



**The Global Initiative**  
*for Economic, Social and Cultural Rights*

**Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the  
CEDAW Committee's 68th Session, 2017.**

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## **1.0 Introduction**

Kenya is celebrated as having one of the most progressive Constitutions in the world. The 2010 Constitution provides for key provisions that promote and protect the rights of women in Kenya. The preamble envisages a government based on “the essential values of human rights, equality, freedom, democracy, social justice and the rule of law” all of which are principles entrenched in the Convention on Elimination of all forms of Discrimination against Women (CEDAW). Article 27(4) of the Constitution further prohibits discrimination on any ground including “race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.”

One of the key wins for women is that Article 2(6) of the Constitution stipulates that any treaty and convention ratified by Kenya will form part of the laws of Kenya. By this Article and the provisions of the Treaty Making and Ratification Act 2012, the rights enshrined in CEDAW form part of the Kenyan laws. Unfortunately, full realization of this gain is hampered by government institutions as will be discussed in this report. Generally, there are continuous efforts to advance principles of equality and nondiscrimination, violations of the human rights of women in Kenya.

FIDA Kenya reiterates the contents of its pre-session report submitted on 31<sup>st</sup> January 2017 to the commission and provides the following additional information jointly with Global Initiative for Economic, Social and Cultural Rights.

The additional report acknowledges the milestones that Kenya has achieved as a country, especially in enacting progressive legislation on women’s rights in tandem with the Constitution of Kenya 2010. The report thereafter provides an overview of the prevailing gaps in structures, policy, attitude and practices that impede achievement of gender equality in leadership, access to basic services, economic development, and employment among other issues. Recommendations on the strategies that the state should explore in mitigating these gaps are then proposed.

## **2.0 Legislative Reforms on Discrimination and Inequalities – Draw Back Clauses in National laws**

The enactment of the Constitution (2010) was followed by an overhaul of the previous system of government, repeal of some retrogressive domestic laws and introduction of new policies,

systems and structures to conform to the Constitution, more specifically laws that safeguard the rights of women..However, some of these laws have been laced with draw back clauses or policies that take women back to the dark times before 2010.

Further, whereas Kenya’s government in its response to the Committee list of issues states that “*Kenya has ratified CEDAW therefore the Convention is part of the Constitution and ranks higher than Acts of Parliament...*”<sup>1</sup> the reality on the ground is different. Parliament has persistently passed laws that contradict the spirit and letter of the Constitution and International instruments. There are also practices and attitudes in the application of the laws, across various government institutions that promote discrimination against women. Some of the examples include:

#### *21. The Marriage Act 2014*

An outstanding gain of this act is that all marriages are now legislated under one Act and it introduces registration of customary marriages, which is a regime that majority of women in Kenya are married under. Registration of customary marriages improves the status of women in such marriages and enhances legitimacy in case of a legal dispute. However, the Attorney General has issued a gazette notice declaring all customary marriages must be registered as from 1<sup>st</sup> August 2017 otherwise they shall be rendered illegal. The directive has been issued without providing adequate infrastructure for the same to be achieved. It is not clear where rural women will register their marriages and/or assignment of officials to the reach the women. There is equally no mechanism to ensure that spouses register, especially male spouses whom legitimizing their union is a challenge based on the fact that customary marriages are potentially polygamous. Locking out women who have not registered their marriages will place them at a more disadvantaged position than what the law intended. This directive also counters what the CEDAW Committee established in its General Recommendation No. 29 on the economic consequences of marriage, family relations and their dissolution, namely that “The State must protect the rights of women in such marriages, regardless of their registration status” (at para. 26). Women who do not comply with the notice risk losing entitlement to shared matrimonial property. Given that 75% of the total Kenyan population lives in rural areas which are difficult to reach, often with limited access to

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<sup>1</sup> CEDAW/C/KEN/Q/\*/add.1 List of Issues and questions in relation to the eighth periodic report of Kenya p.2 para.2

news/information, they are likely not to be aware of legislative changes affecting their property rights.

## *2.2 The Matrimonial Property Act 2015*

A key gain of this act is the acknowledgement of both monetary and non-monetary contribution of women in acquisition of matrimonial property. For decades women's domestic roles and non-monetary contribution were not considered as contribution to ownership of matrimonial property. The Act also emphasizes equality of parties in marriage. However the Act has a claw back clause Section 7<sup>2</sup> that negates the gain of equality in marriage and calls on spouses to show contribution. This leaves majority of women at a disadvantaged position since it is not practical to quantify domestic work and/or non-monetary contribution. The law further leaves the court with the discretion of deciding what the woman deserved. Again, this runs counter to what the CEDAW Committee has said in General Recommendation No. 29, wherein it provides that 'States parties are obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage. State parties should recognize the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage' (at para. 46). FIDA Kenya has filed a public interest case<sup>3</sup> to challenge Section 7 of the Act.

## *2.3 Land Act 2012*

Upon the enactment of the Land Act 2012, spousal consent was required before approval is given for any land transactions that involved matrimonial property. A key purpose for this provision was meant to protect spouses, mostly women, from arbitrary sale of matrimonial property leaving them destitute with their children. Parliament has since passed an amendment law that removed the requirement of spousal consent. Section 11 of the Land Laws Amendment Act amends section 28 of the Land Registration Act by deleting spousal consent. This means that

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<sup>2</sup> Section 7 "...ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved." (Emphasis added)

<sup>3</sup> FIDA Kenya vs. Attorney General Petition No. 164B of 2016

spousal consent is no longer automatically deemed to be overriding interest over registered land without their being noted on the land register. Parliament's action is retrogressive and places married women in a very precarious position, especially in light of polygamy being acceptable in Kenya.

There have also been judgments by judicial officers that endorse such discrimination against women. The case of **P N N v Z W N [2017] eKLR**<sup>4</sup> in a dissenting opinion, one judge ruled that equality in marriage does not translate to equality in distribution of the matrimonial property. Though a dissenting opinion, in Kenya, this is precedent set and can apply to other cases. FIDA Kenya protested against the dissenting opinion and brought the issue to attention of the Chief Justice with the hope of solutions.

### **Recommendation:**

- The government of Kenya needs to commit to repealing the draw back clauses in national laws that deny women equal rights and opportunity. Specifically, the amendment of spousal consent in land matters and Section 7 of the Matrimonial Property Act 2015.
- The Government should also take deliberate steps to stop any directives that would led to discrimination of women and bann discriminative institutional practices and/or attitudes by public servants.

### **3.0 Women's Political Participation – Elections 2017.**

Despite clear provisions of Article 27 (8)<sup>5</sup> and 81(b)<sup>6</sup> of Kenyan Constitution, 7 years post the enactment of the Constitution, the government has refused not only to enact the required legislation but also to apply the principle in its public appointments. In its report and response to list of issues, the government make continued reference to the Supreme Court Advisory Opinion that directed for progressive achievement of this principle by 2015. This advice has not been

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<sup>4</sup> Civil Appeal No. 128 of 2014, Justice Kiage "I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement"

<sup>5</sup> "...the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender."

<sup>6</sup> The electoral system shall comply with the principle that "not more than two thirds of the members of elective public bodies shall be of the same gender."

implemented neither have court orders<sup>7</sup>. FIDA Kenya has once again gone back to court to challenge the unconstitutionality of the composition of the current parliament<sup>8</sup>. Women improved in their performance in the just ended elections (2017).

The Country achieved its first female Governors (3) out of 47, 23 Female Members Parliament Elected out of 210, 5 Senators out of 47 and 47 Women representatives. Even with additional nomination seats, the current National Assembly still falls short of the 30% requirement of women representation. At county level only 98 women were elected out of a possible 1450. Overall, there is no political will by the government to implement this section of the Constitution. Government's averment of a national strategy to enhance support for women in elective politics<sup>9</sup>, is far from the reality. In the absence of a framework for realizations of the 2/3rds gender principle; the State fails to uphold the Kenyan Constitution that guarantees all Kenyans the rights to participation and representation in political leadership. The State also curtails the enjoyment of the right to participation in politics for the women of Kenya.

In addition, the 2017 elections saw increased forms of Elections Gender Based Violence emitted against women. There was unprecedented emotional abuse, slander and violations using the social media space. FIDA Kenya's gender audit<sup>10</sup> post 2013 elections confirmed that electoral violence against women was a major contributing factor to women shying off from politics and/or desire to compete for public positions. FIDA Kenya has equally generated various press statements<sup>11</sup> calling upon the relevant authorities to respond to identified perpetrators. Specific calls have been made to the Inspector General of Police and Director of Public Prosecution with no success.

## **Recommendation**

- The government of Kenya needs to enact legislation to implement the gender rule as stipulated in the Constitution and in compliance with international instruments and policies. This will also be in compliance with SDG 5 that calls on governments to “ensure

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<sup>7</sup> Ruling by Justice Mativo in...The judge directed the Attorney General and Parliament to enact legislation in 60 days to implement two thirds gender rule. Failure to do so, any Kenyan can petition the Chief Justice to advise the President to dissolve Parliament.

<sup>8</sup> FIDA Kenya vs. Speaker of the National Assembly & others H.C Case no. 401 of 2017.

<sup>9</sup> CEDAW/C/KEN/Q/\*/add.1 List of Issues and questions in relation to the eighth periodic report of Kenya p.7 para.21

<sup>10</sup> Find the gender audit at <https://www.ndi.org/sites/default/files/Kenya-Gender-Audit-2013-Electoral-Process.pdf>

<sup>11</sup> Samples statements found at <https://fidakenya.org/news-and-press-release/>

women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life".

- The Government of Kenya needs to put in place deliberate steps to specifically prevent election violence against women.

#### **4.0 Stereotype, Harmful Practices and Violence Against Women.**

Whereas the government has enacted progressive legislation on prevention of harm against women such as Protection from Domestic Violence Act 2015, Prohibition of Female Genital Mutilation Act 2011 and The Victim Protection Act 2014, the government has failed to allocate resources for priority concerns of the survivors of gender based violence. To date the government does not have any shelter homes for survivors and/or safe places. There is need to supplement the efforts of establishing referral hospitals and hotlines, by establishing safe houses. Female Genital Mutilation still persists with limited success of prosecution as compared to number of cases reported.

#### **Recommendation**

- Government should give specific budget lines for response and protection of survivors of gender based violence. Specifically build government supported shelter homes.
- Promote county specific education to stop harmful practices and stereotype attitudes. The sensitization should be included in the school curriculums and education materials.

#### **5.0 Nationality/Citizenship Laws**

Women's citizenship rights area seldom addressed in discussing women rights. Whereas the Constitution of Kenya provides for equal rights of women and men to pass on citizenship rights to their spouses after seven years of marriage<sup>12</sup> the immigration department of Kenya has adopted rules and regulations<sup>13</sup> that directly or indirectly discriminate against women married to foreign men.

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<sup>12</sup> Article 15 (1) of the Kenya Constitution – A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

<sup>13</sup> The Kenyan Citizenship and Immigration Regulations (2012).

The differential treatment makes it almost impossible for women to obtain legal permit for their foreign husbands to live and work in Kenya. Further, based on gender stereotypes and the patriarchal nature of Kenyan society, women are the ones expected to be dependents and to relocate to their husbands' countries upon marriage. The immigration regulation rule 27 (2) defines a dependent as (i) a spouse or child of the applicant or (ii) by reason of age, disability or any incapacity the dependent is unable to maintain himself adequately or (iii) for some other reason the dependent relies upon the applicant for his or her maintenance<sup>14</sup>. Dependents are not allowed to work, study or generate income in Kenya. This definition *ab initio* is discouraging for foreign male applicants.

Kenya lacks spouse specific permits that would permit spouses to obtain legal status in Kenya. This deficiency increases family instability and espouses women married to foreign men to a muddle of legal and socio-economic challenges including foreign husbands living as illegal immigrants, constant fear of deportation, women being sole breadwinners and/or forced to migrate to their husbands' countries regardless of the opportunities in their country of origin (Kenya). Unfortunately, women in such relationships hardly report domestic violence as illegal immigration status of their spouses often supersedes their complaint.

Further, the alleged insecurity caused by foreigners continues to supersede the rights of the women. In the case of **Khatija Ramtula Nur Mohamed and another v Minister for Citizenship and Immigration and 2 others 6 [2015] eKLR, Civil Appeal No. 51 of 2013**, in upholding the regulations of the immigration act and denying a foreign spouse right to reside in Kenya, ruled that “again, we do not think that this is a *heavy price to pay for the 1<sup>st</sup> appellant (Kenyan woman) who having chosen to marry a foreigner (Pakistani Man) has to wait the expiry of three years before they can live together as husband and wife in Kenya, being their domicile of choice*”<sup>15</sup> This is an unfortunate ruling in light of increase in globalization.

### **Recommendation.**

- The Immigration Department must introduce spouse-specific permits that will allow foreign spouses to live, work and attain citizenship regardless of gender.

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<sup>14</sup> The Kenya Citizenship and Immigration Regulations (2012) rule 27 (2).

<sup>15</sup> Khatija Ramtula Nur Mohamed and another v Minister for Citizenship and Immigration and 2 others 6 [2015] eKLR, Civil Appeal No. 51 of 2013, COA Msa (Kenya) (Emphasis added).

- The government needs to unlock Immigration barriers that prevent Kenyan Women from obtaining legal status for their foreign husbands. This will ensure Kenyan women to equally enjoy their citizenship rights as Kenyan and utilize opportunities in their country without being forced to migrate to another country. Spouses should have equal opportunity to reside in either of their countries of domicile.
- Government to repeal any regulations and rules in the Immigration and Citizenship Act, 2012 that causes direct and indirect discrimination against women married to foreign men and wish to reside in Kenya.

## **6.0 Employment Rights for Women**

The government has made great strides in the introduction of fully paid 3 months (91days) maternity leave and introduction of the breast feeding bill to allow mothers to nurse their babies (0-2yrs) while at work. There is however an emerging fear of employers discriminating against female workers especially those of reproductive age. The discrimination stands to be discrete and hardly noticed by law.

### **Recommendation**

- The government need to adopt mechanisms that will prevent any direct or indirect discrimination against female employees for fear of the costs to institutions that come with reproductive roles of career women.
- Employment laws need to be more stringent to protect the rights of women. This should include guiding principles to interview questions during recruitment.

## **7.0 Reproductive Health for Women and Girls**

### **7.1 Maternal Health**

As at the time of submitting this report the Nurses in Kenya are on day 117 of strike with no hope of a solution. Worse still the clinical officers have also downed their tools. Majority of death reported are of women during delivery. It is disheartening that limited attention is being directed to the misfortunes arising from the strike. FIDA Kenya has filed a suit to demand for

immediate end of the strike and resolve of the stalemate<sup>16</sup>. One of the orders sought is a declaration that health services are essential service, and while nurses and doctors have a right to strike, the right to life is sacred. All the trade unions in the health sector must put in measures for continued provision of medical services by a percentage of its membership before issuance of a strike notice.

In addition, the Government of Kenya consistently prides in the free maternal health care which is a presidential directive and the *beyond zero* campaign under the leadership of the first lady. Whereas these initiatives have achieved great milestones, the government has failed to confirm whether the presidential direction is anchored under any law and/or policy. Presidential directive are prerogatives of the sitting president, the same can be revoked by next president and/or government.

Further, the practice on legal abortion in Kenya remains conflicted due to lack of legislation to enable Article 26 (4) of the Constitution of Kenya<sup>17</sup>. Abortion in Kenya continues to be treated as a crime under the penal code<sup>18</sup>. The government in its response to list of issues tacitly avoids to respond to this issue<sup>19</sup>.

## **Recommendation**

- The government should ensure that the Presidential Directive on free maternal care is anchored in law and national policy. The law should clearly provide implementation mechanisms and clarity on the funding processes to county levels.
- The Government must enact a law that requires all the trade unions in the health sector must put in place measures for continued provision of medical services by a percentage of its membership before issuance of a strike notice.
- The government needs to enact a law on Abortion in Kenya in compliance with Article 26(4) of the Constitution.

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<sup>16</sup> FIDA Kenya vs. The Kenya National Union of Nurses & Other Case No. 67 of 2017

<sup>17</sup> Article 26 (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other written law.

<sup>18</sup> Section 158 to 160, 228 and 240 of the Penal Code criminalizes abortion.

<sup>19</sup> CEDAW Committee, *List of Issues and Questions in relation to the eighth periodic report of Kenya*, para. 18, U.N. Doc. CEDAW/C/KEN/Q/8 (2017)

## 7.2 Access to contraceptive for adolescents

The Kenya Demographic Health Survey shows that childbearing in Kenya begins early, with 25% of women giving birth by age 18 and nearly half by age 20.<sup>20</sup> The survey further shows that 18% of adolescent women aged 15-19 are already mothers or pregnant with their first child and that adolescents are least likely to discuss contraception/family planning methods with health service providers<sup>21</sup>. In 2015 Kenya was reported to have registered the youngest mother in Africa<sup>22</sup>. Kenya similarly records an average of 13,000 Kenyan girls drop out of school due to accidental pregnancy.<sup>23</sup> Unfortunately, Kenya continues to neglect the need to empower adolescents to access contraceptives. The National Adolescent Sexual and Reproductive Health Policy (2015) shies away from addressing the need to define consent by adolescents and parameters of which adolescents can consent and access contraceptives.

### Recommendations

- The government needs to enact legislation that introduces minimum legal age limits to access contraceptives. The age must reflect the changing capacity of the adolescent, their protection and their best interest. The access should be without restrictions such as consent from parents. This will avert the number of accidental pregnancies and back street abortions.
- The ministry of education should introduce age appropriate education on pregnancy prevention in both primary and secondary school curriculums. The education needs to be comprehensive on sexual and reproductive health rights. This will enhance an adolescent's competence to make informed choices.

### Conclusion.

The CEDAW Committee should place emphasis on the need of Kenya not only ratifying the option protocol to CEDAW and amendment to Article 21 of the Convention, but also to remove any

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<sup>20</sup> The Kenya Demographic Health Survey (2014)

<sup>21</sup> The Kenya Demographic Health Survey (2014)

<sup>22</sup> Daniel Russel, Meet The Youngest Mother In Africa, 10 Year Old Gives Birth In Kenya, PULSE.COM.GH NEWS, <http://pulse.com.gh/filla/meet-the-youngest-mother-in-africa-10-year-old-gives-birth-in-kenya-id3622037.html> April 4, 2015

<sup>23</sup> Irin, More Education equals less teen pregnancy and HIV, 2008. <http://www.irinnews.org/news/2008/07/25/more-education-equals-less-teen-pregnancy-and-hiv>. Accessed on March 23, 2017

reservations made to international and regional instruments that deny women full enjoyment to their rights. Example Kenya needs to lift reservations to Article 14 (2) c<sup>24</sup> of Maputo protocol.

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<sup>24</sup> Article 14 (2) c states shall “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”.