



## Economic and Social Council

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### Committee on Economic, Social and Cultural Rights

### Concluding observations on the combined second to fifth periodic reports of Kenya \*

1. The Committee on Economic, Social and Cultural Rights considered the combined second to fifth periodic reports of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/KEN/2-5) at its 8th and 9th meetings (E/C.12/2016/SR.8-9), held on 25 and 26 February 2016, and adopted the following concluding observations at its 20th meeting held on 4 March 2016.

#### A. Introduction

2. The Committee welcomes the combined second to fifth periodic reports submitted by the State party, despite the long delay in submission, and the supplementary information provided in the replies to the list of issues (E/C.12/KEN/Q/2-5/Add.1). The Committee also appreciates the constructive dialogue held with the State party's interministerial delegation.

#### B. Positive aspects

3. The Committee welcomes the incorporation of Covenant rights in the 2010 Constitution and the rulings of the High Court that recognize these rights.

4. The Committee also welcomes the adoption by the State party of the following:

- (a) Basic Education Act, 2013;
- (b) Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012;
- (c) Kenyan Citizenship and Immigration Act, 2011;
- (d) Prohibition of Female Genital Mutilation Act, 2011;
- (e) Counter-Trafficking in Persons Act, 2010.

#### C. Principal subjects of concern and recommendations

##### Domestic application of the Covenant

5. The Committee is concerned that there has been a long delay in adopting legislation and policies that are crucial to the realization of the economic, social and cultural rights enshrined in the Constitution. It is also concerned at the failure of the State party to comply with many court rulings.

**6. The Committee urges the State party to expedite the adoption of pending legislation and policies, including the Community Land Bill, the Social Protection Bill, the Water Bill, the Housing Bill, the Health Bill and the National Social Health Insurance Fund Bill, to give full effect to the economic, social and cultural rights enshrined in its Constitution. It also recommends that the State party implement the decisions of its courts without delay.**

7. The Committee is concerned at the provisions of section 21 (4) of the Government Proceedings Act, which essentially provide impunity to the State party when a monetary award is made against it in favour of an aggrieved party, by way of damages or costs, as is the case in *Ibrahim Sangor Osman v. Minister for Provincial Administration and Internal Security*.

**8. The Committee urges the State party to repeal section 21 (4) of the Government Proceedings Act, since it places the State party above the law in that it does not oblige the State party to comply with court orders and it infringes the rights to equality and the right of access to courts in that it denies the right of an effective remedy in case of a violation by the State party of the economic, social and cultural rights of an aggrieved party.**

##### Legal aid

9. While noting the introduction of the National Legal Aid and Awareness Programme, the Committee is concerned at the insufficient

resources allocated to the Programme. The Committee is also concerned that access to free legal aid is still very limited, making it difficult for disadvantaged and marginalized individuals to claim their economic social and cultural rights.

**10. The Committee recommends that the State party expedite the adoption of the Legal Aid Bill, expand the National Legal Aid and Awareness Programme and allocate sufficient resources to the Programme so that disadvantaged and marginalized individuals, particularly indigenous peoples, women, people living in rural areas and urban informal settlements, are able to claim their economic, social and cultural rights.**

### **Internally displaced persons**

11. While noting the measures taken by the State party to reintegrate or resettle persons displaced as a result of the 2007/2008 post-election inter-ethnic violence, the Committee is concerned that the Truth, Justice and Reconciliation Commission's recommendations have not been fully implemented and that those internally displaced persons continue to face difficulties in enjoying their economic, social and cultural rights. The Committee is also concerned at the overall lack of implementation of the economic, social and cultural rights of internally displaced persons in the State party, resulting from intercommunal conflicts, disasters and development and environment preservation projects, in particular:

(a) The absence of a comprehensive registration system, which leaves most internally displaced persons unregistered, unprotected and unsupported;

(b) The delay in adopting a national policy on internally displaced persons;

(c) Social segregation, the lack of public transportation and limited access of internally displaced persons to basic services, including water and sanitation, health, education and social assistance.

**12. The Committee recommends that the State party implement, without further delay, the Truth, Justice and Reconciliation Commission's recommendations relating to the 2007/2008 post-election violence, including adequate compensation for the internally displaced persons concerned. It also recommends that the State party:**

(a) Establish a comprehensive registration system and keep up-to-date records of all internally displaced persons;

(b) Adopt a national policy on internally displaced persons in consultation with them to facilitate the implementation of the Act;

(c) Ensure that internally displaced persons in resettlement sites have access to public transport and basic services, including water and sanitation, health, education and social assistance.

### **Economic partnership agreement**

13. While noting that on 16 October 2014 the East African Community States, including Kenya, concluded the negotiations for a region-to-region economic partnership agreement with the European Union, the Committee regrets that the negotiations were not preceded by an assessment of its impact on the enjoyment of economic, social and cultural rights (art. 1 (2)).

**14. The Committee encourages the State party to seize the opportunity of the consultations that shall take place prior to the ratification of the economic partnership agreement in October 2016 to identify the potential negative impacts on the enjoyment of economic, social and cultural rights and to adopt the measures necessary to mitigate such impacts, particularly on the livelihood of small-scale farmers and fisherfolk, as well as on access to medicines. The Committee draws the attention of the State party, in this regard, to the 2011 guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5).**

### **The Endorois**

15. The Committee is concerned that the implementation of the decision of the African Commission on Human and Peoples' Rights relating to the Endorois has been long delayed, despite acceptance of the decision of the Commission. While noting the establishment of the Task Force on the implementation of the decision of the African Commission on 26 September 2014 contained in communication No. 276/2003, the Committee regrets that the Endorois are not represented on the Task Force and that they have not been sufficiently consulted on the work of the Task Force (art. 1 (2)).

**16. The Committee recommends that the State party implement, without further delay, the decision of the African Commission on Human and Peoples' Rights (276/2003) and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process. It also recommends that the State party set up a mechanism that will facilitate and monitor the implementation, with active participation of the Endorois. It further recommends that the State party ratify the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization.**

### **Maximum available resources**

17. The Committee is concerned that corruption in the public sector is pervasive and that there is a large amount of illicit financial flows and tax avoidance, which impede the realization of economic, social and cultural rights. It is also concerned that cases of corruption, particularly those involving high-level officials, are not thoroughly investigated, which results in a very small number of convictions in comparison to the large number of cases brought before the Ethics and Anti-Corruption Commission. It is further concerned that the Commission is not able to carry out its mandate independently and effectively owing to lack of resources and

interference by high-level officials (art. 2 (1)).

**18. The Committee recommends that the State party take all the measures necessary to combat illicit financial flows and tax avoidance with a view to raising national revenues and increasing reliance on domestic resources. It also recommends that the State party increase the level of public funding, at both the national and county level, to ensure the progressive realization of economic, social and cultural rights, particularly the rights to housing, water and sanitation, social security, health and education, and that the State party make all efforts to improve its budget execution process with a view to spending all the allocated funding in a timely, effective and transparent manner. It further recommends that the State party strengthen its investigation of cases of corruption and the prosecution of those involved in corruption by enhancing the investigative capacity of the anti-corruption body and public prosecutors and ensuring the independent functioning of the Ethics and Anti-Corruption Commission.**

## **Non-discrimination**

19. The Committee is concerned at the absence of comprehensive anti-discrimination legislation (art. 2).

**20. The Committee recommends that the State party adopt a comprehensive anti-discrimination law that prohibits discrimination, direct or indirect, on all grounds expressed in article 2 of the Covenant and taking also into account the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights and to take all the measures necessary to eliminate discrimination de jure and de facto.**

## **Lesbian, gay, bisexual, transgender and intersex persons**

21. The Committee is concerned that sexual relations between consenting adults of the same sex are criminalized in the Penal Code and that lesbian, gay, bisexual, transgender and intersex persons are stigmatized and socially excluded, as well as discriminated in gaining access to social services, particularly health-care services (art. 2 (2)).

**22. The Committee calls upon the State party to decriminalize sexual relations between consenting adults of the same sex. It also recommends that the State party take the steps necessary to put an end to the social stigmatization of homosexuality and ensure that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity.**

## **Equal rights of women and men**

23. While noting with appreciation that gender equality is guaranteed through the Constitution and national laws, the Committee remains concerned at gender discriminatory provisions in the existing laws, particularly customary laws that allow polygamous marriages and deny women's equal rights to inheritance and ownership of land (art. 3).

**24. The Committee recommends that the State party take all the steps necessary to review the existing laws with a view to repealing gender discriminatory provisions, including those in customary law, especially in relation to polygamous marriages and to the rights of women to inheritance and ownership of land. It also recommends that the State party review the Matrimonial Property Act of 2013 and take all the measures necessary to strengthen its enforcement once reviewed, including raising awareness among women, local and traditional communities and their leaders, the judiciary and land administration officials and providing legal support to women to claim their rights.**

## **Representation of women at the decision-making level**

25. While welcoming the two-thirds gender rule guaranteed in the Constitution and the progress made in the judiciary in this respect, the Committee is concerned that it has not been fully implemented owing to the lack of a legislative and policy framework and that the representation of women remains low at most decision-making levels, including in Parliament (art. 3).

**26. The Committee recommends that the State party take all the measures necessary to fully implement the two-thirds gender rule in the public sector, in both elective and appointive bodies, and expeditiously adopt and implement the Duale Bill.**

## **Unemployment and underemployment**

27. The Committee is concerned that the unemployment rate remains high, particularly among youth, women and persons with disabilities, and that the majority of work opportunities are in the unregulated informal economy. The Committee regrets that the measures taken to promote the employment of marginalized groups, including the 5 per cent employment quota for persons with disabilities in the public and private sector and the Access to Government Procurement Opportunities for youth, women and persons with disabilities, have not been effective (art. 6).

**28. The Committee recommends that the State party intensify its efforts to upgrade the vocational skills of the workforce to meet the needs of the labour market and to create decent job opportunities, including through implementation of the National Employment Policy and Strategy of Kenya. It also recommends that the State party develop and implement special measures to promote the employment of youth, women and persons with disabilities, including through the creation of an effective system for enforcing the existing quota systems and the Access to Government Procurement Opportunities.**

## **Minimum wages**

29. The Committee is concerned that minimum wages are not applied to all sectors of the economy and that the levels of minimum wages are not sufficient to ensure a decent living for workers and their families (art. 7).

**30. The Committee recommends that the State party take concrete steps to apply minimum wages to all employees, unionized or non-unionized, and to establish a mechanism to index the minimum wage to the cost of living, and also to increase minimum wages to ensure an adequate standard of living for workers and their families. The Committee draws the attention of the State party to its general comment No. 23 (2016) on the right to just and favourable conditions of work.**

### **Occupational safety and health**

31. While noting the increase in the number of labour inspections carried out in the past years, the Committee regrets the lack of information on results and follow-up to the inspections. The Committee is also concerned that the Directorate of Occupational Safety and Health Services lacks sufficient human and financial resources to carry out its mandate (art. 7).

**32. The Committee recommends that the State party provide the Directorate of Occupational Safety and Health Services with sufficient human and financial resources to carry out its mandate effectively. It also recommends that the State party include detailed information on labour inspections, particularly results and follow-up, and the effectiveness of the National Occupational Safety and Health Policy in its next periodic report.**

### **Migrant domestic workers overseas**

33. The Committee is concerned at the exploitative working conditions of Kenyan domestic workers in the Gulf and Middle East region and the lack of mechanisms to protect them in the countries where they work (art. 7).

**34. The Committee recommends that the State party take the steps necessary to put in place effective mechanisms to protect Kenyan domestic workers overseas from abuse and exploitation, including through bilateral agreements with countries of destination, to strengthen the regulation of recruitment agencies and to enhance consular and legal services for these workers.**

### **Right to social security**

35. The Committee is concerned at the limited coverage of cash transfer programmes, leaving more than half of people eligible for the programmes unsupported, at duplication errors in beneficiary registration and overlapping benefits. It is also concerned that the amount of the benefits is not regularly adjusted or sufficient to ensure a decent living and that payments are often delayed. The Committee is further concerned that the coverage of the National Social Security Fund and the National Health Insurance Fund is very low and excludes most workers in the informal economy (art. 9).

**36. The Committee recommends that the State party intensify its efforts to ensure that the cash transfer programmes cover all eligible beneficiaries, increase the amount of benefits and regularly readjust the amount to ensure a decent living and timely payment for the beneficiaries. It also recommends that the State party take the measures necessary to extend the coverage of the National Social Security Fund and the National Health Insurance Fund to all employees in the formal and informal economy and the self-employed. The Committee draws the attention of the State party to its general comment No. 19 (2008) on the right to social security and its statement on social protection floors (2015).**

### **Domestic violence**

37. While welcoming the adoption of the Protection against Domestic Violence Act, the Committee is concerned that the Act is not effectively enforced and that domestic violence is still pervasive, particularly against women, children and persons with disabilities and that the majority of cases of domestic violence go unreported (art. 10).

**38. The Committee recommends that the State party take all the measures necessary to strengthen enforcement of the Act, including by conducting training for law enforcement officials and judges on the application of the Act and awareness-raising campaigns for the public.**

### **Female genital mutilation**

39. The Committee remains concerned that, despite the fact that female genital mutilation tends to be gradually decreasing, it is still rampant, particularly in the North Eastern region, where the prevalence rate is 97.5 per cent, and that the perpetrators are rarely convicted and punished under the Prohibition of Female Genital Mutilation Act (art. 10).

**40. The Committee recommends that the State party intensify its efforts to prevent and eradicate female genital mutilation and other harmful traditional practices, by strengthening the enforcement of relevant legislation and enhancing awareness-raising campaigns on the negative impact of female genital mutilation, particularly at the community level, with a view to abandoning the practice.**

### **Poverty**

41. The Committee is concerned at the high percentage of people living under the poverty line and the failure of the State party to significantly reduce the poverty rate (art. 11).

**42. The Committee recommends that the State party intensify its efforts to eradicate poverty, including through the comprehensive analysis of the needs of the most disadvantaged and marginalized individuals and groups and adoption of concrete and targeted measures to address them.**

### **Adequate food and malnutrition**

43. The Committee is concerned at the prevalence of chronic malnutrition and the high level of stunting, particularly among children and those living in arid and semi-arid areas (art. 11).

**44. The Committee recommends that the State party take the steps necessary to address chronic food insecurity, chronic malnutrition and the critical nutritional needs of children, particularly in arid and semi-arid areas, including the adoption of a national action plan on food security and nutrition in line with the Committee's general comment No. 12 (1999) on the right to adequate food and the 2004 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security.**

### **Right to housing**

45. The Committee is concerned at the lack of effective measures to provide social housing for low-income families, at the large proportion of the population living in informal settlements in poor living conditions with limited access to basic services, including water and sanitation, health care and education (art. 11).

**46. The Committee recommends that the State party take all the measures necessary to provide affordable social housing units for low-income families and to improve living conditions in informal settlements, including through the adoption of the Housing Act, the Community Land Bill and the National Slum Upgrading and Prevention Policy, and allocate sufficient budgetary resources to ensure the implementation of such measures.**

### **Forced evictions**

47. The Committee reiterates its concerns that pastoralist communities and persons living in informal settlements are under constant threat of eviction due to the lack of legal security of tenure and that forced evictions continue without prior notice and provision of adequate alternative housing or compensation. It is also concerned that the State party has not yet enacted a legislative framework to recognize and protect communities' right to land and to explicitly prohibit forced evictions and define the circumstances and safeguards subject to which evictions may be carried out, despite the decisions of its own domestic courts (art. 11).

**48. The Committee recommends that the State party take concrete steps to guarantee security of tenure for all, including residents of informal settlements. It also recommends that the State party prioritize the enactment of the Community Land Bill and the Evictions and Resettlement Bill. The Committee further recommends that the State party implement judicial orders that provide remedies to victims of forced evictions as a matter of priority and adopt a moratorium on mass evictions at the national level until adequate legal and procedural safeguards are in place. The Committee draws the attention of the State party to its general comment No. 7 (1997) on the right to adequate housing: forced evictions and the 2007 basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18).**

### **Water and sanitation**

49. The Committee is concerned at the insufficient access to safe drinking water and adequate sanitation with huge disparities between urban and rural areas, and formal and informal settlements. It is also concerned at the lack of effective regulation of water prices, particularly unregistered small-scale water vendors, and at the high prices that people living in informal settlements and rural areas have to pay for water (art. 11).

**50. The Committee recommends that the State party increase the budgetary allocation to improve access to water and sanitation, particularly in urban informal settlements and rural areas. It also recommends that the State party intensify its efforts to effectively regulate water prices and ensure compliance, particularly by small-scale water vendors, with the tariff guidelines, which were set by the Water Services Regulatory Board.**

### **Access to health-care services**

51. The Committee is concerned at the inadequate budget allocation to the health sector, very limited coverage of the National Health Insurance Fund and the significant share of out-of-pocket payments in health expenditure, which limit access to health for disadvantaged and marginalized persons. The Committee also regrets the regional disparities in access to health-care services and the delay in enacting the Health Bill, implementing the decision of the High Court in *P.A.O. and 2 others v. Attorney General* (2012) and amending the Anti-Counterfeit Act, 2008 (art. 12).

**52. The Committee recommends that the State party take concrete measures to enhance access to health services, particularly for disadvantaged and marginalized individuals and groups, including through increasing budgetary allocation to the health sector and expanding the coverage of the National Health Insurance Fund. It also recommends that the State party expeditiously adopt the Health Bill and amend the Anti-Counterfeit Act, 2008.**

### **Sexual and reproductive health**

53. The Committee is concerned at the criminalization of abortion under any circumstance provided in the Penal Code, the large

number of unsafe abortions and the consistent high rate of maternal mortality. It is also concerned at cases of post-delivery detention of women unable to pay their medical bills in health-care facilities. It is further concerned at the limited access to sexual and reproductive health information and services as well as contraceptives, especially for women living in rural areas (art. 12).

**54. The Committee recommends that the State party amend its legislation on the prohibition of abortion in order to render it compatible with other fundamental rights, such as women's rights to health, life and dignity, and reinstate the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya. It also recommends that the State party take concrete measures to ensure free maternal health-care services and to prevent the incidence of post-delivery detention in health-care facilities. It further recommends that the State party strengthen its efforts to improve access to sexual and reproductive health information and services, including contraceptives. In this regard, the Committee draws the attention of the State party to its general comment No. 22 (2016) on the right to sexual and reproductive health.**

## **HIV/AIDS**

55. The Committee is concerned at the high rates of HIV/AIDS and of new infections as well as at the high mother-to-child transmission rate, which has raised the mortality rate among children under 5 years of age. It is also concerned that mother-to-child transmission has become criminalized. It is further concerned at the large gap between children and adults in receiving antiretroviral treatment and the low retention rate of women who are being treated within a year of initiation. While welcoming the High Court decision on the HIV and AIDS Prevention and Control Act, it is concerned that the State party has not yet implemented the decision (art. 12).

**56. The Committee recommends that the State party intensify its efforts to combat the spread and effects of HIV/AIDS, including mother-to-child transmission, by effectively implementing relevant national policies, strategies, guidelines and programmes on HIV/AIDS and extending the coverage of free antiretroviral treatment, particularly to children and women. It also recommends that the State party make an adequate amendment to the HIV and AIDS Prevention and Control Act in accordance with the High Court decision (Petition No. 97, 2010).**

## **Right to education**

57. The Committee is concerned that the State party has not dedicated sufficient resources to financing school facilities and qualified teachers, and to ensuring effective enjoyment of the right to free primary education for all. It is also concerned that inadequacies in the public schooling system have led to the proliferation of so-called "low-cost private schools", which has led to segregation or discriminatory access to education, particularly for disadvantaged and marginalized children, including children living in informal settlements and arid and semi-arid areas (arts. 13 and 14).

**58. Recalling that the State has the primary responsibility in ensuring the right to education, the Committee recommends that the State party take all the measures necessary to strengthen its public education sector. The State party should increase the budget allocated to primary education and take all the measures necessary to improve access to and the quality of primary education for all without hidden costs, particularly for children living in informal settlements and arid and semi-arid areas. It also recommends that the State party bring the Registration Guidelines for Alternative Provision of Basic Education and Training in line with articles 13 and 14 of the Covenant and other relevant international standards; that it ensure that all schools, public, private, formal or non-formal, are registered; and that it monitor their compliance with the Guidelines.**

59. While noting the measures taken to assist children who have left school to continue to study, the Committee reiterates its concern at the large number of children dropping out of school, particularly girls due to early marriage and pregnancy (arts. 13 and 14).

**60. The Committee recommends that the State party take the measures necessary to address the underlying reasons why children drop out of school, to intensify its efforts to prevent students from doing so and to bring those children back to school to complete their education.**

## **Access to the Internet**

61. While noting that more than 50 per cent of the population has access to the Internet, the Committee expresses its concern that, among disadvantaged and marginalized individuals and groups and in rural areas, such access is limited (art. 15).

**62. The Committee recommends that the State party continue working to expand Internet access, in particular for disadvantaged and marginalized individuals and groups.**

## **D. Other recommendations**

**63. The Committee encourages the State party to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.**

**64. The Committee also encourages the State party to withdraw its reservation to article 10 (2) of the Covenant.**

**65. The Committee recommends that the State party take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights in order to facilitate the assessment of progress achieved by the State party in the compliance of its obligations under the Covenant for various segments of the population. In this context, the Committee refers the State party to, inter alia, the conceptual and methodological**

framework on human rights indicators developed by the Office of the United Nations High Commissioner on Human Rights (HRI/MC/2008/3).

66. The Committee requests the State party to disseminate the present concluding observations widely among all levels of society, particularly among members of Parliament, public officials and judicial authorities, and to inform the Committee, in its next periodic report, about the steps taken to implement the recommendations contained herein. It also encourages the State party to engage non-governmental organizations and the wider civil society in the implementation of the present recommendations, as well as in the preparation of its next periodic report.

67. The Committee requests the State party to submit its sixth periodic report, to be prepared in accordance with the reporting guidelines adopted by the Committee in 2008 (see E/C.12/2008/2), by 31 March 2021. The Committee also invites the State party to update its common core document in accordance with the harmonized guidelines on reporting under the international human rights treaties (see HRI/GEN/2/Rev.6, chap. I).