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An Analysis of the Right of Refugees to Access Public and Private Services in Kenya

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Abstract

This paper discusses the right of refugees to access public and private services in Kenya. It explores this right against the international, regional and national obligations in handling refugee affairs.

The first part is introductory, setting the scene for the presence of refugees in Kenya and the need for their socio-economic integration through recognition of their Refugee ID.

The second part delves into the legal framework, extrapolating relevant provisions that buttress the right of refugees to access these services at the international, regional and national level.

The third part discusses the situational analysis on access of public and private services for refugees in Kenya.

The fourth part provides recommendations to the foregoing situational analysis in access of public and private services for refugees in Kenya.

The fifth part concludes the paper emphasizing the urgent need of refugees to access public and private services as this is crucial to their socio-economic integration.

1.1. Introduction

According to the 1951 Refugee Convention, refugees are persons fleeing persecution or violence owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group

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or political opinion.¹ The said persons flee outside the country of their nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of their country.²

Currently there are more than 550,000 refugees in Kenya with the number growing due to civil strife in the neighboring countries such as Somalia and South Sudan.³ These refugees are spread across the two main refugee camps, Dadaab and Kakuma as well as urban areas such as Nairobi. When crossing the borders these refugees are at their most vulnerable state and need as much assistance as can be accorded them.⁴ The principle of non-refoulement prohibits countries from returning refugees to their place of torment, which is often their country of origin.⁵ Subsequently, most of them stay in the host country for extended periods with some even beginning a completely new life within the refugee camps. During this period, refugees in Kenya are issued with refugee identity (ID) cards by the authorities. Unfortunately, these refugee ID cards do not have the same status as the Kenyan national ID cards and are largely restrictive when it comes to ensuring that the refugees access public and private services such as; government e citizen portal services, private services such as MPESA and work permits and opening bank accounts.⁶ Refugee ID cards are often not recognized as one of the means of formal identification as is the national ID. As a result, refugees are unable to services, which are crucial to restoring them to a dignified socio-economic life.

¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, art 1; available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 12 May 2022]

² <https://www.unhcr.org/what-is-a-refugee.html> accessed 12/5/2022

³ Fact sheet, European Civil Protection and Humanitarian Aid Operations, 2022.

⁴ Majidi, Nassim, *Devolution a Kenya: Transitional Solutions for Refugees in Kenya?* (2015).

⁵ Ranja, Titus W, *The Kenyan law on refugees and its compliance with the principle of non refoulement*, 2015 (Masters Thesis, University of Nairobi)

⁶ <https://privacyinternational.org/video/4412/when-id-leaves-you-without-identity-case-double-registration-kenya#:~:text=Today%2C%20those%20who%20apply%20for,aware%20of%20this%20ongoing%20issue.> accessed 12/5/2022

1.2. Legal framework on the right of refugees to access public and private services in Kenya

Refugees form part Kenya's population and thus the state has obligations towards them under international, regional and national law. Part of its obligations is to ensure that they are able to secure services that enable them lead dignified lives.⁷ Presently, this is not entirely possible because they cannot use the state issued refugee identity cards to access fundamental government services and private services as well. Ultimately, this violates their rights under international, regional and national legal framework.⁸

1.2.1. International Framework

1.2.1.1. Universal Declaration on Human Rights (UDHR)

The UDHR is a globally recognized milestone document that provides for human rights, which ought to be enjoyed by all persons with no discrimination. Article 1 of the UDHR emphasizes that human beings are born free and equal in dignity and rights.⁹ This provision underscores the dignity for every human being. Refugees are not able to live dignified lives if they are unable to access fundamental e services on the government portal due to non-recognition of their identification documents. Further, refugees are not able to live a dignified life where they cannot use their cards to access private services such as the common use of MPESA to send and receive money, opening bank accounts or have access to work permits readily.

Articles 2 and 7 of the UDHR highlights the fact that persons are to enjoy their rights with no discrimination on their background, class, or origin.¹⁰ Refugees in Kenya are discriminated upon by virtue of not being able to use their identification document to access public and private services. They are

⁷Muigua K., Protecting Refugees Rights in Kenya: Utilising International Refugee Instruments, The Refugee Act 2006 and The Constitution of Kenya as Catalysts.

⁸ RCK, Asylum under threat: Assessing the protection of Somali refugees in Dadaab, 2012.

⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 12 May 2022]

¹⁰ Jeon, Hayoung, Humanitarian Affairs and Refugees under the UN Human Rights: the case of Somali refugees' crisis and the dilemma of Dadaab Camp, Kenya (2017).

unable to enjoy socio economic services such as are enjoyed by the holders of the National ID.

In article 13, the UDHR provides for everyone's right to leave any country, including their own, and to return to their country. Refugees in Kenya cannot apply for a passport on the e services portal as their identification documents are not recognized as one of the drop down options. This means that they are unable to leave the country or travel within the country at will even for valid reasons. The documentation process for them to get permission to leave the country points to the difficulties they face when acquiring travel documents in Kenya.¹¹

According to article 17 of the UDHR, everyone has the right to own property alone as well as in association with others. In Kenya, Refugees are not able to easily own property as the acquisition process requires recognition of their identification documents and access to services on the government portal including the Kenya Revenue Authority.¹² This then means that they have to use proxies to own property or establish businesses through companies. For this right to be respected, their identification documents should be recognized as official documents as well under the e services portal and private serves for financial transactions.

Article 23 of the UDHR states that everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. When refugees' documentation is not recognized in the government e services portal, they are unable to apply for employment opportunities with the government. Such employment opportunities often require documentation such as Police good conduct and EACC report, HELB Clearance etc. that is daunting to acquire with the refugee identification document. Further, refugees are unable to access their

¹¹ NRC, *Recognising Nairobi's Refugees; The Challenges and Significance of Documentation Proving Identity and Status*, 2017.

¹² KNHRC, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*, 2010.

work permits (Class M for refugees) readily, which places them at a socioeconomic disadvantage.¹³

1.2.1.2. International Covenant on economic, social and cultural rights (ICESCR)

The International Covenant on economic, social and cultural rights is an instrument outlining rights relating to the socio-economic wellbeing of an individual.¹⁴ These rights include the right to health, social security, adequate standards of living, education and cultural life. Kenya ratified the ICESCR in 1972 making it part of the laws of the country. Articles 6 and 7 of the ICESCR requires state parties to recognize the right to work for all persons, which includes the right of everyone to the opportunity to gain their living by work.¹⁵ This is definitely a daunting task for refugees who may not have the requisite documentation for making job applications in Kenya.

1.2.1.3. 1951 Convention on Refugees

Article 3 of the 1951 Convention on Refugees obliges States parties to apply its provisions without discrimination as to race, religion or country of origin.¹⁶ Non-discrimination is a core principle of international law and the foundation of all human rights treaties. Discrimination is prohibited, whether based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁷ The exclusion of refugees identification documents from the government's e services portal amounts to a form of discrimination based on their identity as refugees since by implication, they are not able to apply for government e services including accessing work permits on the portal. Further, their exclusion from private services such as MPESA also makes it difficult for them to conduct financial transactions unlike individuals with national IDs.

¹³ K.Hargrave and I. Mosel with A. Leach, Public narratives and attitudes towards refugees and other migrants: Kenya country profile, 2020.

¹⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 12 May 2022]

¹⁵ Ibid.

¹⁶ Ibid n 1.

¹⁷ UNHCR, A Guide to International refugee protection and building state asylum systems, 2017.

Article 13 of the Convention provides for the acquisition of movable and immovable property. Acquisition of property in Kenya requires valid identity documents recognized by the government coupled with access to financial services. This is hindered by the non-recognition of the Refugee cards on the government e-services portal that then means that they cannot access property related services under the Ministry of Lands and Planning. This also speaks to their ability to access financial services to complete transactions through MPESA, which is hampered by the status of their ID.

Article 17 and 18 of the Convention highlights the right to a wage-earning employment and self-employment for refugees. States should accord refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. In Kenya, refugees are not able to apply for jobs easily as they are not able to get work permits readily. Further, some of the documentation required when making job can only be accessed on the e citizen portal where their Refugee IDs are not recognized. These documents are such as the Police good conduct certificate. For access to the portal, one needs to have their ID. The Refugee ID is not placed among the options for valid identification on the e services portal unlike the National ID card.¹⁸

Article 28 emphasizes that recognized refugees should be able to access travel documents to make it possible for the refugee to travel (for instance for family visits, education, employment, health care, etc.) and to return to the country of asylum. Presently, the passport application process on the government's e services portal does not recognize the refugee identification card as one of the drop down options to apply for this crucial travel document.¹⁹

¹⁸ <https://www.rckkenya.org/refugees-and-asylum-seekers-lament-limited-access-to-work-permits-in-kenya/> accessed 12/5/2022.

¹⁹ <https://dis.ecitizen.go.ke/applications/5586085/edit?step=2> accessed 12/5/2022.

1.2.2. Regional framework

1.2.2.1. African Charter on Human and Peoples' Rights (Banjul Charter)

The Banjul charter is the primary framework for human rights in Africa.²⁰ The Charter was ratified by Kenya in 1992 and is thus applicable within its jurisdiction. Article 2 of the Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. As aforementioned, refugees are discriminated upon on basis of their identity, when their documentation is not recognized in access of public and private services as compared to the National ID.

As an emphasis to the UDHR, article 5 of the Banjul Charter states that, every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of their legal status. Without the official recognition of their identification documents, refugees cannot lead dignified socio-economic lives.

According to article 12, every individual has the right to freedom of movement and residence within the borders of a state provided he/she abide by the law. This includes the right to leave and return to a country. Refugees in Kenya cannot leave the country easily let alone have free movement within the country. This is because the passport acquisition process excludes the identification of the Refugee ID as a valid document that can be used to access this service.

Despite the fact, that article 14 provides for the right to property, refugees in Kenya do not enjoy it when they cannot access the property related services under the government portal and financial transactions.²¹ This is the same for

²⁰ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 12 May 2022]

²¹ Betts, A., N. Omata, O. Sterck, *Refugee Economies in Kenya*. Refugee Studies Centre, University of Oxford, Oxford (2018).

article 15 where the right to work is guaranteed. Refugees cannot readily apply for government jobs when they do not have the means to access the required documentation for the job application process, thus being deprived of this right. This also impedes their socio-economic development in Kenya. The violation of these rights ultimately contravenes article 22 of the Charter that intends for all people including refugees, to have the right to their economic, social and cultural development with due regard to their freedom and identity.

1.2.2.2. Convention Governing the Specific Aspects of Refugee Problems in Africa

This convention is the main text when addressing the welfare of refugees in Africa. It was ratified in Kenya in 1992 and thus form part of its applicable laws.²² Article IV of the Convention requires member states to uphold the rights of the refugees without any discrimination on any grounds.²³ This if course cannot be the case when they are not able to access certain services using their issued Identity cards. It amounts to a form of discrimination based on the Refugees are not able to access certain public and private services and this amounts to discrimination based on their identity and status as refugees.²⁴

Article VI focuses on the right to obtain travel documents for refugees within states in accordance with the United Nations Convention relating to the Status of Refugees. In Kenya, refugees are not able to easily apply for passports as essential travel documents, using their Refugee card, as the government portal does not recognize their official identification documents.

²² Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at: <https://www.refworld.org/docid/3ae6b36018.html> [accessed 12 May 2022]

²³ Cantor, David & Chikwanha, Farai, *Reconsidering African Refugee Law*. *International Journal of Refugee Law* (2019). 31. 10.1093/ijrl/eez032.

²⁴ *Ibid* n 22.

1.2.3. National framework on the right of refugees to access public and private services

1.2.3.1. Constitution of Kenya 2010

The Constitution is the grundnorm for any country. In Kenya, it contains fundamental rights and freedoms that are applicable to those within the country's jurisdiction including refugees. Article 27(4) of the Bill of rights prohibits discrimination any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. Despite this robust provision, refugees are not able to access public, private services with their government issued documentation, and this amounts to discrimination based on their social origin as refugees.²⁵

According to article 28 of the Constitution every person including refugees, has inherent dignity and the right to have that dignity respected and protected. This right cannot be enjoyed when refugees are not able to build themselves up socio economically due to limited employment opportunities that is further complicated when their documentation is not recognized properly in accessing public and private services.²⁶

The freedom of movement that is provided for under article 39(1) (2) cannot be equally enjoyed by refugees since their documentation curtails this. This is evidenced in the drop down checklist for passport application on the government's e services portal that does not include the Refugee identification card as a valid document for the application process. Since refugees are unable to apply for the passports on the e government portal, it impedes their freedom of movement and the right to leave Kenya.²⁷

²⁵ J. Foni, Civil Society Input to EU Africa Cooperation on Migration: The Inclusion of Refugees in Kenya, ECRE Working Paper 10; 2020.

²⁶ Aleinikoff, T.A. From Dependence to Self-reliance: Changing the Paradigm in Protracted Refugee Situations. Policy Brief. May. Transatlantic Council on Migration (2015) (A Project of the Migration Policy Institute), Washington, DC.

²⁷ N. Omata, Refugee livelihoods: A comparative analysis of Nairobi and Kakuma Camp in Kenya, 2020.

Even though under article 40, every person has the right, either individually or in association with others, to acquire and own property in Kenya. Most refugees are not able to access property related services on the e services portal. This unjustly restricts their right to property.

According to article 41, every person has the right to fair labor practices. The inability to apply for government jobs by getting work permits amounts to unfavorable labor practices for refugees, hampering their economic development.²⁸

Finally, article 56(b) mandates the state to put in place affirmative action programs designed to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields and are provided special opportunities for access to employment.

Being a marginalized group, refugees are not able to access favorable educational and economic opportunities.²⁹ The inability to access government and private services places them a more disadvantaged plane that should be addressed practically and adequately.

1.2.3.2. Refugee Act of 2021

The Refugees Act came into force in February 2022 as the Refugees Act 2021. The new Act provides robust protection whilst empowering refugees for durable solutions.³⁰ It acknowledges that refugees in Kenya have rights like everyone else and establishes government institutions tasked with the responsibility of managing refugee affairs. Further, it also seeks to provide a safe asylum space for refugees especially the most vulnerable groups such as women, children, persons with disabilities and unaccompanied minors. The Refugees Act 2021 has the potential of providing a legal environment for refugees in Kenya to not only survive but to also thrive. Most importantly, the new Act domesticates the three durable solutions to the

²⁸ Ibid.

²⁹ Alloush, M., J.E. Taylor, A. Gupta, R.I. Valdes, E. Gonzalez-Estrada 'Economic life in refugee camps'. World Development. (2017) 95(C). pp. 334– 347.

³⁰ <https://www.voanews.com/a/refugees-in-kenya-welcome-new-law-allowing-them-to-integrate-into-economy-society-/6334009.html> accessed 12/5/2022.

refugee crisis i.e. local integration, resettlement and voluntary repatriation. The adoption of these three durable solutions ensures that Kenya, as a state party to the 1951 UN Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, complies fully with the principle of non-refoulement which binds state parties such as Kenya not to forcefully return refugees to their countries of origin.

With the passing of the Refugees Act, 2021, which affords refugees and the Refugee Identity Card broader rights, particularly in Section 28, it is imperative that the Refugee Identity Card be recognized as a valid form of identification in all government applications that refugees are eligible for, including in online forms. This indicates that the refugee identity card shall at a minimum have similar status to the Foreign National Registration Certificate for purposes of accessing rights and fulfilling obligations under the law.³¹

Further, observing that section 28 (7) of the Refugees Act, 2021 establishes that the Refugee Identity Card “*shall at a minimum have a similar status to the Foreign National Registration Certificate,*” the Refugee Identity Card should render the same privileges as a Foreign National Registration Certificate in regards to identification, and at a minimum be listed and accepted as a valid form of identification on all government and private applications that refugees are eligible to apply for where the Foreign National Registration Certificate is listed and accepted, including on online forms.

Specifically, section 28(6) establishes that refugees have a “right to identification and civil registration documents and such documents shall be sufficient to identify a refugee or asylum seeker for the purposes of access to rights and services;” and Section 28(7) establishes that “the Refugee Identity Card shall at a minimum have a similar status to the Foreign National Registration Certificate.” Refugees therefore should theoretically be able to apply for government applications, including on online forms,

³¹ UNHCR Guidance on Registration and Identity Management.

using their Refugee Identity Card as a valid form of identification. According to the drop down option of identification on the e services portal to applications for work permits and access to financial services such as MPESA, opening of bank accounts, setting up companies and business entities, it is apparent that there is lack of recognition of refugee documentation in public and private services in Kenya.

From the foregoing, the inability to access the government services and private services impedes social economic inclusion of refugees into the Kenyan economic and social spectrum.³² It also violates the provisions of the Refugee Act 2021.

1.3. Situational analysis of the right of refugees to access public and private services in Kenya

As at 2022, Kenya hosts over 550,000 refugees and asylum-seekers mainly living in the Dadaab and Kakuma refugee camps as well as urban areas, including the capital, Nairobi.³³ Upon arrival, the refugees are required to apply for documentation to identify their status.³⁴ This application process is tedious and often experiences long delays.

The issuance of identity documents for refugees is the primary responsibility of the government of the host state. In the framework of the Comprehensive Refugee Response Framework (CRRF) and of SGD 16.9 (legal identity for all), UNHCR advocates for documents to be issued by the national identification registration authority with the same design and specifications applied to identity documentation issued to nationals.³⁵ Identity documents issued by national authorities should ensure that the identity and status of refugees are formally recognized in the country of asylum, facilitating access to rights, protection, services and opportunities afforded to them as refugees.³⁶ Despite a legal and policy framework that promotes integration,

³² Campbell, E. 'Urban refugees in Nairobi: problems of protection, mechanisms of survival, and possibilities for integration'. *Journal of Refugee Studies*. (2006) 19(3). pp. 396– 413.

³³ <https://data2.unhcr.org/en/country/ken> accessed 12/5/2022.

³⁴ <https://www.unhcr.org/ke/registration> accessed 12/5/2022.

³⁵ UNHCR Guidance on Registration and Identity Management

³⁶ *Ibid.*

empowerment and self-determination of refugees through durable solutions, the lived realities of refugees is incongruent with the rights that accrue from their legal status.

Even when refugees are duly registered and possess identification documents, they are still effectively unable to access basic services such as work, banking, education, healthcare, online government services etc. The inaccessibility to services prevents refugees from being contributing members to the Kenyan economy and society, draining Kenyan resources as opposed to contributing to it.

This status of refugee documentation has been further ascertained through a research project launched by Kituo cha Sheria-Legal Advice Centre³⁷ to analyze the experiences of refugees in relation to durable solutions. The project sought to establish the greatest administrative challenges that refugees face in accessing services and contributing towards the growth of the Kenyan economy and society.³⁸ Preliminary findings from the data collection revealed that refugees are often unable to complete online government applications, including KRA PINs and Class M work permits which refugees have a right to access, because their Refugee Identity Card is not recognized as a valid form of identification.

Even after receiving the Refugee ID, refugees are still unable to access certain public and private services such as the government e-services because their ID is not recognized as official documentation in Kenya. These government services on e-citizen, only recognizes National ID and Foreigner ID thus the refugees' documentation cannot easily access such public services and private services such as MPESA, banking services, establishing businesses etc. that is crucial in Kenya's financial economy.

The government's e citizen portal is often used to apply for business permits, good conduct, establishing a company, application for a passport etc.

³⁷ Kituo cha Sheria is a Non-Governmental organization in Kenya which handles refugee matters.

³⁸ <http://kituochasheria.or.ke/our-programs/forced-migration-programme/> accessed 12/5/2022.

Without the recognition of their refugee identification, refugees cannot easily apply for government jobs, acquire property, establish corporate entities, apply for e passports, apply for trade licenses and permits, use the Kenya Revenue Authority services, and apply for recognition, equation and verification of their professional qualifications.³⁹ This has not been the case as refugees identification documents in Kenya are still largely excluded from public and private services. Refugees in Kenya are not systematically included in national surveys and, as a result, there is a lack of data on refugee welfare and poverty that is comparable to the national population.⁴⁰ This further exacerbates their socio economic plight.⁴¹

1.4. Recommendations on the implementation of the right of refugees to access public and private services in Kenya

From the foregoing narrative, it is evident that Kenya has a solid legal and policy framework on the welfare of refugees. However, this has not been adequately implemented to ensure that more gains are made for the identification of refugee cards to access public and private services.

The government through the Ministry of ICT, needs to include refugee cards as valid identification on the e services portal. It should also issue a directive on the status of the refugee card as being equal to that of a national card to enable them access both public and private services. This will tap into the great potential that refugees have in achieving the sustainable development goals and improving their lives socio economically instead of relying on periodic handouts. It will also give great opportunities to skilled refugees who can actively participate in Kenya's labor force to do so.

The government, through the Ministry of Interior and Coordination of National Government, should also see to it that refugees are able to open

³⁹ <https://www.refugeesinternational.org/reports/2021/11/19/if-given-the-chance-refugees-can-help-kenyas-economic-growth-and-recovery> accessed 12/5/2022.

⁴⁰ UNHCR, Understanding the Socioeconomic Conditions of Refugees in Kalobeyei, Kenya Results from the 2018 Kalobeyei Socioeconomic Profiling Survey, 2018.

⁴¹ <https://www.worldbank.org/en/news/feature/2018/09/27/in-kenya-refugees-are-opening-up-frontiers-the-pull-of-investing-in-underserved-areas> accessed 12/5/2022.

businesses, engage in financial transactions, own property and get commercial permits using their ID cards, as it is currently difficult for them to do so.

1.5. Conclusion

The inclusivity and integration of refugees remains fundamental to ensuring that they are able to participate in the economy of their host country. This can only become a reality if they are able to access public and private services using their issued ID Cards without impediment.⁴²

⁴² <https://www.refugeesinternational.org/reports/2022/4/29/what-does-kenyas-new-refugee-act-mean-for-economic-inclusion> accessed 12/5/2022.

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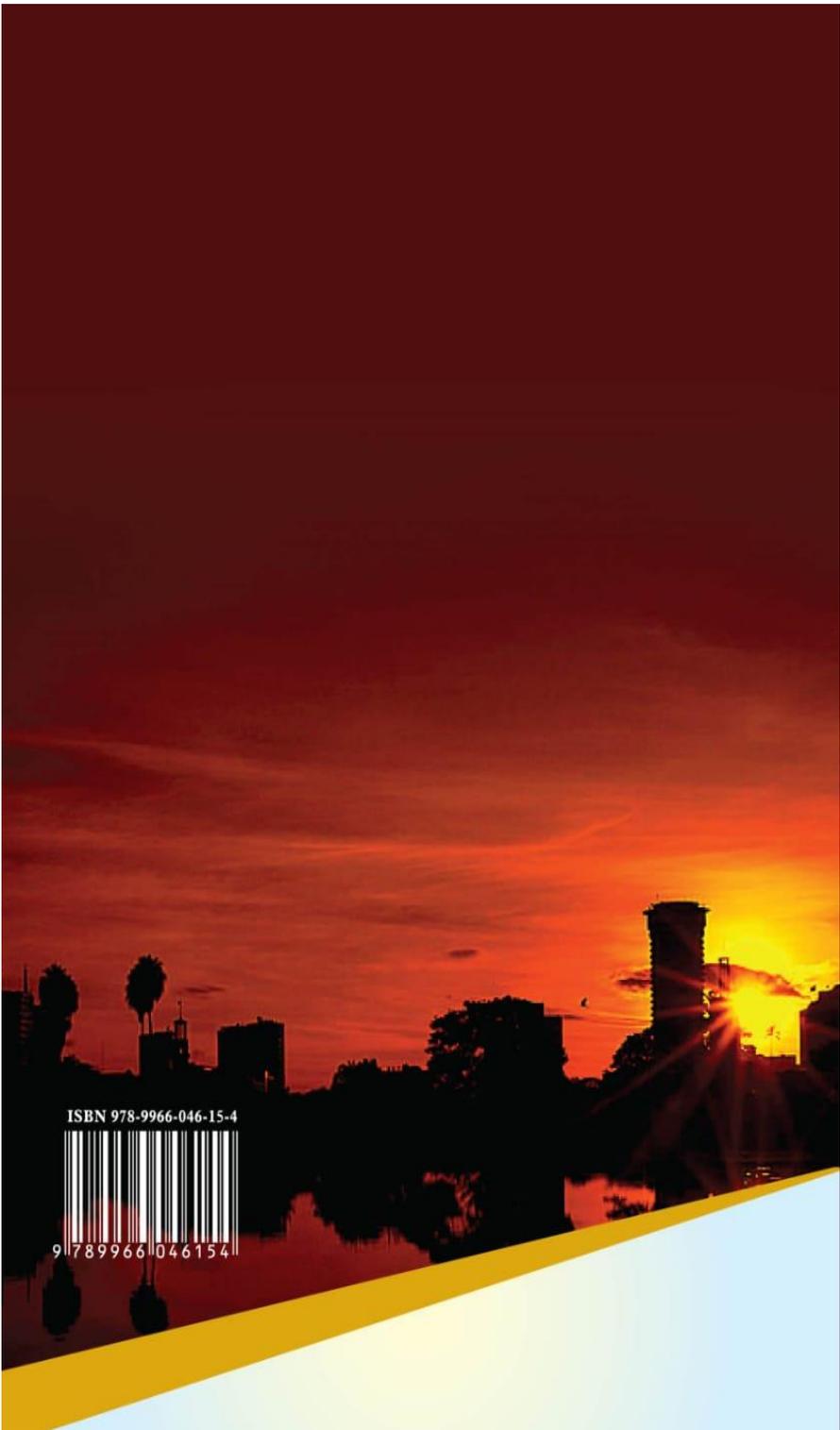
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