



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)

**SUBMISSION IN RESPONSE TO THE GUIDING QUESTIONS FOR
THE FOCUS AREA OF ACCESS TO JUSTICE**

PRESENTED TO:

**THE UNITED NATIONS GENERAL ASSEMBLY OPEN-ENDED
WORKING GROUP FOR THE PURPOSE OF STRENGTHENING THE
PROTECTION OF THE HUMAN RIGHTS OF OLDER PERSONS**

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A. Introduction

The Kenya National Commission on Human Rights is an Independent National Human Rights Institution established under article 59 of the Constitution and operationalized by the Kenya National Commission on Human Rights Act, 2011 (revised 2012). The Commission has a broad mandate to promote respect for human rights and develop a culture of human rights in the Republic of Kenya. The Commission's functions are guided by the 1993 United Nations approved principles on the establishment and functioning of national human rights institution (Paris Principles) and is accredited as an 'A' status institution for its compliance with the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI). The Commission also enjoys Affiliate Status before the African Commission on Human and Peoples' Rights.

The Commission submits this memorandum pursuant to its constitutional mandate of promoting the protection, and observance of human rights in the Republic.

B. National legal framework

1. National legal and policy framework on access to justice by older persons

The Constitution - Equality is one of the central principles of the right to access justice. Article 27(4) of the Constitution identifies age as one of the prohibited grounds of discrimination. Article 48 of the 2010 Constitution guarantees access to justice for all, this includes older members of the society.

The rights of older members of the society are constitutionally enshrined under article 57 of the 2010 Constitution. Article 57 provides that the State is obligated to protect the rights of older persons and ensure their freedom to: full participation in the affairs of society, pursue their personal development, live in dignity and free from abuse, as well as receive appropriate care from the State and family.

The National Policy on Older Persons and Ageing 2014 - The National Policy on Older Persons and Ageing stipulates that one of its objectives is the establishment of legal measures for the protection and promotion of these rights. It specifically states that the government in collaboration with stakeholders shall: enact and review laws for the protection of older persons from abuse, establish and restructure existing institutions to increase and facilitate access to legal services for older persons, ensure that traditional conflict resolution mechanisms are responsive to the rights of older persons and adopt special measures within the national, legal and administrative frameworks to promote participation by older persons.¹

2. Ensuring the availability of judicial and non-judicial mechanisms for older persons in urban, rural and remote areas

¹ National Policy on Older Persons and Ageing 2014 art 2.1.3.

Court-Annexed Mediation - Kenya is embracing Court-Annexed Mediation. In this regard, the Judiciary has recruited professional mediators at the County level to dispense with matters that qualify for mediation.

Alternative Justice Systems - Alternative Dispute Resolution mechanisms (ADR) – are encouraged under article 159 (2) (c) of the 2010 Constitution. In this regard, the use of Traditional Dispute Resolution mechanisms is encouraged. This is due to the fact that formal ADR mechanisms are mostly available in urban settlements,² while most Kenyans, especially older persons reside in rural settlements.³ Therefore, Traditional Dispute Resolution mechanisms serve as a first point of contact for older persons seeking access to justice.

It is noteworthy that KNCHR has been consistently building the capacity of traditional justice system (TJS) actors to ensure proper dispensation of justice. The KNCHR has worked closely with elders from traditional justice systems from Meru, Luo, Turkana, Kwale, Maasai, Kamba, Tharaka and Samburu communities to ensure a human rights based approach is mainstreamed in the operations. In some areas such as the Coast, the TJS actors have been incorporated into respective court users committees thereby increasing their acceptance even amongst the formal justice mechanisms.

3. Ensuring that justice systems (judicial and non-judicial) are secure, affordable and physically accessible for older persons and adapted to their needs

Article 48 of the Constitution stipulates that fees required in ensuring access to justice shall be reasonable and shall not impede access to justice.

The UN Department of Economic and Social Affairs estimates that more than 46 per cent of older persons – those aged 60 years and over—have disabilities.⁴ Thus, it is also important to consider some of the positive provisions that may apply to older persons who acquire a disability and to persons with disabilities who are ageing. In this regard, article 54 (1)(c) of the Constitution provides that persons with disabilities are entitled to reasonable access to all places (which would include courtrooms), public transport and information. Section 21 of the Persons with Disabilities Act states that persons with disabilities ‘are entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities, and assistive devices and other equipment to promote their mobility’. It is also important to note that Kenya has ratified the UN Convention on the Rights of Persons with Disabilities, which comprehensively addresses accessibility under article 9 and access to justice under Article 13.

² The World Bank ‘Population Ages 65 and Above (% of Total Population, Kenya)’ 14 <<https://data.worldbank.org/indicator/SP.POP.65UP.TO.ZS?end=2018&locations=KE&start=1960&view=chart>> accessed 21 November 2019.

³ As above.

⁴ United Nations Department of Economic and Social Affairs <https://www.un.org/development/desa/disabilities/disability-and-ageing.html> accessed 28 November 2019

Cash transfers and other safety net programmes may also assist access to justice/may aid in the financial process of bring a case to court.⁵

See also alternative justice systems discussed under Q 2 above.

4. Existing provisions to guarantee legal assistance for older persons

Legal Aid Act

The Legal Aid Act of 2016 establishes the Legal Aid Fund. The utilization of this fund is directed towards covering expenses incurred by legal aid providers in the course of providing the services stipulated under the Act.⁶ While the Legal Aid Act does not directly make provision for the right to legal aid of older members of society, certain provisions of the Act still remain important to access to justice for this group. In this regard, section 5 of the Act establishes the National Legal Aid Service. Among the functions of the Service under section 7(1)(a) is to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable.

The Care and Protection of Older Members of Society Bill, 2018

Kenya is still in the process of passing a single and specific piece of legislation, which caters for the rights of older members of society with the Care and Protection of Older Members of Society Bill pending before the Senate.⁷ Even though this Bill has yet to be passed, clause 5(c) speaks directly to access to justice for older members of society, clearly demarcating this as a stand-alone right. Clause 5(c) states that [p]ursuant to Article 57 of the Constitution, every senior citizen has the right to access of social and legal services for the enhancement of the protection of the senior citizen's rights under the Constitution of the right to live in dignity and security.

5. Challenges encountered by older persons in accessing justice and remedy in Kenya

Poverty - Older persons are prone to poverty, especially in developing countries, affecting their ability to cover the cost associated with accessing justice within the system.

The **complexity of legal proceedings** also stands as a barrier to ensuring access to justice for older members of society. Kenya is a multilingual and multi-ethnic society, where formal court proceedings are conducted in English and/or Swahili. Older persons not conversant with the languages are unable to follow proceedings,⁸ and the quality of translation services varies widely. Furthermore, the judicial proceeding relies heavily on paper forms and written submissions.⁹ This places uneducated older persons at a disadvantage. Although the 2010 Constitution provides for the right to an

⁵As noted above p 91-92 >; Social Protection <http://www.socialprotection.or.ke/national-safety-net-program/125-older-persons-cash-transfer-opct>> accessed 29 November 2019

⁶ Legal Aid Act 2016 art 29.

⁷ Katiba Institute 'The Elderly have Rights Too' <<https://www.katibainstitute.org/the-elderly-have-rights-too/>> accessed 11 November 2019

⁸ (n 20) 51.

⁹ As above.

interpreter without payment, this right is only exercised in criminal matters and rarely in civil matters.¹⁰

6. Good practices on access to justice and remedy for older persons

See alternative justice systems discussed under Q 2 above.

7. Provisions adopted to ensure effective access to justice for older persons on an equal basis with others

See question 4 on existing legal provisions.

8. Specify existing public policies and awareness-raising and capacity building programmes established for all justice system personnel to address the negative impacts of ageism and age discrimination in justice system.

Not aware of any such programmes.

9. How Kenya ensures that justice systems function in accordance with the principles of independence and impartiality

The Constitution of Kenya creates the judiciary as a separate entity from the executive and the legislature (Article 160 (1))

Other relevant laws include Vetting of Judges and Magistrates Act No. 2 of 2011, Victim Protection Act, 2014 and Witness Protection Act, 2006 and Witness Protection (Amendment) Act, 2010.

Oversight Mechanisms - Include Judicial Service Commission (JSC); Office of the Judiciary Ombudsman; National Council on Administration of Justice (NCAJ); Kenya National Commission on Human Rights (KNCHR) and the National Gender and Equality Commission (NGEC).

C. Conclusion and recommendations

- a) It is imperative that the current Care and Protection of Older Members of Society Bill is passed into legislation.
- b) There is no mention in any law of how the courts system should be adjusted in order to cater for older members of society, in terms of providing age appropriate accommodations. This is a critical gap that should urgently be filled through adequate consultations with all the relevant stakeholders.
- c) Enhancing the use of traditional courts and encouraging Alternative Dispute Resolution mechanisms in appropriate cases is a promising means towards enhancing access to justice for older persons. Scaling up paralegals especially in rural areas is also an important measure towards enhancing access to justice for older members of society.
- d) Finally, it may be worth considering ring-fencing funds for legal aid for older persons within the legal aid fund.

¹⁰ Constitution (n 2) art 50 (2) (m); as above.