

Attaining compliance for digital archiving through effectual implementation of legislative and regulatory frameworks in selected Kenyan universities : are we 'there' yet?

DOI: 10.61735/2jr98p51

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ABSTRACT

Legal and regulatory frameworks constitute the guiding provisions for record keeping globally. However, more often than not, such guidance does not adequately address digital records management. This study examined legal and regulatory frameworks governing digital archives in selected public universities in Kenya, to establish compliance in order to enhance digital archiving practices in the institutions. The study objectives were two-fold: to identify the legal and regulatory frameworks governing digital archives management (DAM) in Kenyan public universities and to establish the effectiveness of the identified legislative and regulatory frameworks in the management of digital archives. The underpinning model for this study was the Archives and Records Management Association (ARMA) Records Management Maturity model. Qualitative research and multiple case study designs were adopted, and data collection was undertaken using face-to-face interviews. The study targeted 205 participants from six public universities in Kenya. Saturation point was however reached after interviewing 29 participants in the categories of Archivists, Records Managers and Records Officers, and 39 participants in the categories of ICT Directors and ICT staff. Additionally, six Legal Officers were interviewed, one from each of the six institutions, giving a total sample size of 74 participants. Data was analysed thematically and presented in narrative descriptions. In a few cases, data was quantified and analysed in descriptive statistics for visual representation using pie-charts. The study established that Public Archives and Documentation Services Act (CAP 19) of the Laws of Kenya (2012) was the major law guiding management of public sector records and archives in the country. Subsequently, the study concluded that legislative and regulatory frameworks governing digital archives in the institutions were deficient and required rigorous review, design, and implementation. The study recommends that the Government of Kenya should fast-track review of Public Archives and Documentation Services Act.

(Key words: digital records; digital archives; digital archiving; public universities; archival legislation; archival regulations.)

I. INTRODUCTION

Digital archives and records are exceedingly vulnerable and easily prone to rapid diminishing of their value as evidence from the time of their creation unless clearly defined legal and regulatory framework are enacted to protect them (Baron and Thurston, 2016, p. 212). National archival legislation is the basis for archives and records management programmes in any given country (Mosweu and Simon, 2018, p. 70), and is a key tool for ensuring proper management, preservation and access to records in universities (Pereira, 2018, p. 221). Consequently, properly formulated legal and regulatory frameworks are a prerequisite for the effective and efficient management of digital archives in universities and state-owned organisations. This is because

recordkeeping legislation determines the environment and infrastructure for records management in a country.

Sound management of digital records requires well-articulated legal and regulatory frameworks in the form of policies, laws, best practices, and standards (Okello-Obura, 2011, p. 6). Kabata (2019, p. 109) identifies Acts, best practice standards, ethical codes and codes of conduct as constituting the legal and regulatory environment for recordkeeping and reiterates that these instruments are key in providing procedures for carrying out recordkeeping activities including archives management. Disregarding these important instruments exposes organisations and governments to the risk of permanent loss of their digital records. In South Africa, the management of public records and archives is

governed by the National Archives and Records Service Act of 1996; the Protection of Personal Information Act (Act No. 4 of 2013) (POPIA); PAIA Act No. 2 of 2002, the Electronic Communications and Transactions (ECT) Act and the Regulation of Interception of Communications Act (RICA) (Katuu and Ngoepe, 2015, p. 3). In Tanzania, the main instruments guiding archives and records management are the Records and Archives Management Act of 2002 and the Tanzania Electronic Transactions Act of 2015 (Kamatula and Kemoni, 2018, p. 78). In Kenya, the management of all public records is administrated by the Public Archives and Documentation Service Act, Cap 19 of the Laws of Kenya (Kenya, 1991).

Notably, however, legal and regulatory frameworks in many countries across the world are not effective in practice. For example, An, Deng, and Zhang (2014, p. 148) note that the existing recordkeeping legislation in China is not in tandem with the rapid changes in technology. It is in light of this worrying concern that the current study was undertaken to establish whether (or not) public universities in Kenya have attained compliance to existing legal and regulatory frameworks for records and archives management, evidenced by efficient digital archiving practices.

Statement of the problem

Development and implementation of legislative and regulatory frameworks for recordkeeping are essential (Asogwa, 2012) in universities because they generate large voluminous information in digital formats such as research content, institutional records, and teaching content, among others. However, records and archives management legislations in many countries are inadequate and does not address digital records (Ngoepe and Saurombe, 2016). Gilliland-Swetland (2000) cautioned that even as archival institutions provide access to records, they must take into cognisance legal issues that are more pronounced in an electronic environment. Mnjama (2003) gave a snapshot of the shortcomings of the Kenya Public Archives and Documentation Service Act, Cap 19 (1965), and its ensuing amendments. Although the Evidence Law Cap 80 of the Laws of Kenya was revised in 2009 to allow the use of digital records in a court of law as evidence, there is still a need to address the issue of archival legislation in the present era of digital archives. This study is motivated by the observation gleaned from the literature that public universities in Kenya except University of Nairobi, lack adequate legal and regulatory framework to govern the management of digital records and archives (Erima, 2022).

The study sought to examine the legal and regulatory frameworks governing digital archives in selected public universities in Kenya, with a view to establishing the extent of compliance and suggesting strategies for the improvement of digital archiving practices in the institutions.

Specifically, the study sought to identify the legal and regulatory frameworks governing digital archives management (DAM) in Kenyan public universities and establish the effectiveness of the identified legislative and regulatory frameworks in the management of archives.

II. REVIEW OF RELATED LITERATURE

Governments around the world have developed legislation to give guidance on the management of records and archives in their countries. Kabata (2019, p. 124) avers that well-formulated recordkeeping legislation clearly articulates the lifecycle management process for records which guarantees their effective management. As noted by Ngoepe and Saurombe (2016, p. 24), recordkeeping legislation which in most countries is in the form of a national archival Act specifies the practices and procedures to be followed throughout the life cycle of records (Ngoepe and Saurombe, 2016. P. 24). It is common practice in many countries therefore that the management of records in public sector organisations is governed by national archival laws and regulatory instruments.

Notably however, many countries in Africa have legal frameworks for records and archives management that are not abreast with digital technologies (Netshakhuma, 2019), with most of these laws being inclined towards paper records (Asogwa, 2012, pp. 206-7). As alluded to by Kalusopa (2011, p. 118), the reason for this mishap could be that there has been no proper input and guidance to planners and policymakers from records managers, information managers, and archivists in the ESARBICA region. Specifically, Asogwa (2012, p. 207) highlights problems such as the absence of a legal definition for electronic records, the absence of laws that allow for legal admissibility of electronic records in court, laws that define the role of archives as a strictly custodial one, among others. This is however not exclusive to African countries alone.

A study undertaken by Kamatula and Kemoni (2018, p. 78) revealed that the management of public records in Tanzania is governed by the Records and Archives Management Act of 2002 which was seemingly ineffective and inadequate, especially in addressing e-government initiatives and digital records management. The law lacks provisions for regulatory requirements to

guide government institutions and organisations to effectively manage digital records. Additionally, the study also found that even though the Tanzania Electronic Transactions Act of 2015 grants legal admissibility to digital records, it falls short of providing specific guidance on digital records management (Kamatula and Kemoni, 2018, p. 78). In most Southern African countries, archival legislations are obsolete and needs to be reviewed, especially because they do not adequately cater for digital archives and records management (Katuu and Ngoepe, 2015, p. 12). Luyombya (2010, p. 157) lauded the decision by some African countries to update and renew their archival legislations and encouraged those former legislations should be reviewed to incorporate key issues such as digital preservation, authenticity, and general management procedures.

In Kenya, management of all public records is guided by Public Archives and Documentation Service Act, Cap 19 of the Laws of Kenya. The Act generally defines public records as records created by any government department, ministry, commission, local authority, or any other body established under or by an Act of Parliament (Republic of Kenya, 2022). However, the shortcomings of the Public Archives and Documentation Service Act have been highlighted by various scholars, specifically on the failure to define and address digital records and archives issues. Various scholars have voiced concern that the Public Archives Act Cap 19 did not explicitly address digital records management (Ambira, 2016; Kabata, 2019; Erima, 2022). These concerns serve to corroborate with findings of previous studies by IRMT (2011) and Maseh (2015) which found that the Act did not define digital records, nor did it give guidance on their management. These studies recommended a review of the Act to integrate definitions of digital records and archives and to comprehensively address digital recordkeeping procedures.

The preceding literature review affirms the importance and impact of legal and regulatory provisions on the management of digital records and archives. It is clear from the literature that supportive legislations, guidelines, standards, policies and best practices in digital recordkeeping are instrumental in governing the lifecycle management process for digital records, thereby supporting all the digital archiving practices (Baron and Thurston, 2016; Kabata, 2019). Sound national archival legislation has specifically been identified as being paramount to the efficient management of digital archives in a country (Mosweu and Simon, 2018, p. 70; Pereira, 2018, p. 222; ISO 15489 – 1: 2016; Ngoepe and Saurombe, 2016, p. 24; Okello-Obura, 2011, p. 6). The problem of weak archival legislations and regulatory frameworks in Africa (Kenya included) remains the weak

link in digital archiving and records management practices in organisations today.

The current study was underpinned by the Records Management Association (ARMA) Records Management Maturity model. The ARMA Records Management Maturity Model is based on the Generally Accepted Recordkeeping Principles (GARP) and the legal and regulatory requirements, best practices, and standards surrounding information governance. The model is meant to be deployed as a quality improvement tool (Eusch, 2016). The purpose of this model is to assist organisations in conducting preliminary evaluations of their recordkeeping programs and practices (Eusch, 2016). In the present study, this model was useful in pointing to the need for legal and regulatory requirements for records and archives management in the selected universities, and in identifying and assessing the level of institutional compliance to the existing tools.

III. METHODOLOGY

The study adopted an interpretivist research paradigm associated with a qualitative approach. In line with the selected approach, the study adopted an embedded multi-case study research design where six of the oldest public universities were purposively selected from the twenty-three fully accredited public universities in Kenya namely: The University of Nairobi (UoN), Moi University (MU), Kenyatta University (KU), Maseno University (MU), Jomo Kenyatta University of Agriculture and Technology (JKUAT) and Egerton University (EU). A total of two hundred and five (205) participants were targeted from the six institutions but a saturation point was reached after interviewing 29 participants in the categories of Archivists, Records Managers and Records staff and 39 participants in the category of ICT Directors and ICT staff.

The study also interviewed six (6) Legal Officers (one from each of the six universities), giving a total sample size of 74 participants. Additionally, desk research was undertaken to corroborate the findings of objective one of this study. The data collected were analysed thematically and presented in narrative descriptions. However, in a few cases, the data was quantified and analysed in descriptive statistics for visual representation using pie-charts. The findings of the study were then used to assess the compliance levels of the universities for digital archiving based on the ARMA maturity model.

IV. RESULTS AND DISCUSSION

The findings are presented in themes gleaned from the objectives of the study and presented in sections that follow.

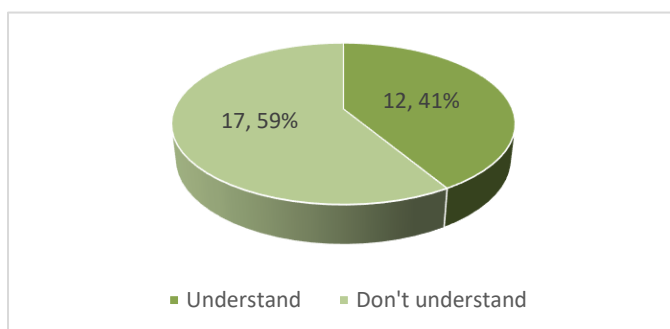
Relevant legislative and regulatory framework for digital archives

The ARMA Records Management Maturity Model (2017) incorporates five levels of organisational information governance. Level three of the model is useful in assessing the presence or absence of key requirements that must be addressed to meet the legal and regulatory requirements for records. In the context of this study, the legal and regulatory frameworks constituted records and archives management legislations, standards, policies and procedures. Therefore, the study sought to find out from respondents whether there were legislations governing the management of records and archives in public universities. The question was posed to ICT Directors, legal officers, finance officers, archivists, records managers and records officers in the six universities. All 47 (36%) respondents affirmed that The Public Archives and Documentation Services Act (CAP 19) of the Laws of Kenya (2012) was the main law governing the management of public records in the country.

Respondent's understanding of Cap 19

For more insights, the researchers asked the archivists, records managers, and records officers in the six institutions (29) if they understood the provisions of Cap 19. From their responses, only 12 (41%) understood the records management provisions of the Act while the remaining 17 (59%) did not understand what the Act provides as shown in Figure 1.

Figure 1: Respondents' understanding of Cap 19 (n=29)



Other laws and regulations

The respondents were asked to identify other laws and regulations and from their responses, they were all aware of additional laws guiding the management of digital archives in Kenya. The voice of one archivist in one of the institutions is given below:

“... Many laws govern the management of digital archives, for example, the constitution itself, the Access to Information Act, the Data protection Act, Kenya Information and Communication Act, to mention but a few. I think there are policies also that guide the management of digital archives at national level. However, as an institution, we are yet to develop our own digital archives management policy ...”

To corroborate the respondents' feedback, desk research was undertaken which helped unearth the following laws and regulations:

- i. *The Constitution of Kenya 2010*: The constitution of Kenya like those of many countries has supremacy in the Kenyan legal system and no law that violates it is allowed to stand. Various articles of the constitution have direct implications on the management of records and archives in both public and private sector organisations. These articles include: Articles 31, 35 and 232 to name a few. On one hand, Article 31 provides for privacy of information while Article 35 provides for access to information. On the other hand, Article 232 provides for transparency in the provision of timely and accurate information to the public.
- ii. *The Public Archives and Documentation Services Act (CAP 19) of the Laws of Kenya (2012)*: This is an Act of parliament that was first enacted in 1966 whose latest amendment was in 2012. It is a key law governing the management of public records and archives in Kenya. Available literature shows that the Act has several inadequacies, key among them being the fact it does not adequately cover the management of digital records and archives. At the time of data collection, however, the Act was under amendment to enhance coverage of digital records and archives.
- iii. *Access to Information Act, 2016*: The purpose and objective of this Act are to provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; The Act further give effect to the right of access to information by citizens as provided under Article 35 of the constitution.

- iv. *The Records Disposal Act, Cap 14, Revised edition 2015 (1962)*: This Act provides for the disposal of records in the custody of the High Court and the Registrar-General. The statute establishes the procedures and authorities for the disposal of records covered in the Act. Further, the statute defines the 169 offices under the office of the Attorney-General, and provides a records retention schedule of the records covered in the Act, and the procedures for their disposal;(v) *The County Government Act, 2012 - Part VIII on Citizen Participation in County Governments* shall be based upon; - Section 87 (a) the principle of timely access to data, information, documents and other information relevant or related to policy formulation and implementation. Section 87 (c) protection and promotion of the rights and interests of minorities, marginalized groups, and communities and their access to relevant information.
- v. *Public Procurement and Disposal Act, 2015*: This Act establishes procedures for efficient public procurement and disposal of unserviceable, obsolete, and surplus stores, assets, and equipment by public entities. The Act spells out the legal requirements for the creation of records, disclosure, and confidentiality of procurement documents and their retention periods. It also highlights the need to have a clear link between procurement and expenditure records.
- vi. *Public Finance Management Act, 2015*: This Act deals with the administration of Government finances in relation to the consolidated fund, including the supply services. It defines the term “accountable documents” and further outlines the categories of documents, their retention periods, and circumstances under which the documents may be preserved or destroyed. The authority for the destruction of accountable documents is vested with the accounting officers.
- vii. *Kenya Information and Communications Act, Revised edition 2013 (1998)*: The Act provides for legal recognition of digital records and specifies requirements for their retention. It provides for the integrity and security of digital information. It further gives the Cabinet Secretary responsible for communication the power to make regulations for the manner and format in which digital records in State offices shall be created, filed, and used. Maseh and Mosei (2019) opine that this is the most forward-thinking piece of legislation in the legislative framework for records management in Kenya.
- viii. *Leadership and Integrity Act, No. 19 of 2012*: This is an Act of Parliament that gives effect to, and establishes procedures and mechanisms for the effective administration of Chapter Six of the Constitution. Under Part II (General Leadership and Integrity Code) of this Act, state officers when performing their duties shall to the best of their ability: 10 (b) carry out duties in a transparent and accountable manner; 10 (c) keep accurate records and documents relating to the functions of the office; and 13 (1) for purposes of Articles 99 (1) (b) and 193 (1) (b) of the constitution, a person shall observe and maintain the following ethical and moral requirements – 13(1) (c) accurately and honestly represent information to the public; 13 (1) (g) not falsify any records; 30. A state officer shall not falsify any records or misrepresent information to the public.

Over the years, the Government has issued several circulars on the management of public records to complement the above Acts, which include:

- #1. Office of the president circular reference No. OP.40/1/1A of 6th June 2003 on the improvement of records management for good governance.
- #2. Office of the President circular reference OP/CAB 39/ 2A Vol. IV (52) of 8th February 2005 on the establishment of libraries and documentation centers in ministries and departments.
- #3. Office of the President circular No. OP.39/2A of 14th November 1999 on cases of missing and lost files and documents in the public service.
- #4. Personnel General Letter No. 7 of 29th August 1991 from Office of the President on destruction of personnel records.
- #5. Office of the President circular OP. 1/48A/11/10 of 7th July 1989 on depositing of reports and other generally circulated documents in the Kenya National Archives.
- #6. District Focus circular No. 1/86 from the Chief Secretary, Office of the President on the establishment and use of district information and documentation centres.
- #7. District Focus circular No. 1/85 of 28th August 1985 from the Chief Secretary, Office of the President on District Focus for Rural Development.
- #8. Office of President circular OP.1/48A/66 of 28th November, 1985 on the destruction of non-current government records.
- #9. Circular reference no. KNA/16/16 of 11th November 1985 from the chief archivist on disposal of old closed files and documents.

#10. Archives Circular No. 2 of 12th January, 1965 from the Office of the Vice-President on archives regulations.

Effectiveness of the legislative and regulatory frameworks for d-archives

The study sought to establish the effectiveness of the identified legislative and regulatory frameworks in the management of d-archives. Archivists, records managers and records officers (29) were asked to indicate whether or not Cap 19 was effective in this regard. While only five (17%) of the respondents felt the Act was effective, 24 (83%) of the respondents discredited the effectiveness of the law in addressing the life-cycle management of d-records. Some of their responses given during interviews are provided below, alluding to the weakness and inability of the law to aid in enhancing digital archiving practices in the institutions:

“... The Public Archives and Documentation Service Act in its present form is outdated and ineffective in the management of records and archives, especially in view of the technological changes that continue to disrupt the processes of information dissemination, storage, and general management ...”

“... The Act is skewed towards the preservation of traditional record formats, yet we are in a digital dispensation ...”

“... The common adage in the business world today is that we are moving towards a paper free office driven by the technological revolution. This spells a big challenge to recordkeeping especially in the issues of digital records preservation, an aspect that is absent in the Act ...”

“... Cap 19 does not specifically address the management of digital records and archives. Hopefully the reviewed Act which we are eagerly awaiting shall have clearly stipulated guidelines on the life-cycle management of d-records ...”

With regard to the other identified statutes, 17 (58%) of the respondents reiterated that they were not familiar with the provisions of the Acts and regulations for records and archives management in Kenya and were therefore unable to comment on their effectiveness. However, 12 (41%) of the respondents were of the view that other laws and regulations were ineffective as far as the management of digital records was concerned.

Archivists and records managers in the six universities were asked whether their institutions had in-house procedures and guidelines for records and archives management. All the respondents affirmed that the

documents had been developed and were operational. One respondent's view reflected the general views of all the other respondents:

“... Since the adoption of ISO quality assurance standards by public universities, institutional-wide audits have become the norm for us. One of the requirements for ISO audits is the availability of documentation such as manuals, guidelines, and procedures for every business process including records management functions...”

The respondents' views implied that although documented procedures and guidelines for handling records in all formats were in place, it was mainly to conform to the ISO audit requirements.

Additionally, archivists, records managers, and records officers were asked whether their institutions had developed record-keeping programmes and/or policies. Out of 29 respondents, 7 (24%) affirmed having formally approved RM programme and policy documents, available on the university intranet. The researcher established that all seven respondents were from one institution (University A). With official permission, therefore, the researcher accessed the records management programme and policy documents for university A and confirmed that the documents adequately addressed the management of d-records and archives. The other respondents (22, 76%) reported that their institutions did not have formally approved recordkeeping programmes and policies. However, all of them indicated that the documents existed in draft form and were awaiting formal approval. For example, a respondent in University F responded as follows:

“... There is as yet no formally approved programme or policy for records and archives management in our institution. However, such a policy was developed in 2015 and is awaiting senior management approval...”

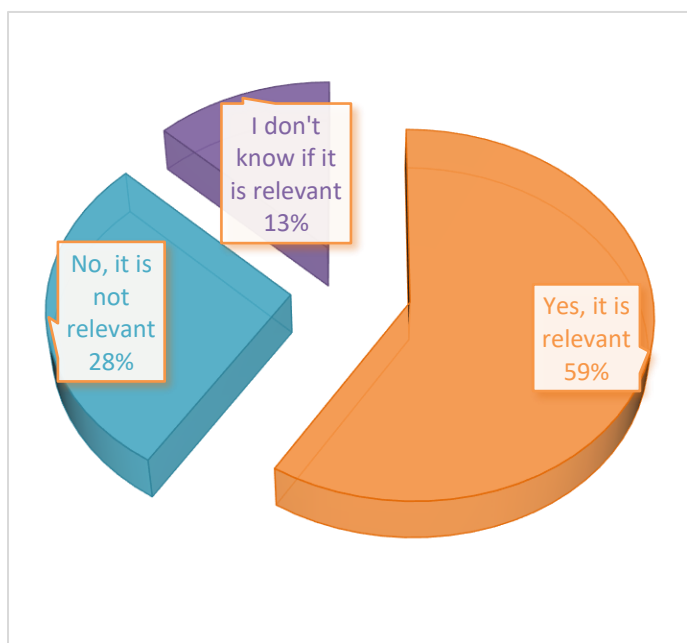
The researcher affirmed through document review that only one University had a national policy for records management in Kenya which clearly stipulated management requirements for records in all formats, although there is a draft policy awaiting formal approval. The researcher sought to establish from respondents in the institution that had a formally approved and draft RM policy, whether the policy was aligned to the national RM policy. All the respondents (15, 100%) indicated that their policy did not make reference to a national RM policy. The general responses provided by all the records managers in the six institutions made it clear that there was no national RM policy in Kenya. One respondent's answer was as follows:

“... We had a difficult time developing an RM policy for our institution because none exists at national level in Kenya. What is there is a draft RM policy dated April 2009...”

The absence of a national RM policy in Kenya was found to be a major contributory factor to the inadequacies experienced in digital records and archives management in the universities.

Additionally, the study also sought to establish whether the six institutions had ICT policies. All the ICT Directors and ICT staff (39) affirmed that their institutions had formerly approved ICT policies. Further, the respondents were asked whether the ICT policies were relevant to and addressed the management of digital archives. Their responses are given in figure 2 below:

Figure 2: Relevance of ICT policies to digital archiving (n=39)



The findings in Figure 2 shows that most of the respondents (23, 59%) were of the view that their ICT policies were relevant and addressed d-archives since they made reference to ‘digital content’ and ‘digital information’. However, 11 respondents (28%) felt the policies were not relevant to d-records and archives management while five (13%) indicated that they did not know the answer to this question. An in-depth scrutiny of the ICT policies during document review led the researcher to conclude that recordkeeping professionals were not brought to the table when ICT policies were being formulated in the universities, hence the lack of detail in addressing digital records as opposed to digital

content. Consequently, mention of digital archiving was present but only from an IT perspective as opposed to a recordkeeping perspective.

Compliance for digital archiving

The findings of the study were assessed for compliance levels for digital archiving based on ARMA Records Management Maturity Model levels. The assessment revealed that the four studied universities were at level 2 since they had no recordkeeping programmes but only had draft policies awaiting formal approval. None of the universities were found to be at level 3, 4 and 5 since there was no evidence of the inclusion of d-records and archives management processes in their organisational strategic plans.

V. CONCLUSION

The findings revealed that the Public Archives and Documentation Services Act (Cap 19) of the Laws of Kenya (2012) was the main legislation that governed the management of public sector records in the country although it was found to be weak and ineffective. Additionally, most of the institutions could not meet compliance requirements because they lacked programmes and policies for the management of records and archives. Subsequently, the study established that the legal and regulatory environment for the management of d-records and archives in Kenyan public universities was deficient and required rigorous review, design, and implementation depending on a case-by-case basis. The paper therefore concludes that we are “not there yet” in terms of attaining compliance to legal and regulatory frameworks for digital archiving and offers suggestions for improvement in the following section.

VI. RECOMMENDATIONS

In view of the foregoing findings, this study submits the following recommendations for attaining compliance with legal and regulatory frameworks for digital archiving:

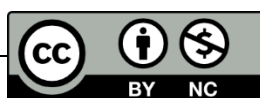
- i. Archivists, records managers, and ICT Directors in individual institutions should collaborate and work together to develop records and archives management programmes, policies, and guidelines that specifically address the management of digital records and archives.
- ii. To provide the much-needed guidance from a national perspective, the government of Kenya should fast-track facilitation of the review process for the Public Archives and Documentation Services Act

- (Cap 19), so that it clearly addresses management of d-records throughout their lifecycle.
- iii. The Government of Kenya should formally adopt the draft National Records Management Policy that can be adapted by institutions while drafting their institutional policies. This will ensure that public universities have a uniform basis for development of records management and digital archiving policies as part of the regulatory frameworks.
- iv. Awareness and sensitization programmes should be undertaken periodically in the institutions to ensure that all staff is familiar with the legal and regulatory frameworks for digital archives management

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