PAIN AND PANDEMIC

UNMASKING THE STATE OF HUMAN RIGHTS IN KENYA IN CONTAINMENT OF THE COVID-19 PANDEMIC

SITUATIONAL REPORT NO. 1 OF 2020
KENYA NATIONAL COMMISSION ON HUMAN RIGHT (KNCHR)
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<td>African Charter on Human and People's Rights</td>
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<td>COVID-19</td>
<td>Corona Virus Disease of 2019</td>
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<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of a Child</td>
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<td>CMS</td>
<td>Complaints Management System</td>
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<td>CSOs</td>
<td>Civil Society Organizations</td>
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<td>DPOs</td>
<td>Disabilities People Organizations</td>
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<td>ECOSOC</td>
<td>Economic Cultural and Social Rights</td>
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<td>HRBA</td>
<td>Human Rights Based Approach</td>
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<td>HRDS</td>
<td>Human Rights Defenders</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant of Economic Social and Cultural Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil &amp; Political Rights</td>
</tr>
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<td>IPOA</td>
<td>Independent Policing and Oversight Authority</td>
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<td>IPICC</td>
<td>Intersex Persons’ Coordination Committee</td>
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<td>KPS</td>
<td>Kenya Prisons Service (KPS)</td>
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<td>KPS</td>
<td>Kenya Police Service (KPS)</td>
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<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<td>KICD</td>
<td>Kenya Institute of Curriculum Development</td>
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<td>MCK</td>
<td>Media Council of Kenya</td>
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<tr>
<td>MoH</td>
<td>Ministry of Health</td>
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<tr>
<td>NERC</td>
<td>National Emergency Response Committee on Coronavirus</td>
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<tr>
<td>NCM</td>
<td>National Coordination on Migration</td>
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<tr>
<td>NCCS</td>
<td>National Council for Children Services</td>
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<td>NHRI</td>
<td>National Human Rights Institutions</td>
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<td>NCAJ</td>
<td>National Council on the Administration of Justice</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>ODPP</td>
<td>Office of the Director of Public Prosecutions</td>
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<td>PWDs</td>
<td>Persons with Disabilities</td>
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<tr>
<td>PIL</td>
<td>Public Interest Litigation</td>
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<tr>
<td>UN-CAT</td>
<td>UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<td>WHO</td>
<td>World Health Organization</td>
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1 Background

The COVID-19 disease (also known as the novel Corona Virus) has engulfed countries across the globe, affecting all facets of human natural order. Corona viruses are a family of viruses known to cause respiratory infections. There is no vaccine yet to prevent COVID-19 disease, and no specific treatment for it, other than managing the symptoms. On 11th March, 2020, the World Health Organization (WHO) officially declared that an outbreak of the viral disease COVID-19; first identified in December 2019 in Wuhan, China – had reached the level of a global pandemic. Citing concerns with “the alarming levels of spread and severity,” the WHO called on governments and States to take urgent and aggressive actions to stop the spread of the virus and provide necessary support to those affected.

By mid-March 2020, more than 150 countries had reported cases of COVID-19, and the WHO reported there were more than 200,000 cases worldwide. More than 7,000 people had died and the numbers were rising at an alarming rate. By 6th June 2020 June More than 7 million cases had been reported to WHO and more than 400,000 people had lost their lives. By the same date, Kenya had recorded 2600 positive cases, with 83 fatalities and 706 recoveries.

Since the first COVID-19 positive case was recorded in Kenya on 13th March, 2020, the government has come up with a raft of measures and mechanisms to contain the pandemic and support the citizens affected by it. On 15th March 2020, closure of educational institutions and work-from-home directives were issued. This was followed by a dawn to dusk curfew order issued on 27th March 2020, restraining the movement of all persons from 7 p.m. to 5 a.m. and subsequently revised to 9 p.m. to 4 a.m. on 6th June 2020 save for essential service providers. Since then other measures such as restriction of movements in vastly affected counties and towns have been put in place to support public health efforts in preventing and controlling the pandemic. This 1st situational report covers the period between 15th March 2020, when the government set up the first COVID-19 directives and 6th June 2020 when the President of the Republic of Kenya in his 8th presidential address reviewed orders such as the dusk to dawn curfew and cessation of movement and issued further directives.

Whereas COVID-19 is a public health threat, it has brought with it paralysis in almost all sectors of the country’s economy and other spheres of public life. The impediments to government’s economic aspirations including the Big 4 Agenda, Vision 2030 and Sustainable Development Goals (SDGs); closure of borders; scaling down of public services and closure of businesses have adversely impacted people’s lives and exposed them to vulnerabilities. In order to protect people from the negative impacts of the pandemic, the government has set up incentives such as tax reliefs, cash transfers for the vulnerable and economic stimulus package, as it monitors the management of the pandemic.
There is no doubt that the interventions in place will have direct impact on human rights hence the need for human rights agenda to be at the center of key decisions being made in Kenya. The WHO Director General in his press statement of 11th March 2020, stated:

“...All countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights...”

(WHO, 2020)

The Constitution of Kenya provides an expansive Bill of Rights which is entrenched as an integral part of the Kenya’s democracy¹ and applies to all laws and binds all State organs and all persons². By virtue of Article 2 (5) and (6) of the Constitution, Kenya is bound by its international and regional obligations under various human rights instruments including; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN-CAT) the International Covenant on Civil & Political Rights (ICCPR); the International Covenant on Economic Social and Cultural Rights (ICESCR); Convention on the Rights of Persons with Disabilities (CRPD); Convention on the Rights of the Child (CRC) and the African Charter on Human and People’s Rights (ACHPR). These instruments together with their commentaries and guidelines provide for protection and safeguards that give full effect of fundamental rights and freedoms of persons by States.

United Nations Secretary General brief on COVID-19 and human rights³ shared six key human rights messages that are pivotal to ensuring human rights-based approach to the management of the pandemic. These are; protecting people’s lives and livelihoods; Non-discrimination; participation and involvement of all; emergency and security measures if needed must be temporary, proportional and aimed at protecting people; cooperation among countries and upon recovery, ensure better conditions for human rights⁴. In addition to WHO, other United Nations and African Union agencies and independent experts such as OHCHR; CESC; UNAIDS, UN WOMEN; CRPD; CAT; ACHPR and special procedures mandate holders have issued communication integrating human rights during the pandemic.

Based on the above background, the Kenya National Commission on Human Rights (KNCHR) recognizes that the State has an obligation, within its jurisdiction and internationally, to take measures to combat the pandemic and in doing so it must respect and promote human rights across the whole COVID-19 spectrum. Respecting human rights is crucial to successful response to the pandemic. Therefore, as an independent Constitutional Commission with a legal mandate to promote and protect human rights in Kenya, KNCHR not only continued to offer regular services to the public but also set up an elaborate process of monitoring the government’s response to COVID-19 pandemic with a view of enhancing protection and

¹ Article 19 (1) of the Constitution of Kenya
² Article 20 (1)
³ Guterres 2020
⁴ WHO 2020
promotion of human rights. While appreciating the daunting challenge faced by the government during the disease outbreak, KNCHR is duty-bound to take appropriate interventions towards protection and promotion of human rights which includes advising and calling out actions or inactions with a view to enhance mainstreaming of human rights standards and principles during the COVID-19 pandemic. This report therefore, provides both a highlight of KNCHR’s COVID-19 interventions and situational analysis of human rights in Kenya during the reporting period (15th March to June 6th 2020).
2 KNCHR Interventions

The United Nations Paris Principles require National Human Rights Institutions (NHRIs) to undertake two broad mandates namely; protection and promotion of human rights\(^5\). In protecting human rights, NHRIs are required to, among other things; investigate reported human rights abuses and take appropriate actions towards redress, and further engage in human rights monitoring. The Paris Principles further require that the NHRIs mandate and their functions be legally defined in national legislation.

KNCHR is an independent body and an ‘A’ status accredited NHRI. It is mandated under the Constitution of Kenya and the KNCHR Act of 2011\(^6\) to among other things, monitor, investigate and report on the observance of human rights in all spheres of life in Kenya; receive and investigate complaints on alleged human rights abuses and make recommendations to improve the functioning of State organs and ensure compliance of State’s obligations under international and regional treaties and conventions relating to human rights. KNCHR is currently operating under the 2018–2023 Strategic Plan with a strategic goal of increased enjoyment of human rights and fundamental freedoms.

Following the announcement of the first COVID-19 positive case in Kenya and the subsequent government directives to the public on measures to prevent the virus spread, KNCHR made drastic measures to ensure continuity of its services to the public guided by the Ministry of Health protocols. In addition, noting possible negative impact of the pandemic on the enjoyment of human rights, KNCHR developed a strategy plan titled ‘A Human Rights Based Approach to the COVID-19 Pandemic in Kenya, KNCHR Strategy and Plan of Action 2020’ to assist in seamless response to the pandemic and ensure adherence to human rights standards by all when responding to the pandemic. The strategy was to review government COVID-19 interventions and to enhance management and processing of complaints in order to develop appropriate and timely interventions. KNCHR utilized its existing ICT systems such as the Complaints Management System (CMS) to secure and analyze data expeditiously and provide real time reporting. The processed reports are key in informing KNCHR’s interventions including issuance of advisories to relevant State agencies and press releases. The risk-based strategy mapped out human rights violations likely to occur during the pandemic and highlighted possible KNCHR’s interventions to avert or redress violations.

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\(^{5}\) GANHRI 2020  
\(^{6}\) Article 59 (2) c), d), e) f) and g) of the Constitution and Section 8 c), d) and e) of the Kenya National Commission on Human Rights Act of 2011
In addition to the KNCHR’s strategy plan, an internal multi-divisional Technical Committee on COVID-19 was set up as the focal point for coordination of its COVID-19 interventions guided by a set of terms of reference. During the pandemic, KNCHR undertook the following; complaints processing, issuance of advisories, media engagement and monitoring of human rights.

2.1 Complaints Processing

KNCHR continued to receive and process complaints directly from petitioners and *suo moto* ("on its own motion") through various channels including; emails, SMS platform, mobile phones and social media platforms. The complaints registered during the review period were both COVID-19 and non-COVID-19 related violations. Noting the limited movement occasioned by the restrictions, KNCHR received complaints from the country-wide pool of Human Rights Defenders (HRDs). The HRDs have been trained by KNCHR on human rights reporting and documentation. The complaints were uploaded and processed through the Complaints Management System (CMS) which enables easy data analysis and retrieval of real time information.

Between 15th March and 6th June 2020, KNCHR received 222 complaints related to the COVID-19 situation. Out of reported complaints, 120 were petitioned by male (54.1%), 58 by female (26.1%), 32 by intersex persons (14.4%) and 12 (5.4%) were group complaints.

![Figure 1: Complaints by gender and group analysis](image)
Out of the reported cases, eight (8) of them (3.6%) related to human rights abuses against Persons with Disabilities (PWDs). Five (5) had physical disabilities. One (1) had psychological disability, one (1) with visual and hearing disability and another one (1) with speech impairment.

![Figure 2: Complaints analysis of persons with disabilities](image)

Majority of the complaints were against State agents with ninety-one (91) complaints (40.0%) against the Ministry of Interior and Coordination of National Government, out of which fifty four (54) complaints were against Kenya Police Service, twenty three (23) against Administration Police, Eight (8) against the General Service Unit, four (4) against Area Chiefs and one (1) each leveled against an Assistant County Commissioner and Kenya Prisons Service. Twenty-one (21) complaints were leveled against the; Ministry of Labour and Social Protection and the Ministry of Health and County Governments. Other complaints against non-State actors, mainly involved unfair termination of employment by business entities.
Figure 3: No. of complaints against state agencies

<table>
<thead>
<tr>
<th>Agency</th>
<th>Number of Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenya Police Service</td>
<td>54</td>
</tr>
<tr>
<td>Administration Police</td>
<td>23</td>
</tr>
<tr>
<td>General Service Unit</td>
<td>8</td>
</tr>
<tr>
<td>Area Chief</td>
<td>4</td>
</tr>
<tr>
<td>Assistant County Commissioner</td>
<td>1</td>
</tr>
<tr>
<td>Kenya Prisons Service</td>
<td>1</td>
</tr>
</tbody>
</table>

Figure 4: Percentage of Complaints against state security agencies.

In terms of categorization of rights, 49.5 % of the complaints related to Civil and Political Rights (CPR), 32% related to Economic Social Cultural Rights (ECOSOC) and 18.5 % related to Group/Communal Rights.
The Civil and Political Rights included ten (10) complaints related to right to life, eighty-seven (87) related to violations against freedom and security of the persons; seven (7) on access to justice and five (5) on fair administrative action. Under the ECOSOC rights, KNCHR received general complaints related to right to food, employment and labour relations, health and social security.
Twenty-one (21) complaints related to older persons’ rights to social security, thirteen (13) on right to the highest attainable standards of health, nine (9) on adequate standards of living and six (6) related to labour rights.

KNCHR has admitted one hundred and eighty (180) of all the reported complaints for processing and various interventions are on-going. Legal advice was offered to thirty-nine (39) of the complainants and files closed, while three (3) of the cases are pending awaiting submission of relevant evidential documents. KNCHR continues undertake appropriate interventions to ensure accountability for the violations reported including referring appropriate cases to the Independent Policing Oversight Authority (IPOA) for further action. Equally KNCHR has issued relevant advisories to Ministries, Departments and Agencies, Parliamentary and Senate Committees and also bodies engaged in litigation.
2.2 Strategic Public Interest Litigation

KNCHR participated in Public Interest Litigation (PIL) with a view to seek accountability for human rights violations and advance human rights jurisprudence in the country. During the COVID-19 pandemic period under review, the Commission was engaged in the following cases:

**Constitutional Petition Number 120 of 2020 (High Court of Kenya in Nairobi - Constitutional and Human Rights Division)**

The Petitioner was the Law Society of Kenya (LSK). Among other orders, LSK sought to have the Curfew Order issued on 27th March 2020 declared unconstitutional and orders prohibiting the police from using excessive and unreasonable force when enforcing the curfew. KNCHR participated as an interested party where it supported the Petition, presented evidence and submitted on unlawful use of force by the police. The Court, among other orders, declared as unconstitutional and prohibited the use of unreasonable force (by the police) in enforcing the Curfew Order. The Court further issued an order prohibiting interference with media coverage of the curfew.

The Petition challenged the constitutionality of the Public Health Regulations (*COVID-19 Restriction of Movement of Persons and Related Measures Rules, 2020*) issued by the Cabinet Secretary for Health) on grounds that the Regulations were enacted without any public participation, are vague and failed to comply with the provisions of the Statutory Instruments Act. KNCHR joined in the suit as an interested party. The Commission supports the Petition and has submitted on: lack of public participation, lack of certainty, validity of the regulations insofar as procedures for enactment of statutory instruments and the proportionally of the penalty imposed. All parties have filed their submissions and judgment shall be on notice.

Constitutional Petition No. 140 of 2020 Okiyah Omtata -VS- CS Ministry of Health & Another (As consolidated with Petition No 128/2020 and MSA Petition No 28/2020)

Among others, the Petition challenges the validity of the various restriction of movement orders; the legal validity of the decisions by the government to require individuals to go into compulsory quarantine for public health protection without obtaining a Magistrate's order authorizing the compulsory quarantine; and legal validity of the decisions by the government forcing people ordered into compulsory quarantine in places other than of their own. KNCHR successfully applied to be enjoined as an interested party. Parties have since filed their respective responses and submissions in readiness for hearing on 7th July 2020.

### 2.3 Issuance of Advisories

Initial containment efforts of the pandemic by the government targeted developing of various legislation and policies specific to COVID-19. KNCHR focused on monitoring any amendments to the existing legislation and new legislation and issued advisories to ensure compliance with human rights standards. Some of the advisories issued by KNCHR include;

(a) Advisory on Public Finance Management (*COVID-19 Emergency Response Fund*) Regulations 2020

Submitted to the Principal Secretary, the National Treasury advising on the need for the regulations to make reference to an accountability structure and need for membership of the
Board to comply with the legal requirement on gender, persons with disabilities, youth and regional balance.

(b) Advisory on Public Health (Prevention, Control and Suppression of COVID-19) Rules

Submitted to the Office of the Attorney General advising on three key issues; need for the rules to be subjected to public participation, scrutiny of Parliament and inclusion of provisions on protection of personal health information to be considered.

(c) Memorandum on The Human Rights Dimensions of COVID-19

Presented to the Senate Ad-hoc Committee on the COVID-19 situation that highlighted human rights concerns arising from COVID-19 situation across various human rights thematic areas and called upon the Senate to ensure the implementation of the various recommendations.

(d) Advisory on the Pandemic Response and Management Bill, 2020

Presented to the National Assembly and called for; transparency and prudence in administration of the pandemic response fund; setting up socio-economic protective measures and clear role of the State in taking up measures to mitigate economic impact of the pandemic.

(e) Advisory on the Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020

KNCHR submitted that the rules were enacted without involvement of the public and Parliament, and that the immediate enforcement of the rules made compliance difficult especially for travelers.

(f) Advisory on Mental Health during the COVID-19 Pandemic

Prepared by CSO Stakeholders’ Forum on Mental Health that was convened by KNCHR. The advisory focused on various issues including; access to information; continuity of care; preventive measures in psychiatric units and institutions; enhanced social protection measures; and the involvement of persons with disabilities in the fight against the pandemic.

(g) Advisory to the Inspector General of Police

Issued on 8th April 2020, called on the Inspector General of Police to ensure that all law enforcement officers under his command uphold human rights in the management and response to the pandemic. In addition, it called upon the Inspector General of Police to com-

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7 Kenya Gazette Supplement No. 39; Legal Notice No. 49 dated 3rd April 2020.
8 Kenya Gazette Supplement No. 44 (Senate Bills No. 6) of 17th April, 2020.
mence investigations and make public findings of police officers involved in perpetuating the human rights violations and abuses.

(h) Advisory to the National Covid-19 Education Response Committee

KNCHR issued memorandum on the COVID-19 response strategies for the basic education sub-sector. The memorandum focused on the need for the state to ensure that alternative education provided during the pandemic is accessible to all; and the decision to re-open schools be guided by scientific and medical evidence that factor risk-based approach to reduce spread of the virus.

2.4 Media Relations and Engagement

To keep members of the public updated on human rights during the pandemic, KNCHR developed social media messages shared on a regular basis on its social media platforms; Twitter and Facebook. In addition, it issued the following public statements in form of press releases⁹:

<table>
<thead>
<tr>
<th>On 17th March 2020</th>
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<tr>
<td>The press statement and advisory on response to COVID-19 disease in Kenya acknowledged the government’s decision of suspending some national operations to contain the spread of the Corona virus and need to respect human rights and government to remain the mainstay in disseminating COVID-19 information.</td>
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<table>
<thead>
<tr>
<th>On 27th March 2020</th>
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<tbody>
<tr>
<td>The press statement on Law Enforcement Agencies to adhere to the basic checklist on human rights and fundamental freedoms which was in response to heart-rending media reports and complaints received by KNCHR on unjustified and disproportionate use of force against the public by uniformed police officers and other law enforcement officers following the start of the dusk to dawn curfew across the country.</td>
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⁹ All press releases are available at the KNCHR website www.knchr.org
**On 29th April 2020**

KNCHR released a press statement on safeguarding human dignity and rights in combating COVID-19 calling the government and civilians to adhere to national and international guidelines to safeguard human rights during the COVID-19 pandemic. KNCHR shared data on various human rights violations it had received including; un-procedural COVID-19 quarantine processing and economic violations.

**On 20th May 2020**

KNCHR issued a statement on the enjoyment of human rights during and post COVID-19 pandemic. The Commission highlighted its strategies and interventions on complaints processing and rapid response investigations and also public interest litigation in a bid to secure redress and accountability for violations occasioned by COVID-19 measures.

**On 1st June 2020**

The Commission issued a public statement through the broadcast media on its audit in prisons to identify the extent of COVID-19 preparedness in prisons.

**On 6th June 2020**

The Commission made a public statement through community radio stations on extra-judicial killings during the COVID-19 pandemic as a result of the partial lock-down in the country.
3 KNCHR Monitoring of Human Rights Based Approach to COVID-19 Interventions

“...NHRIs are encouraged to engage in response to COVID-19, to the extent that their mandate, staff health, safety and capacities permit and in coordination with national health emergency management mechanisms. NHRIs should monitor the situation, build their knowledge, identify key issues and address them, including by bringing them to the attention of appropriate responders and making recommendations…”

Michele Bachelet High Commissioner for Human Rights 21st April 2020

A key intervention that KNCHR engaged in during the COVID-19 period is monitoring human rights, which form the basis for this report. The essence of monitoring human rights is to keep track of the situation in a bid to ensure that the government embraces human rights-based approach in addressing the COVID-19 pandemic and prevent and/or de-escalate the perpetuation of violations. In addition to the pandemic period, this monitoring exercise will assist the government identify human rights concerns including mental health, right to water and sanitation; rights of persons deprived of liberty exacerbated by the pandemic and rights and freedoms that have received little or no attention over the years.

In order to effectively monitor the situation, KNCHR developed a monitoring framework that was guided by its legal mandate; relevant domestic legislation; human rights protected under the constitution, international and regional human rights instruments such as; ICCPR, ICESCR, ACHPR, and CRPD. In addition, the monitoring framework was guided by communications by the United Nations and African Union agencies and special procedures mandate holders communication on application of human rights based approach including those specific to the COVID-19 pandemic.

The communications specific to COVID-19 pandemic include: WHO guidance on addressing human rights during the pandemic which calls for integration of human rights protection and guarantees in COVID-19 responses; United Nations Secretary General Brief on COVID-19 and human rights: UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and other closed settings; UNCESCR statement on taking measures to ensure econom-

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10 Bachelet 2020
11 WHO, 2020
12 UN 2020
13 Waly, Gebreysus, Byanyima, & Bachelet, 2020
ic, social and cultural rights are respected and protected\textsuperscript{14}; the ACHPR Chairperson’s statement requiring member States to take all necessary human and peoples’ rights based measures for preventing the threat of the pandemic\textsuperscript{15}; the Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings on use of force by law enforcement personnel in the time of COVID-19 emergency\textsuperscript{16} and the UN Special Rapporteur on the right to adequate housing statement calling for suspension of all evictions during the COVID-19 pandemic\textsuperscript{17} Other communication include recommendation on treatment of persons deprived of liberty including those under quarantine; respecting the rights of children; and persons with disabilities and use of emergency powers within the parameters provided by international human rights law.

Further, the Office of the High Commissioner for Human Rights issued an Aid Memoire to NHRLs dated 21\textsuperscript{st} April, 2020 that recognizes how the pandemic affects various human rights and why human rights should be at the center of all responses to the pandemic. In addition, it encourages NHRLs to integrate their mandate and activities with national plans towards addressing the COVID-19 pandemic and its impact; and among others ensure human rights standards are adhered to.

Guided by the above, KNCHR developed a monitoring framework with the following thematic focus areas;

(a) Enforcement of COVID-19 Prevention and Control Measures;

(b) Access to Justice;

(c) Media and Access to Information;

(d) Education;

(e) Labour and Social Security;

(f) Housing;

(g) Water and Sanitation;

(h) Health Facilities and Services; and

(i) Vulnerable Groups.

KNCHR collected primary data from complainants as recorded in its Complaints Management System and information received from select government key informant interviews. In addition, the commission reviewed relevant secondary data from various sources including government directives and circulars and information from other non-State institutions.

\textsuperscript{14} Committee on Economic, Social and Cultural Rights 2020

\textsuperscript{15} Dersso 2020

\textsuperscript{16} Callamard 2020

\textsuperscript{17} Farha 2020
From a human rights perspective, this monitoring report delves into an analysis of government's interventions aimed at addressing the impact of the pandemic, the gaps and makes recommendations to relevant State agencies as a call to action. This is the initial monitoring report that covers the period between 15th March, 2020 and 6th June, 2020. It provides a situational analysis of human rights in Kenya amid the COVID-19 pandemic within the aforesaid period.
4 Monitoring Findings

4.1 Thematic Focus 1: Enforcement of COVID-19 Prevention and Control Measures

The government developed a number of laws, regulations and directives in order to curb the spread of the COVID-19 in the country. These measures included; curfew orders; cessation of all movement in and out of; the Nairobi Metropolitan area and the counties of Kilifi, Kwale and Mombasa Counties18; cessation of movement in and out of Eastleigh areas of Nairobi and in the area of Old Town in Mombasa county among other broader measures and mechanisms.

During monitoring, KNCHR sought to establish whether government measures to curb the spread of COVID-19 were lawful, necessary and proportionate. The government measures have impacted on a variety of human rights such as; privacy, freedom of movement and association. The Constitution of Kenya, international and regional human rights instruments allow for derogation of certain rights such as; privacy; freedom of association; and freedom of assembly; provided the derogation meet reasonable conditions. These conditions include; existence of a written law with limiting provisions; and that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom19. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR restricts enjoyment of certain derogable rights in consideration of clear parameters20. Public health, public safety and public emergency that threatens the life of the nation, are recognized grounds for invoking restrictions. The Siracusa Principles require that limitations must be; in accordance with the law; based on a legitimate objective; strictly necessary in a democratic society; the least restrictive and intrusive means available; not arbitrary, unreasonable or discriminatory; the limitation is not applied for any other purpose than the prescribed objective; and that the restriction is based on scientific evidence and not drafted or imposed.

In addition, UN special procedures mandate holders,21 and the UN Human Rights Committee22 have issued guidance and statements on need for States to take extraordinary measures in protecting the health and well-being of the population including restrictions. Such restrictions are to be within the parameters provided by international human rights law

19 Article 24 of the Constitution and General Comment No. 14 of ICESCR
21 Special Rapporteurs and Independent Experts 2020
22 Human Rights Committee 2020
including; proportionality, legality, necessity and be non-discriminatory. Whereas certain rights can be derogated under certain circumstances and within certain parameters, rights such as freedom from torture and cruel, inhuman or degrading treatment or punishment; and right to fair trial cannot be derogated under any circumstance. Despite this provision, KNCHR received the following complaints relating to violations of non-derogable rights.

(a) Right to Life

The Constitution protects the right to life under Article 26 (1) and prohibits the intentional deprivation of this right unless authorized by the law. In addition, this right is protected under Article 6 of the ICCPR and Article 4 of the ACHPR. KNCHR received ten (10) cases of deaths reported from various parts of the country within the monitoring period. Preliminary investigations have established that five (5) of the reported cases were attributed to excessive use of force by police while enforcing the COVID-19 regulations; investigations are ongoing in the other five (5) reported cases.

Below is a highlight of some of the complaints received and processed by KNCHR.

| Matuga, Kwale County          | A boda-boda rider was allegedly assaulted by police officers after he ferried an expectant mother to hospital during the curfew hours and died due to the injuries. |
| Mumias, Kakamega County       | A market trader died after police lobbed tear gas canister at him in a market area to enforce social distancing directive. He took refuge in a stall and was later found dead inside the stall. |
| Embakasi, Nairobi County      | A 27-year-old man sustained injuries after being assaulted by police officers enforcing curfew orders. He was then abandoned by the officers by the roadside and his family members picked him up while in serious pains. He succumbed to the injuries a day after the assault. |
| Changamwe, Mombasa County     | In Mombasa, a 19-year-old man was assaulted and succumbed to the injuries inflicted by a vigilante group who were assisting the local administration officers enforce the curfew orders. |

(b) Freedom and Security of the Person

Article 29 of the constitution protects the freedom and security of the person which includes; the right not to be subjected to any form of violence from either public or private sources and right not to be subjected to torture in any manner and treated or punished in a cruel, inhuman and degrading manner. In addition, the Kenya Prevention of Torture Act, 2017, Article 7 of ICCPR, Article 2 of UNCAT and Article 5 of the ACHPR prohibits acts of torture or oth-

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23 Article 25 of the Constitution provides for four rights that shall not be limited under any circumstances
24 Article 26 (3)
er cruel, inhuman or degrading treatment or punishment. KNCHR has received a total of eighty-seven (87) complaints on allegation of violations of freedom and security of the person. All cases involved the enforcement of COVID-19 regulations and orders. Below is the summary of some of the complaints received and processed.

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nambale, Busia County</td>
<td>Police officers without any justifiable cause entered into a private homestead and indiscriminately assaulted all family members and destroyed properties.</td>
</tr>
<tr>
<td>Githumu, Muranga County</td>
<td>A truck driver returning home after supplying maize flour, which is an essential service under the curfew order, was assaulted by police officers at 1915 hours and sustained serious injuries that required hospitalization.</td>
</tr>
<tr>
<td>Hulugho, Garissa County</td>
<td>A trader was opening her business when she was assaulted by the police and lost personal items including Ksh. 150,000 to the officers. In the process she also sustained serious injuries.</td>
</tr>
<tr>
<td>Bureti, Kericho County</td>
<td>A clinical officer, who is an essential service provider, was shot on his leg while walking home from his place of work at around 7.10 p.m. He sustained serious injuries that required major surgery and long hospital stay.</td>
</tr>
<tr>
<td>Nakuru Town, Nakuru County</td>
<td>A boda boda rider who had taken a sick person to Nakuru Provincial General Hospital was assaulted by police officers for flouting the curfew order. He sustained a broken left arm and other serious injuries on his back and head as a result of the assault. He was admitted in hospital as a result of the sustained injuries.</td>
</tr>
<tr>
<td>Saboti, Trans Nzoia County</td>
<td>A man was assaulted by police officers for flouting the curfew order and he sustained a fracture on left arm and other injuries that required hospitalization.</td>
</tr>
<tr>
<td>NyaribariChache, Kisii County</td>
<td>A boda boda rider was requested by a police officer to drop him at his work place in a police station in order to get there on time. On his way back from the station heading to his home, he was stopped and assaulted by other police officers at 7.30 p.m., He was arrested and detained for the night and continued to be assaulted. He was released without any charged been preferred. He sustained serious physical and mental injuries as a result of the ordeal.</td>
</tr>
</tbody>
</table>

In addition to the Constitution of Kenya, ICCPR, UNCAT and ACHPR, the Siracusa Principles prohibit arbitrary denial of right to life and freedom and security of the person. To ensure that these rights are protected during the pandemic, the United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings issued dispatch on use Force in State of
Emergency requiring law enforcement personnel when enforcing the law during the COVID-19 emergency to note that right to life is non-derogable and need to refrain from excessive use of force on the public. Further, the OHCHR Guidance on Emergency Measures and COVID-19 calls for use of emergency powers within the parameters provided by international human rights law.

It is evident from the above cited cases that police officers engaged in abuse of power and use of excessive force when enforcing COVID-19 government directives. This in turn resulted to massive human rights violations. KNCHR notes the use of force was against the standards set out in Section 61 (2) and sixth schedule of the National Police Service Act advisory issued by special procedure mandate holders calling on law enforcement agencies against use of arbitrary deprivation of life and use of torture and inhuman and degrading treatment. Further, the mandate holders recognized that breaking of curfew or restriction of movement cannot justify use of force by the police. This position was affirmed by the High Court in the *Law Society of Kenya vs Hillary Mutyambai, Inspector General, National Police Service and 4 others*.

Despite the President issuing a public apology on incidences of use of force by law enforcement officers and the Cabinet Secretary; Ministry of Interior and Coordination of National Government and the Inspector of Police making public pronouncements on ending the vice, KNCHR continues to receive complaints of police brutality.

KNCHR however notes that law enforcement during the pandemic brought to light the different approaches in policing which is solely informed by individual police officers’ attitude as well as institutional culture within the National Police Service. On a positive note, there are some police officers who have enforced curfew orders in a more humane manner, depicting positive attitude and appreciation of human rights-based approaches to law enforcement. Cases in point are; the Baringo Central Administration Police Commandant Mr. Ibrahim Abachilla and Embakasi Police Station police officer Ms. Amina Ramadan who were recognized for their unique style of handling curfew timelines. Other positive incidences include; the OCPD and OCS of Mumias Police Station who took a victim with speech and hearing impairment to hospital following police brutality and the OCS and Deputy OCS of Akala Police Station also accompanied an injured victim of police brutality to hospital. Such cases and many other untold stories that depict positive change in police service form part of the hon-

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25 Callamard 2020  
26 OHCHR 2020  
27 Special Rapporteurs and Independent Experts 2020  
or able Kenyan law enforcement officers who appreciate rights-based approach to service delivery.

Based on the preliminary investigations undertaken and application of human rights principles and standards, KNCHR made the following observations and findings:

1. Derogation of certain rights such as freedom of movement and freedom of association by the government to promote public health and safety amid the COVID-19 pandemic is permitted under the constitution and international human rights instruments including the Siracusa Principles.
2. Against the constitution, international and regional human rights instruments and recommendations by various human rights agencies, non-derogable rights including the protection against arbitrary denial of the right to life and freedom and security of the persons were violated by law enforcement officers when enforcing the COVID-19 orders and directives.
3. Law enforcement officers’ use of force to enforce the COVID-19 curfew and directives was excessive, arbitrary and unjustified. In addition, it was unlawful since it was against the principles of legality, necessity, proportionality and precaution.
4. There were a number of law enforcement officers who have applied human rights-based approach during the enforcement of COVID-19 directives and curfew orders.

(c) Right to Privacy

The right to privacy is a constitutionally protected right under Article 31 of the Constitution and Article 17(1) of the ICCPR. Though the right to privacy is not absolute, a patient’s information held in confidence can only be breached in accordance with the provisions of section 11 (2) of the Health Act which are; user consents to such disclosure in writing in the prescribed form; court order or any applicable law requires such disclosure; or non-disclosure of the information represents a serious threat to public health.

During the monitoring period, KNCHR received complaints of illegal entry and searches by law enforcement officers. In one incident it is reported that police officers forcefully entered homes in Nakuru and arrested individuals found without masks. KNCHR recorded violations of the right to privacy, protection from discrimination and profiling of individuals who were accused of breaking the curfew orders and other COVID-19 management directives; and persons who tested positive to the virus.

In addition to the violations reported above, the KNCHR established that effective public participation was not achieved during development of most of the Bills and regulation. The time frame for submission of memoranda from the public was too short and in certain cases the call for submission was issued after the fact e.g. the Public Health (COVID-19 Restriction of
Movement of Persons and Related Measures) Rules 2020. Further KNCHR has observed that the provisions of the Statutory Instruments Act, 2013 have largely not been adhered to during this period. The Chairperson of the Committee on Delegated Legislation in the national assembly is on record stating that the Committee was constrained by time to review the various instruments and it would be an exercise in futility to review certain instruments whose lifespan had already lapsed.29

4.2 Thematic Focus 2: Access to Justice

Access to Justice is a basic principle of the rule of law, and a fundamental human right protected by Article 48 of the Constitution and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The COVID-19 directives and legislations have greatly impacted on the access to justice in the country. KNCHR findings indicate that the regulations and directives put in place to support suppression of the pandemic, have resulted in some of the provisions creating criminal offences and penalties. These offences include restrictions of movement, maintenance of physical distancing and use of face masks in public spaces. Consequently, there has been an increase in the number of arrests and charges, making the demand for access to justice services higher. This, coupled with scaling down of court services will continue to increase the backlog of cases.30

The UNODC and UNDP May 2020, guidance notes on ensuring Access to Justice in the context of COVID-19 give short, mid and long-term interventions aimed at ensuring justice is served during and after the pandemic. On preparation, it highlights a need for; multi-sectoral strategy; prioritization of cases such as serious crimes; violence against women and cases involving child offenders; support remote hearing; enhance accountability and oversight of law enforcement; increase use of alternatives to detention and support access to legal education. The Judiciary is advised to ensure justice is dispensed in a timely manner, adopt strategies for reducing risk of the pandemic in places of detention, ensure effective remedies for victims and survivors of violence and support remote access to justice. The COVID-19 pandemic has not suspended constitutional rights. Thus, based on the foregoing KNCHR sought to assess: accessibility of courts during the COVID-19 Pandemic period; adequacy of measures have been put in place to safeguard the right to a fair trial and measures put in place to safeguard access to justice by marginalized persons.

Effective 15th March 2020, the National Council on the Administration of Justice (NCAJ), issued a series of statements scaling down court services across the country31. In the statements, police officers were required to issue police bonds for petty and traffic offenders while maintaining centralized records for persons arrested and released on police bonds to

29 The Senate 2020
30 Judiciary 2020
promote accountability. In addition, plea taking for urgent criminal matters would continue with hearing of sexual offences cases expedited upon the request of the ODPP. Further, the High Courts would continue to review files for petty offenders to promote prison decongestion.

The National Police Service published curfew guidelines on the 27th March 2020, instructing Station heads to grant police bonds to detained persons where possible, to enable social distancing by limiting numbers of persons detained in police holding cells. In offering bond for petty and traffic offences, the Police are guided by the Bail and Bond Policy Guidelines [3]. Release of children and vulnerable persons without a surety is also provided for. On children cases, a police officer is expected to consider the best interest of the child.

The Office of the Director of Public Prosecution developed staff guidelines on preventative measures against the spread of COVID-19 in Kenya. The guidelines were on handling fresh matters and conduct of matters before court. The ODPP staff members were guided to suspend all pretrial conferences as well as meetings with complainants. Prosecution of new cases were suspended for 14 days with exception of serious cases (murder, robbery with violence, sexual offences, terrorism, human and drug trafficking). New matters would be handled at the police stations subject to guidelines that were to be issued by the Inspector General. The police were expected to update the ODPP regional and county heads on how they disposed of the cases as well as seek their guidance. Equally the prosecution heads were expected to report weekly on the recorded statistics. To deal with possible backlog, the suspects on cash bail/police bond are to be given bi-weekly court attendance dates, which can be extended subject to the prevailing pandemic situation.

The Judiciary embraced use of ICT to support seamless delivery of services during the pandemic. The Chief Justice gazetted Practice Directions on Electronic Case Management Gazette number 2357 of 2020[1], to guide the integration of Information Communication Technology (ICT) in judicial proceedings. This would include filing cases electronically, conversion of cases to electronic exchange of proceedings and virtual hearings and electronic case tracking system amongst others. The practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global pandemic were further issued vide Gazette number 3137 of 2020. County governments, public health departments together with representatives of the Judiciary have conducted sanitary inspections of courts to ascertain preparedness and suitability of court premises, structure and measures to fight COVID-19 in preparation for up scaling court services.

The practice directions have seen judicial officers hear urgent matters and deliver rulings and judgment virtually. Whereas, criminal hearings were suspended save for serious cases, some
hearing and delivery of judgment and ruling for persons in custody are done via video links. There have been some technical challenges in rolling out the virtual hearings, which are resolved respectively with feedback from the court users. The Cabinet Secretary for National Treasury and Planning through Legal Notice No. 59 waived court fees in respect of commercial disputes where the value of the suit does not exceed one million shillings, for a period of two years. The NCAJ continues to issue statements on up scaling of services\textsuperscript{32}.

KNCHR further notes support given to access to justice actors from different partners to upscale the use of technology in access to justice. For example under the PLEAD project; the judiciary, ODPP, Probation and Aftercare Service and the Kenya Police Service each received five (5) ICT equipment and the Kenya Prisons Service received eighteen (18) assorted equipment. KNCHR noted that despite the measures being put in place to ensure that the wheels of justice keep turning, it has received complaints related non-full compliance of police bonds where some police stations still arrest and detain petty and traffic offenders and hold them for hours or overnight stay before releasing them on cash bail.

In addition, KNCHR received complaints on allegations of police inaction impacting on victim’s access to justice, especially where the police were the perpetrators of injustice. Below are sampled cases:

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>Kanangoni, Kilifi County</td>
<td>The petitioner was assaulted during the enforcement of the curfew order. Four (4) police officers entered the petitioner’s house and demanded that he leaves the house for flouting the curfew. When he tried to explain that he had not violated any curfew directives, the police officers pulled him outside and assaulted him. The next day he went to the Marereni police station to record a statement and the police officers refused to record it. A call from the KNCHR to the station OCS enabled him to record his statement.</td>
</tr>
<tr>
<td>Elburgon, Nakuru County</td>
<td>The petitioner was assaulted by the area chief and three (3) police officers from Elbugon police post. He sustained injuries leading to his admission at Nakuru provincial general hospital. The matter was reported at Elburgon police post where the petitioner alleges that no action has since been taken.</td>
</tr>
<tr>
<td>Mudete, Vihiga County</td>
<td>A 14-year-old girl was arrested for failing to wear a face mask in public. Despite her mother (a person with disabilities) requesting for her release on police bond, the child was detained at the police station and further held in an adult cell. This was against the Bail and Bond Policy which requires a police officer to consider the nature of a crime and best interest of a child in granting police bail.</td>
</tr>
</tbody>
</table>

Based on the judicial interventions to ensure continuity of access to justice; KNCHR makes the following findings on access to justice.

\textsuperscript{32} Justice Maraga, 2020
1. The judiciary has put in place strategies to ensure continued dispensation of justice during the pandemic. The strategies were developed in a participatory manner through high level NCAJ membership save for the limited prioritization of children’s access to justice evident by lack of children court case practice guidelines.

2. Use of ICT to support remote functions for justice system is a notable progress. However, the applicability and accessibility of the same across the country remains a challenge. In addition, the platform fails to measure up to the human rights standards specifically, accessibility, non-discriminative and acceptability among the people with low level of literacy, persons with disabilities like visual, hearing impairment, learning disabilities, autism, spectrum disorders and mental health conditions.

3. Whereas NCAJ has developed accountability measures requiring law enforcement to share centralized records of reports on released persons; there is need for the directive to be applied in all police stations especially in far flung areas. Further, members of the public should be provided with information on lodging of complaints arising from the directive.

4. The scaling down of court services and high demand for access to justice service amid creation of offences under public health regulations have increased the backlog of cases.

5. The Judiciary in supporting Kenya Prison Service decongestant programme, had at 1st April 2020, released 4,800 petty offenders jailed for less than six months and others who had less than six months to complete their jail terms.

6. The measures put in place to safeguard access to justice currently are not inclusive for every court user. For instance, the Judiciary directives dissemination strategy using mainstream media and social media platforms and pinned notices in court stations leaves out a majority of court users like the persons with disabilities, the poor in informal settlements and the marginalized in remote areas. The right to information is a constitutional obligation that helps build public trust, confidence and institutional transparency.

7. Whereas the Judiciary has identified sexual violence as serious crimes as those deserving prompt hearing, there is limited support for victims of crime due to the pandemic. It is crucial to ensure effective access to online and offline support services, including psychological aid and other social services such as shelters, trauma support for victims of crimes such as sexual and domestic violence. Notable during the period, in response to the escalating cases of sexual and gender-based violence especially towards minors, is the introduction of a toll-free number by the directorate of community policing and gender and child protection to facilitate ease of reporting for
such cases. In addition, the Judiciary should monitor implementation of the directive to avoid further victimization of victims especially the vulnerable.

8. The suspension of criminal trials has resulted in delayed justice especially for persons in trial custody.

4.3 Thematic Focus 3: Media and Access to Information

Access to information and media freedom are fundamental in a society that is governed by the rule of law. Timely and accurate information provides individuals with the knowledge required to participate effectively in the democratic processes and fosters openness and transparency in decision-making. These rights are protected under Articles 34 and 35 of the Constitution of Kenya; Article 19 ICCPR and Article 9 of the ACHPR. The Committee on Economic, Social and Cultural Rights regards access to information as “core obligation” of provision of “education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.”

The African Commission on Human and People’s Rights acting through the Special Rapporteur on Freedom of Expression and Access to Information in Africa stated that it is a critical duty of States in times of public health emergencies to ensure that members of the public receive accurate, regular, accessible and science-backed information. On COVID-19, such information would include; the threat it poses to health; the role and impact of the measures adopted for preventing and containing the virus; the precautionary measures that members of the public should take and the scale of the spread.

KNCHR takes note of the pivotal role of a free media in promoting access to information during a pandemic thereby monitored media freedom and access to COVID-19 related information. The monitoring sought to establish; if media freedom is guaranteed during the enforcement of COVID-19 emergency powers or regulations; whether the Government is guaranteeing fair and equal access to journalists and media to all information related to the COVID-19 health crisis and in cases where physical access is precluded by health measure, whether alternative access to the media for coverage and reporting is provided. The KNCHR also sought to establish whether access to information on COVID-19 is guaranteed including by vulnerable persons such as persons with disabilities and if the government has taken steps to including addressing the digital divide to promote access to information on COVID-19 for all. The commission made the following findings on media freedom and access to information;

(a) Media Freedom

KNCHR notes that since the first COVID-19 positive case was reported in the country, media work was listed as an essential service and journalists have been allowed to attend govern-
ment press briefings and raise pertinent questions. In addition, media houses have been able to organize media interviews with relevant State officers. This saw increased coverage and information sharing on the pandemic. The Media Council and Kenya and the Kenya Union of Journalists undertook media specific trainings to mitigate on COVID-19 coverage and reporting. This resulted largely to journalists adhering to public health safety guidelines while on duty. However, there are reported cases that threatened media freedom in the course of covering and reporting the COVID-19 pandemic across the country. The immediate cases that came to the fore involved harassment and intimidation of journalists by law enforcement officers included; the assault of a NTV journalist in Mombasa; harassment of a WERU TV journalist in Meru, arrest of Citizen TV journalists in Eldoret and harassment of two Standard Media Group journalists in Nakuru. KNCHR issued a terse statement on the harassment of journalist and called to action the need for duty bearers to support media freedom during COVID-19 pandemic coverage and reporting.

(b) Access to Information

Prior to the first COVID-19 case being reported in Kenya, the government set up the National Emergency and Response Committee on Corona Virus whose mandate among others was to provide key and accurate information on COVID-19 pandemic and draft measures that the government would take to combat the spread of the virus. After the reporting of the first case the government, in conjunction with the media fraternity has endeavored to develop and disseminate elaborate public communication messaging.

The daily press briefings by Cabinet Secretary of Health and health officials alongside relevant government officials and other experts delved on statistics on the rate of COVID-19 infections, recoveries and update on measures put in place to avert the pandemic. The media has been a key source of information of government interventions with the journalists from a cross section of media houses being allowed to field pertinent questions relating to the government efforts. As at 6th June, 2020 and day 86 of COVID-19 infections in Kenya, the government through the Ministry of Health had issued 80 press briefings through mass media; there were (8) public Presidential addresses to the nation covering critical information on the government's initiatives regarding the COVID-19 pandemic. The inclusion of signs language interpreters during the briefing has enabled persons with hearing impairment to follow the proceedings. In addition, the disaggregation of data using gender, age and geographical groupings is a positive move.

In addition, regular updates have been made available through traditional media (television and radio) as well as social media (Facebook, twitter, websites). The mode and frequency of information has helped counter misinformation, enhanced public confidence and encouraged collective efforts in mitigating the crisis. To boost coverage, the media fraternity through the Media Owners Association (MOA) contributed over Ksh 150 million in form of advertising space and airtime where pertinent information on the pandemic is relayed to the
public. The media houses have regularly invited various industry players in health, business, technology, education and experts in various fields to help elaborate on initiatives put in place to combat the negative effects of the pandemic and also offer other relevant information.

In addition to media briefings and public education, the government has been enhancing its efforts on improvement of ICT Infrastructure to promote access to information. In context, citizens in urban areas enjoy almost unparalleled access to several medium of information through TV, radio, mobile and internet but the rural areas have lagged behind due to lack of appropriate infrastructure to ensure regular flow of information. The government, in attempts to address the digital divide, has been making in-roads lessening the gap information access. These efforts include; launch of the Google Loons Project to ensure more Kenyans access 4G connectivity.

The government has also constituted the COVID-19 ICT Advisory Committee whose mandate includes: developing and implementing a framework for identifying, supporting and scaling local ICT solutions that can support the country’s efforts in combating the pandemic.

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33 The Presidency 2020
In view of the above KNCHR has established that:

1. The government has provided the public with accessible, timely and reliable information on COVID-19 including symptoms, and threat it poses to their health and evidence-based guidance on keeping safe. This has helped in disinformation of facts.

2. In enhancing access to information, the government has taken steps to expand universal 4G access in the country; used community radios to share information; and inclusion of sign language interpreters during the daily Ministry of Health briefings.

3. Despite the efforts on access to information, KNCHR notes that cases of stigma and discrimination against those infected or suspected to be infected by the virus together with their family members are on the rise especially in the rural areas.

4. The COVID-19 messaging has left out children and other persons with disabilities such as persons with visual and hearing impairment.

4.4 Thematic Focus 4: Education

Right to education is a fundamental human right protected under Article 43 (1) f), 53 (1) b) and Article 26 of UDHR, Article 17 of the ACHPR; Article 11 of the ACRWC, Article 28 of the CRC; and Articles 13 and 14 of the ICESCR.

The Committee on Economic, Social and Cultural Rights in its General Comment No. 13 to ICESR right to education noted that education is both a human right in itself and an indispensable means of realizing other human rights. It requires the State to ensure that education exhibits the following salient and interrelated features: availability, accessibility, acceptability and adoptability\(^\text{34}\). On availability, educational institutions and programmes should be available and in sufficient quantity. Accessibility requires that educational institutions and programmes have to be accessible to everyone, without discrimination. Accessibility has three dimensions namely, non-discrimination that requires education to accessible to all especially the marginalized; physical accessibility within safe physical reach or modern technology and economic accessibility where education has to be affordable to all. On acceptability, the concept requires that form and substance of education including teaching methods have to be appropriate and acceptable.

\(^{34}\) CESC R General Comment No. 13: The Right to Education (Art. 13) Para. 1 Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10).
The concept of adaptability obligates the State to ensure that education is flexible and adaptable to the needs of changing societies and communities and that it responds to the needs of students within their diverse social and cultural settings. This concept requires that the State must strive to fulfill and respect, even in times of emergencies such as the COVID-19 pandemic period.

The effect of the pandemic and impact of government directives on curfew and social distancing have negatively impacted on the right to education in Kenya. Recognizing the impact of the pandemic to education, UNESCO provided five steps to support right to education for all during the pandemic\(^{35}\); need for cross sectorial coordination, planning and communication response to the pandemic; maintain operational capacities during school closures; provision of continuous support to teachers, learners and their families; provision of hygiene and health education and prepare for school reopening. Further CESCR has called on governments to ensure continued teaching and learning online but mitigate factors that would widen educational inequalities\(^{36}\).

KNCHR sought to find out whether the Ministry of Education, Science and Technology, has provided alternatives to ensure access to education for all; and whether the provided alternatives are accessible to all including the vulnerable.

As to whether the government has provided alternatives to ensure access to education for all during the pandemic; KNCHR has established that the Ministry of Education, Science and Technology through Kenya Institute of Curriculum Development (KICD) and other stakeholders has come up with alternatives that will promote the continuity of realization of the right to education for the approximately 15 million students in primary and secondary level while observing the adherence of safe distance measures. In a press release issued on 18th March 2020, the government came up with various modalities on how students were to access education while at home\(^{37}\). Commencing 23rd Mach 2020, the Ministry enhanced the following four platforms for students to access learning while at home:

(a) Radio Programmes

In partnership with the Kenya Broadcasting Corporation (KBC), the Ministry of Education, Science and Technology broadcasted radio programs daily, from Monday to Friday through Kiswahili Radio Taifa and English Radio services. Radio Taifa lessons ran from 1000hrs to 1100hrs and English service lessons are scheduled from 0915hrs to 1200hrs. The broadcasts

\(^{35}\) UNESCO 2020


\(^{37}\) Ministry of Education, Science and Technology Press release dated March 18th 2020, signed by the CS Education Prof George Magoha.
were also made available on Iftin FM and Trans-world in northern counties Garissa, Mandera and Wajir Counties.

(b) Television Programmes

Through Edu-Channel which is owned by Kenya Institute of Curriculum Development (KICS), the Ministry of Education, Science and Technology, engaged the station to help learners access education. The channel is available on free to air transmission and can also be accessible though KICD website: www.kicd.ac.ke

(c) Social media (YouTube)

The KICD has YouTube Channels which streams live learning contents.

The Kenya Education Cloud is available through www.kicd.ac.ke and provides access to digital contents for learners. The contents are approved by KICD.

Other modes of learning adopted by private learning institutions include:

(a) Webinar learning by use of Zoom, Skype and Microsoft Teams Apps

This allows live online learning and interactive sessions between teachers and their students in a bid to re-assert some normalcy in their lives.

(b) Accelerated learning

This is a multi-dimensional approach to learning that provides an atmosphere where participants are able to absorb and retain information in a multisensory and natural way. This mode of learning has been adopted during this time of COVID-19 by the catch-up centers that are supported by Action-Aid organization in Kenya. These centers are mostly found in the marginalized areas of Kenya such as; Isiolo, Garissa, Kilifi, Migori and some parts of Muhoroni in Kisumu County. Here the “Teacher Coaches” photocopy the learning materials and assignments and then physically distribute the same to the students for their learning. The materials are then collected for marking after a week.

On whether the alternatives to learners are effective and acceptable to learners; KNCHR has established that despite the government’s progressive and positive efforts to enable learning at home, it is ostensibly clear that only a small proportion of learners have been able so far to access education through the stated above channels. This has widened the gap in access to education by the few private students and the majority who are from the public schools. The Committee on Economic and Social Cultural Rights (CESCR) in its recent note has similarly cautioned the risk that such measures carry in terms of, ‘deepening educational inequalities
between rich and poor learners due to unequal access to affordable internet services and equipment such as computers, smartphones and tablets’^38

In April 2020, Usawa Agenda, a lobby group championing equitable access to equality education conducted a survey that interviewed 3,700 household heads in 255 villages in the identified counties and 263 school heads association officials in 211 sub-counties. The findings of the survey are as follows^39.

1. Only 22 per cent of students interviewed in forty-two (42) counties were accessing online learning resources with those enrolled in private schools being twice as likely to take part in digital learning compared to their counterparts in public schools. This speaks to discrimination which would have long term effects on the affected children beyond the pandemic.

“The findings show that on average 22 out 100 children are accessing online learning in Kenya. A child in a private school is twice as likely to be accessing digital learning compared to his/her counterpart in a public school. Less than 10 per cent of learners in public schools are accessing digital learning materials...” the report reads in part.

2. Almost 80% of students are unable to access digital learning platforms provided by the government as a result of drawbacks ranging from micro to macro environments thus making more children to be left behind in the learning process.

3. Two (2) out of ten (10) parents were not aware that their children were expected to continue learning from home and thus making the children not engage in any form of learning during the said period.

KNCHR has further established that; while the efforts to adapt and continue teaching and learning online are very commendable to mitigate the impact of school closures on the right to education, it is worrying that this has not been accessible to all learners due to social status, technological and geographical challenges.

According to the recent KNBS report^40, nationally 57.9% of the households have members who usually attend learning institutions; 48.2% of households used home schooling as a coping mechanism to continue learning and 24.6% of households with members who usually attend any learning institution were not using any method to continue learning at home.

^39 Kihiu 2020
^40 KNBS Survey on Socio Economic Impact of COVID-19 on Households Report
Further, the report established that 18.6% of the households use television, 15.1% use Radio, 12.2% use the internet, 11.8% use print media, 8.9% use social media and 2.1% use other forms as coping mechanism. Based on this, majority of the students come from poor homes that are unable to buy communication devices like a radio and smart phones and even for those who own find it hard to maintain the devices like radio by buying dry cells regularly or bundles to access via smart phones. This is supported by the Kenya Population and Housing Census (2019) report which indicates that out of the total population; 59.6% own a radio, 40.7% own a television, 47.3% own a mobile phone and 17.9% have access to internet. The effects of the pandemic have exacerbated the economic hardship for many Kenyans which have a direct effect on provision of education during this pandemic period.

In addition, KNCHR notes the following concerns that hamper the effectiveness of alternatives provided by the government to learning:

1. The perennial floods which affected most regions in Western Kenya, North Rift, Central and parts of North Eastern. This led to massive displacement of students hence disrupting learning further.

2. The closure of schools and economic hardship brought by the pandemic will affect other ECOSOC rights of learners such as the right to food especially for those who were under school feeding programme.

3. Accessibility of remote regions of the country that are not sufficiently covered with telecommunication networks poses a great challenge to digital learning by students in the country. The Google Loons project is meant to ensure 4G connectivity for 25 Million Kenyans who cannot access the service.

4. Effectiveness of digital learning in terms of pedagogy and andragogy has been in question. Understanding capabilities of learners differ hence the need for a physical teacher to assess the student especially languages and mathematics. Subjects like sciences that need practical lessons have been challenged in terms of delivery.

5. The anxiety by learners on the rising cases of COVID-19 pandemic creates an environment that is retrogressive for learning.

6. Access to the learning content by children living with disabilities ranging from those with visual and hearing impairment, to those with mental challenges has been a challenge as most of the mediums available are not accessible to this group of persons living with disabilities, hence further marginalizing them.

Gender stereotypes are also impacting girl’s access to learning content as they are burdened with assisting their mothers with household chores while the boys have a lot of free time to engage in their schoolwork.
Despite the above challenges KNCHR notes that the Ministry of Education, Science and Technology seeks to put in measures to address the challenges\(^\text{41}\). The measures include; partnering with local radio stations, hiring teachers and ICT specialists and building the capacity of teachers to deliver online contents for varied groups including for learners living with disabilities. The Ministry however, acknowledges the gap in the realization of the right to education and the above mediums are only taken as a back-up measure and when schools reopen learners will resume syllabus coverage from where they left when schools were closed both for that undertaking CBC and the 8.4.4 system. The Committee on Economic and Social Cultural Rights (CESCR) in its recent note has similarly cautioned the risk that such measures carry in terms of, “deepening educational inequalities between rich and poor learners due to unequal access to affordable internet services and equipment such as computers, smartphones and tablets”\(^\text{42}\)

In order to come up with a return to school framework amid the COVID-19 pandemic, the Ministry of Education, Science and Technology has established the National COVID-19 Education Response Committee. The committee’s mandate includes to: advise the Cabinet Secretary on the reopening of basic education institutions (pre-primary, primary, secondary schools, teacher training colleges and adult education institutions.); review and reorganize the school calendar as part of the COVID-19 post-recovery strategy and to advise the Cabinet Secretary on the health and safety measures to be put in place for the pupils/students, teachers and entire school community. This is a good effort since it conforms to UNESCO guidance on need for cross sectorial coordination, planning and communication on education in response to the pandemic.

At the time of publishing this report, the committee was receiving views from the public and from various institutions and KNCHR has also submitted a memorandum containing some of the proposals KNCHR deems necessary, amongst them proposing the mainstreaming of human rights-based approach in the education sector’s approach to COVID-19. Once the committee releases its recommendations the country shall have a way forward on how to enhance the right to education even during these challenging times.


4.5 **Thematic Focus 5: Labour and Social Security**

“Everyone has the right to work, right to free choice of employment, to just and favorable conditions of work and to protection against unemployment”. Other sub-articles provide for pay to favorable pay terms including equal pay for equal work and the right to join trade unions”.

Article 23 (1) of the UDHR

This right to work and the right to social security and protection are further expounded under Article 6, 7, 8, 9 and 10 of the ICESCR. There are several conventions related to work under the International Labour Organization (ILO). The same rights are provided for in the ACHPR (Article 15) and domestically in the Constitution of Kenya (Article 41). Numerous labour and employment laws are in place in Kenya. As it is, many laws are interrelated and share some common principles or have cross cutting themes.

The impact of the pandemic has directly affected the labour market and social security in the country. In the wake of the pandemic, the ILO has issued guidelines on labour which should be considered and applied during this pandemic. On 18th March 2020, the ILO issued its first monitor edition labeled: COVID-19 and the World of Work: Impacts and Policy Responses. In this edition, the ILO outlined the possible effects of COVID-19 on jobs and recommendations on policy responses by States and employers. Further the CESCR through a statement has urged States to take up extraordinary measures to; protect workers from contagion of the virus and economic meltdown; and allocation of funds towards social security to cushion the vulnerable from the impact of the pandemic.

KNCHR effort to monitor labour and social security is aimed at identifying whether the government has taken any proactive measures to mitigate the economic impact of COVID-19, and whether social security benefits are available and accessible.

KNCHR has established that the government has undertaken a myriad of measures to address the negative impacts of the pandemic on labour and social security rights. These measures include:

1. Fiscal directives that will forestall loss of jobs and uphold social security: The government amended several Acts to give effect to measures aimed at reducing the impacts of COVID-19 to individuals and businesses. These amendments are reflected in the Tax Laws (Amendment) Bill 2020[2]. Key highlights include reduction in VAT from 16%

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44 Committee on Economic Social and Cultural Rights 2020
to 14% and reduction in turn-over tax from 3% to 1%. Other measures include reduction in PAYE from 30% to 25% and scrapping of PAYE for those earning less than 24,000 shillings per month, establishment of the COVID-19 Emergency Response Fund whose function includes; support towards cushioning and provision of emergency relief to the most vulnerable persons, support and stimulate select enterprises rendered vulnerable by the pandemic.

2. The establishment and implementation of the Kazi Mtaani: National Hygiene Program under the State Department of Housing and Urban Planning was established to support youths in informal settlements across the country.

3. The Ministry of Labour and Social Protection has provided occupational safety and health advisories and released funds to support the vulnerable population (elderly, persons with severe disabilities and orphans and vulnerable children under the Inua Jamii social protection program).45

4. The Ministry of Labour and Social Protection entered into a tripartite agreement with Central Organization of Trade Unions (COTU-K) and Federation of Kenya Employers (FKE) which among others provides for the; suspension of negotiation of CBAs, suspension of concluded CBAs whose effective date falls within the COVID-19 Period; freezing of increments during the COVID-19 period; provision of adequate training and information on safety and health and protection of migrant workers46.

5. The Ministry of Labour and Social Protection through the Directorate of Occupational Safety and Health Services, Republic of Kenya has issued an Occupational Safety and Health Advisory on COVID-1947. In addition, the Ministry has issued contacts for COVID-19 rapid response at workplace. The toll-free number is 0800211168 and email is complaints@labour.go.ke

6. The Senate Ad hoc Committee on COVID-19 situation in Kenya has been holding sessions to deliberate and issue advisories in regard to the situation of COVID-19. So far the Committee has issued six (6) progress reports. In its workings, it takes views from government institutions, businesses, CSOs and other groups and individual citizens. It then makes recommendations to the concerned agencies for action.

45 Letter from the Principal Secretary Ministry of Labour and Social Protection dated 17th April 2020 to various social protection offices.
46 Chelugui, Atwoli, & Mugo 2020
Whereas the government has taken steps to deal with the economic effects of the pandemic, the following findings show that the gaps continue to widen. According to the KNBS\textsuperscript{48} a big percentage of the working population are not attending work due to the COVID-19 pandemic. Up to 49% of those interviewed in a study conducted in May 2020, were not at work due to stay away order and lockdown. Other reasons include temporary layoffs or slowdown in businesses during the period. Persons in low income areas are most affected\textsuperscript{49}. Many businesses continue to lay off workers as the economic situation in the country continues to worsen. In the latest report, a five-star hotel had to send all its workers away on unpaid leave until further notice\textsuperscript{50}.

KNCHR has also received seven (7) cases from elderly persons who had not received the Inua Jamii fund despite having registered and made follow ups with the relevant offices. In addition, KNCHR received six (6) complaints from persons who lost their jobs due to the ripple effects of the pandemic; all were not members of trade unions. Below is a highlight of complaints received by KNCHR;

<table>
<thead>
<tr>
<th>Changamwe, Mombasa County</th>
<th>An administrator at an educational facility was issued with a non-definite compulsory unpaid leave due to loss of business associated with the pandemic. In addition to her salary she is skeptical about payment of her statutory deductions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kasarani, Nairobi County</td>
<td>An employee alleged that since March 2020, together with other workers, they have not received their salaries. They have tried to engage their employer who keeps making empty promises.</td>
</tr>
<tr>
<td>Westlands, Nairobi County</td>
<td>A migrant worker’s employment contract was terminated and he was not able to travel back to his home country due to the travel restrictions. The employer had also declined to pay him his entitlements as per the employment contract. In addition, he stated that he was barred by the contract from seeking employment in other place within the country until after the expiry of 3 years (he was on his second year of contract).</td>
</tr>
</tbody>
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\textsuperscript{49} TIFA Research 2020
\textsuperscript{50} Ndege 2020
4.6 Thematic Focus 6: Housing

The right to accessible and adequate housing is enshrined in key international, regional and national laws and policies. Article 25 (1) UDHR asserts that housing is one of the key elements that would ensure an adequate standard of living for a person with his dependents and lays emphasis on non-discrimination in realizing this right. The ICESCR embeds the right to housing as a key obligation of the State in Article 11 (1). It largely borrows from the UDHR in recognizing housing as a key prerequisite for an adequate standard of living. Though the right to accessible and adequate housing is not expressly provided for in the African Charter, the African Commission on Human and Peoples Rights has made it clear that the right to housing is implied and hence a State obligation in regards to Articles 14, 16, and 18 (1) of the Charter.

The essential nature of the right to housing has been extensively demonstrated in the Principles and Guidelines on the Implementation of the ECOSOC rights in the Charter. The Constitution of Kenya 2010 in Article 43 (1) b) has made an explicit requirement of the state to fulfill the right to housing.

KNCHR sought to establish whether the State has taken any steps to; prevent people from enjoying accessible and adequate housing; avoid evictions; and put in place measures to mitigate displacement and homelessness caused by natural disasters during the pandemic. KNCHR has established that whereas no direct steps have been taken to prevent people from enjoying adequate housing; review of the tax regime and social safety net programmes have facilitated the people with resources to support the right to accessible and adequate housing albeit targeting a small number of the population.

On evictions, KNCHR takes note of increased number of evictions and demolitions of houses especially for the poor people who are either squatters on government land or who have been conned into buying land belonging to the government and issued with fake title deeds. This has made the COVID-19 measures meaningless and has further exposed the said families to great risk of contracting the disease. Forceful evictions have occurred in Kariobangi where over 5,000 families were left in the cold after demolition of their houses despite the inherent dangers of the pandemic and existence of an interim court order. A further 7,000 families were evicted from Ruai in Nairobi.

The impacts of the demolitions and evictions have had a disproportionate impact on women, the elderly, PWDs and Children. This has been demonstrated through the media where in

52 Citizen Reporter 2020
53 Yusuf 2020
one case, a mother of two (a victim of eviction) was gang raped in the presence of her children. Further, due to the economic downturn brought about by COVID-19, many people have been unable to pay rent and hence some have been evicted or their houses de-structured in a manner that exposes families to elements of weather and criminal attacks. Interviews with landlords in Ongata Rongai, Nairobi, confirmed that indeed many families especially from the lower income category are unable to pay rent. Cases of rent defaulting have increased especially for tenants engaged in informal employment or businesses. It was however reported, that a number of cases are not genuine as some tenants are taking advantage of the pandemic to stop meeting their rent obligations. The non-payment of rent has been corroborated by the KNBS survey that confirmed that up to 30.5% of the tenants were not able to pay their rent in the month of April, 2020.

Worth noting, the demolitions and evictions not only placed the evictees in harm’s way but also contravened Section 152 G (1) (d), (e), (f), (h) and (i) of the Land Act that requires evictions to be carried out in a manner that; respects dignity, right to life and security of those affected; provides special measures to protect the vulnerable and prevent arbitrary deprivation of property. Consequently, OHCHR issued a statement urging the government of Kenya to stop the evictions as they amounted to grave human rights violations. Earlier on, the Special Rapporteur (SP) on Housing had issued a Guidance Note which among others called for States to issue moratoriums against evictions of people from their homes. The Special Rapporteur made an observation that housing has become an important defense against the pandemic. So as to reduce exposure to infections, evictions should therefore not be carried out during the COVID-19 pandemic.

54 Mogoa 2020
56 Rajagopal & Lawlor 2020
4.7 Thematic Focus 7: Water and Sanitation

The importance of clean and safe water and reasonable standards of sanitation in the fight against COVID-19 cannot be overstated. The two are not only determinants of the right to health but have been identified by the Ministry of Health as key to preventing the spread of the COVID-19 virus.58

The UDHR under Article 25 articulates what composes the right to an adequate standard of living. Though water is not specifically mentioned, it is implied that the right to food and water may not be separated and that the listing of these components is not exhaustive. It is this clarification that the Committee on ESCR advances in the General Comment No. 15 on the right to water.59 The Committee notes that Article 11 and 12 of the ICESCR implies that water is a key component of the right to an adequate standard of life. Other instruments that entrench the right to water include CEDAW and CRC. The African Charter as elaborated in the principles and guidelines by the on Human and Peoples Rights also provides for the legal basis of this right. In Kenya, Article 43 (1) d) of the Constitution requires the State to ensure the realization of the right to water. Further, in a bid to operationalize this right, enabling legislations and policies such as the Water Act are in place.

KNCHR sought to monitor if the government has taken any proactive steps to ensure continuous access to clean water for all, including suspending water disconnections and provisions of free and subsidized water in informal settlements and marginalized areas during the COVID-19 pandemic.

KNCHR has established that the Ministry of Water, Sanitation and Irrigation issued protocols and guidelines for supply and provision of water and sanitation services. The protocols and guidelines among others, directed that all Water Service providers should; provide free water to informal settlements and vulnerable populations for three months (April to June 2020); refrain from disconnecting water supply for three months (April to June) and ensure hand washing points are accessible to needy communities.60 Worth mentioning, in some parts of the country e.g. Nairobi (Hurlingham, Embakasi, Kibera) and Isiolo counties, there have been alternative sources of water; such as boreholes, water bowser, reserves for rain water, provided by the government.

This notwithstanding, there have been reports of water disconnections occasioned by destruction of distribution pipes as a result of the ongoing floods and landslides. KNCHR has al-

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58 The following criteria is used in determining the realization of the right to water and sanitation; Availability, Acceptable quality, Access, Affordability, Non-discrimination and Equality, Access to Information and Transparency, Sustainability, Participation and empowerment, Accountability (KNCHR, 2017)
59 Committee on Economic, Social and Cultural Rights 2003
60 Correspondent 2020
so received reports of water disconnections by landlords to ‘punish’ tenants with rent arrears. While some areas have reported lack of water supply during the pandemic, other areas have decried perennial water shortages, even prior to the onset of the pandemic. In addition, water prices in areas such as Kawangware and Kibera have increased from Ksh. 5 to Ksh. 30 per 20 litre jerrican. In the absence of water, the hand washing and other requisite sanitary conditions are breached.

Whereas KNCHR commends the Ministry of Water for its guidelines on provision of water and sanitation services to the vulnerable, it is concerned that implementation of the same may not be effectively achieved. The Council of Governors has decried the financial status of Water Service providers and cited lack of funding to cushion the revenue gap as a huge impediment to the implementation of the protocol and guidelines by the Ministry. This in addition to destruction of water sources by natural disasters will inhibit access to water and sanitation services to the vulnerable population.

KNCHR also takes note of the recent wave of cholera cases in the country as a manifestation of inadequate hygiene practices, poor sanitation, lack of safe drinking water and food safety in the affected areas. This situation exacerbates the vulnerability of affected residents to the COVID-19 disease.

4.8 Thematic Focus 8: Health Facilities and Services

The right to health is a fundamental part of human rights. In its constitution, the World Health Organization envisages “...the highest attainable standard of health as a fundamental right of every human being.” The right to health is recognized under Article 25(1) of UDHR; Article 12(2) c) of ICESR and Article 16 of the ACHPR. In Kenya, Article 43 1 (a) of the Constitution guarantees every person the right to the highest attainable standard of health. This is further elaborated in the health Act, employment laws and government policies and directives. The core components of the right to health as elaborated by General Comment 14 of CESC are; availability, accessibility, acceptability and quality.

\[\text{61 These areas include; Nairobi County (Kayole, Lang’ata, Huruma, Embakasi); Marsabit County; Turkana County and Mombasa County} \]
\[\text{62 These areas include; Hurlingham, South C and Lavington in Nairobi County} \]
\[\text{63 Supra n.61} \]
\[\text{65 WHO 1946} \]
According to Kenya’s health policy 2014-2030 despite the improved health profile over the past decade, the disease burden continues to have a negative impact on the right to health. The status quo has been further exacerbated by the COVID-19 pandemic that has led to unprecedented strain in the healthcare system. Merely eighty-four (84) days after the first COVID-19 infection was reported, the country has seen an exponential increase in the number of confirmed cases to 3094, 89 fatalities and 1048 recoveries. As at 6th June, 2020, 37 out of the 47 counties had confirmed COVID-19 cases.

In dealing with the pandemic human rights agencies have called on the State to take steps to address health concerns. WHO guidance on addressing human rights during the pandemic calls for among others; recognition of health as a human right hence the need to address stigma and discrimination; ensure that quarantine and restrictive measures are within the law and governments to take measures to mitigate shortage of medical goods and equipment. The CESCR made recommendations to States to take measures that will ensure the respect, protection and fulfillment of economic, social and cultural rights. Further, the advisory from the United Nations Sub-Committee on the Prevention of Torture made recommendations on how States are to handle persons in mandatory quarantine. The OHCHR also provided guidance on the need for States to take extraordinary measures in protecting the health and well-being of the population.

KNCHR affirms that health facilities and services during the COVID-19 pandemic still need to meet the highest attainable standards. The government should therefore operate within the four core components namely: Availability, Accessibility, Acceptability and Quality. Since health issues are vast, dynamic and guided by the four components, KNCHR identified key thematic areas for monitoring the right to health. On availability and accessibility, KNCHR sought to establish if the government has allocated sufficient funds to deal with the health issues associated with COVID-19 and whether the government continued to offer essential services. On acceptability, KNCHR focused on whether quarantine and isolation facilities are people-centered and if steps have been taken to address stigma and discrimination associated with the COVID-19. Further, while integrating the four core components, KNCHR sought to find out if the government has set standards to ensure quality of service. KNCHR collected

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66 Ministry of Health 2014
67 Nairobi, Mombasa, Mandera, Kwale, Kilifi, Kajiado, Kiambu, Wajir, Migori, Siaya, Taita Taveta, Garissa, Kitui, Nyeri, Nakuru, Uasin Gishu, Bungoma, Kakamega, Kisumu, Homabay, Meru, Isiolo, Turkana, Bomet, Kirinyaga, Kisii, Laikipia, Murang’a, Kericho, Makuini, Trans Nzoia, Embu, Elgeyo Marakwet and Marsabit. The first 5 counties were gazetted as ‘infected areas’ with cessation of movement orders affecting Nairobi, Mombasa and Mandera counties.
68 WHO Special Programme for Research 2020
69 Committee on Economic Social and Cultural Rights 2020
70 UNAIDS 2020
71 OHCHR 2020
data and information with regards to these parameters while also specifically focusing on mental health as an emerging issue.

(a) Access to Essential Health Services

In a recent statement by the World Health Organization, States were warned against placing all focus on containing COVID-19 since more people are likely to die from indirect effects of the pandemic\textsuperscript{72}. This means that the indirect effects of the pandemic, including the social economic issues might affect livelihoods.

KNCHR analyzed the government’s intervention in ensuring that health services especially essential services are accessible and affordable and established the following;

1. To balance between provision of essential health services and COVID-19 responses, the Ministry of Health has set standards by issuing a directive on continuity of these services during the pandemic.

2. There is a gap in implementation of the above directive. KNCHR has consistently been monitoring and receiving complaints from the public on interrupted access to healthcare services. Reports by media, professional bodies (e.g. KMPDU) and the Council of Governors point towards glaring gaps in the interventions deployed in the fight against the pandemic. According to the Council of Governors, counties have reported a drop of Reproductive, Maternal, Newborn and Child Health (RMNCH) services during the pandemic. In the month of April, counties reported a 39% drop of fourth antenatal clinic visits, 32% drop in delivery of skilled birth attendance and 34% drop in immunization. In addition, prevention of mother to child transmission has reduced by 31%.\textsuperscript{73} This in itself is a worrisome trend that needs to be mitigated upon.

3. The curfew order and incidences related to use of excessive force by police officers has affected the uptake of essential services by community members. KNCHR recorded complaints from victims of police brutality who were not able to seek immediate medical attention.

\textsuperscript{72} Merab, 2020
\textsuperscript{73} Ibid (73)
Below is a summary of some of the complaints received by the Commission

<table>
<thead>
<tr>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Embakasi, Nairobi County</td>
<td>A 27-year-old sustained injuries after being assaulted and abandoned at the roadside by police officers who were enforcing curfew orders on 3rd April, 2020 at about 7.30 p.m. His family members picked him up at 9.00 pm. and were too scared of taking him to hospital due to the curfew restrictions. He was taken to hospital on 4th April, 2020 and later succumbed to the injuries while receiving treatment.</td>
</tr>
<tr>
<td>Kinango, Kwale County</td>
<td>A boda-boda rider was allegedly assaulted by police officers on 27th March 2020 after he ferried an expectant mother to hospital during the curfew hours. Due to the curfew restrictions he was not able to seek immediate medical treatment and only did so on 28th March, 2020 and he succumbed to the injuries while receiving treatment.</td>
</tr>
<tr>
<td>Changamwe, Mombasa County</td>
<td>A 19-year-old man was assaulted by a vigilante group member who were allegedly enforcing curfew orders on 26th April, 2020. Despite sustaining severe injuries, his family could not take him to hospital until the next day and he succumbed to his injuries on 28th April, 2020.</td>
</tr>
<tr>
<td>Rangwe, Homabay County</td>
<td>On 24th April, 2020 a female adult was raped by persons who identified themselves as police officers at 9.00 p.m. while she was walking towards her house from her aunt's house. She was not able to access medical care until 25th April, 2020.</td>
</tr>
<tr>
<td>Saboti, Trans Nzoia County</td>
<td>A man was assaulted by police officers who were enforcing the curfew orders on the evening of 29th March, 2020. He broke and fractured his left arm and was not able to access a medical care unit until the following day 30th March, 2020.</td>
</tr>
</tbody>
</table>

Other complaints received point towards interruption of access to continued healthcare services by patients of chronic illnesses such as cancer. The patients, most of whom seek medical services in referral facilities located outside their counties of residence, reported that they had a challenge in accessing the health facilities due to directives on restriction of movements.

Kenya has recorded 13 fatalities from the recent cholera outbreaks in Garissa, Wajir, Turkana, Murang’a and Marsabit counties. As at 21st May, 2020, the aforementioned counties cumulatively confirmed 550 cases. Exposure to different diseases impacts on an individual’s immunity further heightening their vulnerability to the COVID-19 disease.

KNCHR therefore notes that whereas funds have been allocated and standards put in place to ensure access to essential health services; the efforts are hampered by delayed release of funds and excess use of force by police among others.

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74 According to a report by Kenya Red Cross, persons displaced during the ongoing floods and landslides are also vulnerable to pneumonia and bilharzia, (UN OCHA, 2020)
(b) COVID-19 Budgets and Expenditure

During the period under review, KNCHR observed that:

1. The government has established a COVID-19 Emergency Response Fund under the Public Finance Management (COVID-19 Emergency Response Fund) Regulations, 2020. The regulations provide for mobilization of resources for emergency response towards containing the spread, effect and impact of COVID-19 pandemic. The purpose of the fund is to purchase essential medicine and medical supplies for public hospitals, health professionals and frontline workers; restore compulsory quarantine facilities and enhance the capacity of relevant research institutions in handling COVID-19 surveillance. In addition to government appropriation, the Fund has received support from other State agencies, individuals, business entities and donor funding. As at 21st April, 2020 the Fund had received a total of Ksh 1.2 Billion (Ksh 917,768,950 in cash and Ksh 370,300,000 in material resources)\(^75\). These concerted efforts have led to the mobilization of over Ksh 8 Billion by the end of May, 2020.

2. In the Supplementary Budget II for FY 2019/2020\(^76\), Ksh. 3.9 Billion was allocated towards COVID-19 (Ksh.1 Billion for recruitment of health workers; Ksh 300 million towards operations and Ksh. 2.6 Billion towards development- including testing and treatment). The National Treasury has set standards by allocation of more funding on priority areas (e.g. hiring of staff and development which includes testing and treatment) rather than on operational costs.

3. County Government committed to set up a Ksh 5 Billion Fund towards the fight of COVID-19 pandemic\(^77\).

The Ministry of Health, in compliance with the Public Finance Management Act, tabled its report before the Parliamentary Health Committee in April to account for the disbursement and utilization of Ksh 300 Million. The aforementioned reports have solicited criticism from the public citing lack of transparency as the reports indicate lump sum amounts with no specific breakdown. While acknowledging the government’s positive initiatives and progress, KNCHR makes the following observations:

1. Whereas the National Treasury undertook public participation when developing the COVID-19 Fund regulations, the participation was limited. Members of the public decried that time allocated for their submission was limited to allow meaningful participation.

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\(^{75}\) Citizen Digital 2020  
\(^{76}\) The National Treasury 2020  
\(^{77}\) Tanui 2020
2. Delayed disbursements of appropriated funds by the National Treasury have hampered service delivery. In a number of public statements, the Council of Governors has pointed out that despite the allocation of adequate funding, County Governments, whose function under the Constitution includes public health, are yet to receive funds from the national government. Furthermore, KEMRI, the research agency leading Kenya’s COVID-19 fight, submitted a report to the National Assembly Health Committee noting that it had no finances to replenish COVID-19 testing kits, protective gear and the much-needed reagents.

3. The delayed or unequal distribution of resources could be attributed to the unresolved control of the healthcare system by Kenya’s two-tier governments. To a large extent, the pandemic has served to expose the lack of coordination and inequality between the national and devolved healthcare units. There have been concerns on the need to review the now obsolete Public Health Act CAP 242 to ensure it conforms to the new constitutional, legal and social frameworks. The National Health Policy 2014-2030, recognizes that the Act has not been amended to reflect the stewardship role of the two tiers of governments in the current health environment.

4. The Council of Governors has also cited inflexible government procurement procedures as an obstacle in effectively combating COVID-19. The Council’s Chairperson has admitted that County Governments were experiencing challenges in procuring medical supplies and equipment in the midst of the pandemic due to what he termed as monopoly by the Kenya Medical Supplies Authority (KEMSA); and urged the Ministry of Health and Parliament to review or suspend the law to allow county governments to procure from other suppliers.

5. Under the Supplementary Budget II, the approved allocation for Health was reduced from Ksh 115.6 Billion to Ksh 103.4 Billion. Out of this budget, the Preventive, Promotion and Reproductive, Maternal, Newborn Child and Adolescent Health (RMNCAH) approved allocation was greatly affected with a 48.8% decline. This will negatively affect the provision of these services to Kenyans.

KNCHR finds that unless the above concerns are addressed, availability and accessibility of the much needed health services will be hampered.

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79 Ibid (72)
(c) Quarantine and Isolation Centres

In order to determine acceptability of key COVID-19 services offered by the government, KNCHR sought to establish if the quarantine and isolation facilities and services offered are human rights centered. Specifically KNCHR sought to establish the following; availability of quarantine and isolations facilities guidelines; availability of adequate quarantine and isolation centers across the 47 counties; whether the physical infrastructure and functionality of the quarantine and isolations facilities are adequate and can accommodate vulnerable groups; steps taken by the government to ensure access to food, water and health care amongst others is available for persons in quarantine and isolation; whether measures are in place to control and prevent cross-infection and whether there are measures to ensure that the centers safeguard critical rights including freedom from torture, cruel, inhuman and degrading treatment, right to informed consent to medical treatment, experiment, research and confidentiality.

KNCHR established the following:

1. The Cabinet Secretary, Ministry of Health in exercising the powers vested under the Public Health Act, issued isolation and quarantine directives in line with WHO standards to protect members of the public from exposure to the COVID-19 virus. Initially, all persons arriving into the country were expected to self-isolate. However, on 23rd March 2020, the government imposed a mandatory quarantine for all persons coming into Kenya to reside in select quarantine facilities.

2. To promote quality and standards; the Ministry of Health developed quarantine protocols for hotels and education facilities that provide for minimum standards such as; provision of food, medical checkup, water and accommodation. Nevertheless, the protocol does not stipulate standards used for designating a center as a quarantine facility and how the facilities are to be run. This has resulted in COVID-19 infections to staff that operate the quarantine centers.

3. The implementation of the government’s directive on mandatory quarantine and isolation of persons affected by COVID-19 has been criticized by citizens as well as human rights and civil society groups. KNCHR has received complaints of deplorable conditions; such as lack of water and poor sanitation standards; exorbitant costs of quarantine centers and lack of structured communication to the COVID-19 patients at quarantine areas causing uncertainty, anxiety and panic. As a result of the aforementioned conditions, there have been reports of persons escaping from quarantine centers and citizens avoiding the mass testing initiative by Ministry of Health.

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80 Ministry of Health 2020 See also Mutua 2020
4. To address the issue of quarantine and isolations costs, the government waived fees for those placed under mandatory quarantine. The costs are currently being paid by the government. Worth noting, the waiver does not apply to those placed in forced isolation units for defying social distancing rules or the dusk-to-dawn curfew order.

5. The quarantine centers have been used to arbitrary punish persons who violate government directives; such as curfew orders, failure to wear face masks or failing to adhered to social distancing directives. This is carried out through forceful and compulsory 14 days’ quarantine and thereafter arrest, arraignment and charging in court under the Public Health Act.

6. KNCHR received complaints where citizens were arbitrary punished using forced quarantine. The complaints included; non-adherence to the due process of placing persons on quarantine; the cost of keeping a person on a quarantine facility; the poor conditions in the quarantine facilities, the arbitrary extension of the time/duration of quarantine and how quarantine was being used in some cases to settle scores in business rivalries. Below are examples of cases received by the KNCHR;

<table>
<thead>
<tr>
<th>Location</th>
<th>Case Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nambale, Busia County</td>
<td>Two women traders, one with an infant and another who was expectant and with pre-existing medical conditions, were arrested for selling their food items outside the designated market area. Instead of being arraigned in court, and despite their existing vulnerability, they were forcefully detained in a deplorable quarantine facility. The facility lacked food, beddings, water and medical personnel. KNCHR intervention resulted in their release.</td>
</tr>
<tr>
<td>Olkalau, Nyandarua County</td>
<td>A business woman was put in a quarantine facility after she returned from a business trip in Migori on 22nd April, 2020. The husband alleged that her detention was influenced by business rivalry since prior to her arrest a trader had warned her of consequences. No information was availed to the family on her COVID-19 test status.</td>
</tr>
<tr>
<td>Rangwe, Homabay County</td>
<td>On 11th May, 2020 a widow, having acquired requisite movement document, travelled back to the village for purposes of setting in motion a succession process with her co-wife. Upon arrival her deceased husband family members raised concerns about her return despite producing her travel clearance document. Together with her brother, they were put under 14 days quarantine. Tests returned negative results but the two continued to be detained.</td>
</tr>
</tbody>
</table>

7. The conditions of many quarantine facilities are deplorable thus limit the enjoyment of certain rights which are non-derogable under the constitution and international standards including Siracusa Principles and guidance notes by the United Nations Subcommittee on the Prevention of Torture Advisory to State Parties of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading
**Treatment or Punishment**\(^{81}\). The advisory provides recommendations on how States are to handle persons placed in mandatory quarantine. Human rights monitoring groups have documented poor conditions of quarantine facilities, including lack of bedding, water, and food and cleaning supplies, such as soaps and detergents\(^{82}\). There are also cases of authorities extending quarantine periods from the initial mandatory 14 days, to more than 30 days, even when quarantined persons have tested negative several times.

8. There has been differential application and implementation of standards developed by the Ministry. In April, 2020, the Ministry of Health issued a series of guidelines (developed in line with the World Health Organization protocols and the Public Health Act) to be followed for the safe disposal of patients who have succumbed to COVID-19. The protocols called for the respect of culture and societal concerns while disposing dead bodies. As pertains to the dignity of patients succumbing to COVID-19, KNCHR has observed unequal treatment of cases and disregard of prescribed procedures.

(d) Stigma and Profiling

The pandemic has been associated with a lot of stigma and profiling due to fear of the unknown as well as misinformation about the disease\(^{83}\). KNCHR has established that whereas the government had been issuing regular updates on the virus to avert disinformation, reports and complaints received by KNCHR point towards prevalence in exclusion of persons held at quarantine facilities and those who have recovered from the virus. In some instances, the stigma extends to families of victims of COVID-19. Re-integration of recovered COVID-19 patients back into the community has been difficult due to fear, myths and misconceptions about the virus. Further, KCNHR notes that the violation of right to privacy has propagated stigma and discrimination.

KNCHR has received complaints on violation of right to privacy that has resulted to stigma and discrimination. Below are examples:

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\(^{81}\) UNAIDS 2020  
\(^{82}\) Human Rights Watch 2020  
\(^{83}\) Poster on why COVID-19 is associated with stigma, (Ministry of Health 2020)
Mandera East Mandera County

The County Chief Executive Committee Members (CECM) for Health made public announcement regarding two patients who tested COVID-19 positive. The CECM shared their names and also their age, location and ID and telephone numbers. This resulted in having details of the two patients’ parents, siblings, house helps and a person who had visited their home published and shared widely through social media. In addition, the two patients while in isolation received threatening calls from unknown persons for “bringing” the virus to Mandera County.

Isiolo North, Isiolo County

The County Governor made public announcement regarding a patient who tested COVID-19 positive. It was reported that the Governor shared the private details of the patient publicly via the national and local media that included his name, age, ID No., telephone number and location. Subsequently the details of the patient were widely shared on social media. In addition, he reported that MOH official from Garba Tullah Sub County Hospital photographed him while in the isolation ward without his knowledge and consent. Following the publication of his information he received calls from far and wide. He stated that his family is stigmatized and is labelled as ‘Corona people” thereby affecting is business and social life.

The UNAIDS issued a report to guide in navigating COVID-19, which emphasized on the importance of maintaining people’s privacy. It calls upon the government to treat with care sensitive personal information such as; name, diagnosis and medical history as to reduce stigma and discrimination. KNCHR affirms that whereas right to privacy can be limited, within the context of a pandemic, it is necessary that the medical information of a patient is guarded.

(e) Mental Health

The loss of livelihoods, fear of contracting the virus, lock down and social distancing directives have been cited by WHO as possible triggers to mental health illness during the pandemic, therefore calling for both mental and physical health to be considered amid the COVID-19 pandemic.

KNCHR has established that the government has undertaken the following measures to avert mental illness associated with the pandemic and continued essential support to non-COVID-19 related mental illness:

84 UNAIDS 2020
85 WHO, 2020
1. The Ministry of Health has developed a set of guidelines to cater for mental health needs of the citizens during this period. The Psychological First Aid; the Interim Guidance on Continuity of Mental Health Services during the Pandemic; and the Comprehensive Guide on Mental Health and Psychological Support using the COVID-19 pandemic which provides guidance for among others; the provision of practical mental health and psychological care services. The guidelines are set to address the needs of, people with mental health conditions requiring continuing care, people suspected or diagnosed with COVID-19 virus, people who experience mental illness or psychological effects as a result COVID-19 pandemic and care and support of health workers.

2. Campaign posters on mental wellness and toll-free call number ‘719’ have been made available to members of the general population. In addition, the National Agency for the Campaign against Drug Abuse (NACADA) has provided 24 hours toll free number 1192 available for counseling in cases of drug and substance abuse.

3. Mental health issues in the country continue to receive minimal attention. In its 2011 Human Rights Audit report of the Mental Health System in Kenya KNCHR noted among others the need to review the Mental Health Act in order to support the realization of mental health rights. The Mental Health Amendment Bill is currently pending before the National Assembly.

4.9 Thematic Focus 9: Vulnerable Groups

It is not in doubt that the pandemic has created a shared sense of vulnerability; however, the impact differs depending on status and level of marginalization. COVID-19 disease has had a greater impact on the vulnerable members of the community who include the elderly, intersex persons, children, persons with disabilities; migrants, refugees and prisoners.

International bodies; UNODC, WHO, UNAIDS and OHCHR issued a joint statement on COVID-19 in prisons and other closed settings which called on States to take up measures to address vulnerability of prisoners and other persons deprived of liberty including; reduced overcrowding and adopt non-custodial measures; ensure health, safety and human dignity for persons deprived of liberty; continued access to essential health services for persons deprived of liberty; respect for human rights (including allowing external inspection bodies) and adherence to United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

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86 Ministry of Health 2020  
87 KNCHR 2011  
88 Waly, Ghebreyesus, Byanyima, & Bachelet 2020
The Committee on the Rights of the Child\textsuperscript{89} and Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary General on Disability and Accessibility\textsuperscript{90} have issued statement on need to protect the rights of children and persons with disability. Based on the human rights mantra of leaving no one behind, KNCHR sought to establish government efforts in addressing the peculiar needs of vulnerable groups and in particular migrants and refugees, persons deprived of liberty, intersex persons and persons with disability.

(a) The Migrants and Refugees

According to the UN’s policy brief titled COVID-19 and People on the Move released in June 2020, the impact of COVID-19 is harshest for those groups who were already in vulnerable situations before the crisis. This is particularly true for many people on the move, such as migrants in irregular situations, migrant workers with precarious livelihoods, or working in the informal economy, victims of trafficking in persons as well as people fleeing their homes because of persecution, war, violence, human rights violations or disaster, whether within their own countries (internally displaced persons (IDPs)) or across international borders (refugees and asylum-seekers).

The policy, which has been shared with member States including Kenya, raises key considerations and measures which need to be put in place to reduce the risks and vulnerabilities of the people on the move. In Kenya, internal and cross border migration management has been one of the key pillars towards managing spread of COVID-19 infections. KNCHR has established that:

1. The National Coordination on Migration (NCM) secretariat which is domiciled in the Directorate of immigration under the Ministry of Interior and Coordination of National Government convened a meeting where updates were shared on the measures put in place by the Government of Kenya on the larger context of migration and how to manage the spread of COVID-19.

2. There are no independent guidelines developed to address the migration management and the rights of people on the move during COVID-19 pandemic. The Directorate of Immigration, which is listed as an essential service provider, manages migration by monitoring entry and exit into the country and issuance of documentation to facilitate movement. It has largely been dependent on the WHO guidelines on COVID-19 management as well as the Presidential directives on restriction of movements and closure of borders. The directorate has made simplified information packs on the

\textsuperscript{89} https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.pdf
\textsuperscript{90} Basharu & Reyes 2020
directives and has restricted border movement except for essential services which supports the economy and movement of essential workers.

3. The Directorate of Immigration has recorded limited movement of migrants at the border points from other countries. This is a factor that is associated with the fear of spreading COVID-19 disease and also adheres to directives by other countries including the restriction of movement of persons.

4. In compliance with WHO guidelines and in collaboration with Ministry of Health, the Directorate of immigration has also put in measures to scale down movement of people into their offices for immigration related services, thus leveraging on technology to support extension and application of passes. Increased hygiene standards, availability of sanitizers, hand washing points and temperature testing kits and provision of personal protection equipment for their border point’s officials provides protection and management of the virus to persons seeking services who include migrants from the East African region.

5. On counter trafficking in persons, there are no new guidelines that have been developed to support the victims of trafficking in the wake of COVID-19 disease. The counter trafficking in persons (CTP) secretariat has been applying the national referral mechanism guidelines\(^\text{91}\) and has so far assisted two internal child trafficking cases reported to their office jointly with the directorate of criminal investigations within the child protection unit.

6. In a letter dated 27th May 2020, the Director General, Directorate of Immigration informed the Inspector General of Police that due to the pandemic, immunity had been granted to all migrants in the country and no charges were to be preferred against irregular migrants on migration related offences. As at 30th May, 2020 the immigration department had not made any arrest relating to violation of migration related offences.

7. In line with the government’s directives, the UNCHR and other relevant agencies have put in place precautionary measures in Dadaab and Kakuma refugee camps to prevent the spread of the virus and protect refugees and asylum seekers.

Further, KNCHR notes the following challenges:

1. Lack of clear guidelines on how a victim of trafficking can be assisted especially if they are unable to access the Counter Trafficking in Persons (CTIP) offices. However, the

\(^{91}\) Ministry of East African Community, Labour and Social Protection 2018
children victims of trafficking cases can be captured in the national child hotline number 116.

2. Border officials have continued to face the reality of inter border relations conflict that have arisen due to the challenge of differential approach by East African Community member States in COVID-19 management, a factor that has exposed them to violation of their right to health and security of the person.

3. In the brief by the National Emergency Response Committee on Coronavirus brief no. 84,92 the concern of border lockdown and challenges facing the truck drivers was addressed. There are many cases of delays in testing and releasing results for the truck drivers to allow them move with ease across the region. There are low supplies of reagents which aid the laboratory testing for COVID-19 samples received.

4. The Government of Kenya has not prioritized messaging designed to reach out to the migrants who often remain vulnerable due to their inherent situation.

5. The border points remain closed to any other movement except the essential services but the porosity of borders remains a key concern for Kenya in the current pandemic. The lack of targeted messaging to the border counties and communities can only promote the spread of COVID-19.

(b) The Children Rights

KNCHR has established that there have been a lot of internal consultations within the Ministry of Labour and Social Protection and its relevant departments on child protection and COVID-19 measures. These include; the National Council for Children Services, the Street Families and Rehabilitation Fund and the Department of Children Services.

Unfortunately, there are no guidelines released by the actors to the public. KNCHR notes that children with special needs such as those with disabilities, the intersex children and child migrants seem to have been forgotten; a factor that has further enhanced their vulnerability to COVID-19 implications.

Below are some of complaints received by KNCHR involving children:

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92 Statement by The Ministry of Health, (Ministry of Health 2020)
**Huruma, Nairobi County**  A minor aged 13 years died after a police officer shot at him while he was at the balcony of his parent’s house.

**Tongaren, Bungoma County**  A 14-year-old victim of defilement was detained at a police post for two nights and three days. There was no justification for the detention of the minor at the same facility where adult suspects were being held. It took the interventions of the OCS (whose jurisdiction the police post falls), KNCHR, IPOA and ODPP to have the child released to her guardian.

On ensuring children rights are protected, the following actions have been undertaken by various State agents:

1. The Judiciary has released 137 children from the statutory institutions as COVID-19 measure although clarity on how this was done and any follow up plan has not been stated.

2. The National Treasury through the Public Finance Management (COVID-19 Emergency Response Fund) Regulations, 2020, set aside Ksh 10 Billion for the elderly, orphans and other vulnerable members of society that includes children.

3. The Ministry of Education, Science and Technology has established platforms to ensure continuity of access to education during the pandemic.

4. The Ministry of Public Service and Department of Children Services have popularized the toll-free numbers 1195 and 116 to support the reporting of gender-based violence and child abuse respectively.

5. The Ministry of Labour and Social Protection released funds to support the vulnerable population of the elderly, persons with severe disabilities, orphans and vulnerable children under the Inua Jamii social protection program.

(c) The Intersex Persons

Intersex persons are a vulnerable group of people who continue to be left behind due to various factors which include; discriminatory policies, laws, societal stigma and lack of comprehensive administrative frameworks. The Intersex Persons’ Coordination Committee (IPICC) has noted an increase in the number telephone calls from the intersex persons on their inability to access basic needs as an implication of COVID-19 measures by Government and the pandemic at large. The Committee has so far received cases of more than 40 intersex persons-led households and families concerning the difficulties they face to access to basic needs such as food, medicine, counseling services and rent during the pandemic. Majority of
these are the intersex youth and house heads who have lost their source of livelihoods and are mostly engaged in casual jobs and small businesses.

KNCHR notes that intersex households mostly comprise of single mothers’ headed families due to broken families and the stigma associated with giving birth to a child who has ambiguous genitalia, hormones, chromosomes and gonads.

In addition, caring for an intersex child has the same implication as that of catering for a child with disabilities. This requires total care dedication to the child to safeguard them from child abuse, inhuman treatment, ridicule and intimidation from the community due to their condition. This explains why many intersex children and adults live in secrecy and operate small businesses, like selling vegetables, washing cars, clothes, casual jobs at construction sites, hawking clothes and other wares. These families constantly move houses and schools once their cover is blown, as a way of safeguarding their identity, personal safety and avoiding societal ridicule/stigma. KNCHR has received 34 complaints from intersex persons touching on right to food and basic needs and loss of income as a result of COVID-19 regulations and directives.

(d) Persons with Disabilities

In the light of the COVID-19 pandemic and the vulnerability of people with disabilities, WHO and Disabilities People Organizations (DPO) have provided governments with standards and best practices which could be adopted to minimize vulnerability of PWDs. The WHO recommendations for example focus on three broad areas; ensuring that public information is accessible to people with disabilities; undertaking targeted support for people with disability and their support networks and undertaking targeted measures for disability service providers. CRPD and other organization have made similar pronouncements.

On access to information, the KNCHR notes that the government provides the public with accessible, timely and reliable information on COVID-19 pandemic and has integrated sign language during its briefings. However, other persons with disabilities such as visually impaired have not been considered. This messaging is contrary to WHO and CRPD guidelines that emphasize on the need for every public material on COVID-19 to be of accessible format to all peoples with disabilities including in Braille document, sign language and use of pictorials and info graphics. In addition, the advisories also emphasize on the need for government to work with DPOs to disseminate public health information. This was reiterated by the Senate Ad Hoc Committee of COVID-19 when it recommended to the Ministry of Health to leverage available spaces in the levels of society for the dissemination of packaged, context-

93 WHO Disability Considerations During COVID-19, (WHO 2020)
94 See advisory shared by Directorate of Occupational Safety and Health Services dated 20th April 2020
specific COVID-19 public messages. This measure will ensure that diverse groups, including persons with disabilities will obtain COVID-19 messages in languages/formats they understand.

Complaint

KNCHR received a complaint from Mumias, Kakamega County, involving an adult male with hearing and speech impairment who was assaulted by a police officer on the 2nd of April 2020 at around 7 p.m. on his way home. The petitioner did not understand why the police officer was assaulting him since he had no information on the curfew order. The officer was charged with assault and the case is pending hearing.

On targeted support for people with disabilities; WHO and CRPD called on States to take deliberate action to mainstream PWDs issues in the COVID-19 response strategies. The Public Finance Management (COVID-19 Emergency Response Fund) Regulations, 2020, were established by the National Treasury to ensure that there is a fund set aside for the COVID-19 pandemic. Importantly, the fund includes Ksh 10 billion set aside for the elderly, orphans and other vulnerable members of society. The focus of Parliamentary debates has been on cash transfers for vulnerable population with the need for a clear identification criteria and transparency and accountability in the disbursement of the funds.

In addition, KNCHR has established that on 20th April 2020, the Directorate of Occupational and Safety and Health Services issued an advisory on occupational and safety and health for employees with disabilities. The advisory includes; provision of COVID-19 information to employees with disabilities in accessible format; permitting employees with disabilities to work from home; and provision of assisted devices (where applicable) when employees work from home.

On targeted measures for disability service providers; KNCHR takes cognizant of the fact a number of PWDs rely on service providers on day to day basis including home based care where support aides are involved. WHO emphasizes on the need for government to work with the disability service providers to identify actions for the continuation of services and priority access to protective equipment. However, there is concern among DPOs on the effect of government social distancing measures on the smooth running of these services as a result of scarcity of protective equipment and application of the social distancing. KNCHR

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95 Third Progress Report of the Senate ad hoc Committee on COVID-19 situation in Kenya, (The Senate 2020)
notes the Ministry of Health directive on continuation and access to mental healthcare services during the pandemic.

United Disabled Persons of Kenya (UDPK), an umbrella organization of national and grassroots associations of persons with disabilities in Kenya and Caucus on Disability Rights Advocacy (CDRA), a coalition of organizations of and for persons with disabilities, have called on the government to take extra efforts to protect the rights of people with disabilities in responding to the pandemic. The organizations highlighted the following:

1. The need for government to identify and attend to PWDs in the informal urban setting noting that many PWDs live in overcrowded informal urban settings making them more vulnerable to the disease.

2. Special protection strategies should be placed for people with certain types of impairment. These include disinfection of handrails of ramps or staircases used by people with disabilities and hand washing facilities that are accessible to the PWDs.

3. The government should take all appropriate measures to ensure access for persons with disabilities to health services and provide them with the same range, quality and standard of health care as provided to other persons, including mental health services.

(e) Persons Deprived of Liberty

According to global health network,

‘Prisons are key settings for communicable diseases due to higher prevalence of risk factors for infection and actual infection, as well as environmental factors in prison such as unavoidable close contact, over-crowding, poor ventilation and limited access to healthcare services, compared to community settings.’

Based on this assumption KNCHR rolled out a monitoring exercise of Prisons during the COVID-19 period.

The exercise was initiated under the KNCHR’s oversight mandate and the advice of the sub-committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the optional protocol on CAT to States parties and national preventive

mechanisms relating to the COVID-19 pandemic. The survey was aimed at; monitoring Kenya Prisons Service (KPS) COVID-19 response measures; identification of gaps and proposing solutions in order to safeguard human rights of all actors in the prison environment and stimulate mechanisms for human rights accountability during this period. The Commission established the following from the exercise:

1. Right to Health: Health Care and Hygiene

KNCHR established that Kenya Prisons Service (KPS) in conjunction with respective county governments ensured availability of water for officers and inmates. Kenya Red Cross provided soap and training for both officers and inmates on management of COVID-19. In addition, some county governments have been undertaking weekly fumigation of prisons and staff quarters with a number of prisons setting up disinfectant points for human and motor vehicles.

Mandatory screening of prison officers and visitors is undertaken and records taken and prison staff residing outside prisons quarters are restricted from accessing the main prison and prisoners. Further, industries and farm work have been halted and inmates are only engaged in general cleaning.

Other measures to curb the spread of the virus include; KPS directive limiting new admission of inmates to 38 (29.4%) prisons and KPS working jointly with the Ministry of Health to implement the COVID-19 safety protocols. Further, KPS has set aside isolation wards for the new admissions of inmates. The inmates are isolated for 21 days before being tested after a negative test; the inmate is released into the prison general population. In case of a positive test KPS is required to contact the respective county COVID-19 emergency response team for transfer to designated government isolation facility with KPS maintaining the responsibility of providing security to the inmate.

KNCHR however notes that the supply of PPEs (masks and gloves) were not in adequate supply. Cases of recycling of facemasks were reported and this increases prison officers and inmate’s vulnerability to infection. At the time of pre-testing no information about inmates getting the PPEs was received.

KNCHR applauds efforts by Kenya Prisons Service to keep to COVID-19 outside places of detention. During the monitoring period the country had reported 35 cases in places of detention, all of which were detected at the point of admission. This is a clear indication that the safety measures in places of detention are working despite the many challenges being faced by prisons.
2. Limitations in Accessing Prisons

Prison visits were restricted following the announcement of the first case COVID-19 case in the country. KNCHR established that family members and other NGOs working within places of detention were restricted from accessing the prisons. There was no uniformed practice allowing lawyers to access their clients in prison, with some prisons allowing access and others not permitting lawyer’s visits. In order to bridge the gap occasioned by the restrictions, prisons have received additional phones to facilitate communication between inmates and their families in an attempt to bridge the gap occasioned by the restrictions on visitation.

Kenya Prisons Service issued communication to all prisons to allow KNCHR officers full access to prisons pursuant to its mandate. KPS action conformed to the joint statement by UNODC, WHO, UNAIDS and OHCHR on COVID-19 in prisons and other closed settings\(^7\) that called for States to take up measures to address issues on respect for human rights including access of external inspection bodies and adherence to United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

3. Decongestion Efforts in Prisons

KNCHR established from Kenya Prisons Service records that from 15th March to 30th April 2020 a total of 9,546 inmates have been released from prisons across the country. Out of the total number; 2,944 cases were normal end-of-sentence releases; 4,374 cases were commuted to community service while 2,228 were released after review of bond and bail terms. However, KNCHR was not able to establish the factors which were taken into consideration in identifying those benefiting from the ongoing prison COVID-19 decongestion process. The prison authorities confirmed that the review of cases for decongestion was being done by the Judiciary, office of the Director of Public Prosecution and Probation and Aftercare department.

4. Access to Justice and Protective Measures to Allow Trials and Legal Representation

A directive from Kenya Prisons Service only allowed specific prisons to receive new inmates during the pandemic period. Some prisons have been having hearings via online conferencing while some had never heard a single hearing since the restrictions were put in place. The process has greatly been hampered by the lack of appropriate infrastructures to support online court processes. The following are some of the major challenges noted in prisons in relation to virtual hearings:

a) Lack of computers for video conferencing;

b) Poor internet connectivity;

\(^7\) (Waly, Ghebreyesus, Byanyima, & Bachelet, 2020)
c) Difficulties in linking advocates with the clients during the hearings; 
d) Lack of trained personnel in managing the video conferences; and 
e) Some inmates expressed their reluctance in having online cases as they feel justice is not served. (These fears remain legitimate since the inmates are the main consumers of the justice process and must therefore feel comfortable in the processes in place.)
5 Recommendations

Based on the monitoring findings, KNCHR makes the following thematic based recommendation in order to improve human rights situation in the Country during the COVID-19 pandemic.

5.1 Thematic Focus 1: Enforcement of COVID-19 Prevention and Control Measures

5.1.1 Ministry of Interior and Coordination of National Government

5.1.1.1 The Inspector General of Police

1. Through regular communication including through circulars, direct and emphasize that law enforcement officers must operate within the law and refrain from violating human rights.

2. Publicize actions taken against individual police officers who violated rights of the public during the enforcement of the curfew order directive.

3. Leverage on partnership with the KNCHR and other institutions such as IPOA to support capacity building and attitude change among the police officers on how to address emergencies, pandemics and still uphold human rights.

4. While coming up with any operational directives, embed the human rights accountability measures including reporting and feedback mechanisms of cases reported.

5. Put in place measures to ensure that information shared on police communication channels on reported crimes, remains safeguarded and upholds right of privacy and security of the informer and the victim.

6. Ensure that members of the national police service do not exploit the COVID-19 pandemic to criminalize or obstruct the work of civil society organizations and human rights defenders.

7. On Media Freedom:

   (a) Ensure that police officers respect media freedom by refraining from intimidating and using force against journalists reporting on COVID-19.

   (b) Investigations and action to be taken against officers cited for violating the rights of journalists.
5.1.2 **The National Emergency Response Committee on Coronavirus**

Ensure strict compliance with the Constitution and *Siracusa Principles* on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (ICCPR).

5.1.3 **The National Police Service Commission**

1. Exercise disciplinary control over errant members of the Police Service who violate the standards of service.

2. Review actions taken against errant officers by the national police service.

3. Closely monitor and document compliance of the national police service with the Constitution in this COVID-19 period particularly the national values and principles of governance as well as values of public service secured under Article 232.

4. Work to ensure that members of the Service are adequately equipped with PPEs as they undertake their work.

5.1.4 **Members of the Public and Civil Society Organizations**

Continue to report cases of human rights violations and abuses and seek the right to redress and accountability.

5.2 **Thematic Focus 2: Access to Justice**

5.2.1 **National Council on the Administration of Justice**

1. Leverage on its membership including those at the Court Users level to ensure access to justice for the vulnerable and effective remedies for survivors of violence. This includes;

   (a) Sourcing for support towards acquisition of ICT equipment for the Kenya Prisons Service to allow increased remote hearing of cases.

   (b) Putting in place protective measures such as; shelters, counseling and exemption to movement restrictions for persons who have recovered from COVID-19.

2. Develop a scaling up strategy within the Ministry of Health safety protocols to resume trial of cases especially criminal cases.

3. Publicize communication through media and networks platforms that will ensure wider dissemination of information to all including complaints reporting.
4. Put in place special measures to ensure that cases relating to marginalized persons and specifically children in conflict with the law are fast tracked. ICT support to be given to the department of children services and the children courts to ensure evidence is secured and cases heard and determined in a timely manner.

5. Develop and disseminate guidelines on how to deal with the three (3) months case backlog created by the scaling down of court services.

5.2.2 The Judiciary

1. Evaluate remote functions of the courts using human rights standards of acceptability, affordability, adaptability, non-discriminative, adequacy and quality.

2. Review court processes to cushion vulnerable groups due to economic, environmental, social and cultural factors.

3. Continue to review sentences and bail terms to support decongestion of prisons.

4. Review the police bail and bond records.

5. Review police bail and bond processes on a regular basis to enhance accountability.

5.2.3 Office of the Director of Public Prosecutions (ODPP)

1. Increase application of diversion as an alternative to prosecution so as to reduce the number of cases taken to court as a way of reducing case backlog while administering justice.

2. Give priority to cases resulting from the COVID-19 and public health regulations.

5.3 Thematic Focus 3: Media and Access to Information

5.3.1 Ministry of Health

1. The Ministry of Health in conjunction with the county governments to continue dissemination of accurate, timely and consistent information to the public with special emphasis on vulnerable groups such as children, persons with low or no literacy and persons with disabilities by using appropriate medium and languages regarding COVID-19.

2. The Ministry of Health should ensure that patient confidentiality is protected even as authorities take steps to identify those who may have been exposed to the virus.
5.3.2 Ministry of Information Communication Technology (ICT)

1. Accelerate the roll out of robust ICT infrastructure especially to the rural regions. The pandemic has provided a great opportunity to enhance digital literacy. The Google Loons is a great start but there must be appropriate infrastructure and requisite knowledge for the project to be effective.

2. Enhance digital literacy especially in the rural areas by equipping the stakeholders to help bridge the gap on the digital divide. Sustained capacity building initiatives is necessary for effective adoption of new digital solutions.

3. Explore partnerships with Internet Service Providers and other industry players to provide quality and affordable internet access. Solutions such as zero-rated mobile internet bundles for subscribers and improve network coverage for the rural areas to thrive.

5.4 Thematic Focus 4: Education

5.4.1 Ministry of Education, Science and Technology

1. Online learning should be used to mitigate the immediate impact of lost normal school time so as to safeguard the right to education as far as possible.

2. Schools deploying educational technology for online learning should ensure the tools protect child rights and privacy.

3. The Ministry should put strategies on how to recover missed in-person class time once schools reopen.

4. Ministry should adopt measures to mitigate the disproportionate effects on children who already experience barriers to education, or who are marginalized for various reasons including those with disabilities, those affected by their location, their family situation and other inequalities.

5. The Ministry should adopt mitigation strategies, by working with teachers, school officials, and teachers’ unions and associations to factor in plans to recover teaching or contact hours lost, adjusting school calendars and exam schedules.

6. The Ministry to guarantee continued meal provision during school closures for children in low income families who are missing subsidized meals in the school feeding programmes.
7. The government should also sustain the distribution of sanitary towels during the school closure period in order to secure the dignity of the girls and ensure that girls are not left vulnerable to exploitation.

5.4.2 Ministry of Information, Communication and Technology (ICT) and Ministry of Education, Science and Technology

The two Ministries should take measures to address the structural barriers that disadvantage a section of learners in the home-schooling set up in particular by, ‘[expediting] access to affordable internet services and vital technical equipment including radios or tablets by all students, particularly those in poorer communities and regions, so that they can benefit equally from the virtual learning programs.

5.5 Thematic Focus 5: Labour and Social Security

5.5.1 Ministry of Labour and Social Protection

1. Monitor job losses during the pandemic and use the data to support government interventions to address loss of businesses, jobs and economic recovery plan.

2. Enhance its monitoring systems to ensure that it benefits the right targets and avoid pilferage and misappropriation of funds targeting the vulnerable.

3. Employ the ILO guidelines and instruments especially on safeguarding jobs through negotiations between the parties involved.

4. The government to issue a moratorium against evictions and demolitions during this pandemic. This is in line with the Constitution and the guidance issued by the OHCHR, the Special Rapporteur on Housing and the Committee on ESCR.

5.5.2 National Treasury

Tighten the vetting processes to ensure that businesses that deserve help get it as opposed to blanket provisions which are prone to abuse and corruption.

5.6 Thematic Focus 7: Water and Sanitation

5.6.1 National Treasury and Ministry of Water, Sanitation and Irrigation

1. Increase funding on water services including to water service providers to mitigate revenue gaps to enable them provide water and sanitation services to the vulnerable.
2. Implement minimum core obligations namely; accesses to minimum essential water facilities and services especially for the vulnerable, safe and regular water and ensure access to adequate sanitation for all as provided in the Framework for Monitoring Realization of the Right to Water and Sanitation in Kenya that was developed with KNCHR in collaboration with WHO and Ministry of Water, Sanitation and Irrigation.

5.7 Thematic Focus 8: Health Facilities and Services

5.7.1 Ministry of Health

1. Ensure that standards set for provision of essential services during the pandemic are adhered to. This should include monitoring and evaluating the implementation of the standards with a view to identify and remedy possible challenges.

2. Mitigate on vulnerabilities associated with the pandemic that hamper access to essential services.

3. Enhance public education and strengthen community health services.

4. Provide guidance to government agencies including counties, media and law enforcement agencies on respecting a person’s privacy.

5. Use of media and alternative platforms to reach the masses and educate the public on need to refrain from stigmatization and discrimination based on COVID-19 health status.

6. Establish targeted psychosocial support systems for victims of stigmatization and profiling.

7. Create robust public awareness mechanism that promotes coping strategies for the people affected during this unprecedented COVID-19 period.

8. Ensure prompt disbursement of funds to respective public offices and county governments to ensure efficiency and effectiveness in combating the pandemic.

5.7.2 County Governments

1. Have clear guidelines that stipulate standards for designating a center as a quarantine facility as well as regulate the management of quarantine facilities. Human rights standards in service delivery must be strictly adhered to.

2. Enhance communication between the county officials and the quarantined/isolated patients.
3. Put in place measures and mechanisms including sensitization, privacy and counseling services to cushion patients who have recovered and their families from stigma and discrimination.

4. Increase budgetary allocation to health services in the counties.

5. Prioritize improving the quality, adequacy and accessibility of affordable health care services at the county level.

6. Ensure proper coordination of functions and interventions in the national and devolved public healthcare units.

7. Ensure impartial enforcement of the guidelines that upholds human dignity.

8. To have a better public health outcome, refrain from criminalizing the pandemic and focus more on empowerment to enable people and communities to protect themselves.

5.7.3 County Assemblies and the National Assembly's Public Accounts Committee

To put in place measures to enhance transparency and accountability of COVID-19 funds in exercise of their oversight mandate. These measures include; admitting testimonies from the public auditing of reports and making reports publicly available.

5.7.4 Parliament

1. Review the Public Health Act to align it with the current health environment which includes the stewardship role of the two levels of governments.

2. Expedite the enactment of Mental Health (Amendment) Bill, 2018 which is pending before the National Assembly. Once enacted, the law will provide comprehensive prevention, care and treatment of mental health conditions in Kenya within the acceptable international human rights standards.

3. Effective enforcement of the provisions of Statutory Instruments Act, 2013 to ensure implementation of statutory instruments do not precede parliamentary scrutiny. Review the Act to ensure effective application and management of the provisions of the Act.

4. In exercise of oversight mandate, ensure that funds set aside for use in the Covid are optimally utilized, in a transparent manner and fully accounted for.
5.7.5 Community Members

1. Continue to seek essential medical services when needed and in the event of any inhibition reach out to relevant State agencies including KNCHR.

2. Refrain from victimization and stigmatization of patients and their family members by seeking appropriate and accurate information on COVID-19 and correct negative language used to propagate stigma and discrimination.

3. Abide by the health and safety measures put in place by the government towards the containment of the spread of coronavirus.

5.8 Thematic Focus 9: Vulnerable Groups

5.8.1 Migrants

5.8.1.1 Ministry of Health

Prioritize the procurement of the reagents for the laboratories and enhance the turnaround timelines for the testing and release of results for the COVID-19 testing of truck drivers in order to promote regional trade.

5.8.1.2 Counter-Trafficking in Persons (CTP) Secretariat

Design strategies and simplified messaging that is friendly to children, persons with disabilities. In the same breath, provide guidance on how the people can reach their services despite limited office operations.

5.8.1.3 The National Coordination Mechanism (NCM) Secretariat

1. Include a chapter in the national draft migration policy on migration management and pandemics and identify indicators that can govern future actions during pandemics.

2. Collate all the data from the border posts with regard to migration management, rights of migrants in the wake of COVID-19.

5.8.2 Children

5.8.2.1 Ministry of Labour and Social Protection

1. Bridge the gap to promote child protection measures in the National and County Governments’ COVID-19 decisions and directives and put in place measures to support children rights during the pandemic
2. Create and implement clear guidelines or standards on how to safeguard children and maintain human rights accountability mechanism.

5.8.2.2 National Council for Children Services (NCCS)

Urgently share with key actors and the public a comprehensive status report on current situation of children in Kenya, measures put in place to protect all children, trends of child abuse cases reported, concerns raised for assistance due to impact of COVID-19 as well as follow up action for children within the institutions, those at home, the most vulnerable and intersex children.

5.8.2.3 Ministry of Health and Ministry of Education, Science and Technology

1. Ensure access to child friendly information to safeguard well-being and welfare of all children in Kenya as they continue to remain at home in the wake of COVID-19 pandemic. The current COVID-19 messaging is generic for the general public and not child friendly.

2. Provide guidance and create awareness of measures put in place to prevent children against COVID-19, handling of children in quarantine facilities and mass testing exercise.

5.8.2.4 National Council on the Administration of Justice

1. Prioritize and give directions to all court users on how to manage children cases during COVID-19 period and intentionally develop and disseminate general child protection and practice guidelines that will boost access to justice for children by strengthening the chain links, referral pathways as well as human rights accountability measures to safeguard children while in the justice process.

5.8.3 Intersex Persons

5.8.3.1 Ministry of Labour and Social Protection

1. To promote equality and non-discrimination for intersex persons to access social protection services, expedite the consideration of intersex persons in equalization fund and include them as part of beneficiaries in the ongoing financial support, food aid and any other support that would help ease suffering, cushion them against the negative impact of COVID-19 while empowering them to comply with the Government’s measures of containing the spread of COVID-19 infections.

2. Enhance their operations guided by the principles of human rights such as the non-discrimination, participation, empowerment, transparency, rule of law and accounta-
bility in identifying the special interest groups benefiting from the ongoing COVID-19 financial support, monitoring the release of the monies, follow up on the groups that has been left out and also ensure that when the mapping is being done the information is made public to enable the intended beneficiaries to apply and get assistance.

5.8.4 Persons with Disability

5.8.4.1 Ministry of Health

1. Take deliberate effort to translate COVID-19 related Information, Education and Communication (IEC) materials into accessible formats for persons with different types of disabilities to ensure that PWDs are not deprived of this life saving information.

2. Work with DPOs at the national, county and community level to promote access to information, and access to essential health services.

5.8.4.2 Ministry of Labour and Social Protection

Engage local leaders and community PDOs in identification and registration of PWDs not linked to government social support services.

5.8.5 Persons Deprived of Liberty

5.8.5.1 Kenya Prisons Service

1. Make accessible COVID-19 management protocol between the Ministry of Health and Kenya Prisons Service to enable partners and other agencies working within places of detention to review and give feedback.

2. Urgent and constant supply of PPEs to officers especially in prisons that are receiving inmates. Innovative ways of providing masks for inmates should also be explored e.g. KPS to make their own masks. Most prisons have requested to be facilitated with materials to make masks.

3. Urgently liaise with the Ministry of Health and respective county governments to facilitate prisons with health personnel who have received proper training on management of COVID-19.

4. Explore alternatives on communication and visitation of inmates, this will ensure that inmates are not absolutely denied access to family members and lawyers and if they are allowed; it must be done within the health and safety protocol. There is also need to engage Law Society of Kenya on how inmates can access advocates while respect-
ing the special challenges. Prisons face with allowing unfettered access to lawyers.
Right to legal counsel remains a fundamental right especially for incarcerated person.

5. Establish alternatives to the various rehabilitative programs offered in prison. Pro-
grams such as farm work and industries have now stalled due to the pandemic.

6. Engage PDOs and other organizations to support efforts that will promote rights of
PWDs in prison.

5.8.5.2 National Council on the Administration of Justice

Support the setting up of structures that will support online court processes for in-
mates which remains a challenge in the administration of Justice.

5.8.5.3 Judiciary

Continue to explore and implement alternative sentences and utilization of Communi-
ty Service Order (CSO) to reduce prison population.

5.8.5.4 Power of Mercy Advisory Committee

Resume sittings to review cases worthy of Presidential pardon as a way of decongest-
ing prisons. This will be done in collaboration with KPS and the department of proba-
tion and aftercare services.
Conclusion

The KNCHR has noted the devastating impact the COVID-19 pandemic has caused across the globe. Initially regarded as a health issue, the pandemic has directly affected other human rights in the country such as freedom and security of the person, right to adequate food, right to education and freedom of association. The effect of the pandemic affirms human rights core principles of indivisibility and interdependence. In this situational report, KNCHR has observed positive measures by the Kenyan government aimed at curbing the pandemic and addressing the social-economic impact associated with the pandemic. Provision of economic initiatives to cushion the adverse economic impact, access to information on COVID-19, setting up structures for continuity of education; setting up health standards on COVID-19 including in prisons and allocating of funds to fight the pandemic are positive steps taken by the government KNCHR is greatly concerned by the reported violations including human rights abuses that have resulted in deaths and serious injuries caused by unlawful use of force by law enforcement officers while enforcing the COVID-19 directives. KNCHR is further concerned about the ineffective public participation process in the development of COVID-19 related laws and policies and the lack of parliamentary scrutiny of some of the COVID-19 related statutory instruments.

In addition, KNCHR is concerned by the inequalities faced by the vulnerable and marginalized members of the community such as children, people with disability and intersex persons. The violations and inequalities have not only caused immense suffering to Kenyans but also exposed the gaps in service delivery by the government.

This is the first situational report under the monitoring project; KNCHR will continue to monitor the situation and will occasionally issue public statements and advisories from time to time to ensure that the containment of the pandemic is carried out in accordance with the law and in compliance with human rights and principles.

Lastly, KNCHR will keenly follow up on the recommendations made herein and continue to receive and process complaints.
7 References


