

AFRICAN UNION

*African Committee of Experts on the Rights
and Welfare of the Child (ACERWC)*

الاتحاد الأفريقي



"An Africa Fit for Children"

UNION AFRICAINE

*Comité Africain d'Experts sur les Droits et le
Bien-être de l'Enfant (CAEDBE)*

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**CONCLUDING RECOMMENDATIONS BY THE AFRICAN COMMITTEE OF
EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC) ON THE
KENYA 1st PERIODIC REPORT ON THE STATUS OF IMPLEMENTATION OF THE
AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**

I. INTRODUCTION

1. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) extends its compliments to the Government of Kenya and wishes to acknowledge with thanks receipt of the periodic report on the status of implementation of the African Charter on the Rights and Welfare of the Child. The ACERWC, during in its 1st Extra Ordinary Session which was held on 6-11 October, considered Kenya's periodic report which was submitted in accordance with the State Party's obligation under Article 43 of the African Charter on the Rights and Welfare of the Child (ACRWC).
2. The Committee welcomes the open constructive dialogue with the delegation of the Government of Kenya led by Mr Ali Noor Ismael, the Principal Secretary in the Ministry of Labour and Social Security Services, insofar as it enlightened the Committee in assessing the implementation of the Charter in the State Party.

II. PROGRESS IN THE IMPLEMENTATION OF THE CHARTER

3. The Committee commends the State Party on the following measures:
 - a. The adoption of the Marriage Bill, 2012 which sets the minimum age of marriage at 18;
 - b. The adoption of the Counter-Trafficking in Persons Act, 2010 and the recent establishment of the Advisory Committee for the implementation of the Counter-Trafficking in Persons Act, 2010;
 - c. The enactment of the Basic Education Act, No. 14 of 2012;
 - d. The adoption of the Prohibition of Female Genital Mutilation Act, 2011;
 - e. The enactment of the Sexual Offences Act, 2006 which has criminalized sexual acts with persons under the age of 18 years, even if they give consent.
 - f. The adoption of Persons with Disabilities Act in 2003;
 - g. The National Policy on Human Rights, 2012;
 - h. The establishment of children's courts
 - i. The establishment of Children Assemblies, including at national and district levels

III. AREAS OF CONCERN AND RECOMMENDATIONS

A. General measures of implementation

4. The Committee commends the State Party for its Constitution of 2010, which includes a clause on children's rights. The Committee takes note of the fact that

the Children's Act of 2001 has been under review since 2010; however it has not yet been amended, *inter alia*, to bring it in line with the Constitution. Hence, the Committee urges the State Party to expedite the amendment process as the Act is important for protecting and promoting children's rights. The Committee also urges the State Party to urgently finalize the adoption of other laws undergoing a revision or a process of adoption.

5. The Committee notes with appreciation the monitoring mechanisms which the government has devised as mentioned in the State Party's response to the list of issues. These include: the Department of Children's Services, the Kenya National Commission on Human Rights (KNHCR), the National Council on the Administration of Justice (NCAJ), the Commission on Administrative Justice (CAJ), and the National Gender and Equality Commission. The Committee also commends the State Party for its stable coordination mechanism which involves CSOs and independent national human rights institutions. It is however the concern of the Committee that there is no independent organ to promote and protect the rights and welfare of children. Therefore, the Committee encourages the government of Kenya to establish an independent organ which has the sole mandate to monitor the implementation of children's rights. The Committee suggests for the government of the State Party to create an independent commission for children or to create child specific office in the Kenya National Commission on Human Rights (KNCHR) and the National Gender and Equality Commission (NGEC).
6. The Committee welcomes the adoption of the Prohibition of Female Genital Mutilation Act of 2011 as well as the establishment of the Anti-Female Genital Mutilation Board. Nevertheless, the implementation of this law is not yet sufficiently effective as the practice remains significant in the country. Accordingly, the Committee recommends to the executive organs of the State Party to engage in combating the practice of FGM especially in rural areas where it is still highly prevalent; and also to prosecute the perpetrators of female genital mutilation.
7. The Committee acknowledges the utility of the previous National Plan of Action for Children, but it expired in 2012. The Committee encourages the State Party to fast-track the revision of the National Plan of Action.
8. The Committee recognizes with appreciation the efforts of Ministry of Health, and also the policies and strategies it has devised for delivering a better health care service. However, the Committee has concerns on how the Ministry is responding to the devolution of health services due to devolution of functions to local government. The county governments are not appropriately budgeting for health services in accordance with the commitment of the State under the Abuja Declaration. In addition, it was recorded that many health care workers who were

transferred from the central to the county governments have resigned due to delayed salaries and removal of allowances. There is also lack of medical equipment in the county health care centers. The Committee recommends and calls upon the State Party to take the following measures:

- a. Push county governments increase the budget they allocate for health care services;
 - b. Improve the managerial systems of the county governments through capacity building and incentives;
 - c. Improve the medical facilities available within the health care centers;
9. The Committee appreciates the State's effort in strengthening its collaboration with CSOs and the vibrant CSO community in the country. But the Committee is concerned that the Public Benefit Organisations amendments to the 2013 Act might reduce the engagement of CSOs and therefore encourages the State Party to undertake a continuous review of the Act. Even though the purpose of limiting the fund is to keep the CSOs accountable, it should be taken into account that it has implications on their tasks and the support they render to the government as well as the society as a whole. Hence, the Committee suggests that the State Party reconsider the imposition of restrictions on the funding of CSOs.
10. The Committee commends the data collection process both at the ministerial and national level; among others it appreciates the national census conducted every 10 years. As data collection is the main tool in devising the State's policies, the government should give due attention to disaggregated data collection in all the counties. The Committee urges the State Party to expedite the setting up of the Child Protection System and also to disaggregate children's data based on sex, disability, geographical location, family earning and parental status, so as to guide the State in resource allocation. The Committee refers the State Party to the Committee's reporting guidelines in this respect.
11. The Committee is aware that there is a serious security issue in the country. However, the Committee recommends that security concerns should not compromise the rights of children as enshrined in the Charter.
12. Taking note of the decisions rendered by the Committee, and the African Commission on Human and Peoples' Rights, the Committee regrets that there is a huge gap in the implementation of decisions concerning the Nubian children and their access to birth registration and the necessary documentation. The Committee rendered a decision in 2011, but the State has not implemented the decision fully and the situation remains to be the same for unregistered children. The Committee urges the State Party to urgently take measures to comply with the decision of the Committee as well as that of the Commission.

B. Definition of child

13. The Committee commends the State Party for including the definition of the child in its Constitution. However, the Committee has concerns regarding the age of criminal responsibility. The Committee regrets that the age of criminal responsibility is still 8 years of age. The Committee thus calls upon the State Party to adopt the draft Child Justice Bill of 2012 as soon as possible in order to raise the minimum age of criminal capacity to 12. The criminal prosecution of all children beyond the age of 8 vividly affects the wellbeing and development of children. The Committee recommends accelerating the process of the adoption of the Bill and in effect altering the age of criminal responsibility.
14. The Committee welcomes the passage of the Marriage Act 2013 in April 2014 which now sets a minimum age of marriage at 18 years in accordance with the Charter.

C. General principles

Non-discrimination

15. While the Committee appreciates all the efforts of the State Party in addressing some of the issues relating to discrimination, it recommends the State Party to take the following measures:
 - a. Fully implement the Citizenship and Immigration Act, 2011 and address the position of the children of Nubian descent, the majority of whom don't have birth certificates and also ensure non-discrimination on all grounds in respect of other indigenous children;
 - b. Accommodate children with disabilities, particularly autistic children, in the education system and take measures to ensure that there is no discrimination against children with albinism;
 - c. Train and educate communities to change their perceptions of children with disabilities and also to combat all forms of discrimination insofar as this falls under the State Party's mandate to ensure the respect for and the promotion of the rights of children under the Charter.

Best interests of the child

16. The Committee notes with appreciation that the best interests of the child is constitutional right for all children. The Committee recommends that the best interests of the child be the primary consideration in all settings and for all children, including in respect of any security measures taken by the State Party.

17. The Committee particularly calls upon the State Party to give attention to the best interests of the child in custody cases where children are confiscated by their fathers only for child support and maintenance reasons.
18. The Committee appreciates the criminalization of sexual offences against children; nevertheless, the State Party has failed to ensure the protection of girl victims of sexual offences through prosecution of offenders in courts of law. Many offenders are not being prosecuted as required by the Sexual Offences Act, 2006 due to cultural practices; in certain cases, girls are forced to marry the offenders. The lack of prosecution and the practices of the community are against the best interests of children and seriously affect their development. The Committee recommends that the State Party take measures to ensure that sexual offenders are prosecuted with the full might of the law to ensure the deterrence of other potential offenders and reduce forced child marriage.

Survival and development

19. The Committee notes with appreciation the provision of free child birth services in public hospitals and health centers to prevent infant mortality. However, the public health centers are not well equipped and staffed, which compromises the quality of health care service delivered by the State and puts at risk the survival of children. Another factor affecting the survival and development of children is the prevalence of teenage pregnancy. The Committee, therefore, recommends that the State Party increases the budget allocated for health care services; that it intensifies efforts to train and educate health staff, and also continuously strives to provide better health facilities. It also recommends that the State Party takes all the necessary steps to reduce teenage pregnancy by educating teenagers and their parents and also by properly implementing the Sexual Offences Act.
20. The Committee welcomes all the measures the State has taken in relation to food and nutrition security such as the formulation of the National Food and Nutrition Security Policy and the National Nutrition Action Plan 2012-2017. While acknowledging the measures the State has taken, the Committee has qualms that the arid and semi-arid lands (ASAL) are still fully dependent on food aid. Children die due to malnutrition in these areas. The Committee, therefore, urges the State Party to devise and plan strategies in which it can efficiently address the issue of malnutrition in these areas.

Child participation

21. The Committee congratulates the government of Kenya for establishing children's assemblies in all counties. The Committee encourages the government of Kenya to give due consideration to the views of children in policy making as well as budgeting. The Committee encourages the State Party to provide children

in contact with the justice system with state funded legal aid and facilitate the legal representation of children by NGOs to realize their participation in the administration of justice to the fullest.

D. Civil rights and freedoms

Name, nationality and birth registration

22. The Committee appreciates the growing rate of birth registration and that of free birth registration available within 6 months of birth. However, only 60% of the Kenyan children are registered. The Committee recommends the intensification of the campaign on birth registration, including creating awareness that registration is free, making registration easily accessible in all areas of the country and expediting the process of making registration of vital events digital. The Committee moreover refers to its General Comment No. 2 on Article 6 of the Charter to the State Party for guidance.
23. The Committee notes with appreciation the adoption of the Citizenship and Immigration Act of 2011, and also the measures taken by the state to grant children of Kenyan mothers a Kenyan nationality irrespective of the nationality of their fathers. The Committee, however, has concerns on the issue of children of Nubian descent and emphasizes the non-implementation of its decision of 2011. The right of children to nationality and registration is a milestone for the realization of other rights enshrined in the Charter. Thus, the Committee calls upon the State Party to urgently implement the decision on the Communication and grant Nubian children nationality.
24. The Committee is also concerned about the registration of all children including transgender and intersex children by the State Party as there are cases being brought before the courts in this regard. The Committee thus recommends the State Party to adopt a registration model which specifies the registration of transgender and intersex children.

Freedom of expression, freedom of association, freedom of conscience and religion, protection of privacy

25. The Committee commends the establishment of Children's Assemblies and Area Advisory Councils as a means of fulfilling children's rights to freedom of expression. The Committee recommends that these Assemblies be trained and well equipped and also well popularized so that they can have a legitimate say in decision making. The State also needs to take appropriate measures to educate parents and society in general that children's participation adds value to the governance of the country.

26. The Committee appreciates the measures the State Party is taking to balance freedom of conscience and religion on the one hand and provision of health care and education on the other hand. The State Party in its Response to the List of Issues stated that it has taken two measures to address the issue: raising awareness and providing the services forcefully. While the Committee encourages the State Party to continue taking these measures, the Committee recommends the adoption of a clear guideline which can balance the two conflicting interests by taking the best interest of the child into account. Moreover, the Committee urges the State Party to implement the decision of its Supreme Court which addressed the rights of children who were deprived of education and health care because of the belief of their parents.
27. The Committee has concerns on the protection of privacy of children particularly of child victims. There is no suitable structure where violations can be reported while protection of victim's privacy is at the same time ensured. The Committee hence calls the State Party to create collaboration among child protection services in order to protect privacy of children.

Protection against torture and abuse

28. The Committee notes with concern that child torture and abuse is prevalent in all parts of the country in different forms. The level of child abuse and torture is rising from time to time and the violations are perpetrated by parents and teachers. The Committee is also concerned that there is weak prosecution for such violations as the Prevention of Torture Bill has not yet been adopted. The Committee is concerned that these violations and the lack of prosecution are obstructing the implementation of the Charter.
29. The Committee urges the State Party to adopt the Prohibition of Torture Bill as it can be the legal and normative basis for the prevention of abuse against children. The Committee urges the government of Kenya to properly prosecute violators in schools, families and also religious places. The Committee further recommends that the State Party to raise awareness of the community on the issue so that they discontinue violations and not tolerate abuse and torture.
30. The Committee notes with appreciation the prohibition of corporal punishment under the Constitution, but recommends that it be implemented. The Committee encourages the State Party to raise awareness and give training on a continuous basis on alternative disciplinary measures.

E. Family environment and alternative care

Protection of the family

31. The Committee appreciates the steps the State has taken to safeguard the family. However, the Committee notes with concern that there are many children who are abandoned and who are orphans; and that the State Party has limited resources to address this situation. The Committee also notes that the Family Protection Bill is still a draft. The Committee hence encourages the State Party to:
- a. Expedite the adoption of the Family Protection Bill;
 - b. Raise awareness on the value and importance of family for the wellbeing of children and tackle the current decline of the family;
 - c. Raise the budget allocated for the protection of the family in accordance with its need;
 - d. Prevent breakdown of families by providing mediation and addressing the root causes of family breakdown;

Adoption

32. The Committee commends the State Party for its effort in monitoring the Charitable Children Institutions, promoting domestic adoption and setting a time limit in international adoption for second time adoption by the same parents. However, there are Charitable Children Institutions which are not yet registered by the State Party. The Committee recommends that the State Party expedite the registration of the Charitable Children Institutions which operate without being registered. The Committee in addition encourages an escalated regulation and monitoring of these institutions and setting minimum standards which need to be observed by the Charitable Children Institutions. The Committee brings the UN Guidelines for the Alternative Care of Children and the Guidelines for Action on Inter-country Adoption of Children in Africa to the attention of the State Party for its action.

Parental responsibility

33. There are many instances where fathers fail to pay maintenance which is a problematic issue for the Committee affecting the socio-economic status of children and their well-being. The Committee encourages the State Party to effectively enforce maintenance orders.
34. The Committee recommends that the State Party takes measures to ensure that both parents bear equal responsibility for their children and avoids any practice to the contrary. It also recommends that effective measures be taken against parents who fail to discharge their parental responsibilities.

Separation from parents

35. The Committee appreciates the measures the State Party has taken regarding family reintegration. The Committee encourages the State Party to strengthen its efforts in rehabilitation of street children, to reunify them with their birth parents or extended family or facilitating their adoption in order to provide them with a family environment which is essential for their optimal growth and development. The Committee moreover encourages the State Party to address the root causes of separation such as poverty and family displacement.

F. Basic health and welfare

36. The Committee applauds the free health care available for children under the age of 5 and the free maternity health services which have significantly contributed for the reduction of child mortality rates. Nevertheless, health care for children between the age of 5 and 18 as well as caesarean and complicated birth delivery is not free. The Committee insists for making health care free for all children and all mothers including caesarean and complicated birth delivery which will provide a better guarantee of the life and survival of all children. The State Party should consider a policy that the counties give such services for free and reclaim the fee from the central government instead of making the mother bearer the costs of birth.

37. The Committee congratulates the State Party for the 100% free GPI vaccination. The Committee encourages the government to continue the vaccination campaign and to give it nationwide coverage.

38. While appreciating the measures taken to prevent child morbidity and mortality, the under 5 years of age mortality rate remains high. To this effect, the Committee urges the State Party to focus on feeding programs and children's growth to address malnutrition.

39. In implementing early childhood development, the Committee commends the State Party for granting maternity leave and providing places where women can bring children at working places. The Committee further calls upon the State to promote exclusive breast feeding.

40. Even though the National Policy on Disability addresses children with disabilities, the lack of facilities which take into account the special needs of children with disability is a concern to the Committee. Children with disabilities are mostly disadvantaged in health care services. The Committee implores the State Party to give attention to children with disabilities, particularly autistic children, and adopt an inclusive structure of receiving health care.

G. Education, leisure and cultural activities

41. While the Committee appreciates the Special Needs Education (SNE) policy framework for the education of children with disabilities, it has earnest concern about children with disabilities and their access to education. The Committee urges the State Party to ensure access to education for children with disabilities and to realize inclusive education. In order to achieve inclusive education, the government needs to train teachers in special needs education, provide and improve basic infrastructure suitable to children with disabilities and prepare teaching materials which can be utilized by children with disabilities.
42. The Committee commends the State party for providing free primary education and the budget allocated to the education sector. The Committee has concerns though about the 1.5 million children who are not in school despite the opportunity provided by the government. The Committee thus calls on the State Party to bring children to school by addressing the causes of their non-attendance. The State Party needs to adopt a non-discriminatory and inclusive approach which enables children not registered, stateless children and abandoned children to have effective access to education. The education system should further accommodate girls who get pregnant while they are in school.
43. The Committee also has concern about the quality of education, the high teacher-pupil ratio which affects the quality of education; and the high disparity of quality of education between private and public schools. The Committee therefore calls the State Party to improve the quality of education, especially in public schools, taking into account the desired learning outcomes. The Committee suggests that a code of conduct for teachers be adopted to ensure non-absenteeism, high ethics and professionalism and recommends an intensive teachers training and recruitment. The Committee further recommends close monitoring of private education, as well as an ongoing assessment of the impact of privatization. Minimum standards should be set for all education institutions. The government should also monitor pre-schooling so that it is not solely left to the private sector.
44. The Committee appreciates the talent academies and the different clubs which exist in schools to provide children with opportunities for leisure and play. The Committee further encourages the State Party to provide children with the time and materials for play, to give due consideration to children with disabilities, and monitor schools and their environment.

H. Special Protection Measures

Child labour

45. The Committee appreciates the fact that the Employment Act No. 11 of 2007 defines a child as a person below the age of 18 and that it forbids employers from employing children. It also commends the measures the State Party has taken to combat child labour such as the removal of more than 8000 children from child labour, and the establishment of child labour committees in the counties. However, the Committee is concerned that child labour is still prevalent and that there are more than 1 million children who perform labour. Child labour impedes the right to education, play, leisure and the right to the best attainable standard of health. Considering the severe consequences of child labour, the Committee encourages the State Party to continue taking all the necessary measures to reduce child labour, to invent new feasible mechanisms of fighting child labour and to address the root causes of child labour. The Committee recommends the State Party to further regulate child labour and enforce the law both in the formal and informal sector.

Sexual exploitation

46. With regard to sexual tourism, the Committee is aware that there is a high rate of sexual tourism. The Committee encourages the State Party to strengthen its efforts to prevent and eliminate sexual tourism. 40% of the perpetrators appear to be domestic people. Therefore, the State Party should improve law enforcement, and elevate the level of accountability of hotels and tour guides by adopting code of conduct. The State Party should devise a system in which such actors will be held accountable; they should not be left entirely to self-regulate.

47. The Committee urges the State Party to take measures to combat the practice of forced marriage to perpetrators of sexual violence. There are also instances of sexual abuse of girls by teachers. The Committee recommends early identification, investigation, prosecution and conviction of perpetrators. For its informed action, the State should have disaggregated data on victims and perpetrators of sexual abuse.

Children in conflict with the law

48. The Committee commends the State Party for establishing specialized courts and child protection units in all the counties. The Committee encourages the State Party to continue to take actions towards a child friendly justice system and recommend the State Party to consult Guidelines on Action for Children in the Justice System in Africa. The Committee moreover recommends that measures should be taken for the separation of children from adults in pre-trial and trial

phases, for improved condition in prisons where children are accommodated, and for the development of a system which caters for their rehabilitation. There are reported cases of abuse by police officers of children in conflict with the law. The State needs to train and sensitize the police on how to deal with children in conflict with the law.

Children of incarcerated parents or caregivers

49. The Committee notes that the State Party provides education and health care by accommodating children below the age of 4 with their mothers. The State Party does not provide protection for children above the age of 4. There is only one Charitable Children Institution which provides care for children of incarcerated caregivers who are beyond the age of 4. The Committee urges the State Party to devise a mechanism in which the State can provide children of incarcerated parents or caregivers who are beyond the age of 4 the necessary care and support where they cannot be placed with family members. The Committee refers its General Comment No. 1 on article 30 of the Charter to the State Party for further guidance on children incarcerated with their mothers.

Children refugees

50. As indicated in the constructive dialogue by the State Party, the country hosts a large number of refugees including children. The Committee encourages the State Party to continue its effort to enhance protection of asylum seeking, abandoned and unaccompanied children. The State should provide such children with basic education, health care and protection.

Child trafficking and abduction

51. While the Committee appreciates the adoption of the Counter-trafficking Act, it is concerned that nothing has been done on child prostitution. The Committee commends the State Party for the code of conduct for hoteliers and tour operators. The Committee further urges the State Party to fully implement the Act and take effective measures to combat child prostitution as well as rehabilitating and reintegrating child prostitutes.

52. The Committee takes note of the fact that there are children recruited in gangs and armed groups and become juvenile delinquents. The Committee calls upon the State Party to develop an action plan to prevent recruitment of children in gangs and armed groups and to reintegrate those already recruited as required by the Charter.

Harmful traditional practices

53. There are many harmful traditional practices that occur, female genital mutilation/cutting (FGM) being the prevalent one in the State Party. The Committee applauds the appointment of the former Minister to be the head of national council on FGM. , The Committee recommends that the State Party continues to raise awareness on such issues and establish rescue centers for children who flee from the threat of harmful traditional practices particularly of FGM and child marriage or who are rescued; and the State party is urged to provide them with the appropriate shelter.

I. Responsibility of the child

54. The Committee commends the State Party for incorporating responsibilities of the child in the Children Act. The Committee encourages the State Party to educate children about their responsibility towards their family and their national community. The State Party should empower children to contribute to the solidarity and integrity of their nation. Furthermore, the Committee encourages the State Party to avoid any cultural barriers which disregard the responsibilities of the child and to empower children so that they can meaningfully discharge their responsibilities.

J. Conclusion

55. The African Committee of Experts on the Rights and Welfare of the Child appreciates with satisfaction the efforts invested by the Government of Kenya and aspires for the implementation of these recommendations. The Committee would like to indicate that it will undertake a follow-up Mission to explore the implementation of these recommendations in the foreseeable future. The Committee would also like to invite the State Party to submit its combined Second, Third, Fourth, and Fifth Periodic Reports by 10 August 2017 and every three years thereafter. The Committee invites the State party to include in the next periodic reports information about the implementation of the present concluding recommendations.

56. The African Committee of Experts on the Rights and Welfare of the Child takes this opportunity to renew to the Government of the Kenya, the assurances of its highest consideration.