



MEMORANDUM

**Proposals to the Judiciary on the Use of Video Conferencing in
Judicial Proceedings during the Covid-19 Pandemic**

Presented to

The Chief Justice of the Republic of Kenya

By



The Kenya ICT Action Network (KICTANet)

www.kictanet.or.ke

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Background

As of 23 April 2020, Kenya had 320 confirmed cases of Covid-19 virus, the highest within the East African Community with around 848 cases.¹ The government has taken steps to contain the spread of the pandemic including among others, implementing a nation-wide curfew, mandatory quarantine, contacts tracing and recommending hand washing and sanitizing, mask wearing and social distancing measures.

Following the announcement of the pandemic, the Judiciary and the National Council on the Administration of Justice (NCAJ) took measures to scale down the operations of courts across the country, and made recommendations to safeguard the health of court users and court officials. However, these drastic measures have resulted in calls to balance the need to ensure access to justice, service delivery and the health and safety measures. Consequently, the NCAJ has seen it fit to find ways to upscale court operations and quickly pivot them by fast-tracking the use of technology to ensure continued access to justice.²

In the past month, the NCAJ and various courts across the country have demonstrated their versatility, resilience, innovation and ability to leverage on video conferencing applications to hold meetings and deliver judgements and rulings respectively. These efforts to adapt are indeed commendable and KICTAnet applauds the effort. KICTAnet further welcomes the recent announcement by the Chief Justice that Microsoft has donated its Microsoft Teams video conferencing application for use by the Judiciary in the coming weeks.

The rapid adoption of video conferencing technologies are not without its fair share of challenges. Courts still need to address the legal issues surrounding technology usage, capacity of court users to understand and use of the technologies, the application features and the new procedures required. Further, the financial resources to ensure the availability of functional equipment, reliable internet connectivity and technical support will be key. A critical challenge in our view, is the lack of clear guidelines on etiquette and procedures when conducting court sessions through video conferencing. It is worth noting that while virtual court sessions are similar to open court proceedings, it is not enough to translate open court procedures to virtual sessions.

In light of this, KICTAnet makes the following recommendations:

¹ EAC CommonHealth Data Map <https://covidcheck.eac.int/>

² Statement on justice sector operations in the wake of the COVID-19 pandemic <http://ncaj.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>

General Recommendations

Legal Aspects

1. Define the types of matters for which video conference sessions may be used.
2. Require that video conferencing proceedings are conducted as judicial proceedings and therefore, all formalities, courtesies, etiquette, dressing, decorum, and protocols must be observed by all participating individuals.
3. Require that all relevant statutory provisions applicable to judicial proceedings shall apply to judicial proceedings through video conferencing.
4. Provide for the procedure to be adopted where a court may either *suo moto* or by an application of a party, for any person to appear before the court through video conferencing.
5. Specify whether the taking of evidence will be allowed during the virtual court sessions.

Responsibility for Video Conferencing

1. Designate specific court officials and staff to act as video conference coordinators at the Judiciary headquarters, at the court stations and in the individual court rooms. The designated court officials could be Judges, Magistrates, Clerks, IT staff, with requisite training on the operations of the video conferencing applications.
2. Specify the host or coordinator of the video conferences. The host can be the judicial officer managing the proceedings, court clerk or any other person appointed to assist with set-up and moderation. It should be noted that the authority of the delegated hosts carry the authority of the court.
3. Where virtual court sessions are conducted outside the court station, such as at detention facilities, the respective facility should also designate the responsible official to be responsible for coordinating the video conferencing.
4. The Judiciary should provide an appropriate budgetary allocation to cater for expenses related to the facilitation of the video conferencing facility such as a stable working internet connection. Where the facility is extended outside court stations such as detention facilities, allocation should be provided for transportation of officials, machinery and for internet connectivity.
5. The presiding judicial officer will have overall control of the session and can give directions on the procedures to be followed, who may control the application and the operation of the conference, and the seating arrangements to ensure all participants are in view.
6. The Judiciary should provide email and telephone contact information of the video conference coordinator at each court station.

Parties at the Session

1. Presiding judicial officers, designated court officials and staff.
2. Advocates on record for litigants.
3. Litigants who are parties to the case.
4. Court officers relevant to the case such as prison and police officers.
5. Third parties may be allowed to be present subject to the direction of the court conducting the session. This would depend on whether a court has a queue management system in place to manage the video conference facility, without disrupting an ongoing session.
6. The coordinators may, subject to the direction of the court, identify persons unconnected with the case present at the start of the video conference and ask them to explain their purpose for being present.
7. There should be a structured approach to the identification of parties present at the session. This should be either by indicating the party, case number, advocates names, and party being represented.

Arrangements before Commencement of Proceedings

Court Aspects

1. The court station should prepare a cause list for the virtual court session in advance following booking by parties. This should clearly indicate the parties, the specific time slots and estimated duration of the court sessions.
2. Parties planning to appear before court by video conference should share their contact information, including of the advocate expected to have conduct of the matter by video conferencing such as telephone, email and other information needed to set up the video conference with the designated official managing the video conferencing at the court. A suitable form to book for video conference sessions should be prepared and availed to parties who have been notified that their rulings or judgements are ready.
3. The cause list should be put online at least 3-days to the court session and could also be shared with the parties by email.
4. The duration of the sessions should be standardised to say between 10 to 30 minutes depending on the nature of the cases.
5. If translation or sign language will be required, a request for the same should be made, or the court should make arrangements in line with existing procedures.
6. The court shall confirm and record the identity of the parties present with the assistance of the coordinators prior to the session. The displayed names should either reflect the case number and the name of the person appearing, sufficient to enable the court to identify the matter and the parties.
7. The court shall satisfy itself that the parties appearing at the session can be seen and heard clearly, and also record that such parties can also clearly see and hear the court, and understand what is expected of them.
8. The court shall record the location of each of the parties appearing before it.
9. The court should inform parties that the proceedings may be recorded for future reference of court proceedings.

10. The coordinator shall announce or notify the parties of the name of the specific court, the presiding officer, and the officials present at the proceeding. The same can be indicated within the software application if the same allows for it. This is to avoid a situation where parties go into the wrong courtroom session.
11. The court should make it clear that physical presence will not be available owing to social distancing requirements.
12. The choice of software adopted should have a virtual waiting room to ensure good queue management of the participants.

Technical Aspects

1. Coordinators should ensure that the minimum technical requirements necessary are present at the court station to facilitate the video conference. This can include availability of working computers, laptops or mobile devices, stable electricity, reliable internet connectivity and broadband speeds, good lighting within the facility, and working microphones, high definition video cameras and sound systems of decent quality.
2. Depending on the choice of application selected by the Judiciary, its minimum requirements should be made public to other court users expected to join the calls to ensure they are adequately prepared.
3. The Judiciary should publicise the type of application such as Microsoft Teams, Zoom etc. selected for use and links to the application shared with parties wishing to join virtual court sessions, to enable them learn and understand how to use it beforehand. A link to a quick guide on how to use the software and join the call should be made available online or on the cause list.
4. To ensure smooth operations, all parties should set up, check and test their devices and connectivity links well in advance e.g. at least one hour before the commencement of the session. This is to allow for resolving of technical problems to ensure proceedings are conducted without interruptions. A lot of precious judicial time can be wasted on set-up and engaging in conversation like: "I can't hear you!", "Can you hear me?" "I can't see you!" "You are breaking off!", or screeching sounds from microphone interference, all of which can distract court sessions or be plain irritating and thus interfere with the sessions.
5. The tests should be done on the same application or system, equipment, connection and in the room the video conference is expected to be held.
6. The courts can invest in good earphones with noise-cancelling microphones and encourage parties to do the same, if they cannot find quiet spaces to join the video calls from.
7. The use of cabled connections for connectivity are recommended where available, as opposed to wireless connectivity such as bluetooth.
8. Parties should invest in alternative backup for electricity, internet and devices in case of any failures.
9. The parties appearing before the court should be available online and present in the virtual room earmarked for the video conference at least 30 minutes prior to the scheduled time.

10. Even once tested, network disruptions, power failures or equipment malfunctions may occur during a session leading to a loss of connection, deterioration of video or sound quality to an unacceptable level. While these may be quickly rectified, they may affect proceedings. Participants should notify the presiding officer of the same, and courts should note when such disruptions occur. Should the disruptions in a specific case last more than the allocated time for a specific session, or where a participant cannot be found, the court may if it deems fit, proceed, or adjourn the matter to a later date and time.
11. All parties appearing before the court session should join the video conference from a physical environment that is quiet and free from distractions. They should take steps to ensure they have: shut off background music from radios and televisions etc.; have a plain wall as their background; and to minimise their movement during the session.
12. Ensure that all parties adjust their video cameras viewfinders to only capture their portrait, that is, the image of their face and the top of the shoulders of each person at the session as one would appear in a passport photograph. Where there are more than one person appearing from one point, the camera should be adjusted to ensure an unobstructed view of all the persons present in the room.
13. If there are documents for example judgements to be shared, preparations should be made to ensure such documents are ready and available for transmission, or sharing, with respective parties by email or vice versa. Screen sharing may be utilised where a court judgement or ruling that is pre-typed, is to be read.
14. Parties should take note that due to poor internet connectivity or equipment, there could be delays between video being seen and sound being heard, or disruption of video quality if there is movement of the person before the camera. Appropriate allowances should be made to take into account such delays to avoid one participant talking over another. Likewise, participants should be advised to limit or reduce their body movements, and remain still as much as possible.
15. Participants should be advised to avoid coughing, whispering, shuffling papers, or tapping objects near the microphone to ensure the clarity of the transmission. Unless one has the floor, their microphones should be muted, and they should be aware of the status of their microphone at all times.
16. The Court should be responsible for organizing, calling back when there is a disconnection, and disconnecting calls at the conclusion of proceedings and indicating the same to the participants.
17. While the proceeding is in progress, technical staff from the court must remain available by telephone in case of a problem.
18. Consider enabling live streaming of court sessions on a web portal.
19. Fast-track the establishment of the e-filing system.
20. If the video quality is sub-optimal, the Court may direct parties to disable the 'video' option and proceed via audio only, once parties have been identified.
21. Recording of court should be prohibited and treated as contempt of court, unless expressly allowed by the court.

Conduct of Proceedings and Audience Management

1. The virtual session should as closely as possible, be conducted in accordance with the usual practice in open court. However, some variations may be necessary to cater for limitations introduced by the technology, the changed environment, and the geographic separation of the participants.
2. The judicial officer should only enter once all participants have been connected, are ready to proceed and have confirmed that they are able to see and hear each other.
3. At the conclusion of a hearing the judicial officer should be the first to leave, while other participants remain connected.
4. The court shall remind the parties of the duration of the session.
5. Allow parties to finish their points before they can get interrupted.
6. Confirm that they are done with their point and then mute them before proceeding to the next speaker in line with standards of practice in courts.
7. The presiding officers and clerks should be trained on how to handle the operations and various features of the video conferencing applications.
8. The court should have assistance of IT officers familiar with the application to coordinate the operation of the application to enable the court to focus on the proceedings.
9. The court should use people's names more often especially when addressing a point involving them, or if they will be expected to contribute or respond. As opposed to physical meetings people don't have the full advantage of reading full body language, and picking up certain cues, also people can get distracted easily.
10. To avoid multiple starts, stops and repetitions, parties should be advised to maintain their composure and remain seated during the sessions. Parties should be informed that it is not necessary for the person addressing the court to bow or stand during proceedings, provided they can be seen and heard.
11. The court may pick-up conversations with a quick and respectful summary of other people's points before responding, to ensure all details are captured.
12. The presiding officer shall be the moderator of the session.
13. The number of participants in the call should be limited, to ensure only those relevant and necessary are participating.
14. The sessions should be concise and laser-focused, as online meetings tend to overrun their timelines.
15. Speakers should be queued and may be asked to use application features such as the raised hand emoji, or indicate intention to speak on the chat board to request an opportunity to speak. They can then be unmuted to speak and then muted once it is confirmed they are finished.
16. The presiding officer should ensure that clear direction and opportunity is provided to parties intending to make interventions as would be done in open court. It should confirm that a party has finished their intervention before they are interrupted.
17. The presiding judicial officer should not attempt to solve technical problems within the session, and should allow the designated officers to handle such matters.
18. Sessions should be kept brief and shorter than usual, with allowance provided in case the session overruns the allocated time due to possible disruptions or distractions.

Conduct of Parties

1. All parties must introduce themselves at the commencement of each hearing, and their identities disclosed to the presiding officer at the commencement of the session.
2. If a party has to leave, they should give notice of the intended departure.
3. If a party is disconnected from the video conference for some reason, they should upon return, be afforded an opportunity by the court to notify the other parties on the point they got disconnected, and to be updated on what they missed, to enable them to catch-up with everyone.
4. All parties must have all the relevant information and documents at hand during the sessions such as notebooks, diaries etc. to avoid disruptions.
5. Parties should not engage in other personal matters or other work during the court session.