



A GUIDE TO YOUR RIGHTS

The Kenyan Bill of Rights



A Guide to Your Rights: The Kenyan Bill of Rights

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Centre for Human Rights, University of Pretoria

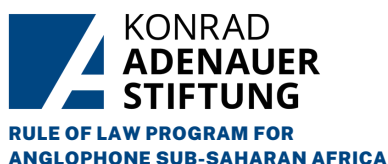
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The Centre for Human Rights, Faculty of Law, University of Pretoria, is an internationally recognised university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa. It aims to contribute to advancing human rights, through education, research and advocacy.

www.chr.up.ac.za



Konrad Adenauer Foundation (KAS) is a German Political Foundation that is committed to achieving and maintaining peace, freedom and justice through political education on a national level as well as on an international level with 111 offices worldwide. The KAS Rule of Law Program for Anglophone Sub-Saharan Africa based in Nairobi has been actively promoting the rule of law, democracy and human rights in the region since 2006. Strengthening constitutionalism as well as the enforcement of basic human rights enshrined in the constitutions of Sub-Saharan Africa has always been among the main focus of the Program's work.



FOREWORD

We live in a world where we often hear talk about human rights, often hear about how rights will help people to live lives that are dignified and free. In many countries, including in Kenya rights are protected in a constitution. This has the potential to give people in Kenya great protection, as they can vindicate their constitutional rights in a range of different ways, including through the courts. Sadly, far too often, people have to struggle to enforce their rights. Sometimes this is the case because they have not been informed about all their rights, and sometimes it might be because they are not sure about what steps they can take to enforce their rights. This booklet is designed to help overcome these obstacles.

This booklet provides an easy-to-use introduction to understand what human rights are, where they come from, and what they mean for citizens and other people living in Kenya. Through this booklet, the Centre for Human Rights (Centre) and the Konrad-Adenauer-Stiftung (KAS) hope to help every citizen, and everyone living in Kenya – hope to help you – know your rights and better understand how they protect you against actions that violate rights, whether by the government, by private entities, like companies, or by other people, and how you can make these rights real.

The Centre and KAS are committed to supporting people's attempts to live in dignity and freedom. Both the Centre and KAS are convinced that providing people with information and help in understanding how to turn this information to action will help people enforce their rights, and ultimately live with more dignity. We are proud to be able to have worked together on this booklet, and we hope that it proves to be a useful tool in helping people enforce the rights that are protected in their Constitution.

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Konrad-Adenauer-Stiftung



Introduction	1
Constitutions: What are they?	2
The history of Kenya's Constitution	4
What is in the Constitution?	6
Separation of powers and the three arms of government	7
The structure of the court system in Kenya	9
What are rights and what do they mean to you?	12
An introduction to the Bill of Rights	16
Rights and fundamental freedoms at a glance	17
The Bill of Rights: A summary	18
Conclusion	30
Organisations that can help you claim your rights	31

TABLE OF CONTENTS

INTRODUCTION

Everyone in Kenya has rights that protect and help them to live dignified and meaningful lives. These rights are found in the Bill of Rights, Chapter 4 of the Kenyan Constitution.

Kenya has had two constitutions since independence. The first constitution came into force at independence in 1963, before being replaced in 2010, by a new constitution. The 2010 Constitution marked a significant moment in Kenya's history because it was passed by Kenyans through a referendum, and because it placed the rights of the people of Kenya at its heart. It provides the framework for a responsive and honest government, which people in Kenya can hold answerable for its actions. This booklet will tell you how the Bill of Rights contributes to this 'new era' in Kenya, and how the Constitution protects you and your community.



Using this booklet

This booklet is intended to provide you with an introduction to the Constitution of Kenya, to tell you what your rights are and what this means for you. It includes some significant court cases, where people have claimed their rights, and held others, including the government, to account for their actions.

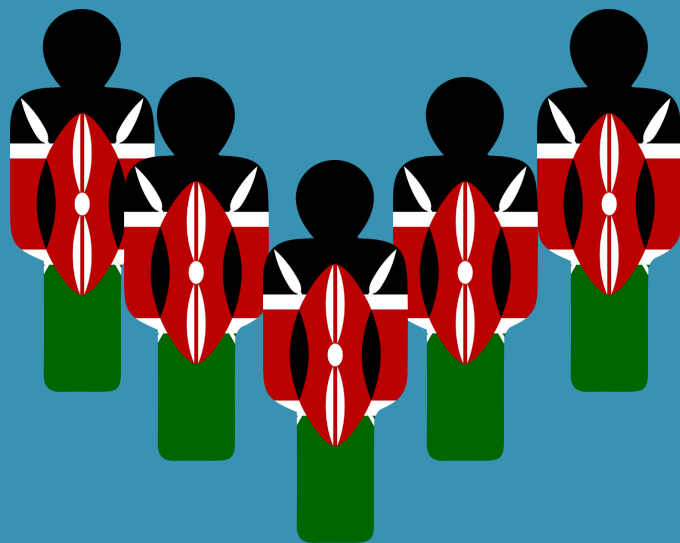
This booklet only provides you with a summary of the rights in the Bill of Rights. If you want to read the Constitution as it is written, in full, you can find the full Constitution online by entering "Kenya Constitution" into a search engine, or by visiting this website:

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

If you would like to find out more about a particular case, you can insert the name of the case into a search engine, and you should be able to find the case that has been under discussion.

CONSTITUTIONS: WHAT ARE THEY?

Most countries in the world have a constitution. A constitution is, in many countries, the highest law in the land. Every law in a country governed by a constitution, and every action taken by the government of that country, must be in accordance with that country's constitution. Constitutions tell us how a country's government should function, about the rights that people in that country have, and about how different government institutions, like the police, should function.

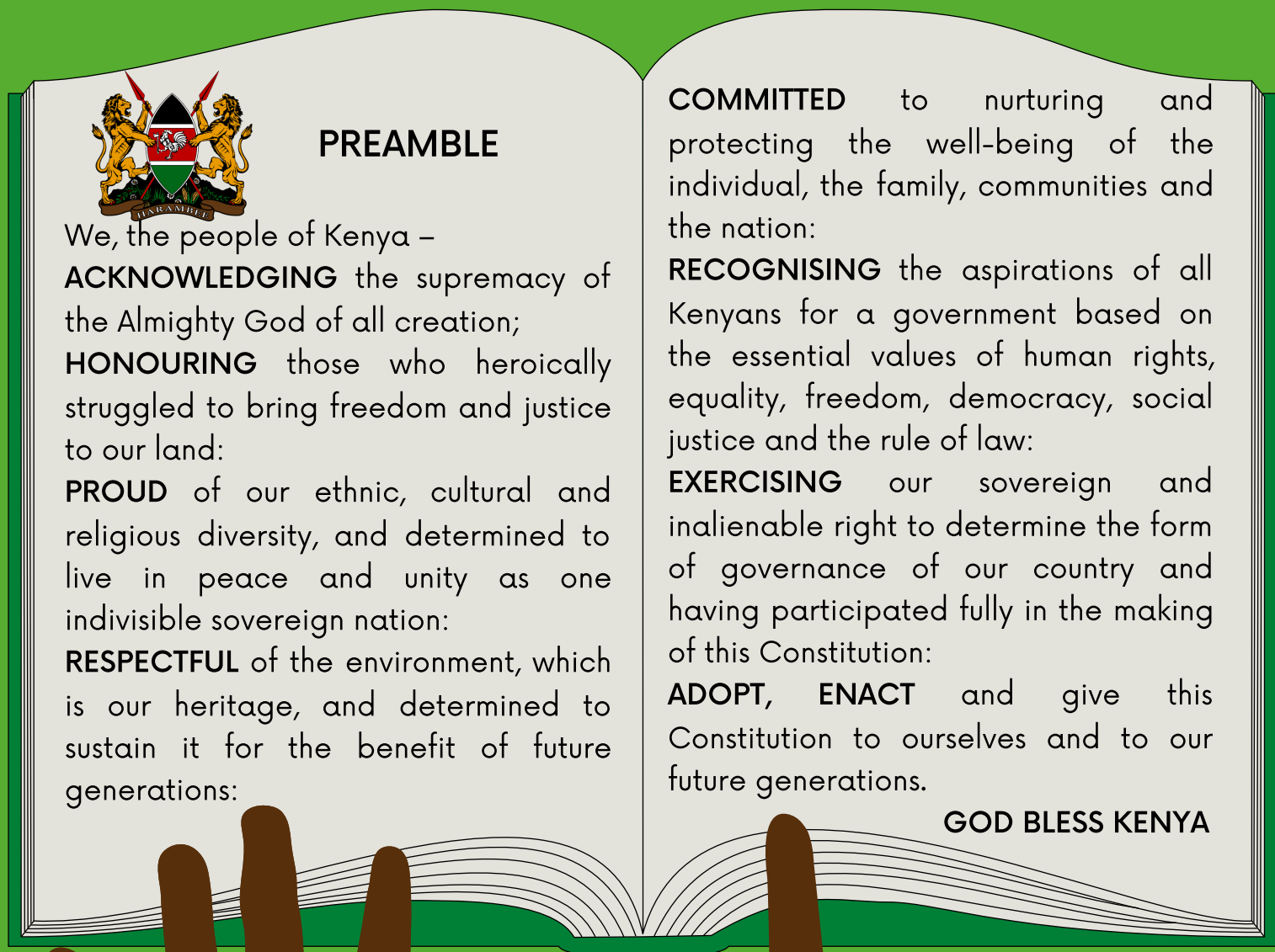


Because they shape what a government can do, constitutions tell us about a country and its values. For example, the Kenyan Constitution tells us that Kenya is a country that will be based on “the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” Every country's constitution is different, reflecting their own values. Most countries in the world have written constitutions, but there are some countries with unwritten constitutions. Where a constitution is unwritten, the fundamental rules of society are formed by customs and by practices that have become common in society.



(CREDIT: ANCL-RADC)

Some countries, including Kenya, have used their constitution to make clear their fundamental values, and their commitment to protecting the rights of everyone in the country. We can see this in the preamble to the Constitution, a section that appears at the beginning of the Constitution, which says:



THE HISTORY OF KENYA'S CONSTITUTION

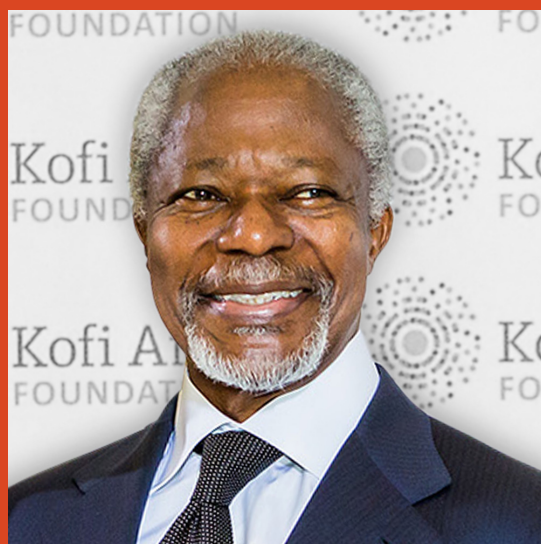
After the post-election violence of 2007, it was recognised that a new approach to Kenyan society was urgent. As part of this new approach, a new Constitution was drafted to replace the independence Constitution. Before the Constitution came into law, Kenyan citizens were able to decide whether they approved of the proposed constitution. Ultimately, more than 68% of voters in Kenya voted to accept the Constitution. The new Constitution sought to promote citizen involvement in government, to tackle poverty and inequality, and to undertake land reform, together with many other elements.

In a case called *David Ndii and Others v Attorney General and Others (the BBI case)*, the High Court of Kenya spoke about how important it was that all citizens were involved determining whether to accept the Constitution into law, saying that the making of the 2010 Constitution is “a story of ordinary citizens striving and succeeding to reject or as some may say, overthrow the existing social order and define a new social, economic, cultural and political for themselves.”

“

...the overwhelming endorsement of the Constitution by referendum was an eloquent expression of the Kenyan people's desire not only to see a clear break with the past, but also to participate in a new beginning for the country

”



(CREDIT: The Kofi Annan Foundation)

- The late Kofi Annan, former Secretary-General of the United Nations

Why did the 2010 Constitution represent a ‘new era’?

In the past, Kenya’s legal systems and constitutions were used to benefit the powerful, often at the expense of those who were without power in the country. The 2010 Constitution seeks to change this. The Supreme Court of Kenya has made this clear, in 2013, in a case called *Speaker of the Senate and Another v Attorney-General and Another*, stating that “...the avowed goal of today’s constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.” The Constitution provides the means to transform Kenyan society, to create a society that is fair and in which everyone has the ability to fulfil their potential.

CASE STUDY: THE CONSTITUTION BRINGS A NEW ERA OF RESPONSIVE GOVERNANCE

Kenya’s commitment to transformation, and the role of the Constitution

In 2014, the Supreme Court of Kenya, in the case of *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, considered whether several broadcasters should receive broadcasting licences. This case dealt with media freedom, with freedom of expression and with the right to access information, all of which are protected in the Bill of Rights. In its ruling, the Court made clear that the 2010 Constitution had committed Kenya to a new path, that the Constitution was ‘transformative’. A transformative constitution is committed to bringing about “large-scale social change.” This includes changing the Kenyan state....

“...from its former vertical, authoritative, non-accountable content under the former Constitution to a State that is accountable, horizontal, decentralised, democratised and responsive to the principles and values enshrined in...the transformative vision of the Constitution.”

WHAT IS IN THE CONSTITUTION?

Everyone, no matter how rich, how influential, has to act in accordance with the Constitution and must respect the rights of others. The Constitution says:

“This Constitution is the supreme law of the Republic and binds all persons and all State organs”

The Constitution consists of 18 Chapters. Each chapter deals with a different element of life and government in Kenya.



THE KENYAN CONSTITUTION

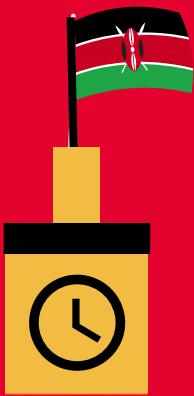
- Preamble
- Chapter 1 – Sovereignty of the People and the Supremacy of the Constitution
- Chapter 2 – The Republic
- Chapter 3 – Citizenship
- Chapter 4 – The Bill of Rights
- Chapter 5 – Land and Environment
- Chapter 6 – Leadership and Integrity
- Chapter 7 – Representation of the People
- Chapter 8 – The Legislature
- Chapter 9 – The Executive
- Chapter 10 – Judiciary
- Chapter 11 – Devolved Government
- Chapter 12 – Public Finance
- Chapter 13 – The Public Service
- Chapter 14 – National Security
- Chapter 15 – Commissions and Independent Offices
- Chapter 16 – Amendment of this Constitution
- Chapter 17 – General Provisions
- Chapter 18 – Transitional and Consequential Provisions

As you can see from the titles of the different chapters of the Constitution, it has an impact on all elements of life in Kenya. This booklet will focus on Chapter 4: The Bill of Rights, but should you wish to read any of the other chapters of the Constitution, you can consult the full Constitution here:

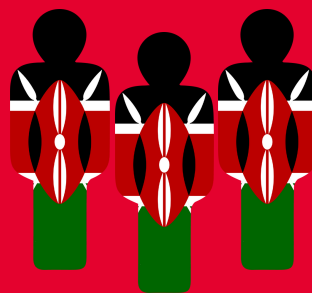
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SEPARATION OF POWERS AND THE THREE ARMS OF GOVERNMENT

Kenya's Constitution recognises that countries often face a problem when one person or one institution has too much power. It is easy for people in such situations to abuse their power, and to undermine the rights of people in that country, and very hard for anyone to stop them when they do. One of the ways that the Constitution protects against anyone in government abusing their power, or the government as a whole abusing its power, is by dividing power amongst different branches of government. Each branch of government exercises some powers of the State, simultaneously with the other branches of government. There are three different branches:



The Legislature (Chapter 8 of the Constitution), which consists of members of parliament and members of legislative assemblies in country governments, which make the laws.



The Executive (Chapter 9 of the Constitution), made up of the national executive – cabinet secretaries (all of the ministers) and the president, as well as executive structures in county government, which are charged with policy formulation and implementation of the law.



The Judiciary (Chapter 10 of the Constitution), which consists of the courts, judges, and magistrates, that interprets the laws.

Each of the three branches of government is independent of the others, and each one is as important as the others. They act as a check on each other – no one person or branch of government can do whatever it wants, which means that it is much harder for people to abuse their power. This separation of powers is very important for the protection of rights – as we will see in our case examples, there are often very important reasons to hold people with power to account.

CASE STUDY: SEPARATION OF POWERS HELPS PREVENT THE ABUSE OF POWER

The separation of powers helps protect the Constitution, the ‘will of the people’

In 2021, the Kenyan Court of Appeal’s decision in the *BBI case*, discussed earlier, showed how the 2010 Constitution introduced a new era to Kenya, and how this makes everyone answerable to the Constitution, including powerful politicians, like the President. In the past, politicians have been able to change the Constitution in ways that suit their needs. This case showed how the Constitution prevents this!

President Kenyatta and a political opponent, Mr Odinga, sought to come to an agreement that would create a ‘lasting unity in the country,’ after disagreements and unhappiness surrounded the 2017 general election. The agreement was called the ‘Building Bridges to Unity Taskforce,’ and this Taskforce recommended changes to the constitutional, amidst other changes. Some of these changes were changes that would change the Constitution in ‘fundamental ways’.

The case was first heard in the High Court, which emphasised that the 2010 Constitution was achieved by involving the Kenyan people in the process, an important element that was found missing in the BBI process. The Court said that even though the President must promote unity in Kenya, this must be done in accordance with the Constitution. The Constitution being the ‘highest law,’ which everyone has to abide by, and which cannot be changed at the will of anyone, even the President.

The decisions of the High Court and Court of Appeal, show that the Kenyan Constitution is transformative and has created a new era. The Constitution makes clear that important changes to it require the permission and participation of the ordinary *mwana* *anchi*. At the date of publishing this booklet, a final appeal was pending in the Supreme Court.

THE STRUCTURE OF THE COURT SYSTEM IN KENYA

The Judiciary plays a vital role in the protection of the rights of people in Kenya. The Judiciary has the obligation to provide justice to everyone in the country. Everyone should be able to have their case considered by a judge or a magistrate who is committed to hearing the matter impartially and to apply the law equally to everyone. The Judiciary of Kenya also undertakes to promote equal access to justice, so that everyone is able to protect their rights and interests from unfair infringement.

There are a number of courts in the Kenyan judiciary. Each court has a different role to play in the justice system. Taken together, the courts in Kenya attempt to ensure that everyone can have their disputes settled quickly and fairly.

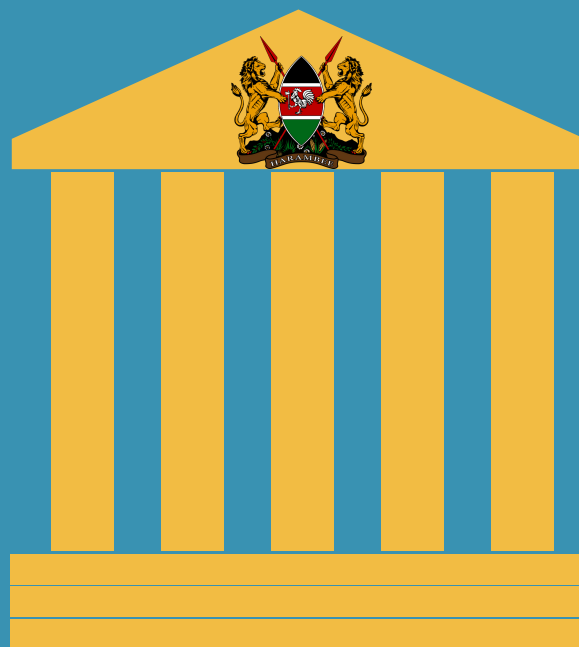
There are two levels of courts in Kenya, Superior Courts and Subordinate Courts. The Superior Courts consist of the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court, and the Environment and Land Court. The Subordinate Courts consist of Magistrates' Courts, Kadhis' Courts, Court Martials, and other courts or tribunals that Parliament might create through an Act of Parliament.



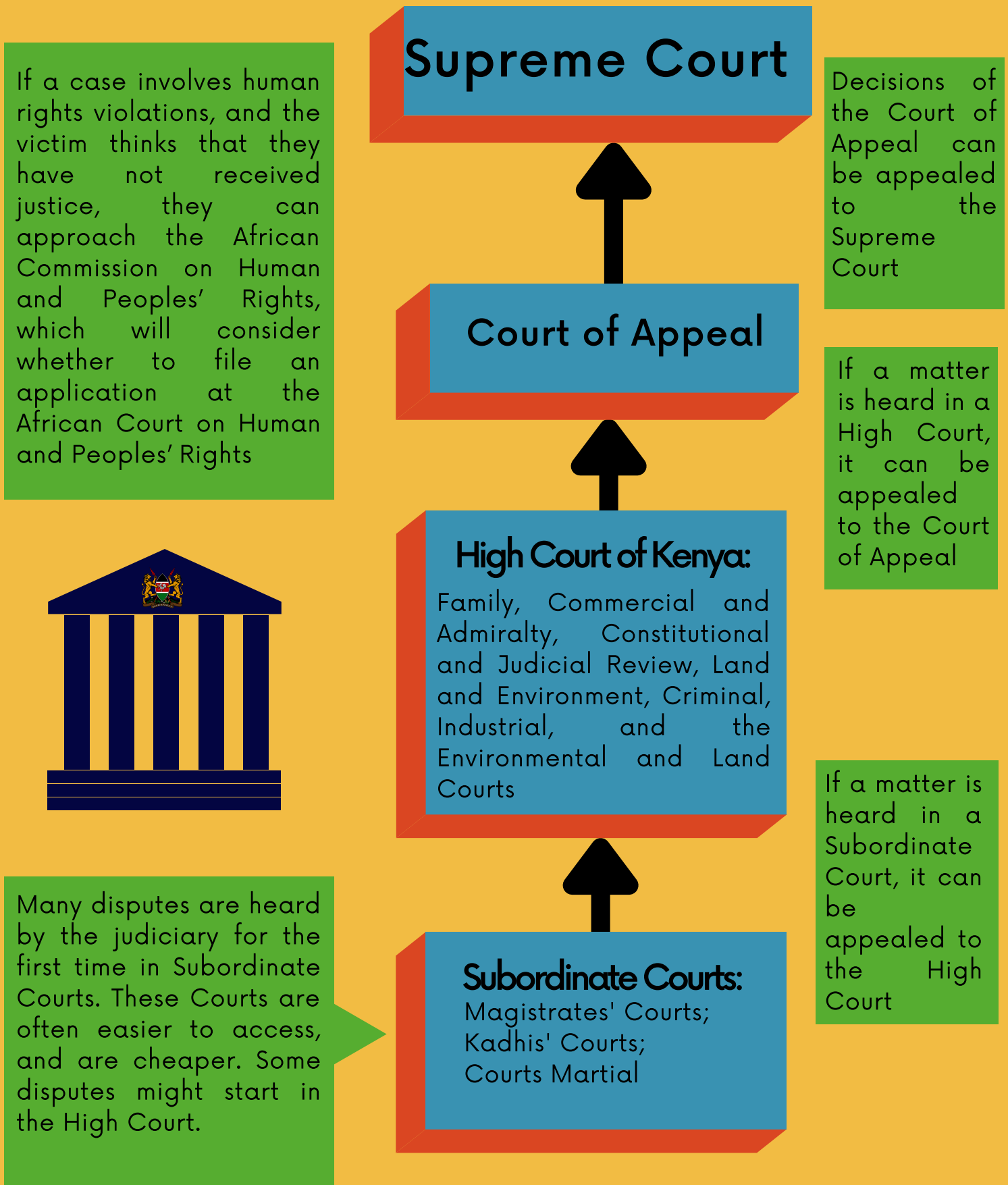
(CREDIT:2MASS)

The court structure

- **The Supreme Court** is the highest court in Kenya. It can hear cases that relate to presidential elections, appeals from the Court of Appeal, and can issue opinions about matters which concern County Governments, the interpretation or application of the Constitution, and in matters of general public importance. The Supreme Court is based in Nairobi.
- **The Court of Appeal** is a court that deals with appeals against decisions of the High Court.
- **The High Court of Kenya** – the High Court can hear all criminal and civil cases, as well as appeals from the Subordinate Courts. There are a number of different divisions of the High Court – including Family, Commercial and Admiralty, Constitutional and Judicial Review, Land and Environment, Criminal, Industrial, and the Environmental and Land Courts. These Divisions are based around the country, in 41 different locations.
- **Magistrates' Courts** hear the majority of cases in Kenya, both criminal and civil.
- **Kadhis' Courts** explore issues that relate to Muslim Law, including questions that relate to marriage, divorce, and inheritance. For a Kadhis' Court to hear a matter, all parties must be Muslims, and agree to the jurisdiction of the Court.
- **Court Martials** are held for people serving in the military.



The court structure



WHAT ARE RIGHTS AND WHAT DO THEY MEAN TO YOU?

The rights of every individual are an important part of the Kenyan Constitution. Many of these rights are found in the Bill of Rights, which is part of the Constitution, and which you can find at chapter 4 of the Constitution.

What is a right?

A right is a 'legal entitlement' – something that someone can claim from the State. It could be an entitlement to be free from State interference – for example, by demanding that the State not violate that person's privacy – or it could be an entitlement to demand something from the State, like access to healthcare.

EXAMPLE

A right can be something that requires the State to do something:

"I have the right to a fair trial"

If someone has a right to a fair trial, it requires the government to provide all of the things that make a legal process fair, which includes the right to be presumed innocent, the right to remain silent, the right to have a trial start reasonably quickly, and to have a legal representative, amongst many other things. The State needs to ensure that all of the requirements are provided to everyone who has a trial

Or it may require the State to not do something:

"I have a right not to be tortured"

The State cannot torture anyone, and must make sure that no one else in the country tortures anyone else.



(CREDIT: Commonwealth Secretariat)

By protecting rights in a constitution, a country shows its commitment to its people and to being held responsible for its actions. The protection of rights helps show that individuals and communities in a country have the ability to protect themselves from the actions of others, whether they are threatened by the government or by other people. Every person in Kenya has rights that come from the Constitution. They also have obligations. These obligations include the requirement that everyone respect the rights of others, and abide by the constitutional values in their own lives.

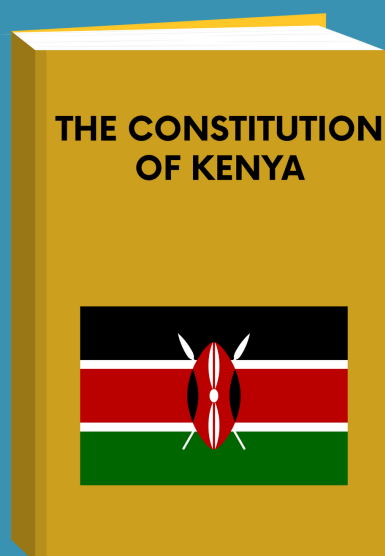
The indivisibility of rights

There are a range of different rights in the Bill of Rights, including, amongst many others, the right to life, the right to privacy, the right to freedom of expression. None of these rights are more important than any of the others. Every right is essential in order for people to be able to live a dignified life – so every right is equally important.

The rights fit together like a puzzle. They rely on each other, otherwise they would not be fully realised. The rights in the Bill of Rights are designed to create the foundation for everyone in Kenya to live with dignity, and to have all of the freedoms necessary to live lives that are dignified and meaningful, and that they have the potential to realise their potential.

Claiming your rights

The rights in the Bill of Rights are designed to ensure that everyone in the country is protected against abuse and mistreatment. Any person whose rights are threatened can take action to enforce their rights – or can even take action to protect the rights of others.



There are a range of different ways to ensure that the rights in the Bill of Rights are protected, but the most common way is to approach the Courts. Courts can order the State to take measures to protect rights, can order compensation, or can order another solution that helps people whose rights and freedoms are threatened or violated. The courts are the ultimate protectors of rights, but people can also obtain rights through other organisations.

There are also a number of organisations created by the Constitution, like the **Kenya National Commission on Human Rights ("KNCHR")** or the **National Gender and Equality Commission**. These bodies are mandated to assist people whose rights are threatened – for example, the KNCHR can investigate suspected abuses, and has a number of powers which it can exercise to make sure that threats to, or violations of, rights end, and that rights are realised, including through progressive realisation.



Other organisations, like non-governmental organisations, can help people claim their rights. The organisations frequently engage with the government in order to protect the rights of people in Kenya, and may have resources to take cases to court or to resolve the matter outside court.

Limiting rights

Although the rights in the Bill of Rights are vital, there are some circumstances where they can be limited. Sometimes we might not have our full rights because our rights interact with other people's, and we have to balance our rights with theirs. And, at other points, there may be good reasons for the



State to limit our rights. This should happen as infrequently as possible. However, sometimes limitation is unavoidable. For example, everyone has the right to protest, and to attend demonstrations. While this right must be protected, there may be occasions that people are not able to assert their right to protest exactly as they would like. Sometimes, because of reasons like public health, public safety, or national security, their right might be limited, which means that the person might not be able to claim the full extent of their right – for example, perhaps they might be prevented protesting in a particular location. When a right is limited like this, it must be clearly determined why it is important for the limitation to occur, and it is also important that no other rights are limited without good reason.

CASE STUDY: RIGHTS SHOULD ONLY BE LIMITED TO THE MINIMUM EXTENT POSSIBLE

Everyone retains rights, even when some elements have to be limited

The COVID-19 pandemic saw countries around the world introduce limits on the rights of the people living in their country. Many of these limitations were justifiable, on the grounds of public health. However, significant problems came about in some countries, including Kenya, about how these limitations were enforced. The police and military used unnecessary force, and violated people's rights without having a good reason – as the Court said 'Diseases cannot be contained by visiting violence on members of the public.' Because of this, in *Law Society of Kenya v Hilary Mutyambai and Others*, the Court ruled that the violent actions of the State were unconstitutional, even though there was a legitimate need to limit some rights to protect people against the spread of COVID-19.

AN INTRODUCTION TO THE BILL OF RIGHTS

The Bill of Rights tells us about the rights that every person in Kenya has, about how they can claim these rights, and about the situations where the government can limit rights. Because everyone in the country, including the State, is bound by the Bill of Rights, these rights protect people from having their rights abused by the State and by other people.

Why does Kenya protect human rights?

The Bill of Rights tells us why Kenya protects human rights: Rights help the country move towards its vision of “preserv[ing] the dignity of individuals and communities and to promot[ing] social justice and the realisation of the potential of all human beings.”

There are a number of rights in the Bill of Rights, all of which are designed to make sure that everyone in Kenya has their dignity protected and feels valued as a human being. Some rights require the State to take action and provide people with help, others, for the State to not interfere with people’s lives.

This is a summarised version of the rights in the Bill of Rights. To read these rights as they stand in the Constitution, you can find them online in the **full Constitution**:

http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_4

or in **Chapter 4: The Bill of Rights**:

<https://www.klrc.go.ke/index.php/constitution-of-kenya/110-chapter-four-the-bill-of-rights>



(CREDIT: Article 25)

RIGHTS AND FUNDAMENTAL FREEDOMS AT A GLANCE

- 26 – The right to life
- 27 – The right to equality and to be free from discrimination
- 28 – The right to dignity
- 29 – The right to freedom and security of the person
- 30 – Freedom from slavery, servitude and forced labour
- 31 – The right to privacy
- 32 – Freedom of conscience, religion, thought, belief, and opinion
- 33 – Freedom of expression
- 34 – Freedom and independence of the media
- 35 – The right of access to information
- 36 – Freedom of association
- 37 – The right to peaceful protect, assembly, demonstration and petition

- 38 – The right to make political choices
- 39 – Freedom of movement
- 40 – Protection of the property rights of individuals
- 41 – The right to enjoy fair labour practices
- 42 – The right to a clean and healthy environment
- 43 – Socio-economic rights, including the rights to:
 - Health care, including reproductive health care
 - Accessible and adequate housing
 - Reasonable sanitation
 - Clean and safe water
 - Social security
 - Education



- 44 – The right to use the language of one's choice, and to participate in the person's choice of cultural life.
- 45 – Family rights, including the rights to:
 - Have one's family recognised and protected by the State
 - Marry someone of the opposite sex, if both consent
 - Have equal rights in a marriage
- 46 – Consumer rights
- 47 – the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action
- 48 – Access to justice
- 49 – Rights for arrested people, including:

- The right to be informed of the reasons for the arrest, of the right to remain silent, and the consequences of not remaining silent
- To remain silent
- To have a legal representative
- Not to be forced to make a confession
- To be held separately from people serving sentences
- To appear before a court as quickly as possible
- 50 – The right to have every dispute or trial held publicly before an independent and impartial court.
- 51 – Rights of persons detained, held in custody or imprisoned

THE BILL OF RIGHTS: A SUMMARY

Every number relates to an article of the Constitution. The Bill of Rights consists of five parts, each containing a number of articles.

PART ONE

GENERAL PROVISIONS RELATING TO THE BILL OF RIGHTS

19 – The Bill of Rights is a central part of Kenya's democratic state, the government's social, economic and cultural policies should help build a culture of rights in Kenya.

20 – The Bill of Rights gives everyone rights and freedoms, and no one, including the government, should violate another's rights.

21 – The State and all of the institutions of the State have to obey the rights in the Bill of Rights.

22 – Everyone in Kenya can go to court if a right or freedom is threatened.

23 – Courts in Kenya must hear cases about threats to or violations of rights and fundamental freedoms. Courts must help protect rights, or order compensation if rights have been violated.

24 – Most rights in the Bill of Rights can be infringed ("limited"), but only in exceptional circumstances, when it is unavoidable and fair to do so.

25 – There are some rights that can never be limited. These are the right to be free from torture and cruel, inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, the right to a fair trial and the right to report unfair detention to a court.



PART TWO

RIGHTS AND FUNDAMENTAL FREEDOMS

26 – **Life** – Every person has the right to life, which begins at conception. No one can take another's life, unless there is a law that allows for it. Abortion is only permitted when medically necessary or authorised by law.

27 – **Equality** – Everyone has the right to be treated equally, to the equal enjoyment of all rights and freedoms. Women and men have equal rights and the right to equal opportunities. Some of the ways that people risk being discriminated against are because of their race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth, amongst a number of others.

CASE STUDY: EVERYONE HAS TO BE TREATED EQUALLY

Some groups are particularly vulnerable to discrimination, such as women and people in poverty

In 2013, in a case called *VMK v Catholic University of East Africa*, a Kenyan court considered a case that a woman brought against her employer. She claimed that she had been discriminated against at her place of work, on the grounds of sex, pregnancy and HIV status. As a result of this discrimination, she alleged that she was not given a permanent contract, was paid less than her colleagues doing the same job, did not receive payment for maternity leave, was not paid overtime, and was ultimately dismissed from her job because of her HIV positive status.

The treatment that the woman suffered at the hands of her employer violated her right to equality, and violated her right to fair labour practices. The court ruled in her favour, calling the employer's actions a 'gross abuse', and awarded her significant compensation for the unfair pay that she had received, and for the damage and hurt that the discrimination had caused to her rights to dignity and equality.

28 – **Dignity** – Every person is valuable and has dignity. They have the right to have this dignity respected by other people.

CASE STUDY: DIGNITY IS PROTECTED BY THE COURTS

If someone is humiliated or dehumanised, their dignity is undermined

In 2017, in *MWK and Another v Attorney General and Others*, the High Court had to consider a case where nude pictures of a minor female (a girl under the age of 18) being strip searched by police at a police station were posted online. The High Court emphasised that everyone had the right to have their dignity respected, and this requires the Police to respect individuals and their human rights in all matters. When the police arrest and search someone, they infringe on that person's rights, and a strip search, as happened in this case, would be particularly humiliating. While these infringements may be justifiable, the High Court noted that dignity is at the heart of the Constitution, and should be protected. If the desired outcome can be obtained within arrest and search, rights are protected. Even if a strip search is necessary, it should be conducted in circumstances which protect the dignity of an individual – for example, it should take place in private, away from cameras. This is particularly important when the matter involves a child.

29 – **Freedom and security of the person** – Everybody has the right to have their freedom of movement respected, and not to have any violence or harm done to them. If someone is imprisoned or detained, there must be a good reason. No one should be treated violently or tortured, be given to corporal punishment, or be treated cruelly, inhumanly or degrading in a degrading manner.

30 – **Freedom from slavery** – No one can be made a slave or kept in servitude, nor can they be required to perform forced labour.

31 – **Privacy** – Everyone has the right to privacy, which includes not to be searched, to have their home searched, to have their possessions taken away, or to have personal information or personal communication revealed.

CASE STUDY: THE RIGHT TO PRIVACY IMPOSES OBLIGATIONS ON THE STATE

The right to privacy includes requiring that the State keeps information about people securely

A 2020 Kenyan High Court case shows how important the right to privacy is, and also how the Constitution requires that the State protects the rights of everyone living in Kenya. The case, called *Nubian Rights Forum and Others v Attorney General*, found that a national ID scheme proposed by the State was unconstitutional, because it threatened the constitutional right to privacy of individuals in Kenya.

The government wanted to create a national database and to issue national ID cards to individuals in Kenya, which would be issued after personal data (including GPS information) and biometric data (things like fingerprints, DNA and voice patterns) had been collected from the person concerned. The Court held that this kind of data is “personal, sensitive and intrusive,” and can undermine people’s right to privacy, and so needs to be carefully protected. Because the government had not put in place a clear framework that would ensure the data was secure, the right to privacy was at risk of being undermined. The High Court forbid the government from collecting personal and biometric data until there was a clear way in which this information would be kept safe, which would ensure that everyone’s right to privacy was protected.

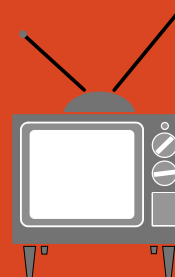


32 – **Freedom of belief** – Each person has the right to believe what they want to believe, and to practise their religion. No one can be discriminated against because of their beliefs or religion, or forced to act in a way contrary to their religion.

33 – **Freedom of expression** – Everyone has the right to express themselves freely, and to receive and share information. This includes academic and artistic freedom. It does not include propaganda for war, inciting people to violence, hate speech, or any advocacy of hatred based on ethnic grounds. The freedom of expression also requires people to respect the rights and reputation of other people.

34 – **Freedom of the media** – Media is permitted to be free and independent of government control, but does not extend to propaganda for war, inciting people to violence, hate speech, or any advocacy of hatred based on ethnic grounds. The government shall not punish anyone for their point of view or opinion.

35 – **Access to information** – Everyone has the right to information held by the State, and any information that someone else has if it is needed for the exercise of a right or freedom. If someone finds information about themselves that is untrue or incorrect, they have the right to have that information corrected or deleted.



CASE STUDY: FREEDOM OF EXPRESSION, MEDIA FREEDOM AND ACCESS TO INFORMATION CAN BE LINKED

The government should not be able to control how people receive their information or where they voice their opinion

In the *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, discussed earlier, the Court spoke about how closely linked the freedom of expression, media freedom and the right to access information are. By denying broadcasters licences, the court had to consider whether several broadcasters should receive licences. The Court emphasised that the Communications Commission is meant to be independent of the government, because media freedom, freedom of expression and the right to access information help people to know what the government is doing, and for them to comment on it, in support or opposition.

36 – **Association** – Every person has the right to choose who they want to spend time with. This includes the right to form, join or take part in the activities of an association, and the right not to be forced to join any organisation that they do not want to join. If the law requires that an organisation be registered, registration must not be unreasonably withheld, and registration cannot be cancelled without a hearing.

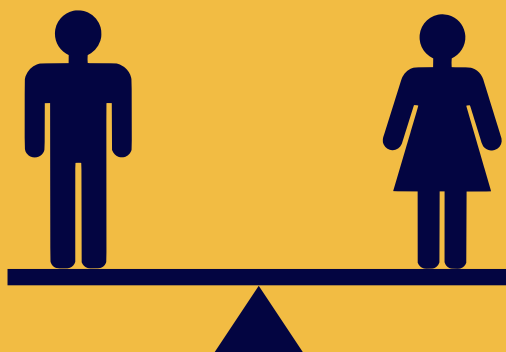
37 – **Assembly** – Everybody has the right to assemble, demonstrate, picket and present petitions to public authorities, but they must do all of these peacefully and may not be armed.

38 – **Political rights** – Kenyan citizens have the right to free and fair elections, to vote in these elections, and to stand as a candidate for public office or for a position within a political party of which they are a member. Kenyan citizens may take the political actions that they desire, which can include forming a political party, joining a political party, recruiting people to join a political party, or campaigning for a political party.

39 – **Freedom of movement** – Everyone has the right to free movement, including the right to leave Kenya. Kenyan citizens have the right to enter Kenya if they are outside the country, to remain in Kenya, and to reside anywhere in the country.

40 – **Property** – Everyone has the right to own property. The State may not take property away from anyone unless it is in the public interest and is authorised by a law passed by Parliament. The State must also protect intellectual property rights of people in Kenya.

41 – **Labour relations** – Everyone has the right to be treated fairly at work. This includes the rights to be paid fairly, to reasonable working conditions, to form, join or participate in the activities of a trade union, and to go on strike.



CASE STUDY: EVERYONE HAS TO BE TREATED EQUALLY

Everyone has the right to be treated fairly in the workplace

In the *VMK v Catholic University of East Africa* case, discussed under the right to equality, the Court found that the employer had violated the applicant's right to fair labour practices, and the employer had to pay a range compensation and damages.

42 – **Environment** – Everyone has the right to a clean and healthy environment. This includes the right to have the environment protected by the State, for present and future generations.

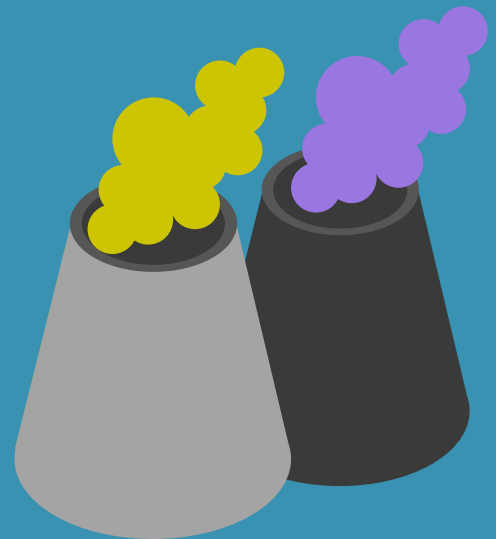


CASE STUDY: EVERYONE HAS TO BE TREATED EQUALLY

The government should not be able to control how people receive their information or where they voice their opinion

Pollution and mismanaged waste products can undermine many rights, including the right to life. This was made clear by Kenya's Land and Environment Court, in a case called *KM and Others v The Attorney General and Others*. The case looked at the impact that lead poisoning had had on the rights of the Owino Uhuru community, which was located near a smelter for recycled batteries.

For nearly 10 years, community members had fought against the smelter, which was badly managed, and caused deaths and illnesses in Owino Uhuru. The court said that this bad management had endangered the health of the workers at the smelter and the community's residents. This violated their rights to health, and to a clean environment. The government, who had not enforced regulations properly, and the companies involved were told to pay compensation – many millions of dollars – to the community, and to clean up the soil, water and waste.



The right to a clean environment is a duty that is imposed upon everyone in Kenya, including the State. Where this right is violated, it can threaten the right to life. Companies and the State may have to pay damages and, as far as possible, fix the problems that they have caused.

43 – **Economic and social rights** – Everyone has a range of social and economic rights that will help them lead a dignified life. These rights include the right to be as healthy as they can be, and to access health care services, including reproductive health care, the right to adequate housing and to reasonable sanitation facilities, to be free from hunger and able to access food that is sufficient in quantity and quality, to access clean water, and education. No one can be denied emergency medical treatment, and the State has to provide social security to everyone who cannot support themselves and their dependents.

CASE STUDY: SOCIO-ECONOMIC RIGHTS ATTEMPT TO PROVIDE THE BASIC NECESSITIES OF LIFE

Socio-economic rights, like the right to education, attempt to remove social injustice

In 2011, the High Court, in *John Kabui Mwai & 3 Others v Kenya National Examination Council* had to consider whether a particular policy discriminated against private school learners who wanted to enter a national school, as private school learners had to get higher marks than public school learners. In considering whether discrimination had taken place, the High Court reflected on the reasons that the right to education, and other socio-economic rights, had been included in the Constitution:

“...the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity.”

The Bill of Rights, and the inclusion of socio-economic rights, recognises that some people may need more help than others in order to reach a point where they are free from socio-economic need. Everyone has a right to education, but the limited resources of the State meant that not everyone could access this right immediately. This resulted in the State adopting policies that selected some, and not others. In this case, the fact that private school learners had had more advantages (in terms of resources and class sizes) meant that it was fair that there would be different treatment of private and public school learners. Socio-economic rights, and the Constitution generally, wanted to “remedy societal inequalities” and to help people who were previously unable to imagine dignified lives lead the lives that they deserve.

CASE STUDY: SOCIO-ECONOMIC RIGHTS IMPOSE OBLIGATIONS ON THE STATE

Socio-economic rights might take some time to realise, but the State must take forward steps

In 2018, a case appeared before the Supreme Court in which the right to shelter was considered. The case, *Mitu-Bell Welfare Society v The Kenya Airports Authority and Others* involved a matter where, in 2011, more than 15 000 people were evicted from their homes, which were then destroyed. They were evicted because the village, an ‘informal settlement’ which had been in existence for nearly 20 years, was close to an airport, and it was claimed that the village would pose a threat to travellers and to the public at large.

The Supreme Court noted that the people of the village had a right to housing – and that every citizen in Kenya had this right. The State may struggle to provide housing for everyone immediately, and may only be able to provide it to everyone over time – to ‘progressively realise’ the right. However, while taking steps to provide the right to everyone, they should not take the right away from people who have managed to provide for themselves, even if they live in an informal settlement. Although the people in this case had illegally occupied public land, the Constitution makes clear that “all land in Kenya belongs to the people of Kenya collectively.” Because of this, the families’ right to housing had to be protected by the State. Instead, the State removed the right. The Supreme Court ordered the State to compensate the families.



(CREDIT: GRID-ARENDAL)

44 – **Language and culture** – Everyone can use the language of their choice, and to participate in whatever cultural life they choose. If they belong to a cultural or linguistic community, they can form, join or maintain cultural and linguistic associations. No one can be forced to be involved in any cultural practices or rites.

45 – **Family** – Families are recognised as the foundation of society, and must be protected by the State. Adults have the right to marry someone of the opposite sex, provided both agree to be married. Throughout the marriage, up to and including any end of the marriage, both husband and wife have equal rights. The law must recognise marriages and systems of law from any tradition or religion, but these practices must be consistent with the Constitution.

46 – **Consumer rights** – Consumers have the right to goods and services of a reasonable quality, and to information that will help them use the goods properly. Consumers should have their health, safety and economic interests protected, and can be compensated for any injuries or losses caused by defective products or services.

CASE STUDY: CONSUMER RIGHTS ARE PROTECTED BY THE LAW

By passing the Consumer Protection Act, the government provides detail about the consumer rights protected in the Constitution

In 2021, the **Consumer Protection Act** came into force in Kenya. The Constitution protects consumer rights at Article 46 of the Constitution, but more detail was required in order for people in Kenya to be properly protected. The Consumer Protection Act provides details about all of the different protections that people in Kenya have, including details about credit agreements, about leases, about unfair practices that consumers might face, amongst other elements. The Consumer Protection Act also provides detail about the remedies that consumers have.



Every part of the Consumer Protection Act is intended to give more substance to the right found in the Bill of Rights. The additional detail is important, as lets us know more precisely about the content of our consumer rights.

47 – **Fair administrative action** – When decisions are made that affect people, the decisions should be made quickly, in accordance with the law, and be fair. If someone's rights or freedoms are adversely affected by a decision, they must be given written reasons for that decision.

48 – **Access to justice** – Everyone should be able to have access to justice. Any fees that are required must be reasonable, and should not prevent people from accessing justice.

49 – **Rights of arrested persons**– If someone is arrested, they must be told why they have been arrested, that they can remain silent, and the consequences of not remaining silent, and they must be told this in a way that they can understand. Everyone has the right to remain silent, to speak to a representative, not to be forced to confess, and to be held separately from convicted individuals. Everyone should appear in court within 24 hours of their arrest, or as soon as possible if courts are not available within 24 hours. At this court appearance, everyone should be informed of what they have done wrong or must be released, and should be allowed to be released on bail, unless there are good reasons not to be released on bail. No one should be kept in prison while they are waiting for their trial if the offence that they will face will only result in a fine or imprisonment of less than 6 months.

CASE STUDY: AN ARRESTED PERSON MUST BE TOLD WHY THEY HAVE BEEN ARRESTED

Failing to inform people of the reason for their arrest is unconstitutional

In *Mohamed Feisal and Others v Henry Kandie and Others*, the Kenyan High Court held that if a person is arrested and is not informed why they have been arrested, the rights of that person are violated. Every person must be informed immediately why they are arrested, and failing to do so constitutes a violation of their rights.



(CREDIT Mubiru Shafik)

50 – **Fair hearing** – Everyone has the right to have their legal disputes settled in a fair and public hearing, either in court or before another appropriate body. Everyone accused of a crime has the right to a fair trial, which includes being presumed innocent until proven guilty, being informed of the crime they are charged with, having enough time to prepare a defence, to have their trial in public, and for the trial to take place reasonably quickly. Everyone accused of a crime also has the right to a legal representative, and to be provided with a lawyer if they cannot afford one. They have the right to remain silent, and to have an interpreter, if their trial takes place in a language that they do not understand. Everyone also has the right to appeal against their conviction.

51 – **Right of people in detention, in custody or imprisoned** – Everyone in detention, in custody or in prison retains all of the rights and freedoms protected by the Bill of Rights, except for the rights that have to be limited by their detention or imprisonment. Everyone must be treated humanely in prison.

PART THREE

RIGHTS AND FUNDAMENTAL FREEDOMS

52 – Certain groups of people are, for a range of reasons, more vulnerable. The Constitution has special provisions that make clear the protections that apply to them.

53 – **Children** – In every matter involving a child, the best interests of that child are of the greatest importance. Every child has the right to a name and to a nationality, to free basic education, to food, shelter and health care, to be protected from violence and harm, including from harmful cultural practices, from exploitative labour, and from inhuman punishment, to parental care, which places an equal responsibility on both a mother and a father to care for the child, not to be detained, except when unavoidable, and, when it is unavoidable, to be detained for as short a period as possible, in appropriate conditions, away from adults.



CASE STUDY: THE BEST INTERESTS OF A CHILD MUST BE CONSIDERED IN EVERY CASE

**Children must be treated with 'care,
compassion, empathy and
understanding**

In 2017, in *MWK and Another v Attorney General and Others*, discussed earlier, the High Court emphasised that even when a child is thought to have done something wrong, they must be treated with as much compassion as possible. The Constitution requires that the "best interests of the child" be considered, and any action that could undermine their development should be avoided.

54 – **Persons with disabilities** – People with disabilities should be treated with respect and should not be demeaned. They should have access to educational institutions and facilities that are integrated into society, should be provided with access to all places they want to go, to public transport and to information. If a person with a disability wishes to use Braille, sign language or another means of communication, they should be allowed to do so, and should be provided with materials and devices that help them to participate in society.

55 – **Youth** – The State must ensure that young people have access to relevant education and training programmes, to employment, to the opportunity to participate in political, social and economic spheres of life. Young people must be protected from harmful cultural practices and must not be exploited.

56 – **Minorities and marginalised groups** – The State must put in place affirmative action programmes to help minorities and marginalised groups participate in society, which includes providing special opportunities to access education and employment, to develop their cultural values, languages and practices, and to participate and be represented in government.

57 – **Older members of society** – Older people must have their rights protected by the State, including the right to fully participate in society, to pursue their personal development, not to be abused, and to receive reasonable care and assistance from their family and from the State.

PART FOUR

STATE OF EMERGENCY

58 – **State of Emergency** – When there is a threat to the nation (which could be a war, an invasion, a natural disorder or another public emergency), the Bill of Rights allows for certain rights to be suspended. This can only happen when the suspension is definitely necessary to combat the threat. Even in states of emergency everyone can be held accountable for breaking the law.

PART FOUR

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION

59 – **The Kenya National Human Rights and Equalities Commission** – The Commission is intended to promote human rights in Kenya. Everyone in Kenya has the right to complain to the Commission if they think a right or a freedom has been violated or threatened. It can investigate suspected human rights abuses, unfair treatment and abuses of power at private and public institutions, including all organs of State, such as the armed forces. The Commission has a particular obligation to promote gender equality.

CONCLUSION

The point of knowing your rights, of knowing about the Constitution, is for you to be able to lead a dignified life, to have the opportunity to fulfil your potential as a human being. But this opportunity, these rights, come with responsibilities. Each of us needs to make sure that we hold the government to account. We need to make sure that the government fulfils the obligations that the Constitution imposes on it, and doesn't violate our rights or the rights of any other residents of Kenya. Each one of us has a responsibility to treat other people with the dignity and the respect they deserve. If we think our rights should be respected, we need to respect other people's rights.

The Constitution has a vision of the society that Kenya can be. Progress has been made in realising this vision. But there is still much to do, still so many steps that need to be taken in order for everyone in Kenya to enjoy their rights. By monitoring the government, and by exhibiting the constitutional values in our lives, each of us can bring this vision closer to coming to life.



ORGANISATIONS THAT CAN HELP YOU CLAIM YOUR RIGHTS

The Judiciary

Physical address: Judiciary Headquarters, Supreme Court Building, City Hall Way, Nairobi

Postal address: P.O. Box 30041 – 00100, Nairobi

Telephone: +254 20 2221221 or 0730 181600/1700/1800

Email: info@judiciary.go.ke

Web: www.judiciary.go.ke

Kenya National Commission on Human Rights

Head Office address: CVS Plaza 1st Floor, Kasuku Lane, Off Lenana Road,

Postal address: P.O. Box: 74359-00200 Nairobi

Telephone: +254-020-3969000 or 0733 78 00 00 or 0736 78 00 00 or 0724 256 448

WhatsApp: 0798 849 871

Fax: +254-020-2716160

SMS: 22359

General Enquiries: haki@knchr.org

Complaints: complaint@knchr.org

Twitter: @hakiKNCHR

Web: <https://www.knchr.org/>

The Commission on Administrative Justice - Office of the Ombudsman

Physical address: 2nd Floor, West End Towers, Opposite Aga Khan High School off Waiyaki Way, Westlands

Postal address: P.O. Box 20414 – 00200, Nairobi

Telephone: +254-20-2270000 or 2303000 or 2603765 or 2409574 or 0777 125818

Toll free: 0800221349

Email: info@ombudsman.go.ke

Web: <https://www.ombudsman.go.ke/>



The National Gender and Equality Commission

Physical address: 1st Floor, Solutions Tech Place, Longonot Road, Upperhill, Nairobi

Postal address: P.O.Box 27512-00506, Nairobi.

Telephone: +254 20 2727778 or +254 709 375 100

Toll free: 0800 720187

SMS: 20459

Email: info@ngeckkenya.org

Web: <https://www.ngeckkenya.org/>

Twitter: @NGECKKenya

The Independent Policing Oversight Authority

Physical address: 1st Ngong Road, ACK Garden Annex

Postal address: P.O. Box 23035-00100 Nairobi

Telephone: +254 20 490 6000

Complaints call centre: 1559

Email: complaints@ipoa.go.ke

Web: <https://www.ipoa.go.ke>

Ethics and Anti-Corruption Commission

Physical address: Integrity Centre, Jakaya Kikwete or Valley Road Junction

Telephone: (020) 2717468 or 0727 285663 or 0733 520641

Fax: (020) 2240954

Email: eacc@integrity.go.ke or report@integrity.go.ke

Web: <https://eacc.go.ke/>