



REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ON THE IMPLEMENTATION OF THE PROVISIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

JULY 2020

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Introduction

The Kenya National Commission on Human Rights (KNCHR) submits this report to the Human Rights Committee to inform its review of the State's Fourth Periodic Report under the International Covenant on Civil and Political Rights (ICCPR).

The Kenya National Commission on Human Rights is established under Article 59 of the Constitution of Kenya, 2010 and operationalized under the Kenya National Commission on Human Rights Act 2011 (revised 2012)¹. It is the successor to the Kenya National Commission on Human Rights established in 2003 under the Kenya National Commission on Human Rights Act 2002². The Commission is constitutionally mandated as the principal organ of the State in ensuring compliance with obligations under international and regional human rights treaties and conventions. KNCHR is the national monitoring agency under Article 33 (2) of the Convention on the Rights of Persons with Disabilities³ and has additional functions to oversight implementation of the Prevention of Torture⁴. The KNCHR has since 2004 enjoyed an Affiliate Status with the African Commission on Human and Peoples' Rights⁵. The Commission is also a member of the Network of African National Human Rights Institutions (NANHRI), the regional umbrella body that brings together National Human Rights Institutions in Africa. The Commission is accredited as an 'A' status National Human Rights Institution on its compliance with the Paris Principles, by the Global Alliance of National Human Rights Institutions (GANHRI).

KNCHR presents this report to the Human Rights Committee in fulfillment of its constitutional and statutory obligations, and in line with its regional and international obligations as a national human rights institution; in order to assist and apprise the Committee on efforts made towards implementation of the provisions of ICCPR at the domestic level and highlights the key achievements, concerns and challenges in implementing ICCPR in Kenya.

¹ Act No 14 of 2011 available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2014%20of%202011>.

² Act No 9 of 2002 (repealed). The History of the institution however dates further back in 1996 when the then His Excellency President Moi set up a Standing Committee on Human Rights (SCHR) vide a gazette notice of June 1996.

³ Letter from the Hon Attorney General to the Secretariat of the Committee on the Rights of Persons with Disabilities referenced DOJ/COM/8/21/TY (97) dated 9th June 2017 nominating the Kenya National Commission on Human Rights as the Monitoring Agency under the United Nations Convention on the Rights of Persons with Disabilities.

⁴ Act No 12 of 2017 available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2012%20of%202017>.

⁵ Status granted during the [36th Ordinary Session](#) of the African Commission on Human and Peoples' Rights held in Dakar Senegal between 23rd November and 7th December 2004. This is in line with the Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa - ACHPR/Res. 370 (lx) 2017, available at <http://www.achpr.org/sessions/60th/resolutions/370/>.

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1. Anti - corruption measures (arts. 2 and 25)

The Ethics and Anti-corruption Commission (EACC)⁶ has, between the year 2003 and November 2019 handled 554 court cases. Out of these, 289 were the convictions; 223 acquittals; and 42 cases were discharged/ withdrawn.⁷ The EACC has also recovered assets both cash and immovable property worth Kshs. 22,563,424,709.⁸

The Proceeds of Crime and Anti-money Laundering Act, 2009 creates the offence of money laundering and introduces measures for combating the offence, the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. The Act complements the functions of the Anti-corruption Act where money acquired through corruption has often been channeled to suspicious ventures as a way to 'sanitize' the said cash.

Despite the existent of a robust legal framework to curb corruption in the country beginning with the Constitution of Kenya 2010 which contains a full chapter dedicated to leadership and integrity⁹; ¹⁰ the Anti-Corruption and Economic Crimes Act 2003, the Ethics and Anti-Corruption Act 2011, Leadership and Integrity Act and the Public Service (Values and Principles) Act; the Bribery Act; Mutual Legal Assistance Act, 2011; the Public Officer Ethics Act, 2003, the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, corruption remains one of the major push back to enjoyment of human rights. The gap therefore is not for

⁶ Established by section 3 of the Ethics and Anti-Corruption Act available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2022%20of%202011>

⁷ EACC Convictions report available at <https://eacc.go.ke/default/wp-content/uploads/2019/12/Convictions-since-2003.pdf>

⁸ Recovered public assets made by the EACC available at <https://eacc.go.ke/default/wpcontent/uploads/2019/12/ASSETS-RECOVERED-BETWEEN-2003-AND-2019..pdf>

⁹ Chapter 6 of the Constitution of Kenya 2010, Articles 73 to 80 underscore integrity, honesty, impartiality and accountability in the conduct of the affairs of State officers public office being a public trust and a responsibility to serve rather than to rule.

¹⁰ Act No. 9 of 2009 as amended over the years; available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%209%20of%202009> .

dearth of relevant laws and policies but the want in the implementation of the provisions to the letter. Indeed, the Report of the Task Force on the Review of The Legal, Policy And Institutional Framework for Fighting Corruption in Kenya dated October, 2015 found that, 'Kenya's anti-corruption regime compares favourably with the best anti-corruption models in the world' and that 'Kenya has most of laws required for effective onslaught on corruption but their enforcement has been somewhat lackluster.

According to two surveys carried out in 2018 and 2020¹¹; majority of Kenyans identify corruption and impunity as the greatest hindrances to realisation of the Bill of rights and fuel to exacerbating inequalities between the wealthy and the poor even in access to justice. This appears to corroborate the 2019 CPI index by Transparency International¹² which shows the Republic of Kenya still in the red zone with a paltry score of 28% at No. 137.

The elimination of systematic corruption, unjust enrichment and instilling of accountability at both national and county levels is the sine qua non to realisation of the human rights and fundamental freedoms including socio-economic rights safeguarded under Article 43 of the Constitution and realisation of SDG Agenda 2030 on leaving no one behind.

In order to fight graft, it is pertinent that the Institutions involved in the fight against graft must intensify efforts to promptly investigate, prosecute and recover proceeds of corruption without discrimination; Public officers and state officers implicated in corruption must not be allowed to continue to serve under any public office in line with the Judgment of the High Court in *Moses Kasaine Lenolkulal v Director of Public Prosecutions*.¹³ Sustained inculcation of values and

¹¹ Better but still unequal: The State of Human Rights in Kenya An Opinion Poll on the 70th Anniversary of the Universal Declaration of Human Rights (December 2018) <https://icj-kenya.org/publications/send/3-publications/234-better-but-still-unequal-the-state-of-human-rights-in-kenya>; Amnesty International-Kenya, Katiba at Ten: Distressed Yet Defiant: A Citizens' Scorecard On The First Decade (Opinion Poll 2020); Available at <https://www.amnestykenya.org/katiba-at-10-distressed-yet-defiant/>

¹² Transparency International (2020), 'Corruption Perceptions Index 2019' available at https://www.transparency.org/files/content/pages/2019_CPI_Report_EN.pdf.

¹³ *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR; available at <http://kenyalaw.org/caselaw/cases/view/178331/>.

principles at family, community and school-based levels key to prevention and shift of attitude towards the vice that is theft of public resources.

2. The fight against impunity and past human rights violations (arts. 2, 6, 7 and 14)

A. Alternative justice systems

The Taskforce on Alternative Justice Systems was appointed in March 2016 to look at the various traditional, informal and other mechanisms used to access justice in Kenya (Alternative Justice Systems).¹⁴ The taskforce has developed the alternative justice systems baseline policy and policy framework which allow for the development of alternative approaches and interpretations that will open space for challenges to cultural beliefs.¹⁵ The Commission commends the progressive move at the launch of the court-annexed mediation project in 2016 at the Judiciary as well as the ongoing efforts at enactment of the Mediation Bill. As at May 2019, court annexed mediation had been rolled out in eleven (11) counties. About 3517 matters had been referred to Mediation, 2593 concluded, with 1279 settled successfully at a settlement rate of 50 per cent. About KSh7.2 billion that had been held in litigation has been released through Court Annexed Mediation during the 2018/2019 financial year.¹⁶ Despite the progressive move at the alternative justice system, more still needs to be done to sensitise and encourage the uptake of this mode of dispute settlement. Furthermore, case backlog continues to bite. At the end of the 2018/2019 period, case backlog stood at 341,056 cases.¹⁷ The perennial disobedience of court orders by the government continues to be a major hindrance to access to justice.

¹⁴ Gazette notice establishing the AJIS Taskforce available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTI5MQ--/Vol.CXVIII-No.21

¹⁵ The taskforce on alternative justice systems policy and framework available at <https://www.judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/>

¹⁶ State of the Judiciary and the Administration of Justice Annual Report 2018/2019 available at <https://www.judiciary.go.ke/download/sojar-report/>

¹⁷ State of the Judiciary and the Administration of Justice Annual Report 2018/2019, available at https://www.judiciary.go.ke/download/sojar-report/pg_24

B. The Truth Justice and Reconciliation Commission

The Truth Justice and Reconciliation Commission was established after the 2007 General election following the post-election violence that marred the country at the time. The core mandate of the Commission was to look into cases of human rights violations in the country between 1963 and 2008.¹⁸ The TJRC report recommended the setting up of a reparations mechanism for which the state shall be responsible. Further, it recommends the following forms of reparations to be provided to victims of historical injustices: restitution, compensation, rehabilitation, satisfaction which includes official declarations restoring dignity and reputation, public apology, commemoration and tributes; and Guarantees of Non-repetition.

The President offered a public apology on behalf of the government for all past human rights violations and other historical injustices. He also instructed the National Treasury to establish the Restorative Justice Fund. The purpose of the fund is to offer relief to the victims and survivors of past human rights violations and other historical injustices.¹⁹

The State, in partnership with the Commission and the International Center for Transitional Justice (ICTJ) developed the draft Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017. The purpose of these Regulations was to provide a framework for the establishment and operationalization of a reparations program. As at the time of reporting, the mechanism was yet to be formalised and adopted by the State.

C. Measures taken to implement effectively the Victims Protection Act 2014, including the status of the Victim Protection Trust Fund.

The Victim Protection Trust Fund is yet to be operational. The Commission continues to press for the fast-tracking of the regulations to operationalise the Victim Protection Trust Fund. The

¹⁸ TJRC Act section 5 available at

<http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202008>

¹⁹ State of the Nation Address by President Uhuru Kenyatta delivered on 26th March 2015 available at

<https://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/>

regulations are key to the operationalisation of various laws including the Victim Protection Act and the Prevention of Torture Act, 2017.

3. Non-discrimination (arts. 2 and 26)

Article 27 (4) of the Constitution states that every person is equal before the law and has the right to equal protection and equal benefit of the law. In addition, it protects any person from discrimination either directly or indirectly. The State is yet to enact the equality and non-discrimination law in line with Article 27 of the Constitution.

A. Protection of LGBT persons

Consensual adult private sexual conduct between persons of the same sex is a crime in Kenya as provided in section 162 (a) and (c), section 163 and section 165 of the Penal Code.²⁰ As at the time of reporting, a petition filed in the High Court challenging the constitutionality of sections 162 (a) and (c), 163 and 165 of the Penal Code was unsuccessful.²¹

Persons of diverse sexual orientation and gender identity face challenges including killings, physical violence, stigma and exclusion from family, expulsion from workplaces, learning institutions, blackmail, extortion, denial of work, housing and poor access to healthcare.²² Furthermore, there exists legal and policy gaps providing recognition for persons whose gender identity does not conform to the sex assigned during birth and for those who wish to change their gender markers in government issued documentation contributing to discrimination and ill treatment of sexual and gender minorities.²³

²⁰ Cap 63 Laws of Kenya available at <http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2063>.

²¹ EG & 7 Others versus Attorney General Petition 150 and 234 of 2016 (Consolidated) available at <http://kenyalaw.org/caselaw/cases/view/173946/>.

²² Kenya National Commission on Human Rights 'Press Release on International Day against Homophobia, Biphobia, and Transphobia (IDAHOBIT) released on 17th May 2018' available at <http://www.knchr.org/Portals/0/Statements/KNCHR%20IDAHOBIT%20statement.pdf?ver=2018-05-17-131148-583>

²³ Kenya Human Rights Commission 'Submissions to the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity submitted on 5th June 2017' available at <https://www.khrc.or.ke/publications/178-the-human-rights-situation-case-law-and-research-on-protections-on-grounds-of-sexual-orientation-gender-identity-and-expression-in-the-republic-of-kenya/file.html>

The reporting period has seen to the courts making progressive pronouncements protecting the rights of persons of diverse sexual orientation and gender identity Kenya:

- (i) COI & another versus Chief Magistrate Ukunda Laws Courts and 4 Others²⁴. The Court of Appeal in Mombasa declared forced anal examination as unconstitutional on account that its amounts to torture and violates the rule against self-incrimination;
- (ii) Eric Gitari versus the Non-Governmental Organizations Co-ordination Board & 4 Others²⁵. The High Court quashed a decision by NGO Coordination Board which rejected an application for registration of an NGO named Gay and Lesbian Human Rights Commission on account that the Penal Code criminalizes same sex conduct. The decision of the high court was upheld by the Court of Appeal.²⁶
- (iii) Republic versus Kenya National Examinations Council and another *ex parte* Audrey Mbugua Ithibu²⁷. The court upheld the right of transgender persons to government issued documentation that bore their desired name with the gender marker removed.

B. Protection of intersex persons

The law in Kenya recognizes only two sex dichotomies-that is male and female.²⁸ This has led to discrimination of intersex children and adults whose sex, gonadal and hormonal characteristics do not conform to the binary male and female. They have been locked out of acquiring and accessing certain basic needs.²⁹

The Persons Deprived of Liberty Act recognizes intersex persons and further gives an intersex person the right to decide the sex of the person by whom they should be searched. Intersex Persons have also been recognised in the National Police Service Standing Orders under Chapter

²⁴ (2018) e KLR available at <http://kenyalaw.org/caselaw/cases/view/150781/>

²⁵ (2015) e KLR available at <http://kenyalaw.org/caselaw/cases/view/108412/>

²⁶ Non-Governmental Organizations Co-ordination Board versus EG & 5 Others [2019] e KLR available at <http://kenyalaw.org/caselaw/cases/view/170057/>.

²⁷ (2014) e KLR available at <http://kenyalaw.org/caselaw/cases/view/101979/>.

²⁸ See The Births and Deaths Registration Act, CAP 149,S.7

²⁹ An intersex

15 which provides that intersex persons shall choose the sex of the officer to conduct any body searches and shall be confined separately from the male and female inmates.

The High Court in the R.M case and Baby ‘A’ case³⁰, upheld the rights of intersex persons to non-discrimination and affirmed their right to protection from torture, cruel, inhuman and degrading treatment by holding that intersex persons are protected under Article 27 (4) of the Constitution. The Court also underscored the need for empirical data on intersex persons in Kenya to inform relevant reforms to address challenges faced by intersex persons as a marginalised group.

A progressive move towards the protection of rights of intersex persons is the establishment by the Attorney General of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya.³¹ The Taskforce found out that for a majority of the intersex persons the recorded sex conflicts with the self- recognized sex. The birth certificates make it difficult for intersex persons to acquire Identity cards (ID)³². Due to this, intersex persons continue to face discrimination in health, education, social and economic sectors.

In 2017, the 11th Parliament in through the National Assembly Committee on Administration and National Security deliberated on a petition filed by concerned citizens regarding the recognition of intersex persons. and directed the Registrar of persons, the Kenya National Bureau of Statistics (KNBS) and the Ministry of Health to provide statistics for all the intersex persons by ensuring that such statistics are captured in the national census and other socioeconomic surveys to facilitate planning.³³

³⁰ Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014], eKLR) available at <http://kenyalaw.org/caselaw/cases/view/104234/>.

³¹Intersex Taskforce formed on 26th May 2017 vide Gazette Notice No. 4904 of 2017; Term further extended vide Kenya Gazette Vol CXIX-No. 165 Notice No. 10810 of 2018.

³²The Intersex Taskforce Report available at <https://www.knchr.org/Portals/0/FINAL%20INTERSEX%20TASKFORCE%20REPORT.pdf>.

³³ Report on the Consideration of a Petition filed by concerned citizens Regarding Recognition of Persons with Gender Disorder Conditions (National Assembly, May 2007)

The KNBS, through continuous interventions from the Commission included the sex marker “I” to cater for intersex persons during the 2019 Kenya Population and Housing Census which indicated that Kenya has a population of 1524 intersex persons.³⁴

4. Gender equality (arts. 3 and 26)

Following the 2017 general election, representation of women in parliament has increased as compared to the representation after the 2013 general election. The current representation stands at 3 out of 47 Governors are women; 3 out of 47 Senators are women; 23 out of 290 Members of Parliament are women and 96 out of 1450 Members of County Assembly are women³⁵. This means that the composition of the 12th Parliament still falls below the constitutional threshold that would require at least 117 women in the National Assembly and 23 women in the Senate³⁶.

A. Implementation of the two-third gender principle

The Constitution of Kenya in article 81 (b) provides that not more than two-thirds of the members of elective public bodies shall be of the same gender. The Constitution in Article 100 further provides that Parliament shall enact legislation to promote representation in parliament of women, persons with disabilities, ethnic minorities and marginalized communities. Before the first general election under the Constitution of Kenya 2010, the Supreme Court in *The matter of the Principle of Gender representation*³⁷ held that the provisions of Article 81(b) would not apply in the 2013 elections but that Parliament was obliged to enact a legislation to give effect to the

³⁴<https://www.knbs.or.ke/?wpdmpo=2019-kenya-population-and-housing-census-volume-i-population-by-county-and-sub-county>.

³⁵ National Gender and Equality Commission: General Elections 2017- Statement on participation of special interest groups available at <http://www.ngeckkenya.org/news/7189/general-elections-2017-statement-on-participation-of-special-interest-groups>.

³⁶ There are 23 women elected to single constituency sit, 47 elected as county women representatives and six women nominated by political parties bringing the tally to 76 and a deficit of 47. Senate has three women elected and 18 women nominated by political parties bringing the tally to 21 women and deficit of two (2).

³⁷ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR available at <http://kenyalaw.org/kenyalaw/cases/view/85286>

provisions of Article 81(b) of the Constitution. Despite the Supreme Order, the National Assembly and Senate failed to enact the legislation as contemplated in Article 81(b) of the Constitution.

KNCHR and others in Centre for Rights Education and Awareness & 2 others³⁸ filed a suit compelling Parliament to put in place legislative measures within 60 days that will enhance the realization of the two-thirds principle. However, this is yet to be actualized.

The Political Parties (Amendment) Act 2016 provides that not more than two-thirds of the membership of all-party organs, bodies and committees, in aggregate, are of the same gender. Further, the Registrar of political parties shall not register a group unless it complies with the principles of good governance and it respects and protects the rights of minorities and marginalized groups.³⁹

Despite the numerous Court judgments on the issue and progressive provisions of our Constitution, no law has been enacted to implement the two thirds gender rule principle. Nonetheless, there have been some shy attempts in the legislative front as summarized below:

- (i) Representation of Special Interest Groups Laws (Amendment) Bill 2019⁴⁰ sought to amend various existing laws in order to give further effect to Article 100 of the Constitution.⁴¹
- (ii) The Constitution of Kenya (Amendment) Bill, 2018⁴². which seeks to give effect to the two-thirds gender principle through the creation of special seats. That will ensure that the

³⁸ Centre for Rights Education and Awareness & 2 others v Speaker others of the National Assembly & 6 others (2017) eKLR petition No. 371 of 2016 available at <http://kenyalaw.org/caselaw/cases/view/133439/>

³⁹ Sections 4, 7 (2) (c) Political Parties Act available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2011%20of%202011>.

⁴⁰ Kenya Gazette Supplement No. 107 National Assembly Bill No. 52 of 2019 dated 3rd July 2019 available at <http://www.parliament.go.ke/sites/default/files/2019-07/The%20Representation%20of%20Special%20Interest%20Groups%20Laws%20%28Amendment%29%20Bill%2C%202019.pdf>

⁴¹ The Bill sought to amend the Persons with Disabilities Act No. 14 of 2003; the Independent Electoral and Boundaries Commission Act No. 9 of 2011; the Political Parties Act No. 11 of 2011; the National Gender and Equality Commission Act No. 15 of 2011; the Elections Act No. 24 of 2011; the Election Campaign Financing Act No. 42 of 2013 and the Election Offences Act No. 37 of 2016.

⁴² Kenya Gazette Supplement No.10 National Assembly Bill No. 4 of 2018 dated 12th February 2018 available at http://www.parliament.go.ke/sites/default/files/201705/The_Constitution_of_Kenya_Amendment_Bill_2018.pdf

gender principle is realized in Parliament over a period of twenty years from the next general election, in this case 2022. As at reporting, the Bill was lost at 2nd reading.

(iii) The Constitution of Kenya (Amendment) Bill 2019.⁴³ The Bill seeks to amend the Constitution by parliamentary initiative in terms of Article 256 of the Constitution in order to ensure that the number of Members of Parliament reflect the requirement of Article 27 (8) that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. As at reporting, the Bill had undergone 1st reading at the National Assembly.

B. Participation of women in the public sector

The levels of representation remain low in both the cabinet as well as Boards of state corporations. Compared to its East African neighbours, Kenyan women's representation in Parliament still lags behind. In an effort to ensure that women participate effectively in the private sector, the President launched the Uwezo Fund⁴⁴ which seeks to expand access to finances and promote women, youth and persons with disability led enterprises at the constituency level⁴⁵.

The government, in August 2007 established the Women Enterprise Fund⁴⁶ to provide accessible and affordable credit to support women start and/or expand businesses for wealth and employment creation.⁴⁷ To-date, 1,143,156 women have undergone various training; 26,114 women have been sensitized on SACCO formation; 8 SACCOs qualified for funding and Kshs. 45 Million has been disbursed.⁴⁸

⁴³ Kenya Gazette Supplement No. 108 National Assembly Bill No. 53 of 2019 dated 4th July 2019 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/The_Constitution_of_Kenya_Amendment_Bill_2019.PDF

⁴⁴ Launched on 8th September 2013 and enacted through a Legal Notice No. 21 of the Public Finance Management Act, 2014, and published on 21st February, 2014

⁴⁵ <http://www.uwezo.go.ke/>.

⁴⁶ A Semi-Autonomous Government Agency in the Ministry of Public Service, Youth & Gender Affairs

⁴⁷ <https://www.wef.co.ke/>.

⁴⁸ The National Treasury and Planning, State Department for Planning, Social and Governance Department; Report of the pilot assessment on the implementation status and impact of affirmative action funds in Kenya- May 2019 available at <https://www.wef.co.ke/index.php/2016-04-22-06-22-35/reports-publications/send/7-reports-and-publications/74-assesmentwef-ngaaf>.

5. Counter-terrorism measures (arts. 2, 4, 7, 9 and 14)

A. The Prevention of Terrorism Act, 2012⁴⁹ gives a broad definition to terrorist act.

In the wake of the terrorist attacks in Kenya in the last months of 2014, the State enacted the Security Laws (Amendment) Act (SLAA). The court in Coalition for Reform and Democracy (CORD) case⁵⁰ declared several sections as unconstitutional for infringing on the bill of rights. For instance, Sections 12 and 64 of Security Laws (Amendment) Act were unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.⁵¹ On the other hand, the court upheld the interception of communication in order to enhance national security as a justifiable limitation to the right to privacy, recognised the world over.⁵²

In the period under review, the national security forces have responded to the attacks in a manner that has occasioned grave human rights violations for which the Commission has recorded in its various reports.⁵³ In a security operation dubbed Operation Usalama Watch in April 2014 aimed at flushing out foreigners linked to terrorism in Nairobi and Mombasa, for instance, the Commission documented multiple human rights violations and breaches of the law targeting members of the Somali Community.⁵⁴

⁴⁹ The Prevention of Terrorism Act, 2012 (No. 30 of 2012), available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2030%20of%202012>.

⁵⁰ Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR; available at <http://kenyalaw.org/caselaw/cases/view/106083/>.

⁵¹ CORD case paras 463, 464.

⁵² Para 300, CORD case.

⁵³ KNCHR(2014), A Country Under Siege: The State of Security In Kenya(2014); <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/The%20State%20of%20Security%20in%20Kenya.pdf>; Solders of Justice: A Case for Increased Citizen Participation in Promoting Security within Kisumu County (2015) <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Soldiers%20of%20Justice.pdf?ver=2018-06-06-201902-103>; KNCHR “The Error of Fighting Terror with Terror”: Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism(2015) <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/The%20Error%20of%20Fighting%20Terror%20With%20Terror.pdf?ver=2018-06-06-200137-237> and KNCHR(2016) Securing National Security & Protection of Human Rights: A Comparative Analysis Of The Efficacy Of Counter Terrorism: Legislation and Policy. https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Securing%20National%20Security%20and%20Protection%20of%20Human%20Rights_1.pdf?ver=2018-06-06-202730-197

⁵⁴ KNCHR, ‘Return of the Gulag: Report of KNCHR Investigations on Operation Usalama Watch’ (July 2014) available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20of%20KNCHR%20investigations%20on%20Operation%20Usalama%20Watch.pdf?ver=2018-06-06-194906-830>

6. Violence against women, including domestic violence (arts. 2, 3, 6, 7, 24 and 26)

A. Female genital mutilation

The Prohibition of Female Genital Mutilation Act establishes the anti –FGM Board which has the mandate to formulate policies, mobilize resources, design and co-ordinate public awareness programs against FGM and advice the government on matters concerning FGM. The Director of Public Prosecutions in April 2014 established the Anti-FGM Unit in order to streamline the prosecution of FGM.

The Kenya Demographic Health Survey 2014⁵⁵ indicates that the prevalence of FGM stands at 21% compared to 27% as documented in 2008. The prevalence rate of FGM in the North Eastern area stands at 97.5% compared to 8% in Nairobi. The percentage of women aged 15-49 circumcised by ethnic group stands at 94% in Somali community, 86% in Samburu, 84% in Kisii, and 78% amongst the Maasai community. In August 2016, the Anti-FGM board reported that a total of 363 girls from the Maasai community were saved from undergoing female genital mutilation. Instead, the girls went through an alternative rites of passage ceremony that initiated them into womanhood. Further, 137 boys were sensitized on the effects of stigma towards girls who did not undergo the traditional cut and were urged to be ambassadors of anti - FGM.⁵⁶

The State has adopted the revised National Policy on the Eradication of Female Genital Mutilation sessional paper no 3 of 2019. The Policy has five core objectives namely⁵⁷ to accelerate the eradication of FGM in Kenya; to strengthen multi-sectoral coordination and networking, partnership and community participation towards eradication of FGM; to address emerging trends and practices aimed at circumventing the legal framework; promoting the empowerment of girls and women; and to strengthen data collection, information and knowledge management.

⁵⁵ Ministry of Health and the Kenya National Bureau of Statistics ‘Kenya Demographic Health Survey’ (2014) available at <https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf>

⁵⁶ As reported by the Anti-FGM Board available at <http://antifgmboard.go.ke/hello-world/>.

⁵⁷ Sessional paper No. 3 of 2019 available at <https://gender.go.ke/wp-content/uploads/2019/10/NATIONAL-POLICY-FOR-THE-ERADICATION-OF-FEMALE-GENITAL-MUTILATION-.pdf>

B. Domestic violence

The protection Against Domestic Violence Act⁵⁸ provides for the protection and relief of victims of domestic violence and for the protection of a spouse and any children or other dependent persons. The Act provides that a survivor may apply for a protection order against a perpetrator. Children may apply through their parent(s) or guardian, through a probation officer among other authorized officials.

The Victim Protection Act provides for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims and to provide special protection for vulnerable victims.

The National Gender and Equality Commission has formulated a model policy framework on sexual and gender-based violence.⁵⁹ The policy is aimed at providing guidance to the County Governments on critical elements and considerations for policy on SGBV. County Governments should customize the policy according to their county needs and sufficient resources (financial and human) should be allocated to ensure the fight against domestic violence is a long term programme.

In addition to the above, the Gender Commission has been conducting a campaign under the theme “Keeping the Promise End Gender Based Violence”. The campaign seeks to provoke and sustain a transformative shift in perceptions towards Gender Based Violence from a culture of tolerance and normalization of Gender Based Violence to a new orientation that affirms accountability and sustainable remedies. This has resulted in the publication of a duty bearers’ handbook that seeks to clarify the roles of the various duty bearers in relation to Gender Based Violence.⁶⁰

The State through the National Police Service has unveiled Standard Operating Procedures for Prevention and Response to Gender Based Violence. The SOPs are geared towards inculcating

⁵⁸ Act no 2 of 2015, commenced operation on 4th June 2015.

⁵⁹ National Gender and Equality Commission, County Government Policy on Sexual and Gender Based Violence 2017.

⁶⁰ <https://www.ngeckeny.org/Downloads/Duty%20Bearers%27%20Handbook%20Second%20Edition.pdf>.

gender sensitive behavior and attitude among officers, improving their capacity to effectively respond to Gender Based crimes and enhance a collective and sustained effort in the prevention of GBV across all communities in Kenya.⁶¹

In order to curb cases of gender-based violence, police stations have gender desks which are for reporting specific cases of gender-based violence. The victims are also given basic psychosocial support before being referred to a medical practitioner. However, some of the police officers in charge of the gender desks are not properly trained on how to deal with a survivor of gender-based violence.

7. Voluntary termination of pregnancy and sexual and reproductive rights (arts. 6 and 17)

Unsafe abortion remains a leading cause of maternal morbidity and mortality in Kenya⁶². According to the Annual Crime Situation Report 2015, there were 851 reported cases of rape in 2015 which was a decline from 893 reported in 2014 and 336 reported cases of incest reported in 2015 an increase from 240 reported in 2014⁶³.

Abortion is permissive in Kenya by dint of Article 26(4) of the Constitution, it is however limited to instances when there is need for an emergency or when the life of the mother is in danger or permitted by written law. The National Guidelines on Management of Sexual Violence in Kenya provides that should a woman become pregnant as a result of rape they are allowed to access safe termination and post abortion care.⁶⁴ Further, Section 35 (2) of the Sexual Offences Act provides that a trial court may, at the request of a victim of sexual offence or their intermediary, grant an order for their treatment as a result of the sexual offence- this may be interpreted to include access to safe abortion that may have been as result of the offence.

⁶¹ <http://www.nationalpolice.go.ke/2015-09-08-17-56-33/news/271-nps-unveils-standard-operating-procedures-for-prevention-and-response-to-gender-based-violence.html>.

⁶² Ministry of Health (Kenya), 'Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Survey (August 2013).

⁶³ Appendix 6 Annual Crime Situation Report available at <http://www.nationalpolice.go.ke/crime-statistics.html>.

⁶⁴ Ministry of Health: National Guidelines on Management of Sexual Violence in Kenya, 2014 Edition.

Despite there being such progressive laws in terms of access to safe abortion, there remains barriers in terms of access to safe abortion with punitive laws. The Penal Code section 158-160, 228 and 240 make it illegal to procure abortion and to supply instruments to be used to procure abortion. The police use this section to harass and extort money from medical providers willing to give abortion services.

In September 2012, Ministry of Medical Services published the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya⁶⁵ but in December 2013, the Director of Medical Services withdrew the Standards and Guidelines and the *“National Training Curriculum for the Management of Unintended, risky and unplanned pregnancies.”* This has led to great confusion as to when legal abortions can be provided.

In Fida-Kenya case⁶⁶, the Federation of Women Lawyers filed a suit challenging the withdrawal of the above stated guidelines and training of health care workers. The High Court held that victims of rape and defilement have a right to terminate a pregnancy if in the opinion of a trained health professional, poses a danger to the life or the health whether physical, mental or social well-being of the mother. The Ministry’s withdrawal of the guidelines and the training curriculum for health professionals violated the highest attainable standard of health, right to non-discrimination, right to information, consumer rights, and right to benefit from scientific progress of women of reproductive age.

Notwithstanding, it is concerning that the Republic of Kenya did not support an express recommendation to implement the High Court’s judgment during the third cycle review under the Universal Periodic Review in January 2020. The recommendation called upon the State to, *“Immediately implement the High Court judgement in Petition No. 266 of 2015 by reinstating the*

⁶⁵ Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya available at <https://www.safeabortionwomensright.org/wp-content/uploads/2018/02/Standards-Guidelines-for-the-Reduction-of-Morbidity-and-Mortality-from-Unsafe-Abortion.pdf>

⁶⁶ Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR available at <http://kenyalaw.org/caselaw/cases/view/175490/>.

Standards and Guidelines on Reducing Maternal Mortality and Morbidity related to unsafe abortion and the Training Curriculum for medical professionals in public hospitals”.

8. Right to life (art. 6)

A. Death penalty

The Constitution of Kenya in Article 26 protects the right to life with the limitation as authorized by the Constitution or other written law. The Commission, jointly with other civil society organizations, was enjoined as amicus curiae in Francis Muruatetu case⁶⁷, a petition that sought to challenge the death penalty. The case went all the way to the highest court of the land whereupon the Supreme Court⁶⁸, declared the mandatory death sentence unconstitutional as relates to the offence of murder as prescribed in Section 204 of the Penal Code. This means that the death penalty is not per se unconstitutional but the mandatory nature of it as couched in section 204 of the Penal Code did not allow for mitigating circumstances and therefore violated the right to a fair trial which is a non-derogable right. The Supreme Court categorically noted in part that, “Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death.”⁶⁹

The Taskforce on the Implementation of the Supreme Court Ruling on the Death Penalty established pursuant to this judgment conducted various stakeholder engagements and has requested for submissions on the recommendations on review of the mandatory death penalty⁷⁰. Some of the recommendations made include that the National Council on Administrative Justice set up a multi-sectoral sub-committee that will oversee the resentencing process.

⁶⁷ Francis Muruatetu & another vs Republic Supreme Court of Kenya Petition No. 15 of 2015 available at <http://kenyalaw.org/caselaw/cases/view/145193/>.

⁶⁸ Francis Karioko Muruatetu & another v Republic [2017] eKLR; Petition 15 & 16 of 2015 (Consolidated) available at <http://kenyalaw.org/caselaw/cases/view/145193/>.

⁶⁹ See also Report of The Task Force on Review Of The Mandatory Death Sentence Under Section 204 of The Penal Code (October, 2019) page 66 accessible at <https://www.statelaw.go.ke/wp-content/uploads/2019/11/EDITED-Final-Nov-5th-DPTF-REPORT.pdf> .

⁷⁰ <http://www.statelaw.go.ke/wp-content/uploads/2018/10/RECOMMENDATIONS-OF-THE-TASK-FORCE-ON-THE-REVIEW-OF-THE-MANDATORY-DEATH-PENALTY-3OCT2018.pdf>

Article 133 (2) of the Constitution establishes the power of mercy advisory committee whose core mandate is to advise the President on the exercise of the power of mercy. In line with its functions, The Power of Mercy advisory committee in conjunction with KNCHR conducted a survey on Kenya's perception on the abolition of the death penalty. The report summarizes the data collected by the Task Force in an audit of the prison population of capital offenders conducted in February 2019; including the finding that there are currently slightly over 4800 offenders who are eligible for resentence hearing in accordance with the Muruatetu judgment. It also provides recommendations for implementation of its recommendations regarding resentence hearing, including a framework for resentencing hearings to be conducted in prisons over the course of approximately three months⁷¹.

On 24th October 2016, President Uhuru Kenyatta commuted 2,747 (2655 men and 92 women) death sentences to life imprisonment. He further signed pardons releasing 102 long term convicts who had been thoroughly vetted and recommended for release by the power of mercy advisory committee.

While acknowledging the above progressive steps towards the abolition of the death penalty, the Commission notes with concern that the Republic of Kenya has consistently noted (not supported) recommendations to accede to the Second Optional Protocol to the Covenant on Civil and Political Rights over the successful cycles (1st, 2nd and 3rd cycles) under the Universal Periodic Review.

B. Enforced disappearances

Enforced disappearance is not defined as a distinct criminal offence within the statute books outside the realm of international crimes. This makes it impossible to prosecute law enforcement officials for their role in effecting enforced disappearances. Enforced disappearance is criminalized as a crime against humanity when committed as part of a widespread or systemic attack directed against a civilian population in the International Crimes Act⁷². The effect of this is that many

⁷¹ Report of the Taskforce on review of the mandatory death sentence available at <https://www.statelaw.go.ke/death-sentenced-offenders-records-audit-report-30-may2019/>.

⁷² Section 6 (4) International Crimes Act available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2016%20of%202008> (accessed on 19th February 2017)

isolated acts of enforced disappearance and not necessarily occurring as part of systemic or widespread attack against civilians will remain outside the scope of domestic criminal law or the jurisdiction of national courts.

The closest definition of enforced disappearance can be found in chapter 25 of the Penal Code which provides for offences against liberty such as kidnapping⁷³, abduction, and wrongful concealing or keeping in confinement kidnapped or abducted persons. However, the Working Group on Enforced Disappearances has pointed out that using the term kidnapping alone is inappropriate in defining enforced disappearances as it *'does not mirror the complexity and the particular serious nature of enforced disappearances.'*⁷⁴ The offences against liberty defined in Chapter 25 of the Penal Code do not cover with sufficiency all the elements of enforced disappearances which are: *'deprivation of liberty against the will of the person concerned; involvement of a government official or indirectly through acquiescence; and refusal to disclose the fate and whereabouts of the person concerned.'*⁷⁵ The sanctions listed for offences against liberty do not take into account the gravity of enforced disappearances therefore fall short of providing comprehensive protection.

The lack of distinct definition of enforced disappearance as criminal offence outside the scope of crimes against humanity comes in the backdrop of about 81 complaints of enforced disappearances that have been documented by KNCHR in the fight against terrorism⁷⁶. Of Concern are reports of persons who have been held in military facilities which are not recognised as places of detention for civilians therefore placing the affected individuals outside the protection of the law. Of further concern is that KNCHR has been denied access to these facilities while carrying out

⁷³ Section 254 as read with section 257 Penal Code which define kidnapping as unlawfully conveying a person beyond the limits of Kenya without the consent of the person or person legally authorised to consent on behalf of that person. The penalty for kidnapping is seven years.

⁷⁴ Human Rights Council 'Report of the Working Group on Enforced Disappearances: Best Practices on Enforced Disappearances in Criminal Legislation A/HRC/16/48/Add.3' (28th December 2010) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/179/54/PDF/G1017954.pdf?OpenElement> accessed on 19th February 2017).

⁷⁵ Ibid.

⁷⁶ KNCHR's report titled 'Error of Fighting Terror with Terror report' (n 7) available at <https://www.knchr.org/Publications/Thematic-Reports/Civil-and-Political-Rights/Torture-Extrajudicial-Executions-Enforced-Disappearance>.

investigations into allegations of torture and ill-treatment as well as detention of persons within military facilities.

In addition, complaints of enforced disappearances documented earlier⁷⁷ during military operations in Mt. Elgon have yet to be redressed. In the year 2016, a Constitutional petition was instituted in the High Court seeking compensation for the victims. The Commission is an interested party.⁷⁸

The only recourse for victims and families of disappeared persons is an order of habeas corpus or an inquiry. The non-derogable right to habeas corpus petition to determine the legality of detention is provided for under Article 51(2) as read with Article 25 (d) of the Constitution of Kenya. Despite the Constitutional provisions, the effectiveness of order of habeas has been called into question especially in the context of the fight against terrorism. In the case of Masoud Salim Hemed case⁷⁹, the Court declined to grant an order of habeas despite glaring evidence that Salim Hemed had disappeared in the hands of the police during the raid of Masjid Musa on 2nd February 2014. Instead, the court went ahead to declare Salim as missing but believed to be dead and ordered for further investigations into his disappearance by the Criminal Investigations Department to be carried out contemporaneously with an inquiry/inquest by the Chief Magistrates court.

Despite the Commission's efforts and correspondence to engage the CID as directed by the court in the Hemed case above, no joint investigations have been launched nor a report filed back in court. The family or the representatives of the disappeared have not been informed of the steps taken by the State.

⁷⁷ KNCHR report titled '*Mountain of Terror: A Report on the Investigations of torture by the Military at Mt. Elgon*' in May 2008 available at <https://www.knchr.org/Publications/Thematic-Reports/Civil-and-Political-Rights/Torture-Extrajudicial-Executions-Enforced-Disappearance>.

⁷⁸ Phyllis Tamnai & 17 others v KDF & the AG [HC PET No. 1 of 2016].

⁷⁹ Masoud Salim Hemed and another versus Director of Public Prosecution and 3 others (2014) eKLR available at <http://kenyalaw.org/caselaw/cases/view/100914/> (accessed on the 19th February 2017)

C. Extra-judicial killings

During the reporting period, the Independent Policing Oversight Authority in exercise of its mandate to provide civilian oversight to the work of the Police, has investigated and forwarded 103 files to office of the Director of Public Prosecutions for further action for the period between 2012 -2018⁸⁰. As a result of its work, IPOA has secured conviction of 6 police officers for excessive use of force and extra-judicial killings. The cases are:

- (i) Republic versus IP Veronica Gitahi and PC Issa Mzee⁸¹ - Involved the shooting of 14-year-old girl in Kwale who died after being shot by Police. The accused were found guilty of the offence of manslaughter contrary to section 202 of the Penal Code and sentenced to 7 years imprisonment.
- (ii) Republic versus PC Titus Ngamua Musila⁸²- Involved the shooting of a 26-year-old male at Githurai 45 bus station, Kiambu by Police. The accused persons were found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and was sentenced to death.
- (iii) Republic versus PC Benjamin Kahindi and PC Stanely Okoti⁸³- Involved the shooting of Geoffrey Mogoi, Amos Makori and Joseph Onchuru in Kangemi, Nairobi by Police. The accused persons were charged and convicted with three counts of murder under section 203 as read with section 204 Penal Code. The three officers were sentenced to death.
- (iv) Republic versus CIP Nahashon Mutua⁸⁴- Involved the killing of Martin Koome while he was detained in custody at Ruaraka Police Station, Nairobi. The accused was charged and convicted for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The officer was sentenced to death.

The Court in a case involving the death of a 6 months old child (Baby Samantha Pendo) established in Kisumu Chief Magistrate's Court Inquest No. 6 of 2017 that members of the National Police

⁸⁰ Independent Policing Oversight Authority 'End-Term Board Report 2012-2018' available at <http://www.ipoa.go.ke/wp-content/uploads/2018/05/IPOA-BOARD-END-TERM-REPORT-2012-2018-for-website.pdf>

⁸¹ [2016] e KLR available at <http://kenyalaw.org/caselaw/cases/view/118626>

⁸² [2018] e KLR available at <http://kenyalaw.org/caselaw/cases/view/149253/>

⁸³ [2018] e KLR available at <http://kenyalaw.org/caselaw/cases/view/168360/>

⁸⁴ [2019] e KLR available at <http://kenyalaw.org/caselaw/cases/view/169489/>

Service were culpable in the death of Baby Pendo. In addition, the Court established that under the doctrine of command responsibility, the respective commanders failed to take reasonable measures to prevent the criminal action of killing of a baby. The ODPP is working at implementing the inquest findings.

The Commission in the reporting period (excluding the period of the 2017 General Election) has received 54 complaints of non-fatal police shooting, 32 complaints of fatal police shooting, 28 complaints of death in police custody, 123 cases of extra-judicial executions, 45 cases of shooting by other armed services/forces and 2 cases of death in prison custody. The top government agency against whom complaints were made against was the Kenya Police Service (146 complaints) and the Kenya Wildlife Services (38 complaints). The Commission remains concerned over the low rate of prosecution of security officers for extra-judicial killings and excessive use of force.

9. Prohibition of torture and other cruel, inhuman or degrading treatment or punishment and treatment of persons deprived of their liberty (arts. 7 and 10)
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A. Prevention of torture

Prosecution under the Prevention of Torture Act, 2017 remains minimal, with preference being made under the Penal Code instead of the Prevention of Torture Act. Some of the challenges have included limited awareness among the justice actors including the police, the judiciary and even members of public; multiple investigative agencies under the Act (section 13) which further conflates the investigative processes. The KNCHR has oversight mandate under section 12 of the Act. However, the Commission has faced various challenges in the oversight role including limited funding, limited access to places of detention as well as the challenge of Coordination of the investigative and prosecution powers amongst the relevant agencies; under section 13(2)(6) of the Act, KNCHR would still forward the matter to the police for investigations and investigation procedures under the National Police Service Act and the Independent Policing Oversight Authority to apply. In view of these bottlenecks, the Commission has engaged with the Office of the Attorney General and Department of Justice, IPOA, DPP and other stakeholders on ways to effectively ensure implementation of the Act.

In terms of reparations, the formulation of the Victim Protection Trust Fund Regulations is yet to be finalised so as to pave way for compensation. The Commission continues to urge for the fast-tracking of these regulations.

The National Coroners Service Act, 2017 provides for a coroner's office to conduct independent investigations into the cause of suspicious deaths in the country. Despite the robust law, the same is yet to be operationalised. The appointment of the coroner is yet to be made. The judgment of the Court in George Baala case⁸⁵ of 23rd January 2017 stated that the Attorney General was not a cabinet secretary. This has implication on operationalisation of several Acts including the National Coroners Service in as far as appointment of the coroner general is concerned.

With regards to awareness raising on the provisions of the Acts, the Commission has developed an abridged version of the Prevention of Torture Act and the National Coroners Service Act⁸⁶. The Commission has further collaborated with the Kenya School of Government has developed a manual for training of public officers on the provisions of the Prevention of Torture Act.

In the third cycle of the review of Republic of Kenya, similar to the previous cycles, the State noted recommendations to accede to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

B. Measures to reduce over-crowding in prisons

An audit of the criminal justice system published in 2016⁸⁷ revealed among other things that 70% of the charges in court were petty offenses. Further, that *'facilities holding persons deprived of their liberty are generally old, limited in space and dilapidated and majority of them were constructed during colonial time'*.

⁸⁵ [George Baala case v Attorney General \[2017\] eKLR](http://kenyalaw.org/caselaw/cases/view/130164/) available at <http://kenyalaw.org/caselaw/cases/view/130164/>

⁸⁶ Handbook on the National Coroners Service Act available at https://www.knchr.org/Portals/0/Handbook%20On%20The%20National%20Coroners%20Service%20Act%2C%202017_2018.pdf

⁸⁷ National Council on the Administrative of Justice; Legal Resources Foundation and Resource Oriented Development Initiatives; 'Criminal Justice System in Kenya: An Audit'; Available at http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf.

During the reporting period, actors within the Criminal Justice Sector coordinated under the National Council on Administration of Justice have come up with measures towards addressing overcrowding, including construction of new prisons and detention facilities; implementation of the Bail and Bond Policy; formation of the National Committee on Criminal Justice Reforms; and implementation of the sentencing policy through the use of non-custodial measures such as community service orders.

In the State of Judiciary and Administration of Justice Report (2016-2017), it was reported that a total of 11,011 probation investigations were made and 6910 offenders were placed on probation orders. On community service orders a total of 34,665 cases were referred for community service pre-sentence reports out of which 33,486 offenders were found suitable to serve their sentence under Community Service Orders.

However, the probation and aftercare service department reported that most offenders were placed on one day community service orders thus not putting enough time to work. Additionally, the department recorded cases where offenders absconded in totality⁸⁸.

10. Liberty and security of person (art. 9)

The punishment of petty offences through arbitrary arrests has not only violated the freedom and security of the person but also created a panacea for the violation of human rights of especially the poor, marginalized and vulnerable people. They seem to punish the status of the person. The National Committee on Criminal Justice Reforms has in the period prepared policy briefs recommending review, amendment or repeal of the laws and policies. The legislation that requires various amendments include: The Penal Code, The Narcotics and Psychotropic Substances (Control) Act, Kisumu, Mombasa and Nairobi Counties' By-Laws, among others. Notably petty

⁸⁸ The Judiciary State of Judiciary and Administration of Justice Report 2016-2017 available <https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-report-2016-2017/> page 216

offences are linked to socio-economic issues thus need for an integrated societal approach towards tackling the issue.

11. Elimination of slavery, servitude and trafficking in persons (arts. 2, 6, 7, 8, 24 and 26)

Following the enactment of the Counter-Trafficking in Persons Act, 2010, the government constituted and launched the Counter-Trafficking in Persons Advisory Committee which has spearheaded the development of the National Plan of Action for Combatting Human Trafficking 2013-2017.

The Advisory Committee has put in place a data collection mechanism to improve tracking of anti-trafficking initiatives across all 47 counties. The reporting period has also seen the development of new policies by the Ministry of Labour for persons seeking employment opportunities abroad to ensure that their work contracts meet minimum standards set out by the Ministry. The impact of this policy is yet to be seen; however, this marks an important step towards preventing trafficking of persons in Kenya overseas. In January 2020 the States of East and Horn of Africa discussed on Priority actions for effective Labour Migration Policy Development and Drafting, Negotiating and Implementation of Bilateral Labour Migration Agreements⁸⁹. In addition, the National Employment Authority has a list of the recently accredited recruitment agencies; this ensures that those seeking employment abroad go through genuine agents⁹⁰.

The government has developed the national referral mechanism guidelines to assist stakeholders in referring victims of trafficking to assistance. In addition, the government for the first time allocated seven million shillings (USD 70,000) in the 2015/16 financial year towards the direct assistance of victims of trafficking through the Victims Assistance Fund. Given the magnitude of the problem in Kenya, more resources need to be allocated towards protection and assistance of victims of trafficking.

⁸⁹ The signed communique available at <https://nea.go.ke/web/wp-content/uploads/2020/02/SIGNED-COMMUNIQUE-HLMM-JAN-21-2020-compressed.pdf>

⁹⁰ List of accredited recruitment agencies available at <https://nea.go.ke/web/wp-content/uploads/2020/03/List-of-Accredited-Recruitment-Agencies-12.03.2020.pdf>

Prevention efforts have culminated in the development of standard operating procedures for prosecutors and training of approximately 50 trainers from key anti-trafficking officials. An immediate outcome of this initiative has been the increase in the number of prosecutions, approximately 762 prosecutions and 456 convictions. Through the activities of the Advisory Committee on Counter trafficking in persons in Kenya and the adherence to the National Plan of Action on Countering Human Trafficking, Kenya has improved from Tier 2 Watch List to Tier 2⁹¹. Nonetheless, reports of human trafficking cases are still rife.

There are no specific measures put in place to protect persons with albinism from abduction, human trafficking and other discriminatory practices that jeopardise their life. Persons with albinism are protected like other members of the public by security agencies and the provisions of the Sexual Offences Act, Criminal Procedure Code (the framework for arrests and prosecutions) and Counter-Trafficking in Persons Act⁹². The Committee on the Rights of Persons with Disability in considering the initial report of Kenya has expressed concern on the different forms of violence against persons with albinism in particular girls and the absence of measures to protect, prosecute and convict perpetrators⁹³.

⁹¹As per the US State Department Report on Human Trafficking 2016 Accessible on <https://www.state.gov/j/tip/rls/tiprpt/2016>. This status has been maintained as per the 2019 Trafficking in Persons report accessible at <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>

⁹² Kenya National Commission on Human Rights 'Compendium on Submissions to Committee on Rights of Persons with Disabilities: Response of the Kenya National Commission on Human Rights on the List of Issues on Kenya's Initial Report on Implementation of the Convention on the Rights of Persons with Disabilities Submitted on 30th July 2015' (2016) available at <http://www.knchr.org/Publications/InternationalObligation.aspx> (accessed on 29th January 2017)

⁹³ Committee on the Rights of Persons with Disabilities 'Concluding Observations on the Initial Report of Kenya' (CRPD/C/KEN/CO/1 adopted on 28th August 2015)

12. Treatment of aliens, including refugees, asylum seekers and migrants, and population displacement (arts. 2, 6, 7, 9, 13 and 26)

A. Protection of refugees, asylum seekers and migrants

Parliament introduced the Refugees Bill, 2019⁹⁴ whose principal object is to provide for the recognition, protection and management of refugees. The Commission noted that whilst the proposed law is an improvement in some respects from the current form, it is inadequate to comprehensively solve the gaps in the extant refugee law. Notably, any legal framework should address the key concerns of the Comprehensive Refugee Response Framework (CRRF).

In October 2018, the Commission was petitioned by a Non-Governmental Institution (NGO) offering humanitarian support to refugees (requested to remain anonymous) over reported incidences of human rights violations on the refugees and asylum community members both at Kakuma and Dadaab Refugee camps. The KNCHR was informed that among other things refugees and asylum seekers were denied registration and those who have applied were taken through slow process of refugee status determination (RSD) and that the government had issued an ultimatum to relocate minorities and close Dadaab camp which was going to result into forceful repatriation of refugees. In its report, the Commission found inter alia that there was lack of consultation and/or participation in the decision-making process by those targeted in the movement/relocation. The report was tabled to the National Assembly for debate.

A recent study conducted by KNCHR on the status of migrants in Kenya's places of detention and holding facilities reveals that a third of the migrants have been detained for being in the country without proper documentation. This comes at a huge cost to the individual, their families as well as the state. The study also discovered that it costs the Kenyan government approximately Kshs 2 Billion annually to process migrants through the criminal justice system and afterwards repatriate them to their countries of origin.

⁹⁴Kenya Gazette Supplement No.126 National Assembly Bill No. 62 of 2019 dated 26th July 2019 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/The_Refugees_Bill_2019.pdf

B. Protection of internally displaced persons

The Prevention, Protection and Assistance to Internally Displaced Persons and Communities Act⁹⁵ provides for the prevention, protection and provision of assistance to internally displaced persons and communities and it gives effect to the Great Lakes Protocol on the protection and assistance to internally displaced persons and the United Nations guiding principles on internal displacement⁹⁶. The Act creates an IDP fund, to cater for the capital and recurrent expenditure relating to protection and assistance to internally displaced persons and communities and the provision of a durable solution to them.

The Act outlines the procedures to be followed in the event of development induced displacements and it shall ensure that the displacement is carried out in a manner that is respectful of the human rights of those affected, taking in particular into account the protection of community land and the special needs of women, children and persons with special needs. However, this has not been adhered to as evidenced by the number of suits filed against various State agencies.

In *Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others*⁹⁷ the court held inter alia that the respondents while undertaking their project should ensure that there is compliance with the right to human dignity, life and security of the evictees. The evictions must not be conducted at night, in bad weather, during festivals or holidays or during school examination periods.

⁹⁵ Act No. 56 of 2012.

⁹⁶ <http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>

⁹⁷ *Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others ex parte Francis N. Kiboro & 198 Others* [2015] eKLR available at <http://kenyalaw.org/caselaw/cases/view/112131>.

13. Forced eviction (arts. 7, 12, 17, 26 and 27)

Forceful evictions persist in disregard of the procedures for effecting evictions contained in the Land Laws(Amendment) Act,2016 (No. 28 of 2016). This has impacted negatively on other socio-economic rights including health, food, education and reasonable standards of sanitation.

The Commission noted in its fourth state of human rights report that in the course of implementation of LAPSET project in Lamu county, Aweer (Boni) community decried lack of public participation and inadequate compensation to deserving dispossessed proprietors. In 2012, residents of Kibera slum were unsatisfied with the compensation by the Kenya Railways Corporation which sought to build a railway line along the railway reserve in the slum area.

In its COVID 19 Situational Report No. 1 of 2020, KNCHR took note of increased number of evictions and demolition of houses especially for the poor people who were either squatters on government land or who have been conned into buying land belonging to the government and issued with fake title deeds. Forceful evictions during the Covid-19 pandemic period occurred in Kariobangi and Ruai where families were left in the cold after demolition of their houses despite the inherent dangers of the pandemic and existence of an interim court order⁹⁸.

14. Freedom of expression (arts. 19 and 20)

There is a thin line between the freedom of expression and the offence of criminal defamation as per Kenyan criminal law. The case of Jacqueline Okuta case⁹⁹ brings into sharp focus the constitutionality of the offence of criminal libel as provided for under section 197 of the Penal Code. The court declared the offence of criminal defamation as unconstitutional citing that there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. The offence of criminal defamation constitutes a disproportionate instrument for

⁹⁸ KNCHR, 'Pain and Pandemic Report: Unmasking the State of Human Rights in Kenya in Containment of the Covid-19 Pandemic-Situational Report No. 1 of 2020,' (June 2020) available at https://www.knchr.org/Portals/0/Final%20KNCHR%20COVID%2019%20Situational%20Report%20June%202020-%20Incorporated%20Recommendations_1.pdf pg 33

⁹⁹ Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR available at <http://kenyalaw.org/caselaw/cases/view/130781/>

achieving the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, the offence of criminal defamation is not reasonably justifiable in a democratic society, hence criminal sanctions on speech ought to be reserved for the most serious cases as envisaged under Article 33 (2) of the Constitution.

Freedom of expression and media freedom was threatened in various instances through both laws and practice. The Security Laws Amendment Act (SLAA), for instance sought to amend various Acts in an effort to combat terrorism in the country. In *Coalition for Reform and Democracy (CORD) case*¹⁰⁰, the court held Section 64 of SLAA which introduced Sections 30A and 30F to the Prevention of Terrorism Act as unconstitutional for violating the freedom of expression and the media.

During the 2017 general elections period, the Communications Authority of Kenya (CA) switched off the signals of four privately owned national TV stations over the stations' decision to air live the Opposition leader Raila Odinga's 'Swearing in Ceremony' at Uhuru Park. Despite a court order to reinstate the TV stations¹⁰¹, the same was not adhered to immediately. The TV stations were switched back on after 10 days, with no explanation from the Communications Authority of Kenya.

In *Geoffrey Andare case*¹⁰², the petitioner challenged the constitutionality of section 29 of the Kenya Information and Communication Act, Cap 411A on the grounds that it criminalises publication of certain information in vague and overbroad terms, has a chilling effect on the guarantee to freedom of expression, and creates an offence without creating the mens rea element on the part of the accused person. The court declared section 29 unconstitutional for being couched in overbroad and vague terms that violate or threaten the right to freedom of association guaranteed under Article 33 of the Constitution.

¹⁰⁰ *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR <http://kenyalaw.org/caselaw/cases/view/106083/>

¹⁰¹ *Okiya Omtatah Okiiti v Communication Authority of Kenya & 8 others* [2018] eKLR available at <http://kenyalaw.org/caselaw/cases/view/151117/>

¹⁰² *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR available at <http://kenyalaw.org/caselaw/cases/view/121033/>

During the COVID-19 Pandemic, the Commission noted the positive aspect of enhancing media freedom by listing media services as essential services and this enhanced media coverage on the pandemic and access to information. However, there were reported cases that threatened media freedom in the course of covering and reporting the COVID-19 pandemic across the country. There were documented instances of harassment and intimidation of journalists by law enforcement officers; including the assault of an NTV journalist in Mombasa; harassment of a WERU TV journalist in Meru, arrest of Citizen TV journalists in Eldoret and harassment of two Standard Media Group journalists in Nakuru. KNCHR issued a terse statement on the harassment of journalists and called to action the need for duty bearers to support media freedom during COVID-19 pandemic coverage and reporting¹⁰³.

15. Freedom of assembly (arts. 19 and 21)

The Constitution under Article 37 provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. Section 78 of the Penal Code creates the offence of unlawful assembly and riot which constitutes the act of three or more people coming together with the intent of committing an offence or when their conduct indicated that they are likely to cause a breach of peace to those around them. Unlawful assembly is considered a misdemeanor and is punishable by 1-year imprisonment upon conviction.

In the run up to the 2017 general elections, there were a number of demonstrations organized by various political parties' supporters. Through analysis of information collected shortly before, during and after fresh presidential elections, the commission established that various human rights were violated. such rights include; the right to security, the right to fair electoral campaign opportunities and practices, the right to assembly and peaceful demonstrations, prisoners right to

¹⁰³ KNCHR Report, 'Pain and Pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 Pandemic,' available at <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic>

political participation, right to property, right to vote and right to run for office (to be voted for) among others¹⁰⁴.

In this respect, several human rights defenders filed a suit, Wilfred Olal & 5 others¹⁰⁵ with regard to the freedom of expression versus their right to demonstrate. The petition invites a candid discussion of the citizens Fundamental Right to demonstrate, picket and present petitions to public authorities and the importance of the exercise of the freedom of expression which is closely connected to the Freedom to demonstrate. In the judgment, the court gave three tests for any limitation on the right to demonstrate: - that the limitation is acceptable if limited by law; the limitation is necessary and proportionate; the limitation pursues a legitimate aim i.e. national security or public safety.

Parliament introduced the Public Order Amendment Bill, 2019 that proposes to amend the Public Order Act so as to make organizers of public meetings or public processions leading to loss of property, life or earnings liable for the loss and compensate the affected persons. In its advisory, the Commission advised against such an amendment as it threatened the freedom of assembly and was unjustifiable in an open and democratic society. The Bill is yet to undergo the second hearing in Parliament.

The National Police Service in partnership with the KNCHR formulated the draft National Police Service (Operational Standards for Public Order Policing) Regulations 2016 which aim to provide guidance on the procedure of maintaining public order and management of demonstrations and large-scale disturbances by the police. However, they are yet to be adopted.

¹⁰⁴ Still a Mirage at Dusk; A Human Rights Account of the 2017 fresh presidential elections available at <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Still-a-Mirage-at-Dusk.pdf?ver=2018-05-23-123451-723>

¹⁰⁵ Wilfred Olal & 5 others v Attorney General & 2 others [2017] eKLR available at <http://kenyalaw.org/caselaw/cases/view/137643/>.

16. Rights of the child (arts. 23, 24 and 26)

The age of criminal responsibility in Kenya is still eight (8) years. The Children Bill proposes to raise the age of Criminal Responsibility to 12 years. The National Council on Children Services developed the draft Children Bill, 2017 but it is yet to be introduced in Parliament for further debate. The Penal Code goes further to say that if the child is between the ages of eight (8) and twelve (12) years of age, and commits a criminal offence, then before prosecution, the court must establish whether the child understood the consequences of his/her actions. If not, then the child will not be prosecuted, but if it comes out that the child understood, then he/she will be prosecuted.

Further, the Act states that male children below the age of twelve (12) years are incapable of committing an offence associated with carnal knowledge or sexual intercourse.

In the case of juvenile offenders, Section 191 (1) of the Children Act provides a variety of ways in which a trial court may deal with the minor with the aim of rehabilitating him as opposed to punishing him for the offence committed.

The National Council on the Administration of Justice Special Taskforce on Children Matters was appointed by the Hon. Chief Justice vide Gazette Notice No. 369 of 29th January 2016 with a mandate to address gaps regarding the administration of justice with regard to children¹⁰⁶.

17. Participation in public affairs (arts. 7, 14, 25 and 26)

During the 2017 general election, there were reported cases of violence across the country and this prompted the Commission to conduct a status of human rights during that period. Some of the grave injuries reported include gunshot wounds and broken ribs caused by blunt objects. The injuries point to the use of excessive force that did not comply with the principles of necessity and proportionality as per the Sixth Schedule of the National Police Service Act. Out of the 126 documented cases, only 3 constituted cases of civilian-to-civilian confrontation. Further, there

¹⁰⁶ More information on the Taskforce is available at <https://ncaj.go.ke/committees/special-taskforce-on-children-matters/>

were 6 reported cases of sexual violence against women and girls including rape which were perpetrated by civilians and police. Cases of physical injuries were also meted on the elderly, youth and children. Thirty-one cases of physical injuries involved females and 95 involved males¹⁰⁷.

The Commission's findings indicate that majority of the survivors come from informal settlements where fierce protests were witnessed. The KNCHR's findings recorded cases in nine (9) counties of Nairobi, Kisumu, Vihiga, Kakamega, Migori, Siaya, Busia, Homa Bay and Bungoma and one (1) case each in the Machakos and Uasin Gishu Counties. It is noteworthy that the 201 sexual violence cases are not conclusive and are a record of survivors who courageously came out to the KNCHR to share their ordeals. The most affected were women at 96.26% while men were at 3.74%. Demoralizingly, older persons were not spared with the eldest survivors being a 70-years-old female and a 68-years-old male and young children as young as seven (7) years old¹⁰⁸.

18. Indigenous peoples (arts. 2, 25, 26 and 27)

The Community Land Act¹⁰⁹ provides for the recognition, protection and registration of community land rights; management and administration of community land; the role of county governments in relation to unregistered community.

Parliament enacted the Forest Conservation and Management Act which provides for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country. It also recognizes community participation in conservation efforts through the registration of community forest associations whose conduct shall be guided by the provisions of the Act.

¹⁰⁷ KNCHR Report, Mirage at Dust available at https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Mirage%20at%20Dusk_B5_210518_2215.pdf?ver=2018-05-23-125203-263

¹⁰⁸ KNCHR Report, Silhouettes of Brutality available at https://www.knchr.org/Portals/0/KNCHR_Silhouettes_of_Brutality.pdf

¹⁰⁹ Community Land Act, No 27 of 2016 available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2027%20of%202016>

The Ogiek community in African Commission on Human and Peoples' Rights vs Republic of Kenya Application No. 006/2012 won the case in the African Court on Human and People's Rights where the Kenya government was ordered to recognize and implement the decision which conferred upon the community their rights to land ownership situated in the Mau forest. A Taskforce was appointed in 2017 by the Cabinet Secretary, Ministry of Environment and Forestry to advise on the implementation of the said decision of the African Court on Human and People's Rights. The Taskforce held public hearings in June 2019 and visited the Mau Complex, Serengeti, Chepkitala, Sossio, Kapoleit and Mukogodo forests and received submissions from the Ogiek, Sengwer, Yaaku and other communities¹¹⁰.

The Taskforce has also conducted public participation hearings in the Mau Complex on 6th February 2019 and Embobut Forest on 3rd April 2019. A stakeholder's forum was held at the Kenya Meteorological Department Offices in Nairobi on 9th April 2019 during which different stakeholders shared their views on how best the Judgment of the African Court on Human and Peoples Rights can be implemented. As at the time of conclusion of this Report, the Taskforce had submitted its report to the Ministry of Environment and Forestry for consideration.

The Commission has pursuant to its constitutional and statutory mandate carried out investigations and documented human rights violation committed against Sengwer Community who live in Embobut Forest and prepared a report¹¹¹. The report and recommendations contained therein were shared by the Commission with the Ministry of Environment and Forestry and the Kenya Forestry Services.

_____End_____

¹¹⁰ Ogiek case available at <https://www.african-court.org/en/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>

¹¹¹ The Report of the High-Level Fact-Finding Mission to Embobut Forest in ElgeyoMarakwet County https://www.knchr.org/portals/0/group/rightsreports/KNCHR-Fact_Finding_Mission_to_Embobut_Forest.pdf