

**JOINT CIVIL SOCIETY ORGANISATIONS  
(CSO) SHADOW REPORT IN RESPONSE TO  
THE THIRD PERIODIC REPORT BY KENYA  
TO THE COMMITTEE AGAINST TORTURE  
AND OTHER CRUEL, INHUMAN OR  
DEGRADING TREATMENT OR  
PUNISHMENT (2013-2022) SUBMITTED BY  
INDEPENDENT MEDICO-LEGAL UNIT  
(IMLU)**





The **Usalama**  
Reforms Forum



## **Preface.**

This report has been written collectively with the contribution of twenty-one (21) National and International Civil Society Organisations for consideration by the United Nations Committee Against Torture at its

73<sup>rd</sup> Periodic Review Session to be held in Geneva, Switzerland from 19<sup>th</sup> April- 13<sup>th</sup> May 2022 during which the Third Periodic Report of the Republic of Kenya will be examined.

The information detailed in this report has been compiled from primary and secondary sources of information by the contributing organisations through a process involving meetings convened to identify the substantive issues prior to drafting of the report in addition to documenting, revising and validating the report. The meetings were organised and supported by the Independent Medico-Legal Unit (IMLU).

The report was produced with technical support from the International Rehabilitation Council for Torture Victims (IRCT)

### **List of all Kenya Civil society that worked on this report:**

*The Independent Medico-Legal Unit, Centre for Rights Education and Awareness; Haki Africa; The Kenyan Section of the International Commission of Jurists (ICJ Kenya); Kenya Human Rights Commission; Law Society of Kenya; Legal Resources Foundation Trust; Nakuru County Human Rights Network; Defenders Coalition ; National Gay and Lesbian Human Rights Commission; Refugee Consortium of Kenya; Muslims for Human Rights (MUHURI), Faraja Foundation; International Centre for Transitional Justice; Social Justice Centres; Stop the Traffik; Protection International Africa; Kariobangi Paralegal Network; Usalama Forum; Wangu Kanja Foundation; Reproductive Health Network; Transparency International.*

## Contents

ACRONYMS AND ABBREVIATIONS	6
INTERPRETATION	6
II: EXECUTIVE SUMMARY	7
III: CONCERNS AND RECOMMENDATIONS	9
Articles 1 and 4	9
Article 2	14
Article 3	27
Article 10	30
Article 11	31
Articles 12 and 13	33
Article 14	48
Article 16	49

## ACRONYMS AND ABBREVIATIONS

- a) **'CAT' or 'Convention'**: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- b) **DPP**: Director of Public Prosecutions
- c) **FGM**: Female Genital Mutilation
- d) **Government**: Government of Kenya
- e) **HRDS: Human Right Defenders**
- f) **ICC**: International Criminal Court
- g) **IEBC**: Independent Electoral and Boundaries Commission
- h) **IMLU**: Independent Medico-Legal Unit
- i) **IPOA**: Independent Policing Oversight Authority
- j) **KMA**: Kenya Medical Association
- k) **KNCHR**: Kenya National Commission on Human Rights
- l) **LGBTIQ**: Lesbian, Gay, Bisexual, Trans, Intersex and Queer
- m) **NGEC**: National Gender and Equality Commission
- n) **NGOs**: Non-Governmental Organisations
- o) **NPM**: National Preventive Mechanism
- p) **NPS**: National Police Service
- q) **PEV**: Post-Election Violence
- r) **UNHCR**: United Nations High Commission for Refugees
- s) **WHRD**: Women Human Rights Defenders

## INTERPRETATION

- a) **'Committee against Torture' or 'Committee'**: Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- b) **Government**: Government of Kenya

## II: EXECUTIVE SUMMARY

- 1) The period 2014-2021 has witnessed normative developments of note regarding the right to freedom from torture and ill-treatment in Kenya. In 2017 Kenya made a tremendous step in the enactment of the Prevention of Torture Act and the National Coroners Service Act which were to ensure that perpetrators of torture and extra judicial killings are held accountable. Kenya also enacted the Persons Deprived of Liberty Act in 2014 establishing excellent bases for ensuring the rights of persons deprived of liberty and monitoring compliance. However, these acts have not been fully implemented since their enactment. The lack of progress in implementing the Acts increases the risk of human rights abuses and limits the preparedness of the state to handle such abuses in a fair and effective manner.
- 2) The outbreak of Coronavirus pandemic in late 2019 created a monumental and unprecedented health crisis that tested the global foundation of human rights, the rule of law and democracy. Kenya, like other countries in the world, introduced a raft of measures to curb the spread of the virus and mitigate its impact on her people. Whereas the necessity of the measures could not be denied, their enforcement raised more concerns than the pandemic itself. In particular, the country became inundated with reports of police brutality against civilians, especially the low-income earners. Cases of deaths and injuries arising out of police excesses.
- 3) The Judiciary has during this period also continued to play its interpretive and adjudicatory functions in a manner which has on the whole provided a level of

redress to victims of torture who have lodged claims before the courts. The Judiciary has sentenced several officers responsible for extra judicial killings.<sup>1 2</sup>.

- 4) During the last four years, the State continued to engage with various international and regional human rights treaty bodies and mechanisms, including the Committee on the Rights of Persons with Disabilities, the Committee on Elimination of Racial Discrimination, the Human Rights Committee, the Committee on Elimination of Discrimination against Women, and the African Commission on Human and Peoples' Rights. The state was non-committal in taking steps to eradicate torture and ill-treatment; yet these commitments were by and large not realised in practice.
- 5) Despite its prohibition under both international and national law, torture and other cruel, inhuman or degrading treatment and punishment still occur with frequency in Kenya mainly in detention. Findings from a prevalence of torture survey undertaken by IMLU in 2016 indicated 30.3% of the surveyed respondents had been victims of torture or ill treatment a 7% increase from 2011 when the survey was last conducted.<sup>3</sup> Between 2019 and 2021 IMLU has documented 419 cases of torture with a 296% increase over the 3 years.
- 6) Despite the comprehensive legislative framework, the rate of investigation of extrajudicial killings has been minimal hence entrenching a culture of impunity within the security agencies. As of 2020, the Independent Policing Oversight Authority had received 18,166 complaints, 6,659 cases had been referred for investigations, and 319 forwarded to the ODPP, 95 are before court and only secured 8 convictions.<sup>4</sup>

---

<sup>1</sup> <http://kenyalaw.org/caselaw/cases/view/169489/>

<sup>2</sup> <http://kenyalaw.org/caselaw/cases/view/149253/>

<sup>3</sup> <https://www.imlu.org/index.php/shortcode/reports/typgraphy/send/3-reports/50-full-national-torture-prevalence-survey-2016>

<sup>4</sup> <http://www.ipoa.go.ke/wp-content/uploads/2020/01/IPOA-Performance-Report-Jan-June-2019.pdf>



### III: CONCERNS AND RECOMMENDATIONS

#### Articles 1 and 4

#### **Enactment and Implementation of the Prevention of Torture Act.**

- 7) In 2017 Kenya made a tremendous step in the enactment of the Prevention of Torture Act<sup>5</sup>. The Prevention of Torture Act 2017 provides for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment and reparations to victims of torture and cruel, inhuman or degrading treatment or punishment.
- 8) The Act gives effect to Articles 25 (a) and 29 (d) of the Constitution which, respectively, establish freedom from torture and ill-treatment as an absolute right, and affirm everyone's right not to be subjected to torture and ill-treatment.
- 9) We note that no prosecutions have taken place under the Act to date. Indeed, one of our concerns is that prosecuting authorities may in future be tempted to initiate prosecutions using laws alternative to the Act. A related concern is that regulations to make the Act operational have not been developed. Furthermore, capacities of State agencies and efforts to raise awareness on the Act and its existence remain limited.
- 10) The state has also not developed and gazetted the guidelines linking the Prevention of Torture Act and the Victim Protection Act to ensure victims of torture are able to receive reparations including rehabilitation services. Furthermore, capacities of State agencies and efforts to raise awareness on the Act and its existence remain limited
- 11) In 2020, a technical team was formed to assist in the drafting of a charge sheet on the Prevention of Torture Act however despite it being completed in 2021 the

---

<sup>5</sup> <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PreventionofTortureAct2017.pdf>

Office of the Director of Public Prosecutions is yet to launch it which is hampering prosecutions under the Act.

We, therefore, recommend that:

- a) *The state fully implements the Prevention of Torture Act 2017 and develops a monitoring and evaluation tool to assess the progress of implementation. This must include developing the regulations necessary for its implementation through a consultative process.*
- b) *KNCHR should appraise the public on the extent to which it has begun implementing its functions under the Act and be provided with adequate resources to enable it to dispense its mandate under the Act effectively;*
- c) *The state invests in immediate capacity building for actors in the administration of the justice sector, including security and law enforcement officials, judicial officers, prison officials, prosecutors, among others.*
- d) *The state should also carry out sensitization amongst the members of the public on an ongoing basis, to ensure that Kenyans understand the provisions of the Prevention of Torture Act 2017 and support its implementation.*
- e) *The state should launch the rapid response guide on the Prevention of Torture Act to ensure that perpetrators are charged under the Act.*
- f) *The state should develop and gazette the guidelines linking the Prevention of Torture Act and the Victim Protection Act to ensure victims of torture are able to receive reparations including rehabilitation services.*

### **Reviewing of the Children's Act.**

12) While Section 18 of the Children Act (No 8 of 2001) prohibits the subjection of a child to torture or ill-treatment, Section 20 of the Act provides that the penalty for this offense is a sentence not exceeding 12 months or a fine not exceeding 50,000 shillings (500 dollars) or both sentence and fine. This means that the punishment

for crimes of torture or ill-treatment on children is not incommensurate with the gravity of the crime. and does not match the prescribed period in the Prevention of Torture Act of 25 years or life imprisonment in case the victim dies.

13) Despite recommendations that the State should repeal Section 20 of the Children Act, this has still not happened. We do however note that under the Prevention of Torture Act, provisions in respect of torture prevail over all other laws and is therefore also applicable to torture of children

14) The National Council on the Administration of Justice through National Task Force on Children Matters which was gazetted on 10 December 2015 is reviewing the Children Act and a bill has been drafted.

We recommend that;

- a) *Section 20 of the Children Act which provides penalties for a person who subjects a child to torture or ill-treatment should be amended to align the Act with the provisions in the Prevention of Torture Act.*
- b) *The government should fast-track the enactment of the children bill 2021 presented to the parliament through the senate to enable measures on safety, care and protection of the rights of children against all forms of torture to be systematically established. The government through recommendations by children's bodies, National Task Force, and the National Children council on child policy matters needs to ensure that all children policies are standardised and integrated into a one policy document that includes all sectors dealing with children.*
- c) *Through the department of children services an official national data management tracking system should be established for documenting children records and their history back birth to all stages of their childhood. This is to run hand in hand with a strengthened monitoring and evaluation structure with relevant bodies in the country to protect and secure the future of children.*

d) *The government should set annual budget allocation to different sectors dealing with children in difficult situation i.e. children in the prison.*

### **Prosecution of State Officials for Torture.**

- 15) Official comprehensive data on the investigation, prosecution and conviction of law-enforcement, security or intelligence officials who have allegedly committed extrajudicial killings, enforced disappearances or other excessive use of force is limited. Some human rights NGOs though have established their own databases. Between 2014 and 2021, IMLU recorded, 286 cases of torture which only represents a fragment of the victims as IMLU. IMLU data identified several different perpetrators including Kenya Police Service being the main perpetrators, Kenya Forest Service, officers from the Special Crimes Prevention Unit, prison warders, city council askaris, Kenya Defence Forces officers, chief/assistant chiefs and Kenya Wildlife Service officers. Further, the missing voices coalition data on extra judicial killings and enforced disappearances indicated that out of 834 cases reported on only 28 have court prosecution procedures started against them for these cases. <sup>6</sup>
- 16) Lack of data gives the impression of the absence of violations when in fact the dearth of data simply perpetuates impunity, impunity and clearly shows the Prevention of Torture is not being implemented at all. The level of coordination between relevant State institutions is not enough to enable effective data collection and collation, analysis and storage.
- 17) Kenya set up its witness protection framework by enacting the Witness Protection Act<sup>7</sup> in 2008 which set up the Witness Protection Agency (WPA) mandated to

---

<sup>6</sup> <https://missingvoices.or.ke/statistics/>

<sup>7</sup> [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WitnessProtectionAct\\_No16of2006.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf)

provide special protection to threatened or intimidated witnesses to ensure their security and welfare is guaranteed when testifying in court. However, in cases dealing with serious crimes that involve the police or State officers, a witness may need protection from the moment of reporting, discovery or whistleblowing. There is a need to empower oversight and investigatory agencies such as IPOA, KNCHR, EACC who interact with witnesses at early stages to directly recommend protection for them if they see fit. There needs to be a better way of identifying witnesses and protecting them in a non-bureaucratic manner.

- 18) Other players in the criminal justice system such as social justice centres and NGOs working on extrajudicial killings have observed that usually, by the time the Agency establishes contact with certain vulnerable witnesses, it may be too late due to the nature of threat
- 19) During the implementation of the COVID-19 pandemic, there was widespread use of excessive, arbitrary and unnecessary force by the police against the public in the enforcement of the measures leading to loss of lives and injuries. The poor and underprivileged bore the brand of the violence. State and non-state bodies reported receiving complaints that confirmed abuse of power by the police in contravention of the law. For instance, KNCHR had by 27 April 2020 registered 117 complaints relating to the pandemic out of which 66 related to use of excessive force by the NPS. The figure had risen to 220 complaints by 6 June 2020. Similarly, IPOA reported receiving 93 (21 of them relating to death) complaints against police officers enforcing the by 22 September 2020.
- 20) IMLU documented 70 cases of Torture of which only 2 cases have been taken by the government to court during the pandemic.

We recommend that:

- a) *An official statutory database should be established and managed on behalf of relevant agencies, including the National Police Service (NPS), the Independent Police Oversight Authority (IPOA), the ODPP, KNCHR, the National Crime Research Centre, and the Judiciary for synthesising and administering investigation, prosecution and conviction data of persons charged with serious crimes such as torture or ill-treatment; and*
- b) *The database should take account of information furnished by human rights NGOs, and it should be accessible to State and non-state actors based on relevant freedom of information legislation.*
- c) *To establish a database on torture-related complaints in order to determine the prevalence of torture within oversight bodies especially in the security sector.*
- d) *To ensure publication of outcomes of investigations to allow for public oversight and avoid impunity.*
- e) *The Office of the Director of Public Prosecutions should work in collaboration with the Independent Police Oversight Authority to ensure that action is taken on the cases that are recommended for prosecution.*
- f) *The government establishes an independent investigative unit for Kenya Wildlife Service officers and Kenya Forest Service Officers.*
- g) *Investigative agencies such as IPOA, KNCHR, EACC who interact with witnesses coordinate between themselves to ensure that witnesses and victims receive protection where necessary.*

## **Article 2**

### **Implementation of the Person deprived of Liberty Act.**

- 21) The Persons Deprived of Liberty Act came into force into 2015. The Act enumerates the rights and limitations of persons deprived of liberty, including:

humane treatment and human dignity; rights upon arrest and due process of law; The Act also establishes mechanisms and institutions for monitoring compliance by security officials with legal safeguards for persons deprived of liberty. These include the complaints and disciplinary procedure under which an inmate may lodge a complaint to the officer-in-charge of a detention institution, the relevant cabinet secretary, KNCHR or the Commission for Administrative Justice. The statute also establishes the Consultative Committee on Persons Deprived of Liberty.

22) Kenya now has the Bond and Bail Guidelines issued by the Judiciary in 2015 which gave substance to relevant constitutional principles and rights, including Article 49 (1) (h) of the Constitution which provides that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial unless compelling reasons exist for not releasing such person.<sup>8</sup> We commend the courts for striving to enforce the guidelines even where the State has pushed back with strong demands that certain accused persons should not be bailed.

23) While the Constitution and the Act establish excellent bases for ensuring the rights of persons deprived of liberty and monitoring compliance, these rights are in practice still not enjoyed to much appreciable extent and compliance is not realised in practice. First, the Act is still not being implemented fully, in respect of the Consultative Committee on Persons Deprived of Liberty which although formally established has not been made operational to any appreciable extent, as well as the complaints and disciplinary procedure. Indeed, despite the provisions of common Section 50 of the Kenya National Commission on Human Rights Act (No 14 of 2011) and the National Gender and Equality Commission Act (No 15 of 2011), one study shows that inmates are unaware they may write to KNCHR to file

---

<sup>8</sup> National Council on Administrative Justice Bail and Bond Policy Guidelines (2015).

complaints.<sup>9</sup> This is evident from the data from the commission, between 2018 and 2022, the KNCHR received a total of 51 complaints of torture, cruel, inhuman and degrading treatment in places of detention. These include: 40 cases at police stations, 8 in prisons and 3 at military camps.<sup>10</sup>

We recommend that:

- a) *The Persons Deprived of Liberty Act should be implemented fully, including through the establishment and capacitation of the Consultative Committee on Persons Deprived of Liberty and the operationalisation of the complaints and disciplinary procedure;*
- b) *Persons deprived of liberty are adequately informed about the existing complaints mechanisms.*

### **Implementation of the Legal Aid Act.**

24) The Legal Aid Act<sup>11</sup> was enacted in 2016 which facilitated access to justice by establishing the National Legal Aid Service mandated to offer legal aid services.

25) The National legal aid service is heavily underfunded which has hampered its full operationalization and decentralisation.

26) Access to justice may not be realised if the Act is implemented on a piecemeal basis. The National Legal Aid Programme has only been rolled out in 3 counties out of the 47 counties and has only five lawyers. Request-approval procedures and institutions have not been decentralised, and there is no regard for the most marginalised people in the community. Furthermore, 3 decentralised offices do not offer legal aid services across all areas.

---

<sup>9</sup> [African Policing Civilian Oversight Forum Pre-Trial Detention for Persons with disabilities in Correctional Institutions \(2017\).](#)

<sup>10</sup> Data from the KNCHR Complaints Management System

<sup>11</sup> [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LegalAidAct\\_No.\\_6\\_of\\_2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LegalAidAct_No._6_of_2016.pdf)



We recommend that:

- a) *The Programme should be decentralised to serve all regions of the country and cover the whole indigent populations' concerns;*
- b) *Public awareness raising on the Programme's aims and available services should be undertaken on an on-going basis, and the capacities of relevant officials should be built;*
- c) *The National legal aid service should be given sufficient resources to enable the realisation of access to justice as envisioned in the Kenyan Constitution and international instruments that Kenya has ratified and;*
- d) *A national database on services provided should be established.*

#### **Ratification on International Instruments.**

27) Kenya has not ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). This leaves Kenya without an independent National Preventive Mechanism (NPM) to undertake regular visits to places of detention and formulate recommendations to the authorities for the prevention of torture in detention facilities.

28) Kenya has also not ratified the International Convention for the Protection of All Persons from Enforced Disappearance therefore enforced disappearance is not recognised in legislation as a crime and there aren't any avenues for judicial recourse. Enforced disappearances of persons in police custody are increasing as earlier stated in our data.

We recommend that:

- a) *The State ratifies the OPCAT and designate KNCHR as the NPM with a mandate to prevent and investigate torture.*

b) *The State ratifies the International Convention for the Protection of All Persons from Enforced Disappearance.*

### **Human Trafficking.**

29) Prevention of human trafficking is effected under the terms of the Counter-Trafficking in Persons Act (CiiP) (No 8 of 2010). We welcome the establishment of the Counter-Trafficking in Persons Advisory Committee in 2014, the development of the National Plan of Action for Combatting Human Trafficking (2013-2017) and the development of the Guidelines on the National Referral Mechanisms for assisting victims of human rights trafficking in Kenya 2016.

30) We welcome the fact that the National Police Service has trained two units within the Directorate of Criminal Investigations (DCI) on human trafficking. These units are the Transnational Organized Crime Unit (TOCU) and the Anti Human Trafficking Child Protection Unit. The Government has, however, not provided protection for victims of human trafficking as defined in Section 15 of the CTiP Act (2010). It has not operationalized the Victim Assistance Trust Fund, established safe shelters for victims of trafficking, or even provided medical and services such as psychosocial support which are all important to ensuring successful reintegration of victims of trafficking into society.

31) Persons living with albinism are attacked and murdered. Their arms and legs, bones and blood, fingers and toes are commodities. Limbs and digits are hacked off to feed an illegal trade in the body parts of persons with albinism, which are sold in the form of bogus potions or charms<sup>12</sup>. There have been thirteen reported attacks in Kenya, including five killings and eight survivors.<sup>13</sup> These numbers are

---

<sup>12</sup> [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/KEN/INT\\_CERD\\_NGO\\_KEN\\_27123\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/KEN/INT_CERD_NGO_KEN_27123_E.pdf)

<sup>13</sup> Under the Same Sun. "Reported Attacks of Persons with Albinism" March 23, 2017

likely very low, as there are almost no monitoring mechanisms, family members are sometimes involved and secrecy usually surrounds witchcraft practice and ritual killings - the sociocultural context of most of these attacks and violations.

We recommend that the Government:

- a) Ensures *implementation of section 15 of the Counter Trafficking in Persons Act (2010) by empowering the Advisory Committee to develop a plan “for return to and from Kenya, resettlement, re-integration, appropriate shelter and other basic needs, psychosocial support, appropriate medical assistance, legal assistance or legal information, including information on the, relevant judicial and administrative proceedings; or any other necessary assistance that a victim may require.”*
- b) *Provide safe shelters for victims of human trafficking, which are able to adequately cater to women and girls as well as boys and men;*
- c) *The Transnational Organized Crime Unit and the Anti Human Trafficking Children Protection Unit should be strengthened and decentralised throughout the country to ensure effective protection of victims of trafficking.*
- d) *The State enter into enforceable agreements with Middle-Eastern countries to ensure the effective protection of Kenyan workers in the Middle-East.*
- e) *All cases of attacks and rights violations against people with albinism are investigated and prosecuted properly and immediately. The vulnerability and marginalization of persons with albinism should be considered an aggravating factor. Publicize convictions and sentences in all cases wherever possible to increase the deterrent effect.*
- f) *The government should investigate, collect and publish data about violence and discrimination against Kenyans with albinism. Better data is needed on attacks, murders, employment, health and other indicators of well-being as, evidence-based policy requires it.*

## **Violence against Women.**

- 32) We welcome the enactment of the Protection against Domestic Violence Act which provides for the protection and relief of victims of domestic violence and the protection of spouses and children from domestic violence. Unfortunately, there is lack of awareness by the public of this Act and the limited implementation capacities by relevant officials. There is also lack of data on cases taken to court under the Act which is a concern that the legislation has not been operationalized.
- 33) Kenya has very few safe houses which limits the implementation of the Act once the Court gives Protection orders.
- 34) Section 43 (5) of the Sexual Offences Act refers to the assumption that rape cannot happen in the context of marriage. According to research done by the National Crime Research Centre on gender-based violence 38% of the female respondents and 20% of the men reported partner violence.<sup>14</sup> This legislation has the effect of denying access to justice for survivor of partner violence.
- 35) Women and girls continue to face SGBV, and the number of SGBV cases has risen in times of political and civil unrest and conflict, including during elections; during natural disasters; and during public health emergencies such as the COVID-19 pandemic.<sup>15</sup> The challenges which exacerbate SGBV include inadequate political will; failure to invest in safe shelters<sup>16</sup> and gender violence recovery centres; inadequate training of law enforcement officers on investigation and prosecution of SGBV cases; poor prosecution of SGBV cases; and lack of coordination among the actors in the access to justice chain and the referral

---

<sup>14</sup> [http://crimeresearch.go.ke/wp-content/uploads/2018/02/wwwroot\\_publications\\_Gender-Based-Violence-in-Kenya.pdf](http://crimeresearch.go.ke/wp-content/uploads/2018/02/wwwroot_publications_Gender-Based-Violence-in-Kenya.pdf)

<sup>15</sup> In Focus: Gender equality matters in COVID-19 response, UN Women, Available at <[https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response?gclid=Cj0KCQjw6-SDBhCMARIsAGb17UikEwgxYjfiKStaQIGj3SmoUR2xUcyZd7aCaTWAZPpvxJ698wVOwMlaAox3EALw\\_wcB](https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response?gclid=Cj0KCQjw6-SDBhCMARIsAGb17UikEwgxYjfiKStaQIGj3SmoUR2xUcyZd7aCaTWAZPpvxJ698wVOwMlaAox3EALw_wcB)>

<sup>16</sup> For example see <<https://nairobi.news.nation.co.ke/news/idle-city-hall-houses-to-be-converted-to-safe-houses-for-gbv-victims>>

pathway. Most often, victims of SGBV continue to live in the same environment as their perpetrators, which further traumatises the victims. Victims also have to take care of their medical costs and psychosocial support

36) The establishment of gender desk in all police stations is a welcomed initiative, however they are not regularly staffed with police officers who have received specialised training on handling sexual violence cases, additionally the state of the gender desk centres is in such a deplorable state, thus creating double trauma for the survivors going to report.

37) The National Police Service launched POLICARE which is an integrated response to Sexual and Gender Based Violence (SGBV) in Kenya. It is designed as a multi-agency victim centred “ONE STOP CENTER” service provider. The service providers will include Police, Forensic investigators, Health providers, Psychologists, DPP representative, a Magistrate on call, Medical-legal, Gender experts, Correctional personnel among others all under one roof. However, despite the launch the service is only available in 3 counties and it is heavily underfunded.

38) The practice of investigation and prosecution of SGBV in Kenya has not been successful in responding to the prevalence of incidents. The problem emerges when the actual investigations and reported prosecutions of SGBV are compared and contrasted to the wealth of laws and policies enacted to combat the same. The resultant minimal success of the investigation and prosecution process is evident. Sexual offences cases account for three per cent of the cases heard in magistrates’ courts with only five percent of the cases resulting in a conviction. Withdrawal of criminal charges are very high presumably because of the poor quality of investigations.

We recommend that:

- a) *The Protection against Domestic Violence Act is implemented fully including by setting up of safe houses, building capacity for agencies within the justice sector and raising public awareness about the Act;*
- b) *The National Police Service ensures that gender-inclusive protocols are employed in all police stations to facilitate effective implementation of the Protection against Domestic Violence Act; and*
- c) *Section 43 (5) of the Sexual Offences Act is repealed.*
- d) *Policare is allocated an adequate budget to ensure that the services are decentralised to every county.*
- e) *the quality of investigations is improved through capacity building for investigative officers and allocations of adequate resources.*
- f) *The State facilitates and adequately resources the establishment of safe-houses across the country drawing on the good practice of Makueni County which has established a furnished safe-house for victims of SGBV.*

**Female Genital Mutilation.**

- 39) According to the 2014 Kenya Demographic and Health Survey, the national prevalence of female genital mutilation (FGM) reduced to 21% in 2014 from 27% in 2007. There is however no national comprehensive data on the implementation of the Prohibition of Genital Mutilation Act, and investigation, prosecution and conviction are limited even in regions which are notorious for the practice.
- 40) Despite the law prohibiting FGM, FGM continues to be practiced in various parts of the country due to deep rooted cultural beliefs. It is difficult to report such practices as most of them happen in the family setting. Girls are made to believe they may get a husband only if they participate in the ritual.
- 41) FGM remains endemic in communities such as the Gusii, Somali and Maasai who have an FGM prevalence of 96%, 94% and 73% respectively. Kenya also continues

to face challenges in prosecuting perpetrators of FGM on account of lack of evidence, intimidation of witnesses and the relocation of survivors. Other challenges include insufficient capacities and resources in key State agencies such as the Office of Director of Public Prosecutions, and issues such as cross-border FGM and medicalization. Practising communities also continue to evolve and change tactics to avoid facing the law, including by carrying out the practice in secrecy or by subterfuge such as during male circumcision ceremonies.

42) We also wish to raise concerns regarding another harmful cultural practice which takes place in the Samburu community in Samburu, Laikipia, Marsabit and Isiolo counties. The practice of girl child beading sanctions non-marital sexual relations between Samburu men in the warrior age-group (*morans*) and young Samburu girls who are not yet eligible for marriage. A *moran* gives beads to a girl who may be as young as nine years to signify the beginning of a sexual relationship, following negotiations with the girl's mother or brothers. The negative consequences of girl-beading include defilement, gender-based violence, abortion, and infanticide and child marriage. One research concluded that child-beading denies girls their childhood, disrupts their education, decreases their opportunities and jeopardises their health.<sup>17</sup>

We recommend that:

- a) *All state agencies with the responsibilities to implement the Female Genital Mutilation Act recognise that criminalisation without socialisation will not eradicate FGM, and that concerted measures should be taken to change societal attitudes which sustain FGM;*
- b) *Alternative rites of passage should be introduced across the whole country as a good practice which all girls and boys should participate in;*

---

<sup>17</sup> Samburu Women Trust, 'The Unspoken Vice in Samburu Community', April 2016

- c) *Adequate resources are provided to the Anti-Female Genital Mutilation Board to enable it to effectively coordinate anti-FGM efforts and to enhance multi-sectoral responses across relevant Ministries, Departments and the community.*
- d) *The state enters into dialogue with communities and undertake continuous community awareness-raising and capacity-building initiatives to change social norms for the abandonment of harmful practices including FGM,*

**Maternity Health Care.**

43) The Stakeholders welcome the State’s efforts, in line with Article 14(2) of the Protocol, to establish and strengthen delivery health services for women, including through the free maternal healthcare policy instituted in 2013 abolishing maternity service costs in public hospitals.<sup>18</sup> Despite this policy, quality health products for pregnant women are limited due to poorly equipped and distant health facilities and the low quality of care.<sup>19</sup> There has been an upsurge in the number of clients seeking maternity services in public health facilities which has overstretched the capacity of health facilities with acute shortage of staff, inadequate and poor infrastructure and equipment.<sup>20</sup> Health facilities also violate the dignity of women in labour who are abused verbally and physically, have to share facilities such as beds, lack privacy, and lack access to information on redress mechanisms.<sup>21</sup> Women have also been detained in health facilities after delivery for inability to clear maternity fees, thereby violating their right to maternal healthcare.

---

<sup>18</sup>. Ministry of Health implements free maternity services nationwide, USAID, Health Policy Project, [http://www.healthpolicyproject.com/ns/docs/MaternalNewbornHealthCare\\_Kenya\\_Oct2013.pdf](http://www.healthpolicyproject.com/ns/docs/MaternalNewbornHealthCare_Kenya_Oct2013.pdf)

<sup>19</sup> Center for Reproductive Rights, ‘Detention and Abuse of Women Seeking Maternal Health Services,’ 2017, [http://reproductiverights.org/wp-content/uploads/2017/05/GLP\\_Africa\\_DententionCase\\_3.17\\_Web.pdf](http://reproductiverights.org/wp-content/uploads/2017/05/GLP_Africa_DententionCase_3.17_Web.pdf), 4.

<sup>20</sup> NGEC, 2014-2015 Annual Report, <https://www.ngeckkenya.org/Downloads/NGEC%20Annual%20Report%20Final%202014-15.pdf>. 38.

<sup>21</sup> J.O.O v Attorney General and 4 Others [2018] eKLR <<http://kenyalaw.org/caselaw/cases/view/150953/>>



- 44) A High Court decision declared the practice of detaining women seeking maternity services a violation of the rights of women under the Constitution. *In Millicent Awuor Omuya alias Maimuna Awuor and Margaret Anyaso Oliele v the Attorney General and 4 others (unreported) Petition No 562 of 2012*<sup>22</sup> The High Court held, inter alia, that the detention in hospital of women who had recently delivered placed their physical and mental well-being at risk and amounted to ill-treatment. However, the Government has thus far failed to institute a fee waiver system in accordance with the Court's decision
- 45) The National Guidelines on Management of Sexual Violence 2014 acknowledge that one of the rights of a survivor of sexual violence is Access to termination of pregnancy and post abortion care in the event of pregnancy from rape.
- 46) The Joint Stakeholders, therefore, welcome the affirmation by the High Court of the constitutional position that pregnancy resulting from rape and defilement that in the opinion of a trained health professional poses a danger to the life or the physical, mental and social well-being of the mother may be terminated under the exceptions provided under Article 26 (4) of the Constitution.<sup>23</sup> The Government has, however, not taken measures to implement the direction by the Court that it should roll out the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya, 2012, and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies. There is therefore continued lack of clarity on the availability of safe abortion services, particularly for survivors of sexual violence.

---

<sup>22</sup> <http://kenyalaw.org/caselaw/cases/view/120675>

<sup>23</sup> *FIDA and Others v Attorney General and Others* [2019] eKLR < <http://kenyalaw.org/caselaw/cases/view/175490/>>

We recommend that:

- a) *The State should take more concrete measures to ensure that the maternity programme is accessed throughout the country as a fully free service;*
- b) *The Government should undertake a stakeholder process involving devolved governments and health stakeholders to define the sector's ailments and strategize on a common approach for resolving problems in the sector; and*
- c) *The state rolls out the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya, 2012, and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies.*
- d) *The state implements the decisions in J.O.O v Attorney General and 4 Others and MAO and another v Attorney General to guarantee the right of women to dignity, privacy, access to information and redress in instances of abuses, and to develop clear guidelines and procedures for implementing a fee-waiver system in all public hospitals, and to ensure eradication of the practice of detaining patients who cannot pay their medical bills.*

### **Older Persons.**

47) Incidents of lynching of older persons continues to be experience in the country. Haki Africa reported 15 lynching cases in Ganze and Kilifi County. <sup>24</sup> No prosecutions have taken place in relation to the lynching.

We recommend that:

- a) *The State should map areas where elderly women are at risk of being lynched on accusations of witchcraft, and law-enforcement agencies in those areas should establish specific protection, investigation protocols and prosecutions; and*
- b) *The State should recognise that older persons are vulnerable to violence and it should establish appropriate protection measures.*

---

<sup>24</sup> <https://www.standardmedia.co.ke/article/2000108029/in-kilifi-you-could-be-killed-for-being-old>

- c) *State fully implements the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons.*

### Article 3

#### Refugees.

- 48) The Refugee Bill, 2019 seeks to align the refugee legislation to the Constitution of Kenya and International law. Clause 19(2) of the Bill empowers the Cabinet Secretary to remove a refugee or an asylum seeker if their conduct is in breach or is likely to result in breach of/ or contrary to public morality, which means that offences against the order of nature that are punishable under the Penal Code would now become offences that would cause a refugee or an asylum seeker to be expelled. Also, Clause 23 (5) provides that an asylum seeker can be removed from Kenya if they fail to comply with any lawful orders. These are additional grounds for refoulement not consistent with the UN Convention on the Status of Refugees.
- 49) There are approximately 18,813 unregistered asylum seekers in Dadaab refugee camp due to lack of political will and constant changes in refugee management policies, with threats of refugee camp closure risking involuntary return of asylum seekers. The unregistered persons lack identification documents and are at risk of being charged with unlawful presence and deported to countries where they may be tortured.

#### **Number of asylum requests by adults and minors registered by the State (UNHCR Kenya Statistics Package as at 31 December 2021)**

Age Group	Sex		Total
	Female	Male	

	#	%	#	%	#	%
0-4	33,947	6.8	38,860	7.2	75,807	14.0
5-11	56,619	10.5	60,363	11.2	116,973	21.7
12-17	43,945	8.1	51,338	9.5	95,283	17.6
18-59	118,281	21.9	119,167	22.1	237,448	44.0
60 and above	7,932	1.5	6,625	1.2	14,557	2.7

50) Kenya is one of the most important refugee-hosting countries in Africa. The majority of the refugees and asylum seekers in the country are from Somalia (54.5%). Other important countries of origin include South Sudan (24.4%), the DRC (8.8%); and Ethiopia (5.9%). While most people fleeing from conflict in South Sudan arrive in Kakuma, in northern Kenya, most Somali refugees flee to Dadaab, in Garissa County in the east.<sup>25</sup>

51) The levels of trauma and torture reported among the refugees in these camps are severe. Many refugees report having experienced targeted violence as well as random atrocities of war. According to the Centre for Victims of Torture, “particularly disturbing are the high levels of rape and sexual violence reported

---

<sup>25</sup> United Nations High Commissioner for Refugees (UNHCR), (2021) ‘Figures at a Glance’, accessed at <https://www.unhcr.org/ke/figures-at-a-glance> on 21<sup>st</sup> October 2021

by refugees throughout their experience, including as acts of war in their home communities.<sup>26</sup>

52) The National Commission on Human Rights has set up a committee of State and non-State actors who work on ensuring that there is an effective referral mechanism for human rights violations. Moreover, the Refugees Act 2006 and its subsidiary regulations, the 'Refugees (Reception, Registration and Adjudication) Regulations', provides procedures for the reception, handling and processing of refugees, including the provision of competent interpreters for asylum seekers and refugees by the Commissioner for Refugee Affairs. However, this legislation does not include a process for the identification of survivors of torture. This is compounded by the generalised lack of knowledge and training of border officials on how to identify and assist vulnerable migrants, including torture survivors.

53) Policy makers lack understanding of the legal and policy protections afforded to migrants under national and international law. Government agencies generally lack expertise in how to document human rights violations, including torture, and are not widely trained on the Istanbul Protocol. This lack of capacity makes redress unattainable for the majority of torture survivors, for example because of poor documentation practices which entail that evidence cannot stand in court. The educational and awareness- raising needs among immigration officers are high and include an improved comprehension of cultural values and dynamics of key refugee groups in order to better understand their fears of persecution and subsequent reasons for migrating<sup>27</sup>.

---

<sup>26</sup> TheCenterforVictimsofTorture, (2013?)'Dadaab,Kenya',accessedat<https://www.cvt.org/where-we-work/africa/dadaab-kenya>on21<sup>st</sup>October2021

<sup>27</sup> OMCT, The roads of torture, <https://www.omct.org/site-resources/files/The-Torture-Roads.pdf>, p. 82

We recommend that;

- a) *The government conducts Refugee Status Determination interviews within the time frame provided in the Refugees Act of 2021 of 90 days and register all asylum seekers.*
- b) *The Government reviews the Refugee regulations and provide guidelines for the implementation of Section 19 (2) and 23 (5) from the Refugees Act, 2021.*
- c) *The state should invest in Education and awareness among immigration officers of the cultural values and dynamics of key refugee groups in each area including that some of them have been subjected to early marriage or FGM and the nature of their situation in terms of key reasons for migration for fear of persecution should be taken to prevent the profiling and subsequent discrimination of migrants from this country.*
- d) *Develop refugee reception centres where screening for entry can be taken near border points where possible and provide psychosocial support at these venues.*
- e) *The state should regularly and transparently monitor the processes that occur at border points with a focus on vulnerable groups and the principle of non- refoulment*

## **Article 10**

### **Training of Police Officers on Human Rights.**

- 54) The police have now incorporated human rights into their curriculum, however there are questions as to how the training is being conducted and its relevance and effectiveness. We note that KNCHR and human rights NGOs enter into mostly ad hoc arrangements under which law-enforcement and security officials are trained on human rights generally and on the Convention's provisions specifically. However, these activities do not amount a coordinated and comprehensive training on implementing the UNCAT.
- 55) Of concern is that training these sectors does not have to realise desired changes. There has been no change in the conduct of law-enforcement and security officials.

As already stated, training also tends to happen in a truncated and ad hoc manner rather than in a comprehensive manner. Far too often officers who have been trained are redeployed where that specific training may not be required.

56) The Law enforcement and Military personnel have not been trained on the Istanbul Protocol which limits their capability to investigate cases of torture effectively.

We recommend that:

- a) *A review of curricula be undertaken by NPSC with support from Non-Governmental Organisations and other specialists to assess whether indeed they address relevant topics such as the Istanbul Protocol adequately*
- b) *The deployment or redeployment of officials should match their skill-sets and training with actual on-the-ground demands; and*
- c) *All police officers, including more senior officials, should attend periodic human rights refresher courses.*
- d) *The Training of Police officers need to happen in a co-ordinated manner to ensure efficacy of the training and reduce duplication.*

## **Article 11**

### **Kenya National Commission on Human Rights.**

57) KNCHR's mandates in terms of the Kenya National Commission on Human Rights Act (Cap 5B) include the promotion of respect for human rights, protection of the observance of human rights and the monitoring and investigation of human rights compliance and violations.

58) The Commission has undertaken visits to the detention facilities to check on the management of covid-19 in places of detention and the state of health care in

prisons<sup>28</sup>. They have produced reports with conclusions and recommendations and both reports have been made public.

59) We note the modest increases in the annual budgetary support for KNCHR which show total receipts in 2013-2014, 2014-2015 and 2015-2016, respectively, of 328 million shillings (3.28 million dollars), 419 million shillings (4.19 million dollars) and 566 million shillings (5.66 million dollars).<sup>29</sup> Unfortunately, in 2018, the Commission was operating at 51.7% of its authorised staff establishment at 106 in-post staff against the recommended 205 staff. Similarly, Government of Kenya funding to the Commission reduced by KShs 17,378,766 during the 2017/18 financial year; a significant budget cut which negatively impacted the Commission's operations.<sup>30</sup>

60) Using this bottom-line figure alone and noting that the Commission's mandates, adequate resources are not being provided to the Commission. This may undermine its ability to execute its mandates in terms of the Paris Principles. In particular, the Commission has only six offices across the whole country.

We recommend that:

- a) *The Government provides the Commission with adequate human and financial resources to be able to adequately perform its duties of protecting and promoting human rights;*
- b) *The Government ensures that the Commission can operate in full compliance with the Paris principles.*

---

<sup>28</sup> <https://www.knchr.org/Publications/Thematic-Reports/Civil-and-Political-Rights/Prison-Reforms>

<sup>29</sup> KNCHR 11th Annual Report 2013/2014; KNCHR 12th Annual Report 2014/2015; and KNCHR 23th Annual Report 2015/2016.

<sup>30</sup> <https://www.knchr.org/Portals/0/AnnualReports/Annual%20Report%202017-2018.pdf?ver=2019-10-16-080029-663>



## **Monitoring of Places of Detention by Independent Policing Oversight Authority.**

61) The Independent Policing Oversight Authority has conducted 2212 inspections of Police stations to monitor compliance with legal frameworks, any improved, decline or status quo of the detention facilities, detainees' welfare and Police working conditions as well as assessing whether the recommendations made during the initial inspections had been implemented, and if not what the challenges were. During the last report of IPOA in 2020, Twenty-six which translates to 60.5% of the 43 parameters assessed during follow up inspections registered a deterioration while 9 (20.9%) improved. There was no change in 8 (18.6%) of the parameters.<sup>31</sup>

We recommend that:

- a) *The Government implements all the recommendation from inspections conducted by IPOA and develop a monitoring and evaluation tool to access the level of implementation.*

## **Articles 12 and 13**

### **Extra Judicial Killings**

62) Human rights NGOs, KNCHR and IPOA have documented instances where persons have been killed extra-judicially or where they have disappeared. In 2016, Haki Africa documented those 71 individuals had been killed extra judicially and/or disappeared within the Coast region within the context of fighting terrorism. In 2017, at least two individuals have disappeared while seven individuals have been killed extra-judicially in the region.<sup>32 33</sup>. According to

---

<sup>31</sup> <http://www.ipoa.go.ke/wp-content/uploads/2021/08/IPOA-Performance-Report-July-Dec-2020-Web.pdf>

<sup>32</sup> Haki Africa What do we tell the Families (2016).

<sup>33</sup> <https://missingvoices.or.ke/facts-and-figures/>

Missing Voices, a group of civil society organizations in Kenya<sup>34</sup> shows that between 2020-2021, we had 327 cases of extrajudicial killings and 42 cases of enforced disappearances<sup>35</sup>

63) Extra-judicial killings also occurred in the context of the contested 2017 general elections. In Nairobi alone, at least 33 individuals were killed, including 23 who appear to have been shot or beaten to death by police officers. The number of people killed throughout the country could be as high as 67.<sup>36</sup>

64) IMLU documented a total number of 239 extrajudicial executions from 2014 to 2021. During the Covid-19 pandemic we documented 46 cases of extra judicial killings and only four have been prosecuted.

65) The Anti-Terrorism Police Unit remains a law unto itself and it does not abide by legal requirements including oversight by authorised bodies. Human Rights Watch documented at least 10 cases of killings, 10 cases of enforced disappearances, and 11 cases of mistreatment or harassment of terrorism suspects in which there is strong evidence of the counterterrorism unit's involvement, mainly in Nairobi.<sup>37</sup>

66) Muslims for Human Rights (MUHURI) together with US based partners filed Freedom of Information (FOIA) requests focusing on grave violations committed by Kenyan units "set up, equipped, trained, funded, and/or guided" by the U.S. government to counter terrorism. The FOIA request included 5 cases that are

---

<sup>34</sup> <https://missingvoices.or.ke/about-us/>

<sup>35</sup> <https://missingvoices.or.ke/mvoicesarticle/press-statement-107-killed-by-police-in-2019/>

<sup>36</sup> Human Rights Watch and Amnesty International Kill Those Criminals: Security Forces Violations in Kenya's 2017 Elections (2017).

<sup>37</sup>

pending in court for *habeas corpus* and requests target records related to abusive operations by U.S.-backed units from January 1, 2003<sup>38</sup>.

67) In 2017, the Government also enacted the National Coroners Service Act, the Act creates a mechanism for mandatory reporting of designated deaths and complements police investigation with forensic medical science. It assists courts to reach a reliable finding in such matters and also aids the government to formulate policy based on forensic studies to prevent similar deaths from happening. However, the act has not been fully implemented since their enactment which is partly due to lack of appropriate funding.

*We recommend that:*

- a) *The state ensures full implementation of the National Coroners Service Act 2017 and the Prevention of Torture Act 2017 and develops a monitoring and evaluation tool to assess the progress of implementation.*
- b) *The Anti-Terrorism Police Unit is overseen scrupulously by relevant authorities, and effective investigations and prosecutions are undertaken where its officers allegedly commit extra-judicial killings or enforced disappearances.*
- c) *The IPOA and the Internal Affairs Unit undertake effective & impartial investigations and prosecutions into all allegations of extra judicial killings and outcomes made public.*
- d) *The National Police Service works with community justice centres to ensure justice for the victims and support the oversight authority's efforts to hold those responsible to account.*
- e) *The state takes appropriate and firm measures to ensure that police officer under investigation for police misconduct are monitored to ensure non-interference with witnesses and evidence.*

---

<sup>38</sup> <https://muhuri.org/kenyan-families-say-u-s-government-fueling-war-on-terror-disappearances-and-killings-demand-records/>

- f) *The state adopt modern investigative techniques such as body cameras to aid in expeditious prosecution of police excesses.*
- g) *The state ensure compliance with Section 5 Part B of the Sixth Schedule as read with Section 2 Part C of the Sixth Schedule of the NPS Act and Section 25 of the IPOA Act, which mandates the Officer-in-Charge or another direct superior of the person who caused the death or injury to report to IPOA.*

**Historical Injustices.**

- 68) The 2007 Post Election Violence remains a grave unpunished injustice on the people of Kenya. Nearly a decade since over 1,000 Kenyans were killed unlawfully and hundreds of thousands were displaced, no major prosecutions of the perpetrators of those crimes have taken place. It is clear to us that the Government does not see the investigation and prosecution of those crimes as a priority, clearly in part because allegations were being made against individuals in current leadership positions.
- 69) In this regard, we wish to bring to the Committee's specific attention the fact that the 8 August 2017 general elections and the further presidential elections held on 26 October 2017 witnessed significant human rights violations. Security forces participated in the unlawful killing of as many as 67 people around the country immediately after the 8 August elections. Security forces used excessive force to disperse demonstrations and to conduct house-to-house searches. Reporting and the gathering of evidence was also suppressed by the police who destroyed cameras and phones, beat photographers, arrested journalists and intimidated human rights defenders.<sup>39</sup>

---

<sup>39</sup> Human Rights Watch & Amnesty International Kill Those Criminals Security Forces Violations in Kenya's August 2017 Elections (2017).

70) During the 2017 electioneering period, IMLU documented a total number of 64 cases of excessive use of force by the police with 34 people being shot, 28 suffering torture and beatings and 2 suffering injuries after inhaling teargas fumes. Out of the 34 who were shot, 13 succumbed to their injuries.

71) Our other concern about the 2007-2008 PEV is that redress for victims has been politicised. In 2015, the president in his address to Parliament offered a public apology to victims and survivors of historical injustices and committed to setting up a Sh10 billion restorative justice fund. Since then, efforts towards administration and disbursement of restorative justice funds to victims and survivors has not been realised.

72) Finally, the Government has made it clear that the Truth, Justice and Reconciliation Commission (TJRC) Report is no longer a priority. The Deputy President has said the Government would not implement the TJRC report because it would divide Kenyans.<sup>40</sup> Hence, it is no longer certain that this report that was tabled in Parliament in 2015 will ever be debated.

We recommend that:

- a) *The Government sends a clear anti-impunity message by facilitating full investigation of the 2017 election violence and prosecuting the perpetrators;*
- b) *The Government provides reparations for the 2007 PEV victims and efforts towards administration and disbursement of restorative justice funds to victims and survivors be realised;*
- c) *The Government prioritises to debate in Parliament the report of the TJRC and provides a detailed report on the extent to which the recommendations of the TJRC have/are being implemented;*

---

<sup>40</sup> <<http://www.nation.co.ke/oped/opinion/Attempt-to-bury-TJRC-s-report-on-historical-injustices-callous/440808-4030498-9blwd1z/index.html>>

d) *The Government gazettes the regulations to the reparation fund.*

### **Accountability Mechanisms for Torture**

- 73) The country now has a significant number of institutions which may investigate acts of torture or ill-treatment, including NPS, KNCHR and IPOA.
- 74) One of the biggest obstacles to the effective investigation of acts of torture and ill-treatment is that the vast majority of victims and witnesses do not report their experience to the police, IPOA, or to human rights organisations. This can be linked to the failure on the part of the state to provide trusted and effective mechanisms for the protection of complainants and witnesses which not only impacts on the fight against impunity but also on the ability of victims to seek and obtain redress and remedy.
- 75) Levels of intimidation against people reporting police abuse continue to be very high, meaning that people are reluctant to come forward to register complaints. Research from Mathare Social Justice Centre shows that the families of victims of torture from poor and marginal populations habitually do not register complaints with NGOs, the police or police oversight authorities, due to fear and overall distrust of these bodies<sup>41</sup>
- 76) Our concern in the above regard is that effective investigations benefit from genuine inter-agency cooperation and partnership, yet far too often this cooperation is not apparent. Furthermore, even IPOA has reported that the NPS does not comply with the legal requirement of notifying IPOA of deaths and serious injuries involving police officers. IPOA is indeed under a lot of pressure from other State agencies and the Government has initiated various attempts to clip IPOA's powers by amending its establishing law.

---

<sup>41</sup> [Mathare Social Justice Centre, A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare https://drive.google.com/file/d/0B2NZry\\_SioNhZHRVQmd6RW1CVWs/view](https://drive.google.com/file/d/0B2NZry_SioNhZHRVQmd6RW1CVWs/view)

We recommend that:

- a) *The obligation for inter-agency cooperation should be stated explicitly, appropriate incentives and penalties should be implemented for cooperation or non-cooperation, and all such agencies should report regularly on the measures they have taken to implement recommendations from counterpart agencies;*
- b) *The state ensures that victims and witnesses of torture and ill-treatment – and their families - are provided with immediate, independent and effective protection, including from reprisals.*
- c) *The state strengthens and allocates adequate resources to the witness protection agency.*
- d) *The state allocates adequate resources for all investigative agencies including by setting up a proper forensic unit.*

### **P3 forms.**

77) In Kenya, a P3 form is a legal document which is produced in court as evidence in cases which involve bodily harm. P3 forms may be downloaded free from a government website, and they are also available from level IV hospitals as well as from gender-based recovery centres. A high court judgment for a constitutional petition outlawed all costs associated with accessing, or processing of P3 forms<sup>42</sup>. The Nairobi County Government also issued a directive<sup>43</sup> to mandate its medical and clinical officers to treat assault cases and also fill the P3 Forms, hence defusing pressure experienced by Police pathologists, especially if such cases concern sexual offences.

---

<sup>42</sup> Police Form 3 is an important prosecutorial tool that details evidence of violence against the victim

<sup>43</sup> Nairobi City County Government directive of 20<sup>th</sup> September 2019 authorising facilities to provide P3 Form services

78) Be that as it may, availing the P3 Forms online has its unique challenges as internet/ cyber café's access may be limited in some localities, thereby limiting access to this service by victims. Additionally, the costs associated with the service may also limit access, mostly by the indigent victims. And despite the high court outlawing all fees associated with access and processing of P3 Forms, the implementation of this judgment has been erratic owing to a variety of factors, including the fact that most duty bearers who are directly involved with this process are unaware of the decisive ruling on this document. In instances where they are, they take advantage of the mass ignorance on this ruling to take advantage of the victims, hence curtailing justice.

79) Duty bearers continue to charge a processing fee which in the case of health officials is said to be for covering evidence-related expenses. State witnesses are not supported from witness funds managed by the ODPP. Further, the processing of P3 Forms continues to attract corrupt deals under which police officers send applicants to be processed by medical officers who in turn co-share charged fees. It is also clear that the P3 protocols are not standardised across the whole country, and as such, it is easier to get the forms in some places and not in other places. Although also a welcome idea, Nairobi County Government's decision to free up the space to allow medical and clinical officers working in their facilities to treat and process P3 Forms for victims is a localised action as it only applies within the county jurisdiction, leaving the rest of the country to compete for the remaining resources which are stretched.

80) The post-rape care forms, which were gazetted in the *Sexual Offenses (Medical Treatment) Regulations of 2012*, have not been printed and availed to all hospitals in enough numbers, and that they are mostly available in Level IV and level V hospitals as well as in big private hospitals.



81) We also note that many families and victims continue to face insurmountable challenges in accessing P3 form in cases where the perpetrator of the injuries is a police officer. In many instances, it takes the intervention of lawyers from human rights NGOs escorting these victims to police stations for these forms to be availed or a report to be recorded. For instance, it took IMLU lawyers' intervention for 18 cases of 2017 related police violence to be recorded at Migori police station in November 2017.

82) In some of these cases, witnesses are subjected to intimidation by state agents, including complicit law enforcement officers, and this leads them to withdraw their participation from such trials.

83) Many doctors testifying as expert witnesses decline to appear in court due to inordinate delays and postponements, with some doctors being kept for a whole day to testify, yet under pressure to serve queues of patients waiting for them at public health facilities.

We recommend that:

- a) *The State fully and transparently implements the high court judgment on P3 Forms that outlawed all charges on accessing and processing of the P3 forms and put in place effective accountability measures*
- b) *The state streamlines the processing of P3 forms to ensure efficiency and should be availed in all police stations;*
- c) *The Post-Rape Care Forms should be made available in sufficient numbers in all health facilities.*
- d) *The state provides guidelines within the judiciary that will make it easier for doctors to testify as expert witnesses without being subjected to inordinate delays.*

### **Reporting Mechanism for Victims of Torture in Places of Detention.**

84) The law establishes mechanisms for victims of torture or ill-treatment in places of detention to lodge confidential complaints, our concern is that the anticipated mechanisms do not in practice make a difference and few if any inmates use those mechanisms. While the idea of online reporting has been mooted, this procedure may obviously not be accessed by victims who are incarcerated in places of detention. Fear that sensitive information may be divulged to perpetrators also discourages reporting. However, the establishment of human rights desks has seen a lot of complaints handled at station levels.

85) Through human rights and behavioural programs by stakeholders all attributed to the open-door policy that has seen a lot of progress in the Kenya Prison Service. As a result, there are a lot of changes such as the child friendly visitations in prison and open day forums. Prisoners can now openly meet with their family members; a clear indication of measures being put in place to reduce ill treatment and handle complaints. Following Part II of CAP 90, the use of force by prison office to inmates does no longer applies and corporal punishment was long abolished in prison. This is evident through a lot of sensitization trainings on UNSMR best practices that has been done by various organisations working with KPS to enhance officers' working relationships with offenders. The establishments of human rights desks in prison facilities also helped in handling complaints related to ill treatments.

86) Human rights training programs facilitates officers to adopt a more humane way of working as they carry out their duties. Inception meetings have been held by CEFA in partnership with KPS to establish SHRCs – Station Human Right Committees that are to be used for EWRM – Early Warning Reporting Mechanism within the stations. This is meant to handle complaints at station level as a preventive and curative measure to aspects of Prison conditions and detention.

We recommend that

- a) *The KNCHR and the Kenya Prison Service assesses the extent to which confidential complaints mechanisms are used by persons in places of detention, and the extent to which redress is provided to complainants.*
- b) *Strengthen the functions of SHRCs at station level to mitigate complaints and a preventive way to handle complaints and issues relating to treatment and wellness of offenders.*

**Criminalization of Petty offences.**

87) Criminalization and punishment of petty offences in Kenya has over the years provided a basis for gross violation of the human rights of poor and vulnerable populations especially those in cities and major urban centres of Kenya. Hundreds of thousands of mainly poor, vulnerable and minority categories of Kenyans, such as hawkers, touts, commercial sex workers, street urchins face punishment, extortion, deprivation and violence meted out mainly by law enforcement agents of the National Police Service and County Government Enforcement Officers commonly known as *askaris*.

88) The continued enforcement of petty offences has been characterized by arbitrary and unlawful arrests targeting the poor and other marginalized groups. The enforcement of the laws has contributed to the number of people in pre-trial detention and thus has led to already overcrowded prisons, which of itself has negative consequences for detainees and an adverse socioeconomic impact on their families. Additionally, the enforcement of these laws has been highly discretionary, thus facilitating the extortion of bribes, and excessive violence is often associated with the arrests.

- 89) In 2013 ICJ Kenya in partnership with Transparency International developed a research publication titled, *Justice at City Hall*. The publication details a qualitative and quantitative analysis on administration of justice by the municipal and city courts with an aim of strengthening judicial reforms in Kenya. Key findings of the research were: The courts largely employed the use of the mass plea system which undermines the rights of suspects; There was evidence of poor investigation by the council officers; The courts imposed spontaneous and varying fines for similar offences; Poor case management at the court registry was evident as municipal and city courts prioritized criminal and civil matters over city and municipal matters; and there are numerous corruption cases involving court orderlies, council officials and council enforcement officers.
- 90) In 2018, ICJ Kenya developed the research titled *Law and Policy on the Petty Offences and Practices Affecting Populations at the National Level and in Kisumu, Mombasa and Nairobi Counties*. "The research was conducted in Nairobi, Mombasa and Kisumu Counties with an object to identify legislation on petty offences and practices that result in human rights violations experienced by minority and vulnerable groups arising from law enforcement with a view to contribute to reform of the criminal justice system in Kenya.
- 91) The research involved a legal review of the domestic and international legal framework that provide protections for human rights abuses arising from the enforcement of petty offences, analysis of the county by-laws from Nairobi, Mombasa and Kisumu counties, and observation of the practices by actors in the justice system in handling potential and actual petty offences at different stages in the justice chain.
- 92) The research findings include but are not limited to: There are major human rights violations and abuse taking place in the pre-detention and pretrial stages as well as violation during trial and detention for petty offenders. These violations affect

different people differently based on their gender, age, profiling and category of petty offence they are suspected to have committed, in all the counties; County government machinery such as patrol vehicles and personnel (arresting officers) are used to intimidate and harass marginalized and vulnerable groups to extort bribes in the pretext of their being petty offenders. ; High cases of extortion of bribes from vulnerable groups are recorded in all the three counties, especially streets vendors, regardless of whether they have licenses for trade; and Gender based violence was found to be rampant with cases of rape and sexual exploitation and harassment of women and members of the LGBTI community being targeted the most.

93) ICJ Kenya and IMLU undertook research between 2014 and 2017 within the urban cities of Kenya to highlight the continued and systematic criminalization of poverty.<sup>44</sup><sup>45</sup> Vendors were arrested on the ruse they did not have licenses or on the basis that they had violated by-laws; and they would be released when they paid a bribe. The askaris would also demand sexual favours particularly from female traders in exchange for protection.

94) We welcome the formation of the National Council on Administration of Justice Criminal Justice Reforms Committee whose mandate is to review the criminal justice laws and systems. One of its Terms of Reference is to recommend laws for decriminalisation and reclassification; with a special focus on petty offences.

95) A study by clean start showed that only 43% were of the women in remand were offered bail or bond at the police station despite the fact that most were arrested for petty offences. Once arrested, most respondents were not able to afford legal representation. Once convicted, the default of the courts was to imprison the

---

<sup>44</sup> ICJ Kenya 'Law And Policy On The Petty Offences And Practices Affecting Populations At The National Level and in Kisumu, Mombasa and Nairobi Counties' (2017)

<sup>45</sup> IMLU A Cry for Justice: Torture and Ill-Treatment of Hawkers and Small Scale Traders in Nairobi City County (2014).

offenders and not offer alternative solutions such as community service orders, probation or even restitution which are sentences available in Kenya's criminal justice system.

We recommend that:

- a) *The National Council on Administration of Justice proposes policy and legislative reform on the decriminalisation and reclassification of petty offences.*
- b) *The state implements the Africa Commission on Human and Peoples Rights Principles on Decriminalisation of Petty offences in Africa.*
- c) *The County Inspectorate and Law Enforcement establishes a complaints mechanism that safeguards witnesses, victims and their families, to enable reporting of cases of torture, ill-treatment, extortion and extra-judicial executions.*
- d) *The Nairobi City County establishes a vetting process for serving officers on their suitability to serve as envisaged by the City Inspectorate Service Act 2017;*

### **Witness Protection Agency.**

96) The witness protection protocols are bureaucratic and that they may still not be accessed speedily by people who may need them, particularly when they live in informal or rural settlements and when their applications are not facilitated by NGOs.

97) There is also a widespread lack of knowledge about available witness protection mechanisms amongst the general public, meaning that witnesses who may fit existing criteria for protection do not come forward. Victims of human rights abuses also have specific challenges when seeking justice and witness protection remains mainly available to high-profile victims and witnesses who are essential for cases which fit with the litigation strategy of the prosecution authority. As such, protection mechanisms are often inaccessible to many victims or witnesses

of torture or ill-treatment. Furthermore, the very nature of torture, which is inflicted by agents of the State, means that traditional witness protection mechanisms established for victims of crime perpetrated by private actors are not always appropriate and effective, and that there is therefore a need for a specialized approach to protecting victims of torture and ill-treatment.

We recommend that:

- a) *The Witness Protection Agency and other relevant State bodies sensitises the public on the roles and protocols of the witness protection programme;*
- b) *The Witness Protection Agency creates a focus outreach programme to reach individuals requiring protection in distant or marginalised parts of the country; and*
- c) *The state establishes Witness Protection Agency offices in the 47 counties and liaison points at each high court station to enhance access by the most vulnerable.*
- d) *The state evaluates the effectiveness of the Witness Protection Agency in providing specialised protection to victims of torture and ill-treatment, including by providing data on: the numbers of victims and witnesses of torture and ill-treatment who have been offered protection by the agency since it was established; the stage at which protection was offered; and the type of protection offered.*
- e) *The state puts in place additional specialised measures to ensure victims of torture and ill-treatment, their families and witnesses are able to access protection before, during and after judicial, administrative or other proceedings so as to ensure victims are able to file complaints and seek a remedy in a confidential environment and without fear of intimidation or reprisals.*
- f) *The state increases budgetary allocation to the witness protection agency to enable it to perform its mandate effectively.*

## Article 14

### Reparation.

- 98) The legal framework within which victims may seek redress for acts of torture or ill-treatment. Notably, the Prevention of Torture Act (2017) affirms a victim's enforceable right to adequate reparation including restitution; adequate compensation; and rehabilitation. The Act even allows a court at the end of a criminal trial to order the perpetrator to provide restitution or compensation. This means a victim may not need to begin fresh civil proceedings for redress.
- 99) The enactment of the Victim Protection Act (No 17 of 2014) and of the Victim Protection Trust Fund provides for rehabilitative services to a victim of torture or ill-treatment. The Act establishes a legislative framework for supporting victims of crime in general including victims of torture during the court process and thereafter.
- 100) During the reporting period, our courts have given awards to victims of torture totalling at least 787 million shillings (7.6 million dollars) in relation to 45 petitions.
- 101) However, it is concerning that the State is not fulfilling its legal obligation to settle compensation awarded to victims of torture or ill-treatment. Forms of reparation such as rehabilitation are not being availed to victims to any appreciable extent. Furthermore, the infrastructure to support the Victim Protection Trust Fund is not fully formed, and while the Fund's Board is in place, a secretariat has been established but with very limited human resource and the Fund has also not been resourced. Civil Society such as IMLU are forced to take the backlog of providing rehabilitative services to victims of torture.

We recommend that:

- a) *The State expedites payment of awards to the victims of 2007 – 2008 post-election violence;*



- b) *The Victim Protection Trust Fund is made fully operational and is resourced at an appropriate level and the regulations under the Prevention of Torture Act developed through a consultative process;*
- c) *The government incorporates Civil Society Organisations who currently provide rehabilitation for survivors in the government medical and psychosocial rehabilitation programme. Their invaluable expertise and outreach capacity will enhance victim access to much needed rehabilitation; and*
- d) *The Government links medical rehabilitation of victims of torture to the National Health Insurance Fund as part of the Government drive towards universal health care.*

#### [Article 15.](#)

#### **Confession.**

- 1) We welcome the clarity in the Prevention of Torture Act (2017) that any information, confession or admission obtained from a person by means of torture or ill-treatment is inadmissible in a proceeding except as evidence against a perpetrator that such torture or ill-treatment took place.

#### [Article 16](#)

#### **Human Rights Defenders.**

- 102) The State has continued to use police violence against human rights defenders who have sought to hold public officials accountable for human rights violations. Human rights defenders have been harassed, tortured, disappeared forcibly and even killed extra-judicially. Reports by the media and Civil society organisations have highlighted instances where human rights defenders and journalists are being subjected to harassment, intimidation, trumped up criminal charges, and negative profiling aimed at paralysing, intimidating and

delegitimising their activities.<sup>46</sup> Security and counter-terrorism operations have been used to justify some of these violations.<sup>47</sup>

103) The Government has still not brought the Public Benefits Organisations Act (No 18) of 2013 into operation and rather continues to use its archaic predecessor legislation, the Non-governmental Organisations Coordination Act (Cap. 134). The PBO Act is a progressive piece of legislation which aims at ensuring a transparent and efficient regulation of civil society in Kenya, setting out clear rules on their registration and creating a system of incentives in support of organisations conducting public benefit activities.

104) It is important to note that a comprehensive whistle-blower protection law is yet to be enacted, there are 2 pending Bills in the National Assembly. We also don't have a national policy on whistle-blower protection. The lack of a comprehensive legal safeguard for whistle-blowers presents a potential weakness in the country's fight against corruption. This is because systematic victimisation of whistle-blowers has contributed to a 'culture of silence' in both public institutions and private sector organisations.

105) The challenge with using the framework under the Witness Protection Act is that it only guarantees protection to witnesses. Thus, beneficiaries under the Act can only be persons agreeing to testify in court and not whistle blowers/ persons that are not within a criminal trial framework. In short, the Act does not protect whistle blowers unless and until they offer to testify in a judicial process. This makes it important to have the enactment of a stand-alone whistle-blower law

106) Human rights defenders (HRDs) play a crucial role in ensuring that fundamental rights are upheld, and that victims are able to pursue justice.

---

<sup>46</sup> Criminalization of rural-based human rights defenders in Kenya: Impact and counterstrategies by protentional international

<sup>47</sup> OMCT and FIDH KENYA 2017 Elections: Broken Promises Put Human Rights Defenders at Risk (May 2017).

However, their work is often challenged and undermined by state agents such as the police and nonstate actors such as illegal armed groups and business enterprises. Wishing to protect their own interests and reputations, these groups have sometimes adopted any viable method to impede the peaceful activities of HRDs. In this context, HRDs become the target of unlawful physical and psychological violence. In addition, those seeking to silence HRDs increasingly resort to quasi-legal tactics such as smear campaigns and baseless charges and prosecutions.

107) In 2020, Robinson Nalengoyo Ole Torome and Raphael Kerenke were also arrested on 26 June and 12 October, respectively. Torome is charged with causing bodily harm and disturbances while Kerenke, who was beaten by the police before being arrested, is charged with attempted assault. Both were released on bail and their cases are ongoing<sup>48</sup>.

108) The authorities have developed a punitive use of the bail and bond system, against human rights defenders and activists granting higher bails compared to criminals accused of more serious offences. This was case for ten human rights defenders who were arrested for “participation in an unlawful assembly” and remained in custody two months for, being unable to pay the bond fixed by the authorities for each of them to KES 300,000 (approx.2,770 euros)<sup>49</sup>.

We recommend that:

---

<sup>48</sup> OMCT, Kenya: Judicial harassment against indigenous Maasai human rights defenders, <https://www.omct.org/en/resources/urgent-interventions/kenya-judicial-harassment-against-indigenous-masai-human-rights-defenders>

<sup>49</sup> <https://www.omct.org/en/resources/urgent-interventions/arbitrary-detention-and-judicial-harassment-of-ten-land-rights-defenders-from-taina-tevada-county>

- a) *The state speeds up investigations on cases of threats and harassment of human rights defenders and ensures that the perpetrators are prosecuted.*
- b) *The state adopts a policy that protects whistle-blowers, journalists and human rights defenders against reprisals, threats, intimidation, physical attack, forced evictions and targeting by both state and non-state agents.*
- c) *The state fully implements the PBO Act.*
- d) *The state enacts the Whistle Blowers Act and accompanying policy.*

### **LGBTQI.**

109) The Judiciary has by and large interpreted the Constitution in a manner that upholds the rights of LGBTIQ+ persons. Kenyan courts have guaranteed the registration of an NGO which works on gay rights;<sup>50</sup> the change of name in the examinations certificate of a trans-woman;<sup>51</sup> and the birth registration of an intersex child.<sup>52</sup> However we take note of the judgment declaring that sections that expose the LGBTIQ+ to discrimination were vague, uncertain or in violation of the Constitutional rights of Kenyans who identify as LGBTQI.<sup>53</sup> Furthermore, state actors are adamant, ignorant and reluctant to enforce judicial pronouncements.

110) LGBTQ+ organizations have documented over 2,500 cases of violence meted against Kenyan citizens on the basis of their real or perceived sexual orientation, gender identity and expression. These reported incidences are associated with blackmail and extortion, violence in both state and non-state institutions, sexual assault, physical assault, verbal abuse, threats to violence, murder, cyber bullying, denial of health services, denial from accessing premises,

---

<sup>50</sup> Eric Gitari v NGO Board and 4 Others (2015) eKLR, Petition No. 440 of 2013.

<sup>51</sup> Republic v Kenya National Examinations Council and Another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR, Judicial Review No. 147 of 2013

<sup>52</sup> Baby A (Suing through the Mother EA) and Another v Attorney General and 6 Others [2014] eKLR, Petition No. 266 of 2013.

<sup>53</sup> <http://kenyalaw.org/caselaw/cases/view/173946/>

disinheritance, disownment, eviction from rental property, dismissal from employment, expulsion from school, conversion therapy, targeted criminal prosecutions, forced migration and forced internal relocation.

111) Lesbian, Gay, Bisexual, Transgender, Queer and Gender Non-conforming persons are targeted by the state and non-state actors under Section 162(a), (c) and 165 of the Penal Code of Kenya.

112) A study conducted by Open Democracy in 2021<sup>54</sup> demonstrates and affirms continuous violations against LGBTQ+ persons who are subjected to torture, humiliation and degradation when their sexual orientation, gender identity, expression and sex characteristics is established. Freedom from torture<sup>55</sup> that is an absolute right to all individuals in Kenya is applied exclusive of LGBTQ+ individuals.

113) The existence of laws criminalizing sex work, consensual same sex sexual conduct among adults, indecency among males, impersonation and cross-dressing continue to negate the existence of transgender people by criminalizing gender expression that does not match a person's sex assigned at birth. Such use of criminal laws upholds fixed, binary concepts of gender based on moral or religious beliefs about strict gender roles for women and men that are determined by a person's sex assigned at birth. Freedom of expression, including gender expression, is a universal human right, whether or not it is reflected in a specific country's laws. While in custody, transgender women engaged in sex work have widely reported mistreatment because of their gender identity. The police repeatedly and systematically target transgender women, resulting in repeated arrests, breach of privacy and dignity, fines and concomitant harassment. While

---

<sup>54</sup> <https://www.opendemocracy.net/en/5050/conversion-therapy-africa-lgbtiq-survivors/>

<sup>55</sup> Article 25(a) Constitution of Kenya

falsification of documents for Transgender people may be necessary to protect their health and well-being yet because of it, Tran's people have been prosecuted for fraud, 'falsification of documents' and other charges for using such documents.

We recommend that the State:

- a) *Takes measures to end acts of violence and abuse committed on LGBTIQ+ persons by state and non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing violence targeting persons based on their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims; and*
- b) *The state enhances the knowledge and understanding of State and Non-state actors around transgender issues and persons and adopt and enact a Transgender Gender Affirming Healthcare Policy domesticating Transgender Implementation Toolkit (TRANSIT) and Standards of Care (SoC) as best practise standards for replication in healthcare systems.*

### **Mental Health**

- 114) KNCHR is empowered to monitor places of detention including psychiatric institutions such as Mathare Mental Hospital where persons with disabilities are held; KNCHR is the designated agency for monitoring the rights of persons with disabilities under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities. It is therefore empowered to monitor places of detention, including psychiatric institutions such as Mathare Mental Hospital where persons with disabilities are held. Between October 2019 and February 2020, the KNCHR in partnership with the Ministry of Health and sector Civil Society Organizations undertook a Quality Rights assessment of four psychiatric facilities across the

country, i.e. the Mathare National Teaching and Referral Hospital, Port Reitz Sub-County Hospital - Mental Unit, Kisumu County Referral Hospital and Moi Teaching and Referral Hospital. The assessment was meant to establish the quality of services offered and their extent of compliance with human rights principles and standards as outlined in five selected provisions of the Convention on the Rights of Persons with Disabilities.<sup>56</sup> This includes the right of persons with disabilities to be free from torture or cruel, inhuman or degrading treatment or punishment, which is established under Article 15 of the CRPD. The assessment established both structural and policy gaps that require a multisectoral approach to ensure effective service delivery in the mental health sector in line with the CRPD requirements. The common gaps identified across the four facilities were:

- Inadequate staffing and gaps in staff knowledge of human rights. Most staff lacked adequate information on existing national, regional and international obligations governing the mental health sector. Both medical staff and non-medical staff also lacked knowledge on de-escalation techniques, which help to decrease the emotional, physical, and mental stress levels of a situation, resulting in less need for use of force in treatment or in resolving inter-personal conflict between patients and staff and among patients.
- Alternative methods of handling service users in acute state were not available; instead, staff used seclusion and chemical restraint. Facilities did not record instances of use of seclusion and restraints (such as type and duration), and neither were these reported to any external body.

---

<sup>56</sup> Kenya National Commission on Human Rights, "Still silenced: A Quality Rights Assessment of selected mental health facilities in Kenya," (Unpublished).

- Some forms of therapy, including electroconvulsive therapy were administered without the free and informed consent of service users.
- Lack of mechanisms or knowledge for service users to formally raise complaints and file appeals to independent external bodies.
- Inadequate psychotropic medication for service users

115) We welcome the Kenya Mental Health Policy and the Kenya Mental Health Strategy which provide a framework for interventions for securing mental health reforms in Kenya and seeks to address systematic challenges, emerging trends and mitigate the health burden of mental health problems and disorders.

116) More generally, persons with disabilities in pre-trial detention continue to face many human rights violations. A study undertaken in 2016<sup>57</sup> concluded that the law is not a neutral arbiter in ensuring the pre-trial detention rights of persons with disabilities, and that inherent biases exist against prisoners with certain types of disabilities who by dint of such disabilities are incarcerated without recourse.

117) In the above regard, the Criminal Procedure Code (Cap. 75) empowers the President to direct that an accused deemed of unsound mind in the course of judicial criminal proceedings be detained in a mental hospital until such time as that person is certified capable of making their defence. Indeed, the High Court has found Section 167 of the Penal Code discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. The Court found this indeterminacy as amounting to ill-treatment which offended Articles 25 and 29 (f) of the Constitution. The Court determined that the order envisaged under Section 167 (1) of the Criminal Procedure Code was a punishment, and any punishment that

---

<sup>57</sup> African Policing Civilian Oversight Forum Pre-Trial Detention for Persons with disabilities in Correctional Institutions (2017).



is or cannot be determined from the onset is cruel, inhuman and degrading. The Court hence found that this section is unconstitutional to the extent it offends the said articles of the Constitution.

118) The study also documented a pattern where detainees with disabilities were denied reasonable accommodations – such as when those with mobility disabilities were forced to give up their crutches or callipers while in detention.

We recommend that:

- a) *The State repeals all laws which deny legal capacity to persons with disabilities, and particularly those with psychosocial and intellectual disabilities, including provisions in the Mental Health Act, the Penal Code and the Criminal Procedure Code; and*
- b) *Detainees with disabilities are provided with appropriate reasonable accommodation while they are in detention, and such persons with mobility disabilities should not be denied the use of crutches and callipers.*
- c) *The Kenya National Commission on Human Rights is adequately funded to carry out its monitoring mandate, including monitoring the right of persons with disabilities to be free from torture, or cruel, inhuman or degrading treatment or punishment both in institutional and community settings.*

### **Conclusion**

Civil society organisations call upon UNCAT to urge the government to implement the recommendations contained in this report for greater protection and promotion of the rights of the people of Kenya. We are available to provide any clarification on the information or issues raised in this report where necessary.