



DEFENDERS
COALITION

**THEY KEEP COMING
AFTER RIGHTS
DEFENDERS**

“Trends Report and Case
Digest on Human Rights
Defenders and the Law
in Kenya”

2016-2019 EDITION



**THEY KEEP COMING
AFTER RIGHTS
DEFENDERS**

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ACKNOWLEDGEMENT

The Defenders Coalition wishes to express its gratitude to all individuals who contributed towards this publication. We extend special thanks to Collins Omondi the lead researcher for his technical support, research and writing the report. Defenders Coalition also acknowledges and appreciates Francis Ndegwa, the Project Officer, for conceptualizing the project, collating relevant information and successfully steering the research project to its conclusion.

We sincerely thank Kamau Ngugi, the Executive Coordinator, for his strategic leadership and guidance throughout the assignment. Further, we sincerely acknowledge and appreciate the role played by Salome Nduta (Programme Officer, Protection), Diana Letion (Protection Associate), Brian Kimari and the entire team at Defenders Coalition for providing technical input in the conceptualization of the project and their invaluable comments for the final production of this publication. We sincerely thank all the lawyers and human rights defenders who worked tirelessly with the coalition to document cases of HRDs in the country.

Finally, the coalition acknowledges the unwavering support of our Board of Trustees and development partners. This project was supported by Open Society Initiative for East Africa, Embassy of Sweden in Kenya and the Embassy of the Kingdom of the Netherlands in Kenya for whom we are grateful. We thank them for making the publication of this report possible.

ABBREVIATIONS AND ACRONYMS

AG	Attorney General
CAJ	Commission on Administrative Justice
CBO	Community Based Organisation
CORD	Coalition for Reforms and Democracy
CSO	Civil Society Organisation
DPP	Director of Public Prosecutions
HRD	Human rights defender
IEBC	Independent Electoral and Boundaries Commission
IGP	Inspector General of Police
IPOA	Independent Police Oversight Authority
KICA	Kenya Information and Communication Act
KNCHR	Kenya National Commission on Human Rights
KTN	Kenya Television Network
LGBTIQ	Lesbians, Gays, Bisexual, Transgender, Intersex, and Queer
MP	Member of Parliament
NGEC	National Gender and Equality Commission
NGO	Non-Governmental Organisation
OCPD	Officer Commanding Police Division
OCS	Officer Commanding Police Station
PBO	Public Benefit Organisation
POTA	Prevention of Terrorism Act
UN	United Nations

SUMMARY

In 2016, the Defenders Coalition published the first edition of trends report and case digest on human rights defenders and the law in Kenya. The report documented trends of human rights violation against HRDs and highlighted landmark court decisions that have had an impact on the working environment of HRDs. This second publication updates the first edition of the trends report and case digest. It focuses on the major events and cases that were reported or decided during the period 2016 to 2019. Major events that impacted on the work of human rights defenders include the 2017 general elections and the terrorist attacks that occurred in Nairobi in January 2019.

The emerging trends of human rights violations that were documented during the reporting period include threats to personal safety and integrity of human rights defenders. This was epitomized by the brutal murder of lawyer Willie Kimani, his client and a taxi driver in June 2016 for pursuing justice against administration police officers who were harassing his clients. In April 2018, Evans Njoroge alias Kidero, a student activist, was shot and killed by a police officer for leading students in demonstration. In August 2018, land rights activist Esther Mwikali was killed and her body dumped in a thicket in Mithini. Robert Bundotich, a community leader from the Sengwer Community was shot dead by Kenya Forest Service officers in January 2018.

LGBTIQ rights activists have made modest progress but negative narratives against LGBTIQ community forces LGBTIQ rights HRDs to continue to operate in the shadows seriously harming the effectiveness of their advocacy efforts. During this period the LGBTIQ community went to court to challenge discriminatory laws and practices with mixed results. In the first case which was an appeal filed by the NGO Board challenging the decision of the High Court directing the Board to register an NGO that sought to advocate for the rights of LGBTIQ community, the NGO Board lost its case at the Court of Appeal. In the second case, several petitioners unsuccessfully challenged the constitutionality of sections 162, 163, and 165 of the Penal Code.

Further, the right to protest, freedom of assembly, freedom of association and freedom of expression faced severe restrictions particularly during the electioneering period. Human rights NGOs, human rights monitors, media houses, journalists and bloggers faced harassment at the hands of state regulatory agencies and policies for reporting or commenting on issues that were deemed unpleasant by the state. The war on terror

did not spare human rights defenders either. At the community level, grassroots human rights defenders faced harassment at the hands of the police for fighting for their land rights or advocating against extrajudicial killings. On the legal front human rights defenders scored major victories in court. Criminal defamation laws in the penal code and section 29 of the Kenya Information and Communication Act were declared unconstitutional.

The report concludes with several recommendations that will improve environment in which human rights defenders in Kenya operate. It calls upon the government to enact a comprehensive legal and policy environment in line with the UN declaration on human right defenders that will secure the right to defend human rights in Kenya.

1. INTRODUCTION

1.1. Who is a human rights defender?

A human rights defender (HRD) is any individual, group of persons or organizations that work to promote and protect human rights and fundamental freedoms¹. Anyone can be a human rights defender regardless of his or her social, economic and professional background. The key unifying factor for all human rights defenders is their commitment to human rights and drive to help those whose rights are violated². Community volunteers, journalists, lawyers, prosecutors, doctors, judges, and security officers who are committed to defend human rights can all be considered human rights defenders.

1 United Nations (2018), Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/73/215. Para 15

2 Office of the High Commissioner for Human Rights (OHCHR), Human Rights Defenders: Protecting the Right to Defend Human Rights, Fact Sheet No. 29, Page 1

1.2. What kind of work do human rights defenders do?



HRDs perform undertake various activities in order to protect and promote human rights of every person. These can be summarized into the following four broad areas:

- i. **Human rights monitoring, reporting and investigation:** They monitor, document, investigate and report violations of human rights. The information gathered from monitoring and investigation activities may be used to draw attention of the state and the public to human rights abuses in order to ensure the abuses stop and violators of human rights are brought to justice. Such information may be used to prosecute offenders before local courts or international tribunals.
- ii. **Human rights research and documentation:** HRDs conduct research and documentation into thematic human rights issues in the country. Through their research and publications, human rights defenders generate new ideas, thoughts, opinion and

recommendations on how to address modern human rights challenges facing the society. Findings of their research may ultimately shape public opinion, promote law and policy reform or lead prosecutions of violators of human rights.

iii. Human rights campaigns and advocacy: HRDs undertake advocacy campaigns to strengthen the laws, policies and institutions for the promotion and protection of human rights. They also help state and non-state actors to develop laws and policies that will enable them to comply with their human rights obligations.

iv. Human rights education and awareness: HRDs also conduct training and sensitizations for government officers, private sector entities, and the public about human rights in order to enhance their capacity to promote and protect human rights.

1.3. Human rights defenders in Kenya: A diverse community

Human rights defenders in Kenya may be classified according to the nature of rights or the categories of persons that they defend. The following four broad categories may be identified. In practice, HRDs may fall in more than one of the categories identified below.

1.3.1. Civil and political rights human rights defenders:

These are human rights defenders who work for the protection and promotion of a wide range of civil and political rights. Under this umbrella there are human rights defenders that advocate for electoral and governance reforms, media freedom, freedom of assembly, as well as those who campaign against extra-judicial killings. Examples include journalists, anti-corruption campaigners, bloggers, civil society activists and non-governmental organizations (NGOs) that campaign for electoral justice, police sector reforms, prison reforms and accountability for victims of torture, political violence, police brutality and extrajudicial killings.

1.3.2. Economic and social justice human rights defenders

These are human rights defenders who advocate for the realization of economic and social rights in Kenya. These include HRDs that promote labour rights reforms, and access to education, health, water, social security, housing and other related rights. Prominent in this group are labour rights activists and trade unionists. Others include teachers, doctors, housing rights activists, and water users associations.

1.3.3. Group rights human rights defenders

These include human rights defenders who promote and protect community or group rights such as community land rights, right to protection of cultural heritage and life, environmental justice and the right to a clean and health environment. Prominent groups of HRDs in this category include environmental and land rights activists and defenders of indigenous rights.

1.3.4. Marginalized and vulnerable communities human rights defenders

There is a special category of human rights defenders who focus on the rights of individuals and groups that are marginalized by the mainstream society due to their gender, political opinion, economic status, culture, age or sexual orientation. These human rights defenders champion causes that are socially, culturally or politically unpopular.

They include human rights defenders focused on women's rights, indigenous peoples' rights, children rights and right of sexual minorities. HRDs in this category face unique vulnerabilities over and above the usual vulnerable faced by the community. Some of them belong to the group of the marginalized communities that they seek to protect.

Grassroots human rights defenders are also another special group in this category. They defend human rights at local or community level where they live in close proximity with those who violate their rights.

2. METHODOLOGY

The trends reports and case digest documents human rights challenges faced by HRDs from the various categories in Kenya over the period 2016 to 2019. It also highlights the harassment faced by HRDs through the use or abuse of the legal system. The information in the report was obtained through literature review and desk research and analysis of selected case files handled by Defenders Coalition and judgments from the court on cases affecting HRDs that were issued during the period under review.

Literature review

Reports and studies on situation of human rights defenders in Kenya that were published during the period 2016 to 2019 were analyzed in order to identify the common challenges that were reported during this period⁴.

4 See for example HRW & NCHRD K (2018), The Just Want to Silence Us: Abuses Against Environmental Activists at Kenya's Coast Region; NCHRD K (2017), Human Rights Defenders and Journalists Situation Leading Up to the 2017 General Elections: Report for the Period April to June 2017; NCHRD K (2017), Election Monitoring Report on the Situation of Human Rights Defenders, Election Monitors, and Journalists During the 2017 General Election; Kenya National Commission on Human Rights (2016), Defending the Defenders: Human Rights Defenders in Conflict with the Law, <https://www.knchr.org/Portals/0/HRD%20Downloads/Report%20on%20the%20Status%20of%20HRDs%20in%20Conflict%20with%20the%20Law.pdf?ver=2018-06-03-120225-007> (Accessed 29 September 2019); East and Horn of Africa Human Rights Defenders Project (2018), To Them, We're Not Even Human; Protection International (2017), Criminalization of Rural Based Human Rights Defenders in Kenya: Impact and Strategies; Privacy International (2017), Track, Capture Kill: Inside Communications, Surveillance and Counterterrorism in Kenya.

Desk review of case files and court judgments

The study reviewed active and concluded case files supported by the coalition and partners in order to identify the substance of the cases that were filed by or against HRDs in various court stations in Kenya. In criminal cases, the study analyzed the nature of charges preferred against HRDs, the terms of bail or bond, the nature of sentence that was imposed where appropriate and the time it took to conclude the case. In constitutional cases, the study analyzed the nature of violations that were committed against HRDs, the determination of court and the rationale for the decision, and the impact of the court decision on HRDs. Cases supported by the coalition across the country were sampled and reviewed. 10 judgments that were issued by the High Court and the Court of Appeal during the period 2016 to 2019 were also analyzed.

3. DEFENDING HUMAN RIGHTS IN KENYA: THE CONTEXT

The period 2016 to 2019 witnessed political, economic, social and cultural developments that impacted on the environment in which human rights defenders work and exposed them to varying levels threats from various state and non-state actors. This chapter presents an overview of the political, economic, social and cultural context that human rights defenders faced during the reporting period.

3.1. Political context

During the reporting period the major developments in the civic and political sphere include the 2017 general elections, the ongoing war on terror and general insecurity in Kenya. When Kenya adopted the transformative Constitution in the year 2010, it was expected that the radical reforms to the political and governance institutions would create institutions that are more accountable to the public. It was also envisaged that the reforms would entrench a human rights culture, and promote issue based and violence free elections. However, the reform process has experienced mixed results.

2017 General elections

The 2017 general elections were marred with violence and allegations of fraud. The results of the presidential election of March 2017 were nullified leading to a repeat presidential election in October 2017 that was boycotted by the opposition. Similar to the past elections, the period leading up to the 2017 general elections and the post-period was characterized by violence and intimidation of human rights defenders working on elections reforms and democratic governance. Leading human rights NGOs faced threats of deregistration, and regulatory harassment by agencies such as Kenya Revenue Authority and the Non-Governmental Organization Coordination Board in order to silence them from commenting on the outcome of the general elections.

The fight against terrorism and general insecurity

Kenya is in the midst of the global war on terror with security agencies fighting against terrorists group in Somalia and within Kenyan borders. In January 2019 suspected al Shabaab terrorists attacked Dusit D2 Hotel in Nairobi killing over 20 people. Further high levels of crime were reported particularly in informal settlements such as Mathare in Nairobi. There have been widespread allegations of enforced disappearance and extrajudicial killings of suspected terrorists and criminals at the hands of Kenya's security agencies.

Human rights defenders have continued to advocate for respect for human rights at all times even in the context of war on terror and generalized crime. However, their actions have often been mischaracterized as showing lack of patriotism while some are often branded as sympathizers of terrorists and criminals. Human rights defenders working on cases that pit them against state security agencies face elevated risk of violence, abduction and even murder. The shocking and brutal murder of a human rights lawyer Willie Kimani in June 2016 is symptomatic of challenges facing HRD working on security sector reforms.

Stalled reforms

Transitional justice mechanisms and their anticipated reforms have stalled. By April 2016, all cases related to the 2007/8 post-election violence that were before the International Criminal Court had collapsed burying under the rubbles all hopes for justice for victims of election related violence in Kenya. Meanwhile, final report of the Truth Justice and Reconciliation Commission that was submitted to the President on 23 May 2013 remains buried with no signs that their findings will be implemented.

3.2. Economic context

Kenya's long term economic development agenda is set out in the economic pillar of Kenya's Vision 2030. The government aims to ensure prosperity for all Kenyans through an economic development programme that targets a 10 per cent annual growth in Gross Domestic Product up to the year 2030. This vision is being implemented through 5 year medium term plans the latest being the Medium Term Plan III that runs from 2017 to 2022. The president's Big Four Agenda that prioritizes affordable housing for Kenyans, food security, universal health care and increased productivity in manufacturing has been mainstreamed into the third medium term plan.

To drive the economic agenda the country has prioritized pilot projects in various sectors of the economy that will be implemented through public and private sector participation. These include the Lamu Port-South Sudan-Ethiopia-Transport (LAPSSET) Corridor project, Standard Gauge Railway, and Special Economic Zones. There has also been increased foreign and domestic investment in critical sectors of the economy such as energy, transportation, water, health, and education. Notable investment projects include Crude Oil Exploration and Production by Tullow Oil in Turkana, Lake Turkana Wind Power Project, Lamu Coal Power Plant, and Titanium Mining by Base Titanium Ltd in Kwale.

Undeniably these projects if well managed have the potential to create wealth and employment and promote rights of many Kenyans. However their devastating human rights impact on individuals, community and the environment are increasingly being felt due to the failure by the project proponents to identify and adequately manage their human rights impacts. From Lamu, Turkana, Kwale and other parts of the country where such projects are being implemented, communities have raised concerns about destruction of livelihoods and environment, inadequate consultation and participation of affected communities, lack of adequate compensation, forced eviction and violation of their rights to health and access to water for personal and domestic use.

HRDs working together with affected communities to address the human rights impact of such projects have been threatened by both state and non state actors. Some have been branded enemies of development and risked their lives and properties.

Moreover, devolution brought political power and resources closer to the people but it ironically devolved a culture of impunity to the local political leadership that includes governors and members of county assemblies. Grassroots human rights defenders campaigning on the platform of anti-corruption, good governance, and community rights have been targeted by local political leadership.

3.3. Social and cultural context

Access to basic social services including health, housing, education and social security is low due to high poverty levels particularly in marginalization areas and informal settlements. Unemployment has driven many Kenya to work in low paying and hazardous jobs. The country has a long history of human rights activism in the labour sector that can be traced back to the colonial era. Increasingly human rights defenders are also engaging in advocacy on access to housing, education and health particularly for marginalized and vulnerable communities.

Kenya is a society where with mainstream conservative value system and beliefs informed by culture and religion. There is almost a universal condemnation of human rights advocacy on issues that are considered taboo in the society such as sexual and reproductive health and rights, rights of sexual minorities and, women rights. Human rights defenders working on such issues face an elevated risk that include social exclusion and stigmatization, violence, and death threats.

HRDs in Kenya are working in a challenging and evolving political, social and cultural context that impedes their operations with limited or no protection from the government. The specific threats that they face are well documented in the subsequent sections.

4. LEGAL PROTECTION FOR HUMAN RIGHTS DEFENDERS IN KENYA

4.1. Introduction

The Constitution of Kenya, international and regional human rights treaties guarantees human rights for every person including human rights defenders. They do not specifically protect the right to defend human rights. To address the challenges facing human rights defenders in 1998, the United Nations adopted the Declaration on the Right and Responsibility of Individuals, Groups, Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms popularly known as the Declaration of Human Rights Defenders. This declaration clarifies human rights that are applicable in the context of human rights defenders. This chapter presents an overview of the laws and institutions that protect human rights defenders in Kenya.

4.2. International and regional human rights law

Kenya is a state party several international and regional human rights instruments including

1. International Covenant on Civil and Political Rights (ICCPR),
2. International Covenant on Economic, Social and Cultural Rights
3. The Convention against Torture (CAT)
4. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)
5. Convention on the Rights of the Child
6. African Charter on Human and People's Rights
7. The African Charter on the Rights and Welfare of the Child
8. Protocol to the African Charter on Human and Peoples Rights relative to the Rights of Women in Africa

These human rights instrument provide a broad framework for protection of human rights at the international and regional level. The rights protected include the right to life, liberty including freedom from arbitrary arrests and detention, fair trial, the right to the highest attainable standard of health, and the right to housing. The most important human rights instrument in the context of the work of human rights defenders is the UN declaration on human rights defenders.

4.2.1. United Nations Declaration on Human Rights Defenders

The Declaration on the Right and Responsibility of Individuals, Groups, Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms popularly known as the Declaration of Human Rights Defenders sets the standard for the protection of human rights defenders globally. The declaration does not introduce new rights but it clarifies how rights that are already guaranteed in domestic, regional and international human rights instruments apply in the context of human rights defenders. The application of these rights to the specific context of human rights defenders is explained below⁵.

1. The right to defend human rights

Article 1 of the declaration provides for the right to defend human rights. It declares the right of human rights defenders to work to promote and defend human rights, individually or in association with others. This is an important right for human rights defenders as it is the basis upon which they are able to work.

2. Right to be protected

Articles 2, 9 and 12 of the declaration outline the States duty to protect human rights defenders and guarantee their rights without any discrimination. Article 2 calls on States to pass

⁵ United Nations (2011), Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/66/203

laws, and adopt administrative and other measures to ensure that rights and freedoms referred to in the declaration are effectively guaranteed. This includes taking measures to ensure that the state does not violate rights of human rights defenders and to protect defenders from suffering violations at the hand of non-state actors. In order to create a conducive and safe environment for human rights defenders, states are urged to adopt a comprehensive policy and a legal framework that is in line with the declaration.

3. Right to freedom of assembly

Articles 5(a) and 12 of the declaration recognize the right of human rights defenders to freely assemble to defend human rights and to participate in peaceful protests against human rights violations. The right to freedom of assembly is recognized as essential to the work of HRDs without which their work may be severely restricted. This includes the right of HRDs to hold public and private meetings, to hold demonstrations, to picket and hold similar processions. However, the declaration calls for human rights defenders to exercise this right peacefully.

4. Right to freedom of association

Article 5(b) of the declaration protects the right of HRDs to freely form, join or participate in non-governmental organizations, associations or groups. The right protects associations that are legally registered as well as unregistered informal or loose associations and networks of human rights defenders. The state is required to create a political, legal and institutional environment that enables HRDs to freely associate and defend human rights. State must extend special protection to organizations that are critical of states human rights policies and expose violations committed by state authorities.

5. Right to access and communicate with non-governmental and intergovernmental organizations and international bodies

Article 5(c) and 9 of the declaration recognizes the right of HRDs to have unfettered access and communication with non-governmental organizations and international bodies with mandate to receive communications concerning human rights matters. The ability of HRDs to alert the international community, UN human rights mechanisms, regional human rights mechanisms, and national and international NGOs about human rights violations in their countries is essential as it serves as an early warning mechanism on emerging threats to human

rights. Human rights defenders should not be intimidated or suffer reprisals for engaging with or providing testimony to such institutions.

6. Right to freedom of opinion and expression

The right of HRDs to freedom of opinion and expression is provided for in article 6 of the declaration. There are three aspects of this right. The first is the right to form and hold opinion without interference on observance of human rights and to draw the public attention to those matters. No restrictions on the right to hold opinion without interference are permitted. The second aspect is the right to access information on how rights are given effect in legislative, judicial and administrative system while the final aspect is the right to impart or disseminate information and ideas on all human rights and fundamental freedoms. Certain restrictions may be permitted on the right to access and disseminate information in the interest of the community as a whole or other person but these restrictions must comply with state's international human rights obligations. However, governmental restriction relating to among other things reporting on corruption and human rights violations are not permissible.

7. Right to protest

The right to protest represents a cocktail of rights some of which are reflected in the declaration. These rights include freedom of association, freedom of opinion and expression, freedom of assembly and the right to strike. This right is especially important for some groups of protestors that need special protection during demonstration including women HRDs working on sexual and reproductive rights and HRDs defending LGBTIQ rights.

8. Right to develop and discuss new human rights ideas

Article 7 of the declaration affirms the right of HRDs to develop and discuss new human rights ideas and to advocate for their acceptance. This acknowledges the evolving nature of human rights. Previously rejected notions of human rights that challenged entrenched social, political and cultural norms have over the years become accepted into the mainstream human rights discourse due to the brave and transformative work of HRDs. The state is required to guarantee pluralisms and tolerance of divergent views particularly for persons belonging to minorities and marginalized sections of the society.

9. Right to an effective remedy

The right to an effective remedy is guaranteed under article 9 of the declaration. This right entails an effective access to justice throughout the entire chain of justice including conducting impartial investigations, prosecution of cases before an impartial and independent tribunal or judiciary, access to judicial, administrative or quasi-judicial mechanisms and access to fair administrative actions. Reparations for human rights violations should also be provided in the form of compensation, restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

10. Right to access funding

Human rights defenders have the right to solicit, receive and utilize resources for the purpose of protecting human rights including the receipt of funds from abroad as guaranteed under article 13 of the declaration. States are required to enact measures that facilitate or at a minimum do not hinder access to funding for human rights defenders. The state should not restrict funding from foreign donors. It should not abuse tax and other financial regulations to harass or undermine operations of human rights defenders that are critical of governments human rights record. They should not impose unreasonable or arbitrary tax demands, or arbitrarily enforce anti-money laundering laws.

Article 17 of the declaration provides that any limitation to these rights must meet the state's international human rights obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Permissible limitations on the rights must be provided for in the law and should be necessary in a democratic society.

The declaration encourages every person to become a human rights defender. It outlines the responsibilities for everyone to promote human rights, to safeguard democracy and its institutions and not to violate the human rights of others. Article 11 of the declaration imposes an obligation on persons exercising professions that can affect the human rights of others, to respect human rights and comply with relevant national and international standards of occupational and professional conduct or ethics. These professionals include police officers, lawyers, and judges.

4.2.2. Relevance of the declaration to Kenya

A declaration is not binding legal instrument that State must enforce in their national law. However, it represents policy aspirations of the States that adopt it. In Kenya, declarations are persuasive sources of law that judges use to interpret and clarify the law. They may also influence legislative, policy and institutional reforms that are aligned to the goals of the declaration. In 2016 in the case of *Eric Gitari v Non-Governmental Organizations Coordination Board and 4 others*⁶ the High Court invoked the provisions of the declaration. It ruled that the NGO Coordination Board had infringed on the freedom of association of Eric Gitari a right that was protected under the UN Declaration of Human Rights Defenders. On appeal, Justice Martha Koome at the Court of Appeal recognized that the declaration and the Constitution protect the right of HRDs to form, join and participate in NGOs, associations or groups.

4.3. The Constitution of Kenya

The Constitution of Kenya guarantees a wide range of civil, political, economic, social and cultural rights for everyone including human rights defenders in the Bill of Rights outlined in chapter four of the Constitution. Article 19(3) of the Constitution of Kenya provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.

Some of the rights protected in the constitution include the right to life, equality and freedom from non-discrimination, freedom and security of the person, freedom of expression and freedom of the media, and the right to fair trial. Some of these rights are discussed in the next section.

The rights protected in the Constitution cannot be limited except in accordance with Article 24 of the Constitution. The limitation to the rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality, freedom taking into account various factors listed in Article 24(1). However, according to Article 25 of the Constitution the following rights cannot be limited under any circumstances: freedom from torture, cruel, inhuman and degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial, and the right to an order of habeas corpus.

4.4. National legislation

There are also several laws that provide protection to the rights guaranteed in the Constitution. However some of these laws are

⁶ [2015] eKLR Petition No 440 of 2013 (Nairobi)

prone to abuse by the state to deny human rights defender their constitutional rights. Some of the notable laws that have impacted on the work of human rights defenders are outlined below:

4.4.1. Laws that regulate the right to privacy

The right to privacy is protected under Article 31 of the Constitution. The right to privacy include the right not have one's body, home or property searched and the right not to have privacy of communication infringed.

The laws that seek to protect or limit the exercise of the right to privacy include the Kenya Information and Communication Act (KICA) of 2008 and the Computer Misuse and Cybercrimes Act of 2018. KICA criminalizes interception and disclosure of messages sent through licensed telecommunication system by a telecommunication operator. It also criminalizes unauthorized access to computer system with a view to obtain or intercept any data. The Kenya Information and Communication (Consumer Protection) Regulations 2010 further restricts licensed telecommunication services from monitoring, disclosing, or allowing any person to monitor or disclose the content of any information of any subscriber transmitted through the licensed systems. The Communications Authority is responsible for enforcing KICA. The Computer Misuse and Cybercrimes Act criminalizes unauthorized access to computer system. Despite these provisions of the law, HRDs have raised fears about unlawful surveillance of their communication by security agencies.

4.4.2. Laws that regulate freedom of expression and freedom of the media

Article 33 of the Constitution protects freedom of expression which includes freedom to seek, receive and impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research. Article 34 protects freedom and independence of all types of the media. Both freedom of expression and freedom of the media do not extend to propaganda for war, incitement to violence, hate speech, or advocacy for hatred based on ethnic incitement or prohibited grounds of discrimination.

The laws that seek to regulate the freedom of expression and freedom of the media include the Penal Code, Public Order Act, Official Secrets Act, Kenya Information and Communication Act, Computer Misuse and Cyber Crime Act and Media Council Act. Recently courts have declared unconstitutional restrictive provisions of laws that seek to limit enjoyment of freedom of expression such as the offence of misuse of telecommunication system under KICA⁷, and criminal defamation laws under the Penal Code.

⁷ Section 29 of KICA

4.4.3. Laws that regulate freedom of association

Article 36 of the Constitution provides that every person has the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind. The Constitution requires that laws that regulate registration of an association should provide that registration may not be withheld or withdrawn unreasonably. There should be a fair hearing before registration is cancelled. Freedom of association is fundamental to the work of HRDs especially where they seek to register organizations that will advocate for human rights. It allows HRDs to form and operate civil society organizations.

The Non-Governmental Organizations Coordination Act and the Public Benefits Organizations Act are some of the laws that regulate registration and operation of civil society organizations. Some organizations are registered under other legal forms such as companies limited by guarantee under the Companies Act, trusts under the Trustees (Perpetual Succession) Act, societies under the Societies Act and community based organizations.

The Non-Governmental Organizations Coordination Act No. 19 of 1990 sets out the law governing registration and operations of NGOs. Except for exempt organizations, all NGOs that operate in Kenya must apply for registration and if successful they are issued with a certificate of registration. The Act provides for vague grounds for refusal to register an NGO or cancellation of the certificate of registration. For example, the Non-Governmental Coordination Board may under section 14 of the Act refuse to register an organization on the following grounds:

- i. If it is satisfied that its proposed activities or procedures are not in the national interest; or
- ii. If it is satisfied that the applicant has given false information on the requirements of subsection (3) of section 10; or
- iii. If it is satisfied, on the recommendation of the NGO Council, that the applicant should not be registered.

The board may cancel a certificate of registration if the terms or conditions attached to the certificate have been violated; the organisation has violated the NGO Act; or the Council has submitted a satisfactory recommendation for the cancellation of the certificate. Under regulation 24 of the Non-Governmental Organization Coordination Regulations 1992, registered NGOs are required to submit annual reports failing which they are liable for a fine of up to Kenya shillings 25,000. Operating an NGO without registration and certificate is an offence punishable by up to eighteen months imprisonment or a fine of up to Kenya shillings 50,000 or both. Additionally, a person convicted of the offence faces a ban of up to 10 years from holding office in any NGO.

The Public Benefit Organisations Act No. 18 of 2013 provides the regulatory framework for the establishment and operations of Public Benefit Organizations (PBO). One of the core objects of the act is to safeguard the freedom of expression, association and peaceful assembly. It is a more progressive legislation than the NGO Coordination Act that it intends to repeal and replace. A Public Benefit Organization shall be registered under the Act for it to enjoy the legal benefits accruing thereunder including the benefit of holding itself out as a registered Public Benefit Organization. There are clear and simple registration requirements and the philosophy of the law is to encourage greater collaboration between government and public benefit organization as well as a detailed administrative structure that includes The Public Benefits Organization Tribunal whose jurisdiction is to hear and determine complaints arising out of breach of the Act. The PBO Act has not yet come into force.

4.4.4. Laws that regulate freedom of assembly

Freedom of assembly and the concomitant right to public protest and demonstration have advanced human rights and social change globally and in Kenya. Article 37 of the Constitution protects the right to peaceful assembly and protest. It provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to the authorities. Human rights defenders exercise their right to assemble and protest as a key strategy to push for change in the society.

The government regulates the exercise of the right to freedom of assembly and to protest through the Penal Code, the Public Order Act and the National Police Service Act. Although the laws are intended to limit enjoyment of the freedom of assembly within constitutional bounds, they have been abused by state authorities

to disrupt legitimate protests by human rights defenders. The colonial era Public Order Act of 1950 regulates public gatherings and processions. Section 5 of the law requires organizers of a public meeting or procession to notify in writing the local officer commanding police station (OCS) of their intention to hold such meeting or procession at least three days before the event. The police may prevent the holding of such event where no notice has been given in accordance with the law, or where there was a prior notice of another public meeting or procession. They may also stop and order the dispersal of the meeting if there is clear, present and imminent danger of a breach of peace or public order. Any person who declines to disperse commits an offence that is punishable by a fine of up to Kenya shillings 50,000 or 6 months imprisonment or both.

Sections 78 and 83 of the Penal Code prescribes offences against public tranquility such as unlawful assemblies and riots and rioting after proclamation which are punishable with a prison term of up to one year for the former and up to life imprisonment for the latter. According to the Public Order Act, an unlawful assembly is one that has not been notified in accordance with the law. Section 78 of the Penal Code defines unlawful assembly as a situation in which three or more persons assemble with intent to commit an offence or cause persons in the neighbourhood to fear that they are likely to commit a breach of the peace or provoke other persons to commit a breach of the peace. Section 8 of the Public Order Act provides that an assembly may be stopped or prevented when there is clear, present or imminent danger of a breach of the peace or public order.

Where it is necessary for the police to use force to disperse a meeting, section 14 of the Public Order Act regulates the use of force by the police during public assemblies. It provides that the force used shall not be greater than is reasonably necessary for that purpose. It also provides that firearms shall not be used unless weapons that are less likely to cause death have been used without achieving the intended purpose. The Sixth Schedule of the National Police Service Act 2011 and Chapter 58 of the Service Standing Orders also set out restrictions on the use of force on almost similar terms. These provisions pose a threat to HRDs involved in protests since the police have wide discretion to determine when to use force.

4.4.5. Laws that protect personal safety and integrity of human rights defenders

The Penal Code prohibits and criminalizes certain conduct in order to secure rights that include right to life, freedom and security of the person, and human dignity for human rights defenders and their

families. Offences proscribed by the penal code include offences against the person such as murder, manslaughter, assault, kidnapping and abduction.

However the state also utilizes criminal law provisions to target HRDs working on specific issues. For instance, HRDs working on sexual and reproductive health rights and LGBTIQ rights are undermined by applying criminalised penal code offences relating to prostitution (153 and 154), abortion (157 and 158), and homosexuality (162-165). The HRDs working to prevent discrimination and abuse of commercial sex workers and sexual minorities are frequently targeted, intimidated, and even abused by law enforcement officials using these provisions.

4.4.6. Laws that protect human rights defenders facing criminal cases and other administrative proceedings

The Constitution provides for the right to fair administrative action, right to access justice, rights of an arrested person, right to fair hearing and right to habeas corpus. These rights protect the human rights defenders facing criminal cases and other administrative proceedings.

Fair administrative action laws

To guard against excesses or abuse of power by regulatory agencies, Article 47 of the Constitution and the Fair Administrative Action Act 2015 protect the right to fair administrative action. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Any person who is adversely affected by action taken by any administrative agency has the right to be given reasons for the action.

The Fair Administrative Action Act of 2015 sets out detailed procedures that administrators shall comply when taking any administrative action against any person. For example, the law provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an adequate and prior notice of the nature and reasons for the proposed administrative action. He shall also be entitled to be heard. A person who aggrieved by an administrative action or decision may apply to the High Court or a tribunal, where applicable, for a review of the action or decision.

Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application

of the law decided in a fair and public hearing before a court or another independent and impartial tribunal or body.

All administrative bodies are bound by law to comply with Article 47 of the Constitution and the Fair Administrative Action Act 2015. However, agencies such as the NGO Coordination Board often harass and threaten human rights NGOs with deregistration for spurious allegations of violating the law. HRDs are also targeted using section 46 of the Prevention of Terrorism (POTA) Act 2012, which allows the refusal of applications for registration, and the revocation of registration, of associations linked to terrorist groups. Some of the human rights organisations that have challenged the government have been threatened with deregistration on false accusations of linkage to terror organisations, terrorism financing and money laundering allegations, under the POTA and Anti-Money Laundering Act.

Criminal laws

State authorities keen on undermining work of HRDs often abused the criminal justice system to harass HRDs. The Constitution and other laws set out rules and procedures to prevent abuse of criminal justice system by the police, investigators, prosecutors and judicial officers.

i. Rights of an arrested person

Human rights defenders facing arrest by the police enjoy the rights protected under article 49 of the Constitution. These include the right to be informed promptly of the reasons for the arrest and the right to be brought to court as soon as reasonable but not later than 24 hours following the arrest. They also have the right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. No person shall be remanded in custody for an offence that is punishable by a fine only or imprisonment for not more than six months.

The Criminal Procedure Code governs conduct of criminal proceedings. It sets out the law regulating arrests, issuance of bail and bond and conduct of investigations and criminal trials. In circumstances where force has to be used to arrest a suspect the law provides the police shall not use excessive force than is necessary to arrest a suspect.

The Children Act, the Prevention of Terrorism Act and the National Police Service Act also regulate criminal proceedings including granting of bail and bond to an accused person. The Bail and Bond Policy Guidelines establish policy principles that guide the

police and judicial officers as they exercise their powers to grant or deny bond and bail.

ii. Right to fair trial

Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or another independent and impartial tribunal or body.

Human rights defenders facing a criminal trial are protected under article 50(2) of the Constitution that provides for the right to a fair trial for accused persons. These include the right to be presumed innocent, the right to be informed of the charge in sufficient detail to enable the accused person to answer it, and right to a public trial that shall begin and conclude without unreasonable delay.

The Criminal Procedure Code sets out detailed procedure for the conduct of criminal trial.

iii. Rights of persons held in detention

Human rights defenders held in police custody, prison and or other places of detention enjoy all human rights protected under the constitution. According to Article 51(2) of the Constitution, a person who is detained or held in custody is entitled to petition for an order of habeas corpus. The Criminal Procedure Code regulated the powers of the High Court to issue directions in the nature of habeas corpus.

4.5. Institutions that protect human rights defenders

The Constitution and various laws establish institutions that protect human rights in Kenya. These include

1. The Kenya National Human Rights Commission (KNCHR) – KNCHR is established under Article 59 of the Constitution and section 3 of the Kenya National Commission on Human Rights Act of 2011. Its primary mandate is to promote and protect human rights in Kenya. It investigates allegations of human rights abuses among other functions given to it by law.
2. The National Gender and Equality Commission (NGEC) – NGEC is established under Article 59 of the Constitution and section 3 of the National Gender and Equality Commission Act of 2011. Its mandate is to promote gender equality and freedom from discrimination. It also conducts investigations into violations of

principle of equality *and freedom from discrimination among other function set out in the law.*

3. The Commission on Administrative Justice (CAJ) – CAJ is established under Article 59 of the Constitution and section 3 of the Commission on Administrative Justice Act of 2011. Its mandate is to investigate allegation of abuse of administrative power and unresponsive conduct in public sector.
4. The Independent Policing Oversight Authority (IPOA) – it is established under the Independent Policing Oversight Authority Act of 2011. The mandate of IPOA is to provide civilian oversight over the national police service. It monitors and investigates allegations of police misconduct including disciplinary and criminal offences committed by the police.
5. Internal Affairs Unit of the National Police Service – it is established under section 87 of the National Police Service Act 2011. It receives and investigates complaints against the police.
6. Witness Protection Agency – the Witness Protection Agency is established under section 3A of the Witness Protection Agency Act of 2006. The agency maintains the witness protection programme.
7. High Court – the Constitution guarantees the right of every person to institute proceedings at the High Court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

4.6. Model Human Rights Defenders Policy and Action Plan

Model Human Rights Defenders Policy and Action Plan provides a framework for the recognition, protection and support of human rights defenders in the context of their work. The document sets out the rights of human rights defenders and outlines the relevant human rights instrument that protect human rights defenders at the national, regional and international level. More importantly, the document outlines the policy concerns facing human rights defenders, proposes policy action to be taken and identify the lead agency to undertake the proposed action. The document was developed by the Kenya National Commission on Human Rights and the Defenders Coalition.

The policy concerns raised in the document are categorized under the following two themes:

- i. Physical integrity, liberty, security and dignity of human rights defenders: *Under this theme three policy concerns are highlighted namely: the need for protection from attacks, threats and other forms of abuse; protection from criminalization, arbitrary arrests, detention and abuse of judicial power, and confronting marginalization and stigmatization.*

- ii. *Safe and enabling environment conducive for work of human rights defenders: three policy concerns are also prioritized under this theme namely: realization of freedoms protected in the Bill of Rights in particular freedom of peaceful assembly, freedom of association and freedom of opinion and expression; and the right to access and communicate with international bodies.*

4.7. Conclusion

Kenya has an elaborate framework for protection of HRDs. However, there is still need for a comprehensive legal and policy framework for protection of human rights defenders. The following section reveals the trend of human rights violations committed against HRDs in Kenya during the period 2016 to 2019.

5. TRENDS OF HUMAN RIGHTS VIOLATIONS AGAINST HUMAN RIGHTS DEFENDERS

5.1. Introduction

From the year 2016 to 2019 the Defenders Coalition has received, responded to and documented complaints of human rights violations against HRDs. Several other human rights organisations have also documented human rights violations against HRDs. These include threats to their personal safety and security including murder, violence, kidnapping and torture committed by both state and non state actors. This section outlines the pattern of violations suffered by HRDs during the period 2016 to 2019 as documented by the coalition and other organisations.

5.2. Threat, killings and intimidation of human rights defenders

Human rights defenders including environmental rights activists, journalists, election monitors have faced threats to their personal safety and security. In 2018, Human Rights Watch and the Coalition documented violations against environmental rights activist in Lamu protesting against construction of a coal fired power plant in Lamu⁸. The report documented reports of beatings, kidnapping, arbitrary arrests, blackmail, detention, police harassment and prosecution of environmental justice activists. According to the report two environmental rights activists disappeared in the year 2016 following their arrest by the police. One of them is presumed dead. Police had attempted to blackmail and intimidate the activists by linking to the Al Shabaab terrorist groups in order to force them to abandon the campaign against the construction of the coal plant.

2017 saws heightened incidents of threat and intimidations against human rights defenders and other persons who were monitoring the 2017 general election. The Defenders Coalition and the Media Working Group documented more than 52 cases of human rights violations against HRDs, monitors and journalists in various parts of the country over an eight month period from April to November 2017⁹. The violations included threats, intimidation and harassment by election officials, police, local youths, candidates, aspirants, elected official and local politicians. HRDs activists suffered discriminatory treatment at the hands of local community that discouraged them from participating in the elections. HRDs were also negatively profiled or denied access to voting centres while some were arrested while monitoring political events.

During this period the most shocking event was murder of Willie Kimani, a human rights lawyer who was murdered in June 2016 alongside his client Josephat Mwendwa and a taxi driver Joseph Muiruri. Four suspects were arrested and are facing charges of murder.

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WILLIE KIMANI'S MURDER

In 2015 Mr. Josephat Mwendwa was shot by an administration police officer based at Syokimau AP Camp under unclear circumstances. The police filed several criminal charges against him including possession of narcotic drugs, gambling in public places, resisting arrest by police officer in a bid to cover up the shooting. He lodged a complaint on the alleged shooting with IPOA who opened investigations into the matter. The officers began intimidating and blackmailing Mwendwa to withdraw the complaint filed at IPOA. They threatened to kill him.

⁸ HRW & NCHRD K (2018), The Just Want to Silence Us: Abuses Against Environmental Activists at Kenya's Coast Region
⁹ NCHRD K (2017), Human Rights Defenders and Journalists Situation Leading Up to the 2017 General Elections: Report for the Period April to June 2017; NCHRD K (2017), Election Monitoring Report on the Situation of Human Rights Defenders, Election Monitors, and Journalists During the 2017 General Election

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They also arrested him and charged him with several traffic offences including riding a motor cycle without a helmet, riding a motorcycle without a reflective jacket, carrying excess passengers, carrying uninsured passengers, riding uninsured motorcycle and riding a motorcycle without a driving licence. The charges were all believed to be a fabrication intended to get him to drop the complaint filed with IPOA. He was also alleged to have been involved in robbery with violence although no charges were filed against him.

Mwendwa sought assistance from International Justice Mission, a human rights NGO based in Nairobi who assigned Willie Kimani to his case. On 23 June 2016, Willie Kimani accompanied by his client and a taxi driver were abducted by persons believed to be police officer on their way from Mavoko Law Court. A witness reported to investigators seeing one of them detained in a container at Syokimau AP camp.

5.3. Arbitrary arrests, prosecution and harassment of HRDs

HRDs have faced harassment by the police, investigators, prosecutors and other administrative agencies. Human rights NGOs have also faced accusation of violating labour laws, immigrations laws, tax laws and similar other laws that attract criminal and administrative sanction. With respect to criminal cases, the pattern of violations against HRDs included:

1. Arbitrary arrests of HRDs.
2. Filing of multiple and trumped up charges against HRDs. HRDs faced a variety of offences under the Penal Code, Public Order Act, National Police Service Act, Land Adjudication Act, Traffic and other laws. The table below provides an illustrative list of 25 offences that HRDs have been charged with during the reporting period. There are many other offences that are not in the list.

COMMON CHARGES AGAINST HRDS

1. Rioting after proclamation	4. Trafficking in cannabis
2. Refusing to obey lawful order to disperse	5. Preparing to commit a felony
3. Possession of cannabis sativa,	6. Creating disturbance

COMMON CHARGES AGAINST HRDS

7. Holding or taking part in unlawful assembly	8. Attempted murder
9. Incitement to violence	10. Interfering with legally demarcated land boundary
11. Behaving in a disorderly manner in a police building	12. Resisting arrest
13. Criminal defamation	14. Misusing a licensed telecommunication system
17. Forcible detainer	18. Making a document without lawful authority
19. Preparation to commit a felony	20. Undermining authority of a public officer
21. Assault	22. Disobeying court order
23. Traffic offences	24. Robbery with violence
25. Possession of firearm	

3. Forum shopping by prosecution where accused persons have faced charges in multiple court stations outside court stations that ordinarily have jurisdiction to handle the case. Forum shopping is used as a strategy to frustrate HRDs or to avoid court orders that suspend prosecution of cases against HRDs before specified court stations.
4. Refusal to release accused persons on bail or bond or granting them excessive bail to HRDs especially those from poor background.
5. Misuse of the law on withdrawal of criminal cases

The case of the Taveta land rights activists highlighted in the case study section of this chapter illustrates how the police and the prosecution may abuse criminal laws to persecute HRDs. In 2016, the Kenya National Commission on Human Rights documented several violations of HRDs in conflict and found violations that include violation of right of arrested persons, granting of punitive bail terms, misuse of prosecution powers to withdraw criminal cases, and fabrication of charges against HRD¹⁰.

¹⁰ Kenya National Commission on Human Rights (2016), Defending the Defenders: Human Rights Defenders in Conflict with the Law. <https://www.knchr.org/Portals/0/HRD%20Downloads/Report%20on%20the%20Status%20of%20HRDs%20in%20Conflict%20with%20the%20Law.pdf?ver=2018-06-03-120225-007> (Accessed 29 September 2019)

5.4. Violation of the freedom of assembly and the right to protest

The Kenyan government has undermined right to freedom of assembly of HRDs by arbitrary arresting peaceful protesters demonstrating against electoral injustice, corruption and greed in government, and extra judicial killings. Several organizations including the Centre for Human Rights and Policy Studies¹¹ Independent Police Oversight Authority¹², Human Rights Watch¹³ and the Observatory for the Protection of Human Rights Defenders¹⁴ documented incidents of violation of the right to freedom of assembly.

During the reporting period the most vulnerable groups of protesters were those who were protesting against perceived electoral injustice during the 2017 general election as well as protesters calling for disbandment of the Independent Electoral and Boundary Commission (IEBC) in April 2016. The protests were often violently disrupted by the police leading serious injury and unlawful killing of protesters. In 2017, the IPOA documented at least 5 deaths and 60 injuries attributed to excessive use of force by the police on protesters during demonstrations in Siaya County alone during Anti-IEBC protests in April to June 2016. Other non-election related protests were also violently disrupted or the organizers of the protests were denied permission to hold the demonstrations.

The outcome of court cases seeking to challenge measures employed by the police to stop the protests were mixed. For example in the Boniface Mwangi case discussed in the next chapter, the court found that the protesters rights to freedom of assembly were violated while in the Hussein Khalid case the court made the opposite ruling and declined to declare the challenged provisions of the Penal Code and the Public Order Act as unconstitutional. In the Ngunjiri Wambugu case, the court urged the government to adopt additional regulations to regulate demonstrations in Kenya including to make provision for payment of compensation by protest organizers to third parties who suffer losses as a result of protests which turn violent.

5.5. Violation of the freedom of expression and freedom of the media

The most dramatic violation of freedom of the media occurred on 30 January 2018 when the Kenya government shut down four private TV stations namely Kenya Television Network (KTN), NTV, Citizen TV and Inooro TV for defying government warning against airing the swearing in of the opposition leader Raila Odinga as the People's President. The government ignored a High Court order to lift the ban

11 Ruteere, M. and Mutahi, P. (Eds.) (2019) Policing Protests in Kenya, Nairobi: Centre for Human Rights and Policy Studies

12 Independent Policing Oversight Authority (2017), Monitoring Report on Police Conduct during Public Protests and Gatherings: A Focus on Anti-IEBC Demonstration April – June 2016.

13 Human Rights Watch (2017), Killing Those Criminal: Security Forces Violation in Kenya's August 2017 Elections., New York, Human Rights Watch

14 Federation for Human Rights (FIDH) & World Organization Against Torture (OMCT), Kenya 2017 Elections: Broken Promises Put Human Rights Defenders at Risk. https://www.omct.org/files/2016/05/24320/report_kenya_en_final_web_version.pdf (Accessed on 12 November 2019)

against the affected stations. The shutdown lasted for seven days. The government also threatened to arrest several journalists among them Mr. Linus Kaikai the chairperson of Editors' Guild.

As noted above, journalists and bloggers have been subjected to threats and intimidation while covering election related matters, or reporting on conduct of prominent personalities in the community¹⁵. Two cases relating to prosecution of online bloggers led to landmark decisions that invalidated criminal defamation laws under the Penal Code as well as laws that criminalized use of licensed telecommunication equipment under section 29 of the Kenya Information and Communication Act. These cases are discussed in the next chapter¹⁶.

5.6. Violation of the freedom of association: Shrinking space for civil society in Kenya

Civil society organizations working on controversial human rights issues faced constant threat of deregistration. In 2017 the Horn of Africa Civil Society Forum in their report on shrinking civil society space in the Horn of Africa documented threats by the NGO Coordination Board to deregister over 900 NGOs in 2015 as well as legislative attempts to limit foreign funding of NGOs¹⁷. In 2017, at the height of the dispute concerning the 2017 general election, the NGO Coordination Board purported to deregister the Kenya Human Rights Commission (KHRC) on unfounded allegations of tax evasion, operating illegal bank accounts and illegally hiring expatriates contrary to Kenya's law regulating the NGO sector, tax laws, immigration laws, and financial related laws¹⁸. The purported deregistration was related to KHRC's vocal stance on issues of elections and governance in Kenya.

Foreign NGOs are also increasing facing restrictions in Kenya. In 2016, Amnesty International Regional Office was subjected to unwarranted investigation relating to work permits for foreign staff 2016 while the application for registration of Peace Brigade International Kenya has been pending. The license for International NGO Safety Organisation was withdrawn and its bank accounts frozen.

5.7. Situation of human rights defenders working with vulnerable and marginalized groups

The Coalition and other organizations documented unique experiences of the most vulnerable categories of HRDs in Kenya which include women, sexual minorities, and those from minorities and indigenous communities. In their report on marginalized human rights defenders in Uganda, Kenya and Tanzania, the East and Horn of Africa Human Rights Defenders Project highlighted the plight of

17 HoACFS & Pax (2017), Shrinking Civil Society Space in the Horn of Africa: the Legal Context

18 Daily Nation, NGOs Board Deregisters KHRC, 14 August 2017. <https://www.nation.co.ke/news/kenya-Human-Rights-Commission-deregistered-/1056-4057174-102910d/index.html> (Accessed 12 September 2019).

HRDs from the Turkana region, a marginalized part of Kenya that is rich in oil deposits¹⁹. The oil exploration has led to disputes between the local indigenous community and Tullow Oil, the multinational oil explorer over land rights, compensation and benefit sharing. HRDs working in the region reported receiving threats from government and local political and business elites with vested financial interests in oil exploration.

The report also highlighted the peculiar vulnerability faced by Women HRDs. They are at an elevated risk of sexual and gender based violence. According to the report they often face further stigmatisation if they advocate for taboo subjects relating to women's sexual and reproductive health rights such as access to birth control.

Further, the report noted LGBTIQ rights activists have made modest progress. However, negative narratives against LGBTIQ community forces LGBTIQ rights HRDs to continue to operate in the shadows seriously harming the effectiveness of their advocacy efforts. During this period the LGBTIQ community went to court to challenge discriminatory laws and practices with mixed results. In the first case which was an appeal filed by the NGO Board challenging the decision of the High Court directing the Board to register an NGO that sought to advocate for the rights of LGBTIQ community, the NGO Board lost its case at the Court of Appeal. In the second case, several petitioners unsuccessfully challenged the constitutionality of sections 162, 163, and 165 of the Penal Code.

Protection International documented trends in criminalization of human rights defenders in rural areas and informal settlements as some of the most marginalized human rights defenders in Kenya with limited access to protection mechanism outside their own families, social and community networks²⁰. The report also documented trends in criminalizing HRDs work at the national level through legislation such as NGO Coordination Act, tax laws and anti-money laundering laws. These attempts against national level human rights defender impacted on work of grassroots human rights defenders some of who were profiled as foreign agents by the local community. It also highlighted negative profiling of human rights defenders promoting rights of sexual minorities who were described as terrorists by senior state officials. Women human rights defenders were called names such as prostitutes or home wreckers especially when they pursued cases concerning domestic violence, rape, or access to safe abortion services.

¹⁹ East and Horn of Africa Human Rights Defenders Project (2018), *To Them, We're Not Even Human*

²⁰ Protection International (2017), *Criminalization of Rural Based Human Rights Defenders in Kenya: Impact and Strategies*.

Further, rural based human rights defenders also complained about harassment through the judicial process. They are arbitrarily arrested and charged for attempting to exercise their right to freedom of assembly and association. Many rural based human rights defenders are unable to raise funds to hire a lawyer to defend them in court or to meet the punitive bail terms which may go up to Kenya shillings 300,000 in some cases.

The Coalition supported many such cases in court including *Republic v Francis Kamanza and 12 Others*, Criminal Case No. 712 of 2016, Senior Resident Magistrate Court, Kilungu, and *Republic v. Ramathani Mathenge Kamosu and 9 others* Criminal Case No 381 of 2016, Principal Magistrate Court, Taveta. In Francis Kamanza case, the accused persons were charged with rioting and refusing to obey lawful orders from the police. They were granted bail of Kshs 50,000 and a surety of Kshs 25,000. The case was terminated after one year. The case of Ramadhan Mathenge is highlighted in the case study below.

5.8. Violation of the right to privacy

Human rights defenders working on cases relating to extrajudicial killings and counter-terrorism have often complained about unlawful surveillance by state intelligence agencies. In 2017, the Defenders Coalition and Privacy International detailed the unlawful surveillance practices employment by national intelligence agencies in Kenya in their fight against terrorism²¹. A year later the two organizations conducted a perception survey on communication surveillance and privacy of Human Rights Defenders in Kenya. This was in response to the numerous concerns by HRDs about wiretapping, and unlawful surveillance practices targeted at HRDs especially those who work on electoral reforms, accountability for extrajudicial killings and counter-terrorism measures, sexual and reproductive health and rights²². The survey revealed that a majority of HRDs had experienced security breaches that include unlawful access to their social media and email accounts as well as phone tapping. It also found that many HRDs lacked the technical skills and knowledge to mitigate risks of unlawful surveillance in their work.

In November 2018, the National Assembly enacted the Statutes Law (Miscellaneous Amendment) Act No 18 of 2018 which amended the Registration of Persons Act (Cap 107 Laws of Kenya) and established the National Integrated Identity Management System (NIIMS). NIIMS was intended to be single source of personal information of all Kenyans and foreign persons. In 2019, the Nubian Rights Forum, Kenya Human Rights Commission and the Kenya National Commission on Human Rights challenged the implementation of

21 Privacy International (2017), *Track, Capture Kill: Inside Communications, Surveillance and Counterterrorism in Kenya*.

22 Privacy International and NCHRD K (2018), *Stop Watching Me: A Perception Survey on Communication Surveillance and Privacy of Human Rights Defenders in Kenya*.

NIIMS in court arguing among other grounds that it violated the right to privacy. They argued that provision for collection of biometric data such as collecting personal data Deoxyribonucleic Acid (DNA) and Global Positioning Systems coordinates (GPS) was intrusive and unnecessary. They contended that the amendments imposed excessive and unnecessarily extensive mandatory requirements for citizens' personal information without providing for concomitant safeguards to prevent abuse or intrusions by the state or unintended third parties and that there was no law in force to guarantee privacy.

On violation of the right to privacy, the High Court declared that collection of DNA and GPS co-ordinates for purposes of identification is intrusive and unnecessary, and to the extent that it was not authorised and specifically anchored in empowering legislation, it was unconstitutional and a violation of Article 31 of the Constitution. It declared 5(1)(g) and 5(1)(ha) of the Registration of Persons Act that required the collection of GPS coordinates and DNA unconstitutional, null and void. The case is now subject to appeal by the Nubian Rights Forums on other grounds.

5.9. The Case of Land Rights Activists in Taveta

The previous edition of the case digest profiled the case Joel Ogada, a grassroots human rights defender in Malindi who has faced several criminal charges in various court stations in Malindi and Garsen for his unending campaign against land injustice. The cases against him are still going on. Land rights activists in Taveta are also facing similar predicament as highlighted below.

CASE FILES

THE FATE OF GRASSROOTS LAND RIGHTS ACTIVISTS AT TAVETA SETTLEMENT SCHEME PHASE I AND II ADJUDICATION SECTION

Land rights activists in Taveta led by members of three community based organization namely Building Africa, Tujiinue CBO and Darubini ya Haki have been campaigning against corruption and irregular allocation of land at Taveta Settlement Scheme Phase I and II. They allege that land has been irregularly allocated to politicians, civil servants, local elite at the expense of deserving squatters. The HRDs working for these organizations include Ramadhan Mathenge, Charles Vetaro Mwanzia, Ramadhan Mathenge Kamosu, Justus Munyao, Fabian Nguire, Julius Kimondio, Frank Mbomani, Ambrose Hemedi, Msafiri Mkillo.

The eight HRDs have been vocal and steadfast in their campaign against land injustices at the settlement scheme. They have filed several cases and petition in court against local administrators and other government agencies in court in relation to the disputed land. One such case is Constitutional Petition No. 325 of 2011 that Ramadhan and two other petitioners filed against the government at the High Court in Nairobi challenging among other things the manner in which land allocation was being undertaken at the settlement scheme. In the case, Ramadhan obtained temporary orders suspending 6 criminal cases against 30 squatters that were facing various charged at the Taveta Law

Courts.

Since 2011 Ramadhan, his colleagues and other squatters have faced multiple criminal charges in various courts in Taveta and Voi in Taita Taveta County. In 2015 Ramadhan and three other persons were charged with malicious damage to property, forcible detainer and unlawful assembly in Republic v Ramathan Mathenge and 3 others, Criminal Case No. 152 of 2015. In 2016 Ramadhan and his 7 colleagues were charged with taking part in unlawful assembly contrary to section 79 of the Penal Code in Republic v Ramadhan Mathenge and 8 other,

Criminal Case No. 381 of 2016 at the Principal Magistrates Court at Taveta. The brief facts of the second case are outlined below.

On 31 October 2016, the eight HRDs were arrested by police at the offices of Building Africa and charged with the offence of taking part in an unlawful assembly contrary. The eight were arrested alongside three other members of the public. The three have since been released after the prosecution dropped charges against them. During hear for application for bail the prosecution alleged two of the accused HRDs were facing other criminal cases in which they were facing various offences including incitement to violence, extorting, robbery and attempted murder. The court granted them punitive cash bail of Kenya shillings 300,000. The High Court reduced cash bail to Kenya shillings 50,000 or a bond of Kenya shillings 100,000 for all accused persons except the two who were facing charges of attempted murders. The two granted a bond of Kenya shillings 300,000 with two sureties of similar amounts.

In the High Court, the HRDs did not succeed in challenging the constitutionality of the criminal proceedings against them²³. The criminal cases are still going on.

In one of the many cases that have been filed in relation to the HRDs²⁴, the High Court castigated the prosecution for engaging in forum shopping by filing a fresh criminal case against the Ramadhan and three other accused persons²⁵ at Voi Law Courts instead of Taveta Law Courts in the year 2015. The prosecution attempted to undermine a High Court order that had temporarily suspended all criminal cases arising from the disputed land. Justice Edward Mureithi observed that the attempt by “DPP seeking to side step an Order of the High Court to, unusually, file criminal proceedings contrary to established court practice in a court outside the local geographical limits where the suit property is situate is objectionable as an affront to the due administration of justice²⁶.”

5.10. Conclusion

This chapter has demonstrated that since 2016 the environment for human rights defenders in Kenya has not significantly improved. The next section will provide a summary of some of the landmark cases that have impacted on the work of HRDs.

²⁵ Republic v. Ramadhan Mathenge and 3 Others, Criminal Case No. 152 of 2015

²⁶ Republic v Ramadhan Mathenge Kamosi & 3 Others [2015] eKLR, Criminal Revision No. 3 of 2015, para 16

6. SUMMARY OF COURT DECISIONS THAT IMPACT ON THE WORK OF HUMAN RIGHTS DEFENDERS

6.1. Introduction

Human rights defenders have challenged in court government measures that have sought to limit their freedoms. There have been many notable successes that give hope that judiciary remains that last beacon of hope for human rights defenders. However, there are a few cases that have rolled back progress that HRDs have made over the years. The following is a summary of landmark cases that were decided from 2016 to 2019.

6.2. Right to protests and freedom of expression: Wilson Olal & 5 others v Attorney General & 2 others²⁷

High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Constitutional Petition No 323 Of 2014
Judgment delivered on 28th day of June 2017
Judge: John M Mativo

Relevance of the case to human rights defenders:

The case set precedent on the right of activists to peaceful protest and freedom of expression and the extent to which this right may be restricted. In particular, the court found that sections 83 and 78 of Public Order Act meet the constitutional threshold set out in article 24 of the Constitution. It also stated that enforcement of those provisions by the police must also meet the constitutional test set out in article 24 of the constitution. Any excessive measures taken by the police to enforce these provisions such as arbitrarily banning demonstrations or violently disruption peaceful protests will be declared unconstitutional. The court also deplored the abuse of criminal laws and procedures and the criminal justice system to harass activists.

Summary of facts

On 13 February 2014, several civil society organizations and activists converged at Freedom Corner Gardens at Uhuru Park in Nairobi where they had planned to hold protests against corruption in Government, rising insecurity, unemployment, poverty, mutilation of the constitution and poor leadership among other issues. However on that day, the police cordoned off Freedom Corner Gardens denying the protesters access to the venue yet the organizers of the demonstrations had notified the police about their planned demonstration as required by the Public Order Act. The OCPD Starehe Division who was leading the operation ordered the protesters to disperse ignoring their plea that their protest was lawful as they issued the notice as required under the law. Suddenly the police lobbed teargas on the protesters and violently dispersed them.

Four activists, namely Wilfred Olal, Gacheke Gachihi, John Koome and Nelson Mandela, were arrested when they returned to the venue to find out if their colleagues were injured. At the time of their arrest, the activists were not informed of the reason for their arrest until later in the evening when, at the insistence of their lawyer, the police informed that they were arrested for refusing to obey an order but in court three different charges were preferred against them namely:

²⁷ [2017] eKLR

1. Rioting after a proclamation contrary to section 83 of the Penal Code,
2. Resisting arrest contrary to section 253 (b) of the Penal Code, and
3. Behaving in a disorderly manner in a police building contrary to section 60 (1) as read with section 63 of the National Police Service Act.

The lower court imposed harsh bail terms of Kenya shillings 200,000 cash bail or a bond of Kenya shilling 500,000 each. The activists filed a constitutional petition in the High Court challenging among other things:

1. The constitutionality of sections 83 and 78 of the Penal Code.
2. The legality of the police action stopping peaceful demonstrations
3. The legality of their arrest, detention, and prosecution in the lower court, and
4. The constitutionality of the bail terms

The police alleged in court that the protesters were informed that the demonstrations were cancelled due to national security concerns and requested them to disperse peacefully but they insisted on proceeding with the demonstration and became riotous prompting the police to read the proclamation order to disperse which went unheeded. They also alleged that protesters engaged the police in running battles forcing them to lob teargas. The activists contested the police version of the events and insisted that their demonstration was peaceful.

Decision of the court of the constitutionality of sections 83 and 78(1) (2) and (3)

The court held that sections 83 and 78(1)(2) and (3) which limit the exercise of the right to peaceful protest are not unconstitutional and that they satisfy the requirements set out under article 24 of the Constitution. The sections are aimed at protecting public order and public safety which is a legitimate aim to be pursued in a democracy. They also aim to promote a peaceful environment conducive to the enjoyment of fundamental human rights by citizens and the community at large. In the court's opinion the sections imposed limitation on the constitutional right to demonstrate which is "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom." However, the excessive measures taken by the police to enforce the law were found to be illegal as discussed below.

Decision of the court on the legality of police actions stopping lawful demonstration

The court ruled that several actions taken by the police to stop peaceful demonstration including cancellation of the protests and violent dispersal of protesters were unconstitutional and violated protesters right to peaceful protest under Article 37 of the Constitution. On cancellation of the protest, the court held that the ban on the demonstration was illegal and unconstitutional as it imposed greater restrictions than was necessary to achieve its intended purpose. According to the court, there were other less restrictive measures that were available to the police in order to ensure public order and public safety such as providing security to ensure that the demonstration was peaceful.

Upon review of the evidence tendered in court, including video evidence of the demonstration, the court held that there was no justification for the police to violently disperse the protesters and that there was nothing to show that the protests would result in actions contemplated under exception in article 33(2) of the Constitution. The judge further observed that use of lethal force on protesters was unacceptable. Crucially the court clarified the legislative intent of the Public Order Act in the context of regulating public demonstrations noting that the Act does not limit the right to demonstrate or to assemble but it seeks to protect this right by regulating public marches and processions in order to ensure order. It does this through the requirement of notification to police for public marches and empowering the police to prevent public demonstration where necessary.

Decision of the court on the legality of the prosecution of the petitioners and abuse of court process

The court held that the arrest, detention and prosecution of the four HRDs was undertaken without any factual basis and amounted to a flagrant abuse of police powers and judicial powers. It found that the criminal prosecution of the activists was "tainted with ulterior motives, namely, to curtail the rights of the petitioners to exercise their fundamental right to assemble, associate, demonstrate and exercise their freedom of expression" and that it was "unfair, wrong, baseless and an abuse of police powers or judicial process.". Among the factual circumstances that the court relied upon to reach its conclusion include video evidence of peaceful demonstrations that were violently disrupted by the police without any provocation by protesters, and total disregard of procedural requirement under the law and anomalies and inconsistencies in the charge sheet presented by the prosecution. For example, the judge observed

that the activists were charged with resisting arrests yet the video captured the police arresting the activists facing no resistance from the protesters. The court noted that there was no legitimate public interest being pursued in prosecuting the case and deplored the abuse of criminal justice system to stifle fundamental rights and freedoms guaranteed under the constitution.

Decision of the court on constitutionality of the bail terms

The court did not make a substantive determination on constitutionality of the bail term as it was not provided with material to enable it question the constitutionality of bail terms. However the court observed courts have discretion to grant bail terms provided that the discretion is exercised judicially and that the amount of bail, in and of itself, is not finally determinative of excessiveness. Further the court should give some regard to the accused's circumstances, since what is reasonable bail to a man of wealth may be equivalent to denial of the right to bail if exacted from a poor man charged with a like offence. The four activists were each awarded compensation amounting to Kenya shillings 250,000.

The case took two years and four months to conclude.

6.3. Freedom of association: Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others²⁸

High Court of Kenya at Nairobi
Constitutional & Human Rights Division
Petition No. 351 of 2015
Judgment delivered on 31 October 2016
Judge: Justice J. L. Onguto

Relevance of the case to human rights defenders

The case is another example of how human rights defenders have used the courts to successfully challenge arbitrary actions and decision of the executive that seek to undermine effective operations of civil society organizations in Kenya. However, the practical realities and difficulties that HRDs face with implementation of court decisions have also emerged since the judgment was issued.

Summary of facts

The case concerned the arbitrary delay by the executive through the Cabinet Secretary for Devolution and Planning to operationalize the Public Benefits Organisations Act 2013 more than three years after it was passed by parliament and given presidential assent on 14 January 2013. Before the Act was given a commencement date in October 2014, the Cabinet Secretary for Devolution and

²⁸ [2016] eKLR

Planning appointed an 11 member taskforce to receive and review views on the proposed amendments to the PBO Act, monitor the legislative process of amending the PBO Act and also advise the Cabinet Secretary on the implementation of the Act. In May 2015 the Taskforce presented its finding to the Cabinet Secretary.

Trusted Society of Human Rights Alliance, an NGO based in Nakuru, went to court and challenged the constitutionality of the delay and the attempt by the Cabinet Secretary to appoint a task force to review the Act even before it was implemented. They also challenged the legality of the NGO Coordination Board as constituted since the year 2015 and consequently the validity of its decisions. The NGO and other interested parties in the case wanted the court to declare that the Act came into operation fourteen days after it was published in the Gazette on the 14 January 2013 in line with article 116 of the Constitution 2010. The PBO Act gave the Cabinet Secretary powers to give a commencement date, which date had not been given three years later.

The High Court sought to determine:

1. Whether the neglect or failure by the Cabinet Secretary to thus far appoint a date to bring into operation the PBO Act was a contravention or violation of the Constitution.
2. Whether by appointing a task force to bring, review and suggest amendments to be effected to the PBO Act prior to its amendments the Cabinet Secretary had acted in contravention or violation of the principle of separation of powers.
3. Whether the Non-governmental Organisations Board had been properly constituted since 8th March 2015 and, if not whether its decisions were void.

Decision of the court on whether the failure by the Cabinet Secretary for Devolution and Planning to give a commencement date for the PBO Act was unconstitutional

The court recalled the practice by Parliament and the President under the previous constitutional dispensation to frustrate the implementation of some laws by for instance failing to give presidential assent or gazette a commence date. Section 46 of the repealed Constitution of Kenya did not set stringent timelines within which an act could be given a commencement date comparable to Article 116 of the Constitution 2010.

The court acknowledged that parliament can delegate to the executive powers to give a new law, including the PBO Act, a commencement date as there may exist practical reasons why a law cannot come into effect as soon as it is given presidential

assent and the Bill is gazetted. However the court observed that the executive does not enjoy absolute discretion when it comes to delegated legislation for purposes of implementing a statute and in particular bringing it into force. The delegated powers must be exercised consistently with the Constitution and should not be used to indefinitely suspend the operation of legislation.

The court held that the Cabinet Secretary had acted arbitrarily, unreasonably, irrationally and contrary to the constitution in failing to appoint a commencement date for the Act within a reasonable time.

Decision of the court on whether the appoint of the taskforce to review the PBO Act was unconstitutional

The court held that the decision of the Cabinet Secretary to appoint a Taskforce to review and propose amendments to the Act prior to its commencement was unlawfully and contrary to the spirit and tenor of Articles 94, 95 and 129 of the Constitution. It found that while the Cabinet Secretary had delegated powers to appoint a commencement date, he was not empowered to make, amend, or repeal the PBO Act.

Decision on whether the NGO Coordination board was properly constituted and whether its decisions are valid

The court found that the NGO Coordination Board was properly constituted and legally in office as it was regulated under the NGO Coordination Act which was still in force since the PBO Act had never been fully operationalized. All the actions and decisions undertaken by the Board were thus held to be valid unless those acts are specifically challenged and found to be void by a court of law.

The court ordered the Cabinet Secretary of Devolution and Planning to appoint and gazette a commencement date for the Act within 14 days of the judgment. However, the executive has treated the judgment with contempt. The case was concluded within one year.

Non-implementation of the judgment

However, the executive treated the judgment with contempt and failed to appoint a commencement date for the PBO Act within fourteen days. In fact, in order to avoid the responsibility to implement the court order, the functions in relation to the Public Benefits Organization were transferred to the Ministry of Interior and Coordination of National Government shortly after the judgment was delivered.

In hearing application for contempt filed against the Cabinet Secretary for Devolution²⁹, the High Court ruled that he willfully disobeyed a valid court order. It further ruled that the Cabinet Secretary, Ministry of Interior and Coordination of National Government upon taking over the docket in question cannot be heard to state that it was not bound by a court order issued against the ministry by a court of competent jurisdiction prior to the transfer of the functions to his ministry nor can the Cabinet Secretary hide behind such an excuse to avoid implementing a lawful court order.

6.4. Freedom of expression: Jacqueline Okuta & another v Attorney General & 2 others³⁰

**The High Court of Kenya at Nairobi
Constitutional & Human Rights Division
Petition No. 397 of 2016
Judgment delivered on 6 February 2017
Judge: Justice M Mativo**

Relevance of the case to human rights defenders

The case set a landmark judgment on the constitutionality of criminal defamation laws under section 194 of the Penal Code, which was often used to stifle freedom of expression especially by journalists and online bloggers. Section 194 of the Penal Code was declared unconstitutional for it imposed unreasonable limitations on the right to freedom of expression. Following the judgment, the Director of Public Prosecution terminated all criminal defamation cases in the country.

Summary of facts

Two online bloggers, Jacqueline Okuta and Jackson Njeru, and Article 19 an international NGO that promotes and safeguard freedom of expression and the right to information lodge a petition at the High Court challenging the constitutionality of section 194 of the Penal Code following their arrest and prosecution for the offence of criminal defamation under that section. The two bloggers were accused of using their Facebook accounts to publish allegedly defamatory statements concerning Mr Cecil Miller, a prominent Nairobi-based lawyer. The charged sheet against Jacqueline filed in a court in Kwale read as follows:

“*on diverse dates between the month of March 2014 and April 2014 at unknown time and place within the Republic of Kenya, by electronic means of face book account Buyer beware-Kenya unlawfully*

30 [2017] eKLR

“Published defamatory words concerning the complainants that the persons pictured and named therein were wanted for illegal possession and handling of property. Anyone with information regarding either of the three to get in touch with Face book page-100,000 Likes for justice to be done for Jacky and her Kids.”

In the second criminal case in a Nairobi court against Jackson, the prosecution alleged that on 31 March 2016, he published the following defamatory words against the same lawyer:

“Jackline Okuta vs Cecil Miller (Baby Daddy) sad news coming my way after four years since being charged, numerous hearings, adjournments and seven judgement a member of this group Jacki Okuta alias Nyako Maber has been guilty of misuse of telecommunication device. She is currently at Langata Womens prison I am waiting for her lawyer and mother to call me and will brief the group..... For the evil has no future, the lamp of the wicked will be put out proverbs 24:20.”

The substance of the petitioners argument in the High Court was that criminal defamation law under section 194 of the Penal Code did not meet the test of limitation to freedom of expression set out in Articles 33(2) and 24 of the Constitution. The section was therefore unreasonable and disproportionate to the objectives it sought to achieve since civil defamation law in tort provided sufficient and less restrictive alternative means of limiting the right in order to protect reputation of others.

Decision of the court on constitutionality of Section 194 of the Penal Code

The court declared section 194 of the Penal Code unconstitutional and invalid to the extent that it covers offences other than those contemplated under Article 33 (2) (a)- (d) of the Constitution of Kenya 2010. It also declared that any criminal proceedings against the bloggers under section 194 of the Penal Code were unconstitutional.

In interpreting the limitation to freedom of expression under Articles 33(2) and 24 of the Constitution, the court observed that reasonable restriction contemplated under these provisions are meant to prevent expression that is intrinsically dangerous to public interest and safeguard interests of the State and the general public and not of any individual. The court reiterated that limitations to fundamental freedoms must be construed narrowly and further noted that criminal defamation under section 194 aims to protect an individual was thus outside the scope of Articles 33(2) and 24 of the Constitution which seek to protect public interest generally.

Moreover, the court considered four elements of the test of proportionality to assess whether the limitation imposed on freedom of expression by section 194 of the Penal Code was permissible under Article 24 of the Constitution and found that the tort of defamation provides a sufficient alternative by way of damages. In this regard, criminal defamation did not meet the third element of test, which is that the “*the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation*”. It also found that the maximum sentence of two years imprisonment was patently disproportionate to the objective pursued by the law. The court acknowledged that criminal defamation laws have a chilling effect on the exercise of freedom of expression by citizens, the media and civil society.

The case was concluded within one year.

6.5. Freedom of expression: Geoffrey Andare v Attorney General & 2 others³¹

**High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Petition No 149 of 2015
Judgment delivered on 19 April 2016
Judge: Justice Mumbi Ngugi**

Relevance of the case to human rights defenders

Section 29 of the Kenya Information and Communication Act had been used by the State to arbitrarily arrest and prosecute many prominent human rights defenders, journalists and bloggers including Abraham Mutai, Robert Alai, and the petitioner in this case. The invalidation of section 29 removed from the statute another key arsenal used to harass HRDs. It expands the realm for HRD to enjoy their right to freedom of expression in the context of their work.

Summary of facts

Geoffrey Andare a web developer was charged before a Nairobi Court on 7 April 2015 for misusing a licensed telecommunication system which was an offence under section 29 of the Kenya Information and Communication Act. It was alleged that he had posted grossly offensive information concerning the complainant, a Mr Titus Kuria, an official with a Kenyan NGO. According to the charge sheet, Mr Andare had posted the following false information on his Facebook account with the intention of causing annoyance to Mr Kuria:

31 [2016] eKLR

“you don't have to sleep with the young vulnerable girls to award them opportunities to go to school, that is so wrong! Shame on you”

He immediately moved to the High Court to challenge the constitutionality of section 29 of the Act arguing that it was not a reasonable and justifiable limitation to freedom of expression as contemplated under Article 24 and Article 33(2) of the Constitution. He noted among other things that its provisions were vague and broad prone to arbitrary enforcement by the police and subjective interpretation by the courts. Further, the section offended the principle of legality which required that a law that limits fundamental freedom must be clear enough to be understood and that it failed to interrogate mens rea or the intention of the accused person in establishing his guilt.

Decision of the court on constitutionality of section 29 of Kenya Information and Communication Act

The court declared section 29 of the Kenya Information and Communication Act unconstitutional for violating Articles 24 and 33(2) of the Constitution. Section 29 of the Kenya Information and Communication Act provided in relevant parts as follows:

- A person who by means of a licensed telecommunication system—
- (c). sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (d). sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

According to the court, the Act used vague words that were not defined in the law such as 'grossly offensive', 'indecent', 'obscene' or 'menacing character' leaving the law open to subjective interpretation. Consequently section 29 was found to offend the rule as to certainty of laws that create criminal offences since it was so vague to enable one to appreciate the legal limits of their communication. It was therefore unconstitutional.

Further, the court noted that with respect to legislation that limits rights and freedoms, the burden of proof is on the State to show that section 29 of the Act was permissible under Article 24 of the

Constitution. It found that the state had failed to demonstrate the relationship between the limitation and its purpose, and had not shown that there were no less restrictive means to achieve the purpose intended. Additionally it was held that Section 29 imposes a limitation on the freedom of expression in vague, imprecise and undefined terms that go outside the scope of the limitations allowed under Article 33 (2) of the Constitution.

The case was decided within one year.

6.6. Right to protest: Ngunjiri Wambugu v Inspector General of Police, & 2 others³²

***The High Court of Kenya at Milimani (Nairobi)
Constitutional & Human Rights Division
Petition No.269 of 2016
Judgment delivered on 29 July 2019
Judge: Justice J A Makau***

Relevance of the case to human rights defenders

The judgment opened up possible avenues for clawing back on the right to peaceful protest by recommending imposition of restrictive regulations on the right to peaceful protest under the guise of balancing rights of demonstrators and rights of other third parties. The judge's recommendations would lead to unfair limitation of the right to freedom of assembly and may have a chilling effect on the right to protest in Kenya. Human rights defenders may find themselves incurring huge financial liabilities for organizing protests that turn violent due to no fault of their own³³. This case is unique for the fact that the state did not defend the action in court and no civil society organization applied to be enjoined as interested parties or amicus curiae. It was interesting that the court assessed constitutionality of non-existent regulations.

Summary of facts

The petitioner in this case is a member of parliament from the ruling Jubilee Party in Kenya. He brought a case in court alleging that demonstrations called by the opposition party, the Coalition for Reform and Democracy (CORD) during the month of April 2016 calling for the removal of commissioners of the IEBC violated the right of third parties including property owners and businessmen. The demonstrations turned violent resulting to looting, destruction of property, harassment of third parties and disruption of business activity

³² [2019] eKLR

³³ Kimari, B. (2019) "High Court decision on demos offends constitutional right of assembly," The Star, 1 September, <https://www.the-star.co.ke/news/2019-09-01-high-court-decision-on-demos-offends-constitutional-right-of-assembly/> (Accessed on 17 November 2019)

in the central business district. The demonstrators were armed and carrying offensive weapons contrary to the law on peaceful protests as guaranteed under Article 37 of the Constitution and Sections 6 of the Public Order Act. They faulted the police for failing to enforce the Public Order Act since no arrests were made. The petitioner also blamed the government for failing to make appropriate regulations to govern demonstration, picketing and petition to effectively enforce the Public Order Act as required under section 22 of the Act. This include regulations that would protect or prevent violation of non-demonstrators' rights and also hold the organizers accountable or make them more responsible for any destruction of property or violence.

Decision of the court on the need for regulations to govern conduct of demonstrations

The case was unique in the sense that the petitioner was not challenging justification or reasonableness of existing limitations to the right to peaceful assembly and protest. Rather he was calling for adoption of additional regulations to implement the Public Order Act and govern conduct of demonstrations in Kenya. Curiously, the court went ahead to assess whether the adoption of regulations suggested by the respondent would be permissible under Article 24 of the Constitution. It found that the legislative intervention proposed by the petitioner were compliant with Article 24 of the Constitution. At paragraph 29 of the Judgment, the court observed thus:

“Upon considering the above questions and considering the purpose of limitation, its importance, the relationship between the limitation and its purposes, I am of the view that the proposed limitations are justified because they are a keen on ensuring that the right of other persons especially under Article 27, 28, 39 and 40 are not breached or violated or infringed on during the exercise of freedom of Assembly under Article 37. This if implemented would help the state in achieving objectives of Article 20 and 21 of the constitution in ensuring that the rights are observed, respected, protected, promoted and fulfilled. I further find, that limitations are important to prevent the infringement or breach of rights of other persons as breach was witnessed in the CORD demonstrations..”

The court noted that there was need to formulate regulations that would address among other issues conduct of demonstration generally and compensation to third parties who suffer damages. In doing so, the court looked at similar regulations in South Africa and Australia. The court held that demonstrators and third parties

enjoy equal rights and freedoms during demonstrations. It directed the Inspector General of Police and the Attorney General “to formulate and/or amend the requisite law and regulations to ensure that demonstrations are peaceful and held as per the Constitution including inter alia prescriptions for demarcation of demonstration zones, responsibilities for clean-up costs, maximum numbers, consents of persons/entities adjacent to demonstration zones with appropriate penalties when they go outside the expectations of the law.”

It also directed them “to formulate a Code of Conduct for convenors of demonstrations that includes detailed explanations of how they intend to ensure non-demonstrators are not adversely affected by such demonstrations and that provide a clear line of responsibility of who is liable in case of loss to life or property, or for injury, when a member of the public is aggrieved due to such demonstration.”

The case was concluded in three years.

6.7. Freedom of association of LGBTI: Non-Governmental Organizations Co-Ordination Board v EG & 5 others³⁴

The Court of Appeal at Nairobi

Civil Appeal No. 145 of 2015

Judgment delivered on 22 March 2019

Judges: Justices P. Waki, R. Nambuye, M. Koome, A. Makhandia & D. Musinga, Jj.A.

Relevance of the case to human rights defenders working with LGBTI community

The case laid out the challenges that face human rights defender defending unpopular causes such as recognition and protection of LGBTIQ community. The fact that there was no unanimous decision but a slim majority of 3 to 2 exposed the prejudices that may colour decision of some judges when they handle cases that raise serious moral and criminal issues.

Summary of facts

The case stems from an appeal by the Non Government Organization Coordination Board against judgment of the High Court in the case of Eric Gitari v Non-Governmental Organizations Coordination and 4 others, [2015] eKLR, Petition No. 440 of 2013 (Nairobi). The facts of the case and decision of the High Court is summarized in the first edition of this case digest at page 31. In sum, Eric Gitari had attempted to register an NGO to advocate for the rights of LGBTIQ community but

³⁴ [2019] eKLR (Court of Appeal)

the Board declined to approve the registration basing their decision on sections 162, 163 and 165 of the Penal Code which criminalized homosexuality. Eric has come out publicly as a member of LGBTIQ community and has been advocating for the rights of LGBTIQ in Kenya.

The High Court ruled that Article 36 of the Constitution protects the right to freedom of association for every person including member of the LGBTIQ community. The court also held that the refusal to approve the names proposed by Eric and by extension the refusal to register the proposed NGO violated his right to freedom of association and that the limitation to this right on the basis of section 162, 163, and 165 of the Penal Code was not justifiable. Lastly, it ruled that discrimination on the basis of sexual orientation was one of the prohibited grounds of discrimination under Article 27(4) of the Constitution which outlines a non-exhaustive list of such grounds.

The board challenged the High Court decision at the Court of Appeal arguing that prohibited grounds for discrimination do not include sexual orientation which is not an innate attribute of a human being but a self-prescribed or freely chosen attribute. They reiterated that right to freedom of association does not extend to formation of associations that promote criminal activities proscribed under the Penal Code.

Decision of the majority of the court on the right to freedom of association and non-discrimination

The court by a majority of 3 judges against 2 upheld the decision by the High Court with respect to violation of the right to freedom of association and right to equality and non-discrimination and dismissed the appeal by the Board. Justices Makhandia, Martha Koome and Phillip Waki agreed with the High Court that Article 36 protects freedom of association of every person and that sexual orientation does not in any way bar an individual from exercising his right under Article 36 of the constitution.

They also agreed with the High Court that sections 162 and 165 the Penal Code do not criminalize the state of being homosexual but sexual acts that are against the order of nature. Hence these sections do not prevent people from forming an association based on their sexual orientation. Finally they agreed with the High Court finding the sexual orientation is a prohibited ground of discrimination under Article 27(4) of the Constitution although it is not explicitly listed as such. They found that it would be discriminatory to single out members of the LGBTIQ community as the only group that is capable of committed acts proscribed in sections 162 and 165 of the Penal

Code and deny them their freedom of association since any person including heterosexual are capable of committing such acts. Justice Koome invoked the UN Declaration on Human Rights Defender ruling EG as an LGBTIQ human rights defender has a right to freedom of association as guaranteed in the declaration and the Constitution. She observed thus:

“More important as a defender of the human rights of the gay and lesbian community in Kenya, the petitioner has a right, as stated in the UN Declaration on Human Rights defenders, and in accordance with the Constitution,” “To form, join and participate in non- governmental organizations, associations or groups.”

Minority opinion of the court

Two judges of the Court of Appeal disagreed with the majority and rendered their respective minority opinion, which would have overturned the decision of the High Court. In her opinion, Justice Roseline Nambuye ruled that sexual orientation had not crystallized as a prohibited ground for discrimination under Article 27(4) of the Constitution and that the only way it could be included is through an amendment of the Constitution by the methods contemplated under Article 255(2), 256 and 257 of the Constitution.

Justice Musinga's dissenting opinion was even more direct, if not scathing, in its rejection of the High Court decision. He ruled that the Board's decision to reject the proposed names as being inconsistent with the law was right and that sections 162, 163 and 165 of the Penal Code remained part of Kenya's penal laws and must be observed. In his opinion, the Penal Code outlaws homosexuality and lesbianism. Drawing analogy between these provisions and the law that criminalizes pedophilia, he ruled that the freedom of association of gays and lesbians in Kenya may lawfully be limited by rejecting registration of a proposed NGO, as long as the country's laws do not permit their sexual practices.

He also held that the word 'every person' in Article 36 of the Constitution does not include persons whose practices are not permitted by law and that only law abiding adult can form, join or participate in the activities of a lawful association that accords with the country's Constitution and other laws.

The case was concluded in three years.

6.8. Right to protest and freedom of expression: Hussein Khalid & 16 others v Attorney General & 2 others³⁵

The Court of Appeal at Nairobi

Civil Appeal No. 1 of 2015

Judgment delivered on 22 September 2017

Judges: Justices Makhandia, Ouko & M'inoi,

Relevance of the case to human rights defenders

The case reiterates the need to human rights defenders to ensure that demonstrations are peaceful. It demonstrates that there is a thin line between peaceful protests and violent protests which the police are empowered to lawfully disperse and arrest protesters who disobey orders to disperse. In this case, the court declined to find that there was a violation of the right to peaceful protest.

The case also forms important precedent on the intersection of criminal prosecution with the right to freedom of assembly. It held that the rights of arrested protesters to be informed of the charges levied against them is not violated if a charge is added or changed at any point before close of the prosecution's case. It further held that the right to be presented with evidence to be relied on by the prosecution is not violated as long as the evidence is presented before the prosecution presents its case.

Summary of facts

On 14 May 2013, the appellants took part in demonstrations dubbed Occupy Parliament protesting against plans by Members of Parliament (MPs) to raise their salaries. The demonstrations were largely peaceful but they turned violent when the protesters reached parliament and unleashed a pigs painted with the words 'MPigs' depicting greed among MPs. They poured blood on the road, and blocked the roads forcing the police to intervene and disperse them. The appellants were arrested at about 2.30 pm and detained at Parliament Police Station until about 7.30 pm when they were charged with an offence under the Prevention of Cruelty to Animals Act, Cap 360 and released on free bond. On 20th March 2013 they appeared before the Chief Magistrates Court, Milimani and were each charged in Criminal Case No. 685 of 2013, with three counts, namely offensive conduct conducive to a breach of peace contrary to section 94(1) of the Penal Code; taking part in a riot contrary to section 78 (1) and (2) as read with section 80 of the Penal Code and cruelty to animals contrary to section 3(1)(c) as read with section 3(3) of the Prevention of Cruelty to Animals Act.

³⁵ [2017] eKLR (Court of Appeal)

The appellants unsuccessfully challenged the constitutionality and validity of the charges at the trial court after which they filed Constitutional Petition No. 324 of 2013 in the High Court against the Attorney General (AG), the Inspector General of Police (IGP) and the Director of Public prosecutions (DPP), challenging the legality of their arrest and prosecution and the constitutionality of charges preferred against them. The High Court dismissed their petition and ruled among others things that the appellants' right to right to fair trial under Article 50 of the Constitution, their right to freedom of assembly and freedom of expression were not violated when the appellants were arrested, detained and prosecuted for taking part in demonstrations that turned violent. It also held that sections 78(1), (2) and 94(1) of the Penal Code under which the appellants were charged were not unconstitutional. The appellants moved to the Court of Appeal to challenge the judgment of the High Court but the Court of Appeal dismissed the Appeal and upheld findings of the High Court.

Decision of the Court of Appeal on constitutionality of the Public Order Act and the Penal Code as well as the arrest and prosecution of the protesters

The Court of Appeal held that sections 78(1), (2) and 94(1) and 80 of the Penal Code and section 5 and 6 of the Public Order Act allow the police to stop and disperse public meeting or procession when there is breach of peace do not violate Articles 24 and 37 of the Constitution. The Court explained that the Public Order Act and the Penal Code limit the right to freedom of assembly only when there is clear, present or imminent danger of breach of peace; and there is need to ensure that the enjoyment of the appellants' right does not prejudice the rights and fundamental freedoms of other users of public spaces and thoroughfares who are not involved in the meeting or procession. These provisions were found to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Court held that the rights to freedom of assembly, freedom of association and freedom of expression were not violated.

Decisions on ambiguity of sections 78 and 94 of the Penal Code

The court disagreed with the petitioners the provisions of sections 78 and 94 the Penal Code are unconstitutional for reason of being vague and uncertain. It argued that the alleged lack of definition of what constitutes 'breach of peace' is more apparent than real since this has been clearly answered and set out in many cases. It held that the ingredients of the offences of 'offensive conduct conducive to breaches of peace' and 'taking part in a riot' are clear enough for the appellants to know what conduct constitutes the offence.

Decision on whether the petitioners' right to fair hearing was violated. The petitioners argued that the charge was defective since they were prosecuted for more charges than they were informed of during arrest. They argued that they could only be prosecuted for offences under the Prevention of Cruelty to Animals Act because that is the only reason they were given for their arrest. The Court of Appeal disagreed finding that in accordance with section 214 of the Criminal Procedure Code, charges can be changed, amended, substituted or added any time before the close of the prosecution case.

The petitioners also claimed violation of their right under article 50(2) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. The Court of Appeal disagreed with this argument, pointing out that such evidence is not always available before plea taking. It agreed with the High Court that Article 50(2)(j) only requires availing the evidence to the accused person, as early as is practicable but at any rate in advance of the presentation of the prosecution's case.

The case was concluded within two years.

6.9. Right to protest: Boniface Mwangi v Inspector General of Police & 5 others³⁶

***The High Court of Kenya at Nairobi
Constitutional and Human Rights Division
Petition No.544 of 2015
Delivered on 27 January 2017
Judge: Justice I Lenaola***

Relevance of the case to human rights defenders

The case clarified the constitutional limits for the exercise of the right to freedom of assembly and the right of HRDs to choose the venue for demonstrations. In this case, the court considered that protesters may be barred from demonstrating areas designated by legislation as being out of bounds. State House was found to be an unsuitable choice of assembly venue as it is designated as a protected area under the Protected Areas Act.

Summary of facts

Boniface Mwangi, filed a petition in the High Court challenging the refusal by the OCPD Kilimani Police Division to allow a public march and demonstration from Freedom Corner at Uhuru Park to State House Gate A on the 9th December, 2015 to deliver a petition to the President on the state of corruption in the country. A notice for the intended procession was duly served on the OCPD Kilimani Police who declined to authorize the march to State House Gate A. The

³⁶ [2017] eKLR

petitioner argued that the right to freedom of peaceful assembly encompasses the right to choose a venue, time and purpose of assembly and that the potency of any demonstration is lost when the choice of venue is controlled. He also argued that the OCPD had no powers to decline authorization to proceed with the demonstration since this power is vested in the OCS under the law.

Decision of the court on whether the OCPD had powers to reject the notice issued by the petitioners

The court held that under section 2 and 5(8) of the Public Order Act, it is only the OCS and not the OCPD who could stop the holding of a public meeting or procession on the grounds set out in Section 5(4) and (6) of the Public Order Act. The grounds include that “it is not possible to hold the public meeting or public procession” because “notice of another public meeting or procession on the date, time and at the venue proposed has already been received by the regulating officer.”

Decision of the court on whether the actions by the police violated right to fair administrative action and freedom of assembly

The court held that that the petitioner's right to fair administrative action under Article 47(2) of the Constitution as read with section 4(2) of the Fair Administrative Action Act, No.4 of 2015 was infringed by the 2nd Respondent's failure to provide reasons for the rejection of the petitioner's notice of an intending public demonstration. It observed that the Constitution as well as the Fair Administrative Action Act provide in no uncertain terms that reasons must be given where the decision taken has an adverse consequence upon a person's fundamental right or freedom.

However, the court also held that State House is specifically designated as a protected area by Legal Notice No.187 of 1972 issued under Protected Areas Act, Cap.204. It therefore follows that Gate A of State House Nairobi is inclusive in the definition of State House as a protected area and that any attempt to access it for whatever purpose, without lawful authority, is prohibited by law. It found that the limitations imposed by law were reasonable and justifiable especially considering that the petitioner still had an alternative avenue for ventilating his cause such as presenting the petition to the president's office located at Harambee House instead of State House Gate A.

However, Justice Lenaola (as he then was) also stated that while the present circumstances - by virtue of the existing legislation - presented a justifiable limitation, we must not lose “sight of the fundamental principle that the right to assemble and demonstrate logically necessitates that a venue must be chosen by the organisers and not the Regulating Officer.”

The case was decided in two years.

6.10. EG & 7 others v Attorney General; DKM and 9 others³⁷

The High Court of Kenya at Nairobi
Milimani Law Courts
Constitutional and Human Rights Division
Consolidated Petitions No. 150 of 2016 and 234 of 2016
Judgment delivered on 24 May 2019
Judges: Justices Aburili, Mativo and Mwita

Relevance of the case to human rights defenders

The case, similar to the case of the NGO Coordination Board v EG, demonstrates the challenges that human rights defenders pursuing unpopular causes face in the corridors of justice. The court declined to declare sections 162 and 165 of the Penal Code unconstitutional despite overwhelming international and comparative jurisprudence that shows a trend towards decriminalization of the same sex relations.

Summary of facts

The petitioners in this case challenged the constitutionality of sections 162(a) (c) and 165 of the Penal Code which they argued were being applied to criminalize private consensual sexual conduct between adult persons and were discriminately applied to persons of the same sex. They contended that the provisions are vague and uncertain, and that they breach the principles of legality and rule of law and infringe the rights of Kenyan citizens. They also argued that these provisions breach their right to equality and non-discrimination, human dignity, right to privacy and economic, social and cultural rights.

They sought a declaration that the relevant provisions of the Penal Code were unconstitutional. They also sought a declaration that sexual and gender minorities are entitled to the right to the highest attainable standards including the right to health care services as guaranteed in Article 43 of the Constitution. They also sought an order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector.

The petitioners outlined violations they had suffered on account of their sexual orientation including being physically attacked, raped, arbitrarily detained, eviction from their homes and discrimination on account of their sexual orientation. One of the petitioners, EG, narrated to court several incidents of hostility and discrimination he had suffered on account of being gay including online abuse and publication of his in one of the local newspapers as 'one of the top gays.'

³⁷ [2019] eKLR

Decision of the court on whether sections 162 (a) and (c) and 165 of the Penal Code are unconstitutional on grounds of vagueness and uncertainty.

The petitioners argued that phrases “indecent with another male person” and “any act of gross indecency with another male person” used in the Penal Code are unclear. The court declined to declare sections 162(a) and (c) and 165 of the Penal Code unconstitutional on grounds of vagueness, uncertainty, ambiguity and over broadness. It noted that the impugned phrases have been clearly defined in law dictionaries and in judicial pronouncements, and that lack of definitions in the statute per se does not render the impugned provisions vague, ambiguous or uncertain.

Decision of the court on whether the impugned provisions are unconstitutional for violating Articles 27, 28, 29, 31, 32 and 43 of the Constitution

Right to equality and freedom from discrimination

On the question whether the law discriminated against LGBTIQ community, the Court held that sections 162 and 165 of the Penal Code do not target LGBTIQ community only. According to the judges offences under section 162 could be committed by ‘any person’ while those under section 165 could be committed by ‘any male person’ of any sexual orientation. On whether the enforcement of these provisions was discriminatory, the court held that the petitioners did not adduce convincing evidence of the violations they suffered.

Right to privacy and dignity

Taking into account the historical context of Constitution making in Kenya and the spirit, purpose and intention of Article 45(2) of the Constitution the court declared that sections 162 and 165 of the Penal Code did not violate the petitioners’ rights to dignity and privacy. According to the court, decriminalizing private sexual conduct between two consenting male adults would contradict express provision of Article 45(2) which recognizes marriage as a union between persons of the opposite sex.

In justifying its decision to invoke Article 45(2), the court argued that it was immaterial that the petitioners were not seeking to be allowed to enter into same sex marriage. According to the court, private consensual sexual conduct between consenting adults of the same sex was likely to lead to same sex partners cohabiting as couples whether in private or not, formal or not and would be in violation of the tenor and spirit of the Constitution. The court noted that the

Marriage Act recognizes cohabitation as an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.

The court considered whether sexual orientation was one of the prohibited grounds of discrimination under Article 27(4) of the Constitution and interestingly it observed that that the Court of Appeal in the NGO Coordination Board v EG case had ruled that this depended on the circumstance of each case. In this case, sexual orientation could not be invoked as a prohibited ground of discrimination as doing so would defeat Article 45(2).

The court also found that the petitioners had failed to raise sufficient evidence to prove that the impugned provision of the penal code violated their rights to: the highest attainable standards of health, fair hearing, freedom and security of the person, and their right to freedom of conscience, religion, belief and opinion.

The case was concluded in three years.

7. CONCLUSION AND RECOMMENDATIONS

The situation of human rights defenders has not radically improved since 2016 when the Coalition began documenting trends of human rights violations against HRD. However, HRDs have remained vigilant and ready to take appropriate measures to protect their rights including seeking judicial protection. The Coalition reiterates the recommendations made in the previous edition of case digest. It recommends as follows:

1. **Political commitment by the Government of Kenya to protect Human Rights Defenders**

The coalition calls on the political leadership led by the President of Kenya to issue affirmative statement committing to uphold and protect rights of individuals and groups to promote and protect human rights. In particular the Coalition calls on:

- a. The President and Parliament to commit to uphold all human rights including freedom of assembly, freedom of expression, freedom of the media and right to defend human rights at all times. The state should enhance protection of these rights in the context of general elections, war on terror and fight against crime.
- b. The Attorney General, and the Kenya National Commission on Human Rights, to enact a comprehensive national policy for the promotion and protection of the right to human rights defenders in Kenya;
- c. Parliament to enact legislation, anchored on the UN Declaration of Human Rights Defender that will reinforce protection of human rights defenders in Kenya;
- d. All political players and state and non state actors at the national and county level to engage in constructive dialogue with human rights defenders across Kenya and in all sectors. This should be with a view to promote mutual understanding and harmonious working relationship that advances human rights for everyone including human rights defenders

2. Investigation into of allegations of human rights violations against HRDs

The coalition acknowledges action that has been taken to prosecute on going cases such as the murder of Willie Kimani. It calls upon all the relevant government agencies including the National Police Service, Director of Public Prosecution, KNCHR, NGEC, CAJ and IPOA to expedite investigate all allegations of human rights violations with a view to ensure that appropriate action is taken against perpetrators. It further calls:

- a. IPOA, KNCHR, and International Affairs Unit of the National Police Service to investigate all incidents or attacks, death threats, disappearance and extrajudicial killings of human rights activists.
- b. Commission on Administrative Justice should monitor and investigate all allegations of unfair administrative action against human rights NGOs and other human rights defenders.
- c. The Director of Public Prosecution, IPOA and National Police service should undertake a review of all criminal proceedings filed against human rights defenders with a view to identify and terminate all cases of malicious prosecution. They should take appropriate disciplinary and legal action against security officers

found culpable of arbitrary arrests and prosecution of human rights defenders.

- d. The state should enhance protection for the most vulnerable human rights defenders including human rights defenders working in informal settlements, grassroots human rights defenders, bloggers, journalists and women human rights defenders.

3. Human rights education

- a. The National Police Service should implement a comprehensive training programme for police on managing peaceful protests in line with human rights standards.
- b. KNCHR, NGEC, CAJ and IPOA to fully integrate human right education on the rights of human rights defenders on their training and awareness programme targeted at the Police, and other security sector agencies as well as the public.
- c. The judiciary and the National Police Service should sensitize judicial officers and police officers on the proper administration of bail and bond policy.

4. Enabling legal environment for the enjoyment of all human rights by HRDs

The Coalition calls on the government to create an enabling environment for all HRDs to enjoy their human rights including the right to peaceful protests, right to privacy, freedom of association and freedom of expression. We call upon the government to remove all legal, policy and administrative barriers and practices to the enjoyment of these rights. In particular the Coalition calls for the following:

- a. Parliament and the Ministries responsible for internal security, defence and communication should review of all national laws and policies on surveillance of communication in order to ensure that surveillance is consistent with international human rights obligations and is conducted on the basis of a legal framework that is publicly accessible, clear, precise and non-predictable.
- b. The Cabinet Secretary for Internal Security should remove of all legal restrictions to operations of NGOs in Kenya and operationalize the Public Benefits Organization Act in line with the order of the Court.
- c. Parliament should review all laws that regulate the freedom of expression, freedom of assembly, and freedom of the media to ensure that they are consistent with international human rights standards.

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