensive, rendering them impractical for the majority of asylum seekers. This dichotomy fosters unequal access to justice and may lead to differing results for similar claims based on the forum.

In summary, the procedural framework and execution of hearings within Kenya's asylum adjudication system generate structural inequalities that hinder fairness and consistency in decision-making. Although the law aims for participatory and transparent hearings, practical shortcomings, such as restricted oral participation, lack of legal assistance, and logistical barriers to attendance, greatly limit asylum seekers' capacity to assert their right to be heard and secure an effective remedy.

E. Deliberation

Procedural Rules Governing Deliberation, Panel Composition, and Decision-Making

Pushbacks: In law, procedures concerning alleged pushbacks are intended to be examined by a judicial body. In practice, cases of pushback seldom progress to court, as the majority of pushback incidents are neither documented nor officially acknowledged within the asylum procedure. When cases are presented, they are frequently resolved by a single judge without collective deliberation. As a result, a disparity exists between the law and its application, although the law stipulates comprehensive judicial review, practical limitations such as insufficient documentation, lack of access to legal counsel, and security issues at borders lead to *ad hoc*, expedited, or even non-existent decision-making processes.

Detention: By legal standards, the detention of individuals seeking asylum must be evaluated by an independent judicial body, typically a magistrate or a judge, who assesses the legality and necessity of such detention. This process should provide opportunities for appeal, comprehensive reasoning. Nevertheless, in practice, detention reviews are often performed by individual judges or magistrates, with restricted access to legal counsel and interpretation services, as observed in the case of *Espoir Ndarubuya's* case. Written rulings are sometimes formulaic, mirroring administrative priorities instead of reflecting independent judicial examination. Therefore, although formal mechanisms for multi-tiered deliberation

³⁴⁵ See Parker, Alison. *Hidden in plain view: refugees living without protection in Nairobi and Kampala*. Human Rights Watch, 2002. p.71.

³⁴⁶ 14(1), 17(2)(c)

³⁴⁷ See Hadley, Lance, and Edith Aoko. "How Far are Kenya's Courts? Distance as a Barrier to Justice in Kenya." *Journal of African Law* (2025): 1-10; UNHCR Kenya, 'Annual Results Report' 2023 p.5.

are in place, their practical application is limited and often compromises the procedural rights of detained asylum seekers.

Procedural barriers: Procedurally, asylum appeals and determinations of refugee status are anticipated to involve panels with multiple members, typically integrating legal specialists and administrative representatives³⁴⁸ to consider claims. Dissenting opinions may be presented for deliberation and voting.³⁴⁹ However, in practice, initial decisions in the form of recommendations are made by individual caseworkers or administrative officials before they are submitted to the panels. The lack or insufficiency of interpreters³⁵⁰ and the pressure to manage high caseloads³⁵¹ diminish the quality of decisions. Even in cases where panels are present, institutional limitations, resulting from how the panels are constituted, especially as they are mainly drawn from government agencies,³⁵² restricted independence frequently result in uniform outcomes rather than deliberative ones. Consequently, the gap between legal standards and actual practice is characterised by a deficiency in authentic collective decision-making, inadequate reasoning, and minimal oversight, all of which obstruct fair access to asylum.

Implications of Deliberation Procedures in Law and Practice for Asylum Access Adjudication

Kenyan legislation establishes a framework for structured and collective discussions in the adjudication of asylum cases. According to the Refugees Act 2021 and its related regulations, the DRS is responsible for conducting refugee status determinations, while appeals are to be addressed by the RAC or other designated tribunals. These entities are designed to function as multi-member panels, facilitating deliberation, majority decisions, and documented reasoning. Ideally, this framework seeks to promote balanced outcomes, minimise individual discretion, and maintain procedural fairness.

Nevertheless, in practice, deliberation often becomes more administrative and individualised. Typically, initial asylum decisions³⁵³ are rendered by individual protection officers within the DRS, frequently under considerable workload pressure and lacking comprehensive written justifications.

These practical challenges have significant consequences. The prevalence of single-officer decision-making and limited panel discussions yields inconsistent outcomes and erodes trust in the fairness of the process. Therefore, while Kenya's legal framework anticipates collective and reasoned deliberation, gaps in implementation, arising from institutional capacity and administrative priorities, persistently undermine procedural fairness and consistency in asylum adjudication.

F. Review of decisions

Pushbacks: In law, Kenya's Constitution³⁵⁴ along with the Refugees Act 2021 acknowledge the entitlement to seek judicial review in cases of rights violations, including refoulement. In principle, individuals affected by pushbacks could file constitutional petitions or *habeas corpus* applications with the High Court by virtue of the Fair Administrative Action Act 2015.³⁵⁵

As discussed earlier, in practice, the mechanisms for judicial review are largely inaccessible in instances of pushbacks. These events are informal and extrajudicial, taking place at borders such as Liboi, Mandera, Moyale, before the registration of asylum claims. Individuals impacted are removed without due process and are unable to obtain legal representation, interpreters, or procedural remedies. Organisations like

³⁴⁸ Sec 11, Refugee Act 2021.

³⁴⁹ Sec 9(4) & 11(6), *Ibid*

³⁵⁰ See Forced Migration Review, "Parlez-vous l'anglais ou le swahili"? The role of interpreters in Refugee Status Determination interviews in Kenya' *Op cit*.

³⁵¹ See UNHCR Kenya, 'Annual Results Report' 2023 p.10.

³⁵² See Sec 11 & 13, Refugee Act 2021.

³⁵³ The decisions are made in the form of recommendations to the RAS and RAB, who, on many occasions, adopt the decisions of the caseworker.

³⁵⁴ Sec 22, 23, & 51, Kenya Constitution 2010.

³⁵⁵ See Sec 7,8 & 9, the Fair Administrative Action Act 2015

KNCHR, RCK, and Kituo Cha Sheria occasionally engage in strategic litigation concerning refoulement, yet these efforts are retrospective and do not constitute individual appeals.

With regards to discrepancy, although the law provides for oversight, the lack of documentation makes pushbacks effectively non-justiciable. Consequently, judicial review is confined to systemic issues rather than individual remedies as revealed in the case of *KNCHR v Attorney General & Others* [2017].

Detention: Under Sec 49 of the Constitution, individuals who are detained must be presented before a court within a 24-hour timeframe. Sec 11(10), 14, 28, 29 of the Refugees Act 2021 ensures the provision of fair procedures and access to judicial systems. Detainees have the right to contest unlawful detention through *habeas corpus* or constitutional petitions.

In practice, asylum seekers frequently find themselves detained for periods exceeding the 24-hour limit without being brought before a court. In isolated regions such as Dadaab and Kakuma, the presence of courts and legal officials is lacking. Judicial reviews occur occasionally, typically only when NGOs intervene. Documentation of detentions is inadequately maintained, and numerous detainees remain unaware of their rights or face challenges in filing habeas corpus petitions due to factors such as isolation, financial constraints, and the unavailability of interpreters.

The discrepancy is in the lack of automatic judicial oversight concerning immigration-related detentions, which leads to unlawful extended detentions and diminished accountability. Cases like *Serogo Alex & Others v Republic* [2022] underscore wrongful convictions that stem from insufficient legal representation.

Procedural barriers: Sect 14(1) of the Refugees Act 2021 establishes 30 days for appealing to the Refugee RAB. Judicial review of decisions made by the RAB can be sought in the High Court pursuant to Sec 47 of the Constitution and Sec 7 of the Fair Administrative Action Act 2015.

In practice, the system faces challenges due to the inadequate capacity of RAB.³⁵⁶ Numerous asylum seekers, especially those in camps, fail to meet deadlines because of delayed communication and logistical obstacles. Appeals are conducted on paper and necessitate physical delivery,³⁵⁷ which is often managed by NGOs. Occasionally, courts may extend deadlines, as seen in *Rada Haile & Another v Republic* [2012] and *Espoir Ndarubuya v AG* [2021], but such instances are rare and contingent upon NGO involvement in litigation. However, the inflexible 30-day rule, exacerbated by administrative inefficiencies, turns procedural deadlines into mechanisms of exclusion.

Implications of Judicial and Quasi-Judicial Review Mechanisms for Asylum Access Adjudication

Judicial and quasi-judicial review mechanisms in Kenya have served a corrective yet limited function in the adjudication of asylum access. The higher courts, notably the High Court, have set significant precedents that strengthen *non-refoulement* and fair procedure, evident in cases such as *Rada Haile & Another v Republic* [2012] and *KNCHR v Attorney General & Others* [2017], which serve as guidance for lower courts and quasi-judicial entities like the Refugee Appeals Board. Nevertheless, the impact of these precedents is inconsistent due to varying applications, a lack of judicial specialisation, and inadequate institutional coordination between the courts and administrative asylum agencies. Although rulings from higher courts aim to foster legal consistency in theory, practical discrepancies, particularly in remote regions and first-instance tribunals, persist, leading to diverse jurisprudence and selective adherence, thereby undermining the uniform protection of asylum rights in Kenya.

G. Procedures in decentralized states

Pushbacks: The procedural implementation of *nonrefoulement* and access to asylum varies considerably between border regions and urban jurisdictions. In border counties such as Mandera, Garissa, and Lamu,

³⁵⁶ Government of Kenya, 'Support for Host Community and Refugee Empowerment (Share): Kenya's Comprehensive Refugee Response Framework (CRRF)', October 2020. p.8.

³⁵⁷ See The Refugees (General) Regulations, 2024, Part B form, Appeal Procedures; See also UNHCR Kenya help website/What happens after I apply?

law enforcement and immigration authorities typically function within security-oriented frameworks, where asylum seekers intercepted at borders face informal pushbacks before registration.³⁵⁸ These actions are led by executive authorities rather than being supervised by the judiciary, often occurring under national security initiatives like *Usalama Watch*, which results in summary returns without proper documentation or hearings.³⁵⁹

Whereas urban areas such as Nairobi, where NGOs and the UNHCR have established offices, exhibit a higher degree of procedural adherence to the Refugees Act 2021.³⁶⁰ Public interest litigation spearheaded by the KNCHR and *Kituo Cha Sheria* has facilitated some level of judicial oversight regarding pushback practices. Nevertheless, in practice, border enforcement continues to be informal and lacks review, leading to significant territorial disparities in access to asylum procedures.

Detention: Although the Refugees Act 2021 and the Citizenship and Immigration Act 2011 establish consistent legal standards, their implementation varies by region. In Nairobi and Mombasa, detainees sometimes have the opportunity to obtain legal representation through NGOs or the courts, and *habeas corpus* petitions may be submitted to the High Court. Whereas, in isolated detention facilities and police stations in Turkana, Garissa, and Mandera, asylum seekers are often detained without judicial oversight or knowledge of their right to appeal.³⁶¹

Procedural barriers: Procedural inconsistencies across different regions arise from the geographical and administrative centralisation of refugee status determination. The DRS headquarters and RAB are situated in Nairobi, which leaves counties such as Dadaab and Kakuma reliant on camp-based administrative frameworks. Although the Refugees Act stipulates 30 days for asylum applications, delays in DRS outreach, a lack of interpretation services, and inadequate communication infrastructure in rural counties render compliance nearly unfeasible for new arrivals.

High courts, located mostly in urban areas, have recognised these regional difficulties and have adopted a rights-based, flexible approach to procedural deadlines.³⁶² Nevertheless, lower courts in border areas continue to enforce strict procedural regulations, leading to inconsistent legal outcomes based on geography.

Assessment of Procedural Divergences According to Relevant Sources

Although Kenya's asylum framework, as outlined in the Refugees Act 2021, is legally centralised, notable territorial discrepancies emerge in practice due to the country's devolved governance system and dependence on local enforcement agencies. While asylum policy is a national responsibility, its execution across various counties, particularly in border areas such as Garissa, Mandera, Turkana, and Lamu, is significantly shaped by local security priorities.

In these border regions, access to asylum is frequently restricted through informal pushbacks, refoulement, and arbitrary detention, actions that are rationalised by counterterrorism and border security issues. These practices violate Art 33 of the 1951 Refugee Convention, Art II (3) of the 1969 OAU Refugee Convention, and Sec 29 of the Refugees Act, all of which uphold the principle of non-refoulement. The level of judicial oversight in these areas is low, resulting in spatial disparities in protection and restricted access to legal remedies.

³⁵⁸ See Human Rights Watch. "From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis." (2009). p.23; NRCREACH, 'Dadaab comprehensive intentions and cross border movement monitoring; Dadaab Refugee Complex, Garissa County, Kenya,' 31 July 2019. *Op cit*;

Kenya Red Cross, 'Kenya: Mandera Refugee Influx Updates' News and Press Release, 11 Mar 2011. *Op cit*

³⁵⁹ See Amnesty International, *Somalis are Scapegoats in Kenya's Counterterrorism Crackdown*, 27 May 2014, *Op cit*.

³⁶⁰ See Nanjala, C. 'Determinants of effective legal Aid service delivery in Kenya.' *International Journal of Social Sciences and Entrepreneurship* 1, no. 5 (2013) p.10.

³⁶¹ See UNHCR, 'Kenya: Refoulement of Somali asylum seekers' Briefing notes. *Op cit*.

³⁶² *Serogo Alex & Others v Republic* [2022] *Supra*

In contrast, urban areas such as Nairobi and Mombasa, where the DRS, courts, and NGOs like the RCK and the KNCHR are located, exhibit greater adherence to procedural norms. Judicial rulings such as *Rada Haile & Another v Republic (2012)* and *Majid Ali Abdu & Another v Republic (2021)* have embraced rights-based interpretations, especially concerning late asylum applications and the non-penalisation of irregular entry. Nevertheless, the centralisation of refugee status determination continues to generate regional backlogs. These territorial discrepancies carry significant consequences. For instance, they undermine consistency, diminish judicial oversight, and bolster a dual-tier asylum framework where the availability of rights is contingent upon location rather than legal principles.

Furthermore, they render Kenya susceptible to scrutiny regarding its international commitments. Essentially, the asylum framework in Kenya shows a landscape marked by procedural disparity, where the fortification of borders and the centralisation of administration work together to restrict equitable access to asylum. It is vital to enhance regional adjudicative capabilities and to decentralise DRS operations to guarantee consistent protection across all regions.

H. Influence of procedures in practice and the role of courts

Divergences Between Formal Procedures and Practices in Asylum Access Adjudication

Kenya has an established formal procedural protection, including oral hearings, the right to appeal to the RAB, and the option for judicial review by the High Court. Additionally, there are statutory time constraints, such as the 30-day filing requirement, provisions for habeas corpus, and a constitutional guarantee of fair administrative action. Nevertheless, in practice, these protections are often compromised by specific operational practices:

Pushbacks/refoulement: Border and security operations frequently expel individuals before their registration or any formal hearing, with such expulsions occurring outside the statutory RSD framework, rendering them effectively unreviewable at that moment. This results in a de facto obstruction of access to any procedural recourse.

Detention and delayed access to hearings: Arrests during border and urban enforcement initiatives often lead to detention without prompt court presentation, violating the 24-hour rule, and limiting access to legal counsel or translators. In remote counties, detainees encounter practical obstacles in filing appeals, as the RAB and the DRS are centralised in Nairobi.

Legal representation and information gaps: Despite the existence of the Legal Aid Act and other legal frameworks, legal aid remains fragmented and reliant on NGOs. Many applicants navigate magistrates' courts without legal representation; only later do their cases reach the High Court through NGOs or public interest advocates. This situation skews outcomes in favour of those who have the support of NGOs or state actors.

The implications of these discrepancies are a landscape of unequal protection, where the applicant's location and access to NGOs dictate the effectiveness of formal procedures in safeguarding their rights. Consequently, there is an inconsistent application of asylum rights, an elevated risk of refoulement or detention for individuals entering at the border, and a bifurcated remedial system where substantial remedies are typically accessible only after reactive litigation, rather than as a standard aspect of procedural protection.

The Role of Judicial and Quasi-Judicial Jurisprudence in Shaping Procedural Protections and the Interpretation of Asylum Rights

Kenyan courts have assumed a corrective function by interpreting statutory and constitutional provisions in a manner that safeguards rights when cases are presented to them. Notable trends include:

Rights-based correction of procedural strictness: High Court rulings have consistently determined that procedural regulations, such as the 30-day filing deadline and the criminalisation of irregular entry, must not be enforced in a manner that undermines the right to seek asylum. In the case of *Rada Haile & Another v*

Republic [2012], where the local court favoured procedural enforcement, neglecting protection needs, the High Court took a softer stand, released and referred the appellants to UNHCR. A similar scenario occurred in *Serogo Alex & Others v Republic [2022]*, where the courts resisted penalising individuals for late filings. These decisions reinforce the principle that administrative efficiency or rigid timelines cannot supersede *non-refoulement* and due process.

Invalidation of oppressive executive actions: The High Court's decisions in *Kenya National Commission on Human Rights & another v Attorney General & others [2017]* limited executive efforts to carry out extensive repatriations and the closure of camps, emphasising the necessity of procedural safeguards and adherence to international obligations.

Domestic case law has enhanced the accessibility of interim relief such as injunctions and stays, and *habeas corpus* as viable remedies. It has encouraged lower courts to take protection status into account before criminal convictions or deportations. However, the influence of the courts is constrained by enforcement deficiencies and the challenges associated with litigating *ad hoc* frontline practices that frequently occur outside of judicial oversight.

The Influence of Supranational Jurisprudence on Procedural Protections and the Interpretation of Asylum Rights

There is no evidence to suggest that jurisprudence from supranational courts shaped procedural protections or the interpretation of asylum rights in Kenya. Nevertheless, international treaties and the soft law of the UNHCR have significantly contributed to this area. While decisions from supranational courts do not serve as a strong direct influence, Kenyan courts frequently reference international treaties and UNHCR guidance when interpreting procedural protections. The High Court have, in several cases, referred to the 1951 Convention, the 1969 OAU Convention, UNCAT, and UNHCR materials to support non-refoulement, interpret the non-penalisation rule for irregular entry, and mandate humane treatment and fair administrative processes. Cases like *Rada Haile & Another v Republic [2012]* illustrate domestic courts utilising international instruments to overturn premature prosecutions and safeguard claimants awaiting RSD.

In effect, the courts have leveraged these sources to enhance procedural safeguards in individual cases, even in contexts where systemic practices remain inadequate.

II. JUDICIAL BODIES IN ACCESS TO ASYLUM

A. Institutional configuration

- *First instance judicial or quasi-judicial body/ bodies:*

At first instance, the process of adjudicating asylum access in Kenya is mainly carried out by two quasi-judicial entities that operate within the DRS, which is a division of the Ministry of Interior and Coordination of National Government. These entities are:

Refugee Status Eligibility Panel (RSEP) - established pursuant to Sec 13 of the Refugees Act, 2021. The RSEP serves as the primary quasi-judicial authority tasked with determining refugee status. It consists of a chairperson and a minimum of four members selected from the Department, along with technical advisors from UNHCR and other pertinent organisations.

Its primary responsibility is to evaluate individual asylum applications, conduct interviews, and submit recommendations to the Commissioner for Refugee Affairs, who ultimately renders the final decision. While the Commissioner maintains administrative oversight, the RSEP assumes a pivotal adjudicatory function, ensuring procedural assessment and adherence to both international and domestic refugee law.

The process embodies characteristics of both administrative and judicial systems: it is investigative in nature yet necessitates reasoned written decisions, particularly in instances of denial, thus fulfilling its quasi-judicial responsibilities.

Concerning specific barriers such as procedural barriers, detention, and pushbacks, the RSEP's efficacy is frequently hampered by insufficient resources, a lack of interpreters, and inadequate legal representation, especially for urban refugees and newcomers at border points.

Magistrate Courts - In cases involving the detention or prosecution of asylum seekers for irregular entry, first-instance jurisdiction is vested in the Magistrate Court as per the Criminal Procedure Code and the Refugees Act. Although these courts are standard criminal courts, they indirectly address asylum-related matters, particularly when asylum seekers face charges related to illegal presence prior to formal registration with DRS. These courts are anticipated to take into account the intent to seek asylum, yet they often neglect to do so in practice, resulting in a disparity between legal standards and their actual application.

- *Second instance judicial or quasi-judicial body/ bodies:*

The Refugee Status Appeals Committee (RSAC): The RSAC was established under sec 11 of the Refugees Act of 2021, functions as a quasi-judicial body at the second-instance level. The RSAC addresses appeals from individuals whose claims have been rejected, annulled, or revoked by the Commissioner for Refugee Affairs. This Committee is made up of representatives from relevant government ministries, departments, and agencies, in addition to specialists in refugee law and human rights. The RSAC operates independently from the RSEP, examining both the factual and procedural elements of the initial decisions. It acts as a quasi-judicial entity by conducting hearings, gathering evidence, and providing written rulings.

Although the Refugees Act and the 2021 Refugee Regulations affirm the right to appeal, the RSAC faces challenges due to insufficient resources and centralisation in Nairobi, which restricts access for applicants located in remote regions such as the Kakuma or Dadaab camps. Appeals are predominantly submitted in paper format, lacking a digital submission system, and delays are frequently encountered. The UNHCR serves as an observer and technical advisor, supplying guidance and information regarding countries of origin, but it does not possess voting rights or decision-making power.

- *Third instance judicial or quasi-judicial body/ bodies:*

At the third instance, i.e., judicial level, individuals seeking asylum have the right to challenge decisions made by the RSAC in the High Court of Kenya through judicial review proceedings, as stipulated in Sec 47 of the Constitution of Kenya 2010 and the Fair Administrative Action Act 2015. The High Court serves as the third-instance judicial authority, exercising both supervisory and constitutional jurisdiction over administrative and quasi-judicial actions.

Further legal appeals on points of law may be directed to the Court of Appeal and, in exceptional circumstances, to the Supreme Court of Kenya. These judicial institutions provide constitutional oversight, particularly concerning the right to fair administrative action, the principle of *non-refoulement*, and access to justice. The High Court has been instrumental in significant cases such as *Kituo Cha Sheria & Others v Attorney General* [2013] and *Rada Haile & Another v Republic* [2012], where it rectified procedural injustices and upheld the rights of asylum seekers to pursue protection despite minor technical non-compliance with procedural deadlines.

The constitutional jurisdiction of the High Court, as outlined in Article 165(2)(d) of the Kenya Constitution 2010, also permits public interest litigation related to asylum and refugee matters, as evidenced in *Kenya National Commission on Human Rights (KNCHR) & another v Attorney General & 3 others* [2017].

Implications of the Institutional Configuration

The institutional configuration of Kenya's asylum adjudication system, where the RSEP and the RSAC function as quasi-judicial entities within the DRS under the Ministry of Interior and National Administration, has profound implications for the autonomy and equity of asylum access adjudication. Although this setup promotes administrative coordination and efficiency, it also integrates decision-

making within the executive branch, leading to both actual and perceived risks of influence driven by political and security concerns. As a result, the neutrality of decisions made at both the first and second instances may be jeopardised, especially in cases involving Somali asylum seekers, where narratives surrounding national security are prevalent.

Additionally, limited resources, centralisation in Nairobi, and the absence of procedural safeguards, such as legal assistance, interpreters, and transparent reasoning, further hinder access to equitable adjudication. The assignment of related asylum issues to Magistrates' Courts, which do not employ protection-sensitive procedures, frequently leads to the criminalisation of asylum seekers for irregular entry, thereby reinforcing the obstacles that the adjudicative system is intended to address. In contrast, the High Court, Court of Appeal, and Supreme Court, as constitutionally independent judicial entities, have served as corrective mechanisms, invoking both domestic and international refugee law standards to counteract executive overreach and reaffirm the principle of non-refoulement. Nevertheless, judicial review remains a reactive, resource-intensive process, primarily accessible to applicants who receive support from NGOs or legal aid.

Overall, Kenya's hybrid framework, integrating executive-driven quasi-judicial entities with a separate higher judiciary, promotes efficiency but compromises independence and uniformity. Enhancing the autonomy, procedural protections, and regional accessibility of the quasi-judicial entities, in conjunction with ongoing judicial supervision, would improve accountability and ensure that Kenya's asylum decision-making aligns with international protection norms.

Power/competences of the judicial bodies responsible for asylum access adjudication

- First instance judicial or quasi-judicial body/ bodies:

The RSEP possesses the authority to assess the merits of an asylum application. Its responsibilities encompass conducting interviews, analysing country-of-origin information, and providing recommendations to the Commissioner for Refugee Affairs, who ultimately renders the final administrative decision. While the RSEP is empowered to evaluate both factual and legal aspects, its determinations are advisory rather than conclusive. The Commissioner is required to issue a written decision that articulates the reasons for any rejection and to communicate this to the applicant. Although the RSEP can suggest either recognition or rejection of an asylum claim, the Commissioner maintains the administrative authority to accept or dismiss these recommendations.

The RSEP lacks the power to issue binding directives to the executive or to enforce compliance. In instances where an asylum claim is denied, the applicant has the right to appeal to the RSAC within a 30-day period. The RSEP is not permitted to reconsider its own final decisions, except in cases where a new claim is presented based on significantly different facts. Concurrently, Magistrates' Courts, which may address issues related to the irregular entry or detention of asylum seekers, possess limited jurisdiction. They primarily adjudicate criminal or immigration violations rather than the merits of asylum claims. However, they are mandated to acknowledge the intent to seek asylum and may refer cases to the DRS or UNHCR if there are protection concerns, as highlighted in *Rada Haile & Another v Republic* [2012]. In practice, however, this obligation is applied inconsistently.

- Second instance judicial or quasi-judicial body/ bodies:

The RSAC is authorised to evaluate the merits and legality of decisions made at the first instance. As stated in Part II, it has the capacity to uphold, modify, or annul the Commissioner's decision and may independently determine eligibility for refugee status. The RSAC operates autonomously from the RSEP, yet it is institutionally situated within the DRS, which restricts its structural independence.³⁶³ Decisions made by the RSAC are binding on the Commissioner, who is obligated to enforce them unless they are

³⁶³ See Sec 11(4), Refugee Act 2021.

overturned by a superior judicial authority. The RSAC is not permitted to refer cases back to the RSEP for further review; rather, it applies its own judgment regarding the merits of the cases.

- *Third instance judicial or quasi-judicial body/ bodies:*

The High Court possesses the authority to examine both the legality and constitutionality of administrative and quasi-judicial decisions. Primarily, the High Court assesses whether a decision made by the RSAC or the Commissioner contravenes the Constitution, the Refugees Act, or the principles of natural justice.

In practice, the High Court frequently issues binding declarations regarding both law and fact, particularly in asylum cases that involve detention, procedural obstacles, or refoulement. Notable examples include *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others* [2017] and *Espoir Ndarubuya & Another v DPP* [2022], where the court annulled executive actions and reaffirmed the non-refoulement principle. Their rulings are binding on all lower courts, including the executive. Once a ruling is issued by the High Court or appellate courts, it carries full binding authority over the government, and non-compliance constitutes a breach of the Constitution.

Implications of the available types of remedies on asylum access adjudication

- *First instance judicial or quasi-judicial body/ bodies:*

Although the RSEP can assess both factual and legal aspects, its decisions are merely advisory and thus non-binding. The Commissioner has the authority to accept, modify, or reject these recommendations. At this stage, the remedies available are primarily internal and administrative, which offer limited examination of legality or procedural fairness. Since applicants cannot secure a binding remedy directly from the RSEP, they are required to appeal to the RSAC or pursue judicial review.

This situation diminishes early oversight and centralises decision-making authority within the executive branch. The practical consequences are considerable; the limited remedies available at the initial stage can facilitate removal, detention, or procedural exclusion prior to any effective review taking place. Insufficient resources, a lack of interpreters, and the absence of legal aid further hinder the accessibility of this remedy, especially for applicants situated in the Dadaab and Kakuma camps. Magistrates' Courts, which occasionally address cases involving the irregular entry or detention of asylum seekers, offer criminal remedies, such as acquittal and bail, but do not provide protection-sensitive relief.

- *Second instance judicial or quasi-judicial body/ bodies:*

The RSAC has the authority to uphold, modify, or reverse decisions and to issue its own conclusive determination regarding refugee status. Its decisions are obligatory for the Commissioner for Refugee Affairs, who is required to enforce them unless they are annulled by a judicial court. This remedy introduces an enhanced level of substantive and procedural examination, effectively redistributing power between the executive branch and the quasi-judicial framework. It allows for the rectification of factual or procedural mistakes made during the initial assessment and offers applicants an internal appeal process before judicial intervention.

However, its efficacy is hindered by institutional constraints. The RSAC operates within the same Department of Refugee Services (DRS) as the Commissioner, which restricts its structural autonomy. The centralisation in Nairobi further obstructs accessibility and prolongs outcomes. The remedy is effective primarily when applicants receive assistance from UNHCR or NGOs capable of navigating the procedural landscape. Without such support, numerous asylum seekers are unable to exercise their right to appeal, making the remedy more theoretical than practical. In summary, the RSAC swings decision-making authority away from the Commissioner in legal terms, but ineffective implementation constrains the extent of scrutiny in practice.

- *Third instance judicial or quasi-judicial body/ bodies:*

In the third instance, the High Court is empowered to evaluate the legality, rationality, and procedural propriety of administrative and quasi-judicial decisions made by RSEP or RSAC. The remedies accessible at this stage are comprehensive and binding on the executive. Through landmark cases like *Kenya National Commission on Human Rights & Another v Attorney General* [2017] and *Espoir Ndarubuya & Another v DPP* [2022], the High Court has demonstrated strong oversight, rectified executive excesses and reaffirmed the right to seek asylum. Nevertheless, access to these remedies is constrained by high litigation costs, geographical obstacles, and reliance on NGO support. Consequently, while judicial remedies offer the most robust and binding scrutiny, they are reactive and accessible to a limited number of asylum seekers.

Ultimately, judicial remedies at this level serve a corrective and precedent-setting function, influencing administrative conduct and enhancing accountability. They significantly shift power towards the judiciary, but only after executive decisions have been implemented. Thus, the efficacy of judicial review highlights both the strength of Kenya's constitutional framework and the vulnerability of administrative remedies at earlier stages.

B. Independence

The level of independence significantly differs between quasi-judicial entities, such as RSEP and RSAC, and judicial institutions, such as the High Court and other appellate courts. In the case of quasi-judicial entities, the Refugees Act, 2021, establishes them within the DRS, which is part of the Ministry of Interior and Coordination of National Government. Though it can be interpreted that the Act envisages that the panels operate impartially and fairly, they do not offer constitutional or statutory assurances of independence that are comparable to those afforded to the judiciary. The Commissioner for Refugee Affairs, who is appointed by the executive, supervises the operations of both the RSEP and RSAC. Consequently, their decisions and recommendations are made within an administrative hierarchy.

In contrast, judicial institutions such as the High Court, Court of Appeal, and Supreme Court possess constitutional independence. The constitution ensures that the judiciary's functional, financial, and administrative autonomy.³⁶⁴ The Judicial Service Commission (JSC) plays a crucial role in safeguarding judges and magistrates from executive interference by implementing transparent processes for appointment, remuneration, and disciplinary actions.³⁶⁵ Therefore, while judicial independence is firmly established in law, quasi-judicial asylum bodies function within the executive structure and do not enjoy complete statutory protection from ministerial influence.

Autonomy of the managing authority of the judicial or bodies in the field of access to asylum

The DRS, which operates under the Ministry of Interior, serves as the managing or supervising authority for both the RSEP and RSAC. The Director-General, also known as the Commissioner for Refugee Affairs, is responsible for staffing, budget management, and operational oversight of these entities. There are no legal frameworks that grant managerial autonomy to the RSEP or RSAC.

The logistical support and secretariat functions are carried out by Department of Refugee Services (DRS) personnel, which means that these bodies remain administratively and financially accountable to the same authority that enforces government refugee policies.³⁶⁶ This structure obscures the line between adjudication and policy implementation, permitting executive priorities, such as encampment policies or national security issues, to indirectly shape decision-making processes.³⁶⁷ Consequently, this leads to a

³⁶⁴ See Sec 160-164, Kenya Constitution, 2010.

³⁶⁵ See Sec 171 & 172(1), *Ibid*

³⁶⁶ See sec 7,8, 9 & 11, Kenya Refugee Act 2021.

³⁶⁷ Ali Nobil Ahmad, *Mapping Displacement Governance in East Africa: Towards Coherence? The Past, Present, and Future of Refugee Management in Kenya* (Migration & Displacement Series, Heinrich Böll Stiftung — Horn of Africa May 2025) p.17; Kenya National Commission on Human Rights. *Transforming Refugee Policy in Kenya: From Encampment to Socio-Economic Integration*. Nairobi: KNCHR, August 2024. pp. 20 & 22

constrained functional autonomy that may undermine impartial decision-making, particularly in cases that are politically sensitive or of high public interest.

Financial independence

The financial independence of quasi-judicial bodies is notably limited. The RSEP and RSAC lack distinct budget lines within the national budget framework, relying on most of their finances from UNHCR and other donors.³⁶⁸

Frequent budgetary constraints lead to delays in sittings,³⁶⁹ further compounded by the centralisation of the appeal hearing. Although appeals can be submitted in Dadaad and Kakuma,³⁷⁰ the hearing, however, is centrally heard and decided in Nairobi. These constraints have a direct impact on procedural fairness, as applicants situated in remote areas experience extended delays or may find it impossible to access remedies. The reliance on the executive for financial distribution further diminishes the perception of independence and limits the capacity of the RSEP or RSAC to operate independently.

In contrast, judicial institutions benefit from constitutionally guaranteed financial,³⁷¹ which creates the Judiciary Fund. This fund ensures that the courts have direct access to their budget and protects them from ministerial budgetary oversight.

Independence concerning human resource decisions

The RSEP members are selected by the Commissioner of Refugee Affairs from individuals within the DRS who possess relevant expertise or experience.³⁷² The members of the RSAC are appointed by the Cabinet Secretary in charge of refugee issues. The RSAC is composed of a chairperson, who is the Principal Secretary overseeing refugee matters, representatives from the KNHRC, the State Department responsible for Immigration, one individual nominated by the Attorney General, and three additional persons with knowledge and experience in refugee issues.³⁷³ Typically, these members are selected from the civil service and are susceptible to transfer, promotion, or dismissal in accordance with the overarching public service regulations. This administrative reliance implies that adjudicators and managers may encounter indirect pressures to conform their decisions to departmental policies.

Furthermore, training and evaluation processes are managed by the DRS, often incorporating technical and financial assistance from UNHCR.³⁷⁴ In contrast, judges and magistrates are governed by the Judicial Service Commission (JSC), which guarantees merit-based appointments, secure tenure, and disciplinary independence, as stipulated in the Constitution³⁷⁵ and the Judicial Service Act of 2011.³⁷⁶ This disparity highlights a dual system; the judiciary functions with built-in protections, whereas quasi-judicial refugee organisations are integrated within executive staffing frameworks.

Internal independence

Within the quasi-judicial frameworks, the autonomy of internal operations is constrained by hierarchical reporting structures. The Commissioner for Refugee Affairs, also known as the DRS Director-General, supervises the administration of RSEP and RSAC, and possesses the authority to provide procedural or operational directives. While adjudicators possess discretion in their individual decisions, the

³⁶⁸ Halakhe, Abdullahi Boru, and Samson Omondi. "Lessons and recommendations for implementing Kenya's new refugee law." *Refugees International* 1 (2024). pp. 6 & 21-22.

³⁶⁹ Kenya: Refugee consortium of Kenya's asylum support and legal aid representation. *Op cit.*

³⁷⁰ See the Ministry of Interior and National Administration website. Accessed via: <<https://refugeeappeals.go.ke/faqs?utm=>

³⁷¹ See Sec 173, Kenya Constitution 2010.

³⁷² Sec 13, Refugee Act 2021.

³⁷³ Sec 11, Refugee Act 2021.

³⁷⁴ Nalule, Caroline, and Derya Ozkul. "Exploring RSD handover from UNHCR to States." *Forced Migration Review* 65 (2020); Kenya National Commission on Human Rights. *Transforming Refugee Policy in Kenya: From Encampment to Socio-Economic Integration*. Nairobi: KNCHR, August 2024. p.30.

³⁷⁵ Sec 172, Constitution of Kenya, 2010.

³⁷⁶ Sec 30-32, Judicial Service Act of 2011

administrative structure permits subtle influence through managerial oversight, policy directives, or performance assessments.

On the contrary, the High Court and higher courts uphold complete internal independence, with decisions made either collectively or individually, free from the influence of senior judges or administrative authorities. Their legal reasoning, as evidenced in cases like *Kituo Cha Sheria & Others v Attorney General* [2013] and *KNCHR & Another v Attorney General* [2017], illustrates the judiciary's ability to scrutinise executive actions through independent constitutional interpretation.

Implications of various aspects of independence

The limited institutional, financial, and personnel autonomy of quasi-judicial bodies dealing with asylum has significant consequences for the ability to achieve fair adjudication. The integration within the executive limits their capacity to deliver unbiased oversight regarding asylum obstacles such as detention, delayed registration, and encampment. Furthermore, it may dissuade adjudicators from reversing decisions that align with governmental policy objectives. This reliance has led to inconsistencies in procedures and diminished confidence in administrative asylum decisions, prompting NGOs and asylum seekers to sometimes depend on judicial review at the High Court for equitable resolutions.

Nevertheless, judicial intervention tends to be reactive and is primarily available to those litigants who possess legal representation. The absence of independence at the initial stages consequently transfers the responsibility of protection from the administrative domain to the judicial sphere, and causing delays in the delivery of justice. Overall, the absence of complete independence undermines the quality of decisions made at both first and second instances, reduces oversight of the executive branch, and reinforces the notion that asylum adjudication in Kenya serves as an extension of migration control rather than a process grounded in rights.

Independence of the whole judicial system

As discussed above, Kenya's judiciary is constitutionally autonomous and comparatively strong by regional benchmarks. The JSC ensures a structural separation from the executive branch and has actively upheld judicial independence. Judicial rulings in asylum matters have illustrated this autonomy through the consistent application of *non-refoulement* principles, the right to a fair hearing, and the protection of constitutional rights.

Nevertheless, the domain of asylum adjudication diverges from this ideal, as quasi-judicial entities remain administratively integrated within the Ministry of Interior. Consequently, while courts maintain genuine independence, the asylum processes at both first and second instances function with limited separation from executive policies, resulting in a disjointed protection system. Thus, the judiciary's strong independence coexists with executive control at the administrative level, leading to a two-tier adjudicatory framework where only higher courts can provide fully independent and enforceable protection.

C. Centralization/decentralization

- First instance judicial or quasi-judicial body/ bodies:

The RSEP functions as a centralised quasi-judicial entity under the Department of Refugee Services (DRS) within the Ministry of Interior and National Administration. There exists one official RSEP, located in Nairobi, which reviews asylum applications and provides recommendations to the Commissioner for Refugee Affairs. While the DRS has registration and eligibility offices situated in Kakuma camp, Dadaab camp and other locations, these field units are primarily responsible for conducting registration, gathering data, and performing interviews,³⁷⁷ with case files sent to Nairobi for conclusive determination.

³⁷⁷ See UNHCR Kenya Help website - Applying for asylum in Kenya

Furthermore, centralisation intensifies resource bottlenecks, diminishing the Panel's capacity to provide timely and consistent rulings.³⁷⁸ It also strengthens executive control, given that both the RSEP and its secretariat are situated close to ministerial headquarters, thereby constraining transparency and independent oversight.

- *Second instance judicial or quasi-judicial body/ bodies:*

Although the RSAC functions through a centralised secretariat located in Nairobi, its appeal hearings are not solely restricted to the capital. Appeal hearing sessions for urban cases are held at the RSAC Head Office in Nairobi, while hearings for appellants in Kakuma and Dadaab occur at the Kakuma DRS Office and Dadaab DRS Office, respectively.³⁷⁹ Nonetheless, the appeal system remains administratively centralised, as the processing, coordination, and management of appeal files are primarily conducted from Nairobi.

Appellants located in Kakuma, Dadaab, and other remote areas are required to submit their appeal forms through DRS field offices, which then forward the documents to the central secretariat. Although this arrangement provides a certain level of geographical outreach during the hearing phase, numerous appeals still depend significantly on paper-based procedures,³⁸⁰ and oral hearings outside Nairobi generally take place only when logistics permit.

The centralised framework of the RSAC continues to have significant implications for access to effective remedies. Firstly, despite the availability of local hearing venues, spatial inequality remains an issue due to communication delays, challenges in document transmission, and limited legal assistance in remote camps, which often hinder appellants' ability to file timely and well-supported appeals. Secondly, the dependence on paper-based processes hampers adjudication and may compromise procedural fairness, especially in cases where applicants are unable to adequately clarify factual discrepancies or present new evidence directly to the panel. Thirdly, the concentration of administrative resources in Nairobi improves internal efficiency but diminishes transparency and engagement for many asylum seekers.

Therefore, RSAC decisions often mirror the experiences of appellants who have greater access to legal assistance or communication avenues, predominantly those situated in urban regions, whereas individuals residing in remote areas, despite having local hearing facilities, continue to be relatively under-represented and encounter considerable structural obstacles during the appeals process.

- *Third instance judicial or quasi-judicial body/ bodies:*

The High Court of Kenya, along with the Court of Appeal and the Supreme Court, constitutes a component of the nationally decentralised judicial framework established by the Constitution³⁸¹ and the Judicature Act.³⁸² The High Court operates in 46 of the 47 counties,³⁸³ whereas the Court of Appeal has permanent offices in Nairobi, Mombasa, Nyeri, Nakuru, and Kisumu, including sub-registries in Eldoret, Garissa, Busia, Kisii, Meru, Malindi and Kakamega, and judges visit these circuits from time to time to hear matters.³⁸⁴ Although the Supreme Court is primarily based in Nairobi, it has sub-registries in Mombasa and Kisumu where cases can be filed.³⁸⁵

This decentralisation of the judiciary facilitates access to judicial review for asylum seekers, NGOs, and legal-aid providers situated in urban or regional centres, eliminating the necessity to travel to Nairobi. However, the practical accessibility of these services remains inconsistent; due to limited capacity and

³⁷⁸ See Miller, Sarah, and Jimmy Graham. "From displacement to development: How Kenya can create shared growth by facilitating economic inclusion for refugees." *Refugee International* (2021). p.20.

³⁷⁹ See the Ministry of Interior and National Administration website. Available via: <<https://refugeeappeals.go.ke/faqs?utm=>

³⁸⁰ *Ibid*

³⁸¹ Sec 163-165, Kenya Constitution, 2010.

³⁸² Sec 3(1), Judicature Act 1967

³⁸³ Kenya Judiciary. *State of the Judiciary & the Administration of Justice: Annual Report 2023–24*. Nairobi: Kenya Judiciary, 2024. p.21.

³⁸⁴ See website of Kenya's Judiciary – Court of Appeal. Available at: <<https://judiciary.go.ke/the-court-of-appeal/>>

³⁸⁵ See Kenya Supreme Court website. Available at: <<https://supremecourt.judiciary.go.ke/registry-overview/?utm=>

knowledge of refugee law, UNHCR strengthen and funds the training of judges on refugee law,³⁸⁶ and the availability of legal-aid services is limited outside of major urban areas. While this decentralisation enhances the independence and outreach of the judiciary, disparities in resources among High Court stations can adversely impact the quality and promptness of rulings related to asylum cases.

Implications of the Centralization or Decentralization

Kenya's asylum adjudication framework integrates administrative centralisation with judicial decentralisation. This dual approach presents various implications:

Access inequality: Although Kenya's refugee status determination process includes field offices in Dadaab, Kakuma, and various other locations, the ultimate decision-making power is held by the Commissioner's office located in Nairobi, which largely leads to centralisation of decisions. This centralisation, coupled with considerable backlogs and limitations in capacity, may lead to disparities in access and delays for asylum seekers situated in remote areas or camps.

Delays and costs: While Kenya's Refugee Act allows for the right to appeal, considerable delays in the status determination process and restricted access to legal representation hinder meaningful access to justice. Such delays may dissuade certain asylum seekers from pursuing appeals, which raises apprehensions regarding the possible risk of refoulement.

Resource efficiency versus fairness: While Kenya's centralised system, managed by the DRS, is expected to promote administrative oversight and uniformity in decision-making, it simultaneously leads to considerable compromises in fairness and inclusivity. In reality, prolonged processing durations, the centralisation of decision-making in Nairobi, and restricted institutional resources in camps or remote regions render the asylum application process more challenging for many asylum seekers, especially those situated outside of major urban areas.

Judicial intervention: Although Kenya's decentralised judicial system improves geographical access to justice, the judicial protection it offers is largely reactive. Courts only step in after administrative decisions have been made, leading to a protective model that responds to harm in a retrospective rather than in a proactive manner.

Overall, while quasi-judicial entities are geographically centralised, limiting prompt access to justice and exacerbating regional inequalities, the decentralised framework of the judiciary theoretically provides a means of correction. Nevertheless, this potential is only partially fulfilled due to persistent resource limitations and limited access to legal aid.

Regional Uniformity / Variation in Decentralized Political Systems

- First instance judicial or quasi-judicial body/ bodies:

The RSEP is a unique national, quasi-judicial body created under the Refugees Act and is administratively overseen by the DRS. This legal and organisational structure is consistent throughout the nation, with no distinct regional RSEP entities. Field registration and eligibility offices are situated in Kakuma, Dadaab, Nakuru, Mombasa, Eldoret, and other locations; however, their primary function is to gather and forward submissions to the central RSEP process in Nairobi, which holds the final authority regarding eligibility decisions.

- Second instance judicial or quasi-judicial body/ bodies:

The RSAC operates as a unified national appeals organisation under the DRS. There are no distinct appeals bodies at the regional level; rather, all appeals are managed through the central RSAC secretariat located in Nairobi. Although submissions from regional offices, such as Kakuma and Dadaab, are sent to the central secretariat, hearings for appellants in these camps take place locally at the corresponding DRS

³⁸⁶ UNHCR Kenya, 'Strengthening Refugee Protection, Assistance and Support to Host Communities in Kenya' Project Proposal August 2008. pp. 11-12. Available at: <<https://www.unhcr.org/sites/default/files/legacy-pdf/48d8e4ed2.pdf?>>

offices. This structure guarantees centralised oversight of appeals while offering restricted regional access for hearings.

- *Third instance judicial or quasi-judicial body/ bodies:*

The judiciary, comprising the High Court, Court of Appeal, and Supreme Court, operates on a national level. According to the Constitution, the High Court maintains various divisions across counties, with multiple local registries. However, the legal status, authority, and structure of these courts remain consistent nationwide, as they do not function as distinct regional or jurisdictional courts that one might find in a federal system. The Court of Appeal and the Supreme Court serve as national appellate bodies.

D. Specialization

Institutional specialization on asylum

- *First instance judicial or quasi-judicial body/ bodies:*

As discussed earlier, the RSEP is a specialised quasi-judicial entity that is solely focused on the refugee status determination and decisions regarding access to asylum. It was established under Sec 13 of the Refugees Act, 2021, with its membership and responsibilities specifically designed to adjudicate asylum cases. The RSEP is composed of a chairperson and a minimum of four members who are appointed by the Director-General of the Department of Refugee Services (DRS). These members are chosen from various departments that possess relevant expertise, normally including officials trained in refugee law, protection, and information about countries of origin.

The RSEP's specialisation is derived from its exclusive authority over asylum applications and its operational connection with units responsible for refugee registration, documentation, and protection. Nevertheless, the practical application of this specialisation is somewhat restricted, especially as members are civil servants whose term with the RSEP is determined by the executive; the training and experience of members can differ significantly, and they may be reassigned to non-refugee administrative roles; the lack of an independent secretariat and the absence of reliable case-law management systems impede the establishment of consistent jurisprudence.

Therefore, although the RSEP is specialised both legally and functionally, it functions with a degree of partial specialisation in practice, limited by staff turnover, insufficient technical training, and administrative reliance on the DRS.

- *Second instance judicial or quasi-judicial body/ bodies:*

The RSAC is a specialised quasi-judicial entity dedicated solely to handling appeals related to asylum determinations. It was established under Sec 11 of the Refugees Act, 2021, and is tasked with reviewing both the merits and legality of initial decisions. The RSAC's focus is evident in its membership structure, which includes experts in refugee law, human rights, and migration management, often seconded from relevant ministries and institutions, including the KNCHR. Its capacity is also strengthened through ongoing technical collaboration with UNHCR. Furthermore, its internal procedures and templates are specifically designed for refugee appeals, distinguishing it from general administrative review bodies.

However, the RSAC's specialisation is compromised by resource limitations and the absence of permanent professional adjudicators. Members typically serve on a part-time, three-year term, which is renewable for one further term.³⁸⁷ The resulting turnover arguably leads to inconsistencies in the quality of decisions. As a result, while there is a clear specialisation in law and mandate, practical challenges in continuity and professionalisation impede effective implementation.

³⁸⁷ Sec 11(5), Refugee Act, 2021.

- *Third instance judicial or quasi-judicial body/ bodies:*

With regards to refugee law, the High Court, Court of Appeal, and Supreme Court function as generalist institutions with extensive authority over administrative and constitutional matters, which encompass refugee and asylum law. While there is no specific court for asylum or immigration, a form of practical specialisation has developed: judges in High Court locations like Nairobi and Garissa are progressively managing judicial reviews and human rights petitions related to asylum issues,³⁸⁸ thus cultivating their expertise over time.

The Human Rights and Constitutional Division of the High Court in Nairobi frequently adjudicates strategic asylum cases that involve issues such as denial, violation, infringement or threat of human rights or fundamental freedoms, including detention, *refoulement*, or obstacles to registration.³⁸⁹ Moreover, the KNCHR and legal aid NGOs, such as HIAS Kenya and the Refugee Consortium of Kenya, are instrumental in educating judges and submitting *amicus curiae* briefs that improve the judiciary's comprehension of refugee protection standards.

Although the judiciary is not officially specialised in refugee law, a *de facto* specialisation is emerging through accumulated experience, consistent case exposure, and the utilisation of expertise from UNHCR and NGOs.

Specialized training in asylum

Specialised asylum training in Kenya is available but is not mandatory or institutionalised. It is delivered mainly through partnerships between the DRS, UNHCR, the Judiciary, and organisations such as the RCK, HIAS Kenya, and Kituo Cha Sheria. Training covers refugee law, procedural fairness, and international protection standards and is open to government officials, adjudicators, and legal practitioners.³⁹⁰

UNHCR has also organised periodic refugee law training for judges, including on the principle of non-*refoulement*, and some judges participate in the International Association of Refugee and Migration Judges (IARMJ).³⁹¹ However, there is no evidence that such training is compulsory or provided on a regular basis. Instead, asylum expertise is largely developed through experience and partner-led capacity-building initiatives.

Discrepancies between the specialization provided on paper and the actual specialization

The degree of specialisation varies across Kenya's asylum adjudication system. The RSEP and RSAC are specialised quasi-judicial bodies whose members possess expertise in refugee law, human rights, and country of origin information.³⁹² However, their effectiveness is constrained by staff turnover, limited technical training, and resource constraints.

By contrast, the regular courts are not formally specialised in asylum law, although judges in the High Court, have developed expertise through repeated exposure to refugee cases and training provided by UNHCR and NGOs.³⁹³ Specialised legal representation is also largely provided by NGOs such as the

³⁸⁸ See *Kituo Cha Sheria & Others v Attorney General* [2013]; *Rada Haile & Another v Republic* [2012], and *Akingbade v Commissioner for Refugee Affairs (Civil Appeal E323 of 2020)* [2022]

³⁸⁹ See Kenya High Court website. Available at: <https://highcourt.judiciary.go.ke/ova_dep/constitution-and-human-rights-registry/?utm=>

³⁹⁰ See Refugee Consortium of Kenya, 'Empowering Women and Girls: RCK's New Initiative' (Refugee Consortium of Kenya) <<https://www.rckkenya.org/empowering-women-and-girls-rcks-new-initiative/>> accessed 24 July 2026.

³⁹¹ See UNHCR, *Kenya Annual Results Report 2024* (12 June 2025) <https://www.unhcr.org/media/kenya-annual-results-report-2024> accessed 24 July 2026.

³⁹² Sec 13, Kenya Refugee Act 2021.

³⁹³ See International Association of Refugee and Migration Judges Africa Chapter (n.d.) *About Us*. Available at: <https://iarmj.africa/index.php/about-us> (Accessed: 25 July 2026); See also "Hon. Justice Reuben Nyambati Nyakundi." *The High Court of Kenya*, <https://highcourt.judiciary.go.ke/team/hon-justice-reuben-nyambati-nyakundi/>

Refugee Consortium of Kenya and *Kituo Cha Sheria*,³⁹⁴ but limited legal aid and the centralisation of expertise create barriers to effective access to asylum adjudication.³⁹⁵

- *First instance judicial or quasi-judicial body/ bodies:*

The RSEP is a specialised quasi-judicial body established under the Refugees Act 2021 to determine refugee status applications.³⁹⁶ Its members receive periodic capacity-building and technical training organised by the DRS, often with support from UNHCR and other refugee protection partners.³⁹⁷ According to a UNHCR staff, the training generally covers refugee status determination procedures, international refugee law, non-*refoulement*, interviewing techniques, credibility assessment, country of origin information and the protection of vulnerable applicants. It was stated that such training is mandatory or conducted according to a prescribed schedule. While the RSEP is specialised by law, its practical level of specialisation varies because members are drawn from different professional backgrounds and institutional continuity depends on periodic appointments rather than permanent specialist adjudicators.

- *Second instance judicial or quasi-judicial body/ bodies:*

The RSAC is a specialised appellate body established under the Refugees Act 2021 to determine appeals against RSEP decisions.³⁹⁸ Similar to the RSEP, members benefit from periodic training and technical support from the DRS and UNHCR on refugee law and international protection standards. Like the RSEP, specialised training is not mandatory or institutionalised for RSAC members. Although the RSAC is formally specialised, variations in members' expertise and the absence of permanent full-time adjudicators may affect the consistency of specialised decision-making.

- *Third instance judicial or quasi-judicial body/ bodies:*

The High Court, Court of Appeal and Supreme Court are not specialised asylum courts,³⁹⁹ and no specialised asylum divisions exists, according to a judicial official. Judges receive general judicial training⁴⁰⁰ and may occasionally participate in refugee law or migration-related programmes organised by the Judiciary Training Institute in collaboration with UNHCR and other partners. As discussed in the foregoing part, some judges have developed *de facto* expertise through repeated adjudication of refugee, constitutional and administrative law cases concerning asylum seekers and refugees. Consequently, specialisation at this level develops through judicial experience rather than formal institutional design.

E. Human resources

Profile of the group of adjudicators

- *First instance judicial or quasi-judicial body/ bodies:*

The Refugee Act 2021 does not specify the number of members or provide information on their socio-demographic characteristics, including gender balance. Going by the wordings of the Act thus the eligibility panel *'shall consist of the following members - a chairperson appointed by the Commissioner [and] not less than four other*

³⁹⁴ Refugee Consortium of Kenya (2021) *Annual Report 2021*. Nairobi: Refugee Consortium of Kenya. Available at: <<https://www.rckkenya.org/wp-content/uploads/2024/06/RCK-Annual-report-2021.pdf>> (Accessed: 25 July 2026); See also Asylum Capacity Support Group (ACSG), *Kenya: Refugee Consortium of Kenya's asylum support and legal aid representation*. Available at: <https://acsg-portal.org/tools/asylum-support-and-legal-aid-representation-by-the-refugee-consortium-of-kenya/> (Accessed: 25 July 2026).

³⁹⁵ Eileen Imbosa and Andrew Maina, Limitations to Accessing Legal Representation in Kenyas RSD Processes (2020) 65 *Forced Migration Review* <<https://www.fmreview.org/recognising-refugees/imbosa-maina>> accessed 25 July 2026.

³⁹⁶ Sec 13, Refugee Act 2021.

³⁹⁷ UNHCR), *Kenya Annual Results Report 2025* (12 June 2026) pp.13, 14 <https://www.unhcr.org/mx/sites/default/files/2026-06/unhcr-annual-results-report-2025-kenya.pdf> accessed 25 July 2026.

³⁹⁸ Sec 14, Refugee act 2021.

³⁹⁹ See Sec 162, 163, 164 & 165 of the 2010 Kenya Constitution.

⁴⁰⁰ Kenya Judiciary Academy, *Training Programmes* <https://www.kja.go.ke/?page_id=2349> accessed 25 July 2026

*members appointed by the Commissioner from among persons in the Department,*⁴⁰¹ it may be safe to conclude that the first instance panel is usually made up of at least five members. Members are appointed from different departments and professional backgrounds from the DRS, reflecting the Panel's administrative rather than judicial character. A UNHCR official stated that the panel members do not enjoy permanent professional refugee adjudicators status.

- *Second instance judicial or quasi-judicial body/ bodies:*

The RSAC is a specialised quasi-judicial appellate body established under the Refugees Act 2021. Like the RSEP, it is composed of members drawn from different professional backgrounds. Similar to the RSEP, it comprises members from diverse professional backgrounds. The Act, however, does not specify the number of members to be appointed or their gender and socio-demographic composition. It only stipulates the appointment of at least five members and a quorum for the Committee's proceedings to be least three members, leaving its overall membership size unclear.⁴⁰²

- *Third instance judicial or quasi-judicial body/ bodies:*

The High Court, Court of Appeal and Supreme Court are composed of career judges exercising general judicial jurisdiction,⁴⁰³ including constitutional and administrative law matters⁴⁰⁴ affecting asylum seekers and refugees. There are no publicly available data on the socio-demographic characteristics of judges who adjudicate asylum-related matters in Kenya. Nevertheless, a review of reported asylum and refugee jurisprudence indicates that most cases at first instance before the High Court are typically heard and determined by a single judge. This appears consistent with the general practice of the High Court in Kenya. However, like other cases, asylum-related matters that reach the appellate level are heard by multi-judge benches in the Court of Appeal and the Supreme Court.⁴⁰⁵

Selection and appointment

- *First instance judicial or quasi-judicial body/ bodies:*

Members of the RSEP are appointed in accordance with the Refugees Act 2021. The Panel consists of representatives from relevant departments of the DRS designated to determine refugee status applications. The available sources do not provide further information on the appointment criteria for selection process beyond the statutory framework.

- *Second instance judicial or quasi-judicial body/ bodies:*

Members of the RSAC are appointed under sec 13 of the Refugees Act 2021 to hear appeals against decisions of the RSEP. The Act does not provide a detailed appointment procedure or selection criteria beyond the statutory provisions establishing the Committee.

- *Third instance judicial or quasi-judicial body/ bodies:*

Judges in Kenya are appointed in accordance with the Constitution of Kenya, 2010 through a merit-based process conducted by the Judicial Service Commission (JSC). The JSC recommends qualified candidates to the President, who formally appoints them.⁴⁰⁶ Once appointed, judges are career judicial officers exercising the general jurisdiction of their respective courts. According to a judicial officer, judges are not appointed or assigned specifically to hear asylum or refugee matters, which are instead determined within the ordinary jurisdiction of the High Court and, on appeal, the Court of Appeal and Supreme Court.

⁴⁰¹ Sec 13, Refugee Act 2021.

⁴⁰² Sec 11, *Ibid*

⁴⁰³ See Sec 162, 163, 164 & 165 of the 2010 Kenya Constitution.

⁴⁰⁴ High Court (Organisation and Administration) Act 2015; Court of Appeal (Organisation and Administration) Act; Appellate Jurisdiction Act; Supreme Court Act, 2011

⁴⁰⁵ Sec 163, Kenya Constitution 2021; Court of Appeal (Organisation and Administration) Act 2015.

⁴⁰⁶ Sec 166, 171, & 172, Constitution of Kenya 2010; Sec 30, Judicial Service Act 2011.

Clerks, or experts supporting the adjudication function

- First instance judicial or quasi-judicial body/ bodies:

The RSEP is supported administratively by the DRS, which receives, registers and processes asylum applications before they are referred for refugee status determination.⁴⁰⁷ The Refugees Act 2021 and the Refugees (General) Regulations 2024 assign the DRS responsibility for administering the refugee status determination procedure, including maintaining records, coordinating interviews and communicating decisions.⁴⁰⁸

However, neither instrument provides for dedicated judicial clerks, legal researchers or independent expert advisers attached specifically to the RSEP. Administrative support therefore appears to be provided through the ordinary structures of the DRS rather than by specialised adjudicatory staff. Likewise, there is no evidence that country of origin experts or specialist legal advisers participate formally in the Panel's deliberations, although UNHCR provides technical assistance and capacity-building to the DRS and refugee status determination processes.

- Second instance judicial or quasi-judicial body/ bodies:

The available legal framework similarly provides little information regarding dedicated support staff for the RSAC. Administrative functions are performed through the DRS Secretariat, but neither the Refugees Act 2021 nor the Refugees (General) Regulations 2024 establish permanent legal clerks, judicial assistants or independent expert advisers attached exclusively to the Committee.

- Third instance judicial or quasi-judicial body/ bodies:

The conventional courts are supported by registrars, deputy registrars, court clerks, judicial assistants and legal researchers appointed under the Judiciary.⁴⁰⁹ These personnel assist with case management, legal research, scheduling and administrative functions across all categories of litigation, including refugee-related constitutional and judicial review proceedings.⁴¹⁰ According to a judge, the Kenyan Judiciary maintains dedicated asylum or refugee law clerks or specialist judicial support units for asylum litigation.

Interpretation service

The Refugees Act 2021 and the Refugees (General) Regulations 2024 recognise the importance of ensuring that asylum seekers understand refugee status determination proceedings. The Regulations require refugee officers to provide adequate interpretation during registration where necessary and oblige the Commissioner to make interpreters available whenever interpretation is required during the refugee status determination process. They further require refugee officers to explain the role of the interpreter to the applicant, record the use of an interpreter in the interview transcript, allow applicants, where possible, to express a preference for the interpreter's sex, and require interpreters to sign an undertaking of confidentiality and impartiality before undertaking their duties.⁴¹¹ Despite these procedural safeguards, neither the Act nor the Regulations prescribe minimum qualifications, accreditation requirements or specialised training for interpreters engaged in refugee status determination. Similarly, there is little publicly available information on the provision of interpretation services before the RSAC or in refugee-related proceedings before the ordinary courts.

Quality and availability of human resources

The Refugees Act 2021 and the Refugees (General) Regulations 2024 recognise the importance of ensuring that asylum seekers understand refugee status determination proceedings. The Regulations require refugee

⁴⁰⁷ See Sec 13, Refugee Act 2021.

⁴⁰⁸ Sec 9, Refugees (General) Regulations, 2024

⁴⁰⁹ Sec 10, Judicial Service Act, No. 1 of 2011.

⁴¹⁰ Sec 18 – 21, High Court (Organization and Administration) Act, 2015; Sec 7, Judicial Service Act 2011; 161(1)-(3) Kenya Constitution 2010.

⁴¹¹ Sec 4(2)(b), 10(4), 10(6)(b) & 24, Refugees (General) Regulations 2024.

officers to provide adequate interpretation during registration where necessary and oblige the Commissioner to make interpreters available whenever interpretation is required during the refugee status determination process. They further require refugee officers to explain the role of the interpreter to the applicant, record the use of an interpreter in the interview transcript, allow applicants, where possible, to express a preference for the interpreter's sex, and require interpreters to sign an undertaking of confidentiality and impartiality before undertaking their duties.⁴¹² Despite these procedural safeguards, neither the Act nor the Regulations prescribe minimum qualifications, accreditation requirements or specialised training for interpreters engaged in refugee status determination. Similarly, there is little publicly available information on the provision of interpretation services before the RSAC or in refugee-related proceedings before the ordinary courts.

Implications of human resources in judicial bodies responsible for asylum access

Limitations in administrative and human resource capacity primarily affect the timeliness and efficiency of asylum access adjudication rather than the legal framework governing refugee status determination. UNHCR has repeatedly identified delays in refugee registration, refugee status determination and documentation as consequences of growing caseloads, operational backlogs and continuing capacity constraints within the DRS.⁴¹³ These delays may increase applicants' exposure to practical barriers, including difficulties in accessing documentation and a heightened risk of arrest or detention before their status is formally determined. In addition, the statutory framework does not provide for dedicated legal researchers, independent expert advisers or specialised judicial support staff for the RSEP, while the Refugees (General) Regulations 2024 establish only limited procedural safeguards relating to interpretation services. By contrast, the ordinary courts operate within a more developed institutional framework supported by registrars, legal researchers and other judicial officers, thereby strengthening judicial oversight of administrative action affecting asylum seekers and refugees. Overall, although Kenya has established specialised institutions for refugee status determination and appeals, their effectiveness continues to depend on adequate administrative capacity, technical expertise and sustained institutional support.

F. Tools supporting adjudication

Key organizational tools supporting asylum adjudication

- First instance judicial or quasi-judicial body/ bodies:

The RSEP operates within the refugee status determination system administered by the DRS. The DRS, acting through the Commissioner for Refugee Affairs, receives, registers and processes asylum applications before they are referred for refugee status determination.⁴¹⁴ The DRS works closely with UNHCR, which provides technical assistance, capacity-building, quality assurance and operational support to strengthen Kenya's national refugee status determination system. In addition, UNHCR collaborates with a range of implementing partners and civil society organisations that provide legal assistance, counselling, interpretation and referral services to asylum seekers.⁴¹⁵ However, neither the Refugees Act 2021 nor the publicly available institutional framework assigns a formal role to the Law Society of Kenya (Kenya Bar) or establishes formal cooperation arrangements between the RSEP and the Judiciary specifically for refugee status determination. Instead, institutional coordination is undertaken principally through the Department of Refugee Services under the statutory refugee status determination framework established by the Refugees Act 2021.

⁴¹² Sec 4(2)(b), 10(4), 10(6)(b) & 24, Refugees (General) Regulations 2024.

⁴¹³ See *Ibid*

⁴¹⁴ Sec 7-8, Refugees Act, No. 10 of 2021.

⁴¹⁵ UNHCR, *Our Partners* (UNHCR Kenya) <<https://www.unhcr.org/ke/our-partners>> accessed 25 July 2026.

- *Second instance judicial or quasi-judicial body/ bodies:*

The RSAC similarly relies on administrative support provided by the DRS. There are sources to indicate additional organisational mechanisms or formal information-sharing arrangements specific to the Committee. As with the RSEP, technical support from UNHCR contributes to strengthening institutional capacity and the application of international refugee law.

- *Third instance judicial or quasi-judicial body/ bodies:*

The ordinary courts operate within the institutional framework of the Kenyan Judiciary and are supported by established administrative structures, including registries, registrars, deputy registrars, legal researchers and other judicial staff. Refugee-related litigation proceeds through the ordinary judicial process, with government agencies appearing as parties to the proceedings and civil society organisations providing legal representation where appropriate.

In selected cases involving refugee protection, UNHCR or other specialised organisations have participated as *amicus curiae* with the leave of the court.⁴¹⁶ However, neither the Constitution, the Judicial Service Act nor the Judiciary's published organisational framework establishes specialised organisational mechanisms, refugee divisions or dedicated judicial support units exclusively for asylum adjudication.

Functioning, role, and implementation of IT tools

- *First instance judicial or quasi-judicial body/ bodies:*

The DRS maintains administrative records relating to refugee registration and refugee status determination.⁴¹⁷ Historically, refugee registration and case management have been supported by UNHCR's *proGres* case management system.⁴¹⁸ According to a UNHCR official, responsibility for refugee management has progressively shifted to the DRS since 2016 and following the enactment of the Refugees Act 2021. Save for *proGres*, the RSEP does not operate a dedicated electronic case management systems, online filing platforms or virtual hearing facilities specifically for refugee status determination.

- *Second instance judicial or quasi-judicial body/ bodies:*

The DRS does not have a dedicate electronic filing system for the RSAC, separate from UNHCR *proGres* case management system. Like the RSEP, there is no virtual hearing systems specific to refugee appeals.

- *Third instance judicial or quasi-judicial body/ bodies:*

The Kenyan Judiciary has significantly expanded the use of digital technologies through the Kenya Law Reports (eKLR) platform, the Judiciary's electronic filing (e-Filing) system, the Case Tracking System (CTS),⁴¹⁹ virtual court hearings and electronic service of court documents.⁴²⁰ According to a Kenya High Court judge, these digital services support civil, constitutional and judicial review proceedings generally and are therefore available in refugee and asylum-related litigation before the ordinary courts. However, they form part of the Judiciary's general digital infrastructure and are not designed specifically for refugee or asylum adjudication.

Implications of organizational tools in asylum access adjudication.

Organisational support for asylum adjudication depends largely on cooperation between the DRS, UNHCR and implementing partners rather than on dedicated institutional support structures within the

⁴¹⁶ See UNHCR intervention before the High Court of Kenya in the case of *Kituo Cha Sheria and others v. The Attorney General*, Petition No. 115 of 2013, 12 March 2013.

⁴¹⁷ Sec 39, Refugee Act 2021.

⁴¹⁸ See UNHCR), *Registration Tools* (Guidance on Registration and Identity Management, ch 3.6) <https://www.unhcr.org/registration-guidance/chapter3/registration-tools/> accessed 25 July 2026.

⁴¹⁹ Judiciary of Kenya, *E-filing is the Solution to Efficient Judiciary* (17 April 2024) <<https://judiciary.go.ke/e-filing-is-the-solution-to-efficient-judiciary/>> accessed 25 July 2026.

⁴²⁰ Supreme Court of Kenya, *Virtual Links* <<https://supremecourt.judiciary.go.ke/virtual-links/>> accessed 25 July 2026.

adjudicatory bodies themselves (DRS). As mentioned earlier, technical assistance, legal guidance and capacity-building provided by UNHCR contribute significantly to the operation of the refugee status determination system, although the extent of institutionalised information-sharing remains limited.

With respect to IT tools, the ordinary courts appear considerably more advanced than the specialised refugee adjudicatory bodies. The Kenyan Judiciary's electronic filing system, virtual hearings and online publication of judgments through eKLR have enhanced access to justice, improved case management and facilitated greater procedural efficiency. Therefore, asylum adjudication at the administrative level continues to rely largely on conventional administrative procedures, which may contribute to processing delays and reduce procedural efficiency.

G. Management

Judicial bodies' managers and middle managers

- *First instance judicial or quasi-judicial body/ bodies:*

The RSEP operates under the administrative oversight of the DRS. The Commissioner for Refugee Services serves as the head of the DRS and is responsible for the overall management of refugee affairs, including coordinating the refugee status determination system, implementing government refugee policy and ensuring that decisions of the Panel are administered. Although the Refugees Act establishes the RSEP, it does not create a separate managerial hierarchy or designate a permanent Chairperson comparable to those found in ordinary courts. Administrative functions are therefore exercised through the DRS and the Ministry responsible for refugee affairs i.e, Ministry of Interior and National Administration.

- *Second instance judicial or quasi-judicial body/ bodies:*

The Act provides for a chairperson and other members of the RSAC but does not establish an elaborate managerial or administrative hierarchy comparable to that of the judiciary. Administrative support is provided through the DRS. There is no separate middle managers responsible for supervising the Committee's work.

- *Third instance judicial or quasi-judicial body/ bodies:*

The ordinary courts operate within the general administrative framework of the Kenyan Judiciary.⁴²¹ At the High Court, overall administrative responsibility rests with the Principal Judge, who is responsible for the administration and management of the Court, while Presiding Judges oversee individual court stations or divisions, including the distribution of cases, administrative functions and the efficient management of court business.⁴²² The Court of Appeal is headed by the President of the Court of Appeal, who oversees the management and administration of the Court, allocates cases and constitutes appellate benches.⁴²³ At the apex of the Judiciary, the Chief Justice serves as the Head of the Judiciary and President of the Supreme Court, providing overall judicial leadership and exercising the constitutional and statutory administrative functions assigned to that office.⁴²⁴

Direct or indirect influence on asylum access adjudication

- *First instance judicial or quasi-judicial body/ bodies:*

There is no evidence to suggest that Commissioner or DRS management directly influence individual refugee status decisions. Their influence is primarily administrative, including the allocation of resources, coordination of refugee status determination procedures, implementation of government policy and

⁴²¹ Sec 159 – 165, Kenya Constitution 1999.

⁴²² Sec 6-7, High Court (Organization and Administration) Act 2015; See also Judiciary of Kenya, Office of the Principal Judge of the High Court, available at: <<https://judiciary.go.ke/office-of-the-principal-judge-of-high-court/>>

⁴²³ Sec 4-6, Court of Appeal (Organization and Administration) Act 2015

⁴²⁴ Sec 161(2)(a) and 163(1)(a), Constitution of Kenya 2010.

overall case management. Therefore, managerial influence appears to be indirect rather than adjudicatory, although administrative capacity may affect the speed and efficiency of refugee status determination.

- *Second instance judicial or quasi-judicial body/ bodies:*

There is no evidence that managerial personnel influence the substantive outcome of appeals. Their responsibilities are limited to administrative coordination and ensuring the functioning of the Committee. Therefore, any influence on asylum adjudication is indirect and primarily relates to the scheduling and administration of appeals rather than the content of appellate decisions.

- *Third instance judicial or quasi-judicial body/ bodies:*

Judicial managers do not direct judges on how individual asylum or refugee cases should be decided, consistent with the constitutional guarantee of judicial independence under Sections 160 and 161 of the Constitution of Kenya. Nevertheless, they may indirectly influence asylum access adjudication through case allocation, constitution of benches, docket management and broader judicial administration. Efficient management can reduce delays and improve access to justice, whereas administrative backlogs or resource constraints may prolong the resolution of asylum-related litigation.

Professional performance measures

- *First instance judicial or quasi-judicial body/ bodies:*

According to a UNHCR official, the Refugees Act 2021 does not establish an asylum-specific system for evaluating the professional performance of the Commissioner for Refugee Affairs, members of the RSEP, refugee officers or other personnel involved in refugee status determination. The Act provides that the DRS shall comprise the Commissioner, refugee officers and such other officers possessing the expertise necessary to assist the Commissioner in the performance of the Department's functions. Members of the RSEP are appointed on the basis that they possess knowledge and experience in refugee affairs, refugee law or refugee status determination. The Panel considers applications and makes recommendations to the Commissioner, who is responsible for making the final refugee status determination. Neither the Refugees Act 2021 nor the Refugees (General) Regulations 2024 prescribes individual productivity targets, decision-quality review mechanisms, appraisal criteria or performance indicators specifically applicable to the Commissioner, members of the Panel or refugee officers engaged in refugee status determination.

- *Second instance judicial or quasi-judicial body/ bodies:*

The Refugees Act similarly contains no express system for evaluating the performance of members of the RSAC or its secretariat. Members are appointed for three-year terms, with the possibility of one reappointment,⁴²⁵ while the Public Service Commission is required to provide the Committee with a secretariat.⁴²⁶ The Committee convenes as and when appeals have been filed and, save as otherwise provided by the Act, regulates its own procedures. Neither the Refugees Act 2021 nor the Refugees (General) Regulations 2024 prescribes performance indicators, productivity targets or appraisal criteria relating to the timeliness, quality or consistency of appeal decisions.

There are no publicly available reports evaluating the individual or collective performance of the RSAC. Likewise, no official statistics have been published concerning average appeal-processing times, the proportion of first-instance decisions overturned on appeal, compliance with procedural guarantees or the quality of written appeal decisions. The absence of quantified performance targets may enable the Committee to determine appeals without formal pressure to maximise disposal rates. However, the absence of publicly available performance information may also limit transparency regarding appellate backlogs and variations in the depth or consistency of appellate review.

⁴²⁵ Sec 11(5), Refugee Act 2021.

⁴²⁶ Sec 11(7), *Ibid*

- *Third instance judicial or quasi-judicial body/ bodies:*

Professional performance measures are considerably more developed within the ordinary judiciary. Kenya's Judiciary applies the Performance Management and Measurement Understandings (PMMU) system to courts, registries, directorates and administrative units.⁴²⁷ Court stations and judiciary personnel are made to set annual performance targets and undergoing evaluation. The reported indicators included the case progress rate, backlog reduction, and the number of pending cases.⁴²⁸ These measures apply institutionally across the courts and therefore include courts that hear asylum-related appeals, constitutional petitions, and judicial review claims, although no asylum-specific performance indicators are specified in the PMMU. The system promotes accountability, monitoring of delay and more efficient docket management. It may therefore benefit asylum seekers where urgent claims concern detention, deportation, registration or threatened refoulement, since delay in such cases can itself undermine effective protection.

However, an emphasis on predominantly quantitative performance indicators may create tensions between the efficient disposal of cases and the scrutiny that asylum appeals require. Refugee litigation often involves complex factual histories, extensive country-of-origin evidence, the application of international legal standards, and decisions with potentially irreversible consequences for those involved. In this context, pressure to improve clearance rates or reduce case backlogs could, if not balanced by qualitative measures, encourage a focus on speed at the expense of thorough examination.

The performance-management framework operates at court and administrative-unit level and does not formally permit managers to dictate the substantive outcome of individual cases.⁴²⁹ It may therefore improve institutional efficiency without necessarily compromising judicial independence. However, the publicly available material does not provide an asylum-specific assessment of its effect on judicial reasoning, reversal rates or the depth of scrutiny applied in refugee cases. Overall, Kenya has an established and comparatively transparent performance-management system for the regular courts, but no equivalent framework specifically governing the Commissioner, Eligibility Panel or Appeals Committee.

H. Caseload and delays

- *First instance judicial or quasi-judicial body/ bodies:*

The DRS, RSEP and Commissioner bear the primary caseload for refugee status determination. Although the Refugees Act 2021 requires applications to be determined within 90 days,⁴³⁰ the DRS continues to experience significant backlogs. UNHCR reported that over 229,521 asylum seekers were awaiting refugee status determination in Kenya as of August 2025,⁴³¹ resulting in prolonged waiting periods and delayed access to refugee documentation and related rights. As discussed earlier, centralised decision-making, limited institutional capacity and administrative backlogs as significant contributors to delays.

- *Second instance judicial or quasi-judicial body/ bodies:*

There are no official statistics are publicly available regarding the annual caseload or backlog of the RSAC. Appeals must be lodged within 30 days of notification of the Commissioner's decision,⁴³² although not provided in the Act or the Regulation, the Committee aims to determine appeals within 180 days.⁴³³ As

⁴²⁷ Judiciary of Kenya, *A Blueprint for Social Transformation through Access to Justice 2023–2033* (November 2023) pp. 52–53; Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report 2022/23 (SOJAR 2022/2023)* (November 2023) pp. 116 & 220.

⁴²⁸ Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report 2022/23 (SOJAR 2022/2023)* (November 2023) pp. 220–221.

⁴²⁹ Sec 160 (1), Constitution of Kenya 2010.

⁴³⁰ Sec 12(9), Refugee Act 2021.

⁴³¹ UNHCR, *Kenya Refugee Programme Factsheet* (UNHCR Operational Data Portal, 2025) <<https://data.unhcr.org/en/documents/download/122476>> accessed 25 July 2026.

⁴³² Sec 14(1), Refugee Act 2021.

⁴³³ Refugee Appeal Board (Kenya), *Appeal Process* <<https://refugeeappeals.go.ke/appeal-process>> accessed 25 July 2026.

discussed above, the centralised administration of appeals in Nairobi, reliance on paper-based procedures and communication delays between field offices and the Secretariat may prolong appellate proceedings, particularly for appellants residing in refugee camps.

- *Third instance judicial or quasi-judicial body/ bodies:*

No official statistics are available on the number of asylum-related cases heard annually by the High Court, Court of Appeal or Supreme Court. Although Kenyan courts have adjudicated a considerable body of refugee and asylum-related litigation, including cases concerning refugee status determination, detention, *refoulement*, constitutional rights and judicial review, these matters are not reported separately within the Judiciary's statistical reporting. Instead, they form part of the ordinary civil, constitutional, judicial review and criminal caseloads.

The Judiciary's State of the Judiciary and Administration of Justice Annual Report 2024/2025 recorded 621,425 new cases, 647,686 resolved cases across all courts.⁴³⁴ This indicates that asylum-related litigation is determined within an already heavily burdened judicial system, although its precise proportion of the overall caseload is not specified.

Implications of caseload on asylum access adjudication

The principal impact of caseload is evident at the administrative stage of refugee status determination, where substantial backlogs prolong applicants' legal uncertainty and delay access to refugee documentation and associated rights, similar situation exists, at the appellate level. Within the regular courts, asylum-related claims compete with a substantial general caseload, which may delay judicial review in urgent matters such as detention and *refoulement*. As discussed in the foregoing parts, these pressures are compounded by limited institutional capacity and resource constraints, although no empirical evidence was identified demonstrating that high caseloads have directly affected the quality or consistency of asylum decisions.

Delays and backlogs characterizing judicial bodies responsible for asylum access adjudication

The principal impact of caseload is evident at the administrative stage of refugee status determination, where substantial backlogs prolong applicants' legal uncertainty and delay access to refugee documentation and associated rights, similar situation exists, at the appellate level. Within the regular courts, asylum-related claims compete with a substantial general caseload, which may delay judicial review in urgent matters such as detention and *refoulement*. As discussed in the foregoing parts, these pressures are compounded by limited institutional capacity and resource constraints, although no empirical evidence was identified demonstrating that high caseloads have directly affected the quality or consistency of asylum decisions.

Implications of backlog and delays in asylum access adjudication

Delays have the greatest impact at the administrative stage of refugee status determination, where prolonged waiting periods postpone access to refugee status, documentation and the rights associated with legal recognition. Extended procedures may also expose applicants to uncertainty, restrictions on movement and difficulties accessing employment and public services. At the appellate level, prolonged proceedings may delay access to an effective remedy and postpone the final resolution of protection claims. Within regular courts, judicial delays may be particularly significant where litigation concerns detention, deportation or alleged *refoulement*, since delayed judicial intervention may reduce the practical effectiveness of legal remedies.

At the same time, delays do not invariably prejudice asylum seekers. In some cases, additional time may enable applicants and their legal representatives to obtain documentary evidence, secure legal representation, prepare expert reports or gather updated country of origin information capable of

⁴³⁴ Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report 2024/25 – Popular Version (SOJAR 2024/2025)* (November 2025) p.5.

strengthening their claims. Nevertheless, the available evidence indicates that, overall, prolonged delays are more likely to hinder than facilitate effective access to asylum and justice.

I. Influence of judicial or quasi-judicial bodies on access to asylum

Kenyan case law has contributed to the legal framework governing access to asylum principally by interpreting refugee legislation in accordance with the Constitution and Kenya's international obligations. In *Kituo Cha Sheria & 8 others v Attorney General (Supra)*, the High Court held that refugee policy and legislation must comply with constitutional rights, including dignity, freedom of movement and fair administrative action, as well as the principle of non-*refoulement*. The Court of Appeal subsequently affirmed that international refugee law forms part of Kenyan law through Sections 2(5) and (6) of the Constitution.⁴³⁵

The Refugees Act 2021 subsequently strengthened and clarified several protections relevant to access to asylum, including the prohibition against refusing entry, expelling, extraditing or returning a person to a territory where they would face persecution or serious threats to life or liberty.⁴³⁶ The *Refugees (General) Regulations 2024* also provide more detailed rules governing reception, registration, interpretation, documentation and referral for refugee status determination.⁴³⁷ These developments are consistent with the constitutional and international-law principles applied in the case law. However, no legislative history expressly demonstrating that particular judicial decisions directly caused the enactment of the Refugees Act 2021 or the 2024 Regulations. The influence of the jurisprudence should therefore be understood primarily as interpretative and normative rather than as a conclusively established cause of legislative reform.

Impact of case law in the field of asylum access adjudication on asylum policies

Judicial decisions have had a clear and immediate impact on Kenya's asylum policy. In *Kituo Cha Sheria & 8 Others v Attorney General*, the High Court quashed the Government's 2012–2013 directive requiring urban refugees and asylum seekers to relocate to designated refugee camps. The directive included the closure of urban registration centres, the cessation of refugee registration in urban areas, and the transfer of humanitarian services to the camps. The Court held that the blanket relocation policy violated constitutional rights, including the rights to human dignity, freedom of movement and fair administrative action, and threatened the principle of non-*refoulement*. The Court further held that the Government has a legal obligation to consult the public when making and implementing public policy affecting refugees, in accordance with the national values and principles of governance under Article 10 of the Constitution.⁴³⁸ The Court of Appeal upheld the essential findings of the High Court, including the requirement that restrictions on refugees' rights satisfy the constitutional test of justification and proportionality.⁴³⁹

Similarly, in *Kenya National Commission on Human Rights & another v Attorney General & 3 others*, the High Court quashed the 2016 decision to close Dadaab refugee camp, collectively repatriate its residents and disband the Department of Refugee Affairs. The Court held that the measures were discriminatory, contrary to non-*refoulement* and inconsistent with constitutional standards of fair administrative action. It ordered the restoration of the institutional arrangements that existed before the impugned directives.⁴⁴⁰ More recently, in *Legal Advice Centre t/a Kituo Cha Sheria & others v Attorney General & others*, the High Court quashed the 2021 directives to close the Dadaab and Kakuma refugee camps. The Court required the Government to undertake a lawful process, including public participation, before adopting measures

⁴³⁵ *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR); *Attorney General v Kituo Cha Sheria & 7 others* [2017] KECA 773 (KLR).

⁴³⁶ Sec 29, Refugees Act 2021

⁴³⁷ Reg 2-7 & 27, Refugees (General) Regulations 2024

⁴³⁸ *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR).

⁴³⁹ *Attorney General v Kituo Cha Sheria & 7 others* [2017] KECA 773 (KLR).

⁴⁴⁰ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR).

concerning camp closure.⁴⁴¹ These judgments have therefore constrained policies based on blanket encampment, collective repatriation and camp closure by requiring individualised assessment, procedural fairness, public participation and compliance with non-*refoulement*.

Impact of case law in the field of asylum access adjudication on executive practices

Case law has also directly affected particular executive practices. The interim and final orders in *Kituo Cha Sheria* prevented the implementation of the proposed roundup and compulsory relocation of urban refugees. The judgment also restrained the closure of urban registration arrangements and confirmed that executive bodies could not suspend registration or assistance through a general directive that disregarded individual circumstances and constitutional rights.⁴⁴²

The 2017 decision in Kenya National Commission on Human Rights required the executive to reverse the disbandment of the Department of Refugee Affairs and restore the pre-existing administration of refugee affairs. It also prevented the collective and involuntary return of refugees from Dadaab.⁴⁴³ The 2024 judgment concerning Dadaab and Kakuma similarly prohibited the executive from closing the camps pursuant to the impugned directives and required compliance with due process and public participation before any future closure measures could lawfully be implemented.⁴⁴⁴

The wider significance of these decisions is that executive measures affecting registration, movement, encampment, repatriation and camp closure are subject to constitutional review. Executive bodies must provide lawful reasons, consider the circumstances of affected persons, comply with fair administrative procedures and avoid exposing refugees or asylum seekers to *refoulement*. As discussed earlier in relation to judicial independence and access to remedies, the ordinary courts therefore provide an important corrective mechanism where executive action restricts access to asylum.

J. Judicialization of politics

Conflicts between the executive and the judiciary exist, although they generally take the form of litigation over executive directives rather than sustained public confrontation between individual judges and government officials. The principal disputes have concerned the Government's use of national-security and migration-control powers to relocate urban refugees, close refugee camps, suspend urban registration, and facilitate large-scale repatriation.

In *Kituo Cha Sheria & 8 others v Attorney General (Supra)*, the High Court invalidated the Government's 2012–2013 directive stopping the reception and registration of asylum seekers in urban areas and requiring refugees to relocate to Dadaab and Kakuma. The executive had justified the policy by reference to terrorist attacks and public security, while the courts assessed it against constitutional rights, proportionality, fair administrative action and non-*refoulement*. The Court of Appeal largely affirmed the judicial power to review such refugee policies.

A similar conflict arose following the Government's 2016 decision to disband the Department of Refugee Affairs, close Dadaab and repatriate its predominantly Somali population. In *Kenya National Commission on Human Rights v Attorney General (Supra)*, the High Court found the measures unconstitutional, discriminatory and inconsistent with non-*refoulement*, and quashed the relevant directives. In 2024, the High Court also invalidated the 2021 directives to close Dadaab and Kakuma, holding that the executive had failed to comply with constitutional rights, international refugee law, due process and public-participation requirements.

⁴⁴¹ *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others; Kenya National Commission on Human Rights & another (Interested Parties)* [2024] KEHC 2973 (KLR).

⁴⁴² *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR).

⁴⁴³ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR).

⁴⁴⁴ *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others; Kenya National Commission on Human Rights & another (Interested Parties)* [2024] KEHC 2973 (KLR).

These cases reveal a recurring institutional disagreement. The executive has treated encampment, repatriation and camp closure principally as matters of security, migration management and political discretion, whereas the courts have treated them as exercises of public power subject to constitutional and international legal limits. No substantial evidence of sustained government criticism directed specifically at refugee-law judges. However, the repeated issuance of substantially similar directives after earlier judicial intervention indicates continuing tension over the respective authority of the executive and the judiciary in refugee policy.

Restriction or expansion of the jurisdiction or competence

The Constitution of Kenya 2010 substantially expanded judicial authority across public law generally.⁴⁴⁵ It strengthened constitutional review, liberalised standing, incorporated international law into domestic law⁴⁴⁶ and empowered the High Court to review legislation and executive action for compatibility with the Constitution.⁴⁴⁷ Available literatures describes the 2010 constitutional settlement as having significantly judicialised Kenyan politics and expanded the judiciary's ability to constrain public authorities.⁴⁴⁸

Within refugee law, the Refugees Act 2021 did not remove the jurisdiction of the ordinary courts. Instead, it retained a multi-level structure comprising first-instance determination by the Commissioner, an appeal to the RSAC and a further appeal to the High Court. Sections 11(10) and section 14(2) expressly preserve the right to appeal an adverse decision of the RSAC to the High Court. The Act therefore confirms rather than significantly expands the courts' pre-existing supervisory and appellate role.

The 2021 Act also institutionalised specialised administrative bodies, including the RSEP and the RSAC. This represents an expansion and clarification of administrative adjudicatory structures, but not necessarily a transfer of broader policy-making authority to them. The available sources do not indicate any recent legislative measure specifically restricting the jurisdiction of courts in asylum matters. Nor was evidence identified of a divergence whereby judicial authority has been legislatively reduced in migration and asylum while expanding in other fields.

Ways to influence policy outcomes

Even without a specific legislative enlargement of asylum jurisdiction, the courts have used constitutional review, judicial review and rights-based interpretation to influence refugee-policy outcomes as discussed in a plethora of cases earlier. They have not confined themselves to deciding narrow questions of statutory interpretation. Instead, they have reviewed the factual justification, proportionality, procedural fairness and human-rights consequences of executive refugee measures.

For example, the courts have required refugee policies to comply with public participation, fair administrative action, equality, dignity, freedom of movement and non-*refoulement*. They have also issued remedies extending beyond declarations of unlawfulness, including orders quashing camp-closure directives, prohibiting implementation and requiring the executive to undertake a lawful decision-making process.

This may properly be characterised as judicialisation because contentious policy questions, such as whether camps should close, whether urban registration may be suspended and whether refugees may be collectively relocated, have become subject to judicially enforceable constitutional standards. However, most proceedings were initiated by affected persons, civil-society organisations or constitutional

⁴⁴⁵ See James Thuo Gathii, *The Contested Empowerment of Kenyas Judiciary, 2010–2015: A Historical Institutional Analysis* (Sheria Publishing House 2016).

⁴⁴⁶ Sec 2(5), 2(6) & 22, Constitution of Kenya 2010.

⁴⁴⁷ Sec 23, 165(3)

⁴⁴⁸ See Victoria Miyandazi, Duncan M Okubasu, Judiciary chiefs in hybrid regimes: Kenya, *International Journal of Constitutional Law*, Volume 23, Issue 1, January 2025, Pages 240–262; See also Muthomi Thiankolu, *Judicialization of Politics under the Constitution of Kenya 2010* (LLM Thesis, University of Nairobi 2015) <<https://erepository.uonbi.ac.ke/server/api/core/bitstreams/b72ec213-eb03-40aa-8203-3101f7009b90/content?utm=>

commissions. The courts' influence has therefore generally arisen through litigation brought by non-judicial actors rather than through judges independently seeking to enter the policy process.

The specialised refugee bodies appear to exercise less direct policy influence. The Eligibility Panel and Appeals Committee primarily determine individual status and appeal cases within statutory mandates. Although individual decisions may shape administrative practice, their decisions are not systematically published, and the available sources do not demonstrate that they have proactively influenced national policy to the same extent as the superior courts.

Influence on policy outcomes in practice

The superior courts have influenced policy outcomes despite the relatively limited volume of publicly reported refugee litigation. This influence arises because several cases have challenged measures of national scope affecting large refugee populations. A single constitutional judgment concerning the closure of Dadaab or Kakuma, urban encampment or collective repatriation may therefore have much wider policy consequences than numerous individual status decisions.

The courts have prevented the implementation of several executive measures, restored administrative arrangements, required consultation and reaffirmed that security considerations do not displace constitutional and international refugee obligations. As discussed, in the foregoing part, the 2017 Dadaab judgment, for example, prevented the implementation of a policy affecting hundreds of thousands of refugees. Similarly, the 2024 decision legally prohibited closure of Dadaab and Kakuma under the impugned directives unless a lawful process was followed. Nevertheless, judicial influence is constrained in practice. Courts are largely reactive and depend on litigants having the resources, standing and legal support necessary to commence proceedings. Judicial decisions may invalidate a particular directive without resolving the political and security considerations that generated it.

The Government's repeated efforts to close refugee camps or revive encampment policies suggest that judicial intervention has not fundamentally changed executive policy preferences. Although the courts have played an important role in checking unlawful executive action, their involvement has largely been confined to specific disputes brought before them. As a result, judicial oversight is significant, but it does not amount to continuous supervision of asylum administration, border control or routine registration practices.

Assessment of the judicialization of politics in the country

The wider literature generally associates the judicialisation of Kenyan politics with the Constitution of 2010.⁴⁴⁹ The Constitution strengthened judicial independence, expanded constitutional review, relaxed standing rules and increased the courts' authority over legislation, elections and executive conduct.⁴⁵⁰ Although these reforms significantly increased the judiciary's role in Kenya's constitutional order, scholars caution that this transformation has been uneven,⁴⁵¹ because the judiciary operates within a political system in which ruling elites continue to seek influence over legal institutions and in which courts remain dependent on political branches for resources and implementation of orders.⁴⁵² The literature also identifies periodic executive resistance and backlash when courts obstruct major government programmes.

⁴⁴⁹ See James Thuo Gathii, *The Contested Empowerment of Kenyas Judiciary, 2010 -2015: A Historical Institutional Analysis* (Sheria Publishing House 2016); See Gathii, James Thuo. "Assessing the Constitution of Kenya 2010 Five Years Later." Chapter. In *Assessing Constitutional Performance*, edited by Tom Ginsburg and Aziz Huq, 337–64. Comparative Constitutional Law and Policy. Cambridge: Cambridge University Press, 2016.

⁴⁵⁰ See Buluma Bwire, Migai Akech and Agnes Meroka-Mutua, *A Conceptual Framework for Assessing the Performance of Kenyan Courts Undertaking Judicial Review of Legislative Action* (2022) 6(1) *Strathmore Law Journal* 107.

⁴⁵¹ See Willy Mutunga, *The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Courts Decisions* (2015) Special Issue *Speculum Juris*.

⁴⁵² See Matthew K Gichohi, *Kenya: Executive Dominance through Constitutional Bargaining* in Leonardo R Arriola, Lise Rakner and Nicolas van de Walle (eds), *Democratic Backsliding in Africa? Autocratization, Resilience, and Contention* (Oxford University Press 2022); See Gathii, James Thuo. "Assessing the Constitution of Kenya 2010 Five Years Later." Chapter. *Supra*.

Most scholarship on judicialisation in Kenya focuses on constitutional transformation, elections, transitional justice and disputes concerning executive power, with comparatively little attention paid to refugee and asylum adjudication. Nevertheless, refugee jurisprudence reflects many of the broader dynamics identified in this literature. Civil society organisations have increasingly relied on the expanded constitutional jurisdiction of the courts to challenge executive refugee policies, while the courts have applied constitutional rights, principles of legality and procedural fairness to issues that were previously regarded largely as matters of executive administration. The main divergence lies in the character of the field. Judicialisation of asylum politics is driven by a relatively small number of strategic or public-interest cases rather than by a consistently large volume of litigation. As stated earlier, its effects are often defensive, preventing relocation, collective repatriation or camp closure, rather than requiring the judiciary to design a comprehensive refugee policy. Accordingly, Kenya demonstrates a meaningful, yet limited judicialisation of asylum politics.

K. Other relevant aspects

Several additional institutional characteristics are relevant to understanding asylum access adjudication in Kenya.

First, Kenya operates a hybrid adjudicatory model, combining specialised administrative refugee bodies with the regular judiciary. Refugee status is initially determined by specialised quasi-judicial bodies established under the Refugees Act 2021, while the High Court retains appellate and supervisory jurisdiction over refugee status determinations and constitutional challenges. This institutional arrangement allows refugee claims to benefit from specialised expertise at the administrative level while preserving judicial oversight through the courts.

Secondly, UNHCR plays an formal institutional role within the refugee determination process. Unlike many administrative proceedings, the Refugees Act 2021 expressly authorises representatives of UNHCR to attend the sittings of both the RSEP and the RSAC as observers and technical advisers. Although UNHCR has no decision-making authority, its participation contributes international refugee law expertise, country of origin information and guidance on international protection standards. This institutional relationship strengthens the consistency of refugee status determination with Kenya's international obligations while preserving governmental responsibility for final decisions.

Thirdly, the asylum adjudication system demonstrates a strong interaction between constitutional law and refugee law. As discussed throughout this report, asylum disputes are increasingly resolved through constitutional litigation invoking equality, fair administrative action, access to justice and the principle of *non-refoulement*. Consequently, refugee protection in Kenya extends beyond the Refugees Act 2021 and is significantly shaped by constitutional adjudication and judicial review.

Lastly, the available evidence suggests that public interest litigation has become an important institutional mechanism for improving access to asylum. Major developments concerning refugee protection, including litigation challenging refugee relocation, camp closures and refoulement, have largely been initiated by civil society organisations, the Kenya National Commission on Human Rights and public, interest legal organisations rather than individual asylum seekers. The Constitution's liberal rules on legal standing have therefore enabled judicial review of executive asylum policies even where affected refugees face practical barriers in accessing the courts. This institutional feature has enhanced judicial oversight of asylum governance while allowing the courts to clarify the scope of constitutional and international refugee protections.

Overall, Kenya's asylum adjudication system is characterised by a combination of specialised administrative expertise, constitutional judicial oversight, formal cooperation with UNHCR and an active public interest litigation culture. Together, these institutional features have strengthened legal accountability in refugee governance, although, as discussed in earlier sections, their effectiveness continues to be constrained by administrative capacity, delays and resource limitations.

III. OTHER ACTORS IN ASYLUM ACCESS ADJUDICATION

A. Bodies of the executive branch in asylum access adjudication

Specialisation and principal characteristics

As discussed in the previous parts, the executive actors involved in asylum access adjudication differ considerably in mandate and expertise. The DRS and the Commissioner for Refugee Affairs are specialised in refugee and asylum administration. Their statutory responsibilities include receiving and registering asylum applications, conducting interviews, maintaining refugee records, coordinating refugee status determination and implementing refugee policy. The RSEP operates within this administrative structure and makes recommendations to the Commissioner on individual applications. Its members are required to possess relevant knowledge or experience in refugee affairs, while UNHCR and other technical actors may be invited to advise the Panel.⁴⁵³

The Ministry of Interior and National Administration, within which the refugee administration is situated, is not exclusively specialised in asylum.⁴⁵⁴ Its wider mandate includes internal security, immigration, border management and national administration.⁴⁵⁵ Therefore, refugee protection operates within an institutional setting in which humanitarian and legal considerations coexist with security and migration-control objectives.

The Directorate of Immigration Services is specialised in immigration and border control rather than refugee protection.⁴⁵⁶ Immigration officers may receive asylum claims as authorised officers,⁴⁵⁷ but their principal institutional responsibilities concern entry, residence, removal and immigration-law enforcement. The Kenya Police Service, including officers operating at borders, in urban security operations and around refugee hosting areas, is a general law-enforcement body and is not institutionally specialised in asylum or human rights.⁴⁵⁸ The overlap between police, immigration and refugee-management responsibilities is particularly important in cases involving irregular entry, detention, deportation and alleged pushbacks.

In litigation, the Attorney General represents the national Government, ministries and public officers in civil, constitutional and judicial-review proceedings. The Attorney General is not specialised in asylum but provides the Government's legal representation across all areas of public law.⁴⁵⁹ The Director of Public Prosecutions may become involved where asylum seekers are prosecuted for immigration offences, unlawful presence or irregular entry.⁴⁶⁰ Neither institution is dedicated specifically to migration or human rights, although individual counsel may acquire relevant expertise through repeated litigation.

Extent, efforts and interests of executive involvement

Executive involvement is generally strongest where proceedings challenge policies or practices considered central to national security, encampment, border management or the Government's authority to regulate non-citizens. In major constitutional litigation concerning urban relocation and camp closure, the Attorney General and the Ministry responsible for internal security have actively defended executive directives through affidavits, documentary evidence and legal submissions. In *Kituo Cha Sheria v Attorney General*, for example, the impugned policy involved the refugee administration, senior ministry officials, provincial administration and the police. The Government defended the relocation of urban refugees principally on

⁴⁵³ Sec 7-13, Refugee Act 2021.

⁴⁵⁴ Department of Refugee Services (Kenya), *Department of Refugee Services* <<https://www.refugee.go.ke/>> accessed 26 July 2026.

⁴⁵⁵ Ministry of Interior and National Administration (Kenya), *Our Profile* <<https://interior.go.ke/our-profile/>> accessed 26 July 2026.

⁴⁵⁶ Kenya Citizenship and Immigration Act 2011.

⁴⁵⁷ Sec 11-14, Refugee Act 2011.

⁴⁵⁸ Sec arts 243-247, Constitution of Kenya 2010; National Police Service Act 2011

⁴⁵⁹ Sec 156, Constitution of Kenya 2010; Sec 4-7, Office of the Attorney General Act 2012.

⁴⁶⁰ Sec 157, Constitution of Kenya 2010; Sec 5-6, Office of the Director of Public Prosecutions Act 2013; Part VIII, Kenya Citizenship and Immigration Act 2011.

national-security grounds, while the court required evidence demonstrating a rational connection between the restrictions and the alleged security threat.⁴⁶¹

Similarly, in *Kenya National Commission on Human Rights v Attorney General*, the Attorney General, Ministry of Interior and senior ministry officials defended the decision to disband the refugee department, close Dadaab and repatriate refugees to Somalia. The litigation therefore concerned not only an individual administrative decision but a high-level executive policy affecting the institutional organisation of refugee administration and a large refugee population.⁴⁶² Executive involvement in such systemic cases is usually extensive because the litigation may affect national policy, public expenditure, diplomatic relations and security strategy.

The pattern differs in individual cases involving detention or prosecution for irregular entry. Here, the principal actors are usually police officers, immigration officials, prosecutors and the DRS. Their participation may be less coordinated, and the litigation record frequently reveals tension between immigration enforcement and the obligation to refer a person to the asylum procedure. In cases such as *Rada Haile (supra)*, *Majid Ali Abdu (supra)*, *Espoir Ndarubuya (supra)* and *Serogo Alex (supra)*, the courts examined the interaction between immigration or criminal enforcement and Kenya's obligations under domestic and international refugee law, including whether the applicants had been afforded a genuine opportunity to seek asylum before enforcement measures were pursued.

Geography may also influence how asylum procedures operate in practice. Major constitutional litigation is ordinarily conducted from Nairobi, where the Attorney General's Office, the headquarters of the Department of Refugee Services and the relevant ministries are located. By contrast, at border points and in refugee hosting areas such as Dadaab, Kakuma, Mandera and Liboi, police and immigration officers are often the first public authorities to encounter asylum seekers, while access to the DRS, legal assistance and the courts may be more limited. Reports of informal interceptions and returns further suggest that enforcement measures do not always result in formal administrative decisions or complete documentary records, which may hinder subsequent judicial review.

Role and implications in adjudication

Executive bodies occupy a dual position in asylum access adjudication. The DRS and Commissioner administer the asylum process and possess much of the relevant information concerning registration, interviews, documentation and individual case histories. When their decisions are challenged, the accuracy and completeness of the administrative record may determine the evidence available to the appellate body or court. Their participation can therefore assist adjudication by providing case files, explaining procedures and identifying the statutory basis of a decision.

At the same time, the concentration of information within the executive creates an evidential imbalance. Asylum seekers may have limited access to their files, internal communications, border records or security assessments, while government respondents can draw upon several ministries and public agencies. This imbalance is particularly significant in cases involving alleged pushbacks or security operations, where the material facts may be known primarily to police or immigration authorities.

Executive affidavits and policy documents may shape the framing of a dispute. In systemic litigation, the Government commonly presents restrictions as necessary for national security, public order or effective migration management. Courts have not treated these claims as conclusive. In *Kituo Cha Sheria*, the High Court found that the State had not established a sufficient evidential connection between urban refugees and insecurity and quashed the blanket relocation directive.⁴⁶³ In the Dadaab litigation, the High Court

⁴⁶¹ *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR).

⁴⁶² *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR)

⁴⁶³ *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR).

similarly rejected collective measures adopted without adequate consultation, individual assessment or compliance with non-*refoulement* and fair administrative action.⁴⁶⁴

According to a UNHCR official, the quality of inter-agency coordination also affects adjudication before a case reaches court. Where police or immigration officials treat an asylum seeker solely as an immigration offender and fail to notify the DRS, the person may be prosecuted or removed before the protection claim is examined. Therefore, timely referral to specialised refugee officers may allow the asylum claim to be registered and may prevent inappropriate criminal proceedings. The available evidence indicates that such coordination is inconsistent, especially in remote border and detention settings.

B. International or regional organizations

Specialisation and principal characteristics

The principal international organisation involved in asylum access adjudication is the UNHCR. UNHCR is specialised in refugee protection, asylum, statelessness and forced displacement.⁴⁶⁵ Its mandate and expertise distinguish it from other United Nations agencies and regional organisations operating in Kenya, whose activities may support refugees more broadly, but which do not ordinarily participate in refugee status determination or appeals.

Under the Refugees Act 2021, the RSEP may, through the Commissioner, co-opt UNHCR representatives or other agencies to provide technical advice. The Refugee Status Appeals Committee may similarly co-opt a UNHCR officer to advise it in performing its functions. UNHCR therefore participates as an adviser or observer rather than as a voting member or decision-maker. The legal responsibility for registration, refugee status determination and the issuance of decisions remains with the DRS, the Commissioner and the competent national bodies.⁴⁶⁶ UNHCR's role as providing technical advice and country-of-origin information without exercising decision-making authority.

UNHCR maintains a substantial operational presence in Kenya, including offices and protection activities in Nairobi, Dadaab and Kakuma.⁴⁶⁷ Its relevant expertise includes registration, documentation, refugee status determination, protection assessment, country-of-origin information, interpretation of international refugee law,⁴⁶⁸ individual case management and the identification of persons with specific protection needs.⁴⁶⁹ As discussed in previous parts, UNHCR also provides technical assistance, capacity-building and financial support to the national refugee administration.

Other international organisations, including IOM, UNICEF, the WFP and other UN or development agencies, operate in refugee hosting areas. However, these organisations do not participate in the adjudication of individual asylum applications or appeals. Their work principally concerns humanitarian assistance, child protection, migration management, education, health, return or development. Similarly, the African Union and the African Commission on Human and Peoples' Rights provide regional legal and human-rights standards relevant to refugees, but do not participate in Kenya's domestic refugee status determination or appeal proceedings.

Extent, efforts and interests of involvement

As mentioned earlier, UNHCR's involvement is extensive but primarily supportive. Since the Kenyan Government assumed full responsibility for refugee registration and documentation, UNHCR has continued to provide technical support to the DRS. This includes assistance with registration systems, biometric and identity-management processes, refugee status determination, quality review, staff training

⁴⁶⁴ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] KEHC 8086 (KLR)

⁴⁶⁵ UNHCR, *UNHCR Kenya – Help for Refugees and Asylum-Seekers* <<https://help.unhcr.org/kenya/>> accessed 27 July 2026.

⁴⁶⁶ Sec 11(8), Refugees Act 2021.

⁴⁶⁷ UNHCR, *UNHCR Kenya – Help for Refugees and Asylum-Seekers* Op cit

⁴⁶⁸ UNHCR, *Refugee Status Determination* <<https://www.unhcr.org/ke/what-we-do/refugee-status-determination>> accessed 27 July 2026.

⁴⁶⁹ UNHCR, *Registration and Identity Management* <<https://www.unhcr.org/ke/registration>> accessed 27 July 2026.

and institutional capacity. UNHCR reports that registration activities are undertaken by DRS personnel through a harmonised data-management system with its technical assistance.

UNHCR also provides continuing technical and financial support to the national refugee status determination process. This involvement is partly explained by the scale of Kenya's refugee population, the substantial first-instance backlog and the continuing need to strengthen national institutional capacity. Although the DRS exercises formal responsibility, UNHCR retains an institutional interest in ensuring that national procedures conform to the 1951 Refugee Convention, the 1969 OAU Refugee Convention and the principle of *non-refoulement*.⁴⁷⁰

UNHCR's involvement is generally more visible in formally registered cases than in informal barriers such as pushbacks or immediate border returns. As discussed earlier, such practices may occur before an asylum seeker is registered and may leave no formal administrative record capable of review. In these situations, UNHCR may engage through protection monitoring, advocacy, communication with government authorities or public statements, but it does not control border officials or exercise adjudicatory authority. The geographical remoteness of some border areas and the speed with which returns occur may further limit its capacity to intervene before removal. According to a UNHCR official, UNHCR's role may also differ in detention cases. UNHCR and its partners may identify detained asylum seekers, confirm registration or protection status, facilitate referral to the DRS and support access to legal assistance. However, involvement often depends upon UNHCR or a partner becoming aware of the detention. As previously discussed, remote detention locations, limited communication and overlapping responsibilities among the police, immigration authorities and the DRS can delay intervention.

Role and implications for adjudication

UNHCR's principal contribution lies in the interpretation and application of refugee law. Its technical advice may assist the RSEP and RSAC⁴⁷¹ in applying the refugee definitions contained in the Refugees Act, the 1951 Convention and the 1969 OAU Convention. It may also provide guidance on *non-refoulement*, exclusion, cessation, credibility assessment, procedural fairness and the treatment of applicants with specific protection needs.⁴⁷² This can strengthen the legal consistency of national decisions and reduce the risk that asylum claims are assessed solely through the perspective of immigration control or national security.

A UNHCR official noted that UNHCR also contribute expertise and evidence that are difficult for individual applicants to obtain, including COI and displacement patterns which can assist adjudicators in evaluating whether an applicant's account is consistent with prevailing conditions. Its involvement may be particularly important where the applicant lacks legal representation or where national officials have limited familiarity with a particular country, conflict or category of persecution.

At the institutional level, UNHCR's financial and technical assistance can expand the capacity of national adjudicatory bodies, support training and improve registration and case-management systems. These contributions are important given the high caseload and delays discussed above. However, continuing dependence on external technical or financial support may also reveal weaknesses in the institutionalisation and sustainability of the national asylum system. The quality and availability of support may vary by location and according to changes in humanitarian funding. UNHCR's advisory status also imposes clear limits. It cannot compel the RSEP, RSAC or Commissioner to accept its interpretation, nor can it substitute its decision for that of a national authority. Its participation does not remove possible concerns about the independence, composition or resources of the national bodies.

Overall, UNHCR plays a significant expert, evidential and capacity-building role in asylum access adjudication, while national authorities retain formal responsibility and decision-making power. Its

⁴⁷⁰ See UNHCR Kenya, 'Annual Results Report' 2025

⁴⁷¹ Sec 11(8) & 13(3), Refugee Act 2021.

⁴⁷² UNHCR, *Kenya Annual Results Report 2024* (May 2025) p.11.

involvement is strongest in registered refugee status determination and appeal procedures and less effective in relation to informal border practices that occur before access to the asylum system. The other organisations international and regional organisations do not have comparable adjudicatory role.

C. NGOs and bar associations

Case law proves significant NGO involvement in asylum access adjudication in Kenya. The organisations most clearly identified include the following:

Kituo Cha Sheria (Legal Advice Centre): Legal Advice Centre is a Kenyan legal aid and human rights NGO. Its work is not confined to asylum, but it operates a specialised programme addressing the rights and welfare of refugees and asylum seekers.⁴⁷³ The High Court expressly recognised this role in *Kituo Cha Sheria & 8 others v Attorney General (supra)*, in which Kituo brought a public interest challenge to the Government's urban refugee relocation and encampment directive. It subsequently participated in litigation challenging the closure of Dadaab and Kakuma and the collective repatriation of refugees.

Refugee Consortium of Kenya (RCK): RCK is an NGO working to protection refugees, forced migration and the rights of asylum seekers, refugees and internally displaced persons. Its activities include legal assistance, detention monitoring, strategic litigation, advocacy and capacity-building.⁴⁷⁴ In *Refugee Consortium of Kenya & Another v. Attorney General & 2 Others (2015) (supra)*, RCK brought proceedings on behalf of refugee children and their parents who had been separated following the compulsory relocation of urban refugees. The Court described RCK as an NGO whose mission is to protect the rights and dignity of refugees, asylum seekers and other forced migrants in Kenya and the wider East African region.

Amnesty International: Amnesty International is an international human rights NGO rather than an organisation specialising exclusively in asylum. It participated as an interested party in the 2017 Dadaab litigation concerning the proposed closure of Dadaab and Kakuma refugee camps, the revocation of Somali refugees' prima facie status and the repatriation of Somali refugees. Its submissions placed the dispute within the broader framework of international human rights law, including the principles of equality and non-discrimination and the prohibition of refoulement.⁴⁷⁵

Other NGOs, together with individual refugees and asylum seekers, participated in more recent litigation, including the consolidated 2021 camp closure proceedings decided in 2024. These proceedings show the continued use of collective constitutional and public interest litigation to challenge government measures affecting refugees and asylum seekers.⁴⁷⁶ However, available case law examined do not demonstrate regular institutional participation by the Law Society (Kenya Bar association) as a party or *amicus curiae* in asylum access litigation. Rather, individual advocates represent asylum seekers, NGOs and State respondents in their professional capacity, which is distinguishable from participation by the professional association itself.

Involvement, efforts, and interests that NGOs and bar associations

NGO involvement is extensive in constitutional and strategic litigation but considerably more limited in the routine adjudication of individual asylum claims. Organisations such as *Kituo Cha Sheria* and RCK have initiated or supported cases challenging policies affecting entire categories of refugees, including the closure of urban registration centres, compulsory encampment, mass relocation, family separation, camp closure and collective repatriation. A small number of NGO-led cases have therefore had consequences for very many refugees. Their comparatively high level of involvement in litigation is explained by several factors. The Constitution permits proceedings to be instituted in the public interest and on behalf of

⁴⁷³ See Kituo Cha Sheria, *Kituo Cha Sheria (Legal Advice Centre)* <<https://kituochasheria.or.ke/>> accessed 27 July 2026.

⁴⁷⁴ See Refugee Consortium of Kenya, *About Us* <<https://www.rckkenya.org/about-us/>> accessed 27 July 2026.

⁴⁷⁵ Amnesty International, *Kenya: Historic Ruling Blocks Closure of Dadaab Refugee Camp* (9 February 2017) <<https://www.amnesty.org/en/latest/press-release/2017/02/kenya-historic-ruling-blocks-closure-of-dadaab-refugee-camp/>> accessed 27 April 2026.

⁴⁷⁶ See *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others (supra)*

persons unable to act in their own names. This enables NGOs to challenge government measures even where affected refugees lack documentation, legal knowledge, financial resources or physical access to the courts. The NGOs also have specialist lawyers and experience in constitutional and refugee law that individual applicants may not have.

Their resources are nevertheless limited. As discussed above in relation to legal aid, RCK and *Kituo Cha Sheria* cannot represent every rejected, detained or undocumented asylum seeker. Available assistance is often concentrated on especially vulnerable cases or strategic litigation capable of clarifying the law or affecting a wider population. Limited funding and institutional capacity result in selective representation, leaving many ordinary applicants without effective legal assistance.

The degree of involvement also differs according to the barrier concerned. NGO participation is most visible where a formal directive, written decision or identifiable policy can be challenged through constitutional or judicial review proceedings. Camp closure, encampment, cancellation of refugee status and the suspension of registration have therefore generated major public-interest cases. By contrast, NGO intervention is less consistent in relation to informal pushbacks, immediate border returns and short-term detention. These measures may occur rapidly, without written records and in places far from courts and legal aid organisations. Legal representation may become available only after an NGO learns of the incident, by which time the affected person may already have been removed from Kenya.

Geographical location also plays a major role in access to legal assistance. Most NGO legal services and specialist lawyers are based in Nairobi or in long established refugee operations around Kakuma and Dadaab. As a result, asylum seekers who are detained or intercepted in remote areas such as Mandera, Liboi and other northern or eastern border regions often face significant challenges in obtaining legal support. Long distances, weak communication networks, security-related restrictions, and the lack of proper documentation make it difficult for NGOs to investigate cases and initiate legal proceedings in a timely manner.

Role of NGOs and bar associations and their implications

NGOs perform several interrelated roles in asylum access adjudication. First, they enable access to judicial remedies by identifying affected persons, providing legal advice, preparing petitions, representing applicants and seeking urgent conservatory orders. In *Kituo Cha Sheria & 8 others v Attorney General (supra)*, the NGO obtained interim orders preventing implementation of the urban relocation directive before the final judgment was delivered. Such intervention is particularly important where implementation of a directive could result in immediate relocation, detention or refoulement before ordinary proceedings are concluded.

Secondly, NGOs influence the interpretation of refugee law by presenting arguments based on the Constitution, the Refugees Act, the 1951 Refugee Convention, the 1969 OAU Refugee Convention and international human rights law. Their pleadings have encouraged courts to consider access to asylum through principles including non-refoulement, dignity, equality, freedom of movement, family unity, public participation and fair administrative action. The resulting jurisprudence has extended beyond the circumstances of individual litigants and established standards applicable to national refugee policy.

Thirdly, NGOs contribute to the collection and presentation of evidence. They may provide affidavits, applicant testimony, reports on conditions in refugee hosting areas, country-of-origin material and documentation of executive practices. Organisations working directly with refugee communities are often better placed than individual litigants to demonstrate the systemic effects of a policy, including its consequences for registration, documentation, assistance, family life and exposure to arrest.

Specialised organisations may also introduce expertise that would otherwise be absent. RCK and *Kituo Cha Sheria* contribute refugee law and protection expertise; and Amnesty International contributes broader international human rights analysis etc. The participation of organisations with different mandates allows courts to assess refugee measures from several legal and factual perspectives.

Nevertheless, NGO-led adjudication has limitations. Strategic litigation necessarily selects a limited number of disputes and may not address the large volume of routine refusals, arrests or procedural failures experienced by individual applicants. Dependence on NGO intervention can also produce unequal access to justice, where applicants whose cases attract organisational attention may obtain specialist representation, while similarly situated persons may remain without assistance. Moreover, favourable judgments require executive compliance, monitoring and, in some instances, further litigation.

Organized or formal involvement of civil society, apart from NGOs

There is organised involvement beyond NGOs, most notably through the Kenya National Commission on Human Rights (KNCHR). KNCHR is not an NGO but an independent constitutional and statutory national human rights institution. It has authority to investigate human rights violations, institute proceedings and intervene in litigation.⁴⁷⁷ KNCHR acted as the principal petitioner in the 2017 Dadaab case and participated as an interested party in the subsequent litigation concerning the closure of Dadaab and Kakuma. Its participation provides formal human rights oversight and gives institutional weight to challenges involving discrimination, non-refoulement and fair administrative action.⁴⁷⁸

Individual refugees and asylum seekers, refugee-led organisations, community representatives and affected families also participate as petitioners or interested parties, sometimes jointly with NGOs. Their involvement ensures that public-interest litigation is connected to the lived experiences of those directly affected. However, publicly available case law does not reveal a permanent consultative or representative body through which civil society formally participates in every refugee status determination or appeal. Civil society involvement remains primarily litigation-based, advisory or project-based rather than in the national adjudicatory structure.

Overall, NGOs are central actors in Kenyan asylum access litigation. They facilitate access to courts, develop legal arguments, collect evidence and transform individual or localised experiences into systemic constitutional claims. Their influence is strongest in formal and strategic challenges and weaker in undocumented practices occurring rapidly at remote borders or detention facilities. Bar associations appear to have a much less visible institutional role, while KNCHR provides the clearest example of organised civil-society-related participation outside the NGO sector.

D. Supranational courts

The case law examined does not demonstrate that judgments of supranational courts have directly or systematically altered Kenyan judicial approaches to pushbacks, asylum-related detention or externalised processing. Kenyan courts have relied much more frequently on the Constitution, domestic refugee legislation, international treaties and UNHCR guidance than on judgments delivered by regional or international courts.

Kenya is subject to regional human rights standards under the African Charter on Human and Peoples' Rights and the 1969 OAU Refugee Convention. However, no case identified in Part II shows a Kenyan court changing its conclusion on an asylum access barrier because it was legally bound by, or expressly following, a ruling of the African Court on Human and Peoples' Rights, the East African Court of Justice or another supranational court. The African Court cases concerning Kenya have principally addressed matters outside refugee and asylum law.

Nevertheless, supranational and comparative jurisprudence has exercised an indirect interpretative influence. In *Kenya National Commission on Human Rights v Attorney General* (*supra*), the High Court observed that regional and domestic courts had interpreted the rights to life and freedom from torture as encompassing protection against *refoulement*. The Court placed this jurisprudence alongside Art 33 of the 1951 Refugee Convention, Art II (3) of the OAU Refugee Convention, Art 3 of the Convention against Torture and UNHCR materials when concluding that collective repatriation from Dadaab would violate

⁴⁷⁷ Sec 59, Constitution of Kenya 2010; Sec 8, 16, 22 Kenya National Commission on Human Rights Act 2011.

⁴⁷⁸ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017)

non-refoulement. The judgment therefore drew upon a transnational body of refugee and human rights law, although it did not identify a single supranational ruling as determinative of the outcome.

The same pattern appears in the 2024 Dadaab and Kakuma camp-closure judgment. The High Court treated *non-refoulement* as a rule found in international, regional and domestic law and relied particularly on Art 33 of the Refugee Convention, Art II (3) of the OAU Refugee Convention and the Refugees Act. The decision invalidated the closure directives because of *non-refoulement*, fair administrative action and public participation concerns, but it was not based on a distinct ruling of a supranational court.

Accordingly, the principal external influence on Kenyan asylum adjudication is better described as international and regional normative influence, rather than direct control by supranational courts. Treaty provisions, customary *non-refoulement*, UNHCR guidance and comparative human rights reasoning have reinforced rights-based interpretations of domestic law. By contrast, the available sources do not provide examples in which a supranational court ruling directly caused a Kenyan court to change its approach to a pushback, detention or externalisation measure.

This limited influence may be explained partly by the structure of the regional system. Kenya has not generated a substantial body of asylum litigation before the African Court, while the East African Court of Justice is not a specialised refugee or human rights tribunal. Asylum disputes therefore continue to be resolved principally through domestic constitutional litigation rather than through enforcement of supranational refugee judgments.

E. Other actors

Several actors not falling neatly within the categories of executive bodies, international organisations, NGOs or bar associations also contribute to asylum access adjudication. They include:

Individual advocates and legal-aid providers

Individual lawyers play an essential role in identifying the relevant legal framework, preparing evidence, filing appeals and constitutional petitions, and representing asylum seekers in hearings. Their involvement is particularly significant because asylum applicants may face language barriers, detention, short appeal deadlines and difficulty obtaining administrative records. In practice, many lawyers act through organisations such as *Kituo Cha Sheria* and the Refugee Consortium of Kenya, although some provide assistance individually or on a *pro bono* basis.

The availability of representation is uneven. As discussed above, specialist lawyers and legal aid organisations have limited resources and are concentrated mainly in Nairobi and established refugee hosting areas. Representation is consequently more likely in strategic cases or where an NGO becomes aware of an applicant's detention or threatened removal. Routine cases, particularly those arising in remote border areas, may proceed without specialist legal assistance.

Lawyers influence adjudication by translating individual experiences into legally reviewable claims and by presenting arguments under refugee, constitutional and international law. However, reliance on externally funded or *pro bono* representation may produce unequal access to review because applicants with similar claims may receive different levels of assistance.

Interpreters and translators

According to a judge, interpreters are important where applicants do not communicate effectively in English or Kiswahili. They facilitate interviews, appeals, consultation with counsel and participation in court proceedings. Their work may directly affect the accuracy with which an applicant's account is recorded and assessed.

Prosecutors and magistrates in immigration proceedings

As discussed, although the Director of Public Prosecutions is an executive actor, individual prosecutors and magistrates occupy a distinct practical position in cases where asylum seekers are charged with

unlawful entry or presence. These proceedings may become the first point at which a person's need for international protection is raised.

Cases such as *Rada Haile (supra)*, *Majid Ali Abdu (supra)*, *Espoir Ndarubuya (supra)* and *Serogo Alex (supra)* reveal that the handling of an asylum claim at the criminal court stage may determine whether the person is referred to the refugee procedure or convicted and exposed to removal. Differences in approach to refugee law among police officers, prosecutors and magistrates may therefore produce inconsistent outcomes. As noted in Part II and other parts, the High Court has on several occasions corrected lower court decisions that applied immigration offences without adequately considering the right to seek asylum.

Experts and country-of-origin information providers

UNHCR commonly provides institutional country-of-origin expertise, while lawyers and NGOs may submit reports from international organisations, human rights bodies and independent researchers.

Expert material can improve the factual basis of adjudication and assist decision makers in evaluating risk. Its influence may nevertheless depend on whether the applicant has legal or institutional support. Applicants without representation may be unable to identify or obtain appropriate expert evidence.

Refugee-led and community-based organisations

According to a UNHCR official, refugee-led organisations and community representatives may identify persons facing detention, removal or documentation problems, refer them to lawyers and provide contextual information concerning the effects of government measures.

Media and investigative organisations

Journalists and investigative organisations such as Amnesty International, Human Rights Watch among others, do not formally adjudicate asylum claims, but their reporting may document border practices, detention conditions and the implementation of camp closure or repatriation policies. Such reporting can alert NGOs and oversight institutions to possible violations and may later support advocacy or litigation. Its evidential value depends on reliability and verification. Media reports generally supplement rather than replace witness testimony, official records and expert evidence.

Overall implications

The involvement of these actors reveals that asylum access adjudication extends beyond the formal relationship between an applicant and an adjudicatory body. Effective adjudication often depends on lawyers identifying a remedy, interpreters enabling communication, community organisations locating affected persons, and experts supplying evidence concerning risk and vulnerability.

Their participation can improve the quality and factual accuracy of decisions. Nevertheless, because access to these actors is uneven and often dependent on humanitarian or civil society resources, their involvement may also reinforce disparities. Applicants in Nairobi or established refugee hosting areas are more likely to reach specialised assistance than persons intercepted or detained in remote border regions. Therefore, the availability of supporting actors may influence not only the outcome of proceedings but whether an asylum access barrier reaches a judicial or quasi-judicial body at all.

IV. THE SOCIO-POLITICAL CONTEXT

A. Migratory routes and entry points

Kenya is primarily a refugee receiving country, although it also functions as an important country of transit within the East and Horn of Africa. It hosts persons displaced mainly from Somalia, South Sudan, the Democratic Republic of the Congo, Ethiopia, Burundi and Sudan. As at 30 June 2026, Kenya hosts 857,065 registered refugees and asylum seekers, of whom around 51.6% of recognised refugees are from

Somalia, and 33.1% are from South Sudan. Somali nationals also constitute 64.9% of the registered asylum seeker population.⁴⁷⁹

Kenya is a major destination and transit country within mixed-migration movements in East Africa and the Horn. It receives refugees and migrants from neighbouring states and the Great Lakes region, while some continue southwards towards Southern Africa or travel onwards through wider regional and international routes.⁴⁸⁰ For asylum access adjudication purposes, Kenya is arguably a refugee-receiving country, particularly when the number of Kenyan asylum seekers is assessed in relation to the total number of Kenyan migrants abroad.⁴⁸¹

Main migration routes towards the country since 2010

Since 2010, Kenya has remained a major destination for refugees fleeing conflict and persecution in the Horn of Africa and the Great Lakes region. Most asylum seekers enter through land borders, particularly from Somalia, South Sudan, Ethiopia and, to a lesser extent, the DRC, Burundi, Rwanda and Sudan.⁴⁸² The Somalia-north-eastern Kenya corridor has been the principal route by which Somali refugees have sought protection in Kenya. Most movements have been directed towards the Dadaab refugee complex in Garissa County, which was established to receive refugees fleeing the Somali civil war and has experienced repeated influxes linked to conflict, drought and famine. Refugee arrivals increased sharply during the 2011 famine, when more than 150,000 Somalis were newly registered in Dadaab, and subsequent displacement continued as conflict and recurrent drought affected southern Somalia. More recently, prolonged drought and insecurity have again contributed to increased cross-border movements into Kenya.⁴⁸³

A second principal displacement route links South Sudan with Turkana County, where most asylum seekers enter Kenya through the Nadapal border crossing before being transferred to Kakuma Refugee Camp and, since 2016, the Kalobeyei Integrated Settlement. The outbreak of civil war in South Sudan in December 2013 triggered a substantial increase in arrivals, making South Sudanese one of the largest refugee populations hosted in Kenya.⁴⁸⁴ Other, smaller routes include the Ethiopia–Moyale corridor, through which Ethiopian asylum seekers fleeing violence in Oromia have entered Marsabit County.⁴⁸⁵ Another is the Uganda–western Kenya route, which passes through Malaba and other Uganda-Kenya crossings, with migrants travelling through Kitale before transfer to Kakuma or Kalobeyei. This route has been used by Burundian and Congolese asylum seekers.⁴⁸⁶

⁴⁷⁹ UNHCR, *Operational Data Portal: Kenya – Refugees and Asylum-Seekers* <<https://data.unhcr.org/en/country/ken>> accessed 01 July 2026

⁴⁸⁰ Julia Blocher and Melissa Siegel, *Kenya Migration Profile: Study on Migration Routes in the East and Horn of Africa* (United Nations University Migration Network, August 2017) p.7

⁴⁸¹ UNHCR, *Operational Data Portal: Kenya*. *Op cit*.

⁴⁸² See UNHCR, *Kenya Statistics Package: Statistical Summary as of 30 April 2024* (30 April 2024); See World Bank and United Nations High Commissioner for Refugees (UNHCR), *Understanding the Socioeconomic Conditions of Refugees in Kenya: Volume A – Analytical Report* (World Bank and UNHCR 2024)

⁴⁸³ Alice Lindley, *Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya* (2011) 30(4) *Refugee Survey Quarterly* 14-49; Asfaw Kumssa, James Williams, John F Jones and Eric A Des Marais, 'Conflict and Migration: The Case of Somali Refugees in Northeastern Kenya' (2014) 1(4) *Global Social Welfare* 145-146; Daniel Maxwell and Nisar Majid (eds), *Famine in Somalia: Competing Imperatives, Collective Failures, 2011–12* (Oxford University Press 2016).

⁴⁸⁴ UNHCR, *Inter-Agency Appeal for South Sudanese Refugees Emergency* (Jan-Dec 2014) p.23; See Alexander Betts, Remco Geervliet, Claire MacPherson, Naohiko Omata, Cory Rodgers and Olivier Sterck, *Self-Reliance in Kalobeyei? Socio-Economic Outcomes for Refugees in North-West Kenya* (Refugee Studies Centre, University of Oxford 2018).

⁴⁸⁵ UNHCR, *Nearly 10,000 Ethiopians Seek Asylum in Moyale, Kenya Following Violence Back Home* (19 March 2018) <<https://www.unhcr.org/ke/news/nearly-10-000-ethiopians-seek-asylum-moyale-kenya-following-violence-back-home>> accessed 31 July 2026.

⁴⁸⁶ Hugh Lamarque and Hannah Brown, *Key Considerations: Cross-Border Dynamics Between Uganda and Kenya in the Context of the Outbreak of Ebola, 2022* (Social Science in Humanitarian Action Platform (SSHAP), December 2022) <<https://www.socialscienceinaction.org/resources/key-considerations-cross-border-dynamics-between-uganda-and-kenya-in-the-context-of-the-outbreak-of-ebola-2022/>> accessed 31 July 2026; See Refugee Consortium of Kenya, *Refugee Protection Situation Report No 11 of 2017* (December 2017).

Under the Refugees Act 2021 and the Refugees (General) Regulations 2024, persons seeking asylum should present themselves to the nearest administrative authority for referral to the DRS. The DRS currently operates principal reception and registration facilities in Dadaab, Kakuma, Nairobi, Eldoret, Nakuru, and Mombasa, where applicants undergo reception, security and registration procedures before their asylum claims are processed.⁴⁸⁷

Actors and practices at entry points

The main state actors are the Kenya Police Service, immigration officers, national administration officers and other border-management authorities. In some border areas, particularly those affected by security operations, the Kenya Defence Forces may also be involved. The DRS becomes directly involved once an asylum seeker reaches a reception or registration office. UNHCR and humanitarian organisations maintain a significant operational presence in Dadaab and Kakuma, although their activities are concentrated at established reception and refugee-hosting locations rather than at all border crossing points.

The DRS itself recognises that non-*refoulement* applies from the moment a person arrives at Kenya's frontier and that registration is a primary means of bringing the person under state protection. The Refugees Act 2021 requires a person seeking asylum to make that intention known immediately upon entry or within 30 days by reporting to the nearest reception centre or government administrative office.

In practice, entry procedures vary considerably. At established reception locations, asylum seekers may be referred for screening and registration. By contrast, at remote border areas where security concerns are more pronounced, police and immigration officials may initially treat new arrivals as irregular migrants or security risks. As discussed in Part II, there have been documented instances in which individuals were intercepted or returned before receiving a written decision, registration interview or referral to the DRS. In such circumstances, affected individuals may find it difficult to challenge the measure before the courts or the Refugee Status Appeals Committee.

Implications that migratory routes towards the country have on how judicial institutions

Migration routes affect both the legal character of disputes and their practical justiciability. The Somalia route has generated the most prominent litigation because of its scale and its connection with national security policy, encampment, camp closure and repatriation.⁴⁸⁸ Kenyan courts have therefore frequently had to balance the executive's reliance on terrorism and border-security concerns against non-*refoulement*, equality, dignity, fair administrative action and freedom of movement.

The relationship between Kenya and Somalia is particularly important. Bilateral and tripartite cooperation has facilitated voluntary repatriation, including the 2013 Tripartite Agreement between Kenya, Somalia and UNHCR.⁴⁸⁹ At the same time, political pressure to close Dadaab and return Somali refugees has produced litigation challenging whether purportedly voluntary return could become collective, coercive or unsafe. The courts have insisted that bilateral cooperation and security considerations do not remove the requirement for individual assessment or permit *refoulement*.

The existence of migration routes through several countries may also complicate asylum adjudication. Congolese, Burundian, Sudanese and other asylum seekers may arrive in Kenya after travelling through Uganda, Tanzania, Ethiopia or South Sudan. This may raise questions about previous registration, residence or access to protection in another country. However, transit through a neighbouring state does

⁴⁸⁷ UNHCR Kenya, 'Refugee Status Determination' <https://www.unhcr.org/ke/what-we-do/refugee-status-determination> accessed 31 July 2026.

⁴⁸⁸ See *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR; *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR; *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others* [2024] KEHC 2973 (KLR).

⁴⁸⁹ See Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013.

not, by itself, relieve Kenya of its obligation to receive and examine an asylum claim, particularly where return would expose the individual to persecution or to onward *refoulement*.⁴⁹⁰

Informal routes are considerably less likely to produce individual case law than formal policies. A person intercepted near Liboi, Mandera or an unofficial crossing may be returned before contacting a lawyer or obtaining written evidence. The resulting cases, where litigation occurs at all, are therefore more likely to take the form of systemic constitutional petitions brought by NGOs than individual appeals against documented decisions. This produces an important evidential bias: reported jurisprudence reflects formal directives and the relatively small number of intercepted persons who obtain legal assistance, rather than the full extent of border practices.

Implications of country entry points on what happens in judicial institutions

The point of entry does not formally alter the substantive refugee law applicable to an asylum seeker. Kenya is a unitary state, and the Refugees Act 2021, the Constitution and international obligations apply throughout the national territory. The High Court exercises the same constitutional and supervisory jurisdiction irrespective of whether a claim arises at the Somali, South Sudanese, Ugandan, Ethiopian or Tanzanian border.

However, the point of entry significantly affects whether those legal protections can be invoked in practice. Persons entering near Nairobi, Mombasa or established DRS offices are more likely to obtain information, registration, documentation and access to lawyers. Persons crossing in Mandera, Wajir, Garissa, Marsabit or Turkana may be located hundreds of kilometres from the nearest court,⁴⁹¹ specialised lawyer or refugee office.

The point of entry also influences which institution first characterises the individual's position. Where DRS officials are engaged promptly, the person is more likely to be treated as an asylum seeker. Where the first contact is with police or immigration officers, particularly in securitised border areas, the individual may instead be treated as an irregular entrant or as presenting immigration or security concerns. That initial classification can lead to detention or prosecution before the protection claim is examined, as discussed in plethora of decided cases.

This divergence is particularly important for the 30-day reporting requirement. An individual who crosses through a remote or informal route may be unable to reach a designated registration office promptly. Subsequent criminal proceedings may therefore require magistrates and appellate courts to determine whether delayed reporting was reasonably connected to forced displacement and whether penalising the individual would be inconsistent with refugee law. The High Court's interventions in cases including *Rada Haile (supra)*, *Majid Ali Abdu (supra)*, *Espoir Ndarubuya (supra)* and *Serogo Alex (supra)* illustrate the corrective role that judicial bodies may perform where first contact authorities and lower courts have treated asylum seekers primarily as immigration offenders.

As stated earlier, entry through an informal or remote border substantially limits the effectiveness of quasi-judicial review. The RSEP and RSAC generally become involved only after registration and an identifiable status decision. They are therefore poorly positioned to review a pushback that prevents an individual from entering the asylum procedure at all. Such barriers must instead be challenged through constitutional or judicial review proceedings, frequently by NGOs acting in the public interest. Formal entry and registration thus open the route to specialised asylum adjudication, whereas exclusion at the border tends to displace review into the ordinary courts, or to prevent adjudication altogether.

Overall, Kenya's geography produces an uneven relationship between law and access to remedies. The national legal framework applies uniformly, but the route and point of entry determine which state institution encounters the asylum seeker, whether the claim is documented, how quickly protection actors

⁴⁹⁰ See UNHCR), *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019,

⁴⁹¹ See Hadley, Lance, and Edith Aoko. "How Far are Kenya's Courts? Distance as a Barrier to Justice in Kenya." *Journal of African Law* (2025): 1-10.

can intervene and whether there is a reviewable decision. The distinction is greatest between formal registration centres connected to DRS and remote, highly securitised border areas where operational decisions may occur outside effective judicial or quasi-judicial oversight.

B. Composition and spatial distribution of forced migration population

Number and composition of refugees and asylum seekers

Kenya has hosted a large and changing population of refugees and asylum seekers for more than three decades.⁴⁹² Changes in the size and composition of this population have largely followed successive conflicts and periods of political instability in Somalia, South Sudan, the Democratic Republic of the Congo, Ethiopia, Burundi and Sudan.⁴⁹³ In the case of Somalia, armed conflict has also combined with recurrent drought, famine and food insecurity to drive substantial movements into Kenya, particularly during the large influxes of 2011 and 2022-2023.⁴⁹⁴

The period began with a major influx from Somalia. Drought, famine and armed conflict produced exceptionally high arrivals into Dadaab in 2011.⁴⁹⁵ Subsequent years were characterised by increased arrivals, voluntary repatriation to Somalia, verification, registration exercises and policy, especially towards Somalis.⁴⁹⁶ A further substantial increase followed the outbreak of conflict in South Sudan in December 2013, which expanded the population of Kakuma⁴⁹⁷ and later contributed to the establishment of the Kalobeyei settlement.⁴⁹⁸ Economic migration, as well as conflict and insecurity in Burundi, the Democratic Republic of the Congo, and Ethiopia, generated additional, although smaller, movements.⁴⁹⁹

According to data from UNHCR and the Government of Kenya, Kenya hosted 857,065 refugees and asylum seekers, comprising 630,946 recognised refugees and 226,119 asylum seekers at the end of June 2026. Asylum seekers are individuals whose applications for refugee status had not yet been determined or who remained formally classified within the asylum-seeker category. Among the recognised refugee population, Somalis constituted the largest group, numbering 325,744 people (51.6%), followed by South Sudanese refugees with 208,856 people (33.1%). Other major countries of origin included the Democratic Republic of the Congo (45,126; 7.2%), Ethiopia (29,131; 4.6%), Burundi (10,533; 1.7%), and Sudan (7,577; 1.2%). Smaller refugee populations originated from Uganda and several other countries.⁵⁰⁰

⁴⁹² County Government of Garissa and United Nations High Commissioner for Refugees (UNHCR), *The Garissa Integrated Socio-Economic Development Plan (GISED) for Enhancing the Socio-Economic Inclusion of Refugees and Host Communities in Refugee Hosting Sub-Counties of Dadaab, Fafi and Lagdera in Garissa County, Kenya: Phase I (2023–2027)* (2023) <https://www.unhcr.org/ke/sites/ke/files/legacy-pdf/GISED-1_Main-Report_Final_26092023.pdf> accessed 28 July 2026> pp.1 &33.

⁴⁹³ Fred Nyongesa Ikanda, *East Africa's Economic Powerhouse and Refugee Haven, Kenya Struggles with Security Concerns* (Migration Policy Institute, 2 July 2024) <<https://www.migrationpolicy.org/journal/country-profile/east-africa-economic-powerhouse-and-refugee-haven-kenya-struggles-security>> accessed 28 July 2026.

⁴⁹⁴ See Anna Lindley, 'Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya' (2011) 30(4) *Refugee Survey Quarterly* 14, 14-49; Laura Hammond, *History, Overview, Trends and Issues in Major Somali Refugee Displacements in the Near Region* (UNHCR New Issues in Refugee Research, Research Paper No 268, 2014); See Pablo Bose, 'Nexus Dynamics: The Impact of Environmental Vulnerabilities on Migration and Displacement' (2024) 4(1) *Oxford Open Climate Change* kgae001.

⁴⁹⁵ See World Food Programme, *Horn of Africa Crisis: Situation Report No 11* (28 September 2011); See also (UNHCR), *Number of Somali Refugees Grows Sharply in 2011* (Briefing Notes, 29 April 2011) <https://www.unhcr.org/uk/news/briefing-notes/number-somali-refugees-grows-sharply-2011> accessed 28 July 2026.

⁴⁹⁶ See *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR; *Kenya National Commission on Human Rights v Attorney General* [2017] eKLR.

⁴⁹⁷ UNHCR), *Update on the Influx into Kakuma: 17 January 2014* (17 January 2014) p.1 <https://www.ecoi.net/en/file/local/1090511/1930_1390402696_kakumaupdate17thjan2014.pdf> accessed 28 July 2026.

⁴⁹⁸ UNHCR), *Kalobeyei Settlement* <<https://www.unhcr.org/ke/about-us/where-we-work/kalobeyei-settlement>> accessed 28 July 2026.

⁴⁹⁹ Fred Nyongesa Ikanda, *East Africa's Economic Powerhouse and Refugee Haven, Kenya Struggles with Security Concerns* (Migration Policy Institute, 2 July 2024) *Op cit*.

⁵⁰⁰ UNHCR, *Operational Data Portal: Kenya – Refugees and Asylum-Seekers*. *Op cit*.

As for asylum seeker population, as of 30 June 2026, Somali nationals accounted for the largest share of asylum seekers as well, with 146,726 individuals representing 64.9% of all pending asylum claims. They were followed by nationals of Burundi (24,515), the Democratic Republic of the Congo (21,528), Ethiopia (14,086), Sudan (6,052), Uganda (3,508), and South Sudan (122). Together, these groups constituted the overwhelming majority of Kenya's asylum-seeker population.⁵⁰¹

The data reveal a clear distinction between the recognised refugee and asylum-seeker populations. South Sudanese nationals account for many recognised refugees but represent only a small fraction of those awaiting a decision on their asylum claims. This largely reflects Kenya's continued application of *prima facie* recognition to many people fleeing the conflict in South Sudan. By comparison, many applicants from Somalia, Burundi, the Democratic Republic of the Congo and Ethiopia remain within the individual refugee status determination process pending a final decision.⁵⁰²

Implications on what occurs in judicial institutions

The growing number of pending asylum applications places increasing administrative demands on the DRS, the RSEP and, where appeals are lodged, the RSAC. The increase from 59,010 pending asylum seekers at the end of 2021⁵⁰³ to 226,119 in June 2026⁵⁰⁴ reflects a substantial expansion in the volume of claims awaiting determination and, consequently, the workload of the national asylum system.

A pending asylum seeker population of this scale places considerable administrative demands on registration, refugee status determination and appeals. It increases the workload associated with interviewing applicants, obtaining and assessing COI, arranging interpretation, preparing decisions and notifying applicants of outcomes. Where new applications continue to outnumber completed decisions, the backlog is likely to grow over time. As a result, some applicants may remain without a final determination for prolonged periods, relying on temporary asylum-seeker documentation while maintaining ongoing contact with the Department of Refugee Services.

An influx may also require temporary adjustments to asylum procedures. Group or *prima facie* recognition reduces the need for individual refugee status determination where people flee circumstances that clearly fall within the broader refugee definition contained in the 1969 OAU Refugee Convention. Where individual assessment remains necessary, however, a sudden influx may place significant pressure on asylum authorities, requiring them to prioritise certain claims, reallocate administrative resources or postpone the determination of older applications.

The effects on the regular courts are more indirect. A large refugee population does not necessarily generate a proportionate increase in litigation because many asylum seekers face practical barriers to obtaining legal representation or accessing judicial review. However, administrative delays, immigration detention, documentation disputes, encampment policies and proposed removals may give rise to constitutional petitions, judicial review proceedings and criminal appeals, including some public interest cases challenging government measures and policies, as discussed in the previous parts.

Implications of demographic and national composition

The composition of Kenya's forced migration population affects the legal norms, evidence and procedures relevant to adjudication. The substantial presence of children requires attention to the best interests of the child, family unity, birth registration, guardianship and the treatment of unaccompanied or separated minors. In litigation concerning the compulsory relocation of urban refugees, for example, the separation

⁵⁰¹ *Ibid*

⁵⁰² See UNHCR), *Refugee Status Determination* <<https://www.unhcr.org/ke/what-we-do/refugee-status-determination>> accessed 28 July 2026; UNHCR), *UNHCR Issues a Non-Return Advisory for South Sudan* (Briefing Notes, 14 February 2014) <<https://www.unhcr.org/uk/news/briefing-notes/unhcr-issues-non-return-advisory-south-sudan>> accessed 28 July 2026.

⁵⁰³ UNHCR), *Kenya Statistics Package: Statistical Summary as of 31 December 2021* (31 December 2021) <<https://www.unhcr.org/ke/sites/ke/files/legacy-pdf/Kenya-Statistics-Package-31-December-2021.pdf>> accessed 10 June 2026.

⁵⁰⁴ UNHCR, *Operational Data Portal: Kenya – Refugees and Asylum-Seekers* <<https://data.unhcr.org/en/country/ken>>

of children from their parents raised constitutional and child-rights considerations extending beyond the general legality of encampment. The involvement of children's rights organisations in such proceedings introduced expertise relating to family unity and the welfare of minors.⁵⁰⁵

Nationality has been a particularly important factor. Because Somali refugees and asylum seekers make up the largest refugee population in Kenya, refugee status determination has become closely intertwined with Kenya's national security concerns, the conflict in Somalia, *Al-Shabaab* activities, and political debates surrounding the Dadaab refugee complex. As a result, Somali nationals have been disproportionately affected by policies and practices such as encampment requirements, security screening, police operations, proposed camp closures, and initiatives promoting or facilitating large scale repatriation.⁵⁰⁶ At the policy level, courts have repeatedly been required to assess whether the Government's reliance on security concerns justifies measures affecting Somali refugees collectively.

South Sudanese claims present a different pattern, as the scale and persistence of the conflict in South Sudan have often supported *prima facie* or group-based recognition. While applicants from other countries are more likely to require individualised assessment of political persecution, armed conflict, ethnicity, nationality, gender or other personal circumstances.⁵⁰⁷ The diversity of the urban caseload therefore increases the range of COI expertise required within the DRS and appellate bodies.

Displaced persons who are neither asylum seekers nor recognised refugees

Kenya also contains several categories of displaced persons who do not fall within the registered refugee or asylum seeker population.

Internally Displaced Persons (IDPs): IDPs are legally distinct from refugees because they remain within Kenya rather than crossing an international border. Internal displacement in Kenya is driven primarily by disasters, particularly flooding and drought, although the specific causes and patterns of displacement vary across the country.⁵⁰⁸ The prevalence of disaster-related displacement has made internal displacement a significant humanitarian and policy issue, and the definition of an IDP in the IDP Act reflects the range of circumstances in which displacement may occur.⁵⁰⁹

IDPs do not ordinarily enter refugee status determination, and the RSEP and RSAC have no jurisdiction to determine their protection needs. Their claims fall instead within the IDP Act, constitutional rights, humanitarian administration and the ordinary courts. Nevertheless, IDPs may experience practical barriers similar to those encountered by asylum seekers, including the loss of identity documents, displacement to remote or inaccessible areas and difficulties accessing humanitarian assistance, public services and legal support.

Unregistered cross-border arrivals: Some persons who cross into Kenya in search of protection may not be included in official refugee statistics because they have not registered, cannot reach a reception centre, are intercepted or returned at the border, or live outside the formal asylum system. The number and composition of this population are inherently uncertain. These individuals are particularly exposed to the barriers analysed in Part I because they may be treated as irregular migrants, detained or removed before an asylum claim is formally recorded.⁵¹⁰

⁵⁰⁵ See *Kituo Cha Sheria & 8 others v Attorney General (supra)*

⁵⁰⁶ Amnesty International, *Somalis are Scapegoats in Kenya's Counterterrorism Crackdown*, 27 May 2014. *Op cit*; Fred Nyongesa Ikanda, *East Africa's Economic Powerhouse and Refugee Haven, Kenya Struggles with Security Concerns* (Migration Policy Institute, 2 July 2024) *Op cit*.

⁵⁰⁷ See UNHCR, *Refugee Status Determination* <<https://www.unhcr.org/ke/what-we-do/refugee-status-determination>>; UNHCR *Issues a Non-Return Advisory for South Sudan* (Briefing Notes, 14 February 2014).

⁵⁰⁸ Sylvain Ponsérre and Vicente Anzellini, *Disaster Displacement Risk in Kenya: An Overview of the Risk of Future Displacement* (Internal Displacement Monitoring Centre (IDMC), April 2026).

⁵⁰⁹ Sec 2, Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012.

⁵¹⁰ See Human Rights Watch, *'Welcome to Kenya': Police Abuse of Somali Refugees* (17 June 2010)

The lack of registration also creates an evidential problem. Because no administrative file or written decision exists, a person who is pushed back or informally refused access cannot use the ordinary refugee appeal procedure. Review must instead occur through constitutional or public interest litigation, assuming that lawyers or monitoring organisations can obtain evidence of the incident.

Stateless persons and persons at risk of statelessness: Kenya also hosts stateless persons and communities at risk of statelessness. According to UNHCR Kenya, the country currently has an estimated 9,800 stateless persons, despite significant progress in reducing statelessness through the recognition and registration of communities such as the Makonde, Shona and Pemba as Kenyan citizens. Stateless persons are not necessarily refugees or asylum seekers. However, the absence of recognised nationality and identity documentation may limit access to education, healthcare, employment, banking, housing and marriage, while also increasing the risk of remaining undocumented,⁵¹¹ and possible arrest and detention.

In Kenya, groups at risk of statelessness include the Rundi community, persons of Rwandan origin, individuals of Asian descent, Nubians, members of the Nyasa and Pare communities, the Galje'el and Sagaf communities, and some people of Kenyan Cushitic and Somali descent who face difficulties accessing birth registration and identity documentation. Where a stateless person also has a well-founded fear of persecution outside his or her country of former habitual residence, refugee status determination may become relevant in addition to the protections available under the law on statelessness.⁵¹²

Spatial distribution

The registered refugee and asylum seeker population is highly concentrated geographically. As of 30 June 2026, Garissa County hosted 420,058 refugees and asylum seekers (49.0% of the national total), most of whom lived in the Dadaab camp. Turkana County hosted 318,825 persons (37.2%), primarily in Kakuma and Kalobeyei, while Nairobi and the urban caseload accounted for 118,182 persons (13.8%). The population in Garissa is mostly Somali with about 406,564 of the 420,058 registered refugees and asylum seekers (96.8%) were Somali nationals, distributed across the Hagadera, Dagahaley, Ifo and Ifo 2 camps. By contrast, the population in Turkana was more diverse, although South Sudanese nationals remained the largest group, comprising about 61.9% of the county's refugee and asylum-seeker population. Smaller populations originated from Somalia, the Democratic Republic of the Congo, Burundi, Ethiopia, Sudan and Uganda.⁵¹³

The urban refugee and asylum-seeker population is considerably more diverse than the populations in the principal refugee-hosting counties. Congolese nationals constituted the largest group within the Nairobi and urban caseload, followed by Somalis, Ethiopians, Burundians and South Sudanese. Unlike the county-level statistics for Garissa and Turkana, the published statistics aggregate the principal urban caseload under Nairobi rather than providing separate population figures for individual urban centres.⁵¹⁴

Implications of spatial distribution for adjudication

Spatial concentration has produced distinct regional patterns of asylum adjudication. In Garissa and Dadaab, cases are strongly associated with Somali displacement, documentation, camp residence, encampment, security operations, repatriation and proposed camp closure. The concentration of a predominantly Somali population means that administrative and judicial decisions are frequently influenced by developments in Somalia and by Kenya's security relationship with that country.

In Turkana, particularly in Kakuma and Kalobeyei, asylum adjudication concerns a more diverse refugee population than in Dadaab. Although refugees originate from several countries, South Sudanese constitute

⁵¹¹ UNHCR), *Statelessness* <<https://www.unhcr.org/ke/what-we-do/statelessness>> accessed 15 July 202

⁵¹² *Ibid*

⁵¹³ UNHCR, *Kenya Statistics Package: Statistical Summary as of 30 June 2026* (30 June 2026) <<https://data.unhcr.org/en/documents/details/123301>> accessed 28 July 2026; See UNHCR, *Country – Kenya: Refugees and Asylum-seekers* (Operational Data Portal) <https://data.unhcr.org/en/country/ken/794> accessed 28 July 2026.

⁵¹⁴ *Ibid*

the largest nationality. Common legal and protection issues include the registration of new arrivals, protection of unaccompanied and separated children, the application of prima facie refugee recognition for eligible South Sudanese arrivals, and legal questions arising from the integration of refugee settlements with host communities.⁵¹⁵

In Nairobi and other urban areas, disputes are more likely to concern freedom of movement, permission to reside outside camps, police harassment, documentation, employment and access to administrative services.⁵¹⁶ As stated previously, the urban caseload also requires broader COI expertise because it contains a more diverse range of nationalities.

The concentration of most refugees in peripheral counties creates substantial barriers to access to justice. Dadaab and Kakuma are far from Nairobi, where the High Court, specialised advocates,⁵¹⁷ senior DRS officials and many national NGOs are concentrated. Applicants may face travel costs, limited communication, inadequate interpretation and difficulty obtaining court documents or legal representation.

Although the High Court has expanded through additional court stations, mobile courts and virtual hearing technologies, these developments have not eliminated the practical challenges associated with geographical distance. It has been observed that physical proximity to courts continues to influence access to justice despite technological and institutional reforms.⁵¹⁸ For refugees living in remote hosting areas such as Dadaab and Kakuma, distance may therefore continue to affect timely access to judicial review, legal representation and other specialist legal services.

Spatial patterns also shape the types of asylum cases that reach Kenya's adjudicatory institutions. Refugee status determination applications originating from the major refugee-hosting areas of Dadaab, Kakuma or from urban centres such as Nairobi are more likely to proceed through the formal procedures administered by the Department of Refugee Services, including the Refugee Status Eligibility Panel and, where applicable, the Refugee Status Appeals Committee.⁵¹⁹ By contrast, individuals intercepted in border areas such as Mandera, Liboi or Moyale may be returned, detained or otherwise prevented from accessing the asylum procedure before their claims are formally registered.⁵²⁰ As a result, some of the most significant protection concerns reported in border regions, including allegations of pushbacks, immigration detention and failures to refer asylum seekers to the refugee authorities, are less likely to generate published administrative or judicial decisions.

The concentration of refugees and, in some areas, internally displaced persons in counties such as Garissa and Turkana also places considerable demands on local administrative authorities, humanitarian agencies and other public institutions.⁵²¹ These settings can present practical challenges for officials responsible for identifying individuals' legal status because refugees, asylum seekers, undocumented cross-border arrivals,

⁵¹⁵ World Bank and UNHCR, *Understanding the Socioeconomic Conditions of Refugees in Kenya: Volume A – Kalobeyei Settlement: Results from the 2018 Kalobeyei Socioeconomic Survey* (World Bank 2021) pp 3-4; UNHCR, *South Sudan Regional Refugee Response Plan: January 2020–December 2021 (Updated March 2021)* (UNHCR 2021) p.10.

⁵¹⁶ *Kituo Cha Sheria & 8 others v Attorney General* [2013] KEHC 6039 (KLR); Eileen Imbosa and Andrew Maina, 'Limitations to Accessing Legal Representation in Kenya's RSD Processes' (2020) 65 *Forced Migration Review* 19, 19–20.

⁵¹⁷ See Hadley, Lance, and Edith Aoko. "How Far are Kenya's Courts? Distance as a Barrier to Justice in Kenya." *Journal of African Law* (2025): 1-10; UNHCR Kenya, 'Annual Results Report' 2023 p.5.

⁵¹⁸ Hadley, Lance, and Edith Aoko. "How Far are Kenya's Courts? Distance as a Barrier to Justice in Kenya." *Journal of African Law* (2025): 1-10; UNHCR Kenya, 'Annual Results Report' 2023 p.476.

⁵¹⁹ See UNHCR, *Kenya Annual Results Report 2024*, pp. 10-12

⁵²⁰ Human Rights Watch, *Kenya: Stop Deporting Somalis Fleeing Conflict* (31 March 2011) <<https://www.hrw.org/news/2011/03/31/kenya-stop-deporting-somalis-fleeing-conflict>> accessed 29 July 2026; Amnesty International, *Kenya: Somalis Trapped in "Catch-22" amid Crackdown on Refugees* (11 April 2014) <<https://www.amnesty.org/en/latest/news/2014/04/kenya-somalis-placed-catch-amid-crackdown-refugees/>> accessed 29 July 2026.

⁵²¹ UNHCR, *Kenya Statistics Package: Statistical Summary as of 30 June 2026* (30 June 2026) *Op cit*; See UNHCR, *Country – Kenya: Refugees and Asylum-seekers* (Operational Data Portal) *Op cit*.

internally displaced persons, pastoralist communities and local residents may all move through the same border regions for different reasons and under different legal frameworks.

Overall, Kenya's forced-migration population is both large and concentrated a few refugee hosting counties. The scale of the pending asylum population places substantial pressure on administrative adjudication, while the spatial concentration of refugees in remote counties limits access to courts and specialist legal assistance. Nationality and demographic composition also shape the substantive issues and barriers. Somali displacement is closely connected to security, encampment and repatriation litigation; South Sudanese displacement is associated more strongly with group recognition and child protection; and the diverse urban population requires a wider range of individualised status assessments.

C. Political and public debate in the country

Relevance of the topic in political debate

Access to asylum is a recurrent but not ordinarily dominant issue in Kenya's national politics.⁵²² Election campaigns have generally focused on economic conditions, corruption, governance, land, devolution and ethnic representation, while refugee policy has attracted sustained political attention mainly during periods of heightened insecurity, large refugee influxes or debates over the future of Dadaab and Kakuma.

Political attention has historically concentrated on Somali refugees and the Dadaab complex. Following terrorist attacks attributed to Al-Shabaab, senior executive officials repeatedly associated Dadaab with national insecurity and announced measures including stricter encampment, accelerated repatriation and camp closure. After the April 2015 attack on Garissa University, for example, the then Deputy President called for Dadaab to be closed within 90 days, linking the camp to the security threat posed by *Al-Shabaab*. In 2016, the Government again announced the intended closure of Dadaab and justified it by reference to terrorism, inadequate international burden-sharing and the prolonged character of the refugee situation.⁵²³

The 2016 and 2021 camp closure directives demonstrate that refugee access and continued protection have formed part of the executive's political agenda even outside election campaigns.⁵²⁴ These measures concerned not only the administration of camps but the potential return of large populations to Somalia and restrictions on the continued availability of asylum in Kenya. The High Court subsequently quashed the 2021 directives, holding that camp closure had to comply with due process, public participation, domestic law and the principle of non-*refoulement*.⁵²⁵

The Government's approach to refugee policy has shifted in recent years. Rather than focusing primarily on camp management and closure, the government launched the *Shirika Plan* in March 2025. The plan sets out a longer-term strategy to transform Kenya's refugee response. It proposes moving away from the traditional camp-based humanitarian model towards integrated settlements where refugees and host communities can access shared public services and economic opportunities. The Plan places particular emphasis on socioeconomic inclusion, self-reliance, local development and the progressive integration of

⁵²² International Crisis Group, *Kenya's 2017 Elections* (Africa Report No 265, International Crisis Group, 2018) p.1; See Gabrielle Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (University of Chicago Press 2011).

⁵²³ Amnesty International, *Nowhere Else to Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya* (Index No AFR 32/5118/2016, 14 November 2016) p.12; UNHCR, *UNHCR Statement on the Future of Kenya's Dadaab Refugee Camps* (Briefing Note, 14 April 2015) <<https://www.unhcr.org/news/briefing-notes/unhcr-statement-future-kenyas-dadaab-refugee-camps>> accessed 29 July 2026.

⁵²⁴ See *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017]; Amnesty International, *Nowhere Else to Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya* (Index No AFR 32/5118/2016, 14 November 2016) pp. 7-13.

⁵²⁵ *Legal Advice Centre (Kituo Cha Sheria) t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*; *Kenya National Commission on Human Rights & another (Interested Parties)* [2024] KEHC 2973 (KLR).

Dadaab and Kakuma into broader socioeconomic areas. Framed as part of Kenya's wider development agenda, the strategy is intended to guide refugee and host-community policy over the period 2025-2036.⁵²⁶

The Shirika Plan nevertheless reflects a significant change in the Government's approach to refugee management. While its primary emphasis is on socioeconomic inclusion, self-reliance and shared service delivery, it also recognises the importance of effective registration, identity management and institutional coordination to support implementation. The Plan further highlights the need for sustained international cooperation and responsibility-sharing, recognising that the successful implementation of its objectives depends on continued financial and technical support from development and humanitarian partners.⁵²⁷

The political significance of asylum varies across territorial scales. It is particularly prominent in Garissa and Turkana counties, where Dadaab, Kakuma and Kalobeyei are located, and where refugee governance has direct implications for land use, service provision, employment, local commerce, humanitarian assistance and relations between refugees and host communities. At the national level, however, asylum policy tends to gain political prominence only intermittently, most notably in response to terrorist attacks, large-scale refugee influxes, funding shortfalls or government initiatives concerning camp closure.

Relevance of the topic in public debate/media

As demonstrated in multiple media sources and reports, access to asylum has attracted considerable media attention in Kenya, although coverage tends to focus on a relatively small number of recurring issues. These include terrorism and national security, proposals to close the Dadaab and Kakuma refugee camps, voluntary repatriation to Somalia, police operations affecting Somali communities, humanitarian funding shortfalls, food insecurity and the living conditions of refugees.

Following major terrorist attacks, media reporting and political debate have often portrayed Dadaab through the lens of national security. Senior government officials repeatedly argued that the camp posed security risks or could be exploited by *Al-Shabaab*, and these statements received extensive coverage in both Kenyan and international media.⁵²⁸ Humanitarian organisations, UNHCR and refugee rights organisations challenged many of these claims, arguing that there was insufficient evidence to justify collective measures such as camp closure or forced return and warning that such actions could expose refugees to persecution or other serious harm.⁵²⁹

Public debate in Kenya has long reflected two competing perspectives. One focuses on border security, irregular migration, terrorism and the pressure that large refugee populations are perceived to place on public services and state resources. The other emphasises Kenya's obligations under international refugee and human rights law, the risks of returning refugees to countries where conflict and persecution persist, and the potential economic and social contributions that refugees, together with humanitarian assistance, can make to host communities.⁵³⁰

⁵²⁶ See Government of Kenya, Department of Refugee Services, *Shirika Plan for Refugees and Host Communities* (March 2025); Department of Refugee Services, *Government Launches Shirika Plan to Enhance Refugee and Host Communities Inclusion* (2 April 2025) <<https://refugee.go.ke/node/381>> accessed 1 May 2026.

⁵²⁷ *Ibid*

⁵²⁸ See Amnesty International, *Nowhere Else to Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya* (Index No AFR 32/5118/2016, 14 November 2016) pp. 7-13; BBC News, Kenya announces Dadaab refugee camp will close by November (31 May 2016) <<https://www.bbc.co.uk/news/world-africa-36418604>> accessed 15 May 2026

⁵²⁹ UNHCR, *UNHCR Urges Kenyan Government to Rethink Dadaab Closure Announcement* (14 April 2015) <<https://www.unhcr.org/uk/news/stories/unhcr-urges-kenyan-government-rethink-dadaab-closure-announcement>> accessed 15 May 2026.

⁵³⁰ See Human Rights Watch, 'Welcome to Kenya': Police Abuse of Somali Refugees (17 June 2010) <<https://www.hrw.org/report/2010/06/17/welcome-kenya/police-abuse-somali-refugees>> accessed 15 May 2026; See Irina Mosel, Amy Leach and Karen Hargrave, *Public Narratives and Attitudes towards Refugees and Other Migrants: Kenya Country Profile* (Overseas Development Institute, August 2020); Erick Ochieng Otieno, Felistus Mwikali and Norvy Paul, 'Refugees and National Security in Kenya: A Case Study of Eastleigh, Kamukunji Constituency, Nairobi County' (2022) 5(1) *International Journal of Public Policy and Administration* 87-111

Media coverage of asylum in Kenya is also largely driven by major events. Announcements about the closure of Dadaab or Kakuma, government repatriation initiatives, terrorist attacks, large-scale security operations and significant court judgments tend to attract extensive attention. By contrast, the everyday operation of the asylum system, including registration delays, refugee status determination, appeals and reports of people being turned away at the border, receives relatively little sustained coverage. As a result, public debate often focuses on moments of crisis rather than on how the asylum system functions in practice. This can create the impression that refugee governance is primarily about security threats and camp management, while the routine legal and administrative processes that shape access to protection remain largely out of public view.

Relevance of the topic in public opinion

Evidence on Kenyan public attitudes to asylum is limited, but the most comprehensive recent data come from the 2024 Afrobarometer survey. The findings suggest a mixed picture. While 57% of respondents considered immigrants to have a positive economic impact, 71% said they would not object to having immigrants as neighbours and 62% expressed the same view towards refugees. At the same time, most respondents supported tighter admission policies: 59% favoured admitting fewer refugees and 20% preferred admitting none. These findings suggest that many Kenyans distinguish between accepting refugees already living in their communities and supporting the admission of additional refugees. Although concerns about security, economic pressures and public services are frequently raised in political and media debates, the survey does not establish that these factors directly explain public attitudes.⁵³¹

Implications that political debate and public opinion have on what occurs in judicial bodies

Political debate influences refugee adjudication in Kenya primarily by shaping the policies that eventually come before the courts, rather than by determining how judges decide individual cases. Security concerns, particularly following terrorist attacks, have repeatedly prompted government measures such as urban-relocation directives, attempts to close Dadaab and Kakuma, and repatriation initiatives, all of which have generated significant constitutional and refugee-law litigation.⁵³²

In these cases, government authorities have commonly justified measures on grounds of national security, public order and limited public resources. The courts have nevertheless required such claims to comply with constitutional guarantees, including legality, fair administrative action, public participation and the principle of non-refoulement. The High Court's 2024 decision on the proposed closure of Dadaab and Kakuma reaffirmed that refugee policy remains subject to judicial review, even where national security is invoked.⁵³³ The effects of political debate may be felt more strongly at the administrative level. Police, immigration officials and prosecutors operating in a securitised environment may initially treat undocumented arrivals as immigration offenders before their protection needs are assessed. High Court decisions involving irregular entry and delayed asylum claims suggest that refugee-law safeguards have not always been applied consistently at the first point of contact.⁵³⁴

Political priorities also influence how administrative resources are allocated. A security-oriented approach tends to emphasise border control, screening and enforcement, whereas the more recent Shirika Plan

⁵³¹ Anne Okello, *Kenyans Support Cross-Border Mobility for East Africans, but Want Fewer Immigrants* (Afrobarometer Dispatch No 950, 25 February 2025)

⁵³² See *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR; *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR; *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*.

⁵³³ See *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others*; *Kenya National Commission on Human Rights & another (Interested Parties)* [2024] KEHC 2973 (KLR)

⁵³⁴ *Rada Haile v Attorney General & others* [2012] eKLR; *Majid Ali Abdu v Republic* [2021] eKLR; *Serogo Alex v Republic* [2022] KEHC 2827 (KLR).

promotes documentation, socio-economic inclusion and support for host communities. These policy choices shape the volume and nature of cases reaching the RSEP, the RSAC and the courts.⁵³⁵

Overall, asylum remains politically important in Kenya, particularly during periods of insecurity or major policy change. While political and media narratives influence the broader environment in which refugee decisions are made, the superior courts have consistently maintained that executive action must comply with constitutional guarantees and Kenya's obligations under international refugee law.⁵³⁶

D. Corruption

Corruption can create a serious practical barrier to asylum in Kenya. There have been instances of corruption involving police and other security personnel at the border, along routes leading to Dadaab, during arrests and detentions, and in security operations in Nairobi. However, there are no known cases of corruption within the formal decision-making of the RSEP, the RSAC or the superior courts.

Human Rights Watch documented systematic police extortion of Somali asylum seekers travelling from the Kenya-Somalia border towards Dadaab. Officers reportedly stopped vehicles, demanded money for onward passage and arrested or detained people who could not pay. Some asylum seekers were threatened with prosecution or return to Somalia even after explaining that they were travelling to the camps to seek protection.⁵³⁷ Corruption therefore did more than impose an additional financial cost: it could prevent an asylum seeker from reaching a registration centre and gaining access to the asylum procedure.

Extortion also occurred during detention. Human Rights Watch found that asylum seekers held at Garissa Police Station sometimes relied on relatives and intermediaries to pay police officers for their release. Reported demands ranged from KSh20,000 to KSh50,000. Those unable to pay could remain in detention or be brought before a court, despite the protection afforded to persons entering Kenya to seek asylum.⁵³⁸ A similar situation was reported among urban refugees in Eastleigh, where incidents of police harassment and extortion were widely documented. Refugees reported being stopped or arrested on allegations of unlawful presence and then released after paying money. The same research found that fear of arrest restricted movement, including journeys to UNHCR offices for registration, documentation and refugee-status procedures.⁵³⁹ These practices could therefore interfere with access to asylum even where a person had already entered Kenya.

Corruption was particularly visible during Operation *Usalama* Watch in 2014. Amnesty International and the Kenya National Commission on Human Rights documented arbitrary arrests, ethnic profiling, confiscation of identity documents, theft and demands for payment from Somalis, including registered refugees and asylum seekers.⁵⁴⁰ Amnesty reported, for example, a case in which KSh7,500 was paid to secure the release of three people.⁵⁴¹ The KNCHR also found that some detainees were not entered in official police records, creating opportunities for extortion and weakening accountability.⁵⁴² These payments in these circumstances are not the regular administrative charges. As the reports have shown,

⁵³⁵ See Government of Kenya, Department of Refugee Services, *Shirika Plan for Refugees and Host Communities* (March 2025); Department of Refugee Services, *Government Launches Shirika Plan to Enhance Refugee and Host Communities Inclusion* (2 April 2025) *Op cit*.

⁵³⁶ See *Legal Advice Centre t/a Kituo Cha Sheria & 5 others v Attorney General & 4 others* [2024] KEHC 2973 (KLR).

⁵³⁷ Human Rights Watch, *"Welcome to Kenya": Police Abuse of Somali Refugees* (17 June 2010) pp. 25-35

⁵³⁸ *Ibid* p.34-49

⁵³⁹ See Sara Pavanello, Samir Elhawary and Sara Pantuliano, *Hidden and Exposed: Urban Refugees in Nairobi, Kenya* (Humanitarian Policy Group Working Paper, Overseas Development Institute, March 2010)

⁵⁴⁰ Amnesty International, *Somalis Are Scapegoats in Kenya's Counter-Terror Crackdown* (Index AFR 52/003/2014, May 2014) pp. 6-11; See Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch* (July 2014)

⁵⁴¹ Amnesty International, *Somalis Are Scapegoats in Kenya's Counter-Terror Crackdown* (Index AFR 52/003/2014, May 2014) p. 6.

⁵⁴² Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch* (July 2014) p.3.

they were extracted through the threatened or actual use of arrest, detention, confiscation of documents or removal. Refugees without documentation, or whose documents were ignored or confiscated, were particularly vulnerable because they had fewer practical means of challenging police action.

Corruption and fraud may also affect access to refugee services. Registration, appointments, refugee status determination, documentation and resettlement services are formally free of charge. UNHCR Kenya warns refugees not to pay anyone to add a child to a file, schedule an appointment or obtain refugee status or resettlement services. It describes demands for such payments as fraud or corruption and provides channels through which suspected misconduct can be reported.⁵⁴³ Private intermediaries may also exploit refugees by claiming that they can accelerate an appointment, influence an RSD decision or secure resettlement in exchange for money. Such claims may cause financial loss and can place applicants at further risk where intermediaries encourage them to submit false documents or inaccurate information. UNHCR nevertheless emphasises that no payment can legitimately secure resettlement or preferential treatment.⁵⁴⁴

There is no reliable evidence indicating how widespread these practices are across Kenya's asylum system, nor do the available reports demonstrate systemic corruption within the RSEP, the RSAC, or the courts. Therefore, it is safer to conclude that corruption appears to operate primarily at points where asylum seekers interact with officials who exercise coercive powers or control access to services. By causing delays, facilitating detention, withholding documentation, or obstructing access to registration and asylum procedures, such practices can effectively determine whether applicants are able to access formal protection mechanisms in practice.

Sources concerning corruption in asylum access adjudication

There are several Kenya-specific sources on corruption affecting access to asylum, but relatively little published research examines corruption within the formal determination or appeal of asylum claims. The clearest evidence comes from reports by Human Rights Watch, Amnesty International and the Kenya National Commission on Human Rights discussed in the foregoing part. These sources document police extortion, arbitrary arrest, confiscation of documents and demands for payment from asylum seekers and refugees at the Kenya-Somalia border, on routes leading to Dadaab and during security operations in Nairobi.⁵⁴⁵ They show that a person's inability to pay could lead to continued detention, prosecution, obstruction of onward travel or, in some reported cases, return towards Somalia without effective access to the asylum procedure.

Academic and policy research on urban refugees provides similar evidence. Research conducted in Nairobi found that refugees frequently associated police stops and arrests with demands for money. Fear of arrest and extortion also discouraged some refugees from travelling to UNHCR offices and other places where they could obtain registration, documentation or protection services.⁵⁴⁶ This evidence helps explain how corruption can affect access to adjudication without necessarily influencing the eventual substance of an RSD decision.

UNHCR Kenya also recognises the risk of fraud and corruption in the provision of refugee services. Its public guidance repeatedly states that registration, appointments, refugee status determination, documentation and resettlement services are free. It asks refugees and asylum seekers to report anyone

⁵⁴³ UNHCR, 'Refugee Status Determination' (UNHCR Kenya) <<https://www.unhcr.org/ke/what-we-do/refugee-status-determination>> accessed 1 May 2026.

⁵⁴⁴ UNHCR, 'Resettlement' (UNHCR Kenya Help) <<https://help.unhcr.org/kenya/helpful-services/resettlement/>> accessed 1 May 2026.

⁵⁴⁵ Human Rights Watch, "Welcome to Kenya": Police Abuse of Somali Refugees (17 June 2010); Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch* (July 2014); See Human Rights Watch, "You Are All Terrorists": Kenyan Police Abuse of Refugees in Nairobi (Human Rights Watch, 29 May 2013)

⁵⁴⁶ Sara Pavanello, Samir Elhawary and Sara Pantuliano, *Hidden and Exposed: Urban Refugees in Nairobi, Kenya* (Humanitarian Policy Group Working Paper, Overseas Development Institute, March 2010) pp.7-18.

who demands payment for these services.⁵⁴⁷ These warnings cover misconduct by officials, staff, partners and private intermediaries who falsely claim that they can accelerate an appointment, influence a status decision or secure resettlement.

Beyond sources from Human Rights Watch and Amnesty International, there are other investigative journalism reports of allegations involving refugee registration and documentation. For example, Ethiopian Oromo refugees interviewed by *The New Humanitarian* reported demands for money in connection with police encounters and access to documentation. Kenyan refugee authorities denied that their staff charged for registration and stated that refugee services were free.⁵⁴⁸ Although this report does not by itself independently establish the scale of corruption with the registration or RSD authorities, it demonstrates how entrenched the problem is and the level of institutional responses. The available sources demonstrate that corruption can obstruct the route into and through the asylum system. They do not provide systematic information on the number of complaints against DRS or asylum adjudicators, the proportion of applicants asked to make unofficial payments, or the outcome of investigations into alleged corruption. Nor do they establish that applicants have routinely purchased RSD recommendations, RSAC decisions or judicial outcomes.

Even UNHCR's refugee status determination and resettlement operations in Nairobi have been the subject of a formal investigation. In the early 2000s, the UN Office of Internal Oversight Services investigated a criminal network involving several UNHCR personnel and individuals outside the organisation.⁵⁴⁹ This demonstrates that corruption has previously reached formal protection processes, but it predates Kenya's present statutory and institutional arrangements and should not be treated as evidence of current practices within the RSEP or RSAC.

In summary, it can be concluded that corruption can restrict access to registration, documentation, liberty and protection, particularly where police or other gatekeepers control an applicant's movement. However, there is not enough publicly available evidence to conclude that bribery routinely determines formal RSD, appellate or judicial outcomes in Kenya.

Influence on judicial and quasi-judicial decision-making

Corruption influences asylum adjudication in Kenya even without evidence that judges or refugee status decision makers themselves have acted improperly. Its principal effects are indirect, operating before a claim reaches the formal decision-making process.

Most importantly, corruption determines whether an asylum claim is ever registered. Human Rights Watch documented cases in which police demanded money from Somali asylum seekers during interception, transport and detention. Those unable to pay risked prolonged detention or return before reaching the refugee authorities, meaning that no asylum application or administrative decision was ever created.⁵⁵⁰ In such circumstances, the RSEP, the RSAC and the courts cannot consider a claim that has never entered the formal system.

Corruption may also affect the quality of the official record available to decision-makers. Where arrests, detention or release occur informally, there may be little or no documentation of an individual's request for protection or allegations of mistreatment. Decision-makers may therefore receive an incomplete

⁵⁴⁷ UNHCR, 'Refugee Status Determination' (UNHCR Kenya) *Op cit*; UNHCR, 'Resettlement' (UNHCR Kenya Help) *Op cit*.

⁵⁴⁸ Charlie Ensor, 'Ethiopian Oromo Refugees Face Bribes, Harassment in Kenya' *The New Humanitarian* (12 January 2018) <<https://www.thenewhumanitarian.org/feature/2018/01/12/ethiopian-oromo-refugees-face-bribes-harassment-kenya>> accessed 1 May 2026.

⁵⁴⁹ Human Rights Watch, *Hidden in Plain View: Refugees Living Without Protection in Nairobi and Kampala* (21 November 2002) <<https://www.hrw.org/reports/2002/kenyugan/kenyugan1002%20ap%20alter-25.htm>> accessed 1 May 2026.

⁵⁵⁰ See Human Rights Watch, *"Welcome to Kenya": Police Abuse of Somali Refugees* (17 June 2010); Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch* (July 2014); Human Rights Watch, *You Are All Terrorists: Kenyan Police Abuse of Refugees in Nairobi* (Human Rights Watch, 2013)

administrative record, making it more difficult to assess whether the person sought asylum at the earliest opportunity or was prevented from doing so.⁵⁵¹

Fraud by private intermediaries presents a further risk. UNHCR Kenya has flyers and publications on its website warning refugees not to pay anyone claiming to influence registration, refugee status determination or resettlement. It also cautions that false identity information, fabricated family relationships or manipulated case files constitute fraud and may jeopardise protection or resettlement opportunities.⁵⁵² Such practices may undermine the credibility of otherwise genuine claims if inaccurate information is introduced into the asylum process.

Overall, the available evidence demonstrates that corruption can obstruct access to registration, documentation and protection procedures, thereby influencing which cases ultimately reach Kenya's adjudicatory institutions. However, the reviewed literature and case law do not demonstrate that judges, members of the RSEP or members of the RSAC have routinely accepted bribes or that corruption is systematically embedded in formal refugee-status determination or judicial decision-making. The evidence therefore supports a more limited conclusion: corruption primarily affects access to adjudication rather than the integrity of adjudication itself.

E. Other socio-political factors

Several additional factors originating outside the judicial system help explain asylum access adjudication in Kenya.

Securitisation and counterterrorism

The most significant factor is the continuing securitisation of refugee policy, particularly in relation to Somali nationals. Refugees and asylum seekers from Somalia have frequently been portrayed not only as people seeking protection but also as potential security threats associated with *Al-Shabaab*, irregular border movements and terrorism.⁵⁵³ This security framing influences how police, immigration officers and other security agencies respond to asylum seekers at first contact. It may encourage arrest, screening, encampment, relocation or removal before an individual's protection needs are properly identified. As discussed in Part 1, the association of Somali refugees with terrorism intensified following the 2013 Westgate and 2015 Garissa University attacks and contributed to security operations that disproportionately affected Somali communities.⁵⁵⁴

The implications for adjudication are most apparent when courts review executive measures justified on national security grounds. While security is a legitimate state concern, courts have repeatedly emphasised that refugee protection requires an individual assessment and cannot be displaced by generalised assumptions based on nationality alone.⁵⁵⁵

Ethnicity, nationality and racial profiling

Refugee governance in Kenya also intersects with the treatment of Kenyan citizens of Somali ethnicity. Police operations have not always distinguished clearly between undocumented migrants, asylum seekers,

⁵⁵¹ Sara Pavanello, Samir Elhawary and Sara Pantuliano, *Hidden and Exposed: Urban Refugees in Nairobi, Kenya* (Humanitarian Policy Group Working Paper, Overseas Development Institute, March 2010) pp.7-18; Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch* (July 2014) p.3.

⁵⁵² UNHCR, 'Refugee Status Determination' (UNHCR Kenya) *Op cit*; UNHCR, 'Resettlement' (UNHCR Kenya Help) *Op cit*.

⁵⁵³ Human Rights Watch, *"You Are All Terrorists": Kenyan Police Abuse of Refugees in Nairobi* (Human Rights Watch, 29 May 2013) pp.17 & 43.

⁵⁵⁴ See Mwangi, Oscar Gakuo, "The 'Somalinisation' of Terrorism and Counterterrorism in Kenya: The Case of Refoulement." *Critical Studies on Terrorism* 2018 12 (2): 298–316; BBC News, 'Westgate attack: Kenya sacks immigration officer' 25 October 2013. Available at: <<https://www.bbc.co.uk/news/world-africa-24679133?utm=>> Amnesty International, *Somalis Are Scapegoats in Kenya's Counter-Terror Crackdown* (Index AFR 52/003/2014, May 2014) p. 6.

⁵⁵⁵ *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR; *Attorney General v Kituo Cha Sheria & 7 others* [2017] KECA 773 (KLR); *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.

recognised refugees and Kenyan Somalis. Human Rights Watch documented abuses affecting all four groups during policing operations in Nairobi and north-eastern Kenya.⁵⁵⁶

This overlap can affect asylum adjudication because identity, nationality and legal status may be disputed from the outset. Applicants may struggle to establish whether they are Kenyan citizens, refugees, asylum seekers or irregular migrants, particularly where identity documents have been confiscated, lost or never issued. Ethnic profiling can therefore contribute to wrongful detention and increase the evidential burden on individuals seeking protection.⁵⁵⁷

Humanitarian funding and institutional resources

Kenya's asylum system depends heavily on cooperation between the Government, UNHCR, humanitarian organisations and international donors. UNHCR continues to provide technical and operational support to Kenya's refugee status determination system, while the asylum system has faced a substantial backlog of pending claims.⁵⁵⁸ Resource constraints can affect staffing, interpretation, registration capacity, documentation, legal aid and the speed with which asylum claims are processed. Although funding shortages do not alter the legal definition of a refugee, they can affect the practical capacity of institutions to apply refugee law effectively.⁵⁵⁹

The Government's Shirika Plan seeks to shift from a predominantly humanitarian response towards a government-led, development-oriented approach that integrates refugees and host communities. Its success, however, depends heavily on sustained donor support and effective coordination between national and county governments, UN agencies, civil society and development partners.⁵⁶⁰

Encampment, local political economy and host-community relations

Dadaab, Kakuma and Kalobeyei are not only places of refuge but also important economic and political spaces. Refugees, host communities, humanitarian organisations, businesses and county authorities all have interests in employment, land, water, infrastructure and public services.⁵⁶¹ These competing interests can generate both support for and resistance to refugee inclusion. Humanitarian programmes create employment, markets and infrastructure, but large refugee populations may also increase perceptions of competition over land, grazing areas, water and public services. Consequently, disputes concerning camp closure, freedom of movement and local integration cannot be understood solely as questions of immigration control.⁵⁶²

The Shirika Plan seeks to address these challenges by integrating refugee and host-community services while promoting local economic development and climate resilience. Whether this approach succeeds will depend largely on the availability of financial resources and the equitable distribution of benefits among host communities and refugees.

⁵⁵⁶ See Human Rights Watch, *"You Are All Terrorists": Kenyan Police Abuse of Refugees in Nairobi* (Human Rights Watch, 29 May 2013)

⁵⁵⁷ Kenya National Commission on Human Rights, *Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch* (July 2014) pp. 4-13.

⁵⁵⁸ UNHCR, *Kenya Annual Results Report 2024* (June 2025) pp.10-11.

⁵⁵⁹ See *Ibid*; UNHCR, *Kenya Annual Results Report 2025* (May 2026)

⁵⁶⁰ Department of Refugee Services, *Shirika Plan for Refugees and Host Communities 2025–2036* (Government of Kenya, 2025); Department of Refugee Services, *Shirika Plan for Refugees and Host Communities 2025–2036* (Government of Kenya, 2025) <<https://refugee.go.ke/sites/default/files/2025-04/SHIRIKA%20PLAN%20FOR%20REFUGEES%20AND%20HOST%20COMMUNITIES.pdf>> accessed 30 July 2026.

⁵⁶¹ Alexander Betts, Naohiko Omata and Olivier Sterck, *Refugee Economies in Kenya* (Refugee Studies Centre, University of Oxford 2018).

⁵⁶² See World Bank and UNHCR, *Understanding the Socioeconomic Conditions of Refugees in Kenya: Volume A – Analytical Report* (2024); Cindy Horst, *Transnational Nomads: How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya* (Berghahn Books 2006)

Regional diplomacy and transnational repression

Kenya's regional and bilateral relationships can affect the treatment of asylum seekers. This is particularly visible in relations with Somalia. Kenya, Somalia and UNHCR concluded a Tripartite Agreement in 2013 to govern the voluntary, safe and dignified return of Somali refugees. However, following the 2015 Garissa University attack, Kenyan officials called for the closure of Dadaab and accelerated returns to Somalia.⁵⁶³ Diplomatic engagement between the three parties subsequently reaffirmed that repatriation must remain voluntary, although human rights organisations later reported that some refugees were pressured to return.⁵⁶⁴

Similar concerns arise where Kenya cooperates with foreign governments on security, extradition or intelligence matters. In October 2024, several Turkish nationals reportedly registered with UNHCR were removed from Kenya despite protection concerns, prompting criticism from human rights organisations.⁵⁶⁵ Where removals occur before an asylum application or an appeal has been determined, judicial scrutiny is often limited to urgent constitutional or judicial review proceedings rather than the ordinary asylum process.

Language, literacy and access to information

Kenya's asylum population comes mainly from the Horn of Africa and the Great Lakes region and is linguistically diverse. Research on refugee status determination in Kenya identifies Somali, Arabic, Amharic, Tigrinya, French, Kinyarwanda, Kirundi and Lingala among the principal languages for which interpretation has been required.⁵⁶⁶

Language barriers may affect an applicant's ability to understand registration requirements, explain a fear of return, review interview records and lodge an appeal. Interpretation quality can also influence credibility assessments where inconsistencies arise through misunderstanding rather than dishonesty. These challenges are often greatest in police stations, remote border areas and lower courts where specialist interpreters may be unavailable.

As stated earlier, the Refugee Act 2021 together with the Regulation contains safeguards intended to reduce these risks. Refugee officers must ensure that applicants understand the procedure, their rights and responsibilities, and the role of the interpreter. The Commissioner must also provide interpreters where necessary.

Gender, sexuality and prevailing social norms

According to a UNHCR staff member, gender and prevailing social norms may also shape asylum procedures. Women and girls may be reluctant to disclose sexual violence, forced marriage or other gender-based harms, particularly where male officials or interpreters conduct interviews. Family and community pressures may likewise affect whether an individual feels able to pursue an independent protection claim. LGBTI asylum seekers face additional challenges. Amnesty International and the National Gay and Lesbian Human Rights Commission have documented violence, discrimination and inadequate protection for LGBTI refugees in Kakuma, noting that prejudice and insecurity can discourage disclosure and hinder effective access to protection procedures.⁵⁶⁷

⁵⁶³ See Mwangi, Oscar Gakuo, "The 'Somalinisation' of Terrorism and Counterterrorism in Kenya: The Case of Refoulement." *Critical Studies on Terrorism* 2018 12 (2): 298–316; Amnesty International, *Somalis Are Scapegoats in Kenya's Counter-Terror Crackdown* (Index AFR 52/003/2014, May 2014) p. 6.

⁵⁶⁴ UNHCR, *Voluntary Repatriation of Somali Refugees from Kenya: Operations Strategy 2015–2019* (29 July 2015)

⁵⁶⁵ Humphrey Malalo, "Turkey Says Four Suspects Detained in Kenya Brought Home" *Reuters* (22 October 2024) <<https://www.reuters.com/world/africa/kenya-says-it-deported-four-turkish-refugees-back-home-2024-10-21/>> accessed 30 July 2026.

⁵⁶⁶ E Odhiambo-Abuya, "Parlez-vous l'anglais ou le swahili"? *The role of interpreters in Refugee Status Determination interviews in Kenya*. Forced Migration Review. <<https://www.fmreview.org/odhiamboabuya/>>

⁵⁶⁷ Amnesty International and National Gay and Lesbian Human Rights Commission, *Kenya: "Justice like any other person" – Hate Crimes and Discrimination against LGBTI Refugees* (AFR 32/6578/2023, Amnesty International, May 2023). pp.7-8

Climate and Environmental Pressures

Drought, flooding and pressure on natural resources affect both displacement within the Horn of Africa and conditions in Kenya's refugee-hosting counties. Climate shocks, often interacting with conflict and insecurity, have contributed to internal and cross-border displacement in the region.⁵⁶⁸ These pressures are particularly significant in Garissa and Turkana, where most of Kenya's refugees are hosted and where communities already face water shortages, food insecurity, limited services and a degraded natural-resource base.⁵⁶⁹ Scarcity of water and pasture may also contribute to tensions between refugees and host communities.⁵⁷⁰ In 2025, UNHCR reported that drought and flooding continued to place additional pressure on resources and infrastructure in Kenya's refugee-hosting areas.⁵⁷¹

These mixed drivers of displacement may complicate refugee status determination. Decision-makers must distinguish claims falling within the 1951 Refugee Convention from those protected under the broader definition contained in the 1969 OAU Refugee Convention, which extends protection to people compelled to leave their country because of events seriously disturbing public order.⁵⁷²

Overall implications

These socio-political factors affect asylum adjudication principally by shaping who reaches the procedure, how state officials initially characterise the person, what evidence is available and which arguments the executive presents when defending restrictive measures.

As seen in the foregoing parts, securitisation and ethnic profiling can encourage collective assumptions, corruption and informal removal can prevent cases from reaching adjudicators. Funding shortages can generate delay and procedural inequality; cultural and linguistic factors can impair disclosure; and diplomacy can expose politically sensitive applicants to removal outside ordinary procedures.⁵⁷³

Judicial and quasi-judicial bodies do not merely apply refugee law in isolation. They operate within this broader environment and must determine whether decisions presented as matters of security, administrative necessity, cultural practice or resource management comply with the requirements of individual assessment, procedural fairness, equality and non-refoulement.

⁵⁶⁸ UNHCR, *UNHCR Drought Response Emergency Appeal: Horn of Africa, May–December 2022* (June 2022) pp. 3-8.

⁵⁶⁹ See World Bank, *Kenya Development Response to Displacement Impacts Project: Additional Financing Social Assessment Report* (May 2018).

⁵⁷⁰ *Ibid* pp. ix-x

⁵⁷¹ UNHCR, *Annual Results Report 2025: Kenya* (8 May 2026) p.4.

⁵⁷² Art I(2), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)

⁵⁷³ Humphrey Malalo, 'Turkey Says Four Suspects Detained in Kenya Brought Home' *Reuters* (22 October 2024) <<https://www.reuters.com/world/africa/kenya-says-it-deported-four-turkish-refugees-back-home-2024-10-21/>> accessed 30 July 2026.