THE UNEQUAL HARVEST

TAX INCENTIVES AND THE FRAGMENTATION OF KENYA'S ECONOMY

TRANSPARENCY INTERNATIONAL KENYA

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ACKNOWLEDGEMENT

Author – Transparency International Kenya
Every effort has been made to verify the accuracy of the information contained in this publication. Transparency International Kenya (TI-Kenya) does not accept responsibility for the consequences of the use of the publication's contents for other purposes or in other contexts. This publication was produced under TI-Kenya's Rallying Efforts to accelerate progress (REAP) Project, with support from the European commission's Directorate General for international Partnerships.

LIST OF ABBREVIATIONS

ASALs Arid and Semi-Arid Lands
CBOs Community Based Organisations
CEREB Central Kenya Regional Economic Bloc
EPZ Export Processing Zones
FCDC Frontier Counties Development Council
GDP Gross Domestic Product
IBEC Intergovernmental Budget and Economic Council
JKP Jumuiya ya Kaunti za Pwani
KAM Kenya Association of Manufacturers
KPDA Kenya Property Developers Association
LREB Lake Region Economic Bloc
MCA Members of County Assembly
NAKAEB Narok-Kajiado Economic Bloc
NITA National Industrial Training Authority
NOREB North Rift Economic Bloc
OECD Organisation for Economic Co-operation and Development
OSR Own-Source Revenue
PWDs Persons With Disabilities
SEKEB South Eastern Kenya Economic Bloc
SBP Single Business Permit
SMEs Small and Medium Enterprises
TVETs Vocational Education and Training institutions
VAT Value Added Tax

EXECUTIVE SUMMARY

This research was undertaken to ascertain how tax incentives drive economic inequality across the regional economic blocs in Kenya. The main objective of the study was to generate evidence-based fiscal practices and incentive schemes that exacerbate the inequality that constrains domestic resource mobilisation across regional economic blocs. The specific objectives were:

1. To establish the types of tax incentives granted by the national and county government.
2. To examine justifications for granting the incentives at the national and county government.
3. To investigate challenges facing the existing tax incentives schemes.
4. To investigate how incentives are causing inequality within and across regional economic blocs.
5. To make recommendations on how to overcome the identified challenges.

Methodology

The research relied on desktop review with a focus on reviewing the legal framework and reports on tax and own source revenue collection for counties.

Key Research Findings

From the research, the key findings were as follows:

a. At the time of the survey, the regional economic blocs did not have the legal framework to carry out their mandate, including structures for oversight. Therefore, fiscal and taxation policies are mainly formulated at the county governments level. There are however proposed amendments to the Public Finance Management Act, 2012 that would see the blocs form committees and undertake joint planning. [1]
b. Tax incentives such as deductions in investments that classify all counties equal outside Mombasa and Nairobi contribute to enhancing inequality across county development blocs since investors may prefer developed (cities) counties with good infrastructure like Kisumu and Nakuru, among others, unlike those under developed counties mainly in the FCDC region.

1 The Public Finance Management (Amendment) Bill, 2023

c. At the national and county level, some tax incentives enhance gender inequality since they target male-dominated sectors. For example, waivers of interest and penalties on land rates mainly benefit men, who are the majority landowners.
d. Most tax incentives targeting low-income earners have upper ceilings, whereas those targeting the rich do not have an upper ceiling for those qualifying.

For example, a first-time homeowner enjoys a waiver of stamp duty once only and PWDs waiver of income tax is capped at only KShs 150,000 monthly, whereas tax incentives targeting housing developers have no upper ceiling for qualifying developers. This, therefore, creates a bias as low-income earners are disproportionately affected by such incentives.

e. Fiscal policies and tax laws for most counties are not readily available in their respective websites and Internet searches. Most counties under study only published the Finance Bills and subsequently failed to publish the Finance Act once enacted by the county assemblies.
f. Most county governments do not have adequate fiscal policies to support an equitable tax system. This is mainly because most counties rely on the Finance Acts passed annually as the basis for levying taxes, and prescribing the tax rates and user fees, which results in uncertainty since, in every financial year, a new Finance Act is enacted.
g. Lack of access to information on budget, tax and fiscal policies constrains the ability of civil society organisations, community-based organisations and the citizenry to participate in the award of tax incentives and oversight the implementation of the incentives.
h. There is limited knowledge of tax and fiscal policy issues among most small-scale traders, farmers and local community-based organisations which hinders their ability to hold the National and County Governments accountable.
i. There are no clear policies for awarding tax incentives, especially at the county level, which often results in abuse of incentives by county governors to further political objectives.
j. The National and County Governments do not keep records of disaggregated data indicating gender and age of beneficiaries of the incentives, thus hindering effective oversight from the public and assessment of whether the incentives are reaching the target group.
k. There are massive enforcement deficits in most counties, which widens horizontal inequality i.e. persons in the same economic state or class should pay equal tax. For example, in Kisumu, boda boda operators do not pay taxes, whereas in other counties like Uasin Gishu they pay taxes.

l. lThere are existing inequalities across the regional economic blocs, most of which can be traced from the colonial period. After independence, fiscal policies such as Sessional Paper Number 10 of 1965 recommended that economic development should prioritise high potential areas, mainly areas formerly occupied by settlers, and insecurities in the arid and semi-arid lands (ASALs) enhanced inequality across regional blocs, then classified as provinces.

Recommendations

The research provided recommendations on what should be done in every incentive awarded on a specific tax, such as land rates, market fees and single business permits, among others, to reduce the widening inequality. In addition to the particular recommendation targeting every tax or user fee, there were general recommendations that, if adopted, would play a crucial part in enhancing equality. The main recommendations include the following:

a. There is an urgent need for concerted efforts from the National and County Governments to ensure enhanced security and development of key infrastructure in the FCDC bloc and other affected areas to make them competitive to attract investors seeking to benefit from incentives such as capital deductions for investments outside cities such as Nairobi and Mombasa.
b. The Senate should fast-track the enactment of the Public Finance Management (Amendment) Bill, 2023 to provide a legal framework for establishing regional economic blocs to support the implementation of economic blueprints and strategic plans.
c. In designing investment incentives such as investment deductions, the national government should consider the varying degrees in county development and adopt incentives explicitly targeting areas such as FCDC to ensure they remain competitive and benefit from the incentives.
d. There is a need to review and set policy objectives for awarding incentives at the national and county level. This will help stakeholders evaluate the incentives' benefits and assess whether their policy objectives have been achieved or whether there is a need for variation or termination of the incentive scheme. Additionally, this will help minimise cases of roadside award of tax incentives for political objectives.
e. At the national and county level, there is a need to keep public records on tax incentives in strict compliance with articles 210 of the Constitution and sections 82(4) and 165(4) of the Public Finance Management Act since, at the time of research, these records were not readily available to the public, hindering effective oversight. Notably, the records should have disaggregated data on the award of tax incentives to ensure monitoring of tax expenditure resulting from specific incentives.

f. Counties should enhance enforcement efforts to ensure tax/revenue laws are strictly and indiscriminately adhered to. This will eliminate revenue leakages, tax evasion and massive enforcement deficits that often lead to inequality, as only those considered weak/vulnerable pay taxes and user fees. In doing these, measures should be put in place to digitalise revenue collection processes and minimise intervention by middlemen like revenue collection clerks.
g. In the award of incentives, special consideration should be given to vulnerable groups. This should be achieved by focusing incentives on direct taxes and other user fees such as market fees, single business permits for small businesses, boda boda licences and other sectors dominated by members of vulnerable groups. Furthermore, where these incentives are awarded, there should be concerted efforts to ensure awareness creation and removal of barriers that often hinder access to the incentives, such as the need to renew PWD cards after every five years for persons with a permanent disability.
h. There should be enactment of statutes to enhance fiscal transparency and award of incentives, especially in most county governments. This will address the gap in county tax laws as most use annual Finance Acts to establish taxes and set the amounts payable. This makes it difficult to assess the objectives of specific tax and the compliance procedures, among others.
i. To enhance public participation at the national and county levels, where fiscal policies are likely to affect vulnerable groups, policies and laws should be simplified for dissemination to the citizenry and in some cases translated into Kiswahili and braille for wide access. Counties should also consider using vernacular radio stations, among others, to enhance participation and awareness of fiscal policies
j. The civil society should actively participate in championing tax justice and equality, by conducting training and sensitisation of vulnerable groups and community-based organisations on fiscal policies and tax incentives to enhance monitoring and oversight. There is also a need for continuous capacity building among elected officials and finance and economic departments at the county level to minimise inequalities resulting from tax incentives.
k. The National Assembly should fast track the enactment of the County Governments (Revenue Raising Process) Bill 2018 to allow harmonisation of county taxes and taxation laws and to ensure that there is a comprehensive legal framework to define specific taxes; a shift from the current practice where the annual Finance Acts provide for taxes some of which are not defined.

Conclusions and next steps

From this research, the objectives were met as follows:

1. The research demonstrated that tax incentives have exacerbated inequality.
2. Section two of the research demonstrated the existing gaps in fiscal policies and legal framework for tax incentives that have resulted in inequality across regional economic blocs and counties.
3. Most importantly, in sections four and five, the research identified inequalities resulting from tax incentives in select taxes and user fees at the national and county government, especially those affecting vulnerable groups like women, youth and PWDs.

Going forward, the enactment of the County Resource Development Bill 2021 and the County Governments (Revenue Raising Process) Bill 2018 will go a long way in establishing a solid legal framework to anchor regional economic blocs and provide a basis for harmonising taxes and tax incentives in counties, respectively. It is hoped that enacting and implementing these laws will address the lack of a legal framework for regional economic blocs and contribute towards harmonising taxes and fiscal policies at the counties. Most importantly, by adopting and implementing the features of an effective incentive scheme discussed in this report and reiterated in the Draft National Tax Policy, it is hoped that inequalities resulting from the award of incentives will be eliminated. If implemented, they will minimise inequalities brought by incentives and fiscal policies. Furthermore, at the county government level, there is an urgent need for technical assistance in formulating laws and policies to support revenue collection by defining the taxes and process for collecting taxes and awarding tax incentives. Finally, there is a need to create awareness among the citizenry on the effects of tax incentives and fiscal policies to develop a capacity for monitoring the award of incentives to ensure it is done in a fair, transparent and accountable manner which will immensely contribute to reducing inequality.

RESEARCH ON TAX INCENTIVES DRIVING ECONOMIC INEQUALITY ACROSS THE REGIONAL ECONOMIC BLOCS IN KENYA

1.1. Background

Kenya experienced tremendous economic growth in the last decade, which saw the World Bank confer it the lower middle-income status in 2015. This was attributed to its steady GDP growth of over $100 billion. [2] Key enablers included increased investments as it maintains its vanguard position as an entry point to the East African region, devolution, diversification of the economy and implementation of fiscal policy reforms. However, this growth has not been inclusive at the national and county levels. In 2017, a report by Oxfam indicated that 0.1 per cent of Kenyans own more wealth than the rest 99.9 per cent of Kenyans. [3]

At the devolved units, there exists wide inequality among counties regarding raising Own-Source Revenue (OSR). The Commission on Revenue Allocation report established that Nairobi City County has its OSR potential to finance 236 per cent of its current budget, whereas 15 counties have a source revenue potential capable of funding less than 10 per cent of their budgets.[4] Recent challenges such as the COVID-19 pandemic[5] and the Russia-Ukraine war [6] are threatening to slow down the efforts of National and County Governments to address inequality in all dimensions. Therefore, if this trend continues, Kenya risks not realising Vision 2030 and Sustainable Development Goals, especially those focusing on addressing inequality and poverty alleviation.

2 Kenya Inclusive Economic Growth' https://www.usaid.gov/sites/default/files/documents/Kenya_Economic_Growth_2022.pdf [accessed 15 May 2022].
3 Oxfam, 'Kenya: extreme inequality in numbers' available at https://www.oxfam.org/en/kenya-extreme-inequality-numbers [accessed 15 May 2022].
4 CRA, Recommendation on the Basis for Equitable Sharing of Revenue Between National and County Governments for Financial Year 2022/23 pg. 25. Available at https://cra.go.ke/wp-content/uploads/2021/11/FY-2022-2023-CRA-Recommendation-on-the-Basis-for-Equitable-Sharing-of-Revenue-Between-National-County-Governments.pdf [accessed 15 July 2022].
5 The World Bank, 'Kenya Economic Update: COVID-19 Erodes Progress in Poverty Reduction in Kenya, Increases Number of Poor Citizens' available at https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-covid-19-erodes-progress-in-poverty-reduction-in-kenya-increases-number-of-poor-citizens accessed 15 March 2022].
6 The UNDP, 'The Economic Impact of the War in Ukraine on Kenya's Economy' 13 July, 2022 available at https://www.undp.org/kenya/publications/economic-impact-war-ukraine-kenyas-economy [accessed 15 July 2022].

The grim statistics highlighted above demonstrate that fiscal and taxation policies are far from realising one of their key aims to redistribute income, thus reducing the gap between the rich and the poor. One of the key measures the government has resorted to in a bid to spur growth is the award of tax incentives. A 2021 Tax Expenditure Report published by the National Treasury established that from 2017 to 2020, the foregone revenue by the national government in the form of tax incentives was KShs 383.9 billion. [7]

The report further estimated that tax incentives constitute about 6 per cent of Kenya's GDP. As the government foregoes significant revenue amidst budgetary deficits and the repayment of public debt, the question is whether these incentives enhance inequality by ensuring income distribution.

Before devolution, inequality across the country was mainly associated with the winner-takes-all approach entrenched in the highly centralised system of governance.[8] In 2013, Kenya shifted to a devolved system of governance anchored in the 2010 Constitution. Under the devolved system of governance, fiscal decentralisation was one of the key pillars that aimed at enabling counties to generate OSR, receive an equitable share of the national budget and implement policies that address challenges in the counties. [9] Though the policy shift has seen a gradual increase in economic growth in the country, it has not significantly addressed the inequalities, especially those relating to fiscal policies, including awarding tax incentives.

To consolidate the gains of devolution, from 2016, most counties began forming regional economic blocs to increase economies of scale, attract investment, enhance inter-county trade and cooperation and promote peaceful co-existence among communities. [10] As the establishment and operationalisation proceed, there is a need to review fiscal policies and incentive schemes at the national and county level to identify those that enhance inequality and provide recommendations on ways to enhance equality.

7 The National Treasury and Planning 2021, Tax Expenditure Report, September 2021.
8 TJRC Report.
9 KNBS Report on Inequality.
10 Technical Support towards Strengthening County Regional Economic Blocs: Volume I: Status Report 2020 available at https://maarifa.cog.go.ke/sites/default/files/2022-08/Kenya%20County%20Regional%20Economic%20Integration%20Blocs%20Status%20Report%20%2C%20Volume%201.pdf [accessed 15 April 2022]

1.2. Scope of the Research

In this project, Transparency International sought to generate evidence-based fiscal practices and incentive schemes that exacerbate inequality and constrain domestic resource mobilisation in the regional economic blocs. In particular, the project seeks to:

i. Use the research findings to come up with viable alternatives that can serve to reduce inequalities at National and County levels.
ii. Establish a level playing field across all the Regional Blocs in Kenya through cost-effective revenue incentive schemes that minimise economic inequalities. The ultimate aim is to curb inequalities by addressing the root causes of the identified challenges and to strengthen the capacity of local Community Based Organisations (CBOs) alongside that of women and other marginalised groups to oversee the grant of revenue incentives, public funds spending and contribute to public policy.

In this research, tax incentives are broadly defined to encompass both tax incentives and revenue incentives sources awarded by counties on fees/charges such as user fees. Tax refers to a compulsory financial charge that a government imposes on a taxpayer to enable the latter fund public expenditures, in form of provision of public goods and services. At the national level, tax includes income tax and value added tax among others. [11] For county governments, taxes in the narrow sense are limited to property and entertainment taxes.[12] User fees or charges are fiscal burdens that the State or County government charges for the services it renders or the use of public goods.[13] The main motive for charging user fees is to defray or share the cost of providing a specific service or maintaining public infrastructure such as roads.

Examples of user fees include cess and market fees, among others. Where user fees do not go to defray the actual cost of offering a service and the revenue generated is appropriated to other sectors, it is considered to be a form of tax, thus blurring the difference between taxes and user fees.[14] Both taxes and user fees constitute revenue streams, and incentives awarded will be considered broadly as tax incentives in this research.

Tax incentives refer to fiscal benefits granted by a government to encourage investments in certain projects or to influence taxpayers to act in a particular

11 Geoffrey Morse and David Williams (5th ed.), Davies: Principle of Tax Law (London: Sweet and Maxwell, 2004) at 6.
12 Constitution art. 209(3).
13 Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion, Gonzaga Law Review, Vol. 38, 2 at 338-43.
14 Adamsmith 'Final Report: Own-Source Revenue Potential and Tax Gap Study of Kenya's County Governments' 17 Available at https://documents1.worldbank.org/curated/en/280021585886703203/pdf/Own-Source-Revenue-Potential-and-Tax-Gap-Study-of-Kenya-s-County-Governments-Final-Report.pdf [accessed 15 March 2022].

way the government considers beneficial to its policy objectives for a specified period.[15] They include tax exemptions, tax deductions, waivers and variations of user fees, especially at the counties. The fiscal benefits include tax exemptions, tax deductions, allowances, tax deferral and concessional tax rates or timing rules, such as accelerated depreciation of capital assets. Apart from tax incentives, there are non-tax incentives such as fertilizer subsidies, among others, that are outside the scope of this research, though they also have far-reaching ramifications on equality. Moreover, taxation of the mining industry is not discussed in this paper though there are incentives in the sector that often enhance inequality and contribute to illicit financial flows (IFFs), especially in developing countries.[16]

1.3. Research Objectives

The main objective of the study is to generate evidence-based fiscal practices and incentive schemes that exacerbate inequality that constrains domestic resource mobilisation across regional economic blocs. The following are the objectives of this research:

1. To establish the main tax incentives granted by the national and county government.
2. To examine justifications for granting the incentives.
3. To investigate challenges facing the tax incentives schemes.
4. To investigate how incentives are causing inequality within and across regional economic blocs.
5. To make recommendations on how to overcome the identified challenges.

1.4. Research Methodology

This employed a mixed research method that entailed both qualitative and quantitative methods. In qualitative research, the research incorporated both primary and secondary data sources. The primary data was obtained through a review of laws, mainly the Kenyan Constitution 2010, the County Governments Act, 2012,[17] the Public Finance Management Act, 2012[18] Finance Acts[19] and tax laws[20] at the national and county level.

15 Bryan A. Garner (8th ed.), Black's Law Dictionary (London: West Thompson, 2007) at 1502.
16 Africa High Level Panel Report on Illicit Financial Flows, 'Track It! Stop it! Get it!' pg. 68 available at https://au.int/sites/default/files/documents/40545-doc-IFFs_REPORT.pdf [7 March 2022].
17 No. 17 of 2012.
18 No. 18 of 2012.
19 This entailed mainly the Finance Act of 2019, 2020, and 2021 for the national and county governments.
20 Mainly the Income Tax Act CAP 470 Laws of Kenya; Value Added Tax Act No. 35 of 2013;

Relevant bills that were also reviewed[21] included reports from the Office of the Auditor General an, the Commission on Revenue Allocation and the Council of Governors, among others. Secondary sources of information were also relied upon in filling information gaps. These include judicial decisions, existing research and newspaper sources and other online sources.

1.4.1. Documents Reviewed

Constitution and Statutes

1. The Constitution of Kenya 2010
2. The County Governments Act No. 17 of 2012
3. The Public Finance Management Act No. 18 of 2012
4. The Income Tax Act No. 16 of 1973
5. The Value Added Tax Act No. 35 of 2013
6. Finance Acts and Bills at the national and select counties from 2018-2021

Tax Waiver statutes for select counties:

1. The Kisumu County Tax Waivers Administration Act, 2014
2. The Mombasa County Tax Waiver And Variation Act 2017
3. Kilifi County Tax Waivers Act, 2014
4. Meru County Tax Waivers Administration Act, 2020
5. The Finance (Criteria for Waiver or Exemption of Taxes, Fees or Charges) Regulations, 2013

Policy Documents

1. Sessional Paper No. 8 of 2012 on the National Policy for Development of Northern Kenya and other Arid Lands,
2. The Draft National Tax Policy 2021
3. The National Treasury and Planning 2021, Tax Expenditure Report, September 2021

Policy Documents for Regional Economic Blocs

1. The Lake Region Economic Blueprint A Better Life, 2015.
2. Lake Region Economic Bloc Strategic Plan (2022 – 2027)
3. Socioeconomic Blueprint for the Frontier Counties Development Council Towards a Regional and Territorial Approach for Local Development
4. North Rift Economic Bloc COVID-19 Social Economic Re-Engineering Recovery Strategy 2020/21-2022/23 September 2020
5. North Rift Economic Bloc (NOREB) Economic Blueprint (DRAFT) Growing Together 2021

21 County Governments (Revenue Raising Process) Bill 2018 (National Assembly Bill); The County Resource Development Bill 2021 (Senate Bill); and County Oversightand Accountability Bill 2018.

6. Central Region Economic Bloc (CEREB) Blue-Print Final Draft
7. Jumuiya ya Kaunti za Pwani 2030 Development Blueprint Jumuiya ya Kaunti za Pwani 2030 November 2019, abridged Draft Proposal.

Bills

1. County Governments (Revenue Raising Process) Bill, 2018
2. County Resource Development Bill 2021

1.5. County Regional Economic Blocs

Table 1: List of Economic Blocs and respective counties.

	Regional Economic Blocs and Membership	No. of Counties	Counties
1	North Rift Economic Bloc (NOREB)[22]	7	Uasin Gishu, Trans Nzoia, Nandi, Elgeyo Marakwet, West Pokot, Baringo, Turkana and Samburu
2	Central Kenya Regional Economic Bloc (CEREB) [23]	10	Tharaka Nithi, Meru, Nyeri, Laikipia, Murang'a, Kiambu, Nakuru, Nyandarua, Embu and Kirinyaga
3	Lake Region Economic Bloc (LREB) [24]	13	Bungoma, Busia, Homa Bay, Kakamega, Kisii, Kisumu, Migori, Nyamira, Siaya,Vihiga, Bomet, Trans Nzoia and Kericho
4	Jumuiya ya Kaunti za Pwani (JKP) [25]	6	Lamu, Kilifi, Kwale, Mombasa, Tana River and Taita Taveta
5	Frontier Counties Development Council (FCDC)[26]	7	Garissa, Wajir, Mandera, Isiolo, Marsabit and Tana River
6	South Eastern Kenya Economic Bloc (SEKEB)	3	Makueni, Kitui and Machakos
7	Narok-Kajiado Economic Bloc (NAKAEB)	3	Makueni, Kitui and Machakos

As devolution gained momentum, most counties as economic units were considered to be generally small in terms of area and population, thus lacking the economic potential to attract meaningful investment.[27]

22 https://noreb.go.ke/ [accessed 15 November 2022].
23 https://meru.go.ke/626/central-region-economic-bloc-cereb/ [accessed 15 November 2022].
24 https://lreb.or.ke/ [accessed 15 November 2022].
25 https://jumuiya.org/coast/ [accessed 15 November 2022].
26 https://fcdc.or.ke/ [accessed 15 November 2022].
27 Council of Governors, Technical Support towards Strengthening County Regional Economic Blocs: Volume I: Status Report 2020.

Therefore, it became necessary to have frameworks for effective inter-county cooperation to spur intercounty economic activities as envisaged in articles 6(2) and 189(2) of the Constitution, and section 6(3) of the County Government Act 2012. To this end, seven regional economic blocs have been formed, as listed in Table 1 above. Most of the blocs have already signed charters, ratified constituting statutes and formulated blueprints and policies apart from NAKAEB and SEKEB blocs that were developing their economic blueprints at the time of writing. Other blocs, such as the LREB, have completed their strategic plan, while FCDC and NOREB were also working on their strategic plans at the time of writing.

The constituting documents for some of these counties are charters, while others are registered as companies limited by guarantee. [28]

The blueprints from each of the economic blocs reviewed have key cross-cutting features as follows:

a. An in-depth situational analysis for each economic bloc, highlighting inequality and poverty as areas of urgent intervention and providing proposals to address persistent challenges; 29
b. The blueprints also single out women, youth and PWDs as a key constituency that require affirmative actions, including the grant of incentives to integrate them into the bloc's economic planning. (Except FCDC); 30 and
c. Proposals to address taxation issues such as harmonising taxes such as cess that have been the subject of dispute and at times threaten intercounty trade and cooperation.

To ensure implementation of the blueprints, some blocs like FCDC, LREB and NOREB established strategic plans that set out the implementation matrix. However, even where strategic plans exist, implementation is yet to begin in earnest. This is mainly because at the national level, there is no policy and legal framework anchoring regional economic blocs.[31] As a result of the lack of a policy framework, most regional economic blocs do not have adequate funding to run their activities.[32] In some like NOREB, LREB, SEKEB and NAKAEB the respective secretariats operate from the county office spaces donated to them and also rely on staff seconded by the counties.[33] Standing out is FCDC that has its own office space and staff who are not seconded from counties but work closely with county governments.

28 Council of Governors, Technical Support towards Strengthening County Regional Economic Blocs: Volume I: Status Report 2020.

29 To complement the blue prints, blocs like LREB, FCDC have adopted strategic plans and at the time of writing, NOREB was also formulating its stragegic plan.

30 In an interview with a representative from FCDC, she indicated that the omission resulted from the fact that the regions main concern is fostering peaceful coexistence among communities and ensuring access to basic needs that are more pressing challenges.

31 Legal framework at the National Level include Article 189 (2) of the Constitution which allows for Co-operation among counties; and Intergovernmental Relations Act, 2012. Technical Support towards Strengthening County Regional Economic Blocs: Volume I: Status Report 2020 pgs 10-12.

32 Interviews with representatives from FCDC, NOREB, LREB and NAKAEB blocs.

33 An interview with a representative from LREB Region.

To support their activities, they rely on funding from counties, approximately three million Kenya shillings which at times is never remitted on time. Those who have received donor funding consider it inadequate and inconsistent to run the affairs of the secretariat. [34]Furthermore, there are no established mechanisms to oversee the blocs, thus raising questions about whether the resources are prudently utilised.[35] Notably, there is hope that the current void will be filled once the County Resource Development Bill 2021[36] is enacted. It is hoped that with proper oversight mechanisms, counties are likely to be more willing to support the activities of the blocs.

Nairobi City County is one of the counties yet to join any regional economic bloc, while others, such as Tana River, Lamu, Garissa, Trans Nzoia and Nandi are in more than one economic bloc. Multiple membership occurs mainly because some counties have shared economic, cultural and social activities with other counties. For such counties, it promises increased trade in intercounty trading activities. However, with initiatives such as establishing regional banks as adopted by the LREB region,[37] multiple memberships for counties with inadequate financial resources will be a daunting challenge and could impede the full implementation of agreed fiscal policies of two different economic blocs. Borrowing from the literature on regional economic integration at international level, countries like Tanzania have at times been cited for non-cooperation due to its multiple membership in the East African Community (EAC) and Southern African Development Council (SADC). [38]Therefore, counties with multiple memberships may need to rethink their position once the implementation of the blueprints and policies such as harmonisation of trade activities, gain momentum. An interview with a representative from NOREB and the FCDC region indicated that at the moment, multiple membership had not manifested challenges in implementing the economic blueprints. Since the blocs do not have a taxation mandate and have not achieved much in implementing fiscal policies and awarding incentives, the subsequent analysis will mainly focus on fiscal practices at the National and County governments.

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34 Interview with a representative of LREB, FCDC, and NOREB; see als Julius Otieno, 'Why county regional economic blocs are financially starving' 15 November 2022 The Star available at https://www.the-star.co.ke/news/2022-11-15-why-county-regional-economic-blocs-are-financially-starving/ [accessed 18 november 2022].

35 Edwin Mutai, 'Senate wants report on use of funds by county blocs' 31 October 2022 BusinessDaily Available at https://www.businessdailyafrica.com/bd/economy/senate-wants-report-on-use-of-funds-by-county-blocs-4002856 [accessed 18 November 2022].

36 The County Resource Development Bill 2021 see sec. 9.

37 Lake Region Economic Bloc Strategic Plan (2022 - 2027).

38 See Digna Mtana and Johansein Rutaihwa, 'Implication of Tanzania's Multiple Memberships in Trade Performances: Focus of EAC and SADC Market' International Journal of Academic Research in Economics and Management Sciences May 2014, Vol. 3, No. 3 available at https://hrmars.com/papers_submitted/905/Implication_of_Tanzanias_Multiple_Memberships_in_Trade_Performances_Focus_of_EAC_and_SADC_Market1.pdf#:~:text=This%20study%20discusses%20implications%20of%20Tanzania%60s%20multiple%20membership,the%20integration%20process%20to%20tap%20the%20market%20opportunities. [accessed 15 May 2022].

LEGAL AND INSTITUTIONAL FRAMEWORK FOR FISCAL POLICIES AND INCENTIVES

The Constitution of Kenya, 2010 establishes a two-tier devolved system of government made up of the national government and 47 county governments: each level of government has its functions according to article 6(2) of the Constitution and as set out in Part I and Part II of the Fourth Schedule, respectively. The national government has a bigger mandate which include security, judiciary, education at all levels and economic policy and planning, among others. County governments' functions include providing health care, pre-primary education, agriculture, maintenance of local roads, trade services, general services and housing services.[39]

Article 209 of the Constitution empowers the National and County governments to raise revenue by levying taxes and fees on services rendered to fund their respective functions. The national government has a bigger taxation mandate and levies taxes such as income taxes, value-added tax, customs and excise duties. The county governments' taxation mandate is limited to charging property rates, entertainment tax and user fees.[40] Under article 209(3)(c), the Constitution allows enlargement of the taxation mandate of the National and County Governments through legislation.

2.1. Constitutional Principles on State and County Revenue Powers

Article 201 of the Constitution sets out the principles that guide or regulate the exercise of revenue mandates by the two levels of government. They include those on public finance, devolution, national values, and aspirations. Of critical relevance are principles such as transparency, accountability, prudent and responsible utilisation of public money, public participation in financial matters and the use of the public finance system to promote equity, and sustainable development. To promote equity, the Constitution underscores three key facets namely: the burden of taxation must be shared fairly; revenue raised shall be shared equitably between national and county government and the expenditure to promote equitable development of the country, marking special provisions for marginalised groups.

39 Refer to the Fourth Schedule of the Constitution of Kenya, 2010.
40 Article 209 (3),(4) & (5) of the Constitution.

In enhancing fair sharing of the tax burden, the principles champion income redistribution by cushioning against over-taxation of some segments of society, especially the low-income earners and promoting tax justice.

Equitable sharing of revenue between counties and national governments seeks to reduce inequality across counties since there are counties with greater revenue-raising potential as opposed to others, especially in the arid and semi-arid lands (ASALs) region, with minimal own source revenue-raising potential. [41]

The Constitution also allows National and County Governments to formulate fiscal policies to enhance equitable development, and where necessary, special provisions can be made to accommodate the marginalised. This window allows the National and County Governments to consider the interests of marginalised groups such as women, youth and persons with disabilities in designing fiscal policies, including granting tax incentives.

To complement the existing tax laws, the National Tax Policy was adopted in June 2022. It is a robust document that acknowledges past and prevailing challenges that have affected the grant of incentives and propose interventions to address them.[42] Finally, to avoid adverse effects of having restrictive tax and fiscal policies across 47 counties in exercising taxation and revenue-raising powers, counties are mandated to ensure fiscal policies do not prejudice national economic policies, economic activities across county boundaries, or the national mobility of goods, services, capital or labour.[43] To enhance effective taxation in 2019, the National Policy to Support Enhancement of County Governments' Own-Source Revenue was adopted to assist counties to adopt and implement progressive fiscal policies.[44]

Regarding transparency and predictability of fiscal policies, article 210 of the 2010 Constitution prohibits the charging of any tax or fee without legislation. It mandates the National and County Governments to keep public records of any tax or fee exemption and the reasons for the exemption reported to the Auditor General. Besides, it prevents legislative organs from passing laws that exclude state officers from paying taxes by reason of the nature of the work done or the office they hold. Expounding further on the provision and regarding incentives, section 82(4) of the PFM Act provides that:

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41 Adamsmith 'Final Report: Own-Source Revenue Potential and Tax Gap Study of Kenya's County Governments' Available at https://documents1.worldbank.org/curated/en/280021585886703203/pdf/Own-Source-Revenue-Potential-and-Tax-Gap-Study-of-Kenya-s-County-Governments-Final-Report.pdf [accessed 15 March 2022].

42 https://www.treasury.go.ke/wp-content/uploads/2022/07/DRAFT-NATIONAL-TAX-POLICY-16.06.-2022-.pdf

43 Article 209 (5) of the Constitution.

44 The National Treasury and Planning, National Policy to Support Enhancement of County Governments' Own-Source Revenue February, 2019

(4) Not later than three months after the end of each financial year, a receiver of revenue for the national government shall submit to the Auditor-General a report with respect to all waivers and variations of taxes, fees or charges granted by the receiver or collector during that year.

(5) The receiver shall include in the report under subsection (4) the following details in respect of each waiver or variation:

a. the full name of each person benefitting from the waiver or variation;
b. the amount of tax, fee or charge affected by the waiver or variation;
c. the year to which the waiver or variation relates;
d. the reasons for waiver or variation; and
e. the law in terms of which the waiver was granted.

(6) The reports referred to in subsection (4) shall be published and publicised.

Regarding county governments, a similar provision exists in sections 165(4) and (5) of the PFM Act with slight differences. At the County level, the report is submitted to the County Assembly within two months after the end of each financial year and there is no requirement for publishing and publicising the report. However, reviewed county tax waiver laws provide for submitting the report on waivers to the auditor general in line with article 210(2)(b) of the Constitution.[45] In addition, in a bold move to enhance the predictability and certainty of tax laws, the draft National Tax Policy recommends a review of tax laws once every five years, a shift from the current practice where tax laws are reviewed annually.

2.2. Sharing of National Revenue by County Governments

Underlying Kenya's devolved system of governance is the philosophy of self cum shared governance. For this reason, the two levels of government are required to run their affairs in cooperation with each other and equitably share revenue raised nationally.[46] Apart from the equitable share, which should be at least 15 per cent of the total national revenue generated, county governments may also receive additional allocations from the national government's share of the revenue either conditionally or unconditionally.[47] When determining how much each of the 47 counties should receive, the Commission on Revenue Allocation is guided by parameters such as population, basic equal share, poverty index, geographical size and the counties' ability to be fiscally responsible.[48] The poverty index as a factor goes a long way in enhancing poverty alleviation.

45 For example The Kisumu County Tax Waivers Administration Act, 2014; The Mombasa County Tax Waiver And Variation Act 2017; Kilifi County Tax Waivers Act, 2014; Meru County Tax Waivers Administration Act, 2020; The Finance (Criteria For Waiver or Exemption of Taxes, Fees or Charges) Regulations, 2013.
46 (Constitution of Kenya, 2010) at Articles 6 (2) and 202 (1).
47 Ibid at Article 202 (2).
48 Ibid at 203 (1).

Cognisant of the inherent marginalisation of counties in the pre-2010 dispensation, the Constitution also provided for an equalisation fund capped at 0.5 per cent of national revenue to support 14 counties, mainly from the ASAL and coastal regions[49] which almost 10 years into devolution has not been operationalised.[50]

2.3. Institutional Framework for Award of Incentives

The institutional framework for the award of incentives includes the Cabinet Secretary for Finance and the executive committee member for finance at the county, the National and County Assembly, the Auditor General, the Commission on Revenue Allocation, and the public through public participation, lobby groups and the civil society as highlighted below.

a. The Cabinet Secretary for Finance and the County Executive Committee Member for Finance

In Kenya, the primary actors in awarding incentives are the Cabinet Secretary in charge of finance while at the county level, it is the committee member in charge of finance. This is done at times upon recommendation from the line ministries. In most counties with tax waiver laws, the Committee Member grants an incentive upon the Governor's approval. Since the President and governors appoint cabinet secretaries and committee members at the county level, respectively, there exists a danger of granting incentives to advance political or personal interests, thus the need for closer scrutiny.

b. The National Assembly and the County Assembly

The National Assembly and the County Assembly have a statutory mandate to approve award incentives. Currently, variations of all tax laws have to be sanctioned by a statute which grants legislative arms an opportunity to oversight the grant of incentives. Where an award of incentive does not entail amendment of the law, the same must be reported to the National Assembly, and at the county level, it is reported to the County Assembly. However, this process is often not utilised effectively since in the past, there have been cases of legislators being whipped to vote along party positions or allegedly taking bribes before approving motions.[51] Noting this trend, it is possible that the award of incentives can be skewed to favour the rich, who can lobby and pay hefty bribes and kickbacks. Additionally, most legislators are not conversant with taxation matters. As a result, incentives and fiscal policies that do not attract public outcry may go unnoticed, hence the need for awareness creation and sensitisation of elected representatives on fiscal policies and their ramifications to vulnerable groups and the economy at large.

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49 Constitution 2010, art. 204;

50 Moses Odhiambo, Yatani sets pace for unlocking Sh26bn Equalisation Fund TheStar 11 August 2020 https://www.the-star.co.ke/news/2020-08-11-yatani-sets-pace-for-unlocking-sh26bn-equalisation-fund/ [accessed 15 March 2022].

51 Felix Amollo Simba, 'Sugar affair: Why Parliament has failed Kenyans' The Standard available at https://www.standardmedia.co.ke/article/2001292204/sugar-affair-why-parliament-has-failed-kenyans accessed 16 May 2022; MCAs 'bribed' to skip debate on sacking Kidero, meet at hotel' 12 October 2022, The Star Available at https://www.the-star.co.ke/counties/nairobi/2016-10-12-mcas-bribed-to-skip-debate-on-sacking-kidero-meet-at-hotel/

c. The Auditor General and other government bodies

The Constitution and the PFM Act provide that all reports regarding awarding incentives should be submitted to the Auditor General within two months after the end of every financial year. This reporting mechanism allows the Auditor General to review and verify whether the incentives were merited and the purpose of the waivers. It is unclear whether the foregoing provisions are implemented since there were no publicly available reports on tax incentives at the time of writing, apart from the national government's Tax Expenditure Report published in 2021.

Nevertheless, in some reports, the Auditor General has flagged counties for awarding incentives without an underlying legal framework of justification and failing to collect taxes without justification.[52] The Commission on Revenue Allocation also plays a key role in encouraging counties to adopt sound fiscal policies, including training on fiscal policies and reviewing their own source revenue performance. Key initiatives have included formulating the Counties' Own Sources Revenue Training Guidelines aiming to equip MCAs with knowledge of the budgetary process and other fiscal policies.[53]

Such initiatives provide avenues for collaborations in training on tax incentives and their impact on widening inequality. Providing impetus for the reforms in own source revenue generation is the Intergovernmental Budget and Economic Council (IBEC), whose effort culminated in the formulation of the National Policy to Support Enhancement of County Governments' Own-Source Revenue as well as the County Governments (Revenue Raising Process) Bill, 2018 seeking to harmonise taxation laws and processes across counties. Both documents highlight challenges that come with irregular awards of incentives, and it is hoped that counties will implement sound fiscal policies to address irregular and unlawful award of incentives.

d. Lobby Groups and Corporations

Lobby groups such as the Kenya Association of Manufacturers (KAM), and Kenya Property Developers Association (KPDA) continue to play an integral role in exercising oversight, especially where fiscal policies are likely to affect their industry. Unlike vulnerable groups, lobby groups have the resources to hire tax experts to assist in lobbying for incentives. Where possible, they can engage in protracted litigations in court challenging the taxation laws and procedures. For example, Base Titanium Limited successfully challenged Mombasa County's plan to levy cess on major highways at the Supreme Court.[54] In the betting industry following the imposition of 20 per cent turnover tax in the betting industry, a number of players, such as Sport Pesa, left the Kenyan market, withdrawing sponsorships in the Kenya Premier League and clubs.[55] The 2020 Finance Act scrapped off the tax, and subsequently, it was reintroduced in the 2021 Finance Act at a lower rate of 7.5 per cent.

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53 Counties' Own Sources Revenue Training Guidelines.

54 Base Titanium Limited v County Government of Mombasa & another (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment).

55 David Kwalima, 'SportPesa to withdraw sports sponsorship in 2018' Business Daily, JUNE 23 2017 available at https://www.businessdailyafrica.com/bd/news/sportpesa-to-withdraw-sports-sponsorship-in-2018-2158012 accessed 15 May 2022.

Other professional bodies such as the Institute of Certified Public Accountants of Kenya (ICPAK) and the Law Society of Kenya (LSK) participated as interested parties in successful petitions against the imposition of minimum tax,[56]. The LSK successfully challenged the defunct municipalities' attempts to levy single business permits fees to its members, a decision that still stand to date, and bars counties from levying single business permits for law firms.[57]

e. Public Participation in the Formulation of Fiscal Policies

Public participation is key as a principle of fiscal governance. The Constitution, the County Governments Act and the Public Finance Management Act provide meaningful public participation in formulating fiscal policies. For the citizenry to participate meaningfully, the national government and county government must avail the key budgetary documents[58] to the citizenry within the set statutory timelines. The national government has enhanced public participation, and in most cases, key stakeholders are involved before finally making fiscal policies.

However, the interest of the poor and illiterate in the society, who in most cases are not organised into lobby groups, is yet to be adequately protected.In some cases, courts have also faulted the national government for failing to conduct public participation.[59]

In the county government, many counties do not undertake effective public participation, and at times do not share key budgetary documents. A random search on the county websites revealed that most counties do not share or publicise all the key budgetary documents on their respective websites.[60] Even where the information is shared, in most cases, it is not comprehensive enough to allow meaningful interrogation and participation.[61] Moreover, there are inconsistencies among counties in sharing information.[62] These loopholes suggest that even when the citizenry are called to participate, they lack adequate information to participate meaningfully. Exacerbating this is the fact that the documents are in English, and with high illiteracy levels in most parts of the country, these reduce the citizenry's ability to participate actively. In some cases, there is no evidence of public participation. For example, in the Financial Year 2019/2020, the Auditor General flagged Kajiado County for failing to submit a report indicating public participation during the budget-making process.[63]

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56 Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Party) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) (20 September 2021) (Judgment).

57 Republic v City Council of Nairobi & another Ex-parte Law Society of Kenya [2014] eKLR.

58 Key documents included the County Integrated Development Plan (CIDP), Annual Development Plan (ADP), Approved Programme-Based Budget (PBB), County Fiscal Strategy Paper (CFSP), County Quarterly Budget Implementation Review Report, County Budget Review, and Outlook Paper (CBROP), Citizens Budget and the Finance Act of the respective years.

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60 See also The International Budget Partnership Kenya, Kenya County Budget Transparency Survey 2020 https://internationalbudget.org/wp-content/uploads/cbts-2020-executive-summary.pdf [16 June 2022].

61 Ibid.

62 Ibid.

63 Report of the Auditor-General on County Executive of Kajiado for the Year Ended 30 June, 2020 available at https://www.oagkenya.go.ke/wp-content/uploads/2022/01/County-Executive-of-Kajiado-2019-2020.pdf [accessed 15 June 2022]

Therefore, inequality at policy formulation always cascades to the implementation phase, thus exacerbating inequality.

Without adequate public participation and transparency in the budget-making process, several challenges arise:

i. The citizenry is unable to hold the National and County Governments accountable and interrogate the essence of incentives issued, leading to cases of award of irregular tax incentives by the national and county governments.[64]

ii. It creates room for tax evasion and avoidance since the local communities do not understand why they pay taxes and levies, thus inhibiting optimal resource mobilisation. Where they understand the benefits that come with paying taxes, this works as an incentive to pay taxes.

iii. Lack of meaningful public participation often increase non-compliance and compliance costs, starting from litigation costs at the courts, and in most cases[65] protests and demonstrations by stakeholders, especially in the transport sector[66] resulting to informal tax bargaining[67] and at times failure to collect revenue. These outcomes negatively affect county own source revenue resulting to revenue shortfalls.

f. The Civil Society

The clarion call for fiscal accountability and transparency embedded in the 2010 Constitution emboldened the civil society to clamour for a transparent and accountable government. The main achievements were witnesses in terms of holding the State accountable through pushing for anti-corruption reforms, which mainly focused on monitoring expenditure.[68] However, increasingly civil society has been keen to scrutinise fiscal policies, especially those relating to taxation in Kenya and across the globe under the tax justice movement.[69] In Kenya, this has been done through participating in public participation forums that are embedded in the budgetary process, especially at the national level.

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64 Titus Oteba, 'Bungoma MCAs say they shouldn't be charged parking fees' Business Daily September 21, 2017. Available at https://www.businessdailyafrica.com/bd/news/counties/bungoma-mcas-say-they-shouldn-t-be-charged-parking-fees-2170080 [accessed 15 May 2022].

65 Kenya Flower Council v Meru County Government [2019] Eklr; Base Titanium Limited v County Government of Mombasa & another [2018] eKLR.

66 Collins Dudi, 'Kisumu bodaboda operators' bosses reject new tax order, 3 June 2019, available at https://hivisasa.com/posts/1108-kisumu-bodaboda-operators-bosses-reject-new-tax-order [accessed 15th May 2022].; see Boda Boda riders protest in Kisumu June 20 2019 available at https://www.youtube.com/watch?v=4AWI-p8BSo4 [accessed 15 May 2022]. Hilton Otenyo, 'Kakamega traders protest high fees for license' 16 February 2021 The Star available at https://www.the-star.co.ke/counties/western/2021-02-16-kakamega-traders-protest-high-fees-for-licenses/ [assessed 15 May 2022]

67 Jon Helfers, 'Case Study Tax Bargaining, the Fiscal Contract and Public Participation in four Kenyan Counties' AHADI on March 28, 2019 available at https://countytoolkit.devolution.go.ke/sites/default/files/resources/OSR_and_Fiscal_Contract_case_study_AHADI_2019.pdf [accessed 16 June 2022].

68 International Monetary Fund, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment, pg 24.

69 Fariya Mohiuddin and Paolo de Renzio, Of citizens and taxes: A global scan of civil society work on taxation International Budget Partnerships, November 2020 https://internationalbudget.org/wp-content/uploads/cso-tax-scan-november-2020.pdf.

Organisations such as the Tax Justice Network Africa (TJN-A) have successfully petitioned the courts, leading to nullifying a double taxation agreement between Kenya and Mauritius for lack of public participation.[70] Apart from court actions, other organisations such as Transparency International – Kenya and Oxfam are taking the lead in sensitising the citizenry on fiscal accountability and transparency through research on fiscal policies and implementation. [71] This research is part of Transparency International – Kenya's effort to create awareness and contribute to creating a sustainable and equitable taxation system at the national and county government levels.

At the county level, 10 years into devolution, the civil society has not given much attention to county fiscal policies. Most of the attention appears to have inclined towards supporting counties in formulating policies to raise OSR and addressing governance challenges at the inception of devolved governance. As a result, this research established that most CBOs at the county level are not well acquainted with taxation matters. Some have participated in public forums discussing budgets; however, they have not paid attention to tax/revenue incentives awarded or interrogated the rationale for the existing taxes and incentives.[72] Contributing to the lack of participation by civil society organisations is the unwillingness of counties to timely share accurate and adequate information on tax waivers.[73] The lack of transparency has led to the award of illegal incentives and overtaxing the low income earners and vulnerable groups like women who may not engage in concerted protests and demonstrations to avoid paying taxes and user fees. Also, CBOs at the county level do not have adequate knowledge of taxation issues and incentives, making them unable to monitor the award of incentives. [74]

70 Tax Justice Network- Africa v Cabinet Secretary for National Treasury & 2 others [2019] eKLR.

71 See for example Oxfam Report 2020.

72 Interviews with representatives of CBOs.

73 In the course of this research, there are a number of counties that did not participate fill questionnaires stating that that it was akin to an audit especially at a time when general elections were approaching.

74 This was evident from interviews with select leaders of CBOs at county level.

ANALYSIS OF SELECTED TAX INCENTIVES AT THE NATIONAL AND COUNTY LEVEL

This part reviews selected incentives at the national and county level to demonstrate how inequality has been manifested in the award of incentives. Before exploring the specific tax incentives, it is important to understand key features of an effective tax incentive system which will inform our subsequent analysis.

3.1. Characteristics of Effective Tax Incentive Schemes

The discussions regarding tax incentives have mainly focused on investment incentives in international trade. This is mainly because reports by OECD and the World Bank found investment tax incentives, especially those granted by developing countries, to be counter-productive with minimal economic significance.[75] However, this has not been the case in all jurisdictions. Outliers such as Singapore and China have used incentives effectively, resulting in significant socio-economic development.[76] To enable developing countries to grant tax incentives effectively, the OECD has recommended principles to enhance transparency and good governance of tax incentives for investment in developing countries.[77] These principles, though, would mainly be applicable in states attracting investments. They can be applied as the basis for analysing the current incentive regimes in the National and County Governments with adaptations to peculiarities that come with fiscal decentralisation and revenue mobilisation at the county/sub-regional level.[78] Also, the underlying principles already exist in the Constitution, the PFM Act, the County Governments Act, the National Tax Policy, the counties tax waivers and revenue administration acts, among others. Therefore, the research proceeds on the assumption that tax incentives that manifest features of an effective tax incentive scheme will minimise inequality, seal loopholes for revenue leakages and enhance domestic resource mobilisation. These features include:

75 OECD, 'Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries' available at https://www.oecd.org/tax/tax-global/transparency-and-governance-principles.pdf [accessed 16 June 2022]; International Monetary Fund, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment: A Report To The G-20 Development Working Group by the IMF, OECD, UN and World Bank, October 2015, available at https://www.imf.org/external/np/g20/pdf/101515.pdf [accessed 16 June 2022].
76 International Monetary Fund, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment, pg 13.
77 OECD, 'Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries'
78 Ibid.

a. Transparency and Accountability of Incentive Schemes

As a feature of a good incentive scheme, transparency and accountability imply openness of the processes and decisions on the grant of revenue favours the selected group of people in a country. In Kenya, these are recognised as some of the principles of good governance that guide the country's public finance system.[79]
This is in line with the requirements for public participation, citizens' right to information and the mandates of public institutions to uphold national values and principles of good governance. It is on the basis of transparency and accountability that article 210 of the Constitution requires that all taxes or fees provided for in statutes. In addition, there must be a public record of any tax or fee exemption and the reasons for the exemption reported to the public through a gazette notice and presented to the National Assembly/County Government for approval and thereafter published.

b. Strong Anti-Tax Avoidance Measures

The need for effective anti-tax avoidance measures stem from the fact that unscrupulous taxpayers may abuse or unfairly take advantage of incentive schemes to the detriment of a country's development plans and occasion revenue leakages. Such practices may lead to unfair burdening of other taxpayers and public confidence in the taxation regime might also diminish. Hence, it is crucial to establish a sound normative framework to guard against potential abuse of the tax incentive schemes.
For example, incentives that target the youth, women or PWDs such as Access to Government Public Procurement Opportunities (AGPO) may be abused by persons who do not belong to such categories where beneficial ownership rules are not strictly enforced.

c. Proper Targeting of Incentives

This entails having clear objectives for each tax incentive and publicising them. The tax incentives are said to be properly targeted if there is an additional investment benefit or gain that can be attributed to them or where the objectives are met.[80] In order to determine this, the deficiency being addressed must be ascertained both in terms of the cost and the benefits to be derived through the grant of the incentives.[81] This explains why it is critical to peg incentives on time limitation, capital investments and at times level of employment opportunities or new businesses created, among other parameters. This requirement may not be applied strictly when looking at incentives given to ameliorate vulnerable groups from poverty, among other challenges.

79 Articles 10 and 201 (a) Constitution of Kenya, 2010.
80 Nathan–MSI Group, Effectiveness and Economic Impact of Tax Incentives in the SADC Region, submitted to USAID/RCSA SADC Tax Subcommittee, SADC Trade, Industry, Finance and Investment Directorate in February 2004 at 5.
81 Nathan–MSI Group, Effectiveness and Economic Impact of Tax Incentives in the SADC Region, submitted to USAID/RCSA SADC Tax Subcommittee, SADC Trade, Industry, Finance and Investment Directorate in February 2004 at 5.

d. Reliable Database on the Impacts of Incentives

Closely linked with the requirement for proper targeting of incentives is the need for adequate data on the actual impacts: whether benefits or losses, of the incentives. This is necessary to enable the government to establish the incentives' relevance in spurring or facilitating the intended policy goal.[82] In other words, the revenue favours should not be granted in vain. To this end, the OECD recommends publishing the amount of revenue foregone by the grant of incentives (tax expenditure). Though the amount of revenue foregone and the resulting benefit is not the ultimate test of the benefits of an incentive in the short term, it is a significant indicator when assessing the long-term impact of tax incentives. Most of the incentives granted at the national and county level do not mirror this principle.

Kenya published the first tax expenditure report in 2021 covering the year 2017-2020. It is hoped that this will be an annual practice.[83] The report provided a basis for the government to conduct a cost-benefit analysis of incentives. However, its findings gave generalised data, making it difficult to analyse the benefit of a given incentive. For instance, the report indicates the cost of incentives awarded in the income tax but does not disaggregate the data to indicate, for example, tax expenditure because of exemptions given to PWDs to enable effective comparison. Additionally, it excludes data from areas such as Export Processing Zones (EPZ), making it difficult to analyse information in such over incentivised areas. At the county level, no such attempt has been made to publish information on revenue foregone because of incentives, making it difficult to appreciate the impact of the incentives. Furthermore, counties are hesitant to share and publish data on incentives awarded, thus limiting oversight. It is therefore hoped that at the national level, tax expenditure reports will be more detailed to enable analysis of specific incentives and that the practice will cascade to counties to enhance fiscal responsibility and eliminate grants of unmerited incentives.

e. Consolidation of all Tax Incentives under the Authority of One Government Body

Tax incentives should be granted from one central government body, preferably the minister for finance, and in counties under the Executive Committee Member in charge of finance. Where many offices grant tax incentives, it increases the opportunities for rent-seeking and overlapping incentives. Having a central body to grant incentives is preferable since it will enhance transparency and limit discretionary powers. Policymakers can easily detect problems that may come with the administration of tax incentives. The draft National Tax Policy as well as respective county government tax waiver statutes have provided for centralisation of incentives and only ministries responsible for finance will award the incentives.

82 Robert S. Chirinko and Daniel J. Wilson, State Investment Tax Incentives: A Zero-Sum Game? Federal Reserve Bank of San Francisco, Working Paper Series at 1.

83 The National Treasury and Planning, 2021 Tax Expenditure Report, September 2021 https://www.treasury.go.ke/wp-content/uploads/2021/09/2021-Tax-Expenditure-Report.pdf

f. Effective Oversight Measures

Tax incentives provided through executive decrees or agreements are likely to be abused where there is no proper scrutiny of the incentives' motivations and objectives. An example in Kenya is the discretionary waiver of Stamp Duty of KShs 350 million in the NIC and CBA bank merger, which the Kenyatta family partly owns.[84]
The Constitution, the PFM Act and Tax Waiver Acts of counties provide for reporting all tax incentives to the Auditor General. The National Tax Policy has reiterated the fact that all tax waivers, for example, affecting income tax not in the Income Tax Act shall be null and void. Once implemented, these will enhance effective oversight of the cabinet secretary for finance and County Executive Committee members for finance powers to grant incentives under sections 77 and 159 of the PFM Act, respectively. Another tier of oversight is by maintaining public records of tax incentives at the county and national level, but which at the moment lacks evidence of compliance. Through publication, the civil society organisations and the citizenry can exercise oversight.

g. Monitor implementation of the incentives to assess the extent that they meet their stated objectives

Incentives should have specific objectives, and therefore, once granted, there is a need for periodic monitoring and evaluation to ensure that the objectives are met. Through monitoring and evaluation, it is possible to have sunset clauses on the incentives to avoid cases where incentives lack time limits. This should also entail monitoring behavioural responses, both good and bad. For instance, good behavioural responses to tax incentives targeting youth enterprises may include the increase of profitable and sustainable youth enterprises in the county. In contrast, on the downside, unscrupulous persons may use youths as fronts for the registration of businesses for incentives only, thus undermining the objective of the incentive. The National Tax Policy underscores the need for a centralised monitoring and evaluation framework for tax incentives and sunset clauses where possible.[85]

h. Enhance Cooperation to Avoid Harmful Tax Competition

From the international trade perspective, harmful tax competition results where countries compete to grant generous tax incentives, leading to the race to the bottom phenomenon.[86]
At the county level, competition to attract investments could also lead to such results that can be avoided through harmonisation of taxation policies and cooperation. With the advent of county economic blocs that promise economies of scale through access to regional markets, cooperation in the award of tax incentives will ensure that investors are not lured to set up businesses in specific counties due to generous and unsustainable tax incentives. Once enacted, the County Governments (Revenue Raising Process) Bill 2018 will enhance coordination between National and County Governments in fiscal matters, ending harmful tax practices, including the award of unmerited incentives.

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84 Annette Wambulwa, 'Omtatah moves to court over NIC-CBA merger tax waiver' The Star, 23 August 2019. Available at https://www.the-star.co.ke/news/2019-08-23-omtatah-moves-to-court-over-nic-cba-merger-tax-waiver/ [accessed 15 May 2022]; OXFAM, Analysis of Tax Incentives and Exemptions in the Finance Acts From 2009-2019' pg. 17.

85 National Tax Policy Pg. 22-23 available at https://www.treasury.go.ke/wp-content/uploads/2022/07/DRAFT-NATIONAL-TAX-POLICY-16.06.-2022-.pdf [accessed 15 July 2022].

86 International Monetary Fund, Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment, pg 21.

Drawing from the key features of an effective tax incentive framework, the subsequent analysis discusses the findings, assessing whether the tax incentives at the national and county government mirror features of an effective incentive scheme. The analysis proceeds on the assumption that where tax incentives do not mirror features of an effective tax incentive scheme, there is a likelihood that they will enhance inequality and constrain domestic resource mobilisation.

3.2. Tax Incentives at the National Level

In the period between 2018/2019 to 2020/2021 financial years, the government adopted far-reaching reforms aimed at reducing tax expenditure by reducing tax incentives, widening the tax base and other regulatory incentives such as the introduction of voluntary tax disclosure programmes[87] to increase revenue collection. These efforts yielded positive results in the 2020/2021 Financial Year, during which the Kenya Revenue Authority (KRA) defied the odds associated with COVID-19 to surpass its revenue targets.[88]

Apart from COVID-19-related incentives to cushion businesses and low-income earners,[89] incentives have focused on the Big Four Agenda namely; affordable housing, manufacturing, food security and universal healthcare, whose realisation has been attributed to lack of incentives.[90] Recently, the government has stepped up to enhance fiscal transparency and predictability by publishing the National Tax Expenditure Report[91] and formulating a draft National Tax Policy that proposes that tax laws should be amended after five years to enhance certainty and predictability. Implementing these initiatives will go a long way in addressing challenges relating to the irregular award of tax incentives. Below is a highlight of sector-specific incentives by the national government through which the gaps between incentives targeting the poor and the rich are visible.

3.2.1. Tax Incentives in the Real Estate Sector

To meet the country's housing deficit, the government has increasingly awarded generous incentives targeting the real estate sector, specifically the affordable housing scheme. The incentives in the real estate sector can be classified into three categories: incentives targeting developers, landlords and prospective homeowners.

To fill the housing deficit especially for the low-income earners, the government granted generous incentives to subsidise the cost of construction. The Finance Act 2019 introduced several incentives for developers in the real estate industry, including VAT exemption on goods imported or purchased locally for direct and exclusive use in the construction of houses under an affordable housing scheme. The cabinet secretary for finance approves the exemption upon the recommendation by the cabinet secretary responsible for matters relating to housing.[92]

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87 Tax Procedures Act Section 37D.

88 KRA, Annual Revenue Performance FY 2020/2021, Press Release 04/07/2021 availabe at https://uk.search.yahoo.com/search?fr=mcafee&type=E211GB714G0&p=Kimbu+County+Waives+payment+of+Cess+Tax [accessed 15 May 2021].

89 See mainly the Tax Laws Amendment Act 2020 and the Finance Act 2020.

90 The National Treasury and Planning, The state department of planning, Implementation Status of the Big Four Agenda 2018/2019 Monitoring and Evaluation Directorate 2020 page 35, Available at https://monitoring.planning.go.ke/wp-content/uploads/2020/10/Big-Four-Agenda-Report-2018_19.pdf [accessed 02 November 2022].

91 The National Treasury and Planning, 2021 Tax Expenditure Report, September 2021.

92 Finance Act No. 23 of 2019, s. 21.a.

These incentives were in addition to the 2009 incentives, in which the government introduced a 150 per cent investment deduction for any person investing more than KShs 200 million to construct a building outside Nairobi, Mombasa or Kisumu. However, in 2020 the Tax Laws Amendment Act reduced these to 100 per cent investment deductions for persons investing within a period of three years 2 billion Kenyan Shillings outside Mombasa and Nairobi only or where the investment in the year of income outside Mombasa and Nairobi is 250 million Kenyan Shillings.[93] Other incentives already in place include a preferential corporate tax of 15 per cent, down from 30 per cent for companies that develop at least 100 residential housing units annually.[94] Initially, this was set at least 400 housing units annually.[95]

In addition to the incentives that accrue to developers, landlords have also enjoyed tax incentives. For instance, in the period before the study, special incentives included blanket amnesty introduced by the Finance Act 2015,including waiver of principal taxes, penalties, and interest relating to 2013 to 2015.[96] Though countries grant such incentives to encourage tax payment, the amnesties and incentives target penalties and interest. For Kenya, this move was unusual given that it resulted in waiving accrued taxes to landlords who are mostly wealthy in the society.

The Finance Act 2020 also increased the upper threshold for Residential Rental Income Tax from KShs 10 million to KShs 15 million per annum, and the lower threshold was increased from KShs 144,000 to KShs 288,000 per annum. This was meant to cushion landlords who receive lower taxes from paying residential rental tax income. At the county level, landlords and generally land owners also enjoy tax waivers on interests and penalties on land rates in what is increasingly becoming an annual event, which begs the question of whether these incentives are realising their objectives.[97]

3.2.1.1. Prospective Homeowners

Under the affordable housing pillar, the government has adopted measures to encourage persons to purchase homes, especially first-time homeowners. In 2019, the Finance Act amended the Income Tax Act to cap the affordable housing relief to 15,per cent of the "employee's contribution" capped to KShs 108,000 per annum and not 15 per cent of "gross emoluments" as previously stipulated.[98] The Tax Laws Amendment Act 2018 exempted first-time homeowners from paying stamp duty under the Affordable Housing Scheme.[99] Surprisingly, in what appears to be a claw back in the government's efforts to realise affordable housing, the 2020 Finance Act scrapped off tax deduction of Home Ownership Saving Plan (HOSP),[100] marking an end to this relief adopted in 1995 to encourage saving with approved institutions for prospective homeowners.

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93 Income Tax Act Second Schedule. Para. 1A (a) & (b).
94 Income Tax Act Third Schedule 2(i).
95 Finance Act No 38 of 2016 section 17(c).
96 Finance Act No 14 of 2015 section 7.
97 David Mwitari, 'Why counties embraced land rates waivers' The Standard, May 25, 2017 available at https://www.standardmedia.co.ke/business/article/2001241049/why-counties-embraced-land-rates-waivers [accessed 15 June 2022].
98 Section 30A Income Tax Act.
99 Tax Laws Amendment Act 2018 section 117(k).
100 Finance Act 2020 section 6 which repealed section 22C of the Income Tax Act.

Analysis of the Incentives in the Real Estate Sector

- Most incentives have been introduced by the Finance Acts and are anchored in statutes such as the Income Tax Act, therefore, enhancing transparency. In terms of accountability, for a developer to qualify for the exemption, the minister for housing must recommend for the minister for finance to approve. Such a procedure may create unnecessary red tape and may lead to abuse of the incentives, especially where no record has been published for the qualifying firms. Moreover, the lack of data impedes effective oversight.
- There are no measures to ensure monitoring to determine whether low-income earners benefit from the scheme. For example, with 74 per cent of salaried Kenyans earning less than KShs 50,000 purchasing a house ranging from KShs 600,000 to KShs 3 million remains a tall order.[101] This is so especially given that at KShs 1,500,000 one can get a one-bedroom house that may not be adequate to host a family in projects like Boma Yangu.[102]
- There is no guarantee that all applicants will be considered in platforms such as Boma Yangu since it lacks defined criteria for assigning houses to qualify subscribers. Therefore, there is no guarantee that qualifying vulnerable persons will get a house.
- It is difficult to determine who qualifies as a first-time homeowner, a loophole that unqualifying persons can exploit to evade stamp duty, thus occasioning revenue leakages.
- Limiting the waiver of stamp duty to first-time homeowners under the affordable housing programme unfairly discriminates and locks out other first-time homeowners who opt to purchase houses in other developments, especially since the affordable housing programme is not available countrywide. Further, with no criteria to determine first time owners, the incentive can be abused.
- Incentives in the affordable housing programme are likely to enhance inequality since those targeting low-income earners, such as waiver of stamp duty for first-time homeowners, have an upper ceiling i.e. can only be enjoyed once, and they range between 2 per cent to 4 per cent of the purchase price depending on whether the land is an agricultural or commercial land respectively. In contrast, those targeting developers do not have limitations and they enjoy increased benefits saving at least 15 per cent of their taxable income.

3.2.2. Incentives in the Agriculture Sector

In the agricultural sector, the bulk of incentives appears to be on VAT exemption on farm inputs, machinery and equipment in a bid to lower the cost of farming. For example, in 2020 VAT was introduced for purchasing tractors and later removed in 2021 in a move seen to enhance mechanised farming, thus lowering costs passed to the farmer. Other incentives include VAT exemptions on inputs towards the manufacture of pesticides, fertilizers, supplies in the fishing sector such as fish feedings and cages and fish processing and handling, imported or purchased for direct and exclusive use, on the recommendation of the relevant State Department.

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101 Victor Juma, '74pc of salaried Kenyans earn less than Sh50,000' Business Daily, November 23, 2018 available at https://www.businessdailyafrica.com/bd/news/74pc-of-salaried-kenyans-earn-less-than-sh50-000-2228858

102 See https://bomayangu.go.ke/Properties/listing [accessed 15 August 2022].

Compounding these are regulatory incentives that seek to prevent market competition for farm produce, such as levying excise duty on eggs imported from neighbouring countries.[103] In the sugarcane sector, there has been zero-rating transportation of sugarcane from farms to millers, a move aimed at boosting the ailing sugar industry that is a lifeline for most communities in the LREB region.

Regarding basic commodities and consumables, the Finance Act 2021 amended the VAT Act by removing commodities such as maize (corn) flour, cassava flour and wheat or meslin flour, from the exemption bracket to zero-rated products. The Finance Act 2020 had brought these essential consumables with the VAT exemption bracket, leading to a price increase. By zero-rating basic consumables, a processor/manufacturer can claim compensation for input VAT, further lowering prices. Though there has been a push toward moving these basic commodities from the zero-rated bracket to the VAT-exempt bracket,[104] it is desirable to maintain these incentives to ensure the price of basic commodities is under control, especially at a time when poor households are battling skyrocketing inflation,[105] resulting in increased food prices among other basic commodities.[106]

Analysis of the incentives in the agriculture sector

- Most of the incentives, though meant to benefit low-income earners, target indirect taxes such as VAT which may not reduce the price significantly given that the manufacturer has leverage in setting prices, thus limiting the utility of incentives in enhancing equity. [107] For example, the price of maize flour has been soaring despite being zero-rated. Therefore, there should be follow-up to ensure incentives on indirect taxes benefit consumer prices, especially where basic commodities are targeted.
- Where VAT related incentives are well targeted, they lead to reduced prices for basic commodities, thus lowering the expenditure for food that takes a large part of earnings for persons in the low-income bracket. However, it is noteworthy that VAT is a regressive tax because all persons benefit equally, notwithstanding the income disparity and therefore, VAT related incentives have minimal benefits in enhancing equality.
- Incentives in the agriculture sector appear to focus on sector considered to have high potential such as growing cash crops like tea, coffee, sugarcane and consumables like maize while sidelining other activities like pastoralism prevalent in the ASAL region, thus resulting in inequality.
- Goods predominantly purchased by the rich such as helicopters, among others, should be subjected to VAT to enhance equity. To this end, introducing VAT on the purchase of helicopters via the Finance Act 2020 is commendable.[108]

103 For example, The Finance Act 2021 imposed excise duty on imported onions, potatoes and eggs in a move seen to be shielding local farmers from competition arising from cheap imports. This is an example of a regulatory incentive and beyond these intervention there is a need to lower tax on farm inputs such as fertilisers to enable produce from Kenya to compete with those from neighbouring countries.

104 For example, this was one of the proposals in the Tax Laws (Amendment) Bill, 2020 though it did not make it to the Act.

105 For example, in July 2022, the Inflation stood at 8.32 see CBK, Inflation Rates, https://www.centralbank.go.ke/inflation-rates/ [25 July 2022].

106 World Bank, 'Kenya's Growth Expected to Slow in 2022 Due to Ongoing Drought, Ukraine Crisis' Press Release June 7, 2022 available at https://www.worldbank.org/en/news/press-release/2022/06/07/kenya-s-growth-expected-to-slow-in-2022-due-to-ongoing-drought-ukraine-crisis

107 Ox farm.

108 Finance Act 2020; see also KPMG, Finance Act 2020 Available at https://assets.kpmg/content/dam/kpmg/ke/pdf/tax/Finance_Act_11_07_2020.pdf [accessed 22 June 2022].

3.2.3. Incentives for Low-income Earners

To increase disposable income for low-income earners, the Finance Act 2016 waived PAYE on bonuses, overtime and retirement benefits paid to employees whose taxable employment income before bonus and overtime allowances did not exceed the lowest tax band.[109] However, the Finance Act 2020 increased the lowest tax band from KShs 12,298 per month to KShs 24,000[110] and scrapped this exemption. Though expanding the tax band may explain the removal of the exemption, other reasons in favour of the exemption, such the increased cost of living and inflation, appears not to have been considered. On a progressive note, the Finance Act 2021 scrapped the excise duty charged on ringback tones in a move that will see most local musicians and artists, mostly youths, benefit from increased earnings.[111] Previously, local artists had decried low revenues from royalties.[112] Correspondingly, another tax incentive favouring the poor is provision of meals to employees.
Free meals capped at KShs 4000 monthly is also an incentive that benefits all employees, especially the low-income earners, since employers are allowed to deduct these amounts from their taxable income.[113]

In 2021, the Finance Act introduced an excise tax of 20 per cent on fees charged by financial institutions in processing loans, a move that has seen banks increase the cost of loans. Consequently, these may keep away low-income earners and SMEs from accessing loans. This tax contradicts the overarching goals of excise duty since, in this case, it cannot be deemed to disincentivise persons from taking loans[114] that may unnecessarily stifle access to credit, a primary source of finance for small businesses.

There have been attempts by the state to widen the tax base by taxing informal businesses. In 2020, the Finance Act introduced a turnover tax that was christened, 'mama mboga tax',[115] which was set at 1 per cent of the Gross Turnover. Though the court suspended the implementation of the tax, such a move underscores the government's determination to overtax the poor.[116] Therefore, whereas there are merits in widening the tax base, there is a need for the government to revamp its responsibility in the redistribution of wealth through taxation and equitable sharing of the tax burden.

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109 See The Income Act, Third Schedule.
110 Ibid.
111 Finance Act 2021 section 33.
112 John Mutua, 'Boost for musicians as Skiza tune removed from excise duty list' Business Daily, JULY 05 2021 available at https://www.businessdailyafrica.com/bd/corporate/companies/boost-for-musicians-as-skiza-excise-duty-list-3461506#:~:text=%E2%80%9CThe%20following%20excisable%20goods%20shall%20be%20exempt%20from,to%20a%20subscriber%2C%E2%80%9D%20reads%20the%20Finance%20Act%2C%202021.
113 Income Tax Act section 5(4)(f); Finance Act 2008.
114 National Tax Policy pg. 27.
115 Charles Okweba, Illegal to tax mama mboga, critics threaten suit, TheStar 01 February 2020 https://www.the-star.co.ke/news/2020-02-01-illegal-to-tax-mama-mboga-critics-threaten-suit/ [accessed 15 June 2022].
116 Waweru & 3 others (suing as officials of Kitengela Bar Owners Association) & another v National Assembly & 2 others; Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Party) (Constitutional Petition E005 & E001 (Consolidated) of 2021) [2021] KEHC 9748 (KLR) (20 September 2021) (Judgment)

Analysis of the Incentives Targeting the Poor

- Incentives on income tax confers direct benefit to low-income earners by increasing their disposable income. The removal of the waiver of income tax on overtime for low-income earners was a claw back to the efforts to ensure low-income earners have increased disposable income. Therefore, to the extent possible, the government should consider reinstating these incentives.
- At the moment, lack of disaggregated data to show how many people benefit from incentives targeting the poor hinders a cost-benefit analysis of these incentives.

3.2.4. Incentives in the Manufacturing Sector

In the period under study, manufacturing has been one of the beneficiaries of tax incentives. Under the Big Four Agenda, the government seeks to increase the contribution of the manufacturing sector to GDP from 8.5 per cent to 15 per cent by 2022.[117] Previously, the Finance Act 2009 introduced incentives in which high-value investors received 150 per cent investment deduction on installation of machinery or building used for manufacturing, provided the investment was more than KShs 200 million and located outside Nairobi, Mombasa or Kisumu. Following an amendment in 2020 the amount was reduced to 100 per cent investment deductions where the cumulative investment value in the preceding three years outside Nairobi City County and Mombasa County is at least KShs 2 billion in 2020 or where the investment in the year of income outside Mombasa and Nairobi is KShs 250 million.[118] Other incentives included 130 per cent tax deduction on electricity cost introduced in 2019,[119] only to be removed a year later.[120]

Previously there was a VAT exemption for plant and machinery exclusively used for the manufacture of goods, which the 2020 Tax Laws Amendment Act removed. In addition, companies that locally assemble motor vehicles are subject to a reduced corporate income tax rate of 15 per cent, half of the standard rate of 30 per cent, for the first five years of operation. [121]

Analysis of the incentives for the manufacturing sector

- Deductions on capital investment on buildings and machinery outside Nairobi and Mombasa are likely to benefit neighbouring counties such as Kiambu, Machakos, Kajiado and counties in other cities and towns such as Kisumu, Eldoret and Nakuru that have good infrastructure, key amenities and access to markets unlike counties in the ASAL regions and other far-flung areas, some of which face problems such as insecurity, thus widening inequality.
- There is a need to develop regions such as ASALs to make them competitive since incentives alone will not make them competitive investment hubs amidst challenges such as insecurity resulting from banditry and terrorism that continue to hinder development. Besides, in other far-flung areas, challenges such as poor road networks, unstable power supply and accessibility to markets, among others, ought to be addressed to make the regions more competitive and capable of attracting investments.

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117 See https://big4.delivery.go.ke/ [15/15/2

118 Income Tax Act Second Schedule. Para. 1A (a) & (b). The Tax Laws (Amendment) Act No. 2 of 2020 repealing the 2nd Schedule of the Second Schedule of the Income Act.

119 Finance Act 2018.

120 Tax Laws (Amendment) Act 2020

121 Kenya Tax Exenditure Report 2021.

- Decisions such as introducing and removing electricity rebates to manufacturers appear not well thought out since this happened in less than a year, a short period to evaluate whether an incentive met its policy objectives. This is a manifestation of unpredictable tax policies.

3.2.5. Tax Incentives in Export Processing Zones and Special Economic Zones

Export Processing Zones (EPZs) generally are designated areas where goods are produced for export, and they are considered insofar as import duties and taxes are concerned to be outside the remit of the customs territory. There are stringent restrictions regarding trading the goods produced in EPZs in local markets. Generally, these zones produce goods and services for export purposes only. They were introduced in 1990 to help meet the deficit of foreign currency. Correspondingly, Kenya has developed special economic zones (SEZ) in a bid to spur industrialisation. Companies located in EPZs enjoy a 10-year tax holiday (0 per cent) from commencement and subsequently pay 25 per cent corporate income tax for 10 years. Companies located in SEZ pay corporate income tax at the rate of 10 per cent for the first 10 years of operation and 15 per cent thereafter. They are also not required to register for VAT. Surprisingly, the 2021 Tax Expenditure Report excluded incentives in EPZs and SEZ, stating that these are preferential tax rates and therefore do not constitute tax expenditure but can only constitute a benchmark for the report. [122]

Analysis of the incentives in the EPZs and SEZs

- Failure to include EPZ and SEZ in the Tax Expenditure Report impedes an effective cost-benefit analysis of the incentives. If these remain a norm, there will be a need to conduct research targeting incentives in EPZs and SEZs to evaluate the benefits resulting from the generous incentives, given that experiences elsewhere have shown that most jobs created are low-ranking positions, and employees often work in poor labour conditions.[123]

- EPZs and SEZs concentrate mostly in urban centres and along major trade routes; therefore, other benefits like access to employment and others benefits that accrue to the surrounding ecosystem mostly benefit host counties, locking out residents of regions such as ASALs that do not have EPZs and SEZs, thus widening regional inequality.

3.2.6. Conclusion from the Incentives at the National Government

Generally, there is a shift towards decreasing tax incentives which has negatively affected the rich and the low-income earners but promises to increase domestic resource mobilisation as a key post-COVID-19 recovery measure. Nevertheless, incentives at the national level are likely to widen the gap between the rich and the poor and inequality among regions in several ways. In widening the gap between the rich and the poor, most incentives targeting the rich are in the form of direct taxes, which increases disposable income, and do not have ceilings. On the contrary, incentives on indirect taxes targeting the poor such as VAT exemptions on consumables, do not always increase disposable income since the manufacturer has a leverage on setting the price. Moreover, since VAT is a regressive tax, related incentives on consumables, though targeting the poor, unfairly benefit the rich despite the wide income inequality.

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122 Tax Expenditure Report para. 2.2.1.

123 See Focus on working conditions in EPZ companies, The New Humanitarian, 9 March 2004 available at https://www.thenewhumanitarian.org/report/48975/kenya-focus-working-conditions-epz-companies [accessed 15 June 2022].

Furthermore, most incentives targeting low-income earners have an upper ceiling. For example, affordable housing relief and income tax relief for persons with disability are all capped to a maximum amount within which they are available. Others have restrictions, for example, those targeting first-time homeowners while most incentives targeting the rich do not have ceilings. For example, developers in the affordable housing programme have a leeway to undertake numerous projects benefiting from the available incentives without any restriction.

3.3. Tax Incentives at the county level

Counties have adopted incentives to meet several objectives, such as enhancing revenue collection, encouraging investment and meeting other social welfare objectives, as seen at the height of COVID-19.[124] In compliance with article 210 of the Constitution, several counties have enacted tax waiver and exemption regulations, which also stipulate procedures for applying for waivers.[125]

However, a significant number of counties still issue waivers solely relying on the PFM Act and the Constitution, which are not elaborate on the procedure to be followed, while even where there are laws, some counties grant illegal waivers and variations predicated on weak policy and legal basis.[126] The waivers are not well documented, and the reasons for the waiver are not always forwarded to the Auditor General or the county assemblies for oversight. The practice largely does not meet the constitutional requirement and the features of an effective incentive scheme. Given the limited information regarding county-level incentives, the following discussion will look at select case studies on several counties in awarding tax incentives on selected taxes and revenue streams and how they increase the gap between the rich and the poor.

3.3.1. Incentives in Property Taxes

In the advent of devolution, property taxes, mainly land rates and rent, remained one of the counties' most viable revenue sources.[127] The legal basis for charging land rates is the Valuation for Rating Act (Cap 266) of 1956 and the Rating Act (Cap 267) of 1963, used by the defunct local authorities. Some counties have enacted laws to provide for charging land rates. Currently, however, property taxes are not optimally collected for several reasons. First, counties use outdated valuation rolls, leading to less taxes collection than expected. For example, Nairobi, Machakos and Mombasa's valuation rolls were last updated in 1982, 1983, and 1991 respectively.[128] This means that the amount collected is less than what should ordinarily be collected, where the rolls are updated every ten years.[129]

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124 'Relief for businesses as counties waive licence fees' The Standard 13 April 2021. https://www.standardmedia.co.ke/counties/article/2001409462/relief-for-businesses-as-counties-waive-licence-fees [accessed 15 June 2022].

125 For example, The Meru County Tax Waivers Administration Act, 2020; The Kisumu County Tax Waivers Administration Act, 2014; The Nyeri County Tax Waivers Administration Act, 2014; The-Mombasa-County-Tax-Waiver-And-Variation-Act-2017; The Kilifi County Tax Waivers Administration Act, 2014

126 The National Treasury and Planning, National Policy to Support Enhancement of County Governments' Own-Source Revenue February, 2019 pg. 16.

127 Adamsmith 'Final Report: Own-Source Revenue Potential and Tax Gap Study of Kenya's County Governments'

128 The National Treasury and Planning, National Policy to Support Enhancement of County Governments' Own-Source Revenue February, 2019 pg. 5.

129 Ibid.

Counties such Kisumu, Nyeri and Kiambu updated their rolls in 2008, 2009 and 2014 respectively.[130]

Secondly, there is massive enforcement deficit by counties. For example, the 2019/2020 Financial Year audit report on Kisumu County revealed that land rates arrears stood at KShs 1.037 billion.[131] In Kiambu County, land rates and ground rent arrears stood at KShs 915 million as of 30 June 2020,[132] while in Nakuru County, property owners owed the County KShs 11 billion in accrued land rates.[133] In Isiolo, despite land rates being the second leading source of OSR, in 2018/2019 Financial Year, the County did not report any revenue from the land rates.[134] This is a significant amount that ought to be collected by counties which will go a long way in reducing budgetary deficits.

Thirdly, though land rates remain a significant source of revenue for county governments, the bulk of Kenyan land is unregistered with 75 per cent of the unregistered land in Mandera, Wajir, Garissa, Kilifi, Tana River, Taita Taveta, Kwale, Samburu and Turkana,[135] part of which is communally owned. These constrain counties' ability to raise adequate revenue from land rates. Instead, counties opt to compensate for the deficit by enhancing the collection of revenue from other small businesses considered to be low-hanging fruits contrary to the principle of fairness in sharing the tax burden, thus widening the inequality.

To encourage payment of land rates, most counties have granted waivers on interest and penalties.[136] Partly this is necessitated by enforcement deficits that counties experience. When a landlord fails to pay land rates, the remedies available include instituting recovery proceedings in court, which is time-consuming and costly.[137]

Apart from incentives in the form of waivers, audit reports from the Auditor General have revealed inconsistencies and breaches of the county laws in administering incentives. For example, in the 2018/2019 Financial Year, the Auditor General flagged Nakuru County for irregular waivers or variation of land rates during the 2018/2019 Financial Year amounting to KShs 5.3 million.[138]

130 Ibid.
131 Report of the Auditor-General on County Executive of Kisumu for the Year Ended 30 June, 2020 available at https://www.oagkenya.go.ke/wp-content/uploads/2022/01/County-Executive-of-Kisumu-2019-2020.pdf [accessed 15 June 2022].
132 Report of the Auditor-General on County Executive of Kiambu For The Year Ended 30 June, 2020 available at https://www.oagkenya.go.ke/wp-content/uploads/2022/01/County-Executive-of-Kiambu-2019-2020-.pdf
133 Report of the Auditor-General on County Executive of Nakuru for The Year Ended 30 June, 2020 available at https://www.oagkenya.go.ke/wp-content/uploads/2022/01/County-Executive-of-Nakuru-2019-2020-.pdf
134 KESRA, Assessment of Own Source Revenue Streams for Isiolo County, available at https://www.kesra.ac.ke/wp-content/uploads/2022/03/Isiolo_County_Consultancy_Report_Final-1.pdf accessed 15 May 2022.
135 The National Treasury and Planning, National Policy to Support Enhancement of County Governments' Own-Source Revenue February, 2019 pg. 5.
136 David Mwitari, 'Why counties embraced land rates waivers' The Standard, May 25, 2017 available at https://www.standardmedia.co.ke/business/article/2001241049/why-counties-embraced-land-rates-waivers [accessed 5TH May 2022].
137 The National Treasury and Planning, National Policy to Support Enhancement of County Governments' Own-Source Revenue February, 2019
138 Report of the Auditor-General on County Executive of Nakuru for the Year Ended 30 June, 2019 available at https://www.oagkenya.go.ke/wp-content/uploads/2021/09/County-Executive-of-Nakuru-2018-2019.pdf accessed 15 June 2022.

With this information, there is a likelihood that more waivers/variations on land rates are awarded without proper documents contrary to article 209 of the Constitution.[139] Additionally, there are allegations that some properties owned by senior county officials do not pay taxes, including land rates which conflict with article 210(3) of the Constitution. Analysis of incentives awarded on property taxes

- Poor fiscal policies, such as failure to update the valuation rolls confer land owners a benefit since they pay lesser taxes that do not reflect the market value of the property.
- Regarding the waiver of land rates, so far, there is no adequate data to demonstrate that counties that have waived have significantly addressed the challenge. Most counties appear to have annual waivers of interests and penalties, which means that this incentive is not meeting its policy objectives.
- The incentive creates inequality in several ways. First, landlords are generally wealthy people, therefore, failure to enforce payment of land rates increases their disposable income as counties resort to taxing other small businesses unfairly to meet the revenue deficits. Secondly, counties appear to be complicit in failing to collect taxes from landlords, unlike low-income earners whose late payment of levies on a daily or monthly basis is often met with brutal enforcement, confiscation of wares and punitive penalties.[140]

- Owing to the history of land ownership in Kenya, tax incentives in property taxes benefit more men, and no reciprocal waivers and other incentives are granted to women-dominated sectors.
- Enforcement deficits across counties have reduced the effectiveness of the incentives since no action is taken against anyone who fails to pay. This is evidence that incentives without enforcement cannot enhance revenue collection.

3.3.2. Incentives Relating to Single Business Permits

Single business permit is a license issued by county governments for business premises instead of having multiple business licenses for each activity.[141] In the pre-devolution period, SBP was provided for under the Local Government (Single Business Permit) Rules, 2008. After devolution, several counties are yet to enact laws to guide levying SBP.[142] Those that have enacted laws to provide for SBP have adopted different modes. For example, Machakos County have enacted a law to provide for the issuance of trading licenses mainly focusing on procures,[143] while others like Kiambu County have a comprehensive statute that sets out the amounts charged independent from the annual Finance Acts.[144]

Counties have different approaches to defining a business unit. For example, the lowest band for SBP is the small trader, shop, or retail service of up to four employees and premises less than 50m2 in faraway location.

139 Interview with a Resident of Kwale County.
140 For example, in Uasin Gishu, a boda boda operator who fails to pay KSH. 600 monthly ticket fee will pay penalties of Kshs 3,000/- in the event his boda boda is confiscated by county askaris for not having a ticket.
141 The National Treasury and Planning, National Policy to Support Enhancement of County Governments' Own-Source Revenue February, 2019.
142 Ibid.
143 Machakos County Trade Licence Act 2014 (Act No.9 of 2014); Mombasa County Trade Licence Act, 2014.
144 Kiambu CountyTrade LicenceAct 2016.

However, counties like Mombasa have a category of 'other wholesalers/retailers/traders/ stores/shops/shop' and micro-business, which though not succinctly defined and pay lower SBP rates.
Right from the classification, there are counties where small businesses and retail shops pay an equal amount of SBP with others like wholesalers, which enhances inequality given that small shops like kiosks have lower returns, unlike wholesale shops.

An example of an incentive on SBP is the 30 per cent relief for special groups (SMEs start-ups) adopted by Mombasa County.[145] The incentive appears well targeted to encourage special groups to set up businesses. Notably, some businesses do not pay SBP because of enforcement deficits and the outdated Local Authority Integrated Financial Operations Management Systems (LAIFOMS), which unfairly grants other businesses an unfair competitive advantage against those that pay. Just like the case for land rates, there is a need to update LAIFOMS and data of business registered within the county periodically. Notably, professionals such as doctors, lawyers and accountants do not pay these levies in counties after the Law Society of Kenya successfully filed a petition against the defunct Nairobi municipality. [146]

Analysis/recommendations of incentives on Single Business Permit

- To enhance equality, there is need to have graduated bands separating wholesalers from retailers like *kiosks*.[147] This will bring some form of progression in paying SBP, thus enhancing equality.
- Where special interest groups like in Mombasa are granted reduced rates, the timeline for this incentive should be set to enhance monitoring and guarantee predictability.[148]
- To enhance monitoring, data should be published to indicate the number of businesses and the revenue foregone to enable one to assess the impact of the incentive and whether it is meeting the set objectives.
- Similarly, some small-scale traders feel pressed paying the SBP fee of KShs 6,000 at once , and therefore calling for a need to pay it at least in two instalments annually.[149]
- The incentives are not similar across the counties, and counties, including those in the same economic bloc, have different tax rates and incentive schemes that, if not harmonised, could enhance horizontal and vertical inequality.

3.3.3. Incentives Relation to Cess

Cess is a levy imposed on domestically traded commodities. In the defunct municipalities, it was levied mainly on agricultural produce, but at the moment, it is set on most commodities, including sand and building stones, among others.[150]

145 The Mombasa County Finance Bill 2021.
146 Republic v City Council of Nairobi & another Ex-parte Law Society of Kenya [2014] eKLR.
147 This is a small retail shop that sells basic consumable items in retail including newspapers etc.
148 For example, in Nairobi County, in 2020, the then Governor Mike Sonko waived SBP for a two year period for new businesses.
149 Though this may require increased administrative cost, counties should consider it.
150 Maurice J Ogada et al, The Burden of Produce Cess and other Market Charges in Kenya's Agriculture' 2018 available at https://ideas.repec.org/a/ags/afjecr/281436.html [accessed 17 June 2022]; Brian Ocharo, 'Kenya transporters to move to court over Mombasa County cess' November 05, 2021 Daily Nation available at https://nation.africa/kenya/counties/mombasa/kenya-transporters-to-move-to-court-over-mombasa-county-cess-3608556 [accessed 16 June 2021];

At the onset, most counties did not have legal frameworks for levying cess, and attempts to levy cess were declared unconstitutional.[151] This saw a number include it in the respective Finance Acts, whereas others enacted statutes to provide for cess. A survey across counties reveals that some counties charge a flat rate on cess, whereas others charge a proportional or graduated amount based on quantities or value of the traded commodities. For example, in Nandi County, the regions are classified into A,B, and C. In zone A, cess for a 90-kilogramme bag of cereals is KShs 50 in zone A and B and KShs 40 in Zone C. In Mandera County, KShs 50 for a 50 kilogramme bag and KShs 100 for a 100 kilogramme bag. Nakuru has a graduated scale and charges 1 per cent of produce gross turnover and further clusters producers as large scale, medium scale and small scale. Small scale has reduced rates of KShs 20 per 50 kilogramme bag.The approach taken by Nakuru County favours small-scale traders since they pay lower cess, unlike cases where Mandera and Nandi counties charge KShs 50 for a 50 kilogramme bag regardless of whether the trader is a small or large-scale trader. Additionally, Nakuru County has waived cess on sand.[152]

Though cess was explicitly meant to be ploughed back to improve the agricultural sector and the roads, this has not been achieved at the counties. Most counties charge cess but still have a poor road network that adds to the transportation cost to farmers.[153]

In some cases, traders end up paying cess more than once along the trade routes, a practice that makes the cess confiscatory, resulting in an increase in costs of basic commodities. For example, a study established that cess accounts for 16 per cent of the price of maize, a staple food for most poor households in Kenya.[154]

Amidst a renewed push to levy cess at source, other counties have come up with taxes such as landing costs which traders have to pay to access markets.[155] A reprieve for traders, came when the Supreme Court held that counties could only levy cess on county roads and not roads maintained by Kenya National Highways Authority (KeNHA), the Kenya Urban Roads Authority (KURA) i.e. class A, B and C roads.[156] However, even with this judgment, some counties like Mombasa are yet to stop levying cess on highways.[157] Often, the cess has been used to advance political objectives. For example, during a campaign rally in Meru, the then Governor of Mombasa waived cess for miraa traders stating that '… *Due to your warm welcome, from today, we will not charge cess for miraa heading to Mombasa County.'*[158] Such a declaration is contrary to the procedure for granting waivers stipulated in the Mombasa County Tax Waivers and Administration Act.

151 Cereal Growers Association & Another v County Government of Narok & 10 others [2014] eKLR
152 Information from County questionnaires.
153 An interview with traders from Homabay and Nandi County.
154 Bayesian Consulting Group, The Burden of Produce Cess and Other Market Charges in Kenya October 2016 available at https://vdocument.in/download/the-burden-of-produce-cess-and-other-market-charges-in-kenya-despite-produce-cess [16 May 2022].
155 Martin Siele, 'Smokie Tax: Farmers Choice Protest KRA Directive' January 31, 2022 Business Today accessed https://businesstoday.co.ke/smokie-tax-farmers-choice-suppliers-protest-kra-directive/ [16 May 2022].
156 Base Titanium Limited v County Government of Mombasa & another (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment)
157 Brian Ocharo, 'Kenya transporters to move to court over Mombasa County cess' November 05, 2021 Daily Nation available at https://nation.africa/kenya/counties/mombasa/kenya-transporters-to-move-to-court-over-mombasa-county-cess-3608556 [accessed 16 June 2021].
158 Wachira Mwangi, Kenya: Joho Removes Cess Charges on Miraa Transporters 18 October 2021 Daily Nation available at https://allafrica.com/stories/202110190139.html accessed 17 June 2022.

Findings and Recommendations on Incentives for the Cess

- There is a need to adopt a graduated approach, distinguishing various regions in a County, besides adopting a graduated approach, a model akin to Nakuru County's, which ensures that small traders pay a lesser and proportionate amount of cess. Moreover, counties should consider waiving cess for small-scale traders since it is a hindrance to inter-county trade.
- Cess should be charged at source to avoid instances of double taxation along the trade routes making the cost of agricultural produce beyond the reach of low-income earners in urban centres, which further compromises their nutrition, making them vulnerable to illnesses.
- Through county economic blocs, it is hoped that counties will harmonise cess collection to reduce delays occasioned by numerous roadblocks along trade routes which often opens room for rent-seeking and corruption.
- Counties should channel amounts collected from cess to repair and construct roads and subsidise other farm inputs in the agricultural sector to ensure the locals appreciate the returns of paying cess, thus enhancing compliance.
- Incentives on cess should be based on sound policy framework to avoid abuse. For example, waiving cess for miraa traders in Mombasa while the same is levied on other consumable products like maize and others, lacks policy justification.

3.3.4. Market Fees

Market fees are a broad category and include market entry fees, mainly for agricultural products and vehicles going to collect goods from the market. These are paid mostly by women who are the majority of traders in markets. During COVID-19, several counties waived market fees as part of the intervention to ensure women had adequate capital.[159] However, this was not across all counties. There are counties where such waivers were not issued or operated for a shorter period. In other counties like Laikipia, traders such as hawkers pay KShs 50 daily, which translates to above KShs 15,200 annually, an amount that is extremely high given that wholesale owners pay KShs 6,000 for an annual licence.[160]

Besides, despite paying market fees, some counties levy charges for accessing amenities such as toilets[161] and in other markets, traders decry poor sanitation, which have often seen them resort to demonstrations.[162]

159 Njenga Stanley, 'Kiambu waives market charges, lowers parking fees' The Star 08 April 2020 available at https://www.the-star.co.ke/counties/central/2020-04-08-kiambu-waives-market-charges-lowers-parking-fees/ [accessed 15 June 2022].

160 Laikipia County Finance Act 2021, see also 'Nyandarua traders decry eviction from Nyahururu market', The Star 20 October 2022 available at https://www.the-star.co.ke/counties/central/2022-10-20-nyandarua-traders-decry-eviction-from-nyahururu-market/ [accessed 30 october 2022.]

161 Ibid (Nyandarua County); see also Farhiya Hussein, 'Kenya: Tudor Residents Protest Over Poor Sanitation' AllAfrica 20 November, 2019 available at https://allafrica.com/stories/201911210129.html [accessed 15 May 2015] (Mombasa County).

162 Traders in Naivasha demonstrate over market fees The Standard 18 March 2018 available at https://www.standardmedia.co.ke/business/news/article/2001273411/traders-hold-demo-over-market-fees [accessed 15 May 2022]; Siaya Traders Decry Poor Hygiene In The Market Kenya News Agency 8 May 2021 available at https://www.kenyanews.go.ke/siaya-traders-decry-poor-hygiene-in-the-market/ [accessed 15 May 2022]; Bondo Traders Withhold Taxes Over 'Dirty' Market, January 08, 2016, available at https://citizen.digital/news/bondo-traders-withhold-taxes-over-dirty-market-111213/ [15 May 2022].

Similarly, livestock traders also pay market fees to access markets. For example, in Kajiado, one pays KShs 100 for a cow and KShs 50 for a goat even where the same is not sold. In some counties, however, like Garissa, traders successfully bargained to ensure that they only pay market access fees for livestock that has been sold.[163] Delays in paying market fees attract penalties, especially where they are paid monthly and therefore, counties use these to ensure compliance.

Findings and Recommendation

- This tax targets mainly women; therefore, counties should earmark this as an area where incentives can be issued to enhance women's economic inclusion and empowerment.
- There is a need to harmonise the rates and the practice and where possible, for instance, in livestock trade, market fees can be paid after selling livestock and not before selling. Paying before selling makes it costly given that sometimes, traders visit markets on several occasions before finding markets for the livestock.[164]
- Counties should use these levies to ensure better amenities, including those accessible to PWDs, and security to ensure traders appreciate the essence of paying market fees.
- Additionally, markets should be classified into various clusters and lower market fees for markets outside major urban centres since, in most cases, there are low trade volumes in small markets, and returns are considerably lower.

3.3.5. Matatu/Bus Park Fees/Parking Fees

These are collected mainly from parking services rendered by the county. Public transport vehicles like matatus and buses pay fees per entry into the bus stage. The fees are clustered into various bands depending on the passenger capacity. In addition, the band extends to include motorcyclists (boda boda) and three-wheeled vehicles (tuk tuks). Taking the case of boda boda, that is mainly youth dominated, the fees vary from the monthly charges of KShs 500 to KShs 200. Some counties like Narok have a standard rate of KShs 500 for monthly stickers, while others, such as Uasin Gishu, have bands for KShs 500, 300 and 200 depending on the zone of trade. Counties with clustered zones provide for a progressive component, whereas those like Narok with a flat rate across the county appear to be regressive since boda bodas in Narok town are likely to earn more income than others in rural areas who find the amount to be relatively high. Surprisingly though some counties like Kisumu have boda boda fees, the boda bodas do not pay it partly because there are enforcement deficits.[165] Such practices mean that boda bodas in Kisumu will save more than their counterparts in other counties that enforce the monthly license.

a. Case Study for Boda Boda in Kisumu County

Since the inception of devolution, boda boda operators in Kisumu County have not been paying levies for monthly stickers despite having the same in the successive Finance Acts.

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163 Jon Helfers, 'Case Study Tax Bargaining, the Fiscal Contract and Public Participation in four Kenyan Counties' pg. 5.

164 Interview with a trader from Kajiado.

165 Interview with two bodaboda operators in Kisumu.

In 2017, boda boda operators declined to pay taxes, threatening the former governor with dire political consequences in the event they are compelled to pay the taxes.[166] Subsequently, after Governor Anyang' Nyong'o took office in 2017, an attempt to introduce taxes was unsuccessful.[167] Apprehensive of political consequences in the event of enforcement, there was no effort to enforce.[168]

Despite allowing this waiver informally, the Finance Act does not reflect it. Though the revenue is not collected, the Finance Act indicates a levy of KShs 100 is paid by boda bodas monthly,[169] a considerably low amount compared to other counties like Uasin Gishu where it is KShs 500 monthly.[170] Where such compromises are adopted, they violate all the principles of an effective taxation and incentive system. Furthermore, they enhance gender inequality since other persons, for example, women who pay market fees, lack comparable informal waivers awarded to boda bodas. In the Financial Year 2020/2021, Kisumu County projected to collect KShs 32 million from boda bodas. However, in the first and second quarter reporting, no amount was reported for boda boda. Comparatively, market fees, a female-dominated area, a total of KShs 12,233,930 and KShs 17,852,640, were collected in the first and second quarters respectively.[171] Therefore, failure to enforce revenue collection among such groups negates the principle of horizontal equity in taxation and makes payment of the levies appear to be an optional activity, a derogation from the principles of a fair tax system.

Analysis and Recommendations

- Most counties have adopted a graduated scale for charging this levy where all means of transport; buses, matatus and tuk tuks pay different rates, hence encouraging vertical equity.
- For businesses like boda bodas, there is a need to reclassify the regions since some operate in sub-counties where the returns are low unlike their counterparts in urban centres.
- Counties like Kisumu should engage boda bodas with a view to setting levies and modalities for their collection. In doing this, it will be necessary for the county to demonstrate services that boda bodas are bound to benefit in return. This will encourage compliance.
- The levy should be collected across all counties since collecting in one county and failing to collect in another without a clear policy reason leads to horizontal inequality among persons at the same level of income.

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166 Kevine Omollo, 'County begins to tax bodaboda operators in bid to raise Sh250 million' The Standard available at https://www.standardmedia.co.ke/ureport/article/2001290182/county-begins-to-tax-bodaboda-operators [accessed 15 May 2022].

167 Maurice Alal, 'You must pay taxes, Kisumu boda boda riders told' The Star 21 June 2019, accessed https://www.the-star.co.ke/counties/nyanza/2019-06-21-you-must-pay-taxes-kisumu-boda-boda-riders-told/ [accessed 15 May 2022]; Colins Dudi, 'Kisumu bodaboda operators' bosses reject new tax order' HiviSasa June 3, 2019 available at https://hivisasa.com/posts/1108-kisumu-bodaboda-operators-bosses-reject-new-tax-order [accessed 15 May 2022].

168 Interview with a boda boda operator in Kisumu.

169 The-Kisumu-County-Finance-Bill-2021.pdf; See Kisumu County Fiscal Strategy Paper FY 2021/2022 reports that in the 2020/2021.

170 Interview with a boda boda operator in Eldoret; See also Uasin Gishu County Finance Bill 2021.

171 Kisumu County Fiscal Strategy Paper FY 2021/2022.

3.4. Conclusion

The foregoing discussion reviewed tax incentives the nation and county governments granted. From the review, some of the reasons include the promotion of social welfare, development of key sectors, fostering development of underdeveloped regions and enhancing compliance. Even without data that will enable a cost-benefit analysis, a general review reveals that the objectives of incentives are far from being realised. Capital deductions meant to spur economic development have not resulted in a significant shift of development to underdeveloped regions such as the counties in the FCDC bloc. Affordable housing schemes also have not resulted in lowering the price of housing since apart from the Boma Yangu platform, it is rare to find developers selling units at KShs 600,000, a price that may be considered affordable for most low-income earners.

VAT related incentives have not yielded much in terms of lowering the cost of basic commodities such as maize flour and in some cases, the government has been forced to subsidise, especially when General Elections are approaching.[172] At the county level, the annual waiver of interest and penalties on land rates alone has proved not to yield much for the last decade, therefore underscoring the need to address enforcement deficits urgently. The foregoing observation does not factor in other positive outcomes of incentives, such as the creation of employment and development of projects with the community, among others. These may be revealed in sector-specific research targeting incentives in sectors such as the EPZs, SEZs and affordable housing programmes, among others. The key component that will make this possible is increased transparency in fiscal policies and strictly complying with features of effective incentive schemes, most of which have been reiterated in the Constitution and the Public Finance Management Act.

More must be done at the counties to ensure that fiscal policies are developed in compliance with the existing laws. Where there are poor fiscal policies and other challenges such as failure to collect revenue and irregular waivers, among others, it becomes difficult to assess the impact of incentives since fiscal policies have the potential to enhance inequality. In this quest, counties may need partners to assist in formulating sound policies as well as training. A starting point would be sharing information and making information readily accessible to allow many actors to participate in the research and policy formulation process. Without any intervention, counties will continue taxing sectors where they consider taxing low-income earners and sectors where counties can easily enforce, thus enhancing inequality.

172 Gerald Andae, 'How new unga subsidy work' 27 July 2022 Business Daily available at https://www.businessdailyafrica.com/bd/economy/how-new-unga-subsidy-works-3893244 [accessed 30 July 2022].

TAX INCENTIVES AND INEQUALITY IN THEMATIC AREAS

One of the functions of an effective tax system is to redistribute wealth and enhance equality. This principle requires that the burden of taxation should be distributed fairly and equitably by everyone.[173] Accordingly, people with the same ability to pay tax ought to pay the same amount, while those with greater ability ought to pay more.[174] In the context of tax incentives, it is vital to note that tailoring the fiscal benefits in favour of a specific class of taxpayers constitutes preferential treatment that must be justified by meaningful gains in return.[175] That is, selective preferential taxation translates into loss of public revenue to the government, which in turn constrains or limits the government's capacity to effectively provide public goods and services. Hence, the revenue regime must be programmed in a way that the revenue foregone (also known as tax expenditure) through the grant of incentives, is adequately compensated by the intended returns.

The theory of distributive justice holds that the social economic benefits and burdens of a society ought to be distributed equitably.[176] The call for equitability in the distribution is conscious of the fact that members of a society are not similarly placed socially and economically and hence some differential treatment is necessary to ensure that the least advantaged or vulnerable in the group should be subjected to less burdens and allowed equitable benefits from distributive mechanisms.[177] Regarding public revenue, the goals of distributive justice are twin-fold; first is to enable a government to raise adequate revenue necessary for fulfilling its mandate to the public, and second is to ensure equitable and equal sharing of tax burdens.[178] Equity has two main elements; horizontal equity and vertical equity. Horizontal equity means that taxpayers in similar circumstances should bear a similar tax burden, and vertical equity generally that taxpayers should pay taxes proportionate to their income i.e. the rich and the poor should pay taxes proportional to their respective income, hence the basis for progressive taxation.[179]

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173 Article 201 (b) (i) of the Constitution, 2010.
174 Geoffrey Morse and David Williams (5th ed.), Davies: Principle of Tax Law (London: Sweet and Maxwell, 2004) at 6.
175 Sally M. Jones and Shelly C. Rhoades-Catanach, Principles of Taxation for Business and Investment Planning (New York: McGraw-Hill Irwin, 2010) at 32.
176 Robert Reiner, Introduction to Jurisprudence and Legal Theory: Commentary and Materials (London: Butterworth's: 2002) at 728.
177 Robert Reiner, Introduction to Jurisprudence and Legal Theory: Commentary and Materials (London: Butterworth's: 2002) at 728.
178 Linda Sugin, Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems, (2004) Fordham Law Review, Vol. 72, Issue 5, Article 27 at 1999.
179 Geoffrey Morse and David Williams (5th ed.), Davies: Principle of Tax Law (London: Sweet and Maxwell, 2004) at 6.

Whereas distributive theory does not specifically advocate for the use of tax or fiscal favours or encourage preferential taxation, the insistence on the differential allocation of revenue burdens; considering the individual's ability to pay, implies that a government has the liberty to employ tax incentives to stimulate economic growth, development of underdeveloped areas and advance other social welfare or humanitarian objectives. To safeguard tax incentives from being abused by governments, it is therefore imperative that incentive schemes be fair, equitable and satisfy the goals of tax justice. An unfair incentive scheme results in many forms of inequality, such as regional inequality, gender inequality and widening the gap between the rich and the poor, among other disparities subsequently discussed.

4.1. Inequality Across Regional Economic Blocs

Regional inequality has been a key feature in Kenya, and it can be traced from the policies adopted by the colonial government and the successive governments in the pre-2010 era. In the post-2010 dispensation, devolution restored hope of equitable distribution of resources by granting counties powers to manage resources for the optimal benefit of the locals and to bridge inequality previously entrenched by skewed government policies. However, this has not yielded much given that the historical inequalities are yet to be addressed and is now manifested in the wide disparity of countries when looking at OSR potential.[180] This disparity in revenue potential in counties has been transposed to regional economic blocs, which have coalesced mainly along the geographical borders of provincial administrations before devolution.

In the ASALs and the greater FCDC, where the key economic activity for the communities is pastoralism, the practice has always been covered by the media in a negative way with minimal attention to benefits of pastoralism such as environmental conservation.[181] The bulk of the headlines from the ASAL region oscillates between banditry and the ravaging hunger resulting from prolonged famine. Government intervention is often characterised by a high-handed approach to combat banditry and donations in periods of extreme famine.

In contrast, in regions like NOREEB and CEREB, where predominant economic activities include tea and coffee farming, farmers enjoy massive support from the government in terms of loans, waivers and marketing. For example, in 2016, former President Uhuru Kenyatta waived KShs 2.4 billion debt for coffee farmers.[182] Such government policy measures provide a safety net for tea and coffee farmers without providing equivalent measures to protect pastoralists in Kenya.

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180 CRA, Recommendation on the Basis for Equitable Sharing of Revenue Between National and County Governments for Financial Year 2022/23 pg. 25. Available at https://cra.go.ke/wp-content/uploads/2021/11/FY-2022-2023-CRA-Recommendation-on-the-Basis-for-Equitable-Sharing-of-Revenue-Between-National-County-Governments.pdf [accessed 15 July 2022].

181 Mike Shanahan, Media perceptions and portrayals of pastoralists in Kenya, India and China' https://www.iied.org/sites/default/files/pdfs/migrate/14623IIED.pdf [accessed 12 January 2023]

182 'Uhuru to offer coffee and tea farmers more debt waivers' Business Daily December, 12 2016 https://www.businessdailyafrica.com/bd/economy/uhuru-to-offer-coffee-and-tea-farmers-more-debt-waivers-2133796 [accessed 10 April 2023].

The national government's fiscal policy remains central to addressing regional inequality, especially for the ASAL counties. However, so far, though policies such as Vision 2030 Development Strategy for Northern Kenya and other Arid Lands, Sessional Paper No. 8 of 2012 on the National Policy for Development of Northern Kenya and other Arid Lands, among others, have been adopted, implementing is yet to commence in earnest. Most of the policies remain on paper. Similarly, the equalisation fund provided for in the Constitution is yet to be fully operationalised to benefit counties earmarked as marginalised.[183]

Furthermore, tax incentives aimed at stimulating the development of underdeveloped areas do not recognise the disparity in development among regions outside Nairobi and Mombasa. For example, the 2020 Tax Laws Amendment Act provided for 100 per cent investment deductions for investments of KShs 200 million outside Mombasa and Nairobi counties, which aimed at encouraging development in counties adjacent to Mombasa and Nairobi and not ASAL region due to the lack of basic infrastructure to support rapid industrialisation in ASAL region. Additionally, there is evidence that policies in various counties will likely enhance regional inequality. For example, counties that do not collect land rates, which is a leading source of revenue in urban centres, are likely to levy punitive tax charges to small traders, thus stifling the growth of small businesses.[184]

4.2. Tax Incentives and Gender Inequality

The introduction of the two-thirds gender rule[185] was a watershed moment for gender mainstreaming in Kenya. It was hoped that there would be a radical shift from patriarchal cultural practices and other forms of discrimination that, for a long time, kept away women and girls from participating in social, political and economic activities.[186] The Constitution also introduced affirmative action, which has increased the representation of women in the legislative houses and senior executive/public service positions.[187] Despite the progress from the 2019 Census Data, there is still a lot to be done in gender mainstreaming in the economic and political spaces. Remarkably, in county assemblies, the two-third gender rule has already been realised, thus elevating women to a vantage point in terms of lobbying for incentives. At the National Assembly and Senate, the same is yet to be achieved. Moreover, women still lag when looking at other development indicators such as education and access to healthcare, among others.[188]

Though a substantive number of legislators at the national and county level are women, the increase in gender representation has yet to substantially impact the formulation of gender-sensitive fiscal policies in Kenya.[189]

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183 National Gender and Equality Commission, 'The Equalization Fund: Audit of the Status of Water, Health and Road Sectors in 8 Marginalized Counties' available at https://www.ngeckenya.org/Downloads/Equalization%20Fund%20Report%20Version%204.pdf [accessed 14.09.2022].

184 CRA, Report on County Assemblies Own Source Revenue Training 2022 pg. 28.

185 The Constitution 2010 Articles 27(8), 81(b), 175(c), 177(1)(b), and 197(1).

186 TJRC, Report on the Truth Justice and Reconciliation Commission Report, 2013 volume IV pg.8.

187 In 2020, the percentage of women in key positions, namely, Cabinet Secretaries, Principal Secretaries, Heads of Constitutional Commissions and Independent Offices, Regional Commissioners and County Commissioners at, 33.3%, 18.6%, 53.3%, 12.5% and 12.8%, respectively. KNBS, Economic Survey 2021, Available at https://www.knbs.or.ke/wp-content/uploads/2021/09/Economic-Survey-2021.pdf.

188 KNBS, 2019 Census Report.

189 Oxfam Report 2020.

At the national level, key strides have included the exemption of VAT on essential supplies, including sanitary products. However, little has been done to deeply analyse the gender bias in fiscal policies, especially those geared towards raising revenue at national and county levels.[190]

From the above review of tax incentives, their role in enhancing gender inequality is evident as most incentives primarily focus on male-dominated economic activities.[191] For example, incentives such as waiver of interests and penalties on land rates at the county level mainly benefit men who own most of the land and real estate across the counties and in counties like Kisumu, boda boda (mostly male) do not pay levies for monthly stickers despite the Finance Acts providing for this levy.[192] On the contrary, women traders in markets do not enjoy similar waivers on fees such as market fees, and where they fail to pay, their wares are confiscated.

At the national level, indirect and consumption taxes like VAT on basic commodities are likely to affect women in poor households who spend a bulk of their little income purchasing these commodities, thus bearing a disproportionate bigger tax burden.[193] The Finance Act 2021 introduced VAT on milk, specially prepared for infants, which includes baby formulas that were previously exempted from VAT, which primarily affects women by reducing their disposable income.[194]

From the above highlights, there is a need to interrogate the existing incentive schemes from a gender lens, identifying the predominant genders in the target group and the long-term effect on gender equality at the county and national levels. These interventions will go a long way in enhancing gender equality in national and county incentive schemes. With more gender-responsive tax incentives policies at the national and county level, it will be possible to enhance gender mainstreaming in the fiscal space by targeting incentives to women-dominated sectors to realise Sustainable Development Goal 5 on substantive gender equality.[195]

4.3. Tax Incentives and the Youth

With the increase in unemployment, several youths have embarked on the development of SMEs and set up other informal enterprises. One common trend for such businesses is limited seed capital and low returns at the onset. With low profitability, high licence fees such as SBP and other levies impede the sustainability of most youth enterprises.

190 Oxfam Report 2020.

191 Committee of Experts on International Cooperation in Tax Matters, 'The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals' Seventeenth session Geneva, 16-19 October 2018. Available at https://www.un.org/esa/ffd/wp-content/uploads/2018/08/CRP19-The-Role-of-Taxation-and-Domestic-Resource-Mobilization-in-the-Implementation-of-the-Sustainable-Development-Goals.pdf ; see also Kathleen Lahey, Gender, Taxation, and Equality in Developing Countries: Issues and Policy Recommendations (New York, UN-Women, April 2018) available at https://www2.unwomen.org/-/media/files/un%20women/grb/resources/geder-tax-report-fin-web.pdf?vs=3508

192 Kevine Omollo, 'County begins to tax bodaboda operators in bid to raise Sh250 million' The Standard available at https://www.standardmedia.co.ke/ureport/article/2001290182/county-begins-to-tax-bodaboda-operators [accessed 15 May 2022].

193 Ibid.

194 Finance Act No. 8 of 2021 section 27.

195 Kathleen Lahey, Gender, Taxation, and Equality in Developing Countries: Issues and Policy Recommendations

Those who engage in activities such as hawking are often violently evicted from their locations by capricious law enforcement officers who illegally confiscate their wares for failure to pay requisite licences and taxes.[196] Though the State has taken affirmative action measures to enhance youths' economic inclusion, youths' interests remain at the periphery in designing tax incentives.

At the national level, one incentive benefiting the youths is the 50 per cent tax rebate of the salaries and wages paid to at least ten (10) youths who are in university or Technical and Vocational Education and Training institutions (TVETs) for six to twelve months of internships.[197]

Initially, it was limited to university graduates until 2021, when it was amended to include graduates from TVETs. Though commendable, many employers and youth-led firms are yet to benefit from this programme due to the insistence on the number to be at least ten and the mandatory requirement for employers' registration and subscription to National Industrial Training Authority (NITA). The minimum number of 10 interns has also locked out SMEs, and most youth-led firms cannot employ ten youths, thus granting established firms a competitive advantage. In 2016, a study by the World Bank found that when compared to the USA and OECD countries, Kenya lags in terms of the growth of young firms that have a great potential to increase employment opportunities in the formal sector.[198] Therefore, the current incentive do not promise to favour many youths and youth-owned firms. It is time to remove the ceiling and allow all firms that offer internship opportunities to any graduate, including those from diplomas and colleges, to qualify.

Another incentive for the youths is the Ajira Digital Programme,[199] through which the government sought to allow youths to access employment opportunities on the virtual platform. The income from the platform is exempted from income tax for a period of three years, starting January 2020.[200] Though this is a positive intervention toward solving the ballooning unemployment, one must pay an annual fee of KShs 10,000 which the ministry indicated should be a seed fund to help other youths. This requirement locks a considerable number of youths from benefiting from the programme since they are unable to raise the amount given that most depend on earnings from the informal sector where the average earning is about KShs 500 per day.[201] Further, being a digital programme, youths from rural areas lacking access to stable Internet are not likely to benefit from the programme, and the 2021 increase of duty on telephone and internet data services from 15 per cent to 20 per cent made the data more expensive.[202]

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196 The Criminalisation of Petty Offences, and Why Poverty is a Crime, 5th May, 2017 available at http://nairobilawmonthly.com/index.php/2017/05/05/criminalisation-petty-offences-poverty-crime/ accessed 16 June 2022; Pristone Mambili, 'Nakuru hawkers decry harassment by askaris' 27 August 2019 Hivisasa https://hivisasa.com/posts/11303497-nakuru-hawkers-decry-harassment-by-county-askaris [accessed 15 May 2022]; Maureen Kinyanjui, 'Askaris owe Sh427,200 for knocking out hawker's teeth 05 August 2021 The Star accessed https://www.the-star.co.ke/news/2021-08-04-askaris-owe-sh427200-for-knocking-out-hawkers-teeth/ [accessed 15 May 2022].

197 Income Tax Act section 39B; The Income Tax (Set-Off Tax Rebate for Graduate Apprenticeships) Regulations, 2016.

198 World Bank, Kenya Economic Update: Kazi ni kazi Informal should not be normal March 2016 | Edition No. 13 p.51.

199 https://ajiradigital.go.ke/#/index [accessed 16 June 2022].

200 First Schedule to The Income Tax Act, Cap 470 s.

201 For example in the Kazi Mtaani initiative, yours were paid 455/-. See No cash payment for Kazi Mtaani, state tells youths, The Star available at https://www.the-star.co.ke/news/2020-08-27-no-cash-payment-for-kazi-mtaani-state-tells-youths/ [accessed 16 June 2022].

202 Finance Act 2021.

Therefore, there is a need to always interrogate incentives and fiscal policies to avoid adverse effects on youths and youth enterprises.

4.4. Tax Incentives and Persons with Disabilities

From the 2019 Population Census, 918,270 people constituting 523,883 females and 394,330 males live with disabilities in Kenya.[203] This is a significant number that requires support at the national and county level. At the national level, persons with disabilities are exempted from paying income tax on their monthly or annual income for the first KShs 150,000 per month or the first KShs 1.8 million per annum.[204] This goes a long way to enhance equality, especially given that it significantly covers the lower band category. However, this incentive is accessible to a limited class of PWDs because most people with disability, especially in rural Kenya, do not access formal employment. As a result, they are unable to benefit from this incentive. A second incentive is the import duty exemption for cars and equipment for PWDs.[205] The waiver of import duty for motor vehicles is capped at one motor vehicle in four years.

At county level, counties such as Embu have taken the lead by giving persons with disabilities a blanket waiver, thus exempting them from paying any levy at the county level provided they have an identity card from the National Council for Persons with Disabilities.[206] A number of counties have laws expressly providing that PWDs may apply for a waiver of taxes and levies by setting out the procedure for obtaining such exemptions.[207] At the regional economic blocs, the blueprints acknowledge that PWDs are a special interest group that requires interventions, including affirmative action measures.

Apart from the incentives on county taxes, some counties have incorporated the provisions of the Persons with Disabilities Act. For example, the Persons with Disabilities Act under section 16 allows employers to deduct 25 per cent of the amounts paid to the PWDs from the employer's taxable income and deduct 50 per cent of cost incurred by the employer to modify fiscal facilities or provides special services to accommodate PWDs and section 35 that includes a waiver of import duty. Though incorporation of the provisions of the Persons with Disabilities Act at county level is welcomed, counties should be conscious of the fact that taxes such as income tax, customs duty, import duty and VAT, among others, are an exclusive function of the national government.[208]

Analysis of Incentives for Persons with Disabilities

Generally, though incentives targeting PWDs are mainly on humanitarian grounds, they do not reflect features of an effective incentive scheme to make them benefit the PWDs because of the following reasons:

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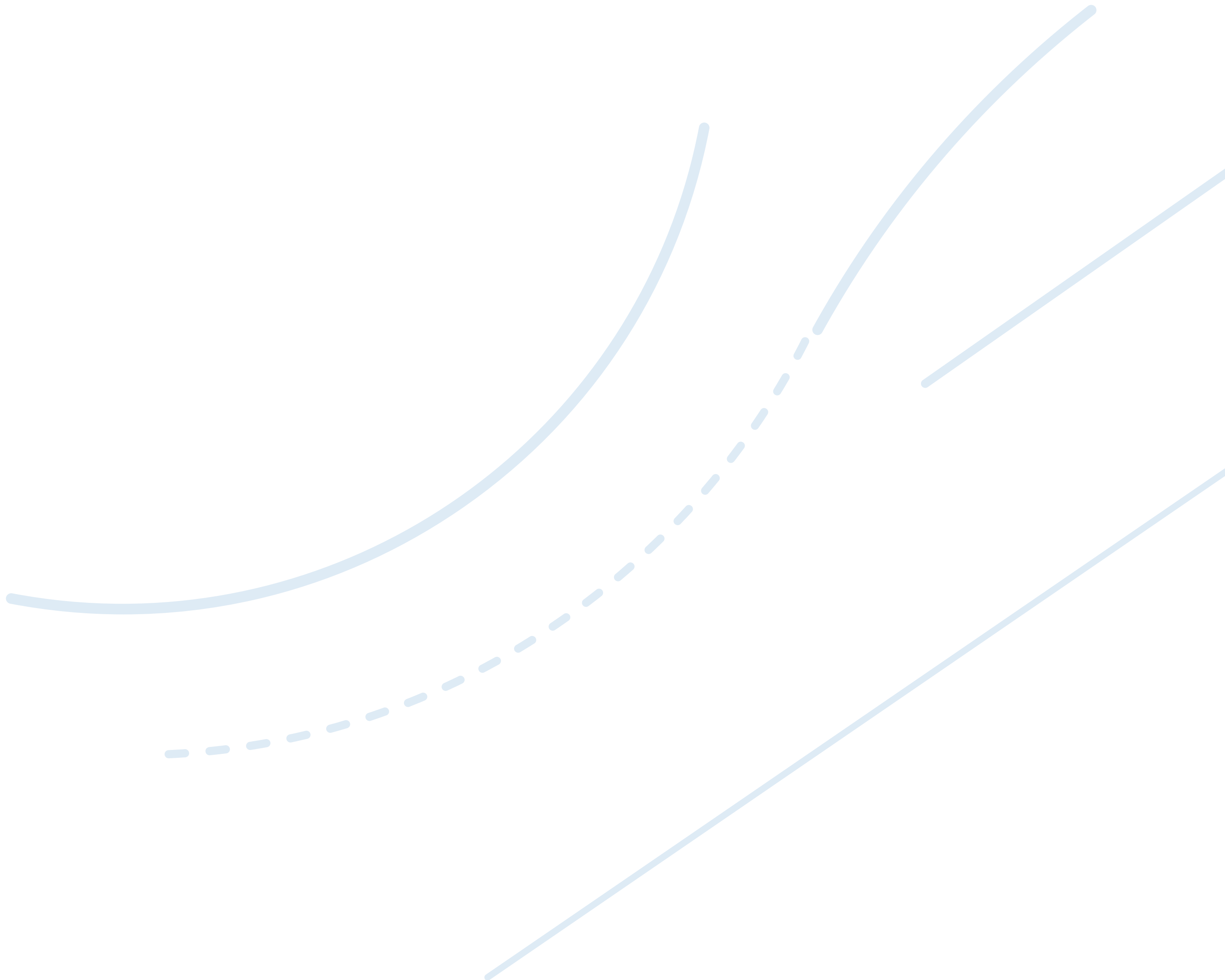
203 Important to note that this number excludes children of below five years.
204 Income Tax Act
205 Value Added Tax No. 35 of 2013 part I para. 399
206 Embu MCAs Approve Tax Waivers For Traders Living With Disability,Press release 27 November 2019 available at https://www.embuassembly.go.ke/embu-mcas-approve-tax-waivers-for-traders-living-with-disability/ [accessed 15 May 2022].
207 For example Homa Bay, Machakos, Nyandarua, Kisumu and Nakuru, Makueni,
208 For example section 25(1) Kisumu County Persons Living with Disabilities Bill, 2014; section 25(1) The Nakuru County Persons with Disabilities Act, 2016; Makueni County Persons With Disability Bill 2016 section 24.

- They are not to be data-driven. Most counties do not have a record of PWDs who own businesses to know the number of beneficiaries of incentives like waiver of payment of fees for single business permits. Where PWDs with companies are a handful, the incentive may only look good on paper but with minimal benefits to the target group.
- Other non-tax incentives such as building markets with amenities friendly and accessible to PWDs may be a long-lasting incentive that would see many PWDs participate in trade due to the accessibility of markets.
- Where the PWDs are allowed to apply for waivers, most do not benefit because of lack of awareness of the incentives and qualifying procedures such as obtaining an identity card from the National Council for PWDs.
- There are inconsistencies in awarding incentives to PWDs across counties. Therefore, some counties like Embu appear to have more generous incentives unlike other counties that are yet to grant incentives aimed at improving the lives of PWDs.
- The existing incentives focus on the PWDs only and do not extend to caregivers like parents and guardians who care for minors or adults with disabilities. Therefore, there is a need for the scope to be widened to include parents and guardians, especially where the disability requires constant monitoring of the PWD. This will help meet the extra financial burden that comes with ensuring a PWD is well attended to.



CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

This research has underscored the multidimensional inequality in Kenya, which affects vulnerable groups such as women, youth, PWDs and marginalised communities especially in the ASAL. Though the inequalities have been part of Kenya's history since the colonial era, the prevalence indicates that subsequent governments have not done enough to bring a paradigm shift at the national and county level. One area that has enhanced inequality as demonstrated in this research is the award of incentives and fiscal policies. The study has revealed that where the National and County Governments award incentives, there is no monitoring to ensure that the incentives benefit the targeted population and achieve the set policy objectives. Surprisingly, data on the incentives and the beneficiaries remains unavailable despite having legal provisions that provide for keeping public records of the data.

Furthermore, incentives are sometimes awarded to further political goals at the national and county level, thus favouring those close to the Executive, without ameliorating tax burden of the majority living with less than a dollar a day. At the county level, urgent intervention is needed, bearing in mind that most counties have poor fiscal practices, including inadequate taxation laws and policies, accountability and oversight mechanisms. The ongoing reforms toward a collection of optimal OSR should be tied to adopting effective tax/revenue incentive schemes. Therefore, it is hoped that by adopting effective fiscal policies and incentive schemes, the national and county government will seal leakages and collect adequate revenue to provide for quality and affordable social services such as education and healthcare that consume a bigger expenditure for most low-income earners, thus reducing the inequality gap.

5.2. Recommendations

To address inequality resulting from fiscal policies and award of incentives at the national and county level, below are key recommendations from this study. These are a summation of incentive-specific recommendations that have already been discussed in this research.

- **Setting policy objectives for awarding incentives**

Incentives should have succinct policy objectives defined at the point of formulation to allow effective oversight and periodic monitoring to determine whether the incentives are producing desired outcomes. In doing this, the Draft National Tax Policy provides a foundation for the National and County Governments to build on. Correspondingly, this practice will help minimise incentives resulting from roadside declarations aiming at advancing political agenda, among other practices that conflict with fiscal policies.

- **Keeping public records on tax incentive**

The Constitution and the PFM Act require county and national governments to keep public incentives records and publicise them. A close attempt to do this is publishing the Tax Expenditure Report, whose data is not disaggregated to indicate the main beneficiaries of incentives and gender dimensions among other granular details that may assist in identifying key beneficiaries of incentives.
Therefore, there is a need to keep all records of incentives and publicise them to inform conversations on the merits and cost-effectiveness of tax incentives. Additionally, data should be disaggregated to ensure monitoring of tax expenditure resulting from specific incentives to allow room for gender or group analysis. To enhance access to information on incentives awarded, the National and County Governments should publish information on fiscal policies and incentives on their respective websites periodically to facilitate wide access.

- **Monitor implementation of incentives**

There is a need to monitor the implementation of incentives to ensure they meet the set objectives. This can be done periodically in all sectors including EPZ and SEZ to understand the holistic contribution of incentives to the economy. Where incentives do not meet their set objectives, such incentives should be repealed or varied to be aligned with the objectives.

- **Counties should enforce compliance with tax/revenue laws**

The study established that counties do not optimally collect taxes such as land rates and instead resort to waivers of interest and penalties, which so far have not yielded results. Therefore, counties should enact laws to provide measures to enforce the collection of land rates and other levies, which will help increase source revenue. It is hoped that with adequate own source revenue, counties will be able to grant more incentives to low-income earners and provide better services.

- **Consider the interests of vulnerable groups when issuing tax incentives**

From this research, most incentives appear to have widened gender inequality on the economic front, as very few incentives focus on sectors dominated by women. Therefore, there is a need for policymakers to consider the beneficiaries of the incentives to ensure that female-dominated sectors get adequate incentives to minimise their taxes and increase disposable income. Partnerships and synergy with organisations such as Kenya Women Parliamentary Association (KEWOPA) and MCAs at the County Assembly and the National Gender and Equality Commission (NGEC), among others, will be vital since they play a key role in policy formulation.
Furthermore, public awareness on the need for gender mainstreaming of fiscal policies will draw many players to allow the tax justice movement. In addition, more studies should be carried out in this area to have a gender analysis of fiscal policies at the national and county level to inform subsequent budgeting processes, including awarding tax incentives. Similarly, the interest of the youth, PWDs and all other low-income earners needs to be considered to ensure that they benefit from the tax incentives awarded.

- **Enactment of statutes to enhance fiscal transparency**

There are several bills whose enactment should be fast tracked to facilitate far-reaching reforms in the fiscal policies in counties and provide the legal framework for establishing regional economic blocs. The main bill is the Government's (Revenue Raising Process) Bill 2018. This bill seeks to harmonise taxes and taxation processes countrywide. It is hoped that once enacted, all county taxes will be reviewed and harmonised. It also sets an elaborate procedure for introducing new taxes and user fees by counties which allows assessment of the viability of new tax bases/revenue sources before implementation.
Additionally, it mandates counties to report the award of incentives to the Auditor General, an aspect that the PFM Act appears to have omitted. Another bill is the County Resource Development Bill 2021 (Senate Bill), which will provide a legal framework for the establishment of regional economic blocs, thus accelerating their take-off. At the county level, counties need to enact laws to provide for all levies charged at that level. This will help counties shift from using the annual Finance Act as a basis for all taxes and levies. With comprehensive laws in each tax and user fee, counties will increase their source revenue since such statutes will include procedures for collecting levies and penalties for non-compliance, among others that are currently missing. This will enhance the certainty and predictability of tax laws.

- **Enhance Public Participation**

Where fiscal policies, taxes and incentives are formed in a participatory process, there is a high likelihood of enhancing compliance since in cases of levies such as user fees, the public will understand the essence of paying taxes. Therefore, at the national and county level, there is a need to include the citizenry. To enhance public participation at the national level, where fiscal policies are likely to affect low-income earners, the same should be published in English, Kiswahili and braille for wide access. New feedback channels, such as text messages, should be encouraged since most low-income earners, especially in the informal sector, do not have emails, which is often the most convenient mode proposed.

At the county level, public participation can be done at the sectoral level. For example, where a proposed tax is likely to affect traders in the market, views should be sought from traders on that specific component instead of conducting a joint forum for all stakeholders.

Forums for all stakeholders are often time-consuming for small traders who rely on daily earnings, thus preventing them from participating. Makueni County has an elaborate public participation framework that counties may consider alongside other reforms. Additionally, counties should partner with CBOs and self-help groups, local media stations (preferably those broadcasting in vernacular) and other grassroots organisations in sensitising county residents on proposed fiscal policies.

- **Create awareness and sensitisation on fiscal policies and incentives**

This challenge affects policy makers and the public. Most members of the National Assembly, Senate and County Assembly lack knowledge on taxation and fiscal policies. As a result, they are not able to carry out effective oversight of fiscal policies.

Therefore, training and sensitisation will enable them to exercise effective oversight and formulate progressive tax laws. The citizenry and local organisations such as CBOs have limited knowledge of tax policies and how they affect their life. Therefore, creating awareness on this front will foster discussions around tax justice and fiscal responsibilities. Currently, the Commission on Revenue Allocation has formulated training materials for members of County Assembly on own source revenue-raising mandate. The Draft National Tax Policy also recommended inclusion of taxation in the curriculum which once implemented, will enhance awareness. In the meantime, civil society organisations and other development partners can liaise with government bodies and learning institutions like universities, among others, to create awareness both on general aspects of tax policies and incentives as well as specific components such as taxation and gender.

- **Enhance Security and develop supporting infrastructure in FCDC bloc and other affected areas**

The research has demonstrated that incentives for developing underdeveloped regions do not work effectively. Areas with ready access to markets, security and infrastructure such as electricity and access markets, tend to attract more investments, thus positioning the region to benefit more from these. Therefore, marginalised regions, mainly FCDC and the larger ASAL region, will accelerate development by ensuring the peaceful co-existence of communities and building infrastructure to support investment. Priority areas will include operationalisation of the Equalisation Fund as well as implementation of the Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands.

- **Counties should enforce compliance with tax/revenue laws**

From the study, it was established that counties do not optimally collect taxes such as land rates and instead resort to waivers of interest and penalties, which so far have not yielded results. Therefore, counties should enact laws to provide measures to enforce optimal collection of land rates and other levies, which will help increase source revenue. It is hoped that with adequate OSR from high potential areas such as land rates, counties will be able to grant more incentives to low-income earners and provide better services.

- **Recommendations to the Civil Society**

The civil society should actively participate in enhancing tax justice and equality by:

- Conducting training and sensitisation of the CSOs on taxation and tax incentives to build capacity among locals, elected officials and county-level finance and economic departments.
- Adopting targeted programmes addressing specific taxation issues, for example, dimensions can include sectorial approaches such as taxation of boda boda and market women, among other dimensions.
- To support the processes by CSOs and any other public-spirited stakeholder, the national and county government should ensure that the available information about the budgets and other fiscal policies is comprehensive, timely and readily accessible. A starting point will be publishing it on the counties' respective websites.

- Publishing and disseminating information on revenues resulting from wasteful tax incentives to foster awareness and enhance monitoring by the citizenry, thus widening the tax justice discourse.
- The civil society should lead an incisive discussion on the finance bills to unearth all incentives that sometimes do not catch the public's attention that mostly focus on price adjustments for consumables and fuel.

Proposed solutions to enhance participation

To enhance public participation, county governments should urgently consider:

a. Sharing information in good time and, where possible, having media summaries in local languages. Additionally, all key bills and notices on fiscal matters should be published on county websites to enhance accessibility.
b. Engaging the local communities in the budgeting process so that they understand the purposes of paying taxes. This may go a long way to reducing tax evasion and informal tax bargaining cases.
c. Conducting focus group discussions on the finance bills and fiscal policies at the sectoral level. For example, where proposals seek to vary market fees, focus group discussions should be conducted in markets to increase the participation of the targeted stakeholders since most may not have time to close their shops to attend meetings. Alternatively, representatives can be selected to champion sectorial interests. Counties can borrow a leaf from Makueni County's public participation model and formulate an elaborate public participation framework.[209]
d. Counties and the national government should share tax information in local languages and braille where possible. In collaboration with local media stations, tax information can be disseminated widely in local languages to enhance awareness.

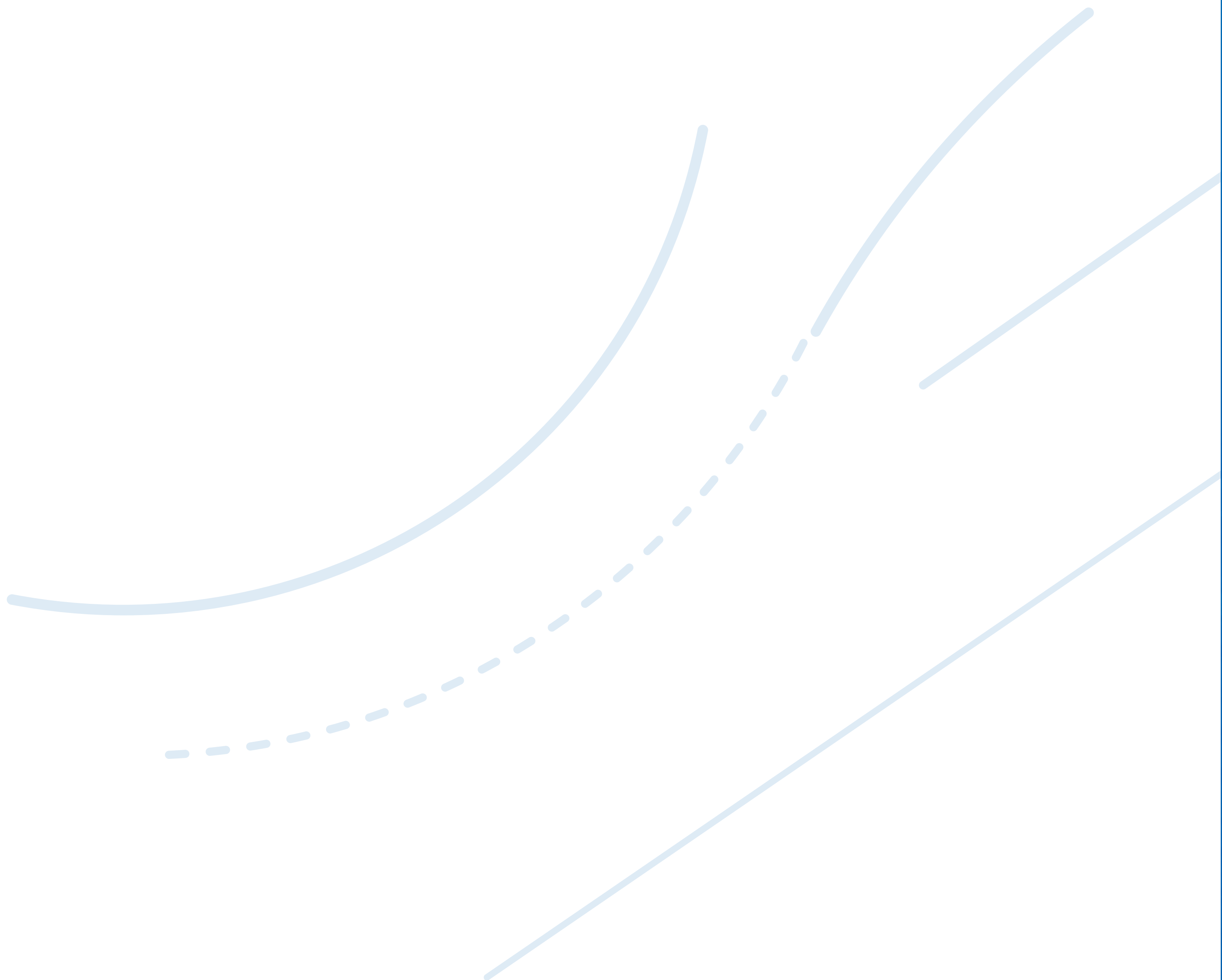
209 See Makueni County, Public Participation Framework' available at https://makueni.go.ke/public-participation-framework/ [accessed 15 October 2022].

ANNEXES

LIST OF INTERVIEWS

	Current Regional Economic Blocs and Membership	Nature of Meeting	D
a)	Chief Executive Officer, North Rift Economic Bloc (NOREB)	Physical	12th April 2022
b)	Chief Executive Officer, Lake Region Economic Bloc (LREB)	Physical	10th May 2022
c)	Chief Executive Officer, Frontier Counties Development Council (FCDC)	Physical	9th May 2022
d)	Chief Executive Officer, Narok-Kajiado Economic Bloc (NAKAEB)	Physical	20th May 2022
	County Visits		
e)	Uasin Gishu County		25th May 2022
f)	Kisumu County		10th May 2022
g)	Homabay County		11th May 2022
h)	Civil Society Organisations		
i)	Tax Justice Network Africa	Virtual	20th July 2022
j)	Kenya Private Sector Alliance Community Based Organizations	Virtual	4th July 2022

k)	A representative from PWD Community (NOREB Region)	Telephone	3rd May 2022
l)	Interview with a representative of Kwale Community Development Programme	Telephone	22nd June 2022
m)	Interview with a representative of Vanga Development Forum	Telephone	22nd June 2022
n)	Interviews with *boda boda* operators from Eldoret, Kisumu, Mombasa.	Telephone /physical	30th June 2022.
o)	Interview with traders in Kisumu Town		
p)	Interview with women in fishing Homa Bay town	Telephone	11th May 2022
q)	Interview with a representative from Konya Disability Organization	Telephone	15th June 2022.
r)	Interview with a representative from Nandi Youth Bunge and a Trader in Kapsabeth Town	Telephone	23rd June 2022
s)	Interview with a farmer in Kajiado county	Telephone	15th June 2022.
t)	Interview with a representative from Mamboleo Justice Centre		30th June 2022
u)	Interview with traders Eldoret.		8th July 2022.



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