

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)

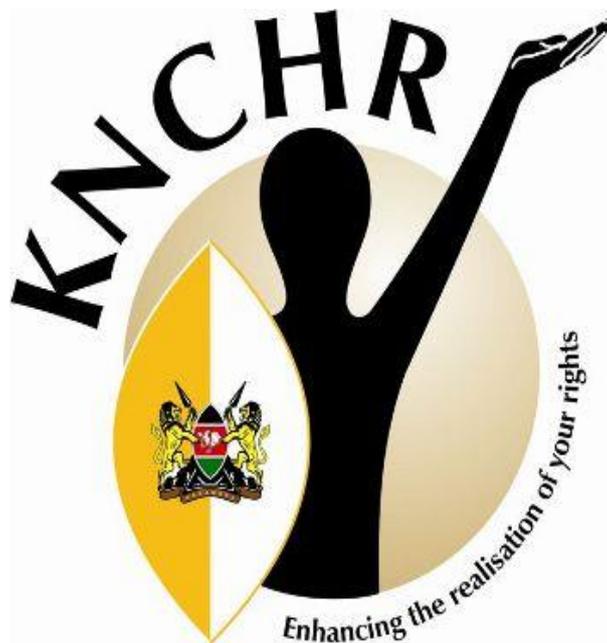
**PRESENTATION TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES'
RIGHTS**

ON

THE ACHPR'S 59TH ORDINARY SESSION AT BANJUL, THE GAMBIA

BY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS



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1. CURRENT STATUS

The Kenya National Commission on Human Rights (KNCHR) is an independent national human rights institution (NHRI) established under the Kenyan law and in line with the Paris Principles with the mandate to promote the respect, protection and observance of human rights in Kenya. In line with its mandate, KNCHR reviews legislation and policy; works with State and non-State actors and monitors the State's fulfilment of its human rights obligations. This is to ensure compliance with the Constitution of Kenya (2010) and international human rights standards and principles.

KNCHR was granted affiliate by the African Commission on Human and Peoples' Rights during its 36th Ordinary Session which happened on 23rd November to 7th December, 2004. Since then, KNCHR has been involved in the activities of the African Commission and has promoted its activities in Kenya.

At the time of KNCHR being granted affiliate status by ACHPR, it was a statutory body having been established under an Act of Parliament. In 2010, a new Constitution was adopted in Kenya which made KNCHR a constitutional commission under Article 59. Further details of its structure and mandate are contained in the KNCHR Act of 2011.

KNCHR has maintained a close working relationship with Civil Society Organizations in the work of promotions and protection of human rights. KNCHR collaborates with CSOs to send information to the ACHPR on the status of human rights in Kenya.

2. RELATIONSHIP WITH AFRICAN COMMISSION

KNCHR has a good working relationship with the African Commission. Since it was granted affiliate status in 2004, KNCHR has interacted with the Commission and participated in its Sessions. It has also worked to support the Commission's work in Kenya. KNCHR has interacted with the Commissioners and Special Rapporteurs from the ACHPR whenever they visited Kenya on a mission.

3. HUMAN RIGHTS SITUATION IN KENYA

The following summary of the human rights situation in Kenya is based on KNCHR's 4th State of Human Rights Report entitled Human Rights, the Elusive Mirage¹ and the 12th Annual Report². The 4th State of Human Rights Report focuses on the situation of human rights in Kenya from 2011 to 2014 and the 12th Annual Report is for the year 2015/2016.

CIVIL AND POLITICAL RIGHTS

Access to Justice

There was improvement in access to justice in the period leading to 2014. There was construction of more courts and recruitment of more judicial officers to offer services to the public. However, there are capacity gaps that still prevail in the judiciary especially on providing access to persons with disability. Provision of Sign Language Interpretation services, court documents accessible in braille and physical access of courts remain big challenges that need to be resolved.

On a positive note, the courts have played a big role in adjudicating matters that touch on human rights. This has advanced the human rights discourse in a great way.

Transitional Justice

The government had set up the Truth Justice and Reconciliation Commission to come up with recommendations on how to resolve past injustices and violations of human rights. The TJRC faced political interference during the course of its operations. Once TJRC released its report, an amendment to the TJRC Act was done to allow Parliament to review its recommendations. The recommendations of the TJRC are yet to be implemented to date. However, the Attorney General has initiated the process of operationalizing a restorative justice fund through setting up of a governance structure in which the KNCHR is a member. The Attorney General has further mandated the

¹ KNCHR, 4th State of Human Rights Report available at <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf> (last accessed 3/10/2016)

² KNCHR, 12th Annual Report, available at <http://www.knchr.org/Portals/0/AnnualReports/Annual%20English%20FINALE%20COPY.compressed.pdf?ver=2016-05-31-172234-997> (last accessed 3/10/2016)

KNCHR to develop regulations and guidelines towards implementation of the restorative Justice Fund. TJRC made key findings that previous governments from the colonial period to 2008 Kibaki government were responsible for gross human rights violations. These included massacres, torture, assassinations, extrajudicial executions, illegal and irregular allocation of public land. Land was actually identified as the single most important cause of ethnic tension and conflict in Kenya.

Right to Life

The right to life for many people in Kenya continues to be threatened and violated. Since 2011, KNCHR in conjunction with Civil Society Organizations has received complaints on extrajudicial killings and forced disappearance. In 2014 only, The KNCHR has documented over two hundred (200) cases of egregious human rights violations that include twenty five (25) extrajudicial killings and eighty one (81) enforced disappearances. These cases have persisted and a recent case was that of the killing of Lawyer Willy Kimani, his client and taxi driver in July 2016. Several such complaints have been documented around the country. KNCHR has embarked on a public inquiry into insecurity and extrajudicial killings at the Coast Region of Kenya.

Kenya is still applying the death penalty. It is yet to yield to the abolition call by UN Committee on ICCPR. A public survey is ongoing with the aim of obtaining what the view from the public are with regards to the death penalty.

Freedom of Information, Expression and Media

Several cases were reported of Journalists who were attacked while in the course of their work by authorities. There were also reports of death threats to Journalists. There were efforts to ensure that a law is passed for the implementation of Article 35 of the Constitution on access to information. It took a long time and advocacy but the Access to Information Act was finally passed and assented to by the President in September, 2016. The Act is a good step forward towards the enhancement of freedom of information in Kenya.

Freedom of Association

There were reports of the threat to the freedom of association especially for Civil Society Organizations from 2013 to 2016. The State had proposed stringent measures against CSOs especially in the wake of insecurity in the country. The State allegedly linked some CSOs to terrorism and used that avenue to curtail their freedom of association. The notable organizations that were affected in this way were MUHURI and Haki Africa. Through a court case, they were able to have the act of the State declared illegal in November 2015 and they resumed operations.

The Public Benefits Organisations Act 2013 had not been operationalized for a long time. Through protracted engagement between the State, KNCHR and CSOs the Cabinet Secretary for Devolution and Planning finally operationalized the Act in September 2016. This Act is crucial in guiding the work of Public Benefit Organizations in Kenya. This is a good step forward towards enhancing the freedom of association in Kenya.

Freedom of Assembly, Demonstration, Picketing and Petition

This right was violated during the demonstrations against the Independent Electoral and Boundaries Commission. These demonstrations took place in the months of May and June 2016 and turned chaotic in most occasions resulting in loss of lives, property and injuries. KNCHR condemned the use of excessive force by the authorities during the protests and also called on the members of the public to also adhere to their duty to respect the rights of other people as they enjoy their freedom of assembly. There is still much work to be done to ensure the enjoyment of the right to freedom of assembly in Kenya. The authorities need to be sensitized so that they do not use excessive force and threaten or violate the rights of protesters.

Corruption

Corruption appears to be a never ending challenge facing Kenya. Corruption has a grave impact on the enjoyment of human rights. Several cases of corruption in the public sector have been reported with varied efforts made by the State to hold those culpable to account. The cases reported include Ministries such as the Devolution and Planning Ministry whose Cabinet Secretary had to resign following allegation of corruption

involving the National Youth Service and also the Ethics and Anti-Corruption Commission (EACC) whose leadership on fighting corruption has been hampered due to allegations of impropriety on its various Chairpersons resulting in their resignation. The immediate Chairperson of the EACC resigned in August 2016. Thus corruptions continues to be a challenge that affects the country and affects the enjoyment of human rights.

ECONOMIC SOCIAL AND CULTURAL RIGHTS

Right to Clean Water and Sanitation

Water still remains inaccessible to many people in Kenya. It is estimated that 41% of the population in Kenya lacks access to good water supply. 17% of this number are found in urban places and 48% are from rural areas. It is estimated that 69% of Kenyans do not have access to improved sanitation. The quality of water and sanitation has a significant impact on health. Low rates of access to clean water and sanitation translates to socio economic costs that affect enjoyment of human rights.

Right to Food

It is estimated that 13 million Kenyans out of a population of 43.5 million are undernourished. This constitutes 30% of the population. Food inadequacy is high in Kenya and 43% of the population gets less than the recommended ration. Kenya experiences perennial drought in various parts of the country which makes the food security challenge even worse. In 2013-2014 Financial Year, Kenya allocated only 2.4% of its budget to the core Ministry dealing with agricultural development. The State needs to prioritize programs that aim at curbing food insecurity since this will improve the enjoyment of the right to food.

Right to Education

Kenya has a policy for free access to primary education which was introduced in 2003. However, the resources for implementation of this policy have been overstretched thus compromising the standard of education. Nevertheless, it is still estimated that over a million children mostly in urban slums and Arid and Semi-Arid Areas are still out of

school. There were several strikes by the teachers for a long period in 2015 and this affected access to education. In the year 2016 there has been a lot of unrest in schools with many reports of burning of schools. This has also affected the enjoyment of the right to education. The government formed a special investigation team in July 2016 to look into the constant burning of schools that saw upwards of 73 schools burnt³.

Right to Health

Provision of health care is a devolved function in Kenya and it is to be executed by County Governments. The Counties have made efforts to improve healthcare however many challenges still prevail. The government has increased budgetary allocation for health over the years but the percentage is still below the target of 15% of the national budget as recommended under the Abuja Declaration.

Access to healthcare is a big challenge in Kenya especially for the low income earners. National Hospital Insurance Fund only covers a small percentage of Kenyans and many remain vulnerable.

The Maternal mortality rate still remains high in Kenya. It is reported as 488 maternal deaths per 100,000 live births.

There have been reports of strikes by healthcare providers in various Counties in Kenya due to poor working conditions and poor pay. This has had a negative impact in the provision of healthcare and the enjoyment of the right to health.

The State needs to continue with the efforts to improve the enjoyment of the right to health in Kenya.

GROUP RIGHTS

Rights of Women

The full realization of the rights of women is yet to be realized in Kenya. Gender based violence against women is still ongoing and the cultural practices that violate the rights

³ Daily Nation, Three Schools Burnt, Government Sets up team to investigate fire incidents, 20th July, 2016 available at <http://www.nation.co.ke/news/education/three-schools-burnt--government-sets-up-team-to-investigate/2643604-3303644-gpgkbl/index.html> (last accessed 3/10/2016)

of women such as Female Genital Mutilation (FGM) are still propagated. The advocacy for the implementation of the two thirds gender rule under the Constitution is still on going with little progress. CSOs, Constitutional Commissions and some section of Members of Parliament have been engaging with the government and specifically Parliament for the passing of the Two Thirds Gender Bills. There were several debates and votes done in Parliament in 2015 and 2016 but the Bills did not garner enough support from Parliamentarians. The KNCHR together with other key stakeholders have proceeded to court to seek orders for parliament to enact a mechanism to operationalize the two thirds gender representation principle. Gender equality is still a challenge in Kenya especially in elective positions and much remains to be done for equality to be achieved.

Children's Rights

The respect, promotion, protection and fulfilment of the rights of children in Kenya are still wanting. Cases of child abuse in the form of forced early marriages, FGM and child labour still persist. There is also discrimination on intersex children since they are denied registration because of only recognition of two genders in Kenya. In case filed in 2013, the court ordered the Registrar of Births to register the baby in that case as intersex. Cases of child trafficking have also been reported in Kenya. These incidences have occurred in homes and hospitals where children have been reported stolen after birth.

The amendment of the Children Act (2001) has been ongoing for a long time. These efforts to amend the Act are meant to conform it to the Constitution of Kenya and international standards.

Rights of Persons with Disability

Kenya has legislation that protects the rights of persons with disabilities. The UNCRPD is also part of Kenyan law since Kenya has ratified it. There are challenges to enjoyment of human rights by persons with disabilities that persist. These include discrimination, lack of accessibility to public places, transportation and information, violation of their right to life, education, health and the right to be free from inhuman, degrading treatment. The Constitution of Kenya has the principle that at least 5% of members of

public in elective and appointive bodies should be persons with disabilities. This principle is yet to be realized. Awareness raising on the rights of persons with disabilities is crucial in Kenya for the advancement of disability rights. Kenya has much to do for the full realization of the rights of persons with disabilities.

4. ACTIVITIES

KNCHR has engaged in various activities aimed at advancement, protection and enjoyment of human rights by all in Kenya. These activities were fashioned around 4 strategic objectives according to its fourth Strategic Plan 2015-2018. The 4 strategic objectives are as follows: To promote the respect and observance of human rights in public institutions; to increase application of human rights principles and standards in institutions and mechanisms of justice; to enhance the realization of economic and social rights in Kenya; and to enhance the efficiency and effectiveness of the Commission. More details of the activities done by KNCHR in the year 2014/2015 are available in its 12th Annual Report on its website⁴.

5. DOMESTIC APPLICATION AND USE OF AFRICAN CHARTER AND AFRICAN WOMEN'S RIGHTS PROTOCOL

The African Charter has been used extensively in Kenya. It is used to guide the human rights conversations while devising policies and laws. Kenyan courts have also used the African Charter to protect human rights and fundamental freedoms that are violated or threatened with violation. Those who litigate before the courts have also used the African Charter to claim for their rights. They use the obligations to the State that are contained in the Charter to hold perpetrators of human rights accountable for their actions. This use of the Charter is evidenced by the cases touching on human rights that are reported in the Kenya Law Reports.

6. STATE REPORTING

Kenya submitted its initial report to the ACHPR in 2006. The report covered the period from 1992 (when Kenya became a State party to the Charter) to 2006. This was a

⁴ KNCHR, 12th Annual Report available at <http://www.knchr.org/Portals/0/AnnualReports/Annual%20English%20FINALE%20COPY.compressed.pdf?ver=2016-05-31-172234-997> (last accessed 3/10/2016)

combination of its 1st to 7th Reports to the African Commission⁵. In 2014, Kenya submitted its combined 8th to 11th Report focusing on the years 2008 to 2014⁶. Kenya is up to date in her reporting and has been given a green card in the African Commission's database of status of State reporting⁷. Kenya has also ratified all the binding legal instruments under the African human rights system that are monitored by the African Commission⁸.

7. SPECIAL MECHANISM AND PROMOTIONAL VISITS

In August 2015, the Special Rapporteur on Freedom of Expression visited Kenya. KNCHR in collaboration with CSOs (Article 19, TI & ICJ-K) invited and hosted the Special Rapporteur on Freedom of Expression and Access to Information in Africa for a 5 days advocacy visit. The Rapporteur met senior government officials, Members of Parliament, Commissioners of Independent Constitutional Commissions, Civil Society, Editors Guild, Media Stakeholders and Journalists. She pushed for the enactment of the Access to Information Bill, 2013 among other things.

8. RECOMMENDATIONS

KNCHR would like the support and involvement of the African Commission in advocating for the protection of the following human rights that are of concern in Kenya:

1. Accountability of the State for the violation of the right to life in the form of extra judicial executions and disappearances that have been reported in the country.
2. Implementation of the TJRC Report that is long overdue.
3. Increase access to justice for all and especially for persons with disabilities with improvement of accessibility to the courts through physical access, provision of Sign Language Interpretation and provision of information in accessible formats.

⁵ African Commission on Human and Peoples' Rights, State Reports –Kenya available at <http://www.achpr.org/states/kenya/> (last accessed 30/9/2016)

⁶ Id.

⁷ African Commission on Human and Peoples' Rights, State Reporting available at <http://www.achpr.org/states/> (last accessed 30/9/2016)

⁸ Id.

4. Urge the State to deal with corruption cases seriously. The African Commission should add voice to the grave effects of corruption in enjoyment of human rights by all in Kenya.
5. The African Commission should urge the State to prioritize budgetary allocation for agricultural programs that aim to improve the food situation in Kenya. This will enhance elimination of food insecurity in Kenya and enhance the right to food.