JUDICIAL DISCRETION: IT'S APPLICATION IN THE KENYAN COURTS.

BY

ANNE NDUNGE MUSAU

BLAW/NRP/103/0055

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT FOR THE AWARD OF A BACHELORS DEGREE OF LAW OF MOUNT KENYA UNIVERSITY.

SUBMITTED ON AUGUST 2013

ABSTRACT

The research project deals with the question of discretion as a method of application of the jurisprudential school of thought referred to as the legal realism. It focuses on judges' application of discretion in hard and new cases since legal realism is premised on judge made law. This is because a world without judicial discretion leads to having a mechanical judiciary and therefore cases will not be considered based on their instances but on a uniform method and this may lead to multiple instances of injustice. The research also shows judge made law is not always created whenever judges exercise discretion. It also shows that discretion only causes injustice whenever there is political influence. This is a changing circumstance thanks to the recent judicial reforms. However there are corrective mechanisms in place that are applied whenever injustice occurs. The research also shows that use of discretion by judges does not lead on overlap between the judiciary and the legislature. The research seeks to fill in gaps left by literature that is in existence as well as correct any distortions. The scope of the research is only limited to Kenyan courts and focuses only on discretion by judges as opposed to other administrators. Realists are of the opinion that judges do indeed apply discretion in deciding cases and those cases are decided on other factors other than legal rules. The research is aimed at emphasizing on the issue of discretion from the perspective of legal realism so as to be of help to those who seek to gain a better understanding of this school of thought. The research recommends that the legislature should modify laws to capture our dynamic society and to give judges more leeway in applying discretion which is wide and unfettered with minimal limitations.