

Securing the Realisation of Environmental and Social Rights for Persons with Disabilities in Kenya

By: *Kariuki Muigua**

Abstract

The Constitution of Kenya, 2010 promotes the development agenda and also human rights in general. The inclusion of all persons is thus provided for. It is necessary to streamline the participation of Persons with Disabilities (PWDs) in society utilizing the legal infrastructure already in place and to also secure the realisation of their human rights. These include environmental and social rights. There are challenges facing PWDs in their quest to be fully recognized and included in society. Consequently, there is need for the empowerment of PWDs, the protection and safeguarding of their human rights and non-discrimination. The writer critically examines the issue of how to secure the full realisation of environmental and social rights for PWDs under the Constitution of Kenya, 2010 and the legal framework in general. The paper further looks at the meaningful inclusion of persons with disabilities in all policies and programmes in Kenya.

1.0 Introduction

The enactment of the current Constitution of Kenya, 2010¹ ushered in an era where human rights and the participation of all in the development agenda of the country gained new weight. Central to this is the concept of empowerment of all persons. This is captured in the spirit of the preamble and also under Article 10 thereof which spells out the national values and principles of governance².

* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [March, 2018].

¹ Constitution of Kenya, 2010, Kenya Government Printer

² Most noticeable are the principles of equality, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, inter alia

The Constitution provides for the inclusion of all persons in the development agenda. Such inclusion, when defined within the circles of persons with disabilities, means the concept of everybody - irrelevant of any kind of ability - being accepted into society without pity, restriction or limitation.³

Persons with Disabilities (PWDs) are also known as persons with special abilities (PWSA). The Kenyan legal and institutional framework had not adequately taken into account the rights of PWDs prior to the enactment of the Persons with Disabilities Act of 2003 and the Constitution of Kenya 2010⁴.

There is a need to secure the realization of human rights for PWDs in Kenya. They require greater inclusion in access to and management of natural resources and the environment plus all other sectors. PWDs need not be afforded special favours; they should be exposed to an enabling environment through education, access to information⁵ and empowerment to enable them actualize their special abilities.

³Cbm, 'Inclusion means equal rights for all.' Available at: <http://www.cbm.org/Inclusion-246762.php> [accessed 2 October 2013]

⁴ Article 54, Constitution of Kenya 2010.

⁵ See the *Access to Information Act, No. 31 of 2016* whose object and purpose of the Act is to – (a) give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; (b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; (c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law; (d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; (e) provide for the protection of persons who disclose information of public interest in good faith; and (f) provide a framework to facilitate public education on the right to access information under this Act. The Act guarantees that subject to this Act and any other written law, every citizen has the right of access to information held by – (a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

PWDs on the other hand, have an obligation to participate, contribute and advance the aspirations of the country and to respect the rights of other people in the society since rights go hand in hand with obligations.

PWDs have not been fully considered in the development discourse. The manifest challenges in the near exclusion of PWDs stem from a discriminatory attitude that has been institutionalized in our various laws in a way that sees the same laws cater for general persons without offering specialized regard to PWDs.

This paper critically examines the issue of how to secure the full realization of environmental and social rights for PWDs under the Constitution of Kenya, 2010 and the legal framework in general. The discourse further explores the meaningful inclusion of persons with disabilities in the development agenda. The argument is that such inclusion should not be driven by pity or temporary uplifting.

The writer suggests solutions and opportunities based on the existent local and international frameworks and policies to offer all round inclusiveness of PWDs in policies and programmes. There is need for empowerment of persons with disabilities in all other aspects including social, economic amongst others. PWDs are entitled to full realization of their environmental and social rights as well as fundamental freedoms without discrimination of any kind on the basis of disability.

2.0 Overview of International Legal and Institutional Framework on Persons with Disabilities

International human rights law lays down obligations which States are bound to abide by. By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to shield individuals and groups

from human rights abuses. The obligation to fulfill means that states must take positive action to facilitate the enjoyment of basic human rights.⁶

There are various legal instruments at the international level that seek to provide a guiding legal framework on the minimum standards that must be attained in the domestic laws dealing with the welfare of persons with disabilities so as to ensure that their rights are well entrenched, protected and promoted by the member states. This section examines such legal instruments. Of particular concern are the international instruments that form part of Kenya's legal framework on the protection of the rights of PWDs, on the basis of Article 2 (6) of the Constitution of Kenya, 2010⁷, which provides that treaties or conventions ratified by Kenya shall form part of the Law of Kenya.

2.1 The Universal Declaration of Human Rights (UDHR)⁸

The UDHR is the main legal instrument that sets down the basic principles guiding the recognition, promotion and protection of the human rights in the world. It informs the setting of standards, laws and institutions for the

⁶ See United Nations Human Rights, <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> [accessed 2 October 2013].

⁷ Constitution of Kenya, 2010, op. cit.; See also the Treaty Making and Ratification Act, No. 45 of 2012 which was enacted apply to – (a) multilateral treaties; (b) bilateral treaties which deal with –

- (i) the security of Kenya, its sovereignty, independence, unity or territorial integrity;
- (ii) the rights and duties of citizens of Kenya;
- (iii) the status of Kenya under international law and the maintenance or support of such status;
- (iv) the relationship between Kenya and any international organisation or similar body; and
- (v) the environment and natural resources.

⁸UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 2 October 2013] UN Doc A/810 at 71 (1948)

protection of human rights in States around the world and is always considered to be part of the International Bill of Human Rights.⁹

Everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹⁰. Furthermore, it provides that no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. PWDs are therefore to be treated as any other person without undue regard to their disability status.

Under the UDHR, everyone has the right to freedom of opinion and expression including the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹¹

The UDHR further provides for the right of all to participate in the governance affairs of their country.¹² In this respect, the UDHR applies to the inclusion of PWDs in Kenya in governance issues. The UDHR provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.¹³

⁹ The international Bill of Human rights entails the UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights.

¹⁰ UDHR, Article 2.

¹¹ *Ibid*, Article 19

¹² *Ibid*, Article 21

¹³ *Ibid*, Article 22

The right to education is safeguarded in the UDHR¹⁴. It provides that such education shall be free and compulsory, at least in the elementary and fundamental stages. It requires that technical and professional education should be made generally available and higher education should be equally accessible to all on the basis of merit. Relating this to the Kenyan scenario, it is vital that education is guaranteed for all. This strengthens the enabling environment for PWDs hence they can actualize their special abilities. Article 54 of the Constitution of Kenya, 2010 secures the right of PWDs to access educational institutions and facilities in society.

Education under the UDHR should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms¹⁵. General human rights and the most basic freedoms are herein secured. Such security is guaranteed to all humans. In society, PWDs are not to be viewed any differently.

2.2 International Covenant on Civil and Political Rights (ICCPR)¹⁶

This Covenant was enacted for the purposes of promotion of the ideal of free human beings enjoying civil and political freedom.¹⁷ The ICCPR offers rights and prohibitions such as everyone having the inherent right to life.¹⁸ Under the ICCPR, torture is prohibited and so is cruel, inhuman or degrading treatment¹⁹ and slavery²⁰. Everyone has the right to liberty and security of person²¹ and if a person is to be deprived of their liberty, they should be treated with humanity and respect for the inherent dignity of the human person.²² The ICCPR provides that everyone has the right to recognition

¹⁴ Ibid, Article 26(1)

¹⁵ Ibid, Article 26(2)

¹⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 3 October 2013]

¹⁷ See preamble.

¹⁸ ICCPR at Article 6(1).

¹⁹ Ibid, Article 7.

²⁰ Ibid, Article 8.

²¹ Ibid, Article 9.

²² Ibid, Article 10.

everywhere as a person before the law.²³ PWDs are free human beings who should enjoy their full civil and political rights.

2.3 Draft Principles on Human Rights and the Environment²⁴

PWDs and all persons alike have the right to active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development²⁵. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁶

The ICESCR aims to ensure the protection of economic, social and cultural rights. It recognises that all peoples have the right of self-determination. This is to enable them freely determine their political status and freely pursue their economic, social and cultural development²⁷.

Article 2 of the ICESCR places an obligation on each State Party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It also obligates them to adopt legislative measures that will facilitate enjoyment of such rights. Kenya has made commendable progress towards implementation of this, as seen under the current Constitution.

²³ Ibid, Article 16.

²⁴ E/CN.4/Sub.2/1994/9/ Annex I (1994).

²⁵ Principle 18.

²⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 3 October 2013].

²⁷ ICESCR at Article 1(1).

Chapter Four of the Constitution of Kenya, 2010 provides for the Bill of Rights and fundamental freedoms that are to be enjoyed by all persons without any discrimination. Indeed, it provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies²⁸. It further provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings²⁹.

The Constitution of Kenya, 2010 prohibits either the State or any person from discriminating against any person on any of these grounds including: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth³⁰.

States parties are to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.³¹ Furthermore, the ICESCR recognizes the right of education to everyone³². The empowerment of PWDs through education as advocated by the writer is thus anchored in international law such as the ICESCR.

2.5 The United Nations Convention on the Rights of Persons with Disabilities³³

This convention was passed to facilitate the realization of human rights for the special group of PWDs. It re-emphasizes the equality of all persons regardless of their physical status.³⁴ The convention in its preamble also states that PWDs should have the opportunity to be actively involved in

²⁸ Constitution of Kenya, 2010, Op. Cit. Article 19(1).

²⁹ Ibid, Article 19(2).

³⁰ Ibid, Article 27 (4).

³¹ ICESCR at Article 3.

³² Ibid, Article 13

³³UN General Assembly, *Convention on the Rights of Persons with Disabilities*, resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at:

<http://www.refworld.org/docid/45f973632.html> [accessed 2 October 2013].

³⁴ Ibid, Preamble.

decision-making processes about policies and programmes. The purpose of the Convention as laid out under Article 1 is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The Convention outlines some important principles for promotion of the rights of PWDs under Article 3 which are as follows: Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Noteworthy is the principle of full and effective participation and inclusion in society for PWDs. This principle together with that of equality of opportunity can only be effectively promoted where PWDs are armed with the relevant skills and knowledge to empower them economically, socially, culturally and to strengthen their role in the development agenda.

Article 4 of the Convention lays down the general obligations of the member states which include adopting all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. Member states are also required to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. PWDs are also entitled to protection and promotion of their human rights in all policies and programmes initiated by member states.

The Convention seeks to alleviate the lives of PWDs through promoting research and development in the use of new technologies, including information and communications technologies, mobility aids, devices and

assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.³⁵

Further, the Convention provides that with regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights.³⁶ Article 4(3) provides for consultations between the state and the representative organisations in decision making processes.

The foregoing obligations are meant to ensure that the member states do more than just put it down on paper that PWDs have recognizable rights. They must take practical steps to ensure that the same is promoted at all levels and by all persons in their territories. Article 8 further provides for awareness raising by member states for PWDs in recognition of their special skills and abilities *inter alia*.

In order to enable PWDs live independently and participate fully in all aspects of life, State Parties should take appropriate measures to ensure they are on an equal basis with others in matters physical environment, transportation, information and communications plus their respective systems, and to other facilities and services open or provided to the public, both in urban and in rural areas³⁷.

Other important provisions are to be found under Article 24 (1) which provides that States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties are to ensure an inclusive education system at all levels and lifelong learning directed to the full development of human potential and sense of dignity and self-worth, and

³⁵ *Convention on the Rights of Persons with Disabilities*, Article 4(g).

³⁶ *Ibid*, Article 4 (2).

³⁷ *Ibid*, Article .9

the strengthening of respect for human rights, fundamental freedoms and human diversity, the development by PWDs of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential and to enabling persons with disabilities to participate effectively in a free society.

Relating this Convention to the Kenyan scenario, the Constitution of Kenya, 2010 has specific provisions on the rights of PWDs as a group of persons recognised under it. It is to the effect that a person with any disability is entitled to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning, to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person, to reasonable access to all places, public transport and information, to use Sign language, Braille or other appropriate means of communication, and to access materials and devices to overcome constraints arising from the person's disability.³⁸ Further, it places an obligation on the State to ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities³⁹.

The former Constitution of Kenya did not have much to offer in terms of specific protection of persons with disabilities. However, Parliament had already taken initiative to promote equality and equity for all groups of persons without necessarily making it appear like a reactive measure resulting from international law pressure. For instance, *The Persons with Disabilities Act* was enacted in 2003. The problem, however, has been full implementation of the same. There is need for ensuring that all stakeholders, especially in the education sector, take part in promoting and protecting the rights of PWDs. In South Africa, efforts to implement inclusive education started before the *Convention on the Rights of Persons with Disabilities* came into force. It is an obligation for every educational institution to ensure

³⁸ Constitution of Kenya, 2010, op. cit. Article 54(1).

³⁹ Ibid, Article 54(2).

physical accessibility for PWDs.⁴⁰ Kenya should also ensure that not only special institutions of learning conform to the international standards for protection of PWDs' rights but all considering that some forms of disability do not necessarily require a person to join a special institution. As such, wherever they choose to be, they should find a conducive environment that enables them to achieve their life goals, as envisaged under the *UN Convention on the Rights of Persons with Disabilities*.

2.6 Committee on the Rights of Persons with Disabilities

This Committee is established under Article 34 of the United Nations Convention on the Rights of Persons with Disabilities.⁴¹ The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors implementation of the Convention by the States Parties. All States parties are under obligation to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Convention and thereafter every four years. The Committee examines each report and shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned.⁴²

The Optional Protocol to the Convention gives the Committee competence to examine individual complaints with regard to alleged violations of the Convention by States parties to the Protocol.⁴³ It is however noteworthy that Kenya has neither signed nor ratified the Optional Protocol yet and may

⁴⁰Realisation of inclusive education for persons with disabilities at rural universities in South Africa. Posted on 10 September 2013 available at: <http://africlaw.com/2013/09/10/realisation-of-inclusive-education-for-persons-with-disabilities-at-rural-universities-in-south-africa/> [accessed 16 October 2013].

⁴¹ UN General Assembly, Convention on the Rights of Persons with Disabilities, op. cit.

⁴² Visit <http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> [accessed 2 October 2013].

⁴³ Article I, UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II, available at: <http://www.refworld.org/docid/4680d0982.html> [accessed 2 October 2013].

therefore not be reported to the Committee by individual complainants. It is however still bound to submit the regular reports on the progress in implementation of PWDs' rights.⁴⁴

2.7 African (Banjul) Charter on Human and Peoples' Rights

The Banjul Charter⁴⁵ provides that every citizen should have the right to participate freely in their government, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen is conferred with the right to equal access to the public service of their country as well as the right of access to public property and services in strict equality of all persons before the law. In Kenya, participation of the people in governance is envisaged in the national values and principles of governance enshrined in Article 10 of the Constitution.

Some documented cases uphold the sanctity of general human rights. The case of *the Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* asserted the rights of the Ogoni people.⁴⁶ In South Africa, in a matter involving a local council's termination of water supply to a block of flats (*Residents of Bon Vista Mansions v Southern Metropolitan Local Council*⁴⁷), the Court held that this amounted to a failure to 'respect' the right (of continuing access) to water, that this was prima facie in breach of the

⁴⁴ All States parties to the Convention on the Rights of Persons with Disabilities are obliged to submit regular reports to the Committee on how the rights are being implemented. Available at: <http://www.refworld.org/publisher/CRPD.html> [accessed 16 October 2013].

⁴⁵ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

⁴⁶ In 1996, the Social and Economic Rights Action Centre (SERAC) brought a case against Nigeria to the African Commission on Human and Peoples' Rights alleging that the military government had, through its business relationship with Shell Petroleum Development Corporation (SPDC), exploited oil reserves in Ogoniland with no regard for the health or environment of the Ogoni People. The Commission found, in a 2001 decision on the merits, that Nigeria had violated many of the rights enshrined in the African Charter on Human and Peoples' Rights (Arts. 2, 4, 14, 16, 18(1), 21 and 24)

"The SERAC case" available at: <http://www.escri-net.org/docs/i/404115>

⁴⁷ 2002 (6) BCLR 625 (W)

obligations of the local council (which was part of the state), and that accordingly there was an onus on the council to justify it in a manner consistent with the Constitution.

2.8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁴⁸

Article 23 of the Protocol⁴⁹ specifically provides for the protection of the rights of women with disabilities. It is to the effect that States Parties must undertake to ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making; and ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

According to Kenya's Initial National Report of 31st August 2011 on the rights of PWDs submitted to the United Nations, women constituted over 50 per cent of the total population yet they remained largely marginalized. Generally, women face a myriad of challenges including the fact that they have limited access to and control of resources, be it natural or not. They also miss out on other socio-economic opportunities. Fewer women enrolled in mainstream education as compared to men and the levels of stigma surrounding them in every circle of life were at alarming levels.⁵⁰

⁴⁸Available at: <http://www.achpr.org/instruments/women-protocol/> [accessed 2 October 2013]

⁴⁹ Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998, available at: <http://www.refworld.org/docid/3f4b19c14.html>.

⁵⁰Kenya's initial national report of 31st August 2011 on the rights of PWDs submitted to the United Nations available at: http://www2.ohchr.org/SPdocs/CRPD/futuresession/CRPD.C.KEN.1_en.doc. [accessed 2 October 2013]

The national report cited that women with disabilities were more vulnerable, neglected and deprived of their rights. Traditional and conservative views were blamed for reinforcing the misconception about the ability of women and girls with disabilities to adequately perform their roles as other peers. Article 27(3) of the Constitution of Kenya, 2010 guarantees all citizens (including women and men with disabilities) the right to equal treatment. Equality and equity should entail equal rights in political, economic, cultural and economic spheres of life.

2.9 Sustainable Development Goals and the Rights of Persons with Disabilities

The 2030 Agenda and the Sustainable Development Goals (SDGs)⁵¹ is a plan of action for people, planet and prosperity. It is meant to eradicate poverty in all its forms and dimensions, including extreme poverty, which is considered to be the greatest global challenge and an indispensable requirement for sustainable development.⁵²

The 17 Sustainable Development Goals and 169 targets seek to build on the Millennium Development Goals and complete what these did not achieve. They seek to realize the human rights of all and to achieve gender equality and the empowerment of all women and girls. They are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.⁵³

The SDGs reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. They emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without

⁵¹A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.

⁵² United Nations Sustainable Development knowledge Platform, "Transforming our world: the 2030 Agenda for Sustainable Development-Preamble," <https://sustainabledevelopment.un.org/post2015/transformingourworld>

⁵³ Ibid.

distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.⁵⁴

The SDGs also seek the empowerment of people who are vulnerable including all children, youth, persons with disabilities (of whom more than 80% live in poverty), people living with HIV/AIDS, older persons, indigenous peoples, refugees and internally displaced persons and migrants. The aim is to take further effective measures and actions, in conformity with international law, to remove obstacles and constraints, strengthen support and meet the special needs of people living in areas affected by complex humanitarian emergencies and in areas affected by terrorism.⁵⁵

The SDGs also seek to commit countries to provide inclusive and equitable quality education at all levels – early childhood, primary, secondary, tertiary, technical and vocational training. All people, irrespective of sex, age, race, ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long learning opportunities that help them acquire the knowledge and skills needed to exploit opportunities and to participate fully in society. The goal is to also provide children and youth with a nurturing environment for the full realization of their rights and capabilities, helping our countries to reap the demographic dividend including through safe schools and cohesive communities and families.⁵⁶

In order to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, Goal 4 provides that all countries should ensure that by 2030, they eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

children in vulnerable situations. They are also supposed to build and upgrade education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all.

Goal 8 provides that one of the ways of promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all will be to achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value by the year 2030.

Countries are also supposed to ensure that, by 2030, they empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.⁵⁷

Goal 11 requires that, by 2030, countries should provide access to safe, affordable, accessible and sustainable transport systems for all, improving road safety, notably by expanding public transport, with special attention to the needs of those in vulnerable situations, women, children, persons with disabilities and older persons. Related to this is also the requirement to provide universal access to safe, inclusive and accessible, green and public spaces, in particular for women and children, older persons and persons with disabilities.⁵⁸

The SDGs provide good guidelines to countries to promote sustainable development agenda that is sensitive and responsive to the rights and special needs of PWDs and they should therefore be incorporated across all sectors in order to achieve an all-inclusive and meaningful development agenda for all persons in Kenya. While Kenya has shown its willingness to adopt these goals, they should be actively promoted and implemented for

⁵⁷ Goal 10.2.

⁵⁸ Goal 11.7.

the sake of all people including PWDs.⁵⁹ PWDs should actively participate in the realisation and enjoyment of sustainable development. They should be free from poverty, access justice and also access funding for development as envisaged in the SDGs 2030 Agenda.⁶⁰

3.0 Domestic Legal and Institutional Framework on the Protection of the Rights of Persons with Disabilities (Pwds)

This section offers a broad overview of the current legal and institutional framework in Kenya governing and protecting the rights of PWDs. In specific focus will be the Persons with Disabilities Act⁶¹ and the Constitution of Kenya, 2010.

3.1 Persons with Disabilities Act

This Act⁶² was enacted to provide for the rights and rehabilitation of persons with disabilities; to achieve equalization of opportunities for persons with disabilities; and to establish the National Council for Persons with Disabilities.⁶³ Section 2 of the Act defines “disability” to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.

To facilitate the realization of the above-mentioned purpose, the Act establishes the National Council for Persons with Disabilities⁶⁴. It is charged with the task of promoting the rights of persons with disability in Kenya and mainstreaming disability issues into all aspects of national development.⁶⁵

⁵⁹ See Framework for Implementing Sustainable Development Goals (SDGs) In Kenya, November 25, 2016, available at

<https://ayubmacharia.com/2016/11/25/framework-for-implementing-sustainable-development-goals-sdgs-in-kenya/>

⁶⁰ For instance, see SDG goals 1, 16 & 17.

⁶¹ No. 14 of 2003, Laws of Kenya.

⁶² Persons with Disabilities Act, No. 14 of 2003, Revised Edition 2010 [2003] Government Printer, Nairobi.

⁶³ Ibid, Preamble.

⁶⁴ Ibid, section 3.

⁶⁵ Website, Visit <http://ncpwd.go.ke/> [accessed 2 October 2013].

The functions of the Council are set out under section 7 of the Act as *inter alia*: to formulate and develop measures and policies designed to achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they obtain education and employment, and participate fully in sporting, recreational and cultural activities and are afforded full access to community and social services; advise the Minister on the provisions of any international treaty or agreement relating to the welfare or rehabilitation of persons with disabilities and its benefits to the country; and encourage and secure the establishment of vocational rehabilitation centers and other institutions and other services for the welfare, rehabilitation and employment of persons with disabilities.

Part III of the Act provides for the rights and the privileges of Persons with Disabilities. Section 11 places an obligation on the Government to take steps to the maximum of its available resources with a view to achieving the full realization of the rights of persons with disabilities set out in this Part. Section 12 of the Act prohibits any person from denying a person with a disability access to opportunities for suitable employment. Section 19 of the Act mandates the Council to work in consultation with the relevant agencies of Government to make provisions in all districts for an integrated system of special and non-formal education for persons with all forms of disabilities and the establishment where possible, of Braille and recorded libraries for persons with visual disabilities. In recognition of the international recognition of civic rights, part IV of the Act provides for the civic rights of PWDs.

The Government of Kenya noted in the Initial Report 2011, as cited above, on the rights of PWDs presented to the United Nations that the PWD Act of 2003 did not specifically take into account the peculiar needs of women and girls with disabilities⁶⁶. On the other hand, the Children Act⁶⁷ provides for the protection of the rights and welfare of the child in which special emphasis is placed on the girl child and children with disabilities.

⁶⁶ Kenya's initial national report of 31st August 2011, op. cit.

⁶⁷ No. 8 of 2001, Kenya Government Printer.

In South Africa, the Government is under a duty to give special assistance to groups who find it particularly difficult to meet their basic needs and such groups include people living with disabilities *inter alia*.⁶⁸ The Association for People with Disabilities (APD) is a social service provider in South Africa that partners with PWDs with the aim of removing disabling barriers so that they can be fully integrated into society.⁶⁹

The National Council should closely work with other relevant stakeholders to protect and promote recognition and realization of the rights of PWDs.

3.2 The Constitution of Kenya, 2010

The Constitution of Kenya, 2010 is founded on the pillars of the national values and principles of governance as set out under Article 10 thereof. Article 10(1) provides that these values and principles shall bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Such values and principles have been listed to include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

Chapter Four of the Constitution provides for the Bill of Rights and fundamental freedoms that are to be enjoyed by all persons without any discrimination. The framework for social, economic and cultural policies is therein established under Article 19(1).⁷⁰ Discrimination of PWDs among other persons of different status is prohibited under Article 27(4) of the Constitution of Kenya, 2010⁷¹.

⁶⁸ Economic, Social and Cultural Rights in South Africa. A study prepared for the Swedish NGO Foundation for Human Rights by the Human Rights Committee of South Africa, January 2000, p 96.

⁶⁹ *Ibid*, p 120.

⁷⁰ Constitution of Kenya, 2010 *op. cit.*

⁷¹ Constitution of Kenya, 2010 *op. cit.*

The Constitution guarantees the right to a clean and healthy environment⁷². Enforcement of environmental rights under Article 70 of the Constitution is also guaranteed. If a person alleges that a right guaranteed under Article 42 has been or is likely to be denied, violated, infringed or threatened, the person may apply to Court for redress in addition to any other legal remedies that are available in respect to the same matter. However, it is important to note that citizens have a duty to participate in environmental conservation and protection. Ojwang Ag. J (as he then was) in *Park View Shopping Arcade v Kangethe & 2 others*⁷³ observed that "...Environmental conservation, by its intrinsic character, cannot be supposed to be a task for Government alone, and all citizens have a right and a duty to make an input..."⁷⁴

Article 43 (1) provides for the economic and social rights of all persons including the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.

Article 48 guarantees the right to access to justice. This right has for the longest time been considered as one of the most important rights entitled to a person in a democratic society⁷⁵. Over time, judicial and legislative reforms have been initiated with the aim of improving access to justice in Kenya. However institutional inadequacies and lack of appropriate policy and

⁷² Article 42, See case of *Peter K. Waweru vs Republic* [2006] eKLR available at: http://www.kenyalaw.org/CaseSearch/view_preview.php?link=51646334621357351283598&words= [accessed 15 October 2013].

⁷³ KLR (E&L) 1, 592.

⁷⁴ Muigua, K & Kariuki, F, Safeguarding Environmental Rights in Kenya. Paper available at: <http://www.kmco.co.ke/attachments/article/100/A%20Paper%20on%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf> [accessed 15 October 2013].

⁷⁵ <http://www.cickenya.org/cicoldsite/news/aligning-laws-and-policies-access-justice-cok-2012> [accessed 11 October 2013].

legislative frameworks continue to hinder equal access to justice⁷⁶. In accordance with its Constitutional mandate, the Commission for the Implementation of the Constitution (CIC) held a consultative forum on access to justice to review laws and policies relating to access to justice. The aim of the forum was to align the respective laws and policies to the Constitution. The forum also discussed current gaps in policy and legislation. What is especially noteworthy is that the forum discussed ways of improving judicial services and equal access to justice for PWDs. This included the provision of procedural accommodations in order to facilitate the role of PWDs as direct or indirect participants in all legal proceedings, including at investigative and other preliminary stages.⁷⁷

The provisions of Article 54 of the Constitution are mirrored by section 13 of the Persons with Disabilities Act that reserves employment for them.⁷⁸ Article 59 establishes the Kenya National Human Rights and Equality Commission which has the mandate to *inter alia*: promote respect for human rights and develop a culture of human rights in the Republic; promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development; promote the protection, and observance of human rights in public and private institutions; and to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.

Chapter Five of the Constitution deals with natural resources use, access and management. Article 60 provides for the principles of land management. Of utmost importance amongst these are: equitable access to land, security of land rights, transparent and cost effective administration of land,

⁷⁶ Ibid.

⁷⁷ This forum was announced at the launch of the CIC Annual report 2011/2012 at the K.I.C.C Nairobi on the 31st of October 2012.

⁷⁸ The National Council for Persons with Disabilities shall endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for PWDs.

elimination of gender discrimination in law, customs and practices related to land and property in land.⁷⁹

Further, Article 69 outlines the obligations of the State in regard to environment to include *inter alia*: ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources, ensuring the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; and utilizing the environment and natural resources for the benefit of the people of Kenya.⁸⁰

Article 69(2) provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. For PWDs to be able to fulfill this duty, the State needs to set up and implement measures that facilitate and empower their participation. Article 72 of the Constitution provides that Parliament shall enact legislation to give effect to the provisions of the part dealing with the environment. The inclusion of PWDs in such legislation especially relating to management, preservation and protection of natural resources and the environment would be a major milestone in securing their rights.

Basically, the Constitution seeks to ensure that all persons regardless of their social or health status are treated equally and afforded the same chances for self development and/or actualization as well as participating in all spheres of development. In conjunction with the international legal human rights instruments discussed, the Constitution can be seen as further promoting the social and environmental rights of PWDs and assisting a great deal in securing the realization of these rights.

⁷⁹ Constitution of Kenya, 2010 op. cit.

⁸⁰ *Ibid.*

4.0 Challenges

Despite the robust and well meaning human rights framework set out under the Constitution, the reality on the ground is that there exist cultural, social, economic and perhaps political impediments to realization of social and environmental rights by PWDs. Before they are realized, the foregoing impediments must conclusively be dealt with.

Some communities erroneously believe that disability is an infliction by evil spirits leading to the view that such people can never amount to anything important in life and can only survive through a life of constant dependency.⁸¹ They are even shunned by the larger society and sometimes even by their own families. Children are denied the right to education as they are locked in the house by parents to avoid 'embarrassing' the family.

Socially, they are stigmatized so that even those who manage to secure a place in the mainstream educational centers suffer silently as they are labeled 'disabled' persons with no ability. Actually, recent campaigns are determined to change this notion and activist groups often use the term 'persons with special abilities' together with the slogan 'disability is not inability'. Not many employers are willing to absorb such people into their organizations and these often leads to financial dependency by PWDs. A person who is economically challenged faces huge hurdles in their endeavours for self-determination and personal development.

Politically, the main challenge that exists is that although laws and policies have been put in place, there often lacks the political will power to enforce them and/or to realize the rights guaranteed therein. The rights of entitlement that only exist on paper may not do much for a group that already faces discrimination right from their own homes and which discrimination is sometimes perpetrated by their closest relatives.

⁸¹ Persons Living with Psychosocial Disabilities in Kenya, Available at: www.un.org/disabilities/documents/mental_disabilities_kenya.doc [accessed 2 October 2013].

Kariuki Muigua

Our current laws are also a hindrance to the inclusion of PWDs in the development agenda as well as to safeguarding their rights. The same laws should undergo specific reviews that consider PWDs in all spheres of development including but not limited to management of natural resources.

Courts have ruled that for one to benefit and be recognised as falling under PWD, they must be registered with the National Council for Persons with Disabilities. The question was canvassed in the case of *Esau Rodgers Mumia v Central Bank of Kenya* [2017] eKLR, Cause no. 940 of 2014, where the Court stated as follows:

“How then does one become certified as a person with disability for purposes of accessing the rights and privileges under the Act? In my view, the answer lies in Section 7(1)(c) which provides for registration of persons with disabilities by the National Council for Persons with Disabilities” [para. 18].

In the *Esau case*, the Court went further to rule that:

“The gist of these decisions with which I fully agree, is that disability as defined in the Persons with Disabilities Act is not an internal matter between an employee and their employer. For an employee to access the benefits of disability set out in law, their disability must be certified through registration by the National Council for Persons with Disabilities relying on duly completed medical reports” [para. 21].

In *Suleman Angolo & another v Executive Officer Teachers Service Commission* [2015] eKLR the Court also stated as follows:

“Persons with Disabilities enjoy certain rights and benefits as provided in the Persons with Disabilities Act. These include tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. To enjoy such benefits however one must be registered with the Council-The National Council for Persons with Disabilities. The same would apply in the area of retirement.”

While mandatory registration of persons with disabilities may be well meaning, it presents challenges especially when it comes to PWDs who are not in formal employment. They may easily miss out on any intended benefits on this ground.

While it is also important to promote equality, the aspect of equity should also be considered as women and girls face unique gender-based challenges that become even more complicated by disabilities. These unique circumstances should be considered in coming up with any plans or policies. Unfortunately, the current framework on protection of the rights of PWDs seems to address the problem in isolation without factoring in the need to identify the unique challenges facing each of the groups falling under PWDs. This would be the essence of the value of equity and not just equality, as guaranteed under the current Constitution of Kenya.

The National Council for Persons with Disabilities thus should work harder to engage various stakeholders to eliminate discrimination and ensure that PWDs are not disadvantaged by their non-registration. Alternatively, where such registration is mandatory, they should ensure that there is enough sensitization of PWDs and the general public to ensure that's they get registered regardless of the physical location or social status.

4.1 A Review of Various Laws⁸²

In the pursuit of securing the realization of environmental and social rights for PWDs and that of including them in the development discourse, a review of some major laws is necessary. These laws and frameworks are instrumental in aiding the growth and development of various social and environmental sectors. However, the question comes in of whether PWDs in Kenya have adequately been provided for under these laws and frameworks.

⁸² VSO Jitolee Report for Consultancy on a Technical Review of Environment and Natural Resource Management Policies and Regulations, July 2013.

In a bid to achieve an integrated and harmonized policy and legal framework, the Environment Management and Coordination Act was enacted in 1999. However, the National Environment Council as established under Section 4, the National Environment Management Authority (NEMA) as established under Section 7 and the NEMA management board have no provisions whatsoever for inclusion of persons with disabilities in environmental management and coordination. Provincial and District Environment Management Committees as currently established under Section 29 do not provide for representation of persons with disabilities. Under Section 37 regarding the establishment of the National Environment Action Committee, there is no representation of persons with disabilities. This is a major hindrance towards safeguarding of the environmental rights of PWDs. The existent non-representation or under-representation of PWDs in management of such an essential natural resource only leaves them disadvantaged and robs them of their much needed due priority. The requirement under section 29(3) of Environment (Management and Coordination) (Amendment) Act 2015 which requires a County Governor, in making the appointments under this section, to ensure equal opportunities for persons with disabilities and other marginalized groups is hardly sufficient to realise this goal due to the wide discretion without necessarily putting in place any mechanisms to ensure that this is actually achieved.

The National Environment Policy⁸³ provides for environmental quality and health. It focuses on issues relating to air quality, water and sanitation, waste management, radiation and noise, all elements which may aggravate disability or cause disability among the populace. This policy was meant to enhance the social and environmental rights of PWDs.

Similarly, the National Water Policy does not expressly and adequately provide for equitable access to water by PWDs. Also, the representation of PWDs in Water Sector Institutions and especially their management is at a

⁸³ Revised Draft 8, August 2012.

minimum. This is a further and continued hindrance to the realization of their environmental right to access to water.

The Water Act 2016⁸⁴ was enacted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.⁸⁵ The Water Act 2016 provides that every person has the right to access water resources, whose administration is the function of the national government as stipulated in the Fourth Schedule to the Constitution.⁸⁶

The Water Act establishes the following institutions: the Water Resources Authority⁸⁷, the Basin water Resources Committee⁸⁸, the Water Resources Users Association⁸⁹, the National Water Harvesting and Storage Authority⁹⁰, the Water Works Development Agencies⁹¹, the Water Services Regulatory Board⁹², the Water Sector Trust Fund⁹³ and the Water Tribunal⁹⁴. Despite the constitutional provisions on provision for opportunities for PWDs as part of special groups, the Water Act 2016 and its powers and functions relating to the above institutions houses no clear provisions for the inclusion of persons with disabilities⁹⁵. Further, the Act does not give due regard to the unique needs of persons with disabilities in the management, conservation and access to water. There is need to streamline the Water Act so that it takes into account the environmental rights of PWDs. PWDs need to be included in water resource management because they require special priority in governance of this natural resource. To this end, their access to the natural

⁸⁴ No. 43 of 2016, Laws of Kenya.

⁸⁵ *Ibid.*, s.3.

⁸⁶ *Ibid.*, s. 9.

⁸⁷ Section 11(l) of the Water Act 2016.

⁸⁸ Section 25 of the Water Act 2016.

⁸⁹ Section 29 of the Water Act 2016.

⁹⁰ Section 30 of the Water Act 2016.

⁹¹ Section 65, Water Act 2016.

⁹² Section 70, Water Act 2016.

⁹³ Section 113, Water Act 2016.

⁹⁴ Section 119, Water Act 2016.

⁹⁵ VSO Jitolee Report, *Op. Cit.*, p 10

resource can be enhanced and improved and ultimately their social and environmental rights secured.

5.0 Opportunities and Way Forward

To ensure that these persons fully enjoy the guaranteed constitutional rights, there is need for a paradigm shift in the push for the rights of PWDs. The efforts should be directed towards empowerment of PWDs as against adoption of affirmative action as this is short-lived while empowerment offers a lasting solution not only to the individual but also to their own families due to the ripple effect of improved livelihoods. An educated person need not depend on favours as they will competently seek public offices while the person who perennially depends on handouts and favors may never achieve fulfillment in their lives.

Article 43 of the Constitution guarantees every person's right to access to education.⁹⁶ To ensure that even PWDs fully participate in the development of the country, the first step should be to empower them through ensuring that they acquire relevant education and/or skills or training.

Article 53 of the Constitution also guarantees the right of every child to access free and compulsory basic education.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides under Article 13(1) that the States Parties to the Covenant should recognize the right of everyone to education. It further provides that education should be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. The provisions also note that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

⁹⁶ Constitution of Kenya, 2010, Op. Cit. Article 43(1)(f)

To actualize this, Article 13(2) lays out the obligations of member States by providing that primary education shall be compulsory and available free to all; secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

This emphasis by the Covenant supports the assertion that education has the ability to empower PWDs in a way not realizable through affirmative action.

The Basic Education Act, 2013⁹⁷ is an Act of Parliament that was enacted to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes. This Act has important provisions that would be useful in realization of the right to access to education by PWDs.

It is perhaps noteworthy that the Act under section 2 defines "basic education" to mean the educational programmes offered and imparted to a person in an institution of basic education and includes Adult basic

⁹⁷ No. 14 of 2013

education and education offered in pre-primary educational institutions and centers.⁹⁸

The Act also recognises "special education needs" which it defines to mean conditions, physical, mental or intellectual conditions with substantial and long term adverse effects on the, learning ability (other than exposure) or the needs of those who learn differently or have disabilities that prevent or hinder or make it harder for them to access education or educational facilities of a kind generally provided for learners of the same age in the formal education system. Further, the Act provides that "special needs education" includes education for gifted or talented learners as well as learners with disability and includes education which provides appropriate curriculum differentiation in terms of content, pedagogy, instructional materials, alternative media of communication or duration to address the special needs of learners and to eliminate social, mental, intellectual, physical or environmental barriers to learners.⁹⁹

Section 4 is also important as it provides the guiding values and principles in the provision of basic education to include *inter alia*: the right of every child to free and compulsory basic education; equitable access for the youth to basic education and equal access to education or institutions; promotion of quality and relevance; encouraging independent and critical thinking; and cultivating skills, disciplines and capacities for reconstruction and development; promotion of peace,, integration, cohesion, tolerance, and inclusion as an objective in the provision of basic education; imparting relevant knowledge, skills, attitudes and values to learners to foster the spirit and sense of patriotism, nationhood, unity of purpose, togetherness, and respect; promotion of good governance, participation and inclusiveness of parents, communities, private sector and other stakeholders in the development and management of basic education; transparency and cost effective use of educational resources and sustainable implementation of educational services; promoting the respect for the right of the child's

⁹⁸ Ibid, section 2.

⁹⁹ Ibid.

opinion in matters that affect the child; promotion of innovativeness, inventiveness, creativity, technology transfer and an entrepreneurial culture; non-discrimination, encouragement and protection of the marginalized, persons with disabilities and those with special needs; and provision of appropriate human resource, funds, equipment, infrastructure and related resources that meet the needs of every child in basic education.

As a reflection of the provisions of the International Covenant on Economic, Social and Cultural Rights, section 28 of the Act obligates the Cabinet Secretary in liaison within other stakeholders to provide for the establishment of: pre-primary, primary and secondary schools, mobile schools, and adult and continuing education centers, within a reasonably accessible distance within a county; appropriate boarding primary schools in arid and semi-arid areas, hard-to-reach and vulnerable groups as appropriate; and academic centers, or relevant educational institutions to cater for gifted and talented learners; special and integrated schools for learners with disability.¹⁰⁰ This should be actualized at the earliest.

Section 39 of the Act spells out the responsibility of the Government regarding basic education to include *inter alia*: providing free and compulsory basic education to every child; ensuring compulsory admission and attendance of children of compulsory school age at school or an institution offering basic education; ensuring that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education; providing human resource including adequate teaching and non-teaching staff according to the prescribed staffing norms; providing infrastructure including schools, learning and teaching equipment and appropriate financial resources; ensuring quality basic education conforming to the set standards and norms; providing special education and training facilities for talented and gifted pupils and pupils with disabilities; and ensuring compulsory admission, attendance and completion of basic education by every pupil; monitoring functioning of schools.

¹⁰⁰ Ibid, Section 28(2).

Section 44 of the Act obligates the Government to establish and run special institutions for offering special needs education.

Going by the foregoing provisions on education provision to all and with special emphasis on the PWDs, the stage is set for the empowerment of PWDs through ensuring that they access education and acquire relevant skills that will enable them compete ably with everyone else when it comes to inclusion and/or participation in the governance of all sectors of the country's economy. What remains is the political will to enforce the implementation of this right as provided for under the various legal instruments.

There is need to include everyone in this campaign and role of ensuring that PWDs are not sidelined in accessing educational facilities and training. It has been noted that this is not a Kenyan problem only but actually in both developed and developing countries, in order to achieve more inclusive societies and employment opportunities for people with disabilities there is need for improved access to basic education, vocational training relevant to labour market needs and jobs suited to their skills, interests and abilities, with adaptations as needed.¹⁰¹

The existing situation will not change unless support is rallied from all quarters. Most of the disabled people in Kenya, as in most developing countries in the world, live in poverty, have limited opportunities for accessing education, health, suitable housing and employment opportunities.¹⁰²

The emphasis around the world is generally on the PWDs' ability to carry out the given task rather than the notion of entitlement. This is captured in the fact that any person or state organ is prohibited from denying a PWD an

¹⁰¹ International Labour Organisation, 'Inclusion of People with Disabilities in Kenya' page 1, Available at: www.ilo.org/wcmsp5/groups/public/.../documents/.../wcms_115097.pdf [accessed 2 October 2013]

¹⁰² Ibid.

employment opportunity on the ground of disability if such a person is qualified for the job. The notion of entitlement may create the wrong impression that it will not matter whether the person is qualified or not but will get a favour on the ground that they are disabled. The reality is that unless PWDs are empowered with skills, training and/or formal education, any meaningful inclusion and participation in the development affairs will never be achieved.

Participation and inclusion in the governance affairs across such areas as environment, politics, and others will require arming the PWDs with the relevant skills and expertise.

Under Section 9 of the EMCA (1999), the National Environment Management Authority (NEMA) should incorporate the function of advising National and County Governments on the impacts of natural resource management on PWDs.¹⁰³ Bearing in mind the concept of the new devolution structure presented by the Constitution of Kenya, 2010, EMCA was amended by *the Environmental Management and Co-ordination (Amendment) Act, 2015*¹⁰⁴ to conform with the new dispensation. The Provincial and District Environment Management Committees in this regard were restructured into County Environment Management Committees. Section 29(3) of the Amendment Act requires that the Governor, in making the appointments under this section, should ensure equal opportunities for persons with disabilities and other marginalized groups. This is a laudable move that should be fully implemented. While it is hardly sufficient, it is a good place to begin as the body in question influences policy and should therefore expand opportunities for the PWDs within the counties' environmental governance structures. There is need to secure some positions that should be exclusively reserved for PWDs in order to achieve the objective of section 29(3) as highlighted above.

¹⁰³ VSO Jitolee Report, op. cit.

¹⁰⁴ No. 5 of 2015, Laws of Kenya.

Section 38 of EMCA on the National Environment Action Plan should set guidelines on how natural resource management in Kenya has an impact on the rights and fundamental freedoms of persons with disabilities. This would mainly be in the areas of mobility, utilisation and access to natural resources. Part VI on Environmental Impact Assessment ought to provide that impact assessments address how proposed projects would impact on persons with disabilities. Activities likely to negatively impact on the mobility, utilization and access to natural resources by PWDs could be tracked through modifying Part VII on Environmental Audit and Monitoring. Part VIII on Environmental Quality Standards ought to be modified so that it can take into account provisions requiring standards that do not aggravate disabilities or cause disability in the populace. Environment quality in this regard should be structured in a way that mitigates disabilities that may be aggravated or caused by the environment including but not restricted to blindness and deafness. This would mean that the Standards and Enforcement Review Committee established under Section 70 undertakes studies on environmental quality standards as well as their implications on disability. Environmental inspections under Section 117 should be trained on disability issues relating to the environment.¹⁰⁵

Under the Environmental Management and Coordination (Amendment) Act 2015, section 4¹⁰⁶, PWDs should utilize Article 35 of the Constitution of Kenya, 2010 to access information relating to natural resource management held by the State. This is necessary to reflect the provisions of the *Access to Information Act*¹⁰⁷ which requires public entities to disclose information but such information should be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information should be

¹⁰⁵ Ibid.

¹⁰⁶ The principal Act is amended by inserting the following new section immediately after section (3)-

3A. (1) Subject to the law relating to access information to information, every person has the right to access any information that relates to the implementation of this Act that is in the possession of the Authority, lead agencies or any other person.

¹⁰⁷ No. 31 of 2016, Laws of Kenya.

easily accessible and available free or at cost taking into account the medium used.¹⁰⁸ Notably, the Access to Information Act 2016 also requires that, where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer should take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.¹⁰⁹ The Act goes ahead to spell out offences which include failure to comply with the duty to take reasonable steps to make information available in a form that is capable of being read, viewed or heard by a requester with disability in accordance with section 11 (3).¹¹⁰

In keeping in line with Article 54 of the Constitution and based on consultations between the National Council for Law Reporting and individuals and institutions on the frontlines of serving the needs of persons with physical disabilities, particularly visually impaired persons, the Council established that over 10% of the world's population suffers from a variety of disabilities. However, information and communication technologies (ICT) have the potential for making significant improvements in the lives of these persons. The Council also established that ICTs offer individuals the ability to compensate for physical or functional limitations, thus allowing them to enhance their social and economic integration in communities by enlarging the scope of activities available to them.¹¹¹

The Council, in this regard, proposed a solution to counter the problem. The solution was put across as converting the Council's public legal information into universally acceptable formats. In achieving this, the Council partnered with the Rockefeller Foundation towards an initiative known as Improving Public Access to Information through Impact Sourcing (IMPACT-IS). This was set to ensure that the Council translates and converts its online content, particularly the Laws of Kenya into universally acceptable formats using a

¹⁰⁸ Ibid., Section 5(2).

¹⁰⁹ Ibid., s. 8(2).

¹¹⁰ Ibid., s. 28(3)(d).

¹¹¹ <http://www.kenyalaw.org/Forum/?p=1144> [accessed 11 October 2013]

set of document translation and conversion standards, guidelines and templates already developed and documented¹¹². User interface components and navigation were the key elements to be made easily operable.

The National Environment Policy 2013, on implementation of strategies and actions, should have proposed mainstreaming of issues relating to PWDs. Further, public participation ought to purposely have policy statements on inclusion of persons with disabilities in all policy, legislative and decision-making processes.

Under the National Water Policy, disability provisions should have been included in the management of Water Sector Institutions and safeguarding of water. PWDs' access to water should be included in the framework to expressly secure their rights. Equitable access to water by PWDs should also be expressly covered under the framework. A vital area that should also be addressed is the inclusion of PWDs in the management structures of Water Sector Institutions. This way, PWDs' representation and participation in natural resource management is achieved.¹¹³

It is also important that the Water Act 2016 is reviewed so that in the end it can achieve the inclusion of PWDs in water resource management. The Water Act also needs to be sensitive to the unique needs of PWDs in the management, conservation and access to water.

6.0 The Law in Operation

The case of *Fredrick Gitau Kimani vs The Attorney General, The Ministry of State & Provincial Administration and Internal Security and the Police Commissioner*¹¹⁴ illustrates that the rights of PWDs are guaranteed and recognized in Kenya. Discrimination of PWDs is a gross violation of their rights.

¹¹² Ibid.

¹¹³ VSO Jitolee Report, op. cit.

¹¹⁴ High Court Petition 157 of 2011 Judgment available at:

http://kenyalaw.org/CaseSearch/view_preview1.php?link=42776934588462347088247

The Petitioner was until his retirement in March 2004, a public officer having been employed as such in January 1974. He lodged his Petition dated 13th September 2011 pursuant to the provisions of Article 27(4), (5) and (6) of the Constitution as well as the Persons with Disabilities Act¹¹⁵.

The Petitioner served the Republic of Kenya until March 2004 when he was relieved of his duties on medical grounds. He was diagnosed with diabetes and his left leg had to be amputated and upon being discharged he was forced to have an artificial limb fitted. The National Council for Persons with Disabilities certified him as a person with disability and the 2nd and 3rd Respondents were so informed. The 3rd Respondent expressed the decision that the Petitioner had to retire upon attaining the mandatory age of 55 years. The Petitioner complained that the action amounted to discrimination on the grounds of health, status, age as well as disability which was a direct violation of Article 27(4) of the Constitution as read together with Section 15(6) of the Persons with Disabilities Act. The Petitioner argued that the Court had a duty to protect him as is its obligation under Articles 20(3), (b), 22(1) and 23 of the Constitution.

The Learned Judge quoted from Article 27(4) of the Constitution citing that the State was barred from discriminating directly or indirectly against any persons on any grounds; one of the grounds being discrimination on the basis of disability. The 3rd Respondent had already advised the Petitioner through a letter that the latter was a beneficiary of Section 15(6)¹¹⁶ of the PWD Act and so his retirement ought to have been sixty (60) years and not fifty five (55) years. Bearing in mind that the Respondent had requested for his retirement age to be extended in light of the circumstances, the same had also not been responded to let alone acknowledged but was blatantly denied. In this regard, the Learned Judge agreed that the Petitioner was in fact discriminated against and the blatant disregard of Section 15(6) of the

¹¹⁵ Cap. 14, Laws of Kenya.

¹¹⁶ Section 15(6) of the Persons with Disabilities Act Op. Cit. provides as follows; "The minimum retirement age for persons with a disability shall be sixty (60) years".

PWD Act only served to strengthen the discrimination allegations put forward.

The Learned Judge allowed the Petition and granted Orders after finding that the Petitioner's right not to be discriminated against under Article 27(4) (5) (6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights had been violated; that failure by the 2nd and 3rd Respondent in extending the Petitioners retirement age from 55 years to 60 years in total disregard to the provisions of Section 15(6) of the Persons With Disabilities Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability; that failure by the 2nd and 3rd Respondents in recognizing the Petitioner as a disabled person pursuant to Section 15(6) of the Persons With Disabilities Act, Chapter 14 Laws of Kenya, was discrimination against the Petitioner, hence a violation of his right as aforementioned; and that as a result of the breaches afore-mentioned, the Petitioner had been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood.

It was ordered that the Petitioner be paid Kshs. 500,000/= as compensation by the 2nd and 3rd Respondents jointly and severally. It was also ordered that costs be paid to the Petitioner by the 2nd and 3rd Respondents jointly and severally.

This case shows that the rights of PWDs are justiciable. It also displays that PWDs can access the Court system in Kenya. This case was also a test of the efficacy of Article 54 of the Constitution of Kenya, 2010. The case sought to secure the realization of and safeguard environmental and social rights for a person with disability in Kenya. Undoubtedly, it set a strong precedent for PWDs in general. They are now recognizable before the legal, social as well as environmental front. The realization of PWDs' environmental and social rights in Kenya was secured by this case and the society can no longer afford to ignore the rights of PWDs. There is need to streamline the statutory and constitutional provisions on protection and implementation of the rights of PWDs across all sectors and especially those related to environmental and social rights. The principles of public participation, equity and equality as

recognised under the Constitution and the sustainable development agenda can only be fully realized when all persons including PWDs are brought on board in governance matters.

7.0 Conclusion

There is a need to streamline the law as discussed in order to include PWDs in the access to and management of natural resources. They need empowerment through education. In view of the international legal human rights instruments, there is the need to streamline the existent corresponding laws in Kenya to echo the provisions guaranteed by the former so that PWDs' social and environmental rights can be safeguarded in a harmonized manner globally. The opportunities and way forward are ideally envisioned solutions to eliminating the discriminatory notion perpetuated by society towards PWDs. Their empowerment lies not only in education and the formulation of laws and policies, but also in the provision of infrastructure that best suits their special needs.

As is evident in the foregoing discourse, the rights of PWDs have not been fully realized let alone actualized. The laws, policies and frameworks reviewed are in dire need of re-evaluation so that as a democratic State, Kenya can enhance the social and environmental rights of PWDs.

Securing the environmental and social rights of PWDs in Kenya is an imperative whose time has come. We have to walk the talk and ensure the legal and institutional framework supports and promotes these rights. PWDs can then be fully involved in the development agenda. After all, in the end, we are one.

References

1. The VSO Jitolee Report for Consultancy on a Technical Review of Environment and Natural Resource Management Policies and Regulations; A report presented to VSO Jitolee by Dr. Kariuki Muigua, July 2013.
2. Muigua, K & Kariuki, F, Safeguarding Environmental Rights in Kenya, available at:
<http://www.kmco.co.ke/attachments/article/100/A%20Paper%20on%20Safeguarding%20Environmental%20Rights%20in%20Kenya.pdf>
3. The Constitution of Kenya, 2010. Kenya Government Printer.
4. Persons with Disabilities Act, No. 14 of 2003. Kenya Government Printer.
5. The Basic Education Act, No. 14 of 2013. Kenya Government Printer.
6. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at:
<http://www.refworld.org/docid/3ae6b3712c.html>
7. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>
8. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993
9. UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106
10. UN General Assembly, The United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, available at:
<http://www.refworld.org/docid/4680cd212.html>
11. UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex II, available at:
<http://www.refworld.org/docid/4680d0982.html>

12. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, available at:
<http://www.refworld.org/docid/3f4b139d4.html> or at:
<http://www.achpr.org/instruments/women-protocol/>
13. The African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986
14. Water Act, No. 43 of 2016, Laws of Kenya.
15. Access to Information Act, No. 31 of 2016, Laws of Kenya.
16. Environmental Management and Co-ordination (Amendment) Act, No. 5 of 2015, Laws of Kenya.