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THE NATIONAL ASSEMBLY


THIRTEENTH PARLIAMENT - THIRD SESSION - 2024
PUBLIC PETITIONS COMMITTEE

REPORT ON-

PUBLIC PETITION NO. 8 of 2023 REGARDING ENACTMENT OF LEGISLATION TO
CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED
DISAPPEARANCE BY DR. ANNETTE MBOGHO

APRIL 2024

*Approved
Boss
11/04/24.*

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE:	1 st APR 2024
	DAY: Thursday
TABLED BY:	Hon. Janet Sieni (Chairperson, Public Petitions Committee)
CLERK-AT THE-TABLE:	Shibuko

Clerk's Chambers
Directorate of Legislative & Procedural Services



TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS	2
CHAIRPERSON'S FORWARD	3
PART I	4
PREFACE	5
1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEE	5
1.2 COMMITTEE MEMBERSHIP	6
1.3 COMMITTEE SECRETARIAT	7
PART II	8
..... PUBLIC PETITION NO. 8 OF 2023 ENACTMENT OF LEGISLATION TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE	8
2.1 INTRODUCTION	8
2.2 PETITIONER'S PRAYER.....	8
PART III	9
STAKEHOLDERS' SUBMISSIONS ON THE PETITION	9
3.1 SUBMISSIONS BY THE PETITIONER	9
3.2 SUBMISSIONS BY THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS	10
3.3 SUBMISSIONS BY MUSLIMS FOR HUMAN RIGHTS (MUHURI)	14
3.4 SUBMISSIONS BY HUMAN RIGHTS AGENDA (HURIA).....	15
3.5 SUBMISSIONS BY HAKI AFRICA.....	16
3.6 SUBMISSIONS BY SEMA UKWELI.....	18
3.7 SUBMISSIONS BY ATTORNEY GENERAL	18
PART IV	24
COMMITTEE OBSERVATIONS	24
PART FIVE	25
ISSUES FOR DETERMINATION AS PER THE PRAYERS IN THE PETITION	25
PART SIX	26
COMMITTEE RECOMMENDATIONS	26
ANNEXURES	27

LIST OF ABBREVIATIONS AND ACRONYMS

AP	-	Administration Police
ATPU	-	Anti-Terrorism Police Unit
BPU	-	Border Patrol Unit
CSO	-	Civil Society Organization
DCI	-	Directorate of Criminal Investigations
GSU	-	General Service Unit
HURIA	-	Human Rights Agenda
IMLU	-	Independent Medico Legal Unit
IPOA	-	Independent Policing Oversight Authority
KDF	-	Kenya Defence Forces
KFS	-	Kenya Forest Service
KNBS	-	Kenya National Bureau of Statistics
KNCHR	-	Kenya National Commission on Human Rights
KPR	-	Kenya Police Reserve
KWS	-	Kenya Wildlife Service
NGO	-	Non-Governmental Organisation
NIS	-	National Intelligence Service
NPS	-	National Police Service
ODPP	-	Office of the Director of Public Prosecutions
RDU	-	Rapid Deployment Unit
VPF	-	Victims Protection Fund

CHAIRPERSON'S FORWARD

On behalf of the Public Petitions Committee and pursuant to the provisions of Standing Order 227, it is my pleasant privilege and honour to present this House the Report of the Public Petitions Committee regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance. The Petition was presented to the House pursuant to Standing Order No. 225 (2) (b) by the Honourable Speaker on behalf of Dr. Annette Mbogho, the Executive Director of Kituo Cha Sheria Legal Advice Centre.

The Petitioner prayed that the House enacts laws that would expressly criminalize and prescribe penalties for the crime of enforced disappearance. The Petitioner stated that the current laws were silent on the extent of prosecuting the crime of enforced disappearance thus the courts were faced with challenges in adjudicating such cases which were also connected to extrajudicial killings.

In consideration of the Petition, the Committee collected the views of various human rights organizations specialized in the subject matter as well as the Kenya National Commission on Human Rights who all emphasized the timeliness and need to enact the said legislation and fast tracking of the International Convention for the Protection of All Persons from Enforced Disappearance.

The Committee observed that Kenya was among the States that were signatories to the International Convention for the Protection of All Persons from Enforced Disappearance but has not taken steps to ratify the Convention and recognise the crime of enforced disappearance in its legislation. Further, a stand-alone law may be enacted or certain laws can be reviewed to criminalize enforced disappearance. The laws that would need to be reviewed include the Penal Code, Cap 63, the Criminal Procedure Code Cap 75, the Persons Deprived of Liberty Act, 2014, the Prevention from Torture Act 2017, the National Coroners Service Act 2017 and any other relevant law.

On the proposal for the National Assembly to enact legislative provisions to criminalise and prescribe penalties for the crime of enforced disappearance, the Committee recommends that the country's legal framework should be reviewed to incorporate the crime of enforced disappearance.

The Committee is thankful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support offered during the consideration of the Petition. The Chairperson expresses gratitude to the Members of the Committee and the Secretariat for their devotion and commitment to duty during the consideration of the Petition.

On behalf of the Committee and pursuant to the provisions of Standing Order 199, I now wish to table the report before the House.



POV
HON. NIMROD MBITHUKA MBAI, M.P.
CHAIRPERSON, PUBLIC PETITIONS COMMITTEE

Date: 11-04-2024

PART I

PREFACE

1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEE

The Public Petitions Committee is established under the provisions of Standing Order 208A with the following terms of reference:

- a) considering all public petitions tabled in the House;
- b) making such recommendations as may be appropriate with respect to the prayers sought in the petitions;
- c) recommending whether the findings arising from consideration of a petition should be debated; and
- d) advising the House and reporting on all public petitions committed to it.

1.2 COMMITTEE MEMBERSHIP

The Public Petitions Committee was constituted in October 2022 and comprises the following Members:

Chairperson

Hon. Nimrod Mbithuka Mbai, M.P.
Kitui East Constituency
United Democratic Alliance (UDA)

Vice Chairperson

Hon. Janet Jepkemboi Sitienei, M.P.
Turbo Constituency
United Democratic Alliance (UDA)

Hon. Patrick Makau King'ola, M.P.
Mavoko Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

Hon. Edith Vethi Nyenze, M.P.
Kitui West Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

Hon. Ernest Kivai Ogesi Kagesi, M.P.
Vihiga Constituency
Amani National Congress (ANC)

Hon. Maisori Marwa Kitayama, M.P.
Kuria East Constituency
United Democratic Alliance (UDA)

Hon. Joshua Chepyegon Kandie, M.P.
Baringo Central Constituency
United Democratic Alliance (UDA)

Hon. John Walter Owino, M.P.
Awendo Constituency
Orange Democratic Movement (ODM)

Hon. Bernard Muriuki Nebart, M.P.
Mbeere South Constituency
Independent

Hon. Bidu Mohamed Tubi, M.P.
Isiolo South
Jubilee Party (JP)

Hon. Caleb Mutiso Mule, M.P.
Machakos Town Constituency
Maendeleo Chap Chap Party (MCCP)

Hon. John Bwire Okano, M.P.
Taveta Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

Hon. Peter Mbogho Shake, M.P.
Mwatate Constituency
Jubilee Party (JP)

Hon. Sloya Clement Logova, M.P.
Sabatia Constituency
United Democratic Alliance (UDA)

Hon. Suzanne Ndunge Kiamba, M.P.
Makueni Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

1.3 COMMITTEE SECRETARIAT

The Public Petitions Committee is facilitated members of the secretariat:

Lead Clerk
Mr. Ahmed Kadhi
Senior Clerk Assistant

Ms. Anne Shibuko
First Clerk Assistant

Ms. Miriam Modo
First Clerk Assistant

Mr. Willis Obiero
Clerk Assistant III

Mr. Shadrack Omondi
Legal Counsel II

Ms. Patricia Gichane
Legal Counsel II

Mr. Martin Sigei
Research Officer III

Ms. Roselyne Njuki
Principal Serjeant-at-Arms

Mr. Paul Shana
Sergeant at Arms

Mr. Calvin Karungo
Media Relations Officer III

Mr. Peter Muteithia
Audio Officer

PART II

PUBLIC PETITION NO. 8 OF 2023 ENACTMENT OF LEGISLATION TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

1.4 INTRODUCTION

1. Public Petition No. 8 of 2023 regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance was presented by the Honourable Speaker on Tuesday, 7th March, 2023 on behalf of Dr. Annette Mbogoh, the Executive Director of Kituo Cha Sheria Legal Advice Centre.
2. The Petitioner stated that Kituo Cha Sheria Legal Advice Centre had worked closely with victims of cases of extra-judicial killings and disappearances in the country since 2007 and documented a total of 1201 killings and 272 enforced disappearances with most of the incidences having occurred in the hands of police and other security agencies.
3. The Petitioner also claimed that in 2021, Kenya reported approximately 43 cases of disappearances of persons who were last seen in police custody or who were abducted by persons believed to be police officers.
4. The Petitioner highlighted northern and coast regions as being the hotspots for incidences of enforced disappearance as a way of counter-terrorism operations and cited an incident where 20 dead bodies were allegedly retrieved from River Yala.
5. According to the Petitioner, there was no legal remedy to hold suspects of the crime of enforced disappearance accountable for forcibly disappearing victims whose whereabouts remained unknown.

1.5 PETITIONER'S PRAYER

The Petitioners prayed that the National Assembly through the Public Petitions Committee—

6. The National Assembly enacts laws that would expressly criminalize and prescribe penalties for the crime of enforced disappearance.

PART III

STAKEHOLDERS' SUBMISSIONS ON THE PETITION

1.6 SUBMISSIONS BY THE PETITIONER

Dr. Annette Mbogoh, the Executive Director of Kituo Cha Sheria Legal Advice Centre appeared before the Committee on Tuesday 18th April, 2023 and submitted as follows—

7. Kituo Cha Sheria Legal Advice Center was one of the oldest and most experienced non-governmental and human rights organization in East, Central and the Horn of Africa having been established in July 1973 to enhance access to justice for poor, indigent and marginalized communities in Kenya. The objectives and mission of the organization was to set and shape the national and regional agenda on human rights issues including environmental, economic and socio-cultural rights issues as well as monitor implementation by the State of provisions of human and people's rights.
8. In the execution of its mandate, the organization had established that the matter of enforced disappearances and extrajudicial killings were prominent and disturbing within the country. That according to statistics from Missing Voices compiled from 2007, 1349 persons were victims of extrajudicial killings and 256 cases of enforced disappearances were documented. Majority of the cases were attributed to the police.
9. The laws were silent on the extent of prosecuting the crime of enforced disappearance thus the courts were faced with challenges in adjudicating such cases.
10. That enforced disappearances were commonly occurring alongside extrajudicial killings hence tarnishing the fabric of law enforcement and the rule of law in the country. Unresolved extrajudicial killings and enforced disappearances were becoming a concern to every citizen.
11. In 2017, during the prolonged and contested general elections, the Human Rights Watch documented that the police and armed gangs killed more than 100 people. At least 67 people were killed during the first round of voting, most of them were either shot or beaten to death by police. In 2018 alone, Kenyan human rights groups documented at least 267 cases of extrajudicial killings by police. The Independent Medico Legal Unit (IMLU), a Nairobi based NGO that worked on police accountability, documented 152 extrajudicial killings by police. Further, investigatory reports by the Kenya National Commission for Human Rights (KNCHR)

implicated security agencies in enforced disappearances, brutality and extrajudicial killings.

12. That there was failure and neglect to institute adequate investigations on extrajudicial killings and enforced disappearances and the state of affairs was exacerbated by the absence of specific legislation criminalizing enforced disappearance. The absence of such provisions hence provided a leeway for inadequate investigations and prosecution of enforced disappearance cases.
13. The international instruments reaffirmed the illegal nature of enforced disappearance under international law and required that enforced disappearance be classified as a crime under national criminal law.
14. In Africa, Burkina Faso, Senegal and Tunisia had criminalized enforced disappearance while Kenya had only signed the instrument pending ratification.
15. That a key element of the crime of enforced disappearance in the International Crimes Act was that it must be committed in a systematic and widespread fashion. As such, where the high standard set in the International Crimes Act were not fulfilled, perpetrators of the crime of enforced disappearance may lack criminal responsibility.
16. The distinction of enforced disappearances from the various offences linked to it was that it was perpetrated by the State and or its agents and persons of authorization, with support and acquiescence of the State. Since the State may decline to acknowledge the deprivation of the liberty and or concealment of the fate of the disappeared person, a stand-alone law was necessary to adequately address the crime.

1.7 SUBMISSIONS BY THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

The Chairperson, Kenya National Commission on Human Rights (KNCHR) Ms. Roselene Odede appeared before the Committee on Wednesday, 26th October, 2023 and submitted as follows—

Background

17. The Petition requesting the National Assembly to enact legislation to criminalize and prescribe penalties for the crime of enforced disappearance was welcome and timely as the legal framework in Kenya lacked a precise definition of enforced disappearance as a distinct criminal offence. The Penal Code (Cap. 63) did not recognize the crime of enforced disappearance, rather, it prohibited kidnapping and abduction. Kidnapping or abduction however did not capture all the complexities involved in enforced disappearances.

18. Enforced disappearance was a grievous act that violated the whole spectrum of the Bill of Rights for the victims, their families, and communities. It was a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.
19. Prioritization of the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance by the Republic of Kenya was key in addressing the issue of enforced disappearance. The Convention was adopted by the General Assembly in its Resolution 61/177 of 2006 and came into force on 23rd December 2010. It was the first universally legally binding human rights instrument concerning enforced disappearance. Notably, Kenya signed the Convention on 6th February, 2007, but was yet to ratify it.
20. The Convention enjoined all state parties to ensure that enforced disappearance constituted an offence under its criminal law. The Convention would ensure the prevention of the gruesome accountability and justice for victims when they do occur.

Justification

21. The Petitioner correctly pointed out, that there was a high trend of enforced disappearances and extra-judicial killings in the country. The status was confirmed by the past and ongoing investigations and documentation which the Commission had painstakingly carried out over the recent years.
22. There were various reports by the Commission documenting violation of enforced disappearance published on its website. That since 2007, KNCHR had documented over 1800 cases of extrajudicial killings and enforced disappearances attributed to the Kenyan Security Forces. For example, in the past five years, the Commission handled 592 cases of extrajudicial killings and 82 cases of enforced disappearance between 2019 and 2023. However, the data was not comprehensive owing to the covert nature that the crimes were committed and the fact that there was no centralised database for the offences (by both State and non-state actors) hence many of these crimes were unreported.
23. The Shakahola forest horror in which more than 400 bodies were discovered and nearly 100 survivors rescued was arguably connected to the crime enforced disappearance.
24. The Commission had established that enforced disappearance and extrajudicial killings involved various units of our security agencies including Kenya Défense Forces (KDF), National Intelligence Service (NIS), Kenya Wildlife Services (KWS), Kenya Forest Services (KFS) and various units of the National Police Service (NPS) including the Criminal Investigations Directorate, Anti-Terrorism Police Unit

(ATPU), Kenya Police Reserve (KPR), Administration Police (AP), Rapid Deployment Unit (RDU) of the AP, Border Patrol Unit (BPU) and the General Service Unit (GSU).

25. The Constitution mandated the State to pursue security, in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms.
26. About 70 States had ratified to the **International Convention for the Protection of All Persons from Enforced Disappearance** while 43 States had signed it. Some of the African countries had ratified the Convention and taken steps to recognise the criminalised enforced disappearance in their domestic laws included Morocco, Benin, Malawi, and the Gambia.

Recognition of Crime of enforced disappearance

The National Assembly needed to amend the existing legislation, more specifically the Penal Code to provide for the various issues in line with regional and international standards as follows:

27. Provide a clear definition of enforced disappearance in criminal law. Such definition should be aligned to the International Convention for the Protection of All Persons from Enforced Disappearance, which considered enforced disappearance to be, "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".
28. Absolute prohibition of the crime of enforced disappearance. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification for enforced disappearance (Article 1(2)).
29. Provide for appropriate penalties which consider the extreme seriousness of enforced disappearance (Article 7(1)).
30. The right for victims of enforced disappearance to obtain reparation and prompt, fair and adequate compensation (Article 24).
31. Command responsibility. That no order or instruction from any public authority, civilian, military, or other, may be invoked to justify an offence of enforced disappearance (Article 6(2)).

32. The duty of State authorities to undertake prompt and impartial investigation where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, even if there has been no formal complaint (Article 12).
33. Express protection of vulnerable groups including human rights defenders and those who work on extrajudicial, journalists and others who are at risk of the gruesome vice.
34. Enforced disappearance as an extraditable offence in any extradition treaty (Article 13).

Proposals by KNCHR

35. The Executive and Legislature to initiate and expedite the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance.
36. The National Assembly expedites the enactment or amendment of legislation to explicitly criminalise enforced disappearance within the national legal framework.
37. The National Security Council to expedite the development and implementation of a National Security Policy in compliance of the Constitution and international rights instruments.
38. The State to expedite the full operationalization of the National Coroners Service Act, 2017.
39. To expedite the full operationalisation of the Prevention of Torture Act, 2017 including developing rules and regulations under the Act.
40. The National Assembly amends the Kenya National Commission on Human Rights Act, 2011 to expressly provide for the Commission to perform its function as provided under Article 59(2)(d) including unfettered access to all places of detention whether public or private consistent with its mandate, recommendations by treaty bodies to Kenya and international best practices.
41. Strengthen investigative and prosecutorial capacities (ODPP, NPS) to ensure effective legal action against perpetrators of enforced disappearance and extrajudicial killings.
42. Prioritize the protection and support of human rights defenders working on cases of enforced disappearance and police killings, including collaboration with relevant government agencies. Relatedly, Kenya to adopt the Human Rights Defenders Protection Policy.

43. The National Assembly reviews the Prevention of Torture Act, 2017 to enable KNCHR to have direct powers of conducting investigations and forwarding file to ODPP for prosecution without requiring the intermediary approach with DCI or NPS to reduce fear of reprisal by relatives or the victims of such torture and victim apathy in pursuing redress.
44. Allocate increased adequate budgetary resources to the KNCHR to enhance its capacity to perform its work including investigations on enforced disappearances.
45. Full operationalisation of the multi-agency team on extrajudicial killings and enforced disappearances with representation from various government bodies to enhance coordination and collaboration in addressing enforced disappearance and related human rights violations.
46. Adopt a holistic government approach to offer comprehensive training programs for law enforcement officers, focusing on human rights, arrest procedures, and the responsible use of firearms.
47. The Attorney General expedites the operationalisation of the Victims Protection Trust Fund Regulations to facilitate compensation for victims and their families.
48. The Kenya National Bureau of Statistics (KNBS) in conjunction with the KNCHR to enhance the collection, collation and reporting of accurate official data on enforced disappearances in line with the agreed framework.
49. The Committee considers the findings and recommendations contained in the Senate Report on the Inquiry into Extrajudicial Killings and Enforced Disappearances in Kenya (October 2021) by the Standing Committee on Justice, Legal Affairs and Human Rights Committee.

1.8 SUBMISSIONS BY MUSLIMS FOR HUMAN RIGHTS (MUHURI)

The Executive Director of MUHURI Mr. Francis Auma appeared for the Committee on Tuesday, 31st October, 2023 and submitted as follows—

50. The organisation had documented many cases of enforced disappearance and sought court orders for habeas corpus. There have been about 12 cases of enforced disappearance in the last 12 years and most of the cases were carried out by ATPU.
51. There was need for a legislature to cover for the gaps regarding enforced disappearance to assist the victims even through restoration and redress.

1.9 SUBMISSIONS BY HUMAN RIGHTS AGENDA (HURIA)

The Executive Director of HURIA, Mr. Yusuf Lule, appeared before the Committee on Tuesday, 31st October, 2023 and submitted as follows—

52. HURIA supported the Petitioner's prayers and the need for a legislation to criminalise and prescribe penalties for the crime of enforced disappearance which was long overdue but timely if there was political goodwill.
53. The government had acknowledged the twin problem of enforced disappearance and extrajudicial killings and committed to ratifying and domesticating the International Convention for the Protection of all Persons from Enforced Disappearance ending all forms of extra judicial execution by security services. Further, amending the National Coroners Service Act, 2017 to establish the Coroners General Office and a special tribunal for gross human rights violation and enforced disappearances.
54. In view of the commitments and the unending crimes against the Kenyan people, the Petition was a beginning of a national conversation on the issues of enforced disappearance and extra judicial killings.
55. That for over 50 cases of enforced disappearance and extra judicial killings were documented by HURIA since 2016 in Kwale County. HURIA made submissions to KNCHR during a public inquiry on the status of security in the Coast region and also the Senate Standing Committee on Justice and Legal and Human Rights Affairs.
56. The occurrence and impact of the crime of enforced disappearance warranted the need for enactment of the said legislation. Further, HURIA had made various observations in its interactions with the cases of enforced disappearance. In a forum conducted on 17th October 2017 to receive and document cases of enforced disappearance and extra judicial executions in Kwale County, families of the victims submitted through questionnaires where about 11 cases of enforced disappearances and 9 killings were reported. After the analysis, HURIA noted as follows—
 - i. On many occasions, incidences of extrajudicial killings began as enforced disappearance hence making the two a twin problem.
 - ii. All the victims registered were Muslim men of Digo ethnic origin, 68 per cent of whom were above the ages of 35 years, 84 per cent were married men with at least two children and most of the claimants were women either married to the victims or daughters and sisters left with the bigger responsibility to fend for their families.

- iii. Most of the victims were in informal employment such as bodaboda operation, fish mongering, fruit vending, teaching in madrassa and farming.
- iv. Most of the killings happen between 7 p.m. and midnight within the area of Ukunda where majority of the victims' bodies were found with bullets.
- v. In the case of disappearances, the claimants alleged that a white Pro box car was mainly used and most of the abductions were carried out during the day. Msambweni Sub County was most affected by the incidences.
- vi. The claimants revealed that 65 per cent of the cases were reported to the police with no appropriate action taken. Most of the abducted victims were later killed and buried within a day as per the Muslim tradition thus hindering the undertaking of autopsies which could have revealed more evidence of the crime.
- vii. Most of the abduction of victims were done during the day by persons who had firearms and handcuffs pointing to the belief that they were law enforcement officers in the country.
- viii. The main target of the victims were youths between the ages of 25 and 35 years who were alleged to be recruiters of terrorist organisations while others were returnees who came back from Somalia.

57. From the observations, HURIA made the following recommendations—

- i. Implementation of the recommendations by the Civil Society Organisations (CSOs) during the Senate Standing Committee on Justice and Legal and Human Rights Affairs that visited parts of the country.
- ii. The Inspector General of Police be held accountable for the loss of the lives of many Kenyans since 2008 to date.
- iii. The families of victims found dead or abducted be compensated for the loss of lives and atrocities they have gone through. Despite the Victims Protection Act, the Victims Protection Fund (VPF) has not been operationalised.

1.10 SUBMISSIONS BY HAKI AFRICA

The Executive Director, Mr. Hussein Khalid appeared before the Committee on Tuesday, 31st October, 2023 and submitted as follows—

58. It was almost impossible to investigate and deal with the cases of enforced disappearances without encapsulating extrajudicial killings. In most instances, victims of enforced disappearances ended up dead hence extremely challenging to

only legislate on enforced disappearance without extrajudicial killings which was a major problem nationally.

59. From the various cases documented by various human rights organisations, there was a hallmark of torture. Any legislation on enforced disappearance and extrajudicial killings should refer to the Prevention of Torture Act to cover for victims who have been disappeared and later found alive and those found dead. There was need for a broader definition of enforced disappearance for the two types of victims.
60. In many cases, the perpetrators were security officers who also conducted the investigations. The responsibility to investigate should not be bestowed on police to build faith that such cases would be conclusively investigated. The mandate should be handed over to Independent Policing Oversight Authority (IPOA) to deal with any suspicion of enforced disappearance. The IPOA only dealt with National Police Service (NPS) yet other security agencies also engaged in enforced disappearances. For instance, the (KDF) were notorious for engaging in enforced disappearance especially in Northern Kenya. The KWS were mentioned many times in their dealing with suspected poachers and KFS while dealing with illegal charcoal sellers were equally mentioned.
61. There should be transition in application of the legislation. Over 700 cases of enforced disappearance have been documented by HAKI Africa in the last ten years. The cases needed to be factored in considering there was no statute of limitation in criminal law hence the need for a provision that would consider cases that happened in the past.
62. While Article 29 of the Constitution put the responsibility for protection of life on government, there was no legislation to ensure the government and its agencies were accountable to its people in the event of enforced disappearance and extrajudicial killings. Whenever the suspects were the same state agencies, the accountability was not clear.
63. The abductions in enforced disappearance are made during the day hence ruling out the possibility of criminals engaging in the act as criminals have different motivations such as ransom and revenge which can be observed if that was the case.

HAKI Africa further submitted some of the effects of the absence of the legislation to criminalize and prescribe penalties for the crime of enforced disappearance as follows—

64. Enforced disappearances had disrupted the normal lives of many families including the status of marriages. Women victims could not establish whether they

were married to their disappeared husbands or not thereby affecting determination in legal requirements of marriages.

65. There were children under guardianship because their parents' status was unknown whether alive or dead thereby affecting certain roles played by parents which could not be played by guardians making them to miss out on programs such as school bursaries.
66. Succession and property ownership had been destabilized as properties registered in the name of a disappeared husband could not be managed by the wives due to legal requirements of the husband's presence. This had led to loss of property in some cases because of the absence of the husbands and the unclear marital status.
67. The families of the victims of enforced disappearance could not pursue legal compensation because enforced disappearance had not been criminalised.

1.11 SUBMISSIONS BY SEMA UKWELI

Mr. Boniface Mwangi, Executive Director, Sema Ukweli appeared on Tuesday, 31st October, 2023 and submitted as follows—

68. The Petition was important and timely as the government had promised to deal with the issues of enforced disappearance and extrajudicial killings. Therefore, there was need for the legislation to deal with the matter.
69. The legislation on enforced disappearance needed not to only punish the junior officers who engage in enforced disappearance but also the senior officers who give the orders for such disappearances. The entire security service needed to be accountable NIS.
70. One of the justifications by the police to engage in enforced disappearance of suspected criminals was that whenever they take suspects to court, they are not convicted. There was need to relook at the Penal Code to find a way of dealing with suspects of heinous crimes so that the police do not take the law into their hands.

1.12 SUBMISSIONS BY ATTORNEY GENERAL

The Attorney General vide a letter REF: DOJ/LJM/2/173 Vol 1 dated 26th September 2023 submitted on the Petition as follows—

71. Enforced disappearance refers to the practice of secret abduction and detention of individuals by state authorities or organizations acting with their consent, support, or acquiescence. The person is taken against their will often without any legal order or due process.

72. The official definition of enforced disappearance is found in the International Convention for the Protection of All Persons from Enforced Disappearance. This definition is comprehensive and captures all of the essential elements of enforced disappearance, including—
- i. The involvement of state agents or persons acting with the authorization, support, or acquiescence of the state;
 - ii. The deprivation of liberty of the victim; and
 - iii. The refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the victim.
73. This definition was also important because it recognized that enforced disappearance was a serious human rights violation. It was a crime against humanity when it was committed on a widespread or systematic basis.
74. It was important to note that Kenya was not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance. However, the definition of enforced disappearance in the Convention was widely accepted and was used by international human rights organizations to document and investigate cases of enforced disappearance.
75. Enforced disappearances were considered grave crimes violating several human rights including the right to life, liberty and security of the person, the prohibition of torture and the right to a fair trial. International law including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention for the Protection of All Persons from Enforced Disappearance categorically condemn enforced disappearances and demand accountability for those responsible.
76. Disappearance had traumatic effect on the victim who was removed from the protection of the law, frequently subjected to torture and was in constant fear for their lives as well as to their families who were uncertain about the individual's fate or whereabouts, wondering and waiting sometimes for years for news that may never come.
77. There has been concern in Kenya about the prevalence of enforced disappearances. Various national, regional and international organizations have decried the practice. However, the lack of accountability and the failure to bring the perpetrators to book have been a major concern in addressing the menace in Kenya.
78. One prominent case was the disappearance of human rights lawyer, Willie Kimani, his client Josphat Mwenda and their taxi driver Joseph Muiruri in 2016. They were prosecuting an alleged case of police brutality when they went missing. Their bodies were later found in a river showing signs of torture.

79. In October 2021, the Senate Standing Committee on Justice, Legal Affairs and Human Rights published a report titled *'Inquiry into extrajudicial killings and enforced disappearances in Kenya'*. Various stakeholders including state and non-state actors submitted feedback to the Senate Committee. The submissions from the Kenya National Commission on Human Rights (KNCHR) stated that for the period 2013-2022, the Commission together with its partners had documented 1,040 cases of Extra-Judicial Killings and enforced disappearances attributed to security agencies. According to their report, the majority of the victims (Over 80%) were young male adults aged 15-35 years. The Independent Policing Oversight Authority (IPOA) submitted that between October 2018 and February 2020 they received 210 cases of deaths arising out of police action in form of death while in police custody or enforced disappearance cases.
80. The Senate Committee noted that—
“The issue of the extrajudicial killings and enforced disappearances in Kenya has been of grave concern both prior to and following the promulgation of the Constitution of Kenya”.
81. A preliminary review of the legal framework in Kenya on enforced disappearances revealed that:
- i. There is currently no definition of the term "enforced disappearance" in Kenyan law.
 - ii. There is no national legislation that criminalizes or penalizes enforced disappearances.
 - iii. There are no effective measures in place to prevent enforced disappearances.
82. As a result, offenders are currently prosecuted under a range of related offences including kidnapping or abductions, false imprisonment, torture, and cruel inhuman treatment. However, these offences did not adequately reflect the gravity and specific nature of enforced disappearance which is a separate and complex crime.
83. In order to address these shortcomings, several areas of interventions have been outlined. These are:
- i. the need for a clear and concise definition of enforced disappearance in Kenyan law;
 - ii. the importance of criminalizing enforced disappearance with appropriate prevent enforced penalties; the need for effective measures disappearances, such as strengthening civilian oversight of the security forces and ensuring that all allegations of enforced disappearance are promptly and effectively investigate; and

- iii. The need for mechanisms to investigate and prosecute cases of enforced disappearance, as well as to provide support and reparations to victims and their families.
84. The Attorney General of Kenya has established a Multi-Agency Committee to review the laws and policies that protect people from extrajudicial killings and enforced disappearances. The Committee includes representatives from the following key stakeholders—
- i. Office of the Attorney General and Department of Justice;
 - ii. Ministry of Interior and Coordination of National Government;
 - iii. National Police Service;
 - iv. Independent Policing Oversight Authority (IPOA);
 - v. Office of the Director of Public Prosecutions (ODPP);
 - vi. Kenya National Commission on Human Rights (KNCHR); and
 - vii. Judiciary.

85. The Multi-Agency Committee is responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya. Their goal is to identify any gaps in the current laws and policies and to make sure that Kenya's laws are in line with international standards.
86. This framework is expected to include the following key elements—
- i. A clear and concise definition of enforced disappearance;
 - ii. The criminalization of enforced disappearance with appropriate penalties;
 - iii. Effective measures for the prevention of enforced disappearances;
 - iv. Mechanisms for the investigation and prosecution of enforced disappearances; and
 - v. Victim support and reparation measures.
87. The establishment of the Multi-Agency Committee was a positive step towards addressing the issue of enforced disappearances in Kenya. The Attorney General or his representative will chair the Multi Agency Committee.
88. The Multi-Agency Committee shall—
- i. Undertake a thorough analysis and review of relevant policies, laws and administrative measures for the protection against enforced disappearance and extrajudicial killings with a view to identifying gaps and incorporating the crime into the Kenyan legislative framework in line with international Standards;
 - ii. Identify gaps which from a legal perspective might hinder the incorporation of the crime of Enforced Disappearance in the national legislation; and
 - iii. Coordinate and collaborate with all relevant stakeholders involved in the custody or treatment of any person deprived of liberty;
 - iv. Provide a platform to identify and address common challenges inter alia, providing inter-agency technical guidance through the development of standards and tools to prevent and respond to cases of extrajudicial killings and enforced disappearances;
 - v. To conduct a comparative study with other jurisdictions that have in place legislation addressing crime of enforced disappearance with a view to developing a legal framework to address the issue;

- vi. Draft recommended amendments to existing provisions in the legislation aiming at mainstreaming enforced disappearance in the legal framework;
 - vii. To develop a matrix of legislation that needs amendment and prepare the relevant legislative drafting instructions;
 - viii. Coordinate policy & advocacy initiatives and provide capacity building and awareness raising on the International Legal Instruments on Protection from Enforced Disappearance;
 - ix. Develop a database for synthesizing and administering data on investigations, prosecution, and conviction of cases of extrajudicial killings, enforced disappearances, torture and other cruel, inhuman or degrading treatment or punishment; and
 - x. Provide leadership and guidance on the eventual ratification process of the International Convention for the Protection of all Persons from Enforced Disappearance.
89. The Multi Agency Committee has six (6) months within which to finalise its work and give recommendations including legislative proposals to incorporate the offence of enforced disappearance into Kenya's legislative framework.

PART IV

COMMITTEE OBSERVATIONS

Having collected the views from the various stakeholders, the Committee made the following observations, that—

90. The increased cases of enforced disappearances have affected and destabilized the lives of the victims as well as their relative as documented by various human rights organizations.
91. Kenya was among the States that were signatories to the International Convention for the Protection of All Persons from Enforced Disappearance but has not taken steps to ratify the Convention and recognise the crime of enforced disappearance in its legislation.
92. The Kenyan Constitution Article 2(6) provides that 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. However, since Kenya has not ratified the treaty, the petitioner prays for the enactment of a law to criminalize and prescribe penalties for the crime of enforced disappearances. Therefore, there is no effective legal remedy available through law to hold suspects accountable for victims of enforced disappearance whose whereabouts remain unknown or denied.
93. The petitioner is thus seeking the application of the convention through legislation of a local law that adheres to the Convention on the protection of all persons from enforced disappearance.
94. The Attorney-General established a Multi-Agency Committee responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya. The committee is to identify any gaps in the current laws and policies and to make sure that Kenya's laws are in line with international standards.

PART FIVE

ANALYSIS OF ISSUES FOR DETERMINATION AS PER THE PRAYERS IN THE PETITION

95. Arising from the findings and observations, the Committee makes determination on prayers sought in the Petition as follows—

Prayer No. 1: *The National Assembly enacts legislative provisions that will expressly criminalize and prescribe penalties for the crime of enforced disappearance.*

96. The Committee notes that—

- a) There is need to review present laws to recommend amendments to existing provisions in the legislation in order to mainstream enforced disappearance in the legal framework;
- b) Presently offenders are currently prosecuted under a range of related offences including kidnapping or abductions, false imprisonment, torture and cruel inhuman treatment. However, these offences do not adequately reflect the gravity and specific nature of enforced disappearance which is a separate and complex crime.
- c) That a statute stand-alone law may be enacted or certain laws can be reviewed to criminalize enforced disappearance. The laws that would need to be reviewed include the Penal Code, Cap 63, the Criminal Procedure Code Cap 75, the Persons Deprived of Liberty Act, 2014, the Prevention from Torture Act 2017, the National Coroners Service Act 2017 and any other relevant law.

PART SIX


COMMITTEE RECOMMENDATIONS

Pursuant to the provisions of Standing Order 227, the Committee recommends that—

97. On the proposal for the National Assembly to enact legislative provisions to criminalise and prescribe penalties for the crime of enforced disappearance, the country's legal framework should be reviewed to incorporate the crime of enforced disappearance. In the alternative, the National Assembly enacts a stand-alone law on Protection of Persons from Enforced Disappearance to safeguard against human rights violations by the state and state agencies.
98. In the alternative, the Multi-Agency Committee lead by the Office of Attorney General and Department of Justice responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya, fast-tracks the finalization of its work and submits a report to the National Assembly.
99. That in its report, the Multi-Agency Committee should identify any gaps in Kenya's legal framework and upon conclusion of the said report, the Office of Attorney General and Department of Justice to review the statute book and propose necessary amendments to the House to ensure it conforms to international standards especially the International Convention for the Protection of All Persons from Enforced Disappearance.

Signal:  11-04-2024 Date: 11-4-2024

THE HON. NIMROD MITHOKA MBARI, MP
CHAIRPERSON, PUBLIC PETITIONS COMMITTEE

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 11 APR 2024	
DAY: <input type="text"/>	
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ANNEXURES

- Annex 1: Adoption List
- Annex 2: Public Petition No. 08 of 2023 regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance
- Annex 3: Letter REF: DOJ/LJM/2/173 Vol 1 dated 26th September 2023 by the Office of the Attorney-General & Department of Justice
- Annex 4: Minutes of the 13th Sitting of 2023 held on Tuesday, April 18 2023
- Annex 5: Minutes of the 71st Sitting of 2023 held on Wednesday, October 26, 2023
- Annex 6: Minutes of the 72nd Sitting of 2023 held on Tuesday, October 31, 2023
- Annex 7: Minutes of the 19th Sitting of 2024 held on 27th March 2024



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - THIRD SESSION - 2024
PUBLIC PETITIONS COMMITTEE

ADOPTION SCHEDULE OF THE REPORT ON CONSIDERATION OF PUBLIC PETITION
NO. 08 OF 2023 REGARDING ENACTMENT OF LEGISLATION TO CRIMINALIZE AND
PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

DATE.....25-03-2024.....

We the undersigned Honourable Members of the Public Petitions Committee, do hereby affix our signatures to this Report on the Consideration of **Public Petition No. 8 of 2023 regarding enactment of legislation to criminalize and prescribe penalties for the crime of enforced disappearance** to confirm our approval and confirm its accuracy, validity and authenticity: -

S/NO	NAME	SIGNATURE
1.	Hon. Nimrod Mbithuka Mbai, M.P. Chairperson	
2.	Hon. Janet Jepkemboi Sitienei, M.P. Vice Chairperson	
3.	Hon. Patrick Makau King'ola, M.P.	
4.	Hon. Edith Vethi Nyenze, M.P.	
5.	Hon. Ernest Ogesi Kivai, M.P.	
6.	Hon. John Walter Owino, M.P.	
7.	Hon. Joshua Chepyegon Kandie, M.P.	
8.	Hon. Maisori Marwa Kitayama, M.P.	
9.	Hon. Bernard Muriuki Nebart, M.P.	
10.	Hon. Bidu Mohamed Tubi, M.P.	
11.	Hon. Caleb Mutiso Mule, M.P.	
12.	Hon. John Bwire Okano, M.P.	
13.	Hon. Peter Mbogho Shake, M.P.	
14.	Hon. Sloya Clement Logova, M.P.	
15.	Hon. Suzanne Ndunge Kiamba, M.P.	



REPUBLIC OF KENYA

**THE NATIONAL ASSEMBLY
THIRTHEENTH PARLIAMENT (SECOND SESSION)**

CONVEYANCE OF PUBLIC PETITION

(No. 08 of 2023)

**REGARDING ENACTMENT OF LEGISLATION TO CRIMINALIZE AND
PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED
DISAPPEARANCE**

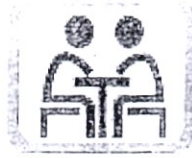
1. **Honourable Members**, Article 119 of the Constitution accords any person the right to petition Parliament to consider any matter within its authority. Further, Standing Order 225(2) (b) requires the Speaker to report to the House any Petition other than those presented by a Member.
2. In this regard, **Honourable Members**, I wish to report to the House that my office has received a petition from one Dr. Annette Mbogoh, the Executive Director of Kituo cha Sheria Legal Advice Centre calling for enactment of legislation to criminalize and prescribe penalties for the crime of enforced disappearance.
3. The Petitioner claims that the organisation has worked closely with victims of cases of extra-judicial killings and disappearances in the country since 2007 and documented a total of 1201 killings and 272 enforced disappearances with most of the incidences having occurred in the hands of the police and other security agencies.
4. The petitioner further claims that in 2021, Kenya reported approximately 43 cases of disappearances of persons who were last seen in police custody or who were abducted by persons believed to be police officers.

5. **Hon. Members**, the petitioner highlights the northern and coast regions as being hotspots for such incidences to counter terrorism operations and sites other instances including the retrieving of at least 20 dead bodies from River Yala.
6. The petitioner is concerned that there is no effective legal remedy available through law to hold suspects accountable for forcibly disappearing victims whose whereabouts remain unknown or denied. Efforts to have the matter addressed through filing of a constitutional petition seeking that the Attorney General does request the President to form a judicial commission of inquiry to look into the rampant cases of enforced disappearances have not been fruitful.
7. **Hon. Members**, the petitioner therefore prays that the National Assembly enacts laws that will expressly criminalize and prescribe penalties for the crime of enforced disappearance.
8. **Honourable Members**, having established that the matter raised in the Petition is well within the authority of this House; and further, that the matters raised in this Petition are not pending before any court of law, constitutional or legal body, I hereby commit the Petition to the Public Petitions Committee for consideration pursuant to Standing Order 208A.
9. The Committee is required to consider the Petition and report its findings to the House and to the Petitioner in accordance with Standing Order 227(2).

I thank you.


THE RT. HON. MOSES WETANG'ULA, EGH, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Date1/3/23.....



KITUO CHA SHERIA

LEGAL ADVICE CENTRE

we care for justice

ENACTMENT OF LEGISLATION ON ENFORCED DISAPPEARANCES

Introduction

Honourable Members, I appreciate the National Assembly and more specifically the Public Petitions Committee for inviting us to this committee hearing in respect to our public petition regarding the enactment of legislation to criminalize and prescribe penalties for the crime of enforced disappearance.

My name is Annette Mbogoh, the Executive Director of Kituo cha Sheria -Legal Advice Centre (hereinafter "KITUO"), the Petitioner herein. KITUO is the oldest and most experienced non-governmental and human rights organization in East, Central and the Horn of Africa having been established in July 1973 to enhance access to justice for poor, indigent and marginalized communities in Kenya. This year, KITUO celebrates its Golden Jubilee having turned 50 years since its inception. The objectives and mission of the organization as set out in its Constitution are inter alia to set and shape the national and regional agenda on human rights issues including environmental, economic and socio-cultural rights issues as well as monitor implementation by the State of provisions of human and people's rights. Through its programmes, KITUO has adopted a legal empowerment ideology in the execution of its mandate which has seen extensive community legal education, direct legal services provision, public interest litigation, advocacy, community organizing and evidence-based research.

In the execution of its mandate, KITUO has found that the matter of enforced disappearances and extrajudicial killings has been particularly prominent and yet disturbing within our country Kenya. According to statistics from Missing Voices compiled from 2007, 1349 persons have been victims of extrajudicial killings. On the other hand, 256 cases of enforced disappearances have been documented. Majority of these cases have been attributed to the police. Yet, the law,

as it is now, is limited to the extent to which especially enforced disappearances can be prosecuted. The courts have hence been faced with challenges in adjudicating such cases.

It is against this backdrop that we have petitioned Parliament to enact legislation that will expressly criminalize and prescribe sentences for the crime of enforced disappearances.

Background

Enforced disappearances, which are commonly accompanied by extrajudicial killings, have tarnished the fabric of law enforcement and the rule of law in the country. Unresolved extrajudicial killings and enforced disappearances should now be a concern to every citizen.

In the year 2017, during the prolonged and contested general elections, the Human Rights Watch documented that the police and armed gangs killed more than 100 people. It was noted that at least 67 people were killed during the first round of voting most of them either shot or beaten to death by police. In 2018 alone, Kenyan human rights groups documented at least 267 cases of extrajudicial killings by police. The Independent Medico Legal Unit (IMLU), a Nairobi based NGO that works on police accountability, documented 152 extrajudicial killings by police. Further, some investigatory reports by the Kenya National Commission for Human Rights (KNCHR) implicate security agencies in enforced disappearances, brutality and extrajudicial killings include the following:

- a) The Error of Fighting Terror with Terror (2015): The report documents 150 cases of people who disappeared, or were killed or brutalized by various security forces involved in the ongoing counter-terrorism operations in the country.
- b) Return of the Gulag – Report on Operation Usalama Watch (2014): The Report captures findings by KNCHR regarding the implementation of the Usalama Watch Security operation. The aforesaid operation commenced on 3rd April 2014 in response to escalating terrorist activities in the country. It was characterized by massive violation of human rights by police officers against residents of areas of operation majority of whom were ethnic Somalis.
- c) The Cry of Blood: Report on Extra-Judicial Killings and Disappearances of Suspected Mungiki Members (2018): The Report covers investigations into executions and disappearances of suspected Mungiki members attributed to the National Police Service.
- d) The Mountain of Terror – A Report on Investigations of Torture and Killings by the Military in Mt. Elgon (2008): The Report documents abuses and brutality

committed by the military against suspected members of the outlawed Sabot Land Defence Force (SLDF) in Mt. Elgon. The abuses were indiscriminate and targeted many innocent civilians who were not members of SLDF.

- e) *Mirage at Dusk: A Human Rights Account of the 2017 General Elections (2017)*: The Report covers human rights violations documented by the KNCHR during the 2017 general elections. Majority of the documented cases were as a result of police aggression towards civilians.
- f) This is well captured in the 2016 Human Rights Watch report, *Deaths and disappearances; abuses in counterterrorism operations in Nairobi and in North Eastern Kenya*.
- g) Missing Voices documents 1349 police killings and 256 enforced disappearances from 2007 to date (<https://missingvoices.or.ke/statistics>)

There has been failure and neglect to institute adequate investigations on extra-judicial killings and enforced disappearances. A good example is well illustrated in the case of Nairobi Misc. Cr. Application No. 244 of 2016 Law Society of Kenya, Willie Kimani and Another V Attorney General and Anor. The Honourable Court observed that, "There was a distinct lack of enthusiasm by the police to investigate the disappearance of the deceased petitioners when the incident was reported to them...While that may be the case, there has been public outcry regarding the manner which the Police Service investigates criminal complaints made against members of the Police Service. The Police Service has variously been accused of conducting shoddy investigations, being lethargic and generally skewering investigations so that such accused police officers are eventually not called upon to account for their misconducts or misdeeds."

The state of affairs has been exacerbated by the absence of specific legislation criminalizing enforced disappearance. The absence of such provisions hence gives leeway for inadequate investigations and prosecution of enforced disappearance.

International Law on Enforced Disappearances

International instruments reaffirm the illegal nature of enforced disappearance under international law. In effect, they require that enforced disappearance be classified as a crime under national criminal law.

On 23rd December 2010, the International Convention for the Protection of all Persons from Enforced Disappearance came into force. In article 2, the Convention considers "Enforced Disappearance" as:

"...the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State followed by a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person which place that person outside the protection of the law."

Article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance provides as follows:

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 4 of the Declaration on the Protection of all Persons from Enforced Disappearance provides as follows:

All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties, which shall take into account their extreme seriousness.

International conventions, international practice and pronouncements/ proclamations have widely accepted the need to domesticate legislation that specifically create the offence of enforced disappearance and prescribes penalties. While the Constitution adopts international instruments as part of the law of Kenya, the instrument must be ratified. In the case of enforced disappearances, Kenya has only signed the instrument. Ratification is pending. In Africa, Burkina Faso, Senegal and Tunisia have criminalized enforced disappearance in their respective countries.

~~The International Crimes Act does provide for crimes against humanity as defined in article 7 of the Rome Statute. The crime of enforced disappearances of persons is categorized and defined as a crime against humanity in International Crimes Act. Article 7(2)(i) of the Rome Statute of the ICC states:~~

"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by

a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

As stipulated hereinabove, a key element of the crime of enforced disappearance in the International Crimes Act is that it must be committed in a systematic and widespread fashion. As such, where the high standard set in the International Crimes Act is not fulfilled, perpetrators of the crime of enforced disappearance may have no criminal responsibility.

The argument by states has been that there is legislation directly or indirectly touching on the enforced disappearance that then addresses the issue. However, it has been suggested that the complexity of enforced disappearance cannot be addressed through fragmented legislation. The Working Group on Enforced or Involuntary Disappearances and the UN Committee on Enforced disappearance have also weighed in on the issue of legislating against enforced disappearances.

The ICJ publication, “Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction A Practitioners Guide” captures the dilemma in the following terms:

The Working Group on Enforced or Involuntary Disappearances (WGEID) has stated that “[a] number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.”

The distinction of enforced disappearances from the various offences linked to it is that enforced disappearance occurs by the hand of the State and or its agents and persons of authorization,

support and acquiescence of the State. The State also would decline to acknowledge the deprivation of the liberty and or concealment of the fate of the disappeared person. A stand-alone law is necessary to adequately cover this crime.

We therefore humbly request:

Parliament enacts legislative provisions that will expressly criminalize and prescribe penalties for the crime of enforced disappearances.

And your PETITIONER(S) will every pray.

(12) DLPS
Please deal.
27/09/23



REPUBLIC OF KENYA
OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

ED Head PJT
to note & deal
araphim
27/9/23

REF: DOJ/LJM/2/173 Vol 1

26th September, 2023

Mr. Samuel Njoroge
Clerk of the National Assembly
Parliament Building
NAIROBI

RE: PUBLIC PETITIONS COMMITTEE MEETING ON ENFORCED DISAPPEARANCE
LEGISLATION

Reference is made to the subject matter captioned hereinabove and to your letter dated 18th September, 2023 under Ref. No. KNA/DLPS/PPETC/CORRR/2023/192 inviting the Attorney General to appear before the Public Petition Committee on 27th September, 2023 at 12.00 noon to discuss the issue of enforced disappearances.

Regrettably, the Attorney General will be engaged on other official duties hence his inability to appear before the committee. Nonetheless, kindly find attached report on the subject matter for your consideration. In the circumstances therefore, we request for rescheduling of the meeting to a later date.

Kindly be advised.

Hon. J.B.N. Muturi, EGH
ATTORNEY GENERAL

Copy to:

Hon. Shadrack J. Mose
Solicitor General

NATIONAL ASSEMBLY
RECEIVED
27 SEP 2023
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P. O. Box 41842, NAIROBI

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REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

MULTI-AGENCY COMMITTEE ON THE REVIEW OF THE LEGISLATIVE, POLICY AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF PERSONS FROM EXTRA JUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES IN KENYA

1. Enforced disappearance refers to the practice of secret abduction and detention of individuals by state authorities or organizations acting with their consent, support, or acquiescence. The person is taken against their will often without any legal order or due process.
2. The official definition of enforced disappearance is found in the International Convention for the Protection of All Persons from Enforced Disappearance. This definition is comprehensive and captures all of the essential elements of enforced disappearance, including:
 - The involvement of state agents or persons acting with the authorization, support, or acquiescence of the state;
 - The deprivation of liberty of the victim; and
 - The refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the victim.
3. This definition is also important because it recognizes that enforced disappearance is a serious human rights violation. It is a crime against humanity when it is committed on a widespread or systematic basis.
4. It is important to note that Kenya is not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance. However, the definition of enforced disappearance in the Convention is widely accepted and is used by international human rights organizations to document and investigate cases of enforced disappearance.
5. Enforced disappearances are considered grave crimes violating several human rights including the right to life, liberty and security of the person, the prohibition of

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torture and the right to a fair trial. International law including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention for the Protection of All Persons from Enforced Disappearance categorically condemn enforced disappearances and demand accountability for those responsible.

6. Disappearance has traumatic effect on the victim who is removed from the protection of the law, frequently subjected to torture and is in constant fear for their lives as well as to their families who are uncertain about the individual's fate or whereabouts, wondering and waiting sometimes for years for news that may never come.

There has been concern in Kenya about the prevalence of enforced disappearances. Various national, regional and international organizations have decried the practice. However, the lack of accountability and the failure to bring the perpetrators to book have been a major concern in addressing the menace in Kenya.

8. One prominent case is the disappearance of human rights lawyer, Willie Kimani, his client Josphat Mwenda and their taxi driver Joseph Muiruri in 2016. They were prosecuting an alleged case of police brutality when they went missing. Their bodies were later found in a river showing signs of torture.

9. In October 2021, the Senate Standing Committee on Justice, Legal Affairs and Human Rights published a report titled '*inquiry into extrajudicial killings and enforced disappearances in Kenya*'. Various stakeholders including state and non-state actors submitted feedback to the Senate Committee. The submissions from the Kenya National Commission on Human Rights stated that for the period 2013-2022, the Commission together with its partners had documented 1,040 cases of Extra-Judicial Killings and Enforced Disappearances attributed to security agencies. According to their report, the majority of the victims (Over 80%) were young male adults aged 15-35 years. The Independent Policing Oversight Authority (IPOA) submitted that between October 2018 and February 2020 they received 210 cases of deaths arising out of police action in form of death while in police custody or enforced disappearance cases.

10. The Senate Committee noted that: -


"The Issue of the extrajudicial killings and enforced disappearances in Kenya has been of grave concern both prior to and following the promulgation of the Constitution of Kenya".

11. A preliminary review of the legal framework in Kenya on enforced disappearances revealed that: -

- There is currently no definition of the term "enforced disappearance" in Kenyan law.
- There is no national legislation that criminalizes or penalizes enforced disappearances.
- There are no effective measures in place to prevent enforced disappearances

12. As a result, offenders are currently prosecuted under a range of related offences including kidnapping or abductions, false imprisonment, torture, and cruel and inhuman treatment. However, these offences do not adequately reflect the gravity and specific nature of enforced disappearance which is a separate and complex crime.

13. In order to address these shortcomings, several areas of interventions have been outlined. These are: -

- 
- a) the need for a clear and concise definition of enforced disappearance in Kenyan law;
 - b) the importance of criminalizing enforced disappearance with appropriate penalties; the need for effective measures to prevent enforced disappearances, such as strengthening civilian oversight of the security forces and ensuring that all allegations of enforced disappearance are promptly and effectively investigate; and
 - c) The need for mechanisms to investigate and prosecute cases of enforced disappearance, as well as to provide support and reparations to victims and their families.

14. The Attorney General of Kenya has established a Multi-Agency Committee to review the laws and policies that protect people from extrajudicial killings and enforced disappearances. The Committee includes representatives from the following key stakeholders:-

- Office of the Attorney General and Department of Justice;
- Ministry of Interior and Coordination of National Government;

- National Police Service;
- Independent Policing Oversight Authority (IPOA);
- Office of the Director of Public Prosecutions (ODPP);
- Kenya National Commission on Human Rights (KNCHR); and
- Judiciary

15. The Multi-Agency Committee is responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya. Their goal is to identify any gaps in the current laws and policies and to make sure that Kenya's laws are in line with international standards.

16. This framework is expected to include the following key elements: -

- A clear and concise definition of enforced disappearance;
- The criminalization of enforced disappearance with appropriate penalties;
- Effective measures for the prevention of enforced disappearances;
- Mechanisms for the investigation and prosecution of enforced disappearances; and
- Victim support and reparation measures.

17. The establishment of the Multi-Agency Committee is a positive step towards addressing the issue of enforced disappearances in Kenya. The Attorney General or his representative will chair the Multi Agency Committee.

Terms of Reference of the Multi -Agency Committee

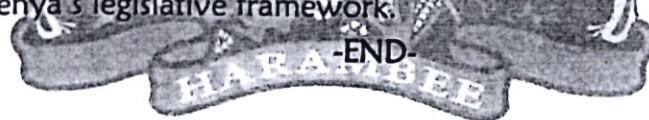
18. The Multi -Agency Committee shall:-

- a) undertake a thorough analysis and review of relevant policies, laws and administrative measures for the protection against enforced disappearance and extrajudicial killings with a view to identifying gaps and incorporating the crime into the Kenyan legislative framework in line with international Standards;
- b) Identify gaps which from a legal perspective might hinder the incorporation of the crime of Enforced Disappearance in the national legislation;
- c) Coordinate and collaborate with all relevant stakeholders involved in the custody or treatment of any person deprived of liberty;

- d) Provide a platform to identify and address common challenges *inter alia*, providing inter-agency technical guidance through the development of standards and tools to prevent and respond to cases of extrajudicial killings and enforced disappearances;
- e) To conduct a comparative study with other jurisdictions that have in place legislation addressing crime of enforced disappearance with a view to developing a legal framework to address the issue;
- f) Draft recommended amendments to existing provisions in the legislation aiming at mainstreaming enforced disappearance in the legal framework;
- g) To develop a matrix of legislation that needs amendment and prepare the relevant legislative drafting instructions;
- h) Coordinate policy & advocacy initiatives and provide capacity building and awareness raising on the International Legal Instruments on Protection from Enforced Disappearance;
- i) Develop a database for synthesizing and administering data on investigations, prosecution and conviction of cases of extrajudicial killings, enforced disappearances, torture and other cruel, inhuman or degrading treatment or punishment; and
- j) Provide leadership and guidance on the eventual ratification process of the International Convention for the Protection of all Persons from Enforced Disappearance.

The Multi Agency Committee has six (6) months within which to finalise its work and give recommendations including legislative proposals to incorporate the offence of enforced disappearance into Kenya's legislative framework.

-END-





REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

MINUTES OF THE 72ND SITTING OF THE PUBLIC PETITIONS COMMITTEE HELD ON TUESDAY, OCTOBER 31, 2023, IN MAGADAI HALL ON THE FIRST FLOOR, VICTORIA PLAZA, HOLIDAY INN HOTEL AT 10.00 A.M

PRESENT

- | | | |
|---|---|------------------|
| 1. Hon. Nimrod Mbithuka Mbai, M.P. | - | Chairperson |
| 2. Hon. Janet Jepkemboi Sitienei, M.P. | - | Vice Chairperson |
| 3. Hon. Joshua Chepyegon Kandie, M.P. | | |
| 4. Hon. John Walter Owino, M.P. | | |
| 5. Hon. Bidu Mohamed Tubi, M.P. | | |
| 6. Hon. Maisori Marwa Kitayama, M.P. | | |
| 7. Hon. Edith Vethi Nyenze, M.P. | | |
| 8. Hon. (Eng.) Bernard Muriuki Nebart, M.P. | | |
| 9. Hon. Caleb Mutiso Mule, M.P. | | |
| 10. Hon. Peter Mbogho Shake, M.P. | | |
| 11. Hon. John Bwire Okano, M.P. | | |
| 12. Hon. Sloya Clement Logova, M.P. | | |

APOLOGIES

1. Hon. Patrick Makau King'ola, M.P.
2. Hon. Ernest Ogesi Kivai, M.P.
3. Hon. Suzanne Ndunge Kiamba, M.P.

SECRETARIAT

- | | | |
|------------------------|---|---------------------------|
| 1. Mr. Samuel Kalama | - | Principal Clerk Assistant |
| 2. Ms. Miriam Modo | - | Clerk Assistant I |
| 3. Ms. Willis Obiero | - | Clerk Assistant III |
| 4. Ms. Mercy Mayemde | - | Media Relations Officer |
| 5. Ms. Felistus Muia | - | Protocol Officer |
| 6. Ms. Rahab Chepkilim | - | Audio Officer |
| 7. Ms. Winnie Nyaga | - | Secretariat |
| 8. Ms. Diana Satia | - | Office Assistant |

IN ATTENDANCE

TELKOM KENYA

- | | | |
|-------------------------|---|---|
| 1. Mr. Mugo Kibati | - | CEO |
| 2. Mr. Allan Wainaina | - | Chief Finance Officer |
| 3. Mr. Julius Cheptiony | - | Chief Strategy and Business Development Officer |
| 4. Ms. Stella Wawira | - | Head of Legal Services |
| 5. Ms. Jean Langat | - | Legal Officer |

HAKI AFRICA

- | | | |
|-------------------------|---|--------------------|
| 1. Mr. Hussein Khalid | - | Executive Director |
| 2. Mr. Japheth Ogola | - | Programmes Officer |
| 3. Mr. Yusuf M Abubakar | - | Director |
| 4. Mr. Odhiambo Ojilo | | |

MUHURI

1. Mr. Francis Auma

SEMA UKWELI

- | | | |
|------------------------|---|--------------------|
| 1. Mr. Boniface Mwangi | - | Executive Director |
|------------------------|---|--------------------|

HUMAN RIGHTS AGENDA

- | | | |
|-----------------------|---|-----------------------------------|
| 1. Mr. Yusuf Lule | - | Executive Director |
| 2. Mr. Mwinyihaji Ali | - | Public Complaint Response Officer |

MIN./PPETC/2023/458: PRELIMINARIES

The Chairperson called the meeting to order at 10:30 a.m., the proceedings began with prayers by Hon. Peter Mbogho Shake, M.P.

MIN./PPETC/2023/459: ADOPTION OF AGENDA

1. Prayer
2. Adoption of the Agenda
3. Confirmation of minutes of previous sittings
4. Matters Arising
5. **Consideration of Public Petition regarding Funds Spent by National Government Contrary to the Provisions of Article 223 of the Constitution—**
 - *Meeting with CEO, Telkom Kenya*
6. **Consideration of Public Petition Regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the crime of enforced disappearance.**
 - *Meeting with various human rights organizations (HAKI Africa, MUHURI, HURIA and Sema Ukweli)*
7. Any Other Business
8. Adjournment

Thereafter, the proposed Agenda of the Meeting was adopted to constitute business having been proposed by Hon. Edith Vethi Nyenze, M.P. and seconded by Hon. Bidu Mohamed Tubi, M.P.

MIN./PPETC/2023/460: CONFIRMATION OF MINUTES OF PREVIOUS SITTING

The Agenda was deferred.

CONSIDERATION OF PUBLIC PETITION REGARDING FUNDS SPENT BY NATIONAL GOVERNMENT CONTRARY TO THE PROVISIONS OF ARTICLE 223 OF THE CONSTITUTION

The CEO Telkom Kenya, Mr. Mugo Kibati, appeared before the Committee on 30th October, 2023 and submitted as follows: -

- i.) Telkom Kenya received a letter that informed the Board of the decision of the Government of Kenya to take over shares that would arise over Jamhuri shareholding.
- ii.) The Treasury vide a letter dated 19th August, 2022 informed the Board Chair of Telkom that Jamhuri Holdings Limited/Helios had informed the Government of Kenya of their decision to exit Telkom by exercising their put option as provided for in the shareholder agreements.
- iii.) The Cabinet Secretary, National Treasury requested the chair to convene a board meeting to pass the necessary resolution to facilitate completion of the said transaction.
- iv.) The Board Telkom responded as follows: -
 - a) The Board as it was constituted at the time due to lack of quorum and therefore could not meet.
 - b) The Company is still held by Jamhuri Holdings that is, the 60% Jamhuri and Government 40%.
 - c) The matter is purely a shareholder matter to mean funds transferred from one shareholder to another.
 - d) The agreed form of the AG's legal opinion has not been submitted for the Board's consideration yet it was a fundamental condition preceeded

Committee's Concerns

i.) On why Telkom is exonerating itself from the whole affair of Article 223 of the Constitution

The CEO responded that matter It was a shareholder matter between the parties that entered into the shareholding agreement. Telkom was not part of the transactions. The Board was to convene the meeting to conclude the transactions.

ii.) The Advisory role of the CEO to the Board

The CEO Asked whether he advised the Board specifically after receiving communication on the exit of Helios. The CEO responded that his role was to represent management on the daily running of the company, however, occasionally, he advises the Board on several matters as and when required.

iii.) Meeting of the Board of Directors on the said transaction

The Committee inquired whether the CEO was privy to the meeting of the Board about the said transaction, and the CEO responded that the transfer of shares was undertaken by the Board and not the CEO. It is the discretion of the shareholders to involve/not involve the Board in such meetings but ordinarily, they are shareholder to shareholder meetings.

iv.) **The Committee inquired why Jamhuri Holdings Limited was still holding on the shares by Jamhuri Holdings Limited yet payment was already made.**

The CEO responded that the transaction went through and shares are yet to be transferred i.e. Jamhuri Holdings 60% and GoK 40%.

v.) **The Committee sought to know the urgency that occasioned transfer of shares and the attendant transactions and if it was procedural?**

The CEO responded that the Board was equally asking itself the same questions. They were not privy to the said transactions as the management especially the issue of nationalizing a private company. The matter came to their attention through the correspondence from the Cabinet Secretary, National Treasury.

vi.) **The Committee asked the CEO whether he was aware that the contract with Jamhuri Holdings Limited had been rescinded by Cabinet and the current status of sharing.**

The CEO responded that, after the new administration came into office, Telkom Kenya Limited engaged the new Cabinet Secretary of the National Treasury who inferred that they wanted to secure a new investor to replace Jamhuri Holdings and would need Telkom's support. The National Treasury has been driving the process of acquiring a new investor to take Jamhuri shares. There is no question about the 40% shares publicly owned. The problem is with the 60% privately owned shares by Jamhuri to the new investor.

vii.) **The Committee sought to know how the money would be recovered and the CEO**

responded that the National Treasury was keen to ensure that funds that were transferred to Jamhuri Holdings must be refunded. He further explained that Jamhuri Holdings are still the shareholders of Telkom's 60% shareholding. In January, 2023, nominees to the Telkom Board were re-nominated. Paul Cunningham was still the CEO of Jamhuri Holdings and Cabinet Secretary, National Treasury for the Government of Kenya. Jamhuri Holdings is owned by a Special-purpose vehicle called Helios based in London and there are many investors in and outside the country.

viii.) **The Committee asked the CEO what he would recommend to prevent such occurrences in future.**

The CEO responded that there are so many avenues to address the matter including putting a policy framework in place for nationalisation as there is none at the moment. If there are any reasons for nationalisation, then there should be a policy framework, a proper policy review of why it should take place and the implications.

MIN./PPETC/2023/462:

CONSIDERATION OF PUBLIC PETITION REGARDING ENACTMENT OF LEGISLATION TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

Meeting with various Human Rights Organizations

Submissions by Muslims for Human Rights (MUHURI)

MUHURI appeared before the Committee and submitted as follows -

i.) The organisation had documented many cases of enforced disappearance and sought court orders for habeas corpus. There were about 12 cases of enforced disappearance in the last

12 years and that most of the cases were alleged to be carried out by Anti-Terror Police Unit (ATPU).

- ii.) There was need for a legislative framework regarding enforced disappearance to assist the victims even through restoration and redress.

Submissions by Human Rights Agenda (HURIA)

The Executive Director of HURIA, Mr. Yusuf Lule, appeared before the Committee and submitted as follows -

- i.) HURIA supports the Petitioner's prayers and the need for a legislation to criminalise and prescribe penalties for the crime of enforced disappearance was long overdue but timely with political goodwill.
- ii.) The government had acknowledged the twin problem of enforced disappearance and extrajudicial killings and committed to ratifying and domesticating the International Convention for the Protection of all Persons from Enforced Disappearance ending all forms of extra judicial execution by security services. Further, amending the National Coroners Service Act, 2017 to establish the Coroners General Office and a special tribunal for gross human rights violation and enforced disappearances.
- iii.) In view of the commitments and the unending crimes against the Kenyan people, the Petition was a beginning of a national conversation on the issues of enforced disappearance and extra judicial killings.
- iv.) Over 50 cases of enforced disappearance and extra judicial killings were documented by HURIA since 2016 in Kwale County. HURIA made submissions to Kenya National Commission on Human Rights (KNCHR) during a public inquiry on the status of security in the Coast region and also the Senate Standing Committee on Justice and Legal and Human Rights Affairs.
- v.) The occurrence and impact of the crime of enforced disappearance warrants the need for enactment of the said legislation. Further, HURIA had made various observations in its interactions with the cases of enforced disappearance. In a forum conducted on 17th October 2017 to receive and document cases of enforced disappearance and extra judicial executions in Kwale County, families of the victims submitted through questionnaires where about 11 cases of enforced disappearances and 9 killings were reported. After the analysis, HURIA noted as follows -
 - a) On many occasions, incidences of extrajudicial killings began as enforced disappearance hence making the two a twin problem.
 - b) All the victims registered were Muslim men of Digo ethnic origin, 68 per cent of whom were above the ages of 35 years, 84 per cent were married men with at least two children and most of the claimants were women either married to the victims or daughters and sisters left with the bigger responsibility to fend for their families.
 - c) Most of the victims were in informal employment such as *bodaboda* operation, fish mongering, fruit vending, teaching in madrassa and farming.

- d) Most of the killings happen between 7pm and midnight within the area of Ukunda where majority of the victims' bodies were found with bullets.
- e) In the case of disappearances, the claimants alleged that a white *Pro box* car was mainly used and most of the abductions were carried out during the day. Msambweni Sub county was most affected by the incidences.
- f) The claimants revealed that 65 per cent of the cases were reported to the police with no appropriate action taken. Most of the abducted victims were later killed and buried within a day as per the Muslim tradition thus hindering the undertaking of autopsies which could have revealed more evidence of the crime.
- g) Most of the abduction of victims were done during the day by persons who had firearms and handcuffs pointing to the belief that they were law enforcement officers in the country.
- h) The main target of the victims were youths between the ages of 25 and 35 years who were alleged to be recruiters of terrorist organisations while others were returnees who came back from Somalia.

From the observations, HURIA made the following recommendations -

- i.) Implementation of the recommendations forward by the Civil Society Organisations (CSOs) during the Senate Standing Committee on Justice and Legal and Human Rights Affairs that visited parts of the country.
- ii.) The Inspector General of Police be held accountable for the loss of the lives of many Kenyans since 2008 to date.
- iii.) The families of victims found dead or abducted be compensated for the loss of lives and atrocities they have gone through. Despite the Victims Protection Act, the Victims Protection Fund (VPF) has not been operationalised.

Submission by HAKI AFRICA

The Executive Director, Mr. Hussein Khalid appeared before the Committee and submitted as follows -

- i.) It is almost impossible to investigate and deal with the cases of enforced disappearances without encapsulating extrajudicial killings. In most instances, victims of enforced disappearances end up dead hence extremely challenging to only legislate on enforced disappearance without extrajudicial killings which was a major problem nationally.
- ii.) From the various cases documented by various human rights organisations, there was a hallmark of torture. The legislation should refer to the Prevention of Torture Act to cover for victims who have been disappeared and later found alive and those found dead. There was need for a broader definition of enforced disappearance for the two types of victims.
- iii.) In many cases, the perpetrators are security officers who again conduct the investigations. The responsibility to investigate should not be bestowed on police to build faith that such

cases will be conclusively investigated. The mandate should be handed over to Independent Policing Oversight Authority (IPOA) to deal with any suspicion of enforced disappearance. Currently, IPOA only deals with National Police Service (NPS) yet enforced disappearance other security agencies also engage in enforced disappearances. For instance, the Kenya Defence Forces (KDF) were notorious for engaging in enforced disappearance especially in Northern Kenya. The Kenya Wildlife Service (KWS) were mentioned many times in their dealing with suspected poachers and Kenya Forestry Services (KFS) while dealing with illegal charcoal sellers were equally mentioned.

- iv.) There should be transition in application of the legislation. Over 700 cases of enforced disappearance have been documented by HAKI Africa in the last ten years. The cases should be factored in considering there is no statute of limitation in criminal law hence the need for a provision that will consider cases that happened in the past.
- v.) While Article 29 of the Constitution puts the responsibility for protection of life on government, there is no legislation to ensure the government and its agencies are accountable to its people in the event of enforced disappearance and extrajudicial killings. Whenever the suspects are the same state agencies, then the accountability is not clear.
- vi.) The abductions in enforced disappearance are made during the day hence ruling out the possibility of criminals engaging in the act as criminals have different motivations such as ransom and revenge which can be observed if that was the case.

HAKI Africa further submitted some of the effects of the absence of the legislation to criminalize and prescribe penalties for the crime of enforced disappearance as follows—

- i.) Enforced disappearances had disrupted the normal lives of many families including the status of marriages. Women victims could not establish whether they were still married to their disappeared husbands or not thereby affecting determination in legal requirements of marriages.
- ii.) There were children under guardianship because their parents' status was unknown to be alive or dead there by affecting certain roles played by parents which cannot be played by guardians making them to miss out programs such as school bursaries.
- iii.) Succession and property ownership have also been destabilized as properties registered in the name of a disappeared husband cannot be managed by the wives due to legal requirements of the husband's presence. This has led to loss of property in some cases because of the absence of the husbands and unclear marital status.
- iv.) The families of the victims of enforced disappearance cannot pursue legal compensation because enforced disappearance has not been criminalised.

Submissions by Sema Ukweli

Mr. Boniface Mwangi, Executive Director, Sema Ukweli appeared and submitted as follows—

- i.) The Petition was important and timely as the government had promised to deal with the issues of enforced disappearance and extrajudicial killings but the same were still happening. Therefore, there was need for the legislation to deal with the matter.

- ii.) The legislation on enforced disappearance should not only punish the junior officers who engage in enforced disappearance but also the senior officers who give the orders for such engagements. The entire security service needs to be accountable including National Intelligence Service (NIS).
- iii.) One of the justifications by the police to engage in enforced disappearance of suspected criminals was that whenever they take suspects to court, they are not convicted. There was need to relook at the Penal Code to find a way of dealing with suspects of heinous crimes so that the police do not take the law into their hands.

Committee Concerns

Motivation for enforced disappearance by the state agencies

The Committee inquired the motivation for the state to engaging in enforced disappearance by the and how the organisations were mitigating the problem. The witnesses submitted as follows: -

- i.) That the incompetence and laxity on the part of the police officers in conducting investigations had made them to engage in disappearing suspects as they are likely to lose the cases in court. The threshold for proving guilt in some of the cases were very high hence requiring proper intelligence and investigation for a successful prosecution. There was need to equip police and other investigative agencies with necessities for proper investigations and a forensic laboratory to make investigations easier and quicker.
- ii.) Also, laxity within the judicial system had caused suspects to be freed thus state agencies resorting to enforced disappearance. The prosecution and judicial system occasionally fail to sentence suspects brought forth by police even with credible evidence. The judicial system should be strengthened to prevent gaps where a judge or prosecutor is bribed to free suspects free. This will ensure that the credible investigations done by the police are considered by the judicial system timely and swiftly. Further, the citizenry needs to support the process to narrow the gaps by coming forth to testify if need be.
- iii.) With regards to the efforts by the organisations to mitigate radicalisation and support the work of the police, the witnesses indicated that the organisations were doing much regarding enforced disappearance and its root cause. Further, enforced disappearance involved not just terror suspects but also other criminal suspects. The organisations were working with police and other groups to address the issues of radicalisation and criminal activities. Steps had been taken to strengthen the judiciary and other partners to manage the situation.
- iv.) There were counternarrative programs against radicalisations including action plans by the county government, community engagement and agitation for equipping of police officers with proper tools of work to improve their investigations.
- v.) Every person had a right to the judicial process and fair trial hence no justification for enforced disappearance and extrajudicial killings. The police should not be allowed to take the law in their hands. The Committee could propose a legislation to manage the situation such that whenever one is accused of certain heinous crimes they are not entitled to bail

until your trial but not more than seven years. That would ensure the rights of the accused is respected as they are presumed innocent until proven guilty.

Proposal by the human rights organisations

The Committee inquired about legislative proposal by the human rights organizations on the matter of enforced disappearance. The witnesses indicated that they were willing to submit proposals and work with the Committee to come up with proposals to enact the legislation.

Notoriety of Coast region for enforced disappearance and extrajudicial killings

The Committee asked why Coast region was notorious for cases of enforced disappearance and extrajudicial killings. The witnesses indicated that due to suspicion of terrorism offenders at the Coast, many cases of enforced disappearance occurred in the region and the Northern Kenya. The regions were alleged to be the major hubs for radicalisation and violent extremism that led to terrorism. However, the organisations had supported programs for youths to disengage them in criminal activities.

The Committee inquired whether the organisations had interacted with cases of disappearances not linked to security officers. The witnesses indicated that from their analysis of the document cases, most of the documented cases of enforced disappearances involved the security officers, and some were even taken to court.

The rights of security officers

The Committee inquired whether the organisations were also defending the rights of police officers the same way as the victims. The witnesses stated that the welfare and conduct of police officers was equally important to be addressed. The definition of enforced disappearance pointed to involvement of state agencies. However, there were various programs focusing on security agencies to build their capacity and training them on human rights approaches. The witnesses further indicated that they were equally addressing cases of police officers who were disappeared by their colleagues including seeking for orders of habeas corpus for a disappeared police officer.

MIN./PPETC/2023/462:

ADJOURNMENT AND DATE OF NEXT MEETING

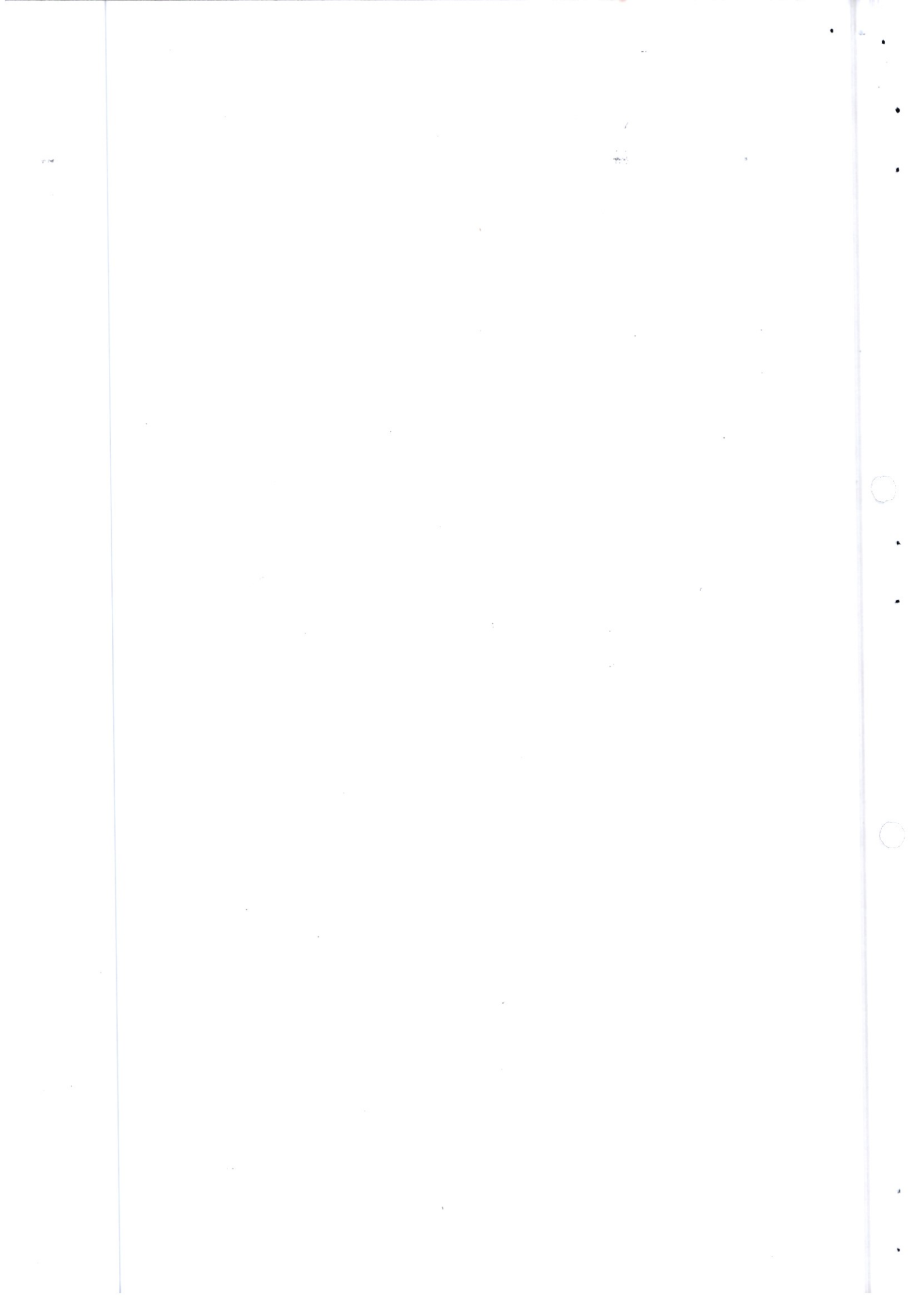
There being no other business, the Chairperson adjourned the meeting at 1:30 p.m. The next meeting will be held on Wednesday, 1st November, 2023 at 11.00 a.m.

Sign: 

FN

(CHAIRPERSON)

Date: 06/12/2023





REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

MINUTES OF THE 71ST SITTING OF THE PUBLIC PETITIONS COMMITTEE HELD ON WEDNESDAY, OCTOBER 26, 2023, IN COMMITTEE ROOM 5 ON THE FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AT 11.00 A.M

PRESENT

1. Hon. Nimrod Mbithuka Mbai, M.P. - Chairperson
2. Hon. John Walter Owino, M.P.
3. Hon. Ernest Ogesi Kivai, M.P.
4. Hon. Bidu Mohamed Tubi, M.P.
5. Hon. Edith Vethi Nyenze, M.P.
6. Hon. Peter Mbogho Shake, M.P.

APOLOGIES

1. Hon. Janet Jepkemboi Sitienei, M.P. - Vice Chairperson
2. Hon. Joshua Chepyegon Kandie, M.P.
3. Hon. Maisori Marwa Kitayama, M.P.
4. Hon. (Eng.) Bernard Muriuki Nebart, M.P.
5. Hon. Patrick Makau King'ola, M.P.
6. Hon. Caleb Mutiso Mule, M.P.
7. Hon. Suzanne Ndunge Kiamba, M.P.
8. Hon. John Bwire Okano, M.P.
9. Hon. Sloya Clement Logova, M.P.

SECRETARIAT

1. Mr. Samuel Kalama - Principal Clerk Assistant
2. Mr. Ahmed Kadhi - Senior Clerk Assistant
3. Ms. Miriam Modo - Clerk Assistant I
4. Ms. Willis Obiero - Clerk Assistant III
5. Ms. Lilian Mburugu - Media Relations Officer
6. Mr. Martin Sigei - Research Officer III
7. Ms. Felistus Muia - Protocol Officer
8. Ms. Rehema Koech - Audio Officer

IN ATTENDANCE

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

1. Ms. Roselene Odede - Chairperson
2. Ms. Petronilla Mukaindo - Deputy Director
3. Mr. Papela Martin - Assistant Director
4. Ms. Clara Amulen
5. Mr. Kamanda Mucheke - D. Director
6. Mr. Samson Omondi - Ass. Director
7. Ms. Safa Idriss - Intern

MIN./PPETC/2023/452: PRELIMINARIES

The Chairperson called the meeting to order at 11.45 a.m. and Hon. Edith Vethi Nyenze, M.P. said the prayers.

MIN./PPETC/2023/453: ADOPTION OF AGENDA

1. Prayer
2. Adoption of the Agenda
3. Confirmation of minutes of previous sittings
4. Matters Arising
5. **Consideration of Public Petition No. 8 of 2023 regarding enactment of legislation to criminalize and prescribe penalties for the crime of enforced disappearance—**
- Meeting with the Kenya National Commission on Human Rights
6. Any Other Business
7. Adjournment

Thereafter, the proposed Agenda of the Meeting was adopted to constitute business having been proposed by Hon. Peter Mbogho Shake, M.P. and seconded by Hon. Bidu Mohamed Tubi, M.P.

MIN./PPETC/2023/454: CONFIRMATION OF MINUTES OF PREVIOUS SITTING

The Agenda was deferred.

MIN./PPETC/2023/455: CONSIDERATION OF PUBLIC PETITION NO. 8 OF 2023 REGARDING ENACTMENT OF LEGISLATION TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

Meeting with the Chairperson, KNCHR

The Chairperson, KNCHR Ms. Roselene Odede appeared before the Committee and made the following submissions—

Introduction

The Commission submitted a more detailed written submission on 3rd October, 2023 which the Commission continued to rely on. The Petition requesting the National Assembly to enact legislation to criminalize and prescribe penalties for the crime of enforced disappearance was welcome and timely as the legal framework in Kenya lacked a precise definition of enforced disappearance as a distinct criminal offence. The Penal Code (Cap. 63) does not recognize the crime of enforced disappearance. Rather, it prohibits kidnapping and abduction. Kidnapping or abduction however do not capture all the complexities involved in enforced disappearances.

Enforced disappearance is indeed a grievous act that violates the whole spectrum of the Bill of Rights for the victims, their families, and communities. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.

The Commission further urged the Committee and the House to prioritize the ratification of the **International Convention for the Protection of All Persons from Enforced Disappearance** by the Republic of Kenya. The Convention was adopted by the General Assembly in its **Resolution 61/177** of 2006 and came into force on 23rd December 2010. It is the first universally legally binding human rights instrument concerning enforced disappearance. Notably, Kenya signed the Convention on 6th February, 2007, but is yet to ratify it.

The Convention enjoins all state parties to ensure that enforced disappearance constitutes an offence under its criminal law. It would ensure the prevention of these gruesome accountability and justice for victims when they do occur.

The Justification

The Petitioner correctly points out, that there is indeed a high trend of enforced disappearances and extra-judicial killings in the country. The status is confirmed by the past and ongoing investigations and documentation which the Commission has painstakingly carried out over the recent years.

There were various reports by the Commission documenting violation of enforced disappearance published on its website. That since 2007, KNCHR has documented over 1800 cases of extrajudicial killings and enforced disappearances attributed to the Kenyan Security Forces. For example, in the past five years, the Commission handled 592 cases of extrajudicial killings and 82 cases of enforced disappearance between 2019 and 2023.

However, the data was not comprehensive owing to the covert nature that these crimes are committed and the fact that there was no centralised database for these offences (by both State and non-state actors) and many of these crimes go unreported.

The ongoing Shakahola forest horror in which more than 400 bodies were discovered and nearly 100 survivors rescued was (arguably) connected to the crime enforced disappearance. The Commission has established that killings involved various units of our security agencies including Kenya Défense Forces (KDF), National Intelligence Service (NIS), Kenya Wildlife Services (KWS), Kenya Forest Services and various units of the National Police Service including the Criminal Investigations Directorate, Anti-Terrorism Police Unit (ATPU), Kenya Police Reservists (KPRS), Administration Police Service (APS), Rapid Deployment Unit (RDU) of the Administration Police, Border Patrol Unit (BPU) and the General Service Unit (GSU).

The Constitution obliges the State to pursue security, in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms. About 70 States had ratified to the **International Convention for the Protection of All Persons from Enforced Disappearance** while 43 States had signed it. Some of the African countries had ratified the Convention and taken steps to recognise the criminalised enforced disappearance in their domestic laws include Morocco, Benin, Malawi, and the Gambia.

Recognition of Crime of enforced disappearance

The Commission urged the National Assembly to amend the existing legislation, more specifically the Penal Code to provide for the following inexhaustive list in line with regional and international standards.

- i.) Provide a clear definition of enforced disappearance in criminal law: Such definition should be aligned to the International Convention for the Protection of All Persons from Enforced Disappearance, which considers enforced disappearance to be, "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".
- ii.) Absolute prohibition of the crime of enforced disappearance: No exceptional circumstances whatsoever (whether a state of war or a threat of war, internal political instability, or any other public emergency) may be invoked as a justification for enforced disappearance (Article 1(2)).
- iii.) Provide for appropriate penalties which consider the extreme seriousness of enforced disappearance (Article 7(1)).
- iv.) The right for victims of enforced disappearance to obtain reparation and prompt, fair and adequate compensation (Article 24).
- v.) Command responsibility: That no order or instruction from any public authority, civilian, military, or other, may be invoked to justify an offence of enforced disappearance (Article 6(2)).
- vi.) The duty of State authorities to undertake prompt and impartial investigation where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, even if there has been no formal complaint (Article 12).
- vii.) Express protection of vulnerable groups including human rights defenders and those who work on extrajudicial, journalists and others who are at risk of the gruesome vice.
- viii.) Enforced disappearance as an extraditable offence. Recognition of this in any extradition treaty (Article 13).

Proposals by KNCHR

- i.) The Executive and Legislature to initiate and expedite the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance.
- ii.) Parliament to expedite the enactment/amendment of legislation to explicitly criminalise enforced disappearance within the national legal framework.
- iii.) National Security Council to expedite the development and implementation of a National Security Policy that is in compliant with the Constitution and international rights instruments.
- iv.) Expedite the full operationalization of the National Coroners Service Act, 2017.

- v.) To expedite the full operationalisation of the Prevention of Torture Act, 2017 including developing rules and regulations under the Act.
- vi.) Amend the Kenya National Commission on Human Rights Act, 2011 to expressly provide for the Commission to perform its function as provided under Article 59(2)(d) including unfettered access to all places of detention whether public or private consistent with its mandate, recommendations by treaty bodies to Kenya and international best practices.
- vii.) Strengthen investigative and prosecutorial capacities (ODPP, NPS) to ensure effective legal action against perpetrators of enforced disappearance and extrajudicial killings.
- viii.) Prioritize the protection and support of human rights defenders working on cases of enforced disappearance and police killings, including collaboration with relevant government agencies. Relatedly, Kenya to adopt the Human Rights Defenders Protection Policy.
- ix.) Government to review the Prevention of Torture Act, 2017 to enable KNCHR to have direct powers of conducting investigations and forwarding file to ODPP for prosecution without requiring the intermediary approach with DCI or NPS to reduce fear of reprisal by relatives or the victims of such torture and victim apathy in pursuing redress.
- x.) Allocate increased adequate budgetary resources to the KNCHR to enhance its capacity to perform its work including investigations on enforced disappearances.
- xi.) Full operationalisation of the multi-agency team on extrajudicial killings and enforced disappearances (as recommended by the Senate) with representation from various government bodies to enhance coordination and collaboration in addressing enforced disappearance and related human rights violations.
- xii.) Adopt a holistic government approach to offer comprehensive training programs for law enforcement officers, focusing on human rights, arrest procedures, and the responsible use of firearms.
- xiii.) The Attorney General to expedite the operationalisation of the Victims Protection Trust Fund Regulations to facilitate compensation for victims and their families.
- xiv.) The Kenya National Bureau of Statistics in conjunction with the Kenya National Commission on Human Rights to enhance the collection, collation and reporting of accurate official data on enforced disappearances in line with the agreed framework.
- xv.) Consider the findings and recommendations contained in the Senate Report on the Inquiry into Extrajudicial Killings and Enforced Disappearances in Kenya (October 2021) by the Standing Committee on Justice, Legal Affairs and Human Rights Committee.

Committee Concerns

- i.) **The Committee inquired into the classification of a disappearance of a person ordered by a third party and not the state.** The Chairperson mentioned that the International Convention for the Protection of All Persons from Enforced Disappearance described enforced disappearance to involve when one is arrested, detained, abducted, or deprived of liberty by the state or group of persons. There were cases where third party actors such as gangs engage in disappearing of persons but the ultimately responsibility for protection of the citizens was the state. Therefore, the state must be involved either directly or indirectly by commission or omission regardless of whether the incident was reported or not. However, most cases of enforced disappearance involved state actors directly.
- ii.) **The Committee inquired into how the Commission was working with the state in conducting investigations of enforced disappearance when the state is involved in the crime.** The Commission stated that every act of criminality under investigation were reported to the police first before investigation is triggered. Further, the state was still responsible in cases of abduction which do not involve state actors directly such as gang violence since the state has the capacity to deal with other criminals. The Commission indicated that the International Convention targeted the state actors in the definition of enforced disappearance since the state holds greater power over citizens. The idea was that the normal crimes can be dealt with by the penal code but when the state commits the crime, there must be a reparation.
- iii.) **The Committee also inquired whether there was any motivation for enforced disappearance conducted by the state.** The Commission indicated that in most cases, the state has engaged in enforced disappearance as a counterterrorism strategy as it sometimes disappears individuals believed to be terrorist. Secondly, sometimes enforced disappearance is just sheer criminality where individual state actors use it as a shortcut solution especially when the police believe an individual is a criminal and they are released.
- iv.) **The Committee inquired whether there were instances of justified enforced disappearance.** The Commission stated that any justification of enforced disappearance from human rights perspective was not acceptable. The Commission further stated that cases of enforced disappearance in the informal settlements had caused the youths to live in fear of being terminated. Therefore, there was need for due process and the rule of law to be followed.
- v.) **The Committee inquired whether it was practical to punishing the state for the crime of enforced disappearance and whether there were any cases state had taken responsibility.** The Commission stated that the crime of enforced disappearance was a well-coordinated exercise by different state actors and sometimes its always challenging to identify the actual criminals. However, there have been cases where the state admitted responsibility, for example, on the case of Lawyer Willy Kimani where police officers were convicted. Some cases were e complex hence the need to ratify the convention to align the laws of Kenya with the international standards regarding.
- vi.) **The Committee sought the opinion of the Commission regarding instances where the judicial system releases an individual believed to be a criminal by the police hence justifying enforced disappearance to protect the citizens who are at a risk.** The Commission indicated that the point of weakness was investigations and evidence presented before court. That there was need for the police to present watertight evidence after a though investigations for the court to find the suspect guilty. However, there were cases of the police tampering with the investigations and intentionally compromising the evidence presented before court.

- vii.) **The Committee inquired on the relationship between the Commission and the state.** The Chairperson indicated that as an independent constitutional Commission, they were working without interference from the executive but also collaborating with the state to achieve its mandate.
- viii.) **With regards to the role of the Commission other than reporting instances of enforced disappearance,** the Commission indicated that it was also providing legal representation for the victims of enforced disappearance and their families in court across all regions in the county. The Commission was not stopping at reporting findings but also following through to seek redress for the victims.
- ix.) **The Committee inquired whether the problem was lack of a legal framework or political goodwill by the state to deal with enforced disappearance.** The Commission indicated that while the state lacked political good will to address the issues of enforced disappearance, there was also lack of proper legislation around the subject especially with regards to clear definition and prescription of punishment. However, the Commission in its reporting of the issues always put actionable recommendations to the relevant authorities.
- x.) **The Committee inquired how the proposed legislation would lead to penalties to the state actors who have been evading prosecution.** The Commission stated that while some state actors involved in enforced disappearance had evaded prosecution, even getting such matters to the courts was a victory. That there were cases where the courts had issued favourable rulings to the victims hence the need for continuous strengthening of legislation. Further, the Commission's investigations always zeroed in on the duty bearers and action was demanded for both acts of commission and omission by the state.

Committee Resolution

After the deliberations, the Committee resolved to invited other non-governmental human rights activists to provide their opinion on the petition.

MIN./PPETC/2023/456:

ANY OTHER BUSINESS

Proposed Committee Retreat: The Committee deliberated on the proposed retreat in Kiambu County for consideration of various pending petitions and resolved to hold the retreat from 30th October, 2023 to 3rd November, 2023.

MIN./PPETC/2023/457:

ADJOURNMENT AND DATE OF NEXT MEETING

There being no other business, the Chairperson adjourned the meeting at 1:00 p.m. The next meeting will be held on Tuesday, 31st November, 2023 at 10.00 a.m.

Sign: 

(CHAIRPERSON)

Date..... 27/11/2023





REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

MINUTES OF THE THIRTEENTH SITTING OF THE PUBLIC PETITIONS COMMITTEE HELD ON TUESDAY, APRIL 18, 2023, IN THE COMMITTEE ROOM ON SECOND FLOOR, CONTINENTAL HOUSE AT 10:00 AM

PRESENT

1. Hon. Nimrod Mbithuka Mbai, M.P. - Chairperson
2. Hon. Ernest Ogesi Kivai, M.P.
3. Hon. John Walter Owino, M.P.
4. Hon. Edith Vethi Nyenze, M.P.
5. Hon. Maisori Marwa Kitayama, M.P.
6. Hon. Joshua Chepyegon Kandie, M.P.
7. Hon. Caleb Mutiso Mule, M.P.
8. Hon. (Eng.) Bernard Muriuki Nebart, M.P.

APOLOGIES

1. Hon. Janet Jepkemboi Sitienei, M.P. - Vice Chairperson
2. Hon. Patrick Makau King'ola, M.P.
3. Hon. Peter Mbogho Shake, M.P.
4. Hon. Suzanne Ndunge Kiamba, M.P.
5. Hon. Bidu Mohamed Tubi, M.P.
6. Hon. John Bwire Okano, M.P.
7. Hon. Sloya Clement Logova, M.P.

WITNESSES

1. Eng. Victor Okuna - Petitioner
2. Calvince Odhiambo - Accompanying person
3. Dr. Annete Mbogoh - Executive Director, Kituo cha Sheria
4. Janet Kavulavu - Ag. Coordinator, Advocacy, Governance & Community Partnerships, Kituo cha Sheria
5. Tracy Wachira - Legal Officer, Kituo cha Sheria
6. Rony Odhiambo - Communications Officer, Kituo cha Sheria

SECRETARIAT

1. Mr. Samuel Kalama - Principal Clerk Assistant II
2. Ms. Miriam Modo - Clerk Assistant II
3. Ms. Anne Shibuko - Clerk Assistant II
4. Mr. Shadrack Omondi - Legal Counsel II

- | | | |
|-------------------------|---|-------------------------|
| 5. Ms. Patricia Gichane | - | Legal Counsel II |
| 6. Mr. Martin Sigei | - | Research Officer III |
| 7. Ms. Lilian Mburugu | - | Media Relations Officer |

MIN./PPETC/2023/91: PRELIMINARIES

The Chairperson called the meeting to order at 11.30 a.m. and prayers were said by the Hon. Caleb Mutiso, M.P.

MIN./PPETC/2023/92: ADOPTION OF AGENDA

The Meeting was taken through the Agenda as follows: -

1. Prayer
2. Adoption of the Agenda
3. Confirmation of minutes of Previous Sitings
4. Matters Arising
5. Consideration of Public Petition regarding *Access roads for residents of Narok East Constituency*
-Meeting with the Petitioner, the Hon. Aramat Lemanken, MP
6. Consideration of Public Petition regarding *Ward Based Solution as a long term remedy to perennial water shortage in Kenya*
-Meeting with the Petitioner, Eng. Victor Okuna
7. Consideration of Public Petition regarding *Amendment to the Kenya Information and Communications Act*
-Meeting with the Petitioner, Mr. Patrick Kaberia, Executive Director PAWA Africa
8. Consideration of Public Petition regarding *Enactment of Legislation to criminalize and prescribe penalties for the crime of enforced disappearance*
-Meeting with the Petitioner, Dr. Annette Mbogoh Executive Director Kituo cha Sheria Legal Advice Center
9. Any other Business
10. Adjournment & Date of Next Meeting

Owing to non-availability of the Petitioners, item 5 and 7 were dropped off the Agenda. Thereafter, the Proposed Agenda of the Meeting was adopted to constitute business of the Meeting having been proposed by the Hon. Bernard Muriuki M.P. and seconded by the Hon. Caleb Mule, M.P.

MIN./PPETC/2023/93: CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS

Minutes of the Eleventh Sitting held on 22nd March 2023 were confirmed as a true record of the deliberations of the meeting having been proposed by Hon. Maisori Kitayama, M.P. and seconded by Hon. Walter Owino, M.P.

Minutes of the Twelfth Sitting held on 13th April 2023 were confirmed as a true record of the deliberations of the meeting having been proposed by Hon. Walter Owino M.P. and seconded by Hon. Caleb Mule, M.P.

MIN./PPETC/2023/94: MATTERS ARISING

- i. Arising from MIN./PPETC/2023/79 of the Eleventh Sitting, the meeting was informed that the Committee would meet the stakeholders on the Petition regarding implementation of Edu Afya Medical Scheme in public secondary schools on Tuesday 25th April, 2023.
- ii. Arising from MIN./PPETC/2023/88 Question arose as to whether the Petitioners were the people of Nyatike as a whole or the *Kadem* clan. Owing to the diverse backgrounds and interest of the various stakeholders, The Members discussed and agreed that,
 - a) while the Petitioners were descendants of the workers of *Macalder* mines, it would be imperative to visit Nyatike area and meet representatives of the *Kadem* clan and other residents including the Suba and Kuria residents. This would be done alongside the visit to Nyanza and Western IDPs.
 - b) the following stakeholders would appear before the Committee alongside the other petitioners:
 - i. DCC- office of the Lands Board
 - ii. Ministry of Lands
 - iii. National Land Commission

MIN./PPETC/2023/95: MEETING WITH ENG. VICTOR OKUNA REGARDING WARD BASED SOLUTION AS A LONG-TERM REMEDY TO PERENNIAL WATER SHORTAGE IN KENYA

Eng. Victor Okuna appeared before the Committee and presented as follows:

- i. That many Kenyans do not have access to clean and safety water; contrary to section 43 sub-Article 1(a) of the Constitution, on economic and social rights which give every citizen a right to clean and safe water in adequate quantities;
- ii. That despite being a devolved function, the County Government has not created infrastructure to enable access of water be decentralised to village level;

- iii. That funds for development expenditure allocated to county governments are insufficient for development of water related infrastructure;
- iv. That the Water Act of 2016 gave regulations on the management and usage of water resources but did not indicate how and when this clean and safe water in adequate quantities will be supplied to the Kenyans;
- v. That the current situation the country is experiencing is as a result of poor policies and inadequate laws that were put forward by previous governments on mitigating droughts in the country;
- vi. That 95% of water pans done by county and national government dried long before the drought because of the seasonal rivers;
- vii. That lack of clean and safe water has made thousands of schools going children skip schools contrary to the article 52 (1)a which gives every child a right to free and compulsory basic education;
- viii. That there is an urgent need for the National Government to come up with long term solution to water shortage that has affected millions of Kenyans;
- ix. That Kenyans have lost thousands of their animals because of lack of water, and during severe drought, the National Government, and with assistance from private organizations only give relief food to affected people while ignoring the animals which are source of livelihood to millions of Kenyans;
- x. That with the experience from the high cost of electricity bills brought forward by among them, private public partnership, the cost of water to the poor Kenyans may triple if water sector is left to run on public, private partnership;
- xi. That the Water Act of 2016 to be amended by inserting Ward Based Water Supply Regulation between Ground Water and Entry on land in the PART III of the Water Act 2016, and should clearly state out how this will be achieved, the department that will execute it as well as the timeline;
- xii. That a sum of Kshs. 16.2 B be allocated annually for the Water Fund and the implementation be effected using a non-political route; and
- xiii. That the National Government Drill, Equip and Solarize at least 2 boreholes per ward per year in each of the 1450 wards (less 85 wards in Nairobi County and in major towns which have water and sewerage line).

Committee concerns

The Committee raised the following concerns with regards to the presentation by the Petitioner:

- a) *Prayers of the Petition*

The Petitioner was asked to clarify his proposal on implementation of the Ward Water Fund. He explained that he expected it to be distributed like the NG-CDF and assigned an amount in the budget.

The Committee was concerned on what the Petitioner meant by the non-involvement of politicians in the distribution role yet distribution of resources was a political process, and wards are political administrative units. The petitioner said he had no ill will but meant that he wanted the process documented and not subject to discussions by the implementing authority.

b) Management of the Fund

Noting that Water is a devolved function, the Committee asked the Petitioner whether he was advocating for transfer of water from county to National government, because the proposal cannot be implemented through counties in its present format.

The petitioner responded by saying that his interest was for the Water act to be amended to provide for the implementation at county level.

c) Proposed area of coverage

The Committee observed that the Petitioner in his submission had excluded Nairobi County in the prayers of the Petition, which was against the principle of inclusivity.

d) Uniqueness of the proposed water body despite the many funds/ bodies under the Ministry of Water, Sanitation and Irrigation

The Committee wondered why he wanted the proposal implemented in a different manner despite existence of other Water related bodies. The Petitioner stated that their mandate was not clear and proposed one umbrella body to manage the agencies under Water sector.

He asserted that his proposal was unique because it provides a solution at ward level (grass root level).

e) Whether the proposal should be a bill or petition

The Committee sought clarification on whether the Petitioner would like a Bill be published or the Committee goes way of the petition presented. The Petitioner responded that the Water Act be amended to allow for the establishment of a Water Fund.

Committee Resolutions

- (a) The Committee to invite the following to give their views on the prayers sought by the Petitioner: -
- i.) Cabinet Secretary responsible for Water, Sanitation and Irrigation on the proposed regulations and the extent of national government's role in protecting water resources with regard to the proposal;
 - ii.) Water Resources Authority on the impact of the proposal on water resources and the measures necessary to ensure ground water conservation or sustainable exploitation;
 - iii.) Cabinet Secretary responsible for Ministry of Environment, Climate Change and Forestry and NEMA on the environmental implications of the proposal; and

iv.) The views of the Council of Governors on the implications to county governments of the proposal, as regards their function of water service provision.

MIN./PPETC/2023/96:

MEETING WITH DR. ANNETTE MBOGOH REGARDING
PUBLIC PETITION ON ENACTMENT OF LEGISLATION
TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR
THE CRIME OF ENFORCED DISAPPEARANCE

Dr. Annete Mbogoh, Executive Director, Kituo cha Sheria appeared before the Committee and presented as follows:

That—

- i. KITUO was the oldest and most experienced non-governmental and human rights organization in East, Central and the Horn of Africa having been established in July 1973 to enhance access to justice for poor, indigent and marginalized communities in Kenya;
- ii. the objectives and mission of the organization as set out in its Constitution are inter alia to set and shape the national and regional agenda on human rights issues including environmental, economic and socio-cultural rights issues as well as monitor implementation by the State of provisions of human and people's rights;
- iii. in the execution of its mandate, KITUO has found that the matter of enforced disappearances and extrajudicial killings has been particularly prominent and yet disturbing within our country Kenya. According to statistics from Missing Voices compiled from 2007, 1349 persons have been victims of extrajudicial killings;
- iv. 256 cases of enforced disappearances have been documented. Majority of these cases have been attributed to the police. Yet, the law, as it is now, is limited to the extent to which especially enforced disappearances can be prosecuted. The courts have hence been faced with challenges in adjudicating such cases;
- v. enforced disappearances which are commonly accompanied by extrajudicial killings, have tarnished the fabric of law enforcement and the rule of law in the country. Unresolved extra-judicial killings and enforced disappearances should now be a concern to every citizen.
- vi. in the year 2017, during the prolonged and contested general elections, the Human Rights Watch documented that the police and armed gangs killed more than 100 people. It was noted that at least 67 people were killed during the first round of voting most of them either shot or beaten to death by police. In 2018 alone, Kenyan human rights groups documented at least 267 cases of extrajudicial killings by police. The Independent Medico Legal Unit (IMLU), a Nairobi based NGO that works on police accountability, documented 152 extrajudicial killings by police. Further, she cited some investigatory reports by the Kenya National Commission for Human Rights (KNCHR) implicate security agencies in enforced disappearances, brutality and extrajudicial killings.

- vii. there has been failure and neglect to institute adequate investigations on extra-judicial killings and enforced disappearances;
- viii. the state of affairs has been exacerbated by the absence of specific legislation criminalizing enforced disappearance. The absence of such provisions hence gives leeway for inadequate investigations and prosecution of enforced disappearance;
- ix. International instruments reaffirm the illegal nature of enforced disappearance under international law and require that enforced disappearance be classified as a crime under national criminal law;
- x. in Africa, Burkina Faso, Senegal and Tunisia have criminalized enforced disappearance in their respective countries in the case of enforced disappearances, while Kenya has only signed the instrument but ratification is pending;
- xi. a key element of the crime of enforced disappearance in the International Crimes Act is that it must be committed in a systematic and widespread fashion. As such, where the high standard set in the International Crimes Act is not fulfilled, perpetrators of the crime of enforced disappearance may have no criminal responsibility.
- xii. the distinction of enforced disappearances from the various offences linked to it is that enforced disappearance occurs by the hand of the State and or its agents and persons of authorization, support and acquiescence of the State. The State also would decline to acknowledge the deprivation of the liberty and or concealment of the fate of the disappeared person. A stand-alone law is necessary to adequately cover this crime.
- xiii. Parliament enacts legislative provisions that will expressly criminalize and prescribe penalties for the crime of enforced disappearances.

a) Choice of word

As regard to the use of the word **Enforced** instead of **Forced**; the petitioner explained that was for purposes of simplification of law for the citizen who uses it. The Petitioner clarified that the term used by international law to mean disappearing not by their own wanting. She agreed that the law can be drafted in simpler terms for ease of understanding simplified for *mwananchi*.

b) Timing of the proposed legislation

As regards to the sudden interest in the legislation despite being in existence for 50 years, and the Petitioner explained that the Petition was informed by the increased wave of extra judicial killings requiring a quick remedy. Further, the institution had faced challenges as an NGO within access to justice system, making it difficult to label offences.

On why the institution did not propose the legislation during drafting of the 2010 Constitution, the petitioner explained that the international instrument had not been drafted, it came into existence in 2010.

On why only four (4) African countries in Africa have criminalized enforced disappearance, the Petitioner explained that there was no goodwill in most of the other African states. The Committee was concerned that the petition focused on the perpetrator and not victim.

Committee Resolutions

The Committee resolved to invite the following to give their views on the petition: -

- i.) The Attorney General; and
- ii.) The Kenya National Commission on Human Rights.

MIN./PPETC/2023/97: ADJOURNMENT AND DATE OF THE NEXT MEETING

There being no other business, the Chairperson adjourned the meeting at 01:45 p.m. The next meeting would be held on Thursday, 20th April, 2023.

Sign: 

(CHAIRPERSON)

Date.....18.04.2023.....



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

MINUTES OF THE 19TH SITTING OF THE PUBLIC PETITIONS COMMITTEE HELD ON WEDNESDAY, MARCH 27, 2024, IN MEDUSA 2 ROOM, MARINA ENGLISH POINT HOTEL, MOMBASA COUNTY AT 02.30 P.M

PRESENT

- | | | |
|---|---|------------------|
| 1. Hon. Janet Jepkemboi Sitienei, M.P. | - | Vice Chairperson |
| 2. Hon. Joshua Chepyegon Kandie, M.P. | | |
| 3. Hon. Ernest Ogesi Kivai, M.P. | | |
| 4. Hon. Bidu Mohamed Tubi, M.P. | | |
| 5. Hon. John Walter Owino, M.P. | | |
| 6. Hon. Caleb Mutiso Mule, M.P. | | |
| 7. Hon. Maisori Marwa Kitayama, MP | | |
| 8. Hon. (Eng.) Bernard Muriuki Nebart, M.P. | | |
| 9. Hon. Edith Vethi Nyenze, M.P. | | |
| 10. Hon. Suzanne Ndunge Kiamba, M.P. | | |
| 11. Hon. John Bwire Okano, M.P. | | |
| 12. Hon. Peter Mbogho Shake, M.P. | | |

APOLOGIES

- | | | |
|--------------------------------------|---|-------------|
| 1. Hon. Nimrod Mbithuka Mbai, M.P. | - | Chairperson |
| 2. Hon. Patrick Makau King'ola, M.P. | | |
| 3. Hon. Sloya Clement Logova, M.P. | | |

IN-ATTENDANCE

- | | | |
|-----------------|---|-----------------------------|
| 1. Mr. Noah Too | - | Principal Clerk Assistant I |
|-----------------|---|-----------------------------|

SECRETARIAT

- | | | |
|-------------------------|---|-------------------------------|
| 2. Mr. Ahmed Kadhi | - | Senior Clerk Assistant |
| 3. Ms. Roselyn Njuki | - | Senior Serjeant-at-Arms I |
| 4. Ms. Miriam Modo | - | Clerk Assistant I |
| 5. Ms. Anne Shibuko | - | Clerk Assistant I |
| 6. Ms. Peninnah Naisiae | - | Legal Counsel II |
| 7. Mr. Willis Obiero | - | Clerk Assistant III |
| 8. Mr. Martin Sigei | - | Research Officer III |
| 9. Mr. Calvin Karungo | - | Media Relations Officer III |
| 10. Mr. Peter Mutethia | - | Audio Officer |
| 11. Ms. Felistus Muiya | - | Public Communications Officer |

MIN./PPETC/2024/ 121: PRELIMINARIES

The Chairperson called the meeting to order at 02:30 p.m. and proceedings began with prayers by Hon. Ernest Kagesi, M.P.

MIN./PPETC/2024/122: ADOPTION OF AGENDA

AGENDA

1. Prayer
2. Adoption of the Agenda
3. Confirmation of minutes of previous sittings
4. Matters Arising
5. Consideration of Report on Public Petition No. 8 of 2023 regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance
6. Consideration of Report on Public Petition No. 9 of 2023 regarding the State of Food Security in the Country
7. Any Other Business
8. Adjournment

The Agenda was adopted to constitute business having been proposed by Hon. Eng. Bernard Muriuki, M.P. and seconded by Hon. Caleb Mutiso Mule, M.P.

MIN./PPETC/2024/123: CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS

The Agenda was deferred.

MIN./PPETC/2024/124: CONSIDERATION OF REPORT ON PUBLIC PETITION NO. 8 OF 2023 REGARDING ENACTMENT OF LEGISLATION TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

The Committee considered the draft report and noted that the Attorney General of Kenya had established a Multi-Agency Committee to review the laws and policies that protect people from extrajudicial killings and enforced disappearances. Since the Multi agency Committee was best placed to comprehensively deal with the matter, the Committee resolved to summon the Multiagency team to -

- i) establish when its 6-month timeline expires;
- ii) update the Committee on the progress on consideration of the matter; and
- iii) establish whether the terms of Reference of the Multiagency team are in line with the Petitioners prayers

Alternatively, the Committee was of the view that it proposes Legislation and involves the Multiagency team as stakeholders during the public participation process.

MIN./PPETC/2024/125: CONSIDERATION OF REPORT ON PUBLIC PETITION NO. 9 OF 2023 REGARDING THE STATE OF FOOD SECURITY IN THE COUNTRY

The Committee considered the draft report and noted that Kenya does not have a stand-alone law on food security and therefore, the petitioner's prayer to amend the Food Security Act and the establishment of a legal framework on food security is ambiguous and lacks clarity.

The Committee further noted that the Petitioner's primary concern was that policies and programmes to implement food security have been unsuccessful, are not enforceable unless by an Act of Parliament.

The Committee advised that the following prayers of the Petitioner in the submitted draft be part of the report:

- i) the National Assembly compels the executive arm of Government to introduce a multi-sectorial/ Disciplinary unit in the presidency to oversee harmonization and Consolidation of food policies, programmes and initiatives to ensure continuous monitoring and assessment of the state of food security in the country to inform timely intervention and mitigation measures to avoid catastrophic effects of hunger;
- ii) the Ministry of Agriculture and Livestock development be instructed to organize a national conference to discuss the issue of Genetically Modified Organism with a view of raising public awareness on the matter since it has seemed to cause a lot of public consternation; and
- iii) the Departmental Committee on Agriculture of the National Assembly re-introduces the Food Security Bill for consideration to give the country a legal framework with clear coordination mechanism between the National and County government in addressing food and nutritional insecurity in the country.

The Committee would consider the Report further and address the concerns of the Petitioner without dismissing the Petition.

MIN./PPETC/2024/126:

ADJOURNMENT AND DATE OF NEXT MEETING

The Chairperson adjourned the meeting at 05:00 p.m. The next meeting will be held on Thursday 28th March, 2024 at 10:00 a.m.

For Sign: 
.....
(CHAIRPERSON)

Date..... 09-04-2024

