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An Examination of the Legal and Policy Framework on Child Refugee Education in Kenya

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Abstract

This paper examines the various laws and instruments that support the right to quality education in Kenya, how they relate to child refugees and point out gaps in the legal framework that fail to enhance the right of child refugees to access education. It argues that this crucial omission has contributed to the dismal efforts by the government in enhancing child refugee education.

The first part contains the introduction and gives context to child refugee education in Kenya.

The second part discusses the various domestic legal framework on child rights as pertains to access to quality education and further highlights the omission of the child refugee education from the various pieces of legislation.

The third part concludes the argument to the paper by pointing out that this omission could possibly be a hindrance to promoting child refugee education in Kenya despite its international obligations to enhance the best interests of the child.

Key Words: Child refugee education, comprehensive legal framework, refugees, Kenya, access to education

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1.1. Introduction

Although, there are several child friendly statutes in Kenya, child refugees still face unique challenges in accessing the quality education. This is because in Kenya, there is inadequate legal policy framework specifically for education for child refugees given their unique plight and them being a vulnerable and marginalized group.² Another reason for this could be the target beneficiaries of this right as has been provided for under several domestic laws. It is possible that child refugees were not necessarily part of the intended target group to access education as enunciated under the Constitution of Kenya 2010.

Many of the child refugees are often in limbo concerning their future. The fact that they are least likely to access quality education makes their circumstances even worse and pitiable. They are also prone to all manner of psychological, emotional and sexual abuse³

With no avenue to be healed from their trauma and no hope for the future, most of these children are likely to fall into depression.⁴ These circumstances coupled with the absence of a deliberate domestic legal framework to enable them access quality education leaves them at risk of becoming dissidents and societal outcasts.

1.2. Legal framework on Child refugee education in Kenya

There are several statutes in Kenya that touch on child rights and access to quality education in Kenya. These fundamental Laws are discussed below

² Comprehensive Refugee Response Framework Global Digital Portal (n.d. a). Kenya 2018. Available at: http://www.globalcrrf.org/crrf_country/kenya-2/

³ Education Cannot Wait, Action for Refugee Education Commitment. Framework for Commitments. Outcome from High-Level Meeting on Action for Refugee Education,(2018)

<https://static1.squarespace.com/static/5b5b0e973917ee4023caf5f4/t/5baa6a2908522977c18490ff/1537894955358/Education+Cannot+Wait+ECW+Commitments+on+Action+for+Refugee+Education.pdf>

⁴ UNESCO, Education in Situations of Emergency, Crisis and Reconstruction (2003a).

1.2.1. The Constitution 2010.

The Constitution of Kenya was promulgated in 2010 with a progressive bill of rights that was and still is highly acclaimed.⁵ Impressively, the bill of rights under the Constitution caters for marginalized groups such as children and women.

Foremost, articles 2(5) and 2(6) of the Constitution provide that principles of international law are also incorporated into the laws of Kenya.

This in effect means that the general principles of law and treaties ratified by Kenya pertaining to child refugee education is binding upon the country. Such laws include the Convention of the rights of a Child⁶ and the 1951 Convention relating to the Status of Refugees⁷ in which states are obligated to take progressive steps towards the education for children within its borders including child refugees. This out rightly puts Kenya under the obligation of enhancing education for children including child refugees within its borders. Under article 21, the state is required to respect, promote and fulfil the rights under the bill of rights. This entails addressing the needs of vulnerable groups such as women, children, persons with disabilities, the elderly and the youth. Child refugees would fall under vulnerable groups under the Constitution, whose rights also need to be respected although they have not been expressly provided for.

Article 43 entitles everyone to socioeconomic rights such as: the highest attainable standard of health, adequate housing, freedom from hunger, clean safe water, social security and education. This means that child refugees

⁵ <https://www.klrc.go.ke/index.php/constitution-of-kenya/110-chapter-four-the-bill-of-rights> accessed 25/8/2020.

⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 10 February 2022]

⁷ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 10 February 2022]

would also have the right to access education, as a socioeconomic right among the rights that have already been listed.⁸

Article 53 further provides that every child has the right to free and compulsory basic education, food, healthcare, protection from any form of abuse and parental care.⁹ With regard to this, the child's best interests are to be taken into consideration in all decisions being made that will affect their wellbeing. In the case of the best interests of the child refugee, they need to access education as a tool that will lead to their socio-economic development. It ensures that they become useful individuals in society with values that enable them to live peaceably and meaningfully with others.

Effectively, these constitutional provisions indicate that the government is obligated under the Constitution to provide child refugees with access to education to equip them for a better future.¹⁰

Again, it is arguable whether the makers of the constitution had the child refugee in mind when putting in place the provisions on the right to education and other socioeconomic rights. They could as well have had in mind the child "citizens". By implication, this means that these are rights that are meant to be enjoyed by the citizens of a country and not necessarily refugees in this context.¹¹ The definition of a child in the minds of the constitution maker is most probably a Kenyan citizen who is thus entitled to education and other socio-economic rights. This could then explain the absence of a deliberate framework touching on access to education for child refugees despite a constitutional provision on the right to education.

⁸ Ibid

⁹ Ibid

¹⁰ Emmert, Simone, Education in Terms of Human Rights. *Procedia - Social and Behavioral Sciences* (2011) 12. 346-361. 10.1016/j.sbspro.2011.02.044.

¹¹ Heckmann, Education and Migration strategies for integrating migrant children in european schools and societies, http://www.interculturaldialogue2008.eu/fileadmin/downloads/resources/education-and_migration_bamberg.pdf (2008) (08.08.2009).

1.2.2. Basic Education Act 2013

The Basic Education Act was enacted in 2013 to give effect to the provisions of article 53 of the Constitution.¹² Its aim is to promote and regulate the provision of free compulsory basic education as envisioned under the Constitution.¹³ The definition of a child under the statute is any person below the age of 18. The whole statutory text makes no direct reference to child refugees.

Section 4 emphasizes the right of every child to free and compulsory basic education. It provides that education should be given with regard to the marginalized and persons with special needs. Section 34 provides that no child shall be denied admission into a public school in Kenya. If this provision is contravened, then the parent or guardian of the child is supposed to report the same to the County Education Board. This provision points to the glaring fact that the child who is probably contemplated under it is the “child citizen.” This is because some of the requirements of entering school pertain to a child’s national identification documents which most child refugees do not have.

Section 39 states that it is the responsibility of the government through the cabinet secretary to ensure that children of school going age have access to education including those from marginalized, vulnerable, or disadvantaged groups.¹⁴

¹² Right to Education Project – Right to Education Country Factsheet Kenya, March 2014

¹³ Boisvert, Kayla, "Case Study Report: RET International Kenya" (2017). Education in Crisis and Conflict Network. 2. Retrieved from https://scholarworks.umass.edu/cie_eccn/2

¹⁴ General Comment ICESCR, Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, The right to education (Art.13) : 08/12/99. E/C.12/1999/10. (General Comments), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument)

The Basic Education act does not expressly incorporate child refugees into its provisions and the mechanisms or modalities of enabling them to access education in Kenya. It is due to such inadequacies that child refugee education remains unstructured and not fully incorporated into the national education curriculum or plan.

This is further made evident by the policies that have been put in place by the Ministry of Education under the Basic Education Act 2013 with regard to education. These policies are:

1.2.2.1. A Policy Framework for Reforming and Education Training for Sustainable Development in Kenya, Ministry of Education Sessional Paper No. 1 of 2019

The above policy framework entails the government's commitment to integrating education, training, and research in all sectors of development as a key pillar of socio-economic growth.¹⁵ The government recognizes education as a basic human right which is critical for human resource and national development. The focus is thus on increasing the infrastructure to enhance educational initiatives. This includes building more learning facilities and increasing the capacity of the human resource involved in the training and research sector.

The policy also indicates the government's commitment to increasing education financing.¹⁶ The objectives of the policy are to: foster national unity, encourage inclusivity and equality in education, enhance respect for diverse cultures, promote religious values and promote awareness on environmental protection. In terms of training and research the policy aims at improving data management systems to support evidence based learning and decision making in education.

¹⁵ Sessional Paper No.1 of 2019 on Policy Framework for the Reforming Education and Training for Sustainable Development of Education.

¹⁶ Valerie Karigitho, Realizing Quality and Inclusive Education in Kenya Through Financing, East African Centre for Human Rights, May 10th, 2021.

From the foregoing, the policy, though geared towards improving access to education and the quality of learning in the institutions, is definitely not tailor made to meet the needs of child refugees more so enabling them to access quality education. This is indicative of the existing structural gap in promoting access to education for child refugees.

1.2.2.2. Education Sector Disaster Management Policy 2018

This policy was put in place in 2018 to guide the Country's response to disaster that occur and affect education.

This policy was enacted according to the Sendai Framework for Disaster Risk Reduction 2015-2030.¹⁷ The Education Sector Management policy is aimed at returning the victims of such disasters to a state of normalcy and to ensure that they are still able to access quality education. The disasters that are contemplated in the provisions of the policy are: natural, manmade and complex disasters that affect approximately 4million boys and girls every year. This denies them their constitutional right to education. It also incorporates peace education and standards on health and hygiene for learners.

It is aimed at furthering Vision 2030 that seeks to build up human social capital in a safe and sustainable environment. It seeks to do this by: raising awareness on disaster preparation in educational institutions, creating a pool of experts who are able to give sustainable insight on disaster preparedness and awareness in the Education sector, embracing the build back better theme in areas where disasters have disrupted education and normal human life and increasing funding for the disaster preparedness departments in the education sector.¹⁸ Among the potential victims of disasters, the policy makes no reference or mention of child refugees who may suffer double jeopardy when they face calamities and health emergencies (take the

¹⁷ The Framework was adopted at the Third UN World Conference on Disaster Risk Reduction in Sendai, Japan, on March 18, 2015.

¹⁸ <http://www.iiep.unesco.org/en/iiep-supports-dissemination-kenyas-education-sector-disaster-management-policy-5034> accessed 10/2/2022.

example of the current health emergency caused by the Covid 19 virus that disrupted education in several institutions) in a foreign country.

1.2.2.3. Mentorship Policy for Early Learning and Basic Education Ministry of Education 2019

The Mentorship Policy for Early learning and Basic Education 2019 is aimed at providing avenues for learners to express themselves, share the challenges they may be facing and develop lifelong skills.¹⁹ It addresses the difficulties learners may face in the course of their educational journey such as: exposure to violence, terrorism and violent extremism, neglect and abuse at home, death of their parents or guardians, bullying, disease, sexual abuse, psychological torture and mental health challenges.²⁰

The policy aims at addressing the above issues by creating a network of peer educators and counsellors in educational facilities who may be at hand to assist the learners cope through the various challenges that they face in life. It also helps them avoid destructive thought processes that may lead them to self-harm and suicidal behaviors.²¹

The policy is also meant to encourage peaceful coexistence in line with the national values of peace love and unity among the learners so that they may grow to become responsible citizens capable of driving the sustainable development agenda.

The policy does not however address the unique psychological challenges that could be faced by child refugees in accessing quality education seeing that theirs is a difficult journey having gone through traumatic life changing events.

¹⁹ Mentorship Policy for Early Learning and Basic Education Ministry of Education 2019.

²⁰ Ibid

²¹ Ibid

1.2.2.4. National Pre-primary Education Policy Standard Guidelines, Ministry of Education, 2018

This policy was put in place in 2018 in line with the government's commitments to ensuring education for all children at the preprimary level and the sustainable development goal no. 4 that champions for inclusive and equal educational opportunities.²² The policy places action points in the County governments and relevant stakeholders in the education sector to promote education among preprimary learners and enable them to have excellent cognitive functions and abilities as they transition into primary education. It focuses on childcare, nutrition, provision of care, early learning, early stimulation services in childcare facilities and adequate child protection as means of ensuring that young learners develop a solid foundation on which they can have a rich educational experience.²³

The policy, however, does not make reference to the challenges that may be faced by young child refugees in their quest for quality education.

1.2.2.5. The National Policy Framework for Nomadic Education (2015)

This policy is quite progressive as it addresses the unique challenges learners face in nomadic areas in Kenya. It also addresses challenges faced in the informal set ups. The aim of the policy is to ensure that learners in these unique environments access quality education.²⁴ The policy recognizes that these are areas commonly characterized by: aridity, insecurity, high levels of poverty, lack of proper nutrition, lack of a permanent shelter for families and communities, poor social amenities such as schools, hospitals, electricity, and lack of water.²⁵

²² Khataybeh, Abdalla & Subbarini, Mohammed & Shurman, Sameera, Education for sustainable development, an international perspective (2010) Procedia - Social and Behavioral Sciences. 5. 10.1016/j.sbspro.2010.07.149.

²³ Dinga, J.N. Cognitive strategy use for explicit and implicit text meaning by urban, peri-urban and rural primary school pupils in Kisumu Municipality (2011) Unpublished PhD thesis, Kenyatta University.

²⁴ The National Policy Framework for Nomadic Education (2015).

²⁵ Koissaba, Ben & Ole, & Cdp. Education For All: Prospects and Challenges of Mobile Schools, (2017) Mobile Education, and E-Learning for The Nomadic Pastoralists In Kenya (2 nd Ed.).

It seeks to mitigate the above difficult circumstances by: increasing funding to support communities in such areas, being deliberate on the improvement of infrastructure and social amenities in such areas such as health and educational facilities.²⁶ The policy recognizes that it is through quality education that such communities that are considered to be remote and marginalized may be empowered. Education could also lead to the eradication of primitive child abuse practices such as the infamous Female Genital Mutilation.

Despite the above impressive policy framework for learners in nomadic and marginalized communities, the plight of child refugees seems to be conspicuously missing. This omission even complicates their already feeble efforts at accessing quality education.

1.2.2.6. The National Plan of Action for Children 2015-2022

The National Plan of Action for Children was put in place to measure Kenya's efforts in child rights protection and point out significant areas of improvement regarding the implementation of the rights of a child²⁷. It recognizes Kenya's international and regional commitment to promoting the rights of children within its territory.²⁸ It addresses challenges faced in child protection such as: child neglect, wars and disasters, child labour, drug abuse, sexual violence, retrogressive cultural practices, lack of identity and HIV/AIDS stigma.²⁹

The Plan also provides a situational analysis of the steps Kenya has taken to enhance child protection despite the challenges mentioned above.³⁰

²⁶ Government of Kenya, *Getting the Hardest to Reach. A Strategy to provide education to Nomadic Communities in Kenya through Distance Learning* (2010a) Government Printer. Nairobi.

²⁷ The National Plan of Action for Children 2015-2022.

²⁸ Kithome, Titus & Syanyisa, W & Asatsa, S. The role of community-based informal approaches in child protection in Mwingi Central Sub-county, Kitui County (2021) 104-115.

²⁹ Ibid n 22.

³⁰ Ibid

It recognizes that Kenya has had an influx of refugees over the past year and that this marginalized groups faced unique socio-economic challenges. More specifically it appreciates that child refugees have a difficulty in accessing quality education to the country's strained resources in catering for refugees and ensuring that they have adequate amenities such as hospitals, nutrition, schools, and adequate shelter. It states that the flow of refugees has placed significant pressure on the education system that making universal education a distant reality.

In as much as the policy correctly identifies the challenges faced by refugees in accessing education, it is still insufficient as an actionable framework in ensuring that such children access quality education.

None of the above policies put in place thus far, critically explores access to education for child refugees. It is probable that the child envisioned as being a beneficiary of the above policies is not the child refugee but the children belonging to Kenyan citizens. Education is thus considered to be right of the citizenry and not necessarily an "outsider right".

Consequently, there are no clear legal guidelines as to how refugee education is to be conducted. This is not to mean that the government does not have the goodwill to promote refugee education but it just points out to the fact that these is a gap in the legal and policy framework with regard to refugee education.

This inadequacy needs to be remedied if child refugees are to have a structured education system in line with the national plans and monitoring mechanisms on the Education sector and Vision 2030. More critically, this gap leaves refugee education to be conducted on an ad hoc basis by international organizations and non-governmental organizations without being fully incorporated into the national education system. It leads to a huge number of child refugees not being able to access education with some dropping out along the system.

1.2.3. Children Act 2001

The Children Act was enacted in 2001 in order to put into effect the provisions of the Convention on the Rights of a Child that has been ratified by Kenya.³¹ The Act is aimed at promoting the best interests of a childbearing in mind the welfare of all children and the need to ensure child participation in matters affecting them.³² It provides that no child in Kenya should be discriminated upon.³³

Further, under the act, the government is obligated to put in place mechanisms to ensure that all children have access to quality education. This is to be done in line with the best interests of a child which is a constitutional requirement.³⁴

Although this is a very progressive piece of legislation with regard to the welfare of a child, it does not provide for the unique circumstances facing child refugees and their access to education. It focuses more of the general wellbeing of a child, leaving a gap in the framework for child refugee education.

1.2.4. Refugee Act 2006

The Refugee Act 2006 was enacted to cater for the management and welfare of refugees in Kenya. The act is centered on the reception, registration, stay and expulsion of refugees in Kenya. It establishes the Commissioner for Refugee affairs in Kenya.³⁵ The Act provides that³⁶ he/she should ensure that the welfare of child refugees whether they are accompanied or not is taken

³¹ Ponge, Awuor 'The Dynamics of Implementing the Participation of Children with regard to Rights to Education in Kenya.' (2016) *International Journal of Humanities and Social Studies (IJHSS)*. 4(6):178 – 186 *International Journal of Humanities and Social Science*. 4. 178-186.

³² Children Act 2001, s4.

³³ *Ibid*, s5.

³⁴ Geoffrey Wango, *Kenya New Constitution and Education: Education in Kenya Under the New Constitution*, 2011:

<https://profiles.uonbi.ac.ke/gwango/publications/kenya-new-constitution-and-education-education-kenya-under-new-constitution>

³⁵ *Refugee Act 2006*, s7.

³⁶ *Ibid*

care of. The Commissioner also ensure that he refugees have been correctly and legally processed to access the country.

The Commission of Refugees also initiates and implements policy concerning refugees in Kenya. He/she is also in-charge of advising the Minister on all matters concerning refugees including their registration, reception, identification of refugees, sourcing for refugee funds and management of refugee camps.

There has been an improvement in efforts to recognise the rights of child refugees in the Refugee Act 2006. It provides that every refugee in Kenya will be entitled to the rights that are accorded they under the various treaties and conventions to which Kenya is a party to under international Law.³⁷ However, key to note is whether these efforts are replicated in implementation of these rights in order to protect child refugees.

More importantly, this still points out to the fact that the act has made no express provision to the unique circumstances facing child refugee education in Kenya. This is despite it being a Refugee act.³⁸ This is because it was enacted mainly for the management of refugees within the country.

1.3. Conclusion

The Legal Framework including policy implementation in Kenya on child refugee education is heavily wanting despite Kenya international obligations towards them. These obligations include the right to access education which remains to be a challenge for child refugees in Kenya. This further compounded by the fact that there is no legislation or adequate policy framework to cater for their right to access education. It is the government's responsibility as per under the Constitution to ensure that child refugees access quality education at the same level and standard as other children and in line with its international obligations.

³⁷ Kariuki Muigua, *Protecting Refugees Rights in Kenya: Utilizing International Refugee Instruments, The Refugee Act 2006 and the Constitution of Kenya 2010.*

³⁸ <https://www.rckkenya.org/development-of-refugee-law-in-kenya/> accessed 26/12/2021.

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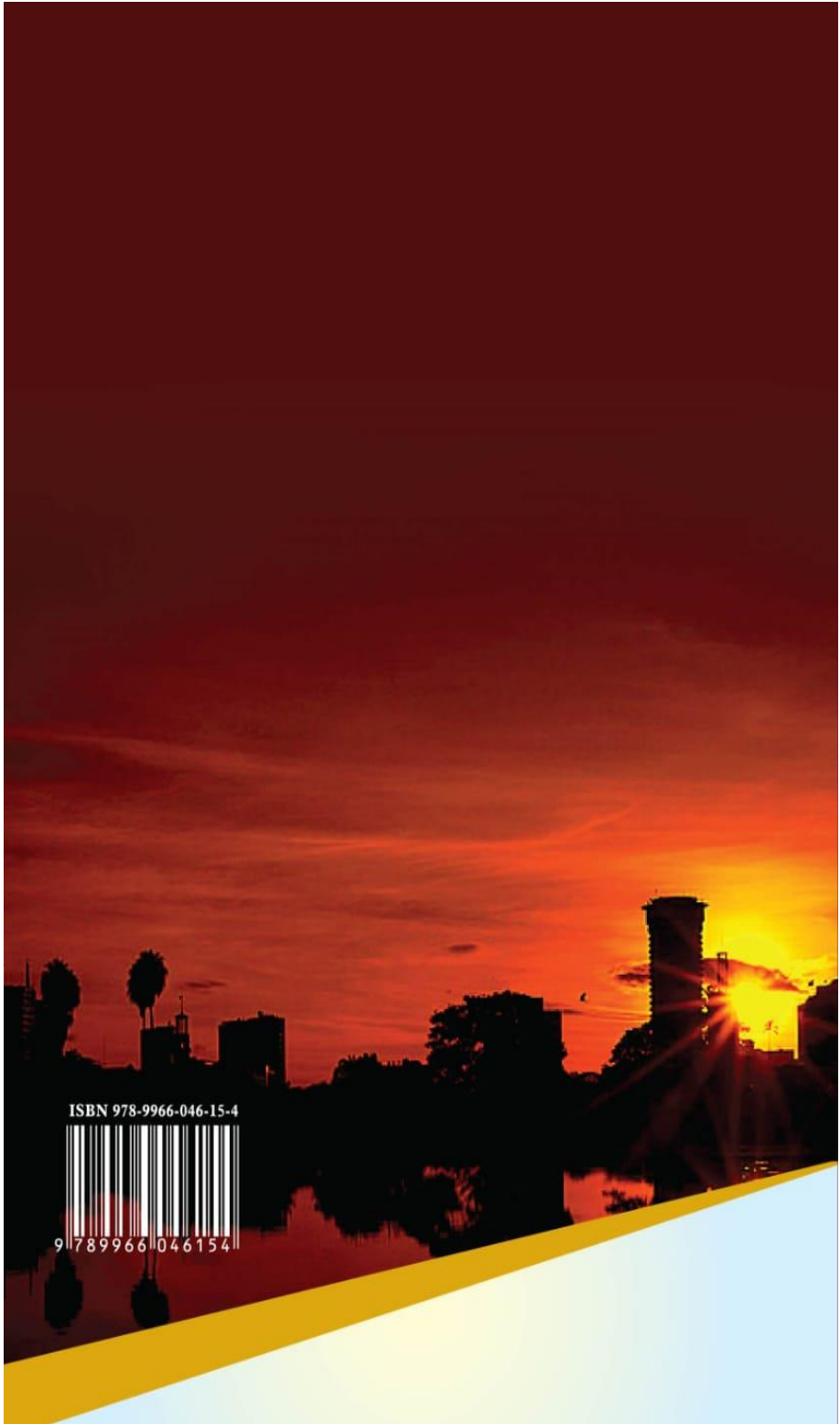
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