



# **DOUBLE EDGED SWORD**

A TRENDS REPORT AND CASE DIGEST ON  
HUMAN RIGHTS DEFENDERS AND THE LAW IN KENYA

National Coalition of Human Rights Defenders-Kenya

P.O. Box 26309-00100, Nairobi Tel: +254-712632390 Email: [info@hrdcoalition.org](mailto:info@hrdcoalition.org)

Website: [www.hrdcoalition.org](http://www.hrdcoalition.org) Twitter: [@nchrdkenya](https://twitter.com/nchrdkenya) Facebook: Nchrd Kenya

**HOT LINE: +254 - 0716200100**

National Coalition of Human Rights Defenders Kenya permits free reproduction of extracts from any of its publications, provided that due acknowledgement is given and a copy of the publication carrying the extract is sent to its offices at the address provided above.

# DOUBLE EDGED SWORD

## A TRENDS REPORT AND CASE DIGEST ON HUMAN RIGHTS DEFENDERS AND THE LAW IN KENYA

Updated upto January 2016



Kingdom of the Netherlands



## ABOUT NCHRD-K

NCHRD-K is a national organization, established in 2007, whose mission is to strengthen the capacity of HRDs to work effectively in Kenya and to reduce their vulnerability to the risk of persecution. The organisation has a track record in advocating for a favourable legal and policy environment for protection of HRDs in Kenya, conducting preventive security management trainings and offering support to HRDs in distress through legal, medical and psychosocial support.

The NCHRD-K is a members of the East and Horn of Africa Human Rights Defenders Project (Defend Defenders) and CIVICUS.

The NCHRD-K runs three programs namely, the protection programme which aims at developing appropriate preventive strategies and interventions for the safety of human rights defenders; the capacity building programme which focuses on strengthening the skills of HRDs on personal safety and secure use of information communication technology (ICT) and the advocacy programme that encourages effective coordination and harmonization of interventions by the NCHRD-K and partners to advocate for a conducive legal and policy environment for the protection of human rights defenders in Kenya.

Over the past nine years, the NCHRD-K has supported HRDs at risk in different ways including temporary relocation, provision of legal assistance to those whose human rights work has been criminalized or those who face prosecution or persecution by state and non-state actors. The NCHRD-K's legal assistance and documentation project seeks to compliment on-going protection measures and strengthen documentation capacity of NCHRD-K to enable the protection programme to rapidly respond to legal needs of HRDs in distress for effective intervention primarily in cases where HRDs are facing arbitrary arrests, malicious prosecutions and those facing prohibitive bail terms.

# TABLE OF CONTENTS

<b>Abbreviations</b>	iii
<b>Acknowledgements</b>	iv
<b>Executive Summary</b>	v
<b>1 BACKGROUND ON HUMAN RIGHTS DEFENDERS</b>	1
1.1 Who is a Human Rights Defender?	1
1.2 How Do You Identify a Human Rights Defender?	2
1.3 Human Rights Defenders' Need for Protection	3
<b>2. EMERGING TRENDS OF VIOLATIONS AGAINST HUMAN RIGHTS DEFENDERS IN KENYA</b>	5
2.1 Political and Social Context	5
2.2 Specific Challenges to the Work of Human Rights Defenders	6
2.2.1 The ICC Cases and Other Transitional Justice Measures	6
2.2.2 Adoption and Implementation of the Constitution of Kenya 2010	7
2.2.3 Fight Against Terrorism	7
2.2.4 Increased Hostility to the LGBTIQ Community	8
2.2.5 Curtailed Freedom of Speech, Media Assembly & Demonstration	9
2.2.6 Rise in Incidents of Corruption	9
2.2.7 Growing Number of Extrajudicial Executions	10
2.3 Recent Trends of Threats, Intimidation and Violence Against HRDs	10
2.3.1 Most Vulnerable HRDs in Current Environment	10
2.3.2 Shrinking Space for Civil Society Organisations	10
2.3.3 Attacks, Threats and Intimidation of HRDs	11
2.3.4 Targeted Killings	12
2.4 Case Study of a Human Rights Defender in Kenya: Joel Ogada	13
<b>3. LEGAL FRAMEWORK FOR HUMAN RIGHTS DEFENDERS IN KENYA</b>	15
3.1 What is the Legal Framework Affecting Human Rights Defenders?	15
3.2 National Legal Framework	15
3.2.1 Constitution of Kenya	15
3.2.2 Overview of Some Relevant Statutes	17
3.2.3 Non-Binding Commentary and Administrative Actions	19

3.3	International and Regional Legal Framework	20
3.3.1	International Human Rights Instruments	20
3.3.2	UN Declaration on Human Rights Defenders	21
3.3.3	Regional Human Rights Instruments	22
<b>4.</b>	<b>CASE DIGEST OF CASES AFFECTING THE WORK OF HUMAN RIGHTS DEFENDERS</b>	<b>23</b>
4.1	Kenyan Case Law Concerning Human Rights Defenders	23
4.2	Case Selection	23
4.3	Case 1	25
4.4	Case 2	28
4.5	Case 3	31
4.6	Case 4	33
4.7	Sources for Further Reading	36
<b>5.</b>	<b>CONCLUSION AND RECOMMENDATIONS</b>	<b>37</b>
5.1	Current Environment for Human Rights Defenders in Kenya	37
5.2	Recommendations to Government to Improve Human Rights Defenders' Situation	37
5.2.1	Political Commitment	37
5.2.2	Investigations	38
5.2.3	Education	38
5.2.4	Right to Privacy	38
5.2.5	Freedom of Expression and the Media	38
5.2.6	Space for Civil Society	38
<b>6.</b>	<b>ANNEX: List of Cases Supported by NCHRD-K and Partners</b>	<b>39</b>

## ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AFRICOG	African Centre for Open Governance
CBK	Central Bank of Kenya
CORD	Coalition for Reform and Democracy
CSGPSRG	Civil Society Governance Programme Stakeholders Reference Group
CSO	Civil Society Organisation
FRC	Financial Reporting Centre
HRDs	Human Rights Defenders
ICC	International Criminal Court
IMLU	Independent Medico-Legal Unit
KICA	Kenya Information and Communication (Amendment) Act
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer
MCA	Media Council Act
MUHURI	Muslims for Human Rights
NCHRD-K	National Coalition for Human Rights Defenders Kenya
NGO	Non-Governmental Organisation
OSIEA	Open Society Initiative for East Africa
PBOA	Public Benefit Organisation Act
POTA	Prevention of Terrorism Act
SLAA	Security Laws (Amendment) Act
TJRC	Truth Justice and Reconciliation Commission
UNDP	United Nations Development Programme
UN	United Nations
UPR	Universal Periodic Review

## ACKNOWLEDGEMENTS

The National Coalition of Human Rights Defenders-Kenya (NCHRD-K) wishes to express its gratitude to all individuals who have contributed towards this publication.

Firstly, our heartfelt gratitude goes out to Edwin Kimtai Birech, the Project Officer, for conceptualizing the project, and collating information and putting together the report and case digest. Secondly, we acknowledge and appreciate the support of Collins Omondi and Heidi Evelyn who reviewed and edited this report and case digest.

The NCHRD-K also duly recognizes and appreciates Kamau Ngugi, the Executive Coordinator, for his strategic leadership and guidance throughout the assignment. Further, we sincerely acknowledge and appreciate the role played by Salome Nduta (Programme Officer, Protection), Yvonne Wamari (Programme Officer, Advocacy), Gloria Madegwa (Programme Officer, Capacity Building) and Patrick Kararu (Finance and Administration Officer) in providing technical input in the conceptualization of the project and their invaluable comments for the final production of this publication.

We sincerely thank Otieno Aluoka, Njoroge Waithera and Paul Gitau who went around the country to document cases of HRDs in Nairobi, Nyanza and Central Rift and Coast regions respectively.

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



# EXECUTIVE SUMMARY

## Findings of the Report

Several key issues emerge in the report. First, since 2003, the legal, policy and administrative space for HRDs in Kenya has deteriorated. An increasingly antagonistic relationship between civil society and government has prevailed, triggered by among other things Civil Society Organisations' (CSOs) advocacy in favour of the Kenyan cases before the International Criminal Court (ICC) and CSOs' demands for respect for rule of law in security operations. Second, as a result of CSOs and HRDs advocacy activities, the State has pursued retrogressive measures that curtail the work of HRDs and CSOs through the enactment of laws that criminalize their work. Legislation such as the *Security Laws (Amendment) Act (SLAA)*<sup>1</sup> and attempts to amend the *Public Benefit Organisations Act*<sup>2</sup> before it comes into force, points to the State's determination to control the operation of CSOs in Kenya. Third, the media, including social media, has also borne a heavy burden of restrictive laws such as the *SLAA*, the *Kenya Information and Communication (Amendment) Act*,<sup>3</sup> and the *Media Council Act*<sup>4</sup>.

Fourth, physical attacks, killings, and intimidation of HRDs, allegedly committed by state and non-state agencies, have also been on the rise. Finally, HRDs at the grassroots level also face challenges while championing for among others, accountability, respect for discriminated and marginalised groups and land rights within their localities. They have been harassed by local administrators and other private actors and in some cases they have faced what appear to be false charges aimed at intimidating them into silence. Due to the remoteness of their areas of operations, issues affecting local HRDs are not given national media attention. These trends notwithstanding, HRDs have remained unbowed and have spared no opportunity in appropriate cases to approach the courts to vindicate their rights.

Since the promulgation of the *Constitution of Kenya*<sup>5</sup> in August 2010, several landmark judgements, relevant to the work of HRDs, have been delivered by the courts and in most cases, the courts have rendered decisions that uphold human rights. However, the prevailing state of conflict between HRDs and the State is no longer tenable and needs to be urgently addressed by all stakeholders. In particular, the Government needs to demonstrate its commitment to uphold the human rights of every citizen, including HRDs, and take necessary measures to enhance the social, political, legal,

1 *Security Laws (Amendment) Act*, 2014 (No. 19 of 2014) [hereinafter *SLAA*].

2 *Public Benefit Organisations Act*, 2013 (No. 18 of 2013) [hereinafter *PBOA*].

3 *Kenya Information and Communications (Amendment) Act*, 2013 (No. 41A of 2013)[hereinafter *KICA*].

4 *Media Council Act*, 2013 (No. 46 of 2013) [hereinafter *MCA*].

5 *Constitution of Kenya*, 2010 [hereinafter *Constitution*].

policy and administrative environment for HRDs in Kenya. This duty is in line with government human rights obligations as enshrined in the *Constitution*, international human rights treaties and regional conventions ratified by Kenya and the *UN Declaration on the Right and Responsibility of Individuals Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*<sup>6</sup> commonly known as the *UN Declaration on Human Rights Defenders*.

## Methodology

NCHRD-K contracted consultants to carry out data collection, in Siaya, Kisumu, Nakuru, Nairobi and Mombasa Counties. This entailed conducting one on one interviews with the HRDs who have been charged in court and community members who understand the human rights background of the HRDs and the environment within which they operate. One on one interviews were also held with the advocates on record to provide clarity on the merit of the cases they were handling. The Consultants then perused court files to collect factual information as recorded in the court documents.

---

6 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 9 December 1998, UNGA Res. 53/144 [hereinafter *UN Declaration on Human Rights Defenders*].

1.0



# BACKGROUND ON HUMAN RIGHTS DEFENDERS

## 1.1 Who is a Human Rights Defender?

According to the United Nations Office of the High Commissioner on Human Rights,

“human rights defender (HRDs) is a descriptive term used to refer to people who, individually or collectively with others, act to promote or protect human rights”<sup>7</sup>.

Human rights are rights that belong to all human beings.<sup>8</sup> Human rights defenders are sometimes popularly referred to as human rights activists, monitors, workers or professionals.<sup>9</sup> Their work, paid or unpaid, benefits their communities by trying to ensure that the human rights of all people are respected.<sup>10</sup> They engage in several interventions designed to promote and protect all human rights including investigatory and documentation work, provision of legal advice and assistance to victims of human rights violations as well as advocating for accountability.<sup>11</sup>

In 1998, the United Nations General Assembly adopted the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*,<sup>12</sup> widely known as the UN *Declaration on Human Rights Defenders* and subsequently, a UN Special Rapporteur on the Situation of Human Rights Defenders was established in 2000 to further support the global implementation of the declaration. These two landmark international events were recognition of the crucial role that HRDs play in the promotion, protection and implementation of human rights and the rule of law all over the world.

7 See Who is a Defender? <<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>>

8 See <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>

9 Who is a Defender?, *supra*, note 7.

10 See <<https://www.amnesty.org.uk/human-rights-defenders-what-are-hrds>>

11 Who is a Defender?, *supra*, note 7.

12 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 9 December 1998, UNGA Res. 53/144 [hereinafter UN *Declaration on Human Rights Defenders*].

At the continental level, the 1999 *Grand Bay (Mauritius) Declaration* of the Organisation of African Unity called on its member states “to take appropriate steps to implement the UN *Declaration on Human Rights Defenders* in Africa”<sup>13</sup>

## 1.2 How Do You Identify a Human Rights Defender?

A human rights defender can be a Non-Governmental Organisation (NGO) worker, a community activist, a teacher, a journalist, a lawyer, a student, a government official or private sector worker or just a concerned citizen. HRDs can protect human rights as part of their job duties or in their free time outside their job. Because almost anyone can be a HRD, the question one must ask is whether a person is acting in order to defend or protect human rights. The UN *Declaration on Human Rights Defenders’* definition would require that a HRD act peacefully to promote or protect human rights in a way that acknowledges that human rights are universal. This very broad definition acknowledges that almost anyone can act as a HRD and should be applied accordingly.

In order to collect and document information on how HRDs are treated, it is important to refer to them by the human rights defender name. When this label is consistently applied, it becomes easier to track information relating to HRDs through field research, online searches and compiling relevant case law. Even though HRDs come from all walks of life and use vastly different methods to promote and protect human rights, it is vital to refer to all of them as human rights defenders (or HRDs).

## 1.3 Human Rights Defenders’ Need for Protection

Human rights defenders stand up to various groups including governments, strong private interests and majority populations to promote and protect the human rights of people who are often vulnerable or unpopular. It is not uncommon for a HRD’s stance to be a minority view. Therefore, it is not surprising that HRDs may find their well-being, freedom or even lives threatened because of their actions to stop human rights violations.<sup>14</sup> Due to the nature of their work involving being in opposition to powerful groups, HRDs are often in need of protection from persecution by these same groups.

The need for the protection of HRDs in Africa was realised by the *Grand Bay (Mauritius) Declaration* in 1999 when the Organisation of African Unity called on its member states “to take appropriate steps to implement the UN *Declaration on Human Rights Defenders* in Africa”<sup>15</sup>.

13 *Grand Bay (Mauritius) Declaration and Plan of Action*, First OAU Ministerial Conference on Human Rights, 1999, Grand Bay (OAU) at Article 19.

14 See <<https://www.amnesty.ie/human-rights-defenders/>>

15 *Grand Bay (Mauritius) Declaration and Plan of Action*, First OAU Ministerial Conference on Human Rights, 1999, Grand Bay (OAU) at Article 19.

This non-binding declaration is intended to encourage the protection of human rights defenders from the abuse that they may suffer due to the nature of their work. Despite this development, few governments in Africa have established protection mechanisms for HRDs and as a result many HRDs continue to suffer human rights violations perpetrated, with impunity, by both state and non-state actors. In Kenya, the deteriorating human rights situation has exposed HRDs to frequent harassment, intimidation and threats to their person, lives and property. This situation therefore underscores the need for appropriate measures and interventions to safeguard the rights of HRDs in Kenya.

In Kenya, there is a strong history of human rights defenders opposing unjust and corrupt governments to uphold the human rights of all Kenyans. For example, those who fought for Kenya's independence, labour unions, journalists, academics, university students, civil society activists, lawyers, community activists, health care providers and faith leaders have all defended the human rights of Kenyans. Today, HRDs not only stand up to different arms of government in Kenya, but they also oppose powerful corporate interests, individual corruption, unfair community practices and criminal organisations who encroach on the human rights of the people. Fortunately, the law in Kenya protects all Kenyans from any abuse of their human rights whether committed by a public or private entity.<sup>16</sup>

---

16 See Article 20(1) of the *Constitution*, *supra*, note 5.



2.0



## EMERGING TRENDS OF VIOLATIONS AGAINST HUMAN RIGHTS DEFENDERS IN KENYA

### 2.1 Political and Social Context

Due to their nature of work in the promotion and protection of human rights, rule of law and democracy, human rights defenders in Kenya have suffered attempts to delegitimise them, prejudice, exclusion, rejection, threats, harassment, intimidation and violence. In some cases, they have been labelled as ‘enemies of the State’ with civil society being derogatorily referred to as ‘evil society’. Human Rights Defenders are also often labelled agents of Western nations who are attempting to import foreign or Western values and to destabilize the current government. Not only does this rhetoric delegitimise the work of HRDs but it also increases their vulnerability because it causes all citizens to question their integrity and whether they are deserving of protection. As a result of this rise in delegitimizing rhetoric, the role of HRDs in Kenya has been seriously undermined and their working environment has become more precarious and challenging.

Despite the implementation of the *Constitution*<sup>17</sup>, many Kenyans are still unsure of their ability to criticise the actions of government or powerful people and fear reprisal. This culture of acceptance of abuse of power has been entrenched over decades of corrupt governance where HRDs were routinely tortured, detained and killed. Even though the powers of the executive have been limited by the *Constitution* and rights clearly set out, it may take a long time for all Kenyans to adopt this new mind set and readily accept the work of HRDs as good for Kenya. Devolution means that government is more present throughout the country and the human rights records of county governments have varied greatly. Therefore, all HRDs, at the grassroots and national level, continue to face these challenges without respite.

---

17 *Constitution of Kenya, supra*, note 5.

## 2.2 Specific Challenges to the Work of Human Rights Defenders

### 2.2.1 The ICC Cases and Other Transitional Justice Measures

Antagonism between state and private citizens who question government policy, corruption and poor service delivery is not new. However, the current challenges faced by human rights defenders in Kenya climaxed following the 2007/2008 post-election violence. CSOs and HRDs, that were actively involved in seeking justice for victims of the post-election violence through documentation of human rights violations perpetrated during this period demanded accountability through national and international justice processes were, unduly targeted for vilification and persecution. In addition advocacy work by local human rights organizations calling for an effective transitional justice mechanism including the establishment of a Special tribunal to prosecute the perpetrators of the violence was not well received by the ruling class. Despite the agreements reached, and codified under the 2008 *National Accord and Reconciliation Act*<sup>18</sup>, to end post-election violence, the government pursued measures to frustrate the operations of the Truth Justice and Reconciliation Commission, established in 2008, and ensured that Commission's report was met with scepticism due to infighting amongst the Commissioners, contentious appointment of the Commission's Chairperson<sup>19</sup>, missed statutory deadlines and allegations of inappropriate alterations, specifically in the Land Chapter. As a result, the work of the Truth Justice and Reconciliation Commission itself has been brought into question.<sup>20</sup> Despite this set back, CSOs' continued advocacy work demanding implementation of the Truth, Justice and Reconciliation Commission Report, which included recommendations concerning sensitive matters such as historical injustices, land grabbing, marginalization of certain ethnic communities and regions as well as accountability for human rights violations. This further enhanced antagonism between CSOs and the government.

Divergent positions taken by the state and CSOs regarding justice for victims and fighting impunity following 2007 post-election violence further strained relations between the government and CSOs. The government failed to implement a critical recommendation of the Commission of Inquiry on Post-Election Violence (Waki Commission) to create a local tribunal to prosecute post-election violence crimes. Consequently, the Commission took the extraordinary step of handing over its findings to the International Criminal Court (ICC) to prosecute the perpetrators. CSOs' made a strong case in support for the Kenyan cases before the ICC against the President and Deputy President, this strained their relationship with government further.

During the campaigns leading up to the March 2013 general elections, politicians allied to the Jubilee Coalition blamed human rights activists for instigating the Kenyan ICC cases. When the Jubilee Coalition assumed government in April 2013, it pursued measures that were perceived to deliberately undermine the work of CSOs. Since 2013, government rhetoric has been geared towards vilification and delegitimizing of human rights defence as well as demonization of the human rights movement through negative profiling, propaganda and smear campaigns. In fact, HRDs have become victims of intimidation and judicial harassment by state actors.

---

18 *National Accord and Reconciliation Act*, 2008 (No. 4 of 2008).

19 Ambassador Bethuel Kiplagat was first Chairperson of the Truth, Justice and Reconciliation Commission

20 See for example: <https://www.ictj.org/news/ictj-kenya-tjrc-final-report-deserves-serious-analysis-and-action>



## 2.2.2 Adoption and Implementation of the 2010 Constitution

The promulgation of the 2010 *Constitution*<sup>21</sup> brought about following risky advocacy by human rights defenders resulted in radical changes in various areas of society including the governance structure, land ownership, the judiciary and the security sector. While many of its provisions are beneficial to HRDs and CSOs, it is important to note that backlash at the broader rights scheme and additional checks on state power it contains, is often directed at the civil society sector and individual HRDs. The ruling political class was never in favour of such a progressive constitution, however, it was forced to pass it due to overwhelming public opinion in its favour and pressure from CSOs.

Therefore, Civil Society initiatives to advocate for and monitor implementation of the various chapters of the *Constitution*, especially Chapter Six on leadership and integrity, antagonized the ruling political class leading to further deterioration of an already strained relationship between government and CSOs. For instance, in 2012, CSOs filed a court case seeking the Court's intervention to prevent candidates facing charges at the ICC from vying for president and deputy president in the 2013 elections<sup>22</sup>. This litigation was perceived as an attempt by CSOs, with backing of Western nations, to prevent one of the leading coalitions, the Jubilee coalition, from being elected. Once in power the Jubilee Coalition made several attempts to discredit CSOs.

In addition, the affirmative action provisions of the *Constitution* regarding gender equality have yet to be fulfilled<sup>23</sup> and patriarchal rhetoric from many factions in Kenyan society continues to be a slight to the work of HRDs working for gender equality.

The judiciary appears to have made huge strides to build confidence among citizens as being bold and independent in the pursuit of objectives ever since conclusion of the vetting process provided for in the *Constitution* was completed. Moreover, the judiciary is now beginning to realize its own ability to ensure that society abides by the *Constitution* and has produced many decisions that curtail the rights of government and corporations but enforcement remains a challenge.

## 2.2.3 Fight against Terrorism

The government has expanded its efforts to combat terrorism in the country following an increase in frequency and scale of terror attacks. However, in some cases the State has used disproportionate force, indiscriminate use of its power of detention and other unconstitutional means in its fight against terrorism. For instance, during the security operations dubbed 'Usalama Watch' in April 2014, there were allegations of religious and ethnic profiling of members of the Somali community, mass arbitrary arrests and unlawful detentions, ill treatment of detainees, rape, extortion, forced relocation of refugees from urban centres to camps and arbitrary deportation of hundreds of undocumented ethnic Somalis.<sup>24</sup> Also in April 2014, the government launched a crackdown on individuals and organisations affiliated to terrorist organisations Al Shabaab, Islamic State of Iraq

21 *Constitution of Kenya, supra*, note 5.

22 *International Centre for Policy and Conflict & 5 Others v. The Hon. Attorney-General & 4 Others* [2013] eKLR Petition No. 552 of 2012 (Nairobi).

23 See *Centre for Rights Education & Awareness (CREAW) v. Attorney General & another* [2015] eKLR Petition No. 18 of 2015 (Nairobi).

24 See <<https://www.hrw.org/news/2014/05/12/kenya-end-abusive-round-ups>>

and Syria (ISIS), Boko Haram and Al Qaeda. Under this crackdown, two prominent CSOs were declared to be acting in association with a terrorist organization under the *Prevention of Terrorism Act*<sup>25</sup> and had their bank accounts subsequently frozen.

In some cases, when HRDs raised concerns about human rights violations during security operations, they were branded as terrorist sympathizers and deliberate attempts were made to radicalize public opinion against them. In such an environment, it is not surprising that the government enacted the controversial *Security Laws (Amendment) Act*<sup>26</sup> in late December 2014 and thereby sought to restrict the capacity of CSOs to question the government's amendments to twenty two existing security related laws<sup>27</sup>. These proposed amendments included provisions that limit the ability of media to publicize images and information relating to terror attacks without the consent of the police and authorize mass surveillance by the National Intelligence Service leaving HRDs vulnerable to raids and interference with their communication devices. Not only are these measures disproportionate and unlawful, the use of security to justify such blatant human rights violations is unprecedented in Kenya in recent years and a high-risk factor for HRDs.

## 2.2.4 Increased Hostility Towards Gender and Sexual Minorities

With the enactment of anti-homosexuality laws in Nigeria in January 2014 and thereafter in Uganda in February 2014,<sup>28</sup> a worrying trend of intolerance towards sexual minorities is developing in the East African region. Some stakeholders in Kenya, including religious organisations and Members of Parliament, called for the adoption of similar laws and strict enforcement of existing anti-homosexuality laws. While a draft bill was not passed, the public discussion of the proposed bill was derogatory and hateful. The vicious anti-gay rhetoric in the public domain has increased the level of risk faced by both the lesbians, gays, bisexual, transgender, intersex and queer (LGBTIQ) community and the HRDs defending their rights in Kenya. Cases of targeted assault by non-state actors and the police, evictions by landlords and denial of access to basic health care services have been reported yet the government has not put adequate protection measures in place to address such violations. Despite the broad protections provided to sexual minorities in the *Constitution*, most Kenyans do not feel that they should also apply to the LGBTIQ community.

---

25 *Prevention of Terrorism Act*, 2012 (No. 30 of 2012) [hereinafter *POTA*].

26 *Security Laws (Amendment) Act*, *supra*, note 1 [hereinafter *SLAA*].

27 See *Coalition for Reform and Democracy (CORD) & Two Others v. the Republic of Kenya & Another* [2015] eKLR Petition No. 628 of 2014 consolidated with Petition No.630 of 2014 and Petition No.12 of 2015 (Nairobi) [hereinafter the *CORD* case] and case brief in the 4.0 Case Digest section below.

28 The bill was nullified in August 2014. The Constitutional court held that the Anti-Homosexuality Act 2014 was passed by Parliament without the required quorum of at least one third of all legislators. See <<http://www.monitor.co.ug/News/National/Court-quashes-anti-gays-law/-/688334/2405446/-/rhg854z/-/index.html>>

## 2.2.5 Curtailed Freedom of Speech, Media, Assembly & Demonstration

The work of journalists and HRDs in Kenya has been seriously curtailed by a growing body of retrogressive legislation that includes the *Kenya Information and Communication (Amendment) Act*,<sup>29</sup> *Media Council Act*<sup>30</sup> and the *Security Laws (Amendment) Act*<sup>31</sup>. Investigative journalists in particular have been targeted with some facing libel suits or being subjected to violence, threats and intimidation by both State and non-state actors.<sup>32</sup> Bloggers, journalists and online users have been charged with section 29 of the *KICA*<sup>33</sup> alleging improper use of a licensed telecommunication system. For example in January 2016, Yassin Juma, a freelance journalist and blogger, was held and charged under the Section 29 of the *KICA*<sup>34</sup> for posting information on social media about the terror attack on a Kenya Defense Forces camp in El-Adde, Somalia which left an unknown number of soldiers dead. No charges, however, have been preferred against him.

As addressed in the case digest section below, police have used unwarranted force, arbitrary arrest and detention as well as multiple offense charges to shut down and discourage public protests.<sup>35</sup> This trend has emerged clearly since the current government was sworn into power in 2013. Police have been increasingly violent against protesters especially noted with demonstrating university students.<sup>36</sup> This increasingly violent response from police has also been the case in the counties.<sup>37</sup> In December 2015, HRD and activist Boniface Mwangi and his Team Courage known for fighting corruption in government were denied the right to present a petition to the President at statehouse regarding the government's current corrupt practices.<sup>38</sup>

## 2.2.6 Rise in Incidents of Corruption

Government corruption is on the rise in both levels of government. It has been reported that in the national government alone, trillions of shillings are unaccounted for yet there has not been any successful prosecution or recovery of public money. County governments have seen similar misappropriation of public funds. Despite the *Constitution* having established the Police Oversight Authority and other accountability mechanisms, corruption remains at every level of government agencies and has become more flagrant.<sup>39</sup> Because this culture of corruption has continued to flourish, some state officials act with impunity and do not have a great fear of their schemes becoming public. This current situation leaves HRDs at higher risk because they are seen as a minor disturbance to corruption but are very often having to act in opposition to the state machinery.

---

29 *Kenya Information and Communication (Amendment) Act, supra*, note 3 [hereinafter *KICA*].

30 *Media Council Act, supra*, note 4 [hereinafter *MCA*].

31 *Security Laws (Amendment) Act, supra*, note 1 [hereinafter *SLAA*].

32 See <<http://www.capitalfm.co.ke/news/2015/11/editor-arrested-over-sh3-8bn-audit-story-at-nkaissery-ministry/>>

33 See *supra*, note 3.

34 *Ibid.*

35 See *Hussein Khalid & 16 Others v. Attorney General & 2 Others* [2014] eKLR Petition No. 324 of 2013 (Nairobi) and case brief on this case in the 4.0 Case Digest section below.

36 <[http://www.the-star.co.ke/news/2014/05/21/university-students-protest-planned-fee-increment\\_c943039](http://www.the-star.co.ke/news/2014/05/21/university-students-protest-planned-fee-increment_c943039)>; <<http://www.bbc.com/news/world-africa-27491630>>

37 <<http://www.knchr.org/Portals/0/PressStatements/PRESS%20RELEASE%20-%20Narok%20Demonstrations.pdf?ver=2015-01-28-123742-810>>

38 <<https://citizentv.co.ke/news/activist-boniface-mwangi-sues-police-over-protest-108161/>>

39 <<http://knchr.org/Portals/0/PressStatements/Press%20statement%20on%20corruption%20and%20human%20rights%20march%202015.pdf?ver=2015-03-23-152709-390>>

## 2.2.7 Growing Number of Extrajudicial Executions

There has been an increase in the number of extra-judicial killings by police and the Kenya Wildlife Service.<sup>40</sup> Such instances are publicized and condemned by CSOs<sup>41</sup> but with little effect. Numerous terrorism suspects have also disappeared or been killed in extrajudicial executions without any official investigations.<sup>42</sup> Worse still, human rights defenders have been tortured and killed. This emerging trend is especially disturbing considering the accountability mechanisms introduced to Kenya's security forces by the *Constitution*. Despite documentation by CSOs and public outcry, the numbers of extrajudicial killings continues to rise, which again contributes to the police and armed forces' impunity and propensity to continue on this path. As extrajudicial executions become more normalised, the resulting environment becomes more dangerous for those opposing police and government actions.

## 2.3 Recent Trends of Threats, Intimidation and Violence Against HRDs

### 2.3.1 Most Vulnerable HRDs in Current Environment

Reported cases of human rights violations against HRDs at both the national and grassroots level have been on the rise in Kenya. Vulnerable HRDs include women HRDs who are susceptible to among other violations, sexual violence. HRDs working on sexual, gender minority rights, extractives and environment rights and journalists are equally not spared. Notably, members of grassroots organisations such as the Malindi Rights Forum and Strategies for Northern Development have faced threats, harassment, and arbitrary arrests but due to the remoteness of the areas in which these grassroots HRDs operate, their issues often escape national scrutiny. Therefore, state and non-state actors who violate the rights of HRDs in remote areas are not as constrained by the immediate responses such as media exposure and advocacy by CSOs that are available in more urban areas.

### 2.3.2 Shrinking Space for Civil Society Organisations

In addition to demonizing the work of CSOs in public discourse, the current government has consistently acted in bad faith when dealing with the Civil Society sector and actively tried to limit the space within society where CSOs can act. After years of stakeholder input and subsequent agreement to introduce legal regime for self-regulation along with transparency, accountability and domestic philanthropy incentive provisions via the *Public Benefit Organisation Act*<sup>43</sup>, that was past and assented by former President Kibaki, the current government has refused to operationalize the *PBOA*<sup>44</sup> as enacted and instead has made repeated attempts to pass amendments that would undermine the work of CSOs through limiting amendments. These proposed amendments have

40 See IMLU Report on Deaths by Police Bullets Jan to Dec 2015 at < <http://www.imlu.org/2011-06-30-23-44-4/2015-08-28-09-08-23/reports/finish/2-reports/457-report-on-deaths-from-police-bullets-from-january-to-december-2015/0.html>>

41 See <<http://www.knchr.org/Portals/0/PressStatements/KNCHR%20press%20statement%20on%20Extra%20judicial%20killings.pdf?ver=2014-07-31-170134-420>>

42 <<https://www.hrw.org/world-report/2016/country-chapters/kenya#bb0a2e>>

43 See *supra*, note 2 [hereinafter *PBOA*].

44 *Ibid.*

included provisions to cap foreign funding of NGOs at fifteen percent (15%) and designating nine out of twelve positions in the newly created Public Benefits Organisation Regulatory Authority to be held by state officers<sup>45</sup>. The *PBOA*<sup>46</sup> Taskforce Report attempted to introduce amendments that would require that national interests and national security to be addressed during registration and post registration, and that “PBOs must uphold the security, cultural, religious values of Kenyans” and prohibition of registration of any public benefit organisations that is involved in promotion and advocacy of indecent acts as defined by sections 162 to 165 of the *Penal Code*<sup>47</sup>.

In addition, Non-Governmental Organisation Coordination Board regularly threatened to de-register Non-Governmental Organisations in October 2015 the NGO Coordination Board deregistered 959 NGOs<sup>48</sup> acting under the current *Non-Governmental Organizations Coordination Act*<sup>49</sup> which remains in force until the *PBOA*<sup>50</sup> is operationalized. While the CSOs were given more time to comply with technical regulations, the government continued to threaten CSOs with deregistration, freezing of bank accounts as well as, delaying or refusing to issue work permits to foreign workers in the sectors. The board has declared plans to legislate limitation on the activities of CSOs including quotas for foreign funding.<sup>51</sup>

### 2.3.3 Attacks, Threats and Intimidation of HRDs

Human rights defenders endured threats, intimidation and physical attacks as they conducted their work. In November 2012, human rights activist Okiya Okiiti Omtata was attacked and seriously injured by unknown assailants after he told them he would not drop a legal case concerning government corruption.<sup>52</sup> Maina Kiai, the former Chairperson of the Kenya National Commission on Human Rights (KNCHR) and United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, on the other hand reported in September 2013 that thugs invaded his mother’s rural home in Nyeri County and threatened to burn it down.<sup>53</sup> Much earlier, in 2008, Maina Kiai was one among several HRDs who received death threats relating to KNCHR investigations into the post-election violence.<sup>54</sup> Another person who has endured persecution because of human rights advocacy is Gladwell Otieno, the Director of the African Centre for Open Governance (AfriCOG). Gladwell was also a victim of vilification, insult and threats through social media in a vicious campaign unhappy with hers and AfriCOG’s role in championing justice for victims of post-election violence. The police and government did not address these threats.<sup>55</sup>

---

45 See <<http://nchrk.org/2013/11/cso-reference-group-legal-advisory-the-kenya-information-communication-amendments-bill-2013-and-the-statute-law-miscellaneous-amendments-2013/>>

46 See *supra*, note 2.

47 *Penal Code*, 2014 (CAP 63).

48 See <<https://www.standardmedia.co.ke/article/2000181037/list-of-kenyan-ngos-that-risk-de-registration>>; <<http://www.irinnews.org/report/102174/ngos-kenya-protest-threatened-deregistration-959-organisations>>

49 *Non-Governmental Organization Coordination Act*, 2012 (CAP 134).

50 See *supra*, note 2.

51 See <<http://www.khrc.or.ke/civic-space-publications/132-civic-space-timeline/file.html>>

52 See <<http://www.nation.co.ke/News/Activist+seriously+injured+in+night+attack/-/1056/1615622/-/sb95y0z/-/index.html>>

53 My life in danger over ICC cases: Maina Kiai available at <<http://mobile.nation.co.ke/News/My-life-in-danger-over-ICC-cases-Maina-Kiai/-/1950946/2000700/-/format/xhtml/-/l4m13t/-/index.html>>

54 <[http://www.em.m.wikipedia.org/wiki/Maina\\_Kiai:RetributionforHumanRightsWork](http://www.em.m.wikipedia.org/wiki/Maina_Kiai:RetributionforHumanRightsWork)>

55 <<https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends>>

Funding partners who supported such organisations including Open Society Foundation (OSF) were not spared either, as they were accused of promoting western ideology and intending to overthrow the government.

In addition to the above incidents, in 2015, the National Coalition for Human Rights Defenders Kenya (NCHRD-K) documented 15 court cases where HRDs were faced with criminal charges on account of their human rights work. In several of such cases, the exercise of human rights was criminalised or they were framed with criminal charges in order to intimidate them. The use of justice system to punish, exhaust and stigmatize human rights defenders was used across the country including Nairobi, Siaya, Chuka, Nakuru, Kisumu, Mombasa and Malindi. Many of these cases were criminal matters filed by the State against HRDs while a few of them were constitutional petitions filed by HRDs to vindicate their rights. Some of the criminal cases are still ongoing. It is worth noting that in other cases, the HRDs' were either acquitted or the cases were subsequently withdrawn by the State. A list of some of the cases indicating the status of the case is annexed where NCHRD-K together with its CSO partners intervened on behalf of the accused HRDs<sup>56</sup>. Below we highlight some of the cases.

#### 2.3.4 Targeted Killings

The most publicized killing of HRDs in the past decade was the assassination of Oscar Kamau King'ara and Paul Oulu in Nairobi in March 2009. Their car was blocked by two vehicles and then they were shot at close range through the windows on Statehouse Road less than a mile from Statehouse. Oscar Kamau King'ara and Paul Oulu were credited with an important role in the investigative work behind the police killings and torture of suspected members of the Mungiki crime sect in Kenya. They had presented their findings to two Parliamentary committees as well as to the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions before they were eliminated. To date, no one has been held to account.

Hassan Guyo, a founding member and the Programmes Director of Strategies for Northern Development, an organization that promotes human rights for women, children and refugees and also works on human trafficking issues in the North Eastern region was similarly shot dead while conducting human rights investigations. He was actively involved in civil society work and partnered with several organisations including the UNDP Amkeni wa Kenya, Civil Society Governance Programme Stakeholders Reference Group, KNCHR, IMLU and NCHRD-K. He was allegedly shot dead by Kenya Defence Forces in Moyale while apparently quelling riots triggered by the arrest and interdiction of a local chief. This was contested by eye witnesses who described the killing as targeted at the human rights defender. An inquest into the matter formed to establish the cause of death could not determine who fired the fatal shot. Similar to the case of Oscar and Paul, no one has been held to account.

---

56 A detailed list of these cases is in the Annex (6.0).

## 2.4 Case Study of a Human Rights Defender in Kenya: Joel Ogada

A member of the Kubuka Farmers Association, Joel Ogada has been on the frontline of advocating for land and environmental rights in his Coastal community for years. Joel advocates against the human rights violations committed by the neighbouring salt companies in Marereni through their expansion onto the surrounding indigenous community's ancestral lands. Joel Ogada, a resident of Kanagoni, the disputed piece of land that neighbors the Kurawa salt farm, has faced numerous threats due to his activism and efforts to resist evictions by the Kurawa Salt Company. He has been arrested several times, charged in court and jailed. He has also been maimed, faced a number of threats and had his property, house and crops destroyed. Recently, he faced three criminal cases.

In 2011, Joel Ogada was accused of threatening to beat Dickson Ngowa, a manager at the Kurawa Salt Company, when workers from the salt farm were surveying the land. In 2013, he was accused of forcible detainer and was alleged to have driven a tractor and ploughed on the land belonging to the Kurawa salt farm. In 2013, he was charged with arson for allegedly setting fire to the Tana Salt Company in the Tana Delta, destroying millions worth of property. He was found guilty and sentenced to 7 years in jail. He appealed against his conviction and in March 2015 had his sentence reduced to 2 years from the date of conviction.<sup>57</sup>

Joel Ogada's frequent arrests and imprisonment adversely affected his family who became the targets of threats when he was imprisoned. In March 2013, his wife was arrested, along with 6 others, and charged with arson and destruction of property at the Kurawa salt farm. It is alleged that she was arrested in his stead. His family has since been forced to move out of Marereni. Joel Ogada's brother, David Ogada, who Joel had asked to watch over his property while he was in prison, was arrested in November 2014 and charged with trespass and being in possession of bhang (marijuana), allegations he denied. The perception among the community and his family is that Joel is being persecuted by the local administration and the Kurawa salt farm in order to intimidate him and force him to vacate the disputed land and abandon his human rights work.

---

57 See *Angogo Joel Ogada v. Republic of Kenya* [2015] eKLR Criminal Appeal Case No. 18 of 2014 (Malindi).





3.0



## LEGAL FRAMEWORK FOR HUMAN RIGHTS DEFENDERS IN KENYA

### 3.1 What is the Legal Framework Regarding Human Rights Defenders Work in Kenya?

Human rights and consequently, the work of human rights defenders emanates directly from international human rights instruments as well as the national constitutional, legal and policy framework. The adoption of the UN *Declaration on Human Rights Defenders*<sup>58</sup> and its related resolutions was the first formal step by the international community to recognize the defence of human rights as a right in itself. The African Union has followed suit with its own declaration. However, despite these developments at the international level, many states, including Kenya, have failed to take concrete steps such as enacting a specific legal framework to protect the rights of HRDs and safeguard their working environment. On the contrary, Kenya has made policy, legal and administrative decisions that have directly undermined the work of HRDs in total disregard to the spirit and the letter of the *Constitution*<sup>59</sup> as well as international and regional human rights frameworks. It is also important to be aware of these negative actions and their legal effect on HRDs. While there is no binding law that specifically provides for the rights and protection of HRDs in Kenya, the *Constitution* has many progressive provisions that are useful to HRDs. In addition, there are other relevant laws which also affect the working environment of HRDs. This section will provide a brief overview of the relevant legal framework with regard to HRDs' work in Kenya.

### 3.2 National Legal Framework

#### 3.2.1 The Constitution of Kenya 2010

The UN *Declaration on Human Rights Defenders*<sup>60</sup> obliges states to adopt legislative, administrative and other steps necessary to ensure that HRDs are able to enjoy their rights and freedoms in the context of their work to promote human rights.<sup>61</sup> Yet while the Kenyan government has not adopted a specific legal framework for HRDs, the *Constitution* strongly protects the rights of all Kenyans.

58 See supra, note 6.

59 *Constitution of Kenya, supra*, note 5.

60 See supra, note 6.

61 *Ibid* at Article 2.

According to the *Constitution*, “[e]very person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom”<sup>62</sup>. Therefore, the Kenyan government is under a constitutional obligation to defend, protect and promote the rights of all its citizens, including HRDs.

Many of the rights guaranteed in the *Constitution's Bill of Rights*<sup>63</sup> are important in facilitating the work of HRDs. These include rights that protect people from unfair interference from state or non-state actors such as the right to life,<sup>64</sup> right to equality and non-discrimination,<sup>65</sup> right to the protection of one’s dignity,<sup>66</sup> freedom and security of the person,<sup>67</sup> right to privacy,<sup>68</sup> rights of arrested persons<sup>69</sup>, right to fair trial<sup>70</sup> and rights of persons detained, held in custody or imprisoned<sup>71</sup>. Having the *Constitution* clearly endorse these rights and freedoms bolsters the advocacy of HRDs promoting them and also reaffirms that HRDs themselves cannot be treated in a way that doesn’t respect these rights and freedoms.

Additional rights protected in the *Constitution* include the freedom of expression,<sup>72</sup> freedom of the media<sup>73</sup>, access to information<sup>74</sup>, freedom of association<sup>75</sup>, freedom of assembly, demonstration, picketing and petition<sup>76</sup>, right to property<sup>77</sup>, labour relations rights<sup>78</sup>, economic and social rights<sup>79</sup>, right to fair administrative action<sup>80</sup> and access to justice<sup>81</sup>. These rights and freedoms allow HRDs to effectively defend all human rights and also underscore their entitlement to protection from negative treatment for exercising their constitutional rights.

It is important to stress that the *Constitution's Bill of Rights*<sup>82</sup> applies not only to “all state organs... [but also] all persons”<sup>83</sup> meaning that every person, corporation and government entity is bound by it. In addition, Article 24 of the *Constitution* narrowly defines the circumstances where constitutional rights, other than those specified in Article 25, may be limited.

---

62 *Constitution, supra*, note 5 at Article 20(2).

63 *Constitution, ibid* at Chapter 4.

64 See Article 26 of the *Constitution, ibid*.

65 See Article 27 of the *Constitution, ibid*.

66 See Article 28 of the *Constitution, ibid*.

67 See Article 29 of the *Constitution, ibid*.

68 See Article 31 of the *Constitution, ibid*.

69 See Article 49 of the *Constitution, ibid*.

70 See Article 50 of the *Constitution, ibid*.

71 See Article 51 of the *Constitution, ibid*.

72 See Article 33 of the *Constitution, ibid*.

73 See Article 34 of the *Constitution, ibid*.

74 See Article 35 of the *Constitution, ibid*.

75 See Article 36 of the *Constitution, ibid*.

76 See Article 37 of the *Constitution, ibid*.

77 See Article 40 of the *Constitution, ibid*.

78 See Article 41 of the *Constitution, ibid*.

79 See Article 43 of the *Constitution, ibid*.

80 See Article 47 of the *Constitution, ibid*.

81 See Article 48 of the *Constitution, ibid*.

82 See *supra*, note 64.

83 *Constitution, supra*, note 5 at Article 20(1).

The High Court reiterated these conditions in the case of *Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 others*<sup>84</sup> holding that any limitation must be:

'...justifiable in an open and democratic society based on human dignity, equality, freedom on the basis of the nature of right or freedom, importance of the purpose of limitation, the need to ensure that the enjoyment of the right does not prejudice the enjoyment by others of their individual rights, the relation between the limitation and the purpose and whether the limitation adopted provides the *least restrictive means* (emphasis added) to achieve the purpose<sup>85</sup>.'

Furthermore, Article 10 of the *Constitution* enshrines national values and principles of governance that are binding on every person and all state organs. These national values and principles include equality, human rights, non-discrimination and protection of the marginalized. This article has provided useful guidance to the courts when interpreting the constitutionality of legislative and administrative actions of the State that potentially undermine the work of HRDs. The *Constitution* also establishes an institutional framework for monitoring the implementation of human rights in Kenya such as the Kenya National Human Rights Commission (KNCHR) and the National Gender and Equality Commission (NGEC)<sup>86</sup> as well as a clear avenue for interpretation of these rights and rectification of violations through the judiciary<sup>87</sup>.

### 3.2.2 Overview of Some Relevant Statutes

Because there is no specific legal and policy framework addressing HRDs in Kenya, to secure their rights, HRDs must rely on the *Constitution* and procedural safeguards embedded in substantive laws such as the *Evidence Act*,<sup>88</sup> *Penal Code*,<sup>89</sup> *Public Order Act*,<sup>90</sup> *Prevention of Terrorism Act*,<sup>91</sup> and the *Criminal Procedure Code*<sup>92</sup>. These legislations include procedural requirements that must be met to ensure the state uses its powers to enforce Kenya's criminal law provisions appropriately and fairly. In some cases, the constitutionality and legality of specific provisions of these statutes as well as the administrative actions of state agencies have been successfully challenged in Court.<sup>93</sup>

---

84 *Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 others* [2015] eKLR Petition No. 19 of 2015 (Mombasa) [hereinafter *MUHURI*] and see case brief on this case in the 4.0 Case Digest section below.

85 *MUHURI*, *ibid* at para. 184 and see Article 24(1) of the *Constitution*, *supra*, note 5.

86 See Article 59 of the *Constitution*, *supra*, note 5; In implementing this Article, the Commission's mandate was split between KNCHR and the National Gender and Equality Commission.

87 See Chapter 10 of the *Constitution*, *supra*, note 5.

88 *Evidence Act*, 2012 (CAP 80).

89 *Penal Code*, *supra*, note 45 [hereinafter *Penal Code*].

90 *Public Order Act*, 2014 (CAP 56).

91 *Prevention of Terrorism Act*, *supra*, note 23 [hereinafter *POTA*].

92 *Criminal Procedure Code*, 2015 (CAP 75).

93 See For instance the *MUHURI* case, *Eric Gitari* case and *CORD* case in the 4.0 Case Digest section below.

The State has relied heavily on the *Penal Code*<sup>94</sup> to prosecute numerous cases against HRDs. Some of the offenses relied on by the State include offensive conduct conducive to breach of peace<sup>95</sup>, taking part in a riot<sup>96</sup>, rioting after proclamation<sup>97</sup>, resisting arrest<sup>98</sup>, unlawful assembly<sup>99</sup>, and incitement to violence<sup>100</sup>. Many of these cases arose in the context where HRDs sought to exercise their rights to peaceably assemble and demonstrate and they were arrested and charged with these offences. In one recent case,<sup>101</sup> HRDs also faced charges under the *Prevention of Cruelty to Animals Act*<sup>102</sup>, *National Police Service Act*,<sup>103</sup> and the *Public Order Act*<sup>104</sup>. In one rare case, HRDs have also faced charges under the Nairobi County bylaws.

The *Security Laws (Amendment) Act (SLAA)*<sup>105</sup> sought to strengthen Kenya's ongoing war against terror by attempting to increase the government's power in the name of fighting terrorism. It introduced several amendments to more than 20 pieces of legislation including the *Public Order Act*<sup>106</sup> *Penal Code*,<sup>107</sup> *Prevention of Terrorism Act*,<sup>108</sup> *Evidence Act*,<sup>109</sup> *National Intelligence Service Act*,<sup>110</sup> *National Police Service Act*,<sup>111</sup> *Kenya Information and Communications Act*<sup>112</sup> and the *Public Benefit Organisations Act*<sup>113</sup>. Some of the SLAA provisions were declared unconstitutional for attempting to limit fundamental rights and freedoms including the right to information, freedom of the media, rights of a person under arrest and the right to fair trial. With the exception of those provisions declared unconstitutional and invalid, the SLAA is now in force and is discussed below in section 4.0 where the constitutional challenge to this bill is detailed.<sup>114</sup>

The *Prevention of Terrorism Act*<sup>115</sup> (POTA) and the *Proceeds of Crime and Anti- Money Laundering Act*<sup>116</sup>, together with their respective regulations, were also enacted with a view to, among other things, strengthen the fight against terrorism. These provisions have been exploited by the State to frustrate work of HRDs working on anti-terrorism related advocacy work. MUHURI and Haki Africa fell victim to this seemingly harmless legislation in April 2015 when the State relied on section 3

---

94 *Penal Code, supra*, note 45.

95 See Section 94(1) of the *Penal Code, Ibid.*

96 See Sections 78(1) and (2) as read with section 80 of the *Penal Code, Ibid.*

97 See Section 83 of the *Penal Code, Ibid.*

98 See Section 253 of the *Penal Code, Ibid.*

99 See Section 79 of the *Penal Code, Ibid.*

100 See Section 96 of the *Penal Code, Ibid.*

101 See *Hussein Khalid* case the 4.0 Case Digest section below.

102 *Prevention of Cruelty to Animals Act*, 2012 (CAP 360).

103 *National Police Service Act*, 2011 (No. 11A of 2011).

104 *Public Order Act, supra*, note 91.

105 *Security Laws (Amendment) Act, supra*, note 1 [hereinafter SLAA].

106 *Public Order Act, supra*, note 91.

107 *Penal Code, supra*, note 45.

108 *Prevention of Terrorism Act, supra*, note 23.

109 *Evidence Act, supra*, note 89.

110 *National Intelligence Service Act*, 2012 (No. 28 of 2012).

111 *National Police Service Act, supra*, note 104.

112 *Kenya Information and Communications Act, supra*, note 3.

113 *Public Benefit Organisations Act, supra*, note 2.

114 See the *CORD* case, *supra*, note 25 and the *CORD* case brief in the 4.0 Case Digest section below.

115 *Prevention of Terrorism Act, supra*, note 23 [hereinafter POTA].

116 *Proceeds of Crime and Anti-Money Laundering Act*, 2009 (No. 9 of 2009) (Revised 2014).

of *POTA* to recommend that these organisations be named specified entities with links to terrorist cells. As a result of the initiation of this process, MUHURI and Haki Africa had their bank accounts frozen by the government<sup>117</sup>.

The *Kenya Information and Communication (Amendment) Act (KICA)*<sup>118</sup> and the *Media Council Act*<sup>119</sup> included provisions that sought to reintroduce the state control of media that was prevalent in Kenya prior to 2003. This legislation also imposes punitive fines on journalists and media houses which encourage self-censorship by journalists and media houses alike.<sup>120</sup> These Acts pose a serious threat to freedom of the media in Kenya and accordingly, a constitutional challenge is currently before the courts.

It is hoped that the recent enactment of the *Fair Administration Action Act*<sup>121</sup> which provides an implementing legislative framework for Article 47 of the *Constitution* will secure the right to the fair exercise of state and non-state power with regard to HRDs. The Act provides procedural safeguards and other legal requirements that must be complied with when making decisions or taking administrative actions that could affect a person's rights.

### 3.2.3 Non-Binding National Law

Commendably, the courts have upheld rights of HRDs in some recent decisions. Notably in April 2015, the High Court made specific reference to the UN *Declaration on Human Rights Defenders*<sup>122</sup> observing that:

While it is not a legally binding instrument, it represents a strong commitment by States and specifies how existing human rights standards apply to human rights defenders by providing a framework to analyse the level of protection accorded to human rights defenders in a given country...<sup>123</sup>

Even though this is just a side comment by the judge in this case, the affirmation of the UN *Declaration on Human Rights Defenders*<sup>124</sup> shows the Court's willingness both to recognize the importance of ensuring fair treatment of HRDs and utilize the UN Declaration as a tool for understanding the relevant issues.

117 <<http://nchr.dk.org/2015/11/situation-analysis-of-muhuri-and-haki-africa/>>

118 *Kenya Information and Communications (Amendment) Act, supra*, note 3 [hereinafter *KICA*].

119 *Media Council Act, supra*, note 4 [hereinafter *MCA*].

120 <<http://nchr.dk.org/2013/11/cso-reference-group-legal-advisory-the-kenya-information-communication-amendments-bill-2013-and-the-statute-law-miscellaneous-amendments-2013/>>

121 *Fair Administration Action Act*, 2015 (no. 4 of 2015).

122 See *supra*, note 6.

123 *Eric Gitari v. Non-Governmental Organisations Board & 4 Others [2015]* eKLR Petition No. 440 of 2013 (Nairobi) at para. 102.

124 See *supra*, note 6.

The *Public Benefit Organisation Act*<sup>125</sup> seeks to allow self-regulation of civil society organisations. Though the *PBOA* was assented to by President Kibaki in January 2013, the current government has refused to operationalize it and therefore it is not yet law. Instead the government has tried to introduce amendments limiting the abilities of CSOs to register, determine their own agendas, receive foreign aid funding and carry out true self-regulation. However, neither the Act nor the proposed amendments are law. Nevertheless, the NGO Coordination Board (which still operates under the previous legislation that remains in force until the *PBOA* is operationalized) has attempted to enforce the proposed amendments even though they are not law.

### 3.3 International and Regional Legal Framework

#### 3.3.1 International Human Rights Instruments

Kenya is a state party to various international human rights instruments and under Article 2 (6) of the *Constitution*, any treaty or convention ratified by Kenya shall form part of the Laws of Kenya. A number of international human rights instruments have been ratified by Kenya and are relevant to the work of human rights defenders. Some of the relevant human rights instruments that are binding law in Kenya include the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention against Torture, Convention on Elimination of all forms of Discrimination against Women, Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child. HRDs can use these instruments alongside national laws to advocate for human rights. These international laws are also useful in holding state and non-state actors to account for their actions taken against HRDs due to their work in promoting and protecting human rights.

There is also a UN Special Rapporteur on the Situation of Human Rights Defenders. This Special Rapporteur was established in 2000 soon after the passing of the UN *Declaration on Human Rights Defenders*<sup>126</sup> in order to collect data concerning HRDs, engage governments in dialogue on improving the situation for HRDs and recommending effective strategies for protecting HRDs.<sup>127</sup>

It is of note that the Kenyan government has been reluctant to vote in favour of some of the recent UN resolutions on HRDs. During the last Universal Periodic Review (UPR) process for Kenya, where each member state has its human rights record reviewed by other member states, the Kenyan government did accept some recommendations on improving the legal and policy environment affecting the work of HRDs. Unfortunately, it also rejected some fundamental recommendations including those touching on the *Security Laws (Amendment) Act*<sup>128</sup> and the *Public Benefit Organisation Act*<sup>129, 130</sup>. Concerns around the *SLAA* are discussed above in section 3.2.2 as well as in section 4.0 in the Case Digest section below. Challenges involving the *PBOA* are discussed in sections 2.3.2 and 3.2.3 above.

---

125 *Public Benefit Organisation Act*, *supra*, note 2 [hereinafter *PBOA*].

126 See *supra*, note 6.

127 <<http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Mandate.aspx>>

128 *Security Law (Amendment) Act*, *supra*, note 1 [hereinafter *SLAA*].

129 *Public Benefit Organisation Act*, *supra*, note 2 [hereinafter *PBOA*].

130 See UN Human Rights Council Working Group on the Universal Periodic Review for Kenya dated 26 March 2015.

### 3.3.2 UN Declaration on Human Rights Defenders

The *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*<sup>131</sup> (UN *Declaration on Human Rights Defenders*) recognizes the defence of human rights as a right in itself. Article 1 declares that “[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels”. In the context of the work of human rights defenders, the declaration reiterates and guarantees a number of internationally recognized human rights including the freedom of assembly and association<sup>132</sup>, the right to information and freedom of expression<sup>133</sup>. The UN *Declaration on Human Rights Defenders* also sets out the “right to access and communicate with international human rights mechanisms with competence to receive communications on matters concerning human rights and fundamental freedoms”.<sup>134</sup>

While most of the human rights covered by this UN statement are already covered in other UN documents, the Declaration is important because it connects these human rights to the dangers faced by HRDs and recognizes the important role HRDs play in promoting human rights around the world. The Declaration also calls upon states to create an enabling environment to facilitate the work of HRDs. Furthermore, it reaffirms existing international human rights instruments as the basic legal framework for securing human rights and fundamental freedoms. It is important to note, however, that the UN *Declaration on Human Right Defenders* is only a declaration and therefore cannot be binding law. Furthermore, it has not been domesticated by Kenya. Nevertheless, as mentioned above the Kenyan courts have cited its usefulness in showing “how existing human rights standards apply to human rights defenders by providing a framework to analyse the level of protection accorded to...”<sup>135</sup> them. Moreover, it highlights the importance of protecting HRDs in a just and democratic society.

While the UN *Declaration on Human Rights Defenders* clearly spells out the state’s obligations in protecting HRDs, by extrapolation, most of these rights are aptly provided for in the *Constitution*. For example, it is arguable that if the police fail to act on information they have that may stop, prevent or curtail actions that are infringing on a person’s right to human dignity or freedom and security of the person, the police themselves are infringing on a person’s right to human dignity or freedom and security of the person and a court case can be filed accordingly.

---

131 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 9 December 1998, UNGA Res. 53/144 [hereinafter UN *Declaration on Human Rights Defenders*].

132 See Article 5 of UN *Declaration on Human Rights Defenders*, *ibid*.

133 UN *Declaration on Human Rights Defenders*

134 UN *Declaration on Human Rights Defenders*, *ibid* at Article 9(4).

135 *Eric Gitari v. Non-Governmental Organisations Board & 4 Others* [2015] eKLR Petition No. 440 of 2013 (Nairobi) at para. 102.

### 3.3.3 Regional Human Rights Instruments

Regionally, Kenya is party to a number of human rights instruments produced by the African Union and because Kenya has ratified them, as per Article 2 of the *Constitution*, they form part of the Laws of Kenya. These human rights instruments include the African Charter of Human and People's Rights (Banjul Charter), the Protocol to the African Charter on Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child. Again, HRDs can use these instruments to advocate for the human rights of others and themselves.

Following the introduction of the UN *Declaration on Human Rights Defenders*, there was special recognition of the need to protect HRDs in Africa in 2003 when the Kigali Declaration<sup>136</sup> noted:

the important role of Civil Society Organisations (CSOs) in general and human rights defenders in particular, in the promotion and protection of human rights in Africa, [and] calls upon Member States and regional institutions to protect them and encourage the participation of CSOs in decision-making processes with the aim of consolidating participatory democracy and sustainable development...<sup>137</sup>

Then in 2004, the African Commission on Human and Peoples' Rights (ACHPR) adopted the *Resolution on the Protection of Human Rights Defenders in Africa*<sup>138</sup> which highlights with grave concern:

the growing risks faced by human rights defenders in Africa... [and the] impunity for threats, attacks and acts of intimidation against human rights defenders persists and that this impacts negatively on the work and safety of human rights defenders[.]<sup>139</sup>

This preamble to this resolution explicitly recognizes the UN *Declaration on Human Rights Defenders* and cites the Organisation of African Unity's call on member states to implement it. The resolution also establishes the ACHPR's Special Rapporteur on Human Rights Defenders who is charged with a mandate to collect and act on information on HRDs, engage and dialogue with member states, recommend protection strategies and promote implementation of the UN *Declaration on Human Rights*.<sup>140</sup> These statements underscore the importance of HRDs and CSOs in a participatory democracy and reinforce their special need for protection in the African context.

136 *Kigali Declaration*, First AU Ministerial Conference on Human Rights, 2003, Kigali (AU).

137 *Kigali Declaration*, *ibid* at Article 28.

138 *Resolution on the Protection of Human Rights Defenders*, Res 69, ACHPR, 35<sup>th</sup> Sess, 2004, Banjul (ACHPR).

139 *Resolution on the Protection of Human Rights Defenders*, *ibid* at the preamble.

140 See Article 1 of *Resolution on the Protection of Human Rights Defenders*, *ibid* and [www.achpr.org/mechanisms/human-rights-defenders/](http://www.achpr.org/mechanisms/human-rights-defenders/).





## CASE DIGEST OF CASES AFFECTING THE WORK OF HUMAN RIGHTS DEFENDERS

### 4.1 Kenyan Case Law Concerning Human Rights Defenders

This case digest summarises landmark judgments arising from constitutional petitions relevant to the work of human rights defenders since the *Constitution*<sup>141</sup> came into force in August 2010. The cases highlighted here are not exhaustive. With the exception of cases involving CSOs, it is important to note that it is often hard to pinpoint court cases regarding HRDs through traditional searching of decisions because HRDs are often not identified in court decisions.

This information is often missing where the courts may not note the HRDs' activities promoting human rights because it is not aware of them or because it views them as not being relevant. For this reason, it is important for advocates and HRDs themselves to describe their activities promoting human rights and how they may be linked to the case before the court. It is also important to cite the *UN Declaration on Human Rights Defenders*<sup>142</sup> as a starting point for analysing a fact scenario. For courts, it is important to identify HRDs and include an analysis of the rights of HRDs in their decision. These steps will not only help to identify cases regarding HRDs but also develop local jurisprudence in the area. In the future, there will be more applicable Kenyan case law as NCHRD-K and other groups continue to compile these cases.

### 4.2 Case Selection

Cases were selected on the basis of whether their outcome had an impact on the working environment of HRDs, whether that is how they promote human rights or how they can defend themselves from persecution. Two of the cases refer to how CSOs whose purpose is to advocate and advance the human rights of marginalised groups, defended themselves from unfair treatment. These cases can inform the actions of CSOs and HRDs and their advocates. Two other cases address developments in the law regarding rights that are often used by HRDs in their work such as freedom of speech, assembly, demonstration, picketing and freedom of the media.

---

141 See *supra*, note 5.

142 See *supra*, note 6.

One of the cases also discussed the increased ability of National Intelligence Service officers to use surveillance of electronic communication. This type of surveillance is often used to infringe the privacy rights of HRDs and monitor their activities to collect information for the purposes of making threats or reprisals.

In *Coalition for Reform and Democracy (CORD) & Two others v. the Republic of Kenya & Another*,<sup>143</sup> the opposition party CORD, Kenya National Commission on Human Rights (KNCHR) and other petitioners challenged the constitutionality of several proposed amendments to various existing security laws introduced by the *Security Laws (Amendment) Act*<sup>144</sup>. The petitioners successfully challenged amendments that restricted the media's publication of images and information relating to terror attacks without consent of the police. However, the Court upheld the amendments relating to surveillance of electronic communication by security officers. The Court also ruled that there is nothing to stop a state organ from filing a petition against the state and found that a reduced period for public participation with short notice was still sufficient and constitutional.

*Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 Others*<sup>145</sup> concerns MUHURI and Haki Africa, two coast based CSOs advocating for human rights within anti-terrorism operations, who challenged the constitutionality of steps taken against their organisations. The Inspector General of Police took actions to declare them as having links to terrorist organisations and government agencies subsequently froze their bank accounts. The Court declared that the Inspector General failed to uphold the right to fair administrative action in seeking to declare the two CSOs as specified entities. The Court also found that freezing the bank accounts was unconstitutional and illegal because it violated the rights to property and fair administrative action and did not comply with the provisions and regulations of the *Prevention of Terrorism Act*<sup>146</sup>.

*Eric Gitari v. Non-Governmental Organisations Coordination Board & 4 Others*,<sup>147</sup> concerned the rights of a citizen to register an NGO as well as the rights of sexual minorities to freedom of association and non-discrimination. The Court reaffirmed that all persons are entitled to the rights to freedom of association and equality and ruled the NGO Coordination Board violated the *Constitution* by declining to register an association that would advocate for the rights of sexual minorities. The case was brought by Eric Gitari after the NGO Coordination Board declined to register his organisation, the National Gay and Lesbian Human Rights Commission, on the grounds that the proposed organisation would promote immorality and homosexuality which was illegal under the law.

Finally, *Hussein Khalid & 16 Others v. Attorney General & 2 Others*<sup>148</sup> where the seventeen accused HRDs alleged violations of their rights following their arrest and prosecution for participation in a peaceful demonstration against attempts by members of parliament to raise their salaries. In this case, the Constitutional Court declined to stop the prosecution of the accused HRDs. The Constitutional Court referred some determinations to the trial court but could not find that the HRDs' rights to freedom of expression or freedom of assembly, demonstration, picketing and petition had been violated.

---

143 *Coalition for Reform and Democracy (CORD) & Two Others v. the Republic of Kenya & Another* [2015] eKLR Petition No. 628 of 2014 consolidated with Petition No.630 of 2014 and Petition No.12 of 2015 (Nairobi).

144 *Security Laws Amendment Act*, *supra*, note 1.

145 *Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 others* [2015] eKLR Petition No. 19 of 2015 (Mombasa).

146 *Prevention of Terrorism Act*, *supra*, note 23.

147 *Eric Gitari v. Non-Governmental Organisations Board & 4 Others* [2015] eKLR Petition No. 440 of 2013 (Nairobi).

148 *Hussein Khalid & 16 Others v. Attorney General & 2 Others* [2014] eKLR Petition No. 324 of 2013 (Nairobi).

### 4.3 Case 1: Coalition for Reforms and Democracy (CORD) and Two Others v. Republic of Kenya and Another<sup>149</sup>

*High Court of Kenya at Nairobi*

*Petition No.628 of 2014 consolidated with Petition No.630 of 2014 and Petition No.12 of 2015*

*Date of Judgment: 23rd February 2015*

*Before: Isaac Lenaola, Mumbi Ngugi, Hedwig Ong'udi, Hillary Chemitei, and Joseph Louis Onguto*

#### Summary of Facts

Following a series of terrorist attacks in 2014, the President formed a team of government officials in the security sector to look into the issue of insecurity. The team presented its report to the President on 4<sup>th</sup> December 2014 and proposed urgent reforms to the country's security system including amending many security related laws. Consequently, the *Security Laws (Amendment) Bill* was published on Monday 8<sup>th</sup> December 2014 and then on Tuesday 9<sup>th</sup> December 2014, the National Assembly shortened the period for the publication of the Bill from 14 to one day. The bill was then presented for first reading and was subsequently committed to the Committee on Administration and National Security.

On 10<sup>th</sup> December 2014, the committee published a newspaper advertisement informing the public that public participation on the bill would take place on the 10<sup>th</sup>, 11<sup>th</sup>, and 15<sup>th</sup> December 2014. During the second reading of the bill on 11<sup>th</sup> December 2014, some opposition members of parliament objected to the process noting that public participation was not complete but the Speaker ruled that public participation would continue after the second reading. On the 18<sup>th</sup> December 2014, the bill was passed following a controversial and chaotic debate and the President assented to it on 19<sup>th</sup> December 2014.

The new law, the *Security Laws (Amendment) Act*,<sup>150</sup> amended 22 statutes concerned with matters of national security. The petitioners, CORD (the opposition coalition), the Kenya National Commission on Human Rights (KNCHR) and a concerned citizen, challenged the new law on various grounds. They argued that the legislature failed to facilitate public participation and that certain provisions of the Act were unconstitutional, breached the Bill of Rights and introduced limitations that were not justifiable in an open and democratic society. In addition to disputing these arguments, the Attorney General challenged the competence of the KNCHR, a state organ, to lodge its petition against the State.

149 [2015] eKLR Petition No. 628 of 2014 consolidated with Petition No.630 of 2014 and Petition No.12 of 2015 (Nairobi).

150 *Security Laws (Amendment) Act*, 2014 (No. 19 of 2014) [hereinafter SLAA].

## Issues

Several key issues were highlighted for determination in this case. Those considered here concentrate on issues that are relevant to the working environment of HRDs, including the following:

1. Whether the KNCHR could lodge a claim against the State?
2. Whether the enactment process for the *SLAA* was flawed and unconstitutional for, among other things, lack of adequate or reasonable public participation?
3. Whether the *SLAA* was unconstitutional for violating several constitutional rights including:
  - a. The right to freedom of expression and the right to freedom of the media guaranteed under Articles 33 and 34 of the *Constitution*;
  - b. The right to privacy under Article 31 of the *Constitution*;

## Summary of Judgment

On the competence of KNCHR, a state organ, to file a petition against the state, the Court held that the *Constitution* does not preclude Constitutional Commissions from instituting proceedings against the government on any ground as a remedial action that they are mandated to pursue under Article 59. According to the Court, the higher goal of ensuring observance of democratic values and principles entitled KNCHR to lodge a petition seeking interpretation of legislation that is deemed to violate or threaten violation of human rights. In addition, the broad formulation of Articles 22 and 258 of the *Constitution* regarding who can approach the Court for protection and promotion of human rights also support this view.

On public participation, the court held that the *SLAA* was not unconstitutional for lack of public participation. The National Assembly had acted reasonably in the manner in which it facilitated public participation on the *SLAA*. It noted that the parliamentary committee gave notice for written submissions to be made to it within 5 days and allowed for 3 days of oral hearing and that 46 stakeholders representing various interests, including some of the petitioners, had engaged with the committee. The court expressed the view that although an opportunity could have been availed for greater public participation, it would not be practical to insist that every Kenyan's view ought to have been considered prior to the passage of the *SLAA*. The Court also acknowledged that members of the National Assembly also represent the people of Kenya. While such representation could not dispense with the need for true public participation, when taken together with the views expressed by stakeholders who made submissions to the committee, it was found that there was reasonable public participation.

With regard to the rights to freedom of expression and freedom of the media, the Court held that sections 12 of the *SLAA* and 66A of the *Penal Code*<sup>151</sup> were unconstitutional because they violated these freedoms as guaranteed under Articles 33 and 34 of the *Constitution*. The *SLAA* created a new offence under section 66A of the *Penal Code* which prohibited the publication and broadcasting of images of dead or injured persons or inciting material. Very broad terms, such as "insulting, threatening, inciting material, images of the dead or injured persons" that were not defined in the section were used to define these prohibitions and were therefore open to subjective interpretation, misinterpretation and abuse. As a result, these limitations on freedom of speech and freedom of the media could not be constitutional.

---

151 *Penal Code*, 2014 (CAP 63).

The Court also held that section 64 of the *SLAA*, which introduced sections 30A and 30F to the *Prevention of Terrorism Act*,<sup>152</sup> were unconstitutional for violating the freedoms of expression and the media guaranteed under Articles 33 and 34 of the *Constitution*. Sections 30A and 30F of *POTA* criminalized the publication of photographs of victims of terror attacks without their consent and also imposed the requirement to obtain prior authorization from the National Police Service before publishing any information relating to terrorism investigations and security operations.

The Court found that the state had failed to meet the test set out in Article 24 as it had not demonstrated the rational nexus between the limitation on the rights to freedom of expression and freedom of the media and its purpose. The state also failed to limit the right in clear and specific terms and neglected to express the intention to limit the right along with the nature and extent of the limitation within the *SLAA*. Finally, the limitation contemplated was so far reaching that it diminished the essential core content of the right guaranteed under Article 34 of the *Constitution*. It was also noted that there was already in existence clear constitutional and legislative provisions to cover such situations such as the law on defamation.

On the violation of the right to privacy, the Court held that section 56 of the *SLAA*, the new section 42 of the *National Intelligence Service Act*<sup>153</sup>, section 69 of the *SLAA* and section 36A of the *POTA* did not violate the right to privacy guaranteed under Article 31 of the *Constitution*. These provisions were constitutional because the interception of communication by the state and searches in the context of terror investigations was justifiable in a free and democratic state and was rationally connected to the intended purpose of detection, disruption and prevention of terrorism. Furthermore, the Court stated that there were sufficient safeguards within the respective amended statutes to ensure that the limitation of the right to privacy contemplated under the laws was not exercised arbitrarily or on a mass scale.

## Why this Case is Important

This case is important to HRDs because it addresses freedom of expression, freedom of the media and the right to privacy. The affirmation of these fundamental freedoms is vital to the work of HRDs to advocate for human rights causes related to terrorism. It allows HRDs to bring issues touching on terrorism and terrorist attacks into the public discourse and the media to fully investigate and publish the information they obtain.

The limitations proposed under the *SLAA* were found to be unconstitutional even in the face of the growing concern over terrorism attacks which show the high regard still shown to the freedom of expression and freedom of the media in Kenya. The infringement of the right to privacy was, however, found to be constitutional and allows for further electronic surveillance which can affect HRDs in a disproportionately negative way because they can often become targets for state surveillance when advocating against state sponsored positions. Therefore, the ability of HRDs and CSOs to advocate for the respect of human rights requires constant vigilance to ensure that unconstitutional limitations on these rights are not introduced.

In addition, this decision reaffirms the ability of state organs such as the KNCHR, an organization that is active in the civil society sector and constantly advocating for the human rights of all Kenyans, to file petitions against the state. Yet, the decision also has a negative impact on the broad civil space sponsored by the *Constitution's* requirement for frequent and meaningful public

---

152 *Prevention of Terrorism Act*, 2012 (No. 30 of 2012) [hereinafter *POTA*].

153 *National Intelligence Service Act*, 2012 (No. 28 of 2012).

participation in the decision-making powers of government. The minimal time and notice provided for public participation on the *SLAA* was still found to be constitutional perhaps because the Court did not consider the overall quality of the public participation that took place.

#### 4.4 Case 2: Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others<sup>154</sup>

*High Court of Kenya at Mombasa,*

*Petition No. 19 of 2015*

*Date of Judgment: 12th November 2015*

*Before: M. J. Anyara Emukule*

##### Summary of Facts

On 7 April 2015, the Inspector General of Police issued a Gazette Notice pursuant to section 3(2) of the *Prevention of Terrorism Act*<sup>155</sup> notifying several organisations including MUHURI and Haki Afrika, two Coast based NGOs, to present themselves to the police in Nairobi within 24 hours to demonstrate why they should not be declared a specified entity. Meanwhile, the Central Bank of Kenya (CBK) and the Financial Reporting Centre (FRC), acting under provisions of *Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations 2013 (POTA Regulations)*, immediately froze the NGOs' bank accounts. The NGOs filed the petition on their own behalf and in the public interest challenging the legality and constitutionality of the actions undertaken by the Inspector General, the CBK and the FRC.

##### Issues

The issues addressed by the Court included:

1. Whether the respondents violated the petitioners' constitutional rights, in particular the right to fair administrative action as guaranteed under Article 47 of the *Constitution*;
2. Whether in issuing the Gazette Notice the Inspector General acted outside the legal powers provided under *POTA* and the *POTA Regulations*; and
3. Whether the freezing of the petitioners accounts under the *POTA* and *POTA Regulations* sections 10 and 11 was in contravention of the petitioners' right to property.

---

154 *Muslims for Human Rights (MUHURI) & Another v. Inspector-General of Police & 5 others* [2015] eKLR Petition No. 19 of 2015 (Mombasa) [hereinafter MUHURI].

155 *Prevention of Terrorism Act, 2012* (No. 30 of 2012) [hereinafter *POTA*].

## Summary of Judgment

The Court held that the petitioners' right to fair administrative action under Article 47(1) of the *Constitution* was violated by the publication of the Gazette Notice. According to the Court, the publication

...was tainted with procedural impropriety for failure to afford the petitioners fair administrative process hence the Gazette Notice is null and void ab initio [or from the beginning]. Being null and void, no action can be based upon it...[.]<sup>156</sup>

In other words, the Inspector General failed to provide adequate notice to the petitioners so that they could prepare and answer the accusations that the Gazette Notice raised. There was no procedural fairness as required by Article 47 of the *Constitution*.

According to sections 3(1) and 3(2) of *POTA*, the Inspector General was required to have reasonable grounds and to afford the petitioners reasonable opportunity to demonstrate why they should not be declared specified entities. The court further emphasized that while the law does not prescribe the form of the reasonable opportunity it must be reasonable and reasonableness is a question of fact that depends on the circumstances in each case.<sup>157</sup>

The Court noted that the 24 hours' notice to appear before the police in Nairobi along with the lack of written reasons supporting the Inspector General's intention to name MUHURI and Haki Africa as specified entities having links to terrorist organisations meant that there was not a meaningful opportunity to respond to the accusations being made against them.<sup>158</sup>

The Court also held that neither the right to fair administrative action nor Article 47 are expressly limited in any provisions of the *POTA*. Moreover, the government did not meet the requirements of Article 24(1) of the *Constitution*, including using the least restrictive means,<sup>159</sup> even if it did make a case to limit the right.<sup>160</sup> Therefore, given the serious consequences facing the petitioners, there was no reason to find that the seriousness of the state's fight against terrorism should limit the petitioners' right to fair administrative action.

Moreover, the Court also found that the Inspector General had no powers to publish the gazette notice under section 3 of the *POTA* even if it was just an intention to recommend that the NGOs be declared a specified entity having connections to terrorism. According to section 3(2) of the *POTA*, the power to gazette is only given to the Cabinet Secretary. Even then, he can only gazette it if he is satisfied with the recommendations and after those affected are provided with an opportunity to defend themselves against the accusations and upon making the order that the body is a specified entity.<sup>161</sup>

156 MUHURI at para. 197.

157 MUHURI at para. 158.

158 See MUHURI at paras. 162-164.

159 See Article 24(1)(e) of the *Constitution*.

160 See MUHURI at paras. 179-184.

161 See MUHURI at paras. 170-172.

Lastly, as a result of its reasoning, the Court found that the Gazette Notice was unconstitutional in violation of the petitioners' right to fair administrative action and that it was also illegal because the Inspector General acted outside his scope of power. Therefore, the freezing of petitioners' bank accounts was unconstitutional in violation of their right to own property. Under regulation 11(1) of the *POTA Regulations*, the responsibility to freeze accounts lies with the Cabinet Secretary for Internal Security and not with the FRC and the CBK so the freezing of the petitioners' bank accounts was also illegal. Nevertheless, the FRC and the CBK were still bound by the *Constitution's* Article 10 on the national values and principles of governance and Article 47 on the right to fair administrative action.

### **Why this Case is Important**

Despite the current government's tendency to try to undermine the work of CSOs, the *Constitution* provides that no state or non-state actor can take unfair administrative actions that are not in accordance with Article 47. This obligation means that the government as well as other entities must apply the law properly and in a procedurally fair manner allowing for all the usual legal safeguards such as clear and timely notice as well as the ability to rebut accusations.

This duty to act fairly is owed to all individuals and by extension to all CSOs as well. Yet, this decision does not mean that one should not try one's best to comply with the parameters set out to challenge administrative action, especially as it is important to note that court cases take time and enforcement of a court decision is not always automatic. In fact, MUHURI and Haki Africa had their bank accounts frozen for months while this case was ongoing. In any event, it is important to be aware that all state and non-state actors must comply with Article 47 and how to highlight the features of an administrative action that make it unreasonable.



## 4.5 Case 3: Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 Others<sup>162</sup>

*High Court of Kenya at Nairobi,*

*Petition No. 440 OF 2013*

*Date of Judgment: 24<sup>th</sup> April 2015*

*Before: Isaac Lenaola, Mumbi Ngugi, and G.V. Odunga*

### Summary of Facts

The petitioner sought to register a non-governmental organisation (NGO) with the Non-Governmental Organisations Coordination Board. In accordance with the requirements for registration of an NGO, on 2 April 2013, the petitioner sought to reserve the following names with the Board for the purposes of registration of a NGO, Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observatory and Gay and Lesbian Human Rights Organization. He was advised by the Board that all the proposed names were unacceptable and should be reviewed. He then sent the following names, Gay and Lesbian Human Rights Commission, Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective with a letter to the Board demanding to know why his application had been rejected. In its written reply to the petitioner's advocate, the Board explained that the basis for the rejection of the proposed names was sections 162, 163 and 165 of the *Penal Code*<sup>163</sup> which criminalise gay and lesbian liaisons. The Board relied on regulation 8(3)(b) of the *NGO Regulations* of 1992 which allows the Director of the Board to reject applications if "such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable".

After several unsuccessful attempts at registering the proposed NGO, the petitioner through his advocate sought reasons in writing from the Board for the rejection of his application. He also explained that he was not seeking to further criminal conduct but to further the equality of lesbian, gay, bisexual, transgender, intersex and queer persons in Kenya. The Board reiterated its position based on provisions of the *Penal Code* and added that sexual orientation was not a prohibited ground of discrimination in Article 27(4) of the *Constitution*. It also stated that the *Constitution* does not permit same sex marriage whilst heterosexual relationships are expressly protected in Article 45(2). The Board urged the petitioner to review the proposed name and to provide the objects of the proposed NGO. Although the petitioner forwarded the objectives and articles and also explained that the proposed NGO sought to defend rights already contained in the *Bill of Rights*, he received no further communication.

### Issues

1. Whether persons who identify as lesbian, gay, bisexual, transgender, intersex or queer have a right to form associations in accordance with the law; and
2. Whether the decision of the Board not to allow the registration of the proposed NGO is a violation of the petitioner's right to equality under Article 27 and freedom of association under Article 36 of the *Constitution*.

---

162 *Eric Gitari v. Non-Governmental Organisations Board & 4 Others* [2015] eKLR Petition No. 440 of 2013 (Nairobi) [hereinafter *Eric Gitari*].

163 *Penal Code*, 2014 (CAP 63).

## Summary of Judgment

The court held that the term “every person” in Article 36 includes homosexual persons and the petitioner therefore falls within the ambit of Article 36 of the *Constitution* which guarantees the right to freedom of association to every person.

The right to freedom of association can only be limited in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Furthermore, the Court found that the Board infringed on the petitioner’s constitutional right to freedom of association, a right it found the UN *Declaration on Human Rights Defenders*<sup>164</sup> explicitly guarantees for person advocating for human rights. Though not binding, the Court remarked on the UN Declaration’s usefulness as a framework for analysing the protection given to HRDs.<sup>165</sup> The Court also found that the Board’s rejection of all the names for the proposed NGO, and by extension its refusal to register the proposed NGO, was a limitation of the petitioner’s right to freedom of association which the Board had not been able to justify in accordance with the requirements of the *Constitution*. The Board’s reliance on the provisions of the *Penal Code* that criminalise certain types of sexual conduct to limit the petitioner’s freedom of association was found to be unjustifiable.<sup>166</sup>

The absence of sexual orientation as one of the prohibited grounds of discrimination in Article 27(4) of the *Constitution* did not assist the Board or give the state free reign to discriminate against people. The use of the word ‘including’ indicates that the list of grounds in Article 27(4) is not closed, is subject to interpretation and may include additional grounds when the context and circumstances demonstrate persistent discrimination.<sup>167</sup> Finally, the Court noted that once a limitation of a fundamental right or freedom is demonstrated, the onus is on the entity attempting to justify its limitation with reference to the law or the analysis under Article 24. The petitioner is not under any obligation, once he has demonstrated a violation of his right, to show that there is no justification for limiting his rights.<sup>168</sup>

## Why This Case Is Important

This case is extremely useful to all HRDs who find themselves in conflict with the law as it explicitly recognizes the UN *Declaration on Human Rights Defenders*, though not binding in Kenya, as an important framework for viewing cases involving persons advocating for human rights. The Court uses Article 5 of the *Declaration on Human Rights Defenders* to reaffirm that everyone has the right to advocate for human rights as an individual as well as collectively with others and is thereby entitled to join, form and participate in NGOs and other associations dedicated to this work. This use of the UN Declaration shows how it can help advocates and courts cut through layers of manufactured legal arguments to address the true fact scenario, in this case the denial of the right

164 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 9 December 1998, UNGA Res. 53/144 [hereinafter UN *Declaration on Human Rights Defenders*].

165 *Eric Gitari* at para. 102.

166 *Eric Gitari* at paras. 112-118.

167 *Eric Gitari* at paras. 119-120.

168 See *Eric Gitari* at paras. 121-122.

to association for a HRD because his cause is not popular. The UN Declaration spells out many other human rights in the specific context of HRDs and consequently, it is a useful legal instrument to help describe many fact scenarios involving HRDs in a way to highlight the rights and need of protection for HRDs. As a result, it is advisable to cite the *UN Declaration on Human Rights Defenders* in every case where a HRD finds him or herself in conflict with the law.

In addition, the Court stresses that HRDs may be promoting an unpopular cause, or one unpopular with those in positions of power, and that doesn't mean that the rights of HRDs shouldn't be respected. This decision also shows that the *Constitution* will not allow discrimination against HRDs who advocate for socially, culturally or politically unpopular causes. It also highlights that the right to association is not limited to any person or purpose and in fact is stated very broadly in Article 36 of the *Constitution*. It is also a strong precedent for the right of all Kenyans to be able to register a NGO or CSO with the government which can be an avenue to more publicity, legitimacy and funding for the causes of HRDs. Ultimately, this decision is also a precedent, broadly speaking, for the limitations on government interference with the civil society sector and the right to association generally.

#### **4.6 Case 4: Hussein Khalid & 16 Others v. Attorney General & 2 Others<sup>169</sup>**

*High Court of Kenya at Nairobi*

*Petition No.324 of 2013*

*Date of Judgment: 26<sup>th</sup> August 2014*

*Before: Isaac Lenaola*

##### **Summary of Facts**

On 14th May 2013, the petitioners, along with others, organised and participated in a demonstration dubbed 'Occupy Parliament'. The demonstration was organised to protest the alleged attempts of members of the National Assembly to oust Commissioners of the Salaries and Remuneration Commission so that they could set their own salaries and benefits. As required by law, the organisers notified the Inspector General of Police of their planned demonstration and because no objection was raised, it went ahead.

The demonstration was largely peaceful and consisted of protesters marching on major city roads making their way to Parliament as police officers provided security. Once the protesters reached Parliament, pigs fed on blood in the streets to draw attention to the greed of members of the National Assembly. Protesters also blocked roads to Parliament when they sat down on the tarmac as they listened to the demonstration leaders recount the alleged actions of the members of the National Assembly. The police responded by throwing teargas at the demonstrators and ordering them to disperse. At about 2:30pm, the petitioners were arrested and detained at the Parliament Police Station where they were bonded and released after 7.30p.m. On 20th May 2013, the protesters were charged with:

---

<sup>169</sup> *Hussein Khalid & 16 Others v. Attorney General & 2 Others* [2014] eKLR Petition No. 324 of 2013 (Nairobi) [hereinafter *Hussein Khalid*].

- i. Offensive conduct conducive to a breach of peace contrary to section 94(1) of the *Penal Code*<sup>170</sup>
- ii. Taking part in a riot contrary to sections 78(1) and (2) as read with section 80 of the *Penal Code*.
- iii. Cruelty to animals contrary to section 3(1)(c) as read with section 3(3) of the *Prevention of Cruelty to Animals Act*<sup>171</sup>

When brought before the Chief Magistrate Court in Milimani, the petitioners argued that the charge sheet was incompetent and that their constitutional rights and freedoms were violated at the demonstration, when they were arrested and in court. They refused to enter a plea and requested the trial court to declare all the charges invalid or refer the constitutional questions to the High Court for determination. On 26th May 2013, the trial court refused to invalidate the charges or refer any question to the High Court and directed the petitioners to plead to the charges. Then the petitioners filed the current constitutional petition questioning the constitutionality of their arrest and charges. The prosecution before the trial court was stayed pending the determination of the constitutional petition.

### Issues

1. Whether the petitioners' arrest and detention violated their constitutional rights to freedom of conscience, religion, belief and opinion, freedom of expression, freedom of association, rights of arrested persons and right to a fair hearing.
2. Whether the charges against the petitioners were unconstitutional for failing to meet the standards of right to fair trial set out in Article 50 of the *Constitution*.
3. Whether the statutory provisions under which the petitioners were charged are unconstitutional in that they are vague, too broad or seek to limit the freedoms of expression, assembly, demonstration and picketing in manner incompatible with Article 24 of the *Constitution*.
4. Whether sections 78(1), (2) and 94(1) of the *Penal Code* are unconstitutional and therefore null and void.

### Summary of Judgment

On the right of an arrested person, the Court held that whereas there was no evidence that the petitioners' rights set out under Article 49(1) (a) were not read out to them, the issue could properly be raised at the trial court and the arresting officer would be questioned on the issue. Furthermore, no complaint had been made that the failure to read the Article 49(1)(a) rights had prejudiced the petitioners in any way.

With regard to the right to fair trial, the Court held that the petitioners' contention that their right to be informed of the charge, with sufficient detail to answer it, was invalid because they were informed of all the charges in adequate detail but had objected to them. On whether the charges met standards set out in Article 50 of the Constitution, the Court held that a defective or incompetent charge does not raise a constitutional issue and the trial court was competent to decide the issue. The Court also found that no evidence had been placed before it to suggest that the trial court did not follow the procedure or the law. It also noted that whether the charges were vague was settled by the trial court and the competency of the charge sheet was before the trial court. On the right to have adequate time to prepare a defence, the Court found that the right to fair trial had not been violated. It noted that the trial had not commenced and that the High Court had stopped it pending determination of the petition and that even the pre-trial process had not been completed.

170 *Penal Code*, 2014 (CAP 63).

171 *Prevention of Cruelty to Animals Act*, 2012 (CAP 360).

On the freedom of assembly, the Court held that the right to assemble and demonstrate was not absolute but was subject to reasonable regulation that is consistent with Article 24 of the *Constitution*.<sup>172</sup> Curiously, the Court stated that it was not open to it to determine whether the police lawfully stopped the demonstration as that is a matter germane to the trial court.

Regarding the constitutionality of sections 78 and 94 of the *Penal Code*, the Court noted that both the *Constitution* and the two provisions themselves seek to advocate for peace and peaceful assembly and thus, there is *per se* no conflict between them.<sup>173</sup> The Court observed that under Article 24 of the *Constitution*, Articles 33 on freedom of expression and 37 on freedom of assembly, demonstration, picketing and petition may be curtailed in appropriate circumstances. In this particular case, the *Penal Code* only limits the enjoyment of these rights under circumstances where persons exercising them disrupt the enjoyment of these rights by others by committing or threatening a breach of peace.<sup>174</sup> Whether this fact created any offence with the petitioners as offenders was not for the High Court to determine.

The Court noted that the petitioners were still innocent unless proved otherwise by the trial court in the pending criminal case. In the circumstances, it could not be said that their arrest and charge was unconstitutional.

### Why This Case Is Important

This case shows how HRD cases can be decided without reference to the commendable actions of the HRDs promoting human rights and in this case, fighting state corruption which hurts all citizens, but the poor and marginalised disproportionately. Without recognizing the important role of HRDs in society and their need for protection from persecution by state or non-state actors, it is possible for the courts to miss the overall picture of whether the authorities were acting fairly. This is especially true in this decision where the protestors were protesting against government and then being teargassed, arrested and charged by government agencies. This case is a reminder that it is very important for advocates to highlight HRDs' activities promoting human rights and the significance of protecting the rights of HRDs.

The decision in this case also describes how the freedom of association, freedom of expression and freedom of assembly, demonstration, picketing and petition can be limited and in the opinion of the Court seemingly quite easily. A breach of the peace was all it seems to take here. These fundamental freedoms are typically utilised by HRDs in their work promoting human rights and therefore the outcome in this case is disappointing. It is instructive because in the current climate that presents many challenges to the work of HRDs in Kenya, it may be advisable to conduct demonstrations in a more peaceful and less controversial manner. The pigs eating the blood perfectly captured the message that the protestors wanted to send to the public about the greedy actions of the members of parliament. The imagery however seems to have increased the penalties the protestors suffered.

---

172 *Hussein Khalid* at para. 63.

173 *Hussein Khalid* at para. 72.

174 *Hussein Khalid* at paras. 73-74.

Finally, once charged with criminal offences, protestors are treated as accused persons, which while there are safeguards within the criminal justice system, it is a very different position to be in as opposed to a citizen demanding fair action. This case shows that even the Constitutional Court may be reluctant to make findings that will interfere with the course of a criminal trial. It should be noted, however, that this case has been appealed.

## 4.7 Sources for Further Reading

- UN Office of the High Commission on Human Rights webpage on Human Rights Defenders: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>
- African Commission for Human and Peoples' Rights webpage on its Declaration and Plan of Action for Human Rights Defenders: <http://www.achpr.org/instruments/grandbay/>
- UK Amnesty International's webpage on Human Rights Defenders: <https://www.amnesty.org.uk/human-rights-defenders-what-are-hrds>
- East and Horn of Africa Human Rights Defenders Project Resource Book found at [https://www.defenddefenders.org/wp-content/uploads/2011/07/EHAHRPD\\_Resource\\_book\\_ENG.pdf](https://www.defenddefenders.org/wp-content/uploads/2011/07/EHAHRPD_Resource_book_ENG.pdf)
- Human Rights Watch World Report 2016 - Kenya Chapter found at <https://www.hrw.org/world-report/2016/country-chapters/kenya>
- The National Council for Law Reporting (Kenya Law)'s website lists all the Laws of Kenya and you may also use their search tool at: <http://www.kenyalaw.org/lex//index.xql>
- The full text of the UN Declaration on Human Rights Defenders can be found at: <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>
- The full text of various International Human Rights Instruments can be found on the website of the Office of the High Commissioner on Human Rights at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>
- The full text of the ACHPR Resolution on the Protection of Human Rights Defenders in Africa can be found at: <http://www.achpr.org/sessions/35th/resolutions/69/>
- The full text of African Human Rights Instruments can be found on the ACHPR website: <http://www.achpr.org/instruments/>
- The National Council for Law Reporting (Kenya Law)'s website has all Kenyan judgments and you may also use their case search tool at: <http://kenyalaw.org/caselaw/>



## CONCLUSION AND RECOMMENDATIONS

### 5.1 Current Environment for Human Rights Defenders in Kenya

Recognition of the right of individuals, groups and organisations to defend and protect human rights has been a turning point for the work of human rights defenders globally. Yet, despite advances at the international level, the domestic situation is precarious. In recent years, the space for HRDs in Kenya has been rapidly narrowing largely due to the various retrogressive legal, policy and administrative measures undertaken by the State and actions committed with impunity by non-state actors. In order to improve the domestic situation of HRDs, the State and the society at large need to recognise the important role HRD play in advancing democracy, rule of law, and human rights and promoting development in Kenya. Sustained and concerted efforts by all stakeholders, especially civil society organisations and the State is necessary.

### 5.2 Recommendations to Government to Improve Human Rights Defenders' Situation

Given the precarious situation of human rights defenders in Kenya, NCHRD-K wishes to reiterate the following recommendations to the Government of Kenya. The state should:

#### 5.2.1 Political commitment

1. Issue strong public statements recognizing the legitimate and important role of human rights defenders.
2. Engage in constructive dialogue with all human rights defenders across Kenya and in all sectors with a view to promote mutual understanding and harmonious relations that upholds the spirit and letter of the *Constitution*<sup>175</sup> and advances rights and fundamental freedoms of everyone including human rights defenders.

---

<sup>175</sup> *Constitution of Kenya, 2010* [hereinafter Constitution].

## 5.2.2 Investigations

3. Ensure that attacks against human rights defenders are properly investigated and their perpetrators are prosecuted. In particular, the Government should:
  - a. Investigate all allegations of abuse or intimidation against human rights defenders by the security forces and private actors; and
  - b. Thoroughly investigate all extrajudicial killings in Kenya with a view to ensuring accountability. In particular investigate the killing of activist Hassan Guyo and hold those responsible to account.

## 5.2.3 Education

4. Fully integrate human rights education into police training programmes, paying specific attention to the topic of the role of human rights defenders in the society.

## 5.2.4 Right to Privacy

5. Review national laws and policies in order to ensure that surveillance of digital communications is consistent with its international human rights obligations and is conducted on the basis of a legal framework which is publicly accessible, clear, precise and non-discriminatory.

## 5.2.5 Freedom of Expression and Media

6. Review the *Kenya Information and Communication (Amendment) Act*<sup>176</sup> and the *Media Council Act*<sup>177</sup> in order to ensure that the principles of the *Constitution* are guaranteed and upheld.
7. Take all the necessary measures to bring to an end attacks on journalists.
8. Guarantee freedom of expression, the press, associations and peaceful assembly of journalists, activists and participants in demonstrations.
9. Review the compliance of the *Kenya Information Communication (Amendment) Act*<sup>178</sup> with international standards on freedom of expression, create an enabling environment for journalists and bloggers and decriminalize media related offences and defamation.

## 5.2.6 Space for Civil Society

10. Create and maintain, in law and in practice, a safe and enabling environment, in which human rights defenders and civil society can operate free from hindrance and insecurity, in accordance with Human Rights Council Resolutions 22/6 and 27/31. In particular, the Government should:
  - a. Ensure that laws enacted to regulate NGOs will not undermine their independence or unduly restrict their activities in the defence of human rights; and
  - b. Repeal or amend any laws which may constrain or limit a vibrant civil society, in line with international human rights obligations and Kenya's *Constitution*. In particular, the Government should implement fully the *Public Benefit Organisations Act*<sup>179</sup> and ensure that any subsequent amendments are undertaken in consultation with civil society and that they conform to respect the *Constitution*. The Government should also refrain from enacting restrictive requirements that stifle NGO operations and funding.
  - c. Develop a law for the protection of HRDs in Kenya in line with the UN Declaration for HRDs

---

176 *Kenya Information and Communications (Amendment) Act*, 2013 (No. 41A of 2013).

177 *Media Council Act*, 2013 (No. 46 of 2013).

178 *Kenya Information and Communications (Amendment) Act*, 2013 (No. 41A of 2013).

179 *Public Benefit Organisations Act*, 2013 (No. 18 of 2013)



6.0



## ANNEX:

### List of Cases Supported by NCHRD-K and Partners

NCHRD-K TABLE OF CASES	
Legal Cases Involving HRDs 2015	
Case	Case details
Republic v. Joel A. Ogada  County: Malindi	<p>Mr. Joel Ogada is a human rights defender and a resident of Marereni in Kilifi County. He is a member of Kubuka Farmers Association which was formed to advocate against land injustices by the salt firms who have been expanding their land and thus encroaching on the ancestral land of the indigenous community. As a result of his activities, Mr. Ogada has faced numerous challenges of threats, intimidation and malicious prosecution which saw him faced with three criminal matters.</p> <p>On November 17th 2013, Mr. Ogada was arrested by five policemen at his home for unlawful occupation of a piece of land, yet Mr. Ogada and his family have resided on the land for decades. The HRD was sentenced to seven years in jail. The NCHRDK together with East Africa Law Society supported the appeal on the sentence. This was reduced to 2 years including time served. He was finally released from prison on 16<sup>th</sup> September having served two years in prison.</p> <p>Other cases affecting HRD Ogada include a case on obstruction of survey work being carried out by Kurawa salt farm for which he was acquitted (CR 41/2013 Republic vs. Joel Ogada). The third matter was that of forcible detainer (CR 713/2013 Republic vs. Joel Ogada) which came up for hearing on the 21st September 2015 and he was also acquitted.</p>
Republic v. Gacheke Gachihi & 3 Others Criminal Case 251/2014  County: Nairobi	<p>In February 2014 despite the ban by police, HRDs peacefully demonstrated the plummeting state of the nation, this was in response to the increase in the cost of living for ordinary Kenyans. Four HRDs were arrested and charged with riot after proclamation and cash bail of Kshs 200,000 was imposed on each of them. Not only did their arrest violate their right to peaceful assembly provided for under article 37 of the constitution, but the amount set as bail was punitive and attempts to intimidate HRDs from peacefully demonstrating on matters of public interest.</p>

<p>Wilfred Olal and others V The Hon. Attorney General and others petition 323/2014</p>	<p>On 18th February, 2014, four HRDs were arrested and charged after a peaceful demonstration. They were charged with;</p> <ol style="list-style-type: none"> <li>1. Rioting after proclamation contrary to Section 83 of the Penal Code.</li> <li>2. Resisting arrest contrary to section 253(b).</li> <li>3. Behaving in a disorderly manner in a police building contrary to Section 60(1) as read with Section 63 of the National Police service Act.</li> </ol> <p>The violation of the rights of the HRDs in the state of the nation case a constitutional petition was filed to challenge the constitutionality of their charges and the punitive bail terms imposed</p>
<p>Ephantus Mungai Mwangi and John KigoMwangi Police Cr. Case No. 126/169/2015</p>	<p>On 25<sup>th</sup> May, 2015 at Kiamaiko in Starehe sub county, the two were arrested and charged with obstructing police officers contrary to section 253 (b) of the penal code.</p> <p>The threats and intimidation efforts, including harassment, arbitrary arrests and trumped up charges against the two were however related to their work of investigation, and campaign to highlight the extrajudicial execution of a 17 year old Stephen Gichuru, who was killed on 17th May 2015 by two known police officers from Huruma Police Station Nairobi. It is the same officers who are cited in the charge sheet as being obstructed.</p>
<p>Republic v. Patrick Kamotho</p> <p>County: Nairobi</p>	<p>The HRD has been advocating for improved sanitation in his area. On 7<sup>th</sup> October, the HRD was arrested after the area chief complained that he had interfered with the sewage of the area.</p> <p>He was taken to city court where he was charged under the Water Act with the offence of interference with sewerage.</p>
<p>Republic v. Bernard Macharia Mwangi <b>Cr. Case No. 2891/13</b></p> <p>County: Nakuru</p>	<p>The HRD was arrested and charged with preparation to commit a felony and being in possession of firearm without certificate.</p> <p>The HRD has regularly documented violations by local chief particularly regarding beating of residents, collection of bribes from business owners. He has raised the issue with the media and human rights organisations. The chief and local police summoned him on several occasion, threatened him with dire consequences.</p> <p>Hearing was on 8th October, 2015 and on 27th November 2015. Submissions were made on 21st December 2015.</p>
<p>Republic v. Argwings Kodhek Otieno Cr. Case No. 13873/15</p> <p>County: Nairobi</p>	<p>On 22<sup>nd</sup> September 2015, HRDs under Bunge la Mwananchi organized a peaceful demonstration in solidarity with the teachers of Kenya. Four of them were arrested. Three were able to post bail and were released. The remaining HRD, Argwings Kodhek Otieno was presented in court and charged with illegal assembly and incitement to violence on 22<sup>nd</sup> September 2015.</p> <p>The HRD was allegedly assaulted by city askaris.</p> <p>The matter is ongoing.</p>
<p>Republic v. Isaac Nderitu &amp; Bernard Macharia <b>Cr. Case No. 470/15</b></p> <p><b>County: Nakuru</b></p>	<p>Bernard Macharia and Isaac Waitherero were charged with conspiracy to defeat justice and showing of pornographic material.</p> <p>The charges were preferred when the two wrote to the DPP and visited Bahati police station to inquire on the status of the case where Isaac was assaulted by the local chief while at his premises where he ran a bicycle repair business and had a public entertainment kiosk where fans watched soccer.</p> <p>The case was mentioned on 23<sup>rd</sup> October, 2015 and 9<sup>th</sup> December, 2015.</p>

<p>Republic v. Vicky Atieno &amp; Another Cr. Case No. <b>953/11</b></p> <p>County: Nairobi</p>	<p>Two women HRDs were arrested in 2013 after a demonstration against poor health service delivery by a privately owned clinic in Nairobi. The two have consistently and religiously attended court for the last two years and the matter has never been heard.</p> <p>This matter was being handled by another advocate who left it pending and NCHRD-K intervened and engaged the current lawyer.</p>
<p>Republic v. Wilfred Olal &amp; 7 others</p> <p>County: Nairobi</p>	<p>8 HRDs were arrested during peaceful demonstrations in Nairobi against the amendments to the security laws and charged with taking part in unlawful assembly and incitement to violence.</p> <p>STATUS: The 8 HRDs were released on a bond of Ksh.300000 each. The case is ongoing.</p>
<p>Republic v. Willis Adika Cr Case No. 620 of 2015</p> <p>County: Nairobi</p>	<p>He was arraigned in court at Makadara on Wednesday, 28th January, 2015 and charged with improper use of a licensed telecommunication system contrary to section 29(a) of the Kenya Communication Act, 1998. Willis Adika is a HRD who works with <i>Sauti ya Mtaa</i> in Kariobangi which is a member of Pawa254. The particulars of the charge are that on the 27th day of January 2015 at Kariobangi North estate within Nairobi County, by means of a licensed telecommunication system namely Safaricom Kenya Limited, he posted a text message through mobile phone number 0716221368 in twitter account @bonifacemwangi "Exposed-OCS Nyaroché Kariobangi police post is asking for Kshs. 5000 from Julio Otieno</p> <p>Otieno was stopped by police officers and arrested for having a laptop without a receipt and in an indecent and menacing manner. Upon taking pleas, Willis was released on a cash bail of Kshs. 30,000/-.</p> <p>The matter was mentioned on 12th February, 2015 and hearing was on 30th March 2015. The case has not had any substantive hearing largely due to the transfer of the trial magistrate.</p>
<p>Republic v. Robert Alai <b>Cr Case 3626/2014</b></p> <p>County: Nairobi</p>	<p>On 17th December 2014, Robert Alai Onyango, a well-known blogger was arraigned in court charged with the offence of "undermining the authority of a public officer contrary to section 132 of the Penal Code."</p> <p>The offence is relating to an opinion he had posted on social media on 12th December 2014 (not clear from the original and amended charge sheets if it was on twitter or face book) concerning President Uhuru Kenyatta's attitude towards the Rt. Hon. Raila Odinga and the President's appreciation of the presidency. According to the charge sheet filed in court the post read as follows:</p> <p>"Insulting Raila is what Uhuru can do. He hasn't realized the value of the Presidency. Adolescent President. This seat needs maturity."</p> <p>ROBERT is charged with "132. Any person who, without lawful excuse, the burden of proof where of shall lie upon him, utters, prints, publishes any words, or does any act or thing, calculated to bring into contempt, or to excite defiance of or disobedience to, the lawful authority of a public officer or any class of public officers is guilty of an offence and is liable to imprisonment for a term not exceeding three years."</p> <p>STATUS: ROBERT was granted cash bail of Kshs. 200,000/- which his family posted.</p>

<p>Muslims for Human Rights (MUHURI) &amp; another V Inspector General of police &amp; 5 others petition No. 19 of 2015</p> <p>County: Mombasa</p>	<p>The two organisations filed a notice of motion on the 13<sup>th</sup> April 2015 seeking orders from court to unfreeze their bank accounts and to issue an injunction to restrain the Inspector General of Police from recommending to Cabinet Secretary in the Ministry of Interior and Coordination of National Government and the Cabinet Secretary that the petitioners be declared as specified entities.</p> <p>A ruling was entered restraining the IG from recommending to the Cabinet Secretary to declare the organisations as specified entities. However their bank accounts were not unfrozen because they did not enjoin CBK in the suit.</p> <p>The two organisations filed another suit, on against the Financial regulatory authority and CBK to unfreeze their accounts.</p> <p>The parties gave submissions on 2 October 2015 judgement was entered on 12 November 2015 in favour of the two organisations. Their accounts were unfrozen and have now resumed operations</p>
<p>Nathan Sitati Wamakacha &amp; 7 others v. Nairobi County, Cr Case 1490-97/2013</p> <p>County: Nairobi</p>	<p>On August 6, 2013, the accused were arrested by Nairobi County officers for congregating outside a building on Wabera Street/City Hall way. The suspects were all arraigned before Senior Resident Magistrate Margaret Kurumbu at City Hall, and charged with wilfully obstructing free passage of a street contrary to Bylaw 14 read with By-law 30 of the General Nuisance Bylaws 2007. The activists who denied the charges were each released on Kshs 2,000 cash bail pending trial.</p> <p>In February 2014, the magistrate acquitted all the accused persons under section 215 of the Criminal Procedure Code.</p>
<p>R v. Leonard Oriaro case Criminal Case No. 601 of 2011</p> <p>County: Siaya</p>	<p>Mr Leonard Otieno Oriaro is an environmental and social economic rights activist based in Kadenge Sub-Location in Siaya District within Siaya County. Mr. Oriaro has been involved in a protracted dispute over a community land that is now under dominion farm in Yala. On 29th August 2011 Mr Oriaro was arrested and arraigned in court on incitement charges for organising residents to protest illegal annexation of their farmland and destruction of their mature maize crop by the Dominion farm.</p> <p>In May 2014, he was acquitted of the charge against him without being put to his defence after the prosecution failed to establish its case. The prosecution has filed an appeal.</p>









**National Coalition of  
Human Rights Defenders-Kenya**

P. O. Box 26309-00100, Nairobi

Tel: +254-712632390

Email: [info@hrdcoalition.org](mailto:info@hrdcoalition.org)

Website: [www.hrdcoalition.org](http://www.hrdcoalition.org)

Twitter: [@nchrdenya](https://twitter.com/nchrdenya)

Facebook: Nchrd Kenya

HOT LINE: +254 - 0716200100



Kingdom of the Netherlands

