



## 14<sup>th</sup> Session of the OEWGA - KNCHR's Response

### Working Group on Ageing Guiding questions for the focus area on participation in public life and in decision-making processes

1. What are the national and local legal provisions and policy frameworks in your country that guarantee

a) The right to equality and prohibition of all forms of discrimination against older persons on the basis of age, alone or combined with other grounds, in the context of participation in public life and in decision-making processes;

#### The Constitution of Kenya<sup>1</sup>

- **Section 10 (2) (b)**, affirms among others inclusiveness, equality, human rights and non-discrimination as the key tenets of national values and principles of governance.
- **Article 21 (3)**, requires of all state organs and all public officers to address the needs of vulnerable groups within society (including older members of society).
- **Article 27(4) (5) and (6)** expressly prohibits discrimination on any grounds including age and obligates the state to take legislative and affirmative action to redress any disadvantage suffered by individuals or groups because of past discrimination.
- **Article 38** enshrines the political rights of every citizen (including older persons) to among others form or participate in forming a political party, register as voters and vote in any election/referendum and to free, fair and regular elections.
- **Article 57** requires the state to take measures to ensure the rights of older persons to fully participate in the affairs of society, pursue their personal development, live in dignity and respect and be free from abuse; and receive reasonable care and assistance from their family and the State.
- **The Electoral Code of Conduct** under the **Elections Act, 2011** requires all persons bound by the Code to avoid any discrimination based on, among others, age, in connection with the election and political activity.<sup>2</sup>

<sup>1</sup> <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>

<sup>2</sup> Section 6 (j) of the Elections Act, 2011, available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ElectionsAct\\_No24of\\_2011\\_New.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ElectionsAct_No24of_2011_New.pdf) page 72

- **The Persons with Disabilities Act** - Provides at Section 15(6) that the minimum retirement age for persons with disabilities shall be 65 years (5 years above the mandatory retirement age).
- **The County Government Act** - Section 87 outlines the principles of citizen participation in Counties to include the protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information.<sup>3</sup> Section 97 obligates county governments, public and private organisations/individuals to promote effective participation of marginalised and minority groups in public and political life.
- **Employment Act** - Promotes equality and prohibits discrimination at the workplace. Whilst age discrimination is not specifically listed under section 5(3)(a), the Constitution requires laws existing before its promulgation to be read in conformity to the Constitution which adopts, as the basis of its interpretation, **a purpose, liberal and inclusive** rather than exclusive approach on the grounds against which discrimination is prohibited.<sup>4</sup>

**The National Policy on Older Persons and Ageing** - Recognizes that older persons are an important segment of the National Population whose rights must be recognized, respected, protected, and promoted including the right to equality and being free from all forms of discrimination.

**b) Elimination of all forms of ageism and age discrimination from laws, frameworks, programs, policies, strategies and practices regarding participation in public life and in decision-making processes;**

- Article 27 (4) and (5) of the Constitution prohibits the State and any person from discriminating directly or indirectly against any person on any ground including age.

**c) Right to freedom of expression, including freedom to seek, receive and impart information;**

- **Article 10 (2) (a)**, requires of the State to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage (critical for older persons).
- **Article 33 (1)** affirms that every person (including older persons) has the right to freedom to seek, receive or impart information or ideas
- **Article 35 (1)** secures the right of every citizen to access information

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<sup>3</sup> [http://www.parliament.go.ke/sites/default/files/2017-05/CountyGovernmentsAct\\_No17of2012\\_1.pdf](http://www.parliament.go.ke/sites/default/files/2017-05/CountyGovernmentsAct_No17of2012_1.pdf) S.87

<sup>4</sup> See Articles 20(3) and (4) and 259 of the Constitution. See also the Judgment of the High Court in **Apollo Mboya V Attorney General, National Employment Authority (Interested Party) Constitutional Petition E335 of 2023 (Nairobi)**, where the High Court declared as unconstitutional a provision limiting employment of persons over 35years of age to the position of Director General, National Employment Authority.

- **The Access to Information Act (2016)**, promotes the right to access information held by public entities and private bodies.

**d) Right of peaceful assembly;**

- **Article 37** of the Constitution guarantees every person (including older persons) the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

**e) Right to freedom of association;**

- **Article 36** of the Constitution provides for the right for all ( older persons included) to form, join or participate in the activities of an association of any kind and the right to register such association.

**f) Right to take part in the government of one’s country, directly or through freely chosen representatives;**

- **Chapter one** of the Constitution provides for sovereignty the people
- **Article 38** of the Constitution provides that every citizen (including older persons) are free to make political choices including participation in elections.

**g) Active, free and meaningful participation of older persons and their representative organizations in all matters related to participation in public life and in decision-making processes;**

- Constitution of Kenya has robust provisions on public participation (targeted to all including older persons).<sup>5</sup>

**h) Access to prompt remedies and redress when older persons’ above-mentioned rights are violated.**

- **Article 23 (1) and (2)** of the Constitution empowers the judiciary to hear and determine any alleged violations of rights (including the rights of older persons).
- **Article 59** of the Constitution mandates the National Human Rights Institution (Kenya National Commission on Human Rights), the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ) to among

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<sup>5</sup> **Article 10 (2) (a)** provides for participation of the people (including older persons) as a National Value and Principle of Governance. **Article 69 (1) (d)**, obligates the State to among other measures encourage public (including older persons) to participate in the management, protection and conservation of the environment. **Article 118 (1) (d)** obligates parliament to among others facilitate public to include older persons participation and involvement in the legislative and other business of Parliament and its committees. **Article 174**, provides powers of self-governance to the people and enhance the participation of the people including older persons in the exercise of the powers of the State and in making decisions affecting them. **Article 196 (1) (b)**, on Public participation and county assembly powers, privileges and immunities provides for facilitation of public participation and involvement in the legislative and other business of the assembly and its committees.

others, receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.

## **2. What steps have been taken to ensure participation in public life and in decision-making processes without discrimination?**

### **i) Legislative Interventions to entrench public participation:-**

- a) **County Governments Act** obligates County Governments to ensure public communication and access to information<sup>6</sup> and create an institutional framework for civic education.<sup>7</sup>
  - b) **The Public Finance Management Act** - Sections 10, 35, 125, 175 and 207 entrench public participation (including by older persons) in budget making and strategic planning.
- ii) Establishment of a Legal Framework for Public Participation by County Governments
- iii) Adoption of the National Action Plan on Business and Human Rights.<sup>8</sup>
- iv) Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa on 15<sup>th</sup> November 2021.<sup>9</sup>

## **Data and research**

### **3. What data and research are available regarding older persons' participation in public life and in decision-making processes? Please indicate how national or sub-national data is disaggregated by sex, age and inequality dimensions, and what indicators are used to monitor older persons' participation in public life and in decision-making processes.**

KNCHR's research; **Growing Old in Kenya** : available at <https://www.google.com/search?client=firefox-b-d&q=growing+old+in+Kenya#ip=1>

## **Equality and non-discrimination**

- **What are the challenges and barriers that older persons face regarding participation in public life and in decision-making processes, including the impact of intersectional discrimination and inequality based on age, gender, disability, race, ethnicity, migratory status and other grounds?**

### **i) Stigma and discrimination.**

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<sup>6</sup> Sections 100 and 101, Sections 3(f), 30 (3) (g), 46(2) and 115 further entrench public participation.

<sup>7</sup> Sections 94 and 95

<sup>8</sup> – obligates the Government to require businesses to conduct Human rights Due Diligence – a comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent, address and redress any human rights violations. These assessments should involve meaningful consultation with potentially affected groups, including older members/indigenous communities.

<sup>9</sup> It enshrines the right of older persons to participate publicly and in all decision-making processes. It calls for the elimination of all forms of discrimination against older persons. Once it comes into effect, it will become part of the law of Kenya under Article 2 (6) of the Constitution of Kenya

- ii) Targeted killings and lynching of older persons on accusations of Witchcraft especially in rural Kenya.
- iii) Limited access to information
- iv) Lack of proper/adequate regulations for Older Persons homes which exposes Older Persons to abuse at facilities.<sup>10</sup>
- v) Lack of disaggregated data.
- vi) Delay in the processing of retirement benefits
- vii) Lack of a dedicated legislative framework on the rights of older persons. –
- viii) Digitization – with most public services and payments therefor being offered online, older persons are often left out/behind in the digitization on account of lack of access to/understanding of the technology.
- ix) Intersectional /Multiple Discrimination

### **Accountability**

**What judicial and non-judicial mechanisms are in place for older persons to complain and seek redress when their right to participate in public life and in decision-making processes is violated?**

- Administratively, - State Department for Social Protection and Senior Citizen Affairs under the Ministry of Labour and Social Protection, National Government Administrative Officers such as Chiefs.
- The KNCHR as well as other oversight mechanisms such as the NGECC, CAJ<sup>11</sup> are mandated to enhance the enjoyment of rights by all (including Older Persons) and have a complaint handling function to facilitate the receipt and processing of reported human rights violations.
- The Judiciary and Tribunals. The Judiciary has embraced its role to promote the application of Alternative Justice Systems<sup>12</sup> that resonate well with and are often relied upon by Older Persons as an avenue for them to seek justice.

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<sup>10</sup> See for instance the BBC Expose: **Betrayed: Elderly Care Exposed - BBC Africa Eye documentary**, available at:

<https://www.youtube.com/watch?v=4Z5ZbYd6FkE>

<sup>11</sup> Section 8 Commission on Administrative Justice Act 2011

<sup>12</sup> See Article 159 (2) (c) of the Constitution