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### Committee on Economic, Social and Cultural Rights

#### Concluding observations on the combined second to fifth periodic reports of Kenya\*

1. The Committee on Economic, Social and Cultural Rights considered the combined second to fifth periodic reports of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/KEN/2-5) at its 8th and 9th meetings (E/C.12/2016/SR.8-9) held on 25 and 26 February 2016, and adopted the following concluding observations at its 20<sup>th</sup> meeting, held on 4 March 2016.

#### A. Introduction

2. The Committee welcomes the combined second to fifth periodic reports submitted by the State party, despite the long delay in submission, and the supplementary information provided in the replies to the list of issues (E/C.12/KEN/Q/2-5/Add.1). The Committee also appreciates the constructive dialogue held with the State party's inter-ministerial delegation.

#### B. Positive aspects

3. The Committee welcomes the incorporation of the Covenant rights in the 2010 Constitution and the rulings of the High Court that recognize these rights.

4. The Committee also welcomes the adoption by the State party of:

- (a) The Basic Education Act, 2013;
- (b) The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012;
- (c) The Kenyan Citizenship and Immigration Act, 2011;
- (d) The Prohibition of Female Genital Mutilation Act, 2011; and
- (e) The Counter Trafficking in Persons Act, 2010.

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\* Adopted by the Committee at its fifty-seventh session (22 February – 4 March 2016).

## C. Principal subjects of concern and recommendations

### Domestic Application of the Covenant

5. The Committee is concerned that there has been a long delay in adopting legislation and policies that are crucial to realize the economic, social and cultural rights enshrined in the Constitution. It is also concerned at the failure of the State party to comply with many court rulings.

6. **The Committee urges the State party to expedite the adoption of pending legislation and policies, including the Community Land Bill, the Social Protection Bill, the Water Bill, the Housing Bill, the Health Bill and the National Social Health Insurance Fund Bill, to give full effect to the economic, social and cultural rights enshrined in its Constitution. It also recommends that the State party implement the decisions of its courts without delay.**

7. The Committee is concerned at the provisions of Section 21(4) of the Government Proceedings Act, which essentially provide impunity to the State party when a monetary award is made, by way of damages or costs, against it in favour of an aggrieved party, as is the case of *Ibrahim Sango Osman v Minister for Provincial Administration and Internal Security*

8. **The Committee urges the State party to repeal Section 21(4) of the Government Proceeding Act, since it places the State party above the laws in that it does not oblige the State party to comply with court orders and it infringes the rights to equality and the right of access to courts in that it denies the right of an effective remedy in case of a violation by the State party of the economic, social and cultural rights of an aggrieved party.**

### Legal aid

9. While noting the introduction of the National Legal Aid and Awareness Programme, the Committee is concerned at the insufficient resources allocated to the Programme. The Committee is further concerned that access to free legal aid is still very limited for disadvantaged and marginalized individuals to claim their economic social and cultural rights.

10. **The Committee recommends that the State party expedite the adoption of the Legal Aid Bill, expand the National Legal Aid and Awareness Programme and allocate sufficient resources to the Programme so that disadvantaged and marginalized individuals, particularly indigenous peoples, women, people living in rural areas and urban informal settlements, are able to claim their economic, social and cultural rights.**

### Internally displaced persons (IDPs)

11. While noting the measures taken by the State party to reintegrate or resettle internally displaced persons (IDPs) displaced as a result of the 2007/2008 post-election inter-ethnic violence, the Committee is concerned that the Truth, Justice and Reconciliation Commission's recommendations have not fully been implemented and that those IDPs continue to face difficulties in enjoying their economic, social and cultural rights. The Committee is also concerned at the overall lack of implementation of economic, social and cultural rights of the IDPs in the State party, resulting from intercommunal conflicts, disasters and development and environment preservation projects, in particular:

(a) The absence of comprehensive IDP registration system, which leave most IDPs unregistered, unprotected and unsupported;

- (b) The delay in adopting a national IDP policy; and
- (c) Social segregation, the lack of public transportation and limited access of IDPs to basic services, including water and sanitation, health, education, and social assistance.

12. **The Committee recommends that the State party implement, without further delay, the Truth, Justice and Reconciliation Commission's recommendations relating to the 2007/2008 post-election violence, including adequate compensation for the concerned IDPs. It also recommends that the State party:**

**(a) Establish a comprehensive IDP registration system and keep up-to-date records of all IDPs;**

**(b) Adopt a national IDP policy in consultation with IDPs to facilitate the implementation of the Act; and**

**(c) Ensure that IDPs in resettlement sites have access to public transport and basic services, including water and sanitation, health, education and social assistance.**

#### **Economic Partnership Agreement**

13. While noting that on 16 October 2014, the Eastern African Community States, including Kenya, concluded the negotiations for a region-to-region Economic Partnership Agreement with the European Union, the Committee regrets that the negotiations were not preceded by an assessment of its impact on the enjoyment of economic, social and cultural rights (art. 1(2)).

14. **The Committee encourages the State party to seize the opportunity of the consultations that shall take place prior to the ratification of the Agreement in October 2016 to identify the potential negative impacts on the enjoyment of economic, social and cultural rights and to adopt measures necessary to mitigate such impacts, particularly on the livelihood of small-scale farmers and fisher folk as well as on access to medicines. It draws the attention of the State party, in this regard, to the Guiding Principles on human rights impact assessment of trade and investment agreements (A/HRC/19/59/Add.5, 2011).**

#### **The Endorois**

15. The Committee is concerned that the implementation of the decision of the African Commission on Human and People's Rights (276/2003) relating to the Endorois has been long delayed, despite acceptance of the decision of the Commission. While noting the establishment of the Task Force on the implementation of the decision of the African Commission on Human and Peoples' Rights contained in communication No.276/2003, the Committee regrets that the Endorois are not represented on the Task Force and they have not been sufficiently consulted in the work of the Task Force (art. 1(2)).

16. **The Committee recommends that the State party implement, without further delay, the decision of the African Commission on Human and People's Rights (276/2003) and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process. It also recommends that the State party set up a mechanism that will facilitate and monitor the implementation, with active participation of the Endorois. It further recommends that the State party ratify ILO Convention (No. 169) on Indigenous and Tribal Peoples.**

#### **Maximum available resources**

17. The Committee is concerned at the pervasive corruption in the public sector and the large amount of illicit financial flows and tax avoidance, which impedes the realization of economic, social and cultural rights. It is also concerned that cases of corruption, particularly those involving high-level officials, are not thoroughly investigated and prosecuted, which results in a very small number of cases convicted in comparison to the large number of cases brought to the Ethics and Anti-Corruption Commission. It is further concerned that the Ethics and Anti-Corruption Commission is not able to carry out its mandate independently and effectively due to lack of resources and interference by high level officials. (art. 2(1)).

**18. The Committee recommends that the State party take all necessary measures to combat illicit financial flows and tax avoidance with a view to raising national revenues and increasing the reliance on domestic resources. It also recommends that the State party increase the level of public funding, at both the national and county level, to ensure the progressive realization of economic, social and cultural rights, particularly rights to housing, water and sanitation, social security, health and education; and that the State party make all efforts to improve its budget execution process with a view to spending all the allocated funding in a timely, effective and transparent manner. It further recommends that the State party strengthen the investigation and prosecution of cases of corruption, through enhancing the investigative capacity of the anti-corruption body and public prosecutors and ensuring the independent functioning of the Commission.**

#### **Non-discrimination**

19. The Committee is concerned at the absence of comprehensive anti-discrimination legislation (art. 2).

**20. The Committee recommends that the state party adopt a comprehensive anti-discrimination law that prohibits discrimination, direct or indirect, on all grounds expressed in article 2 of the Covenant and taking also into account of the Committee's general comment No. 20 on non-discrimination in economic, social and cultural rights (2009) and to take all necessary measures to eliminate discrimination de jure and de facto.**

#### **Lesbian, gay, bisexual, transgender and intersex (LGBTI) persons**

21. The Committee is concerned that sexual relations between consenting adults of the same sex are criminalized in the Penal Code and that LGBTI persons are stigmatized and socially excluded as well as discriminated in accessing social services, particularly healthcare services (art. 2(2)).

**22. The Committee calls upon the State party to decriminalize sexual relations between consenting adults of the same sex. It also recommends that the State party take the necessary steps to put an end to the social stigmatization of homosexuality and ensure that no one is discriminated in accessing healthcare and other social services, due to their sexual orientation or gender identity.**

#### **Equal rights of women and men**

23. While noting with appreciation that gender equality is guaranteed through the Constitution and national laws, the Committee remains concerned at gender discriminatory provisions in the existing laws, particularly customary laws, that allow polygamous marriages and deny women's equal rights to inheritance and ownership of land. (art. 3).

24. **The Committee recommends that the State party take all necessary steps to review the existing laws with a view to repealing gender discriminatory provisions, including those in customary law, especially in relation to polygamous marriages and to the rights of women to inheritance and ownership of land. It also recommends that the State party review the Matrimonial Property Act and take all necessary measures to strengthen its enforcement once reviewed, including raising awareness among women, local and traditional communities and their leaders, the judiciary and the land administration officials and providing legal support to women to claim their rights.**

#### **Representation of women at decision-making level**

25. While welcoming the ‘two-third gender rule’ guaranteed in the Constitution and the progress made in the judiciary in this respect, the Committee is concerned that it is not fully implemented owing to the lack of legislative and policy framework and that the representation of women remains low at most decision-making levels, including in Parliament (art. 3).

26. **The Committee recommends that the State party take all the measures necessary to fully implement the two-third gender rule in the public sector, in both elective and appointive bodies and expeditiously adopt and implement the Duale Bill.**

#### **Unemployment and underemployment**

27. The Committee is concerned that the unemployment rate remains high, particularly among youth, women and persons with disabilities, and that the majority of work opportunities are in the unregulated informal economy. The Committee regrets that the measures taken to promote the employment of marginalized groups, including the 5 percent of employment quota for persons with disabilities in the public and private sector and the Access to Government Procurement Opportunities (AGPO) for youth, women and persons with disabilities, have not been effective (art. 6).

28. **The Committee recommends that the State party intensify its efforts to upgrade vocational skills of the workforce to meet the needs of the labour market and to create decent job opportunities, including through implementation of the National Employment Policy and Strategy of Kenya. It also recommends that the State party develop and implement special measures to promote the employment of youth, women and persons with disabilities, including creation of an effective enforcement system for the existing quota systems and the AGPO.**

#### **Minimum wages**

29. The Committee is concerned that minimum wages are not applied to all sectors of the economy and that the levels of minimum wages are not sufficient to ensure a decent living for workers and their families (art. 7).

30. **The Committee recommends that the State party take concrete steps to apply minimum wages to all employees, unionized or non-unionized, and to establish a mechanism to index the minimum wage to the cost of living, and also to increase the minimum wages to ensure an adequate standard of living for workers and their families. The Committee draws the attention of the State party to its general comment No. 23 on the Right to Just and Favourable Conditions of Work (E/C.12/GC/23 (2016)).**

### **Occupational safety and health**

31. While noting the increased number of labour inspections carried out in the past years, the Committee regrets the lack of information on the result and follow up to the inspections. The Committee is also concerned that the Directorate of Occupational Safety and Health Services lacks sufficient human and financial resources to carry out its mandate (art. 7).

**32. The Committee recommends that the State party provide the Directorate of Occupational Safety and Health Services with sufficient human and financial resources to carry out its mandate effectively. It also recommends that the State party include detailed information on labour inspections, particularly the result and follow-up, and the effectiveness of the National Policy on Occupational Safety and Health in its next period report.**

### **Migrant domestic workers abroad**

33. The Committee is concerned at the exploitative working conditions of Kenyan domestic workers in the Gulf and Middle East region and the lack of mechanisms to protect them in the countries where they work (art. 7).

**34. The Committee recommends that the State party take necessary steps to put in place effective mechanisms to protect Kenyan domestic workers overseas from abuse and exploitation, including through bilateral agreement with countries of destination, to strengthen the regulation of recruitment agencies and to enhance consular and legal services for these workers.**

### **Right to social security**

35. The Committee is concerned at the limited coverage of cash transfer programmes, leaving more than half of eligible people for the programmes unsupported and at duplication errors in beneficiary registration and overlapping benefits. It is also concerned that the amount of the benefits is not regularly adjusted or sufficient to ensure a decent living and payments are often delayed. The Committee is further concerned that the coverage of the National Social Security Fund and the National Health Insurance Fund is very low and excludes most workers in the informal economy (art. 9).

**36. The Committee recommends that the State party intensify its efforts to ensure that the cash transfer programmes cover all eligible beneficiaries and increase the amount of benefits and regularly readjust the amount to ensure the beneficiaries a decent living, and timely payment. It also recommends that the State party take the necessary measures to extend the coverage of the National Social Security Fund and the National Health Insurance Fund to all employees in the formal and informal economy and the self-employed. The Committee draws the attention of the State party to its general comment No. 19 on the right to social security (2008) and its statement on social protection floors (2015).**

### **Domestic violence**

37. While welcoming the adoption of the Protection against Domestic Violence Act, the Committee is concerned that the Act is not effectively enforced and that domestic violence is still pervasive, particularly against women, children and persons with disabilities and that the majority of cases of domestic violence go unreported (art. 10).

**38. The Committee recommends that the State party take all necessary measures to strengthen the enforcement of the Act, including by conducting training for law**

**enforcement officials and judges on the application of the Act and conduct awareness-raising campaigns for the public.**

#### **Female genital mutilation**

39. The Committee remains concerned that, despite the gradually decreasing trend of female genital mutilation (FGM), it is still rampant, particularly in the North Eastern region where the prevalence rate is 97.5% and that the perpetrators are rarely convicted and punished under the Prohibition of Female Genital Mutilation Act (art. 10).

**40. The Committee recommends that the State party intensify its effort to prevent and eradicate FGM and other harmful traditional practices, through strengthening the enforcement of relevant legislation and enhancing awareness-raising campaigns on the negative impact of genital mutilation particularly at the community level, to contribute to the abandonment of this practice.**

#### **Poverty**

41. The Committee is concerned at the high percentage of people living under the poverty line and the failure of the State party to significantly reduce the poverty rate (art. 11).

**42. The Committee recommends that the State party intensify its efforts to eradicate poverty, including through the comprehensive analysis of the needs of the most disadvantaged and marginalized individuals and groups and adoption of concrete and targeted measures to address them.**

#### **Adequate food and malnutrition**

43. The Committee is concerned at the prevalence of chronic malnutrition and the high level of stunting, particularly among children and those living in arid and semi-arid areas (art. 11).

**44. The Committee recommends that the state party take steps to address chronic food insecurity, chronic malnutrition and the critical nutritional needs of children, particularly in arid and semi-arid areas, including the adoption of a national action plan on food security and nutrition in line with the Committee's general comment No. 12 on the right to adequate food (1999) and the 2004 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.**

#### **Right to housing**

45. The Committee is concerned at the lack of effective measures to provide social housing for low-income families, at the large proportion of the population living in informal settlements in poor living conditions with limited access to basic services, including water and sanitation, healthcare and education (art. 11).

**46. The Committee recommends that the State party take all necessary measures to provide affordable social housing units for low-income families and to improve living conditions in informal settlements, including through the adoption of the Housing Bill and the Community Land Bill, and of the National Slum Upgrading and Preventing Policy, and allocate sufficient budgetary resources to ensure the implementation of such measures.**

### **Forced evictions**

47. The Committee reiterates its concerns that pastoralist communities and persons living in informal settlements are under constant threat of eviction due to the lack of legal security of tenure and that forced evictions continue without prior notice and provision of adequate alternative housing or compensation. It is also concerned that the State party has not yet enacted a legislative framework to recognize and protect communities' right to land and to explicitly prohibit forced evictions and define the circumstances and safeguards subject to which evictions may be carried out, despite the decisions of its own domestic courts (art. 11).

**48. The Committee recommends that the State party take concrete steps to guarantee security of tenure for all, including residents of informal settlements. It also recommends that the State party prioritize the enactment of the Community Land Bill and the Evictions and Resettlement Bill. The Committee further recommends that the State party implement judicial orders that provide remedies to victims of forced evictions as a matter of priority and adopt a national-level moratorium on mass evictions until adequate legal and procedural safeguards are in place. The Committee draws the attention of the State party to its general comment No. 7 (1997) on the right to adequate housing and the Basic Principles and Guidelines on Development-Based Evictions and Displacement (A/HRC/4/18 (2007)).**

### **Water and sanitation**

49. The Committee is concerned at the insufficient access to safe drinking water and adequate sanitation with huge disparities between urban and rural areas, and formal and informal settlements. It is also concerned at the lack of effective regulation of water prices, particularly unregistered small-scale water vendors, and at the high prices that people living in informal settlements and rural areas have to pay for water (art. 11).

**50. The Committee recommends that the State party increase the budgetary allocation to improve the access to water and sanitation, particularly in urban informal settlements and rural areas. It also recommends that the State party intensify its efforts to effectively regulate water prices and ensure compliance with the tariff guidelines, which were set by the Water Services Regulatory Board, particularly by small-scale water vendors.**

### **Access to healthcare services**

51. The Committee is concerned at the inadequate budget allocation to the health sector, very limited coverage of the National Health Insurance Fund (NHIF) and significant share of out of pocket payment in health expenditure, which limit access to health for disadvantaged and marginalized persons. The Committee further regrets the regional disparities in access to healthcare services and the delay in enacting the Health Bill and implementing the decision of High Court in *PAO and 2 others v. Attorney General (2012)* and amending the Anti-Counterfeit Act (No. 13 of 2008) (art. 12).

**52. The Committee recommends that the State party take concrete measures to enhance access to health services, particularly for disadvantaged and marginalized individuals and groups, including through increasing budgetary allocation to the health sector and expanding the coverage of the NHIF. It also recommends that the State party expeditiously adopt the Health Bill and amend the Anti-Counterfeit Act.**

### **Sexual and reproductive health**

53. The Committee is concerned at the criminalization of abortion under any circumstance provided in the Penal Code, the large number of unsafe abortions and the

consistent high rate of maternal mortality. It is also concerned at cases of post-delivery detention of women unable to pay their medical bills in health care facilities. It is further concerned at the limited access to sexual and reproductive health information and services as well as contraceptives, especially for women living in rural areas (art. 12).

54. **The Committee recommends that the State party amend its legislation on the prohibition of abortion in order to render it compatible with other fundamental rights, such as women's rights to health, life and dignity and reinstate 'the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya.'** It also recommends that the State party take concrete measures to ensure free maternal healthcare services and to prevent the incidence of post-delivery detention in health care facilities. It further recommends that the State party strengthen its efforts to improve access to sexual and reproductive health information and services, including to contraceptives. In this regard, the Committee draws the attention of the State party to its general comment No. 22 on the right to sexual and reproductive health (E/C.12/GC/22 (2016)).

#### **HIV/AIDS**

55. The Committee is concerned at the high rates of HIV/AIDS and of new infections and the high mother-to-child transmission rate (MTCT) which contributes a high level of under-five child mortality. It is also concerned that the MTCT is criminalized. It is also concerned at the large gap between children and adults in receiving antiretroviral treatment (ART) and the low retention rate of women on ART within a year of initiation. While welcoming the High Court decision on the HIV and AIDS Prevention and Control Act, it is concerned that the State party has not yet implemented the decision (art. 12).

56. **The Committee recommends that the State party intensify its efforts to combat the spread and effects of HIV/AIDS, including MTCT, by effectively implementing relevant national policies, strategies, guidelines and programmes on HIV/AIDS, and extending the coverage of free antiretroviral treatment, particularly to children and women. It also recommends that the State party make an adequate amendment to the HIV and AIDS Prevention and Control Act in accordance with the High Court decision (Petition No. 97, 2010).**

#### **Right to education**

57. The Committee is concerned that the State party has not dedicated sufficient resources to finance school facilities and qualified teachers, to ensure effective enjoyment of the right to free primary education for all. It is also concerned that inadequacies in the public schooling system have led to the proliferation of so-called "low-cost private schools" which has led to segregation or discriminatory access to education particularly for disadvantaged and marginalized children, including children living in informal settlements and arid and semi-arid areas (arts. 13 and 14).

58. **Recalling that the State has the primary responsibility in ensuring to right to education, the Committee recommends that the State party take all necessary measures to strengthen its public education sector. The State party should increase the budgetary allocation to primary education and take all necessary measures to improve the access to and quality of primary education for all without hidden costs, particularly for children living in informal settlements and arid and semi-arid areas. It also recommends that the State party bring the Registration Guidelines for Alternative Provision of Basic Education and Training in line with Articles 13 and 14 of the Covenant and other relevant international standards; that it ensure that all schools, public, private, formal or non-formal, are registered; and that it monitor their compliance with the guidelines.**

59. While noting the measures taken to assist children who left school to continue to study, the Committee reiterates its concern at the large number of children dropping out of school, particularly girls due to early marriage and pregnancy (arts. 13 and 14).

60. **The Committee recommends that the State party take the necessary measures to address the root causes of school drop-out and intensify its efforts to prevent students from dropping out of school and to bring those children who drop out of school back to school to complete their education.**

#### **Access to the Internet**

61. While noting that more than 50 percent of the population has access to the Internet, the committee expresses its concern that, among disadvantaged and marginalized individuals and groups and in rural areas, such access is limited (art. 15).

62. **The Committee recommends that the State party continue working to expand Internet access, in particular for disadvantaged and marginalized individuals and groups.**

#### **D. Other recommendations**

63. **The Committee encourages the State party to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.**

64. **The Committee also encourages the State party to withdraw its reservation made with regard to paragraph 2 of article 10 of the Covenant.**

65. **The Committee recommends that the State party take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights, in order to facilitate the assessment of progress achieved by the State party in the compliance of its obligations under the Covenant for various segments of the population. In this context, the Committee refers the State party to, inter alia, the conceptual and methodological framework on human rights indicators developed by OHCHR (HRI/MC/2008/3).**

66. **The Committee requests the State party to disseminate the present concluding observations widely among all levels of society, particularly among members of Parliament, public officials and judicial authorities, and to inform the Committee, in its next periodic report, about the steps taken to implement the recommendations contained herein. It also encourages the State party to engage non-governmental organizations and the wider civil society in the implementation of the present recommendations, as well as in the preparation of its next periodic report.**

67. **Committee requests the State party to submit its sixth periodic report, to be prepared in accordance with the reporting guidelines adopted by the Committee in 2008 (see E/C.12/2008/2), by 31 March 2021. The Committee also invites the State party to update its common core document in accordance with the harmonized guidelines on reporting under the international human rights treaties (see HRI/GEN/2/Rev.6, chap. I).**