



DPO/NGO information to the 3rd Pre-sessional Working Group of the United Nations Committee on the Rights of Persons with Disabilities

For consideration when compiling the List of Issues on the First Report of the Republic of Kenya under the Convention on the Rights of Persons with Disabilities on 20 April 2015

Submitted by

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Kenya Association of the Intellectually Handicapped (KAIH)

Mental Disability Advocacy Center (MDAC)

4 March 2015

Introduction

- 1. This joint written submission outlines key issues of concern with regard to Kenya's implementation of the Convention on the Rights of Persons with Disabilities (hereinafter "the CRPD"). The submission seeks to assist the 3rd Pre-sessional Working Group of the CRPD Committee (hereinafter "the Committee's Working Group") with its consideration of the Republic of Kenya's initial report. The submission has been written jointly by Users and Survivors of Psychiatry Kenya (USPK), the Kenya Association of the Intellectually Handicapped (KAIH) and the Mental Disability Advocacy Center (MDAC).*
- 2. Users and Survivors of Psychiatry Kenya (USPK) is a national membership organisation whose major objective is to promote and advocate for the rights of people with mental health issues/conditions (people with psycho-social disabilities). USPK is affiliated with the World Network of Users and Survivors of Psychiatry (WNUSP) and the Pan-African Network of People with Psycho-social Disabilities (PANPEP).¹*
- 3. Kenya Association of the Intellectually Handicapped (KAIH) is a national, family based organisation including self-advocates aimed at empowering people with intellectual disabilities. KAIH promotes the human rights of people with intellectual disabilities and their families within society through meaningful participation, education, advocacy, empowerment and information exchange. KAIH is a member of*

¹ Further information is available at <http://www.uspkenya.com/>.

Inclusion International which is the global movement of people with intellectual disabilities and their families.

4. *The Mental Disability Advocacy Center (MDAC) is an international human rights organisation which uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. MDAC's vision is a world of equality where emotional, mental and learning differences are valued equally; where the inherent autonomy and dignity of each person is fully respected; and where human rights are realised for all persons without discrimination of any form.²*
5. *MDAC, USPK and KAIH launched an investigation in 2012 into the right to legal capacity as enshrined in Article 12 of the CRPD for people with mental health issues and people with intellectual disabilities in Kenya. In March 2014, we documented how the right to decide is denied and restricted in law, policy and practice.³ An important finding of the research is that the majority of people with mental health issues and people with intellectual disabilities have their autonomy restricted through social norms and customs.*
6. *Kenya's population is estimated at 40 million people, 80% of whom live in rural areas with 46% of the population living in absolute poverty, while 56% live on less than one US dollar a day.⁴ According to the Kenyan National Bureau of Statistics, the country had approximately 1.3million citizens with disabilities,⁵ including 136,000 persons with mental impairments.*
7. *No figures exist on the number of people who are formally or informally denied their right to legal capacity in Kenya, which was one of the reasons for the joint research undertaken by MDAC, USPK and KAIH.*
8. *This submission focuses on key issues of concern regarding Kenya's implementation of Article 12 of the CRPD and the impact it has on the enjoyment of other key rights guaranteed in the CRPD. This submission suggests questions that the Committee's Working Group are invited to raise in the List of Issues to the Kenyan government in order to shed greater light on the implementation of Article 12 and other connected rights.*

Specific Comments

Article 12: Equal recognition before the law

9. *Article 12 of the CRPD calls for a shift from substituted decision-making regimes to support for persons with disabilities to exercise their legal capacity. It refers both to the recognition of persons with disabilities as rights bearers and as actors in law in "all aspects of life". Article 12(2) prohibits the discriminatory removal or denial of legal capacity and Article 12(3) requires States to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". Article 12(4) requires that, in providing access to support, primacy must be given to the*

² MDAC has three international campaigns to challenge the most widespread and systemic human rights violations against people with mental disabilities worldwide. *My Home, My Choice* seeks to challenge the institutionalisation of people with mental disabilities and advocate for the right to independent living in the community. *I'm a Person* seeks to advance the right to legal capacity, ensuring that supports are provided for people with mental disabilities to make decisions recognised by the law and ensuring that they can author their own lives. *Schools for All* challenges the segregation of children with mental disabilities in education systems and calls for all children to be educated in common learning environments with access to individualised supports. Further information is available at www.mdac.org.

³ USPK, KAIH and MDAC, *The Right to Legal Capacity in Kenya* (Budapest: MDAC, 2014), available online at www.mdac.org/kenya.

⁴ Kenya Initial Report to the CRPD Committee, 31 August 2011, CRPD/C/KEN/1, p 6.

⁵ *Ibid.*, p. 8.

individual's will and preferences alongside with safeguards to prevent abuse. Article 12(5) guarantees the equal right to own or inherit property and control financial affairs, including equal access to bank loans and mortgages.

10. *The Kenyan government has expressed its commitment to shift away from substituted decision-making to supported decision-making in August 2011 in its report to the UN CRPD Committee.⁶*
11. *Our investigation into the right to legal capacity in Kenya looked at the extent to which Kenyan legislation recognised persons with disabilities as persons before the law; the availability of support to exercise legal capacity; the exercise of legal capacity in specific areas of life; and identified legal, policy and social barriers.*
12. *The research took place between 2011 and early 2014 and was comprised of a legislative and policy analysis; and qualitative research including interviews with persons with intellectual disabilities, persons with psycho-social disabilities, and their family members and carers.*
13. *The key findings include the following:*
 - a) *While the 2010 Kenyan Constitution recognises persons with disabilities as persons before the law, this recognition is limited in practice, especially for persons with psycho-social disabilities and persons with intellectual disabilities.⁷*
 - b) *A significant number of persons with mental disabilities experienced restriction of their decision-making rights through informal social processes within the family and their local communities. The social restriction of autonomy and decision-making rights is more pronounced among women and younger persons with mental disabilities.*
 - c) *Kenyan laws allow for partial and full restriction of the right to legal capacity through a court process,⁸ and by decisions of directors of psychiatric hospitals in certain areas.⁹ Section 107 of the Children's Act allows guardianship of a child to extend beyond the age of 18 years in cases where the child has mental or physical disability that renders them "incapable of maintaining themselves or property without the assistance of a guardian". This legislation arbitrarily clusters people with mental health issues and people with intellectual disabilities together as an 'incapable' group, fundamentally based on a deficits approach, and fails to engage with the support needs of each group. Judicial processes for the purpose of determining whether to restrict or remove a person's legal capacity do not give weight to the person's choices will and preferences but start from the assumption that the person lacks legal and mental capacity and that the determination should be based on what the court considers to be their 'best interests'. A High Court Judge in Kenya recently ruled that this blanket presumption of incapacity violates article 12 of the CRPD.¹⁰*
 - d) *The restriction of the right to decide under the law and in social processes within families/communities affects numerous areas of life, including healthcare and treatment decisions, access to justice, family life and marriage, property and land rights, inheritance rights, sexual and reproductive rights, and the exercise of political and civil rights.*

⁶ *Ibid.*, p. 26.

⁷ USPH, KAIH, MDAC, *The Right to Legal Capacity in Kenya*, pp. 22-3.

⁸ Mental Health Act (Cap 248), s. 26.

⁹ *Ibid.*, s. 16.

¹⁰ *Wilson Morara Siringi v the Republic*, High Court of Kenya at Migori, Criminal Appeal No 17 of 2014.

- e) *Legislation itself reflects discriminatory attitudes towards persons with disabilities, with derogatory terms such as 'unsound mind' and 'mental infirmity' frequently used.*

Questions for the Kenyan government

- a. *Please explain measures taken to date (government plans) to abolish formal substituted decision-making regimes and to introduce legislation and enabling regulations to replace this with support for persons with disabilities to exercise their legal capacity, including their right to decide in all areas of life especially access to justice, healthcare and treatment, family life and marriage, property and land rights, inheritance rights, sexual and reproductive rights, and the exercise of political and civil rights.*
- b. *Please provide information on steps or measures taken to combat:*
- *Informal substituted decision-making within families and communities.*
 - *Social and stigma and prejudice faced by people with mental disabilities which have the effect of restricting the exercise of their right to decide*
- c. *What plans does the Kenyan government have to amend legislation to remove derogatory references to persons with disabilities, such as 'unsound mind'. 'mental infirmity' and 'mental incapacity'?*
- d. *Please explain the government's strategy to initiate and support pilot projects on supported decision-making in different regions (both rural and urban) in Kenya and to ensure appropriate and effective safeguards to prevent abuse in the provision of supports to those who may need it to exercise their right to legal capacity.*
- e. *Please provide information on what steps the government is taking, or plans to take, to collect appropriate and disaggregated information, including statistical and research data, relating to people with mental health issues and people with intellectual disabilities, in order to better plan, identify and develop policies and support services that people with disabilities may require in exercising their right to legal capacity.*
- f. *How will the government involve and closely consult with persons with disabilities, their representative organisations and civil society in these processes as required by Article 4(3) of the CRPD?*

Article 12 in relation to Article 23: Marriage and Divorce

14. *Kenyan law explicitly denies persons with psycho-social disabilities and persons with intellectual disabilities the right to marry on an equal basis with others. Section 11(1) of the 2014 Marriage Act, which consolidates existing marriage laws into a single Act states that “A union is not a marriage if at the time of the making of the union- (a) the consent of either party has not been freely given”. In Section 11(2), it states that “Consent is not freely given where the party who purports to give it- (c) is suffering from any mental condition whether permanent or temporary, or is intoxicated, or is under the influence of drugs, so as not to appreciate the nature or purport of the ceremony”. These provisions are discriminatory in purpose and effect against persons with mental disabilities.*

15. *A further discriminatory provision in Section 12 of the same Act states that “...a marriage is voidable if- (a) at the date of the marriage... (ii) either party was or has ever since remained subject to recurrent acts of insanity”. The legislation was condemned by DPOs for entrenching discrimination against persons with psycho-social disabilities.¹¹*

16. *Kenyan government officials will apply these provision in a discriminatory manner and deny the right to marry simply on the basis that they believe that a person has a mental health issue or an intellectual disability. This strips people of their right to form relationships and promotes discrimination instead of eliminating it. The State has an obligation to take effective and appropriate measures to eliminate discrimination (including in cultural practices) against people with disabilities in all matters relating to marriage, family, parenthood and relationships and not to promote it. This violates several rights guaranteed in the CRPD, including Article 23 (right to marry), Article 5 (non-discrimination) and Article 12 (legal capacity) as well as the right to be treated with dignity under Article 54 of the 2010 Constitution of Kenya.*

17. *The CRPD Committee has urged State parties to amend laws such as Kenya’s Marriage Act that deny the right to marry to people with disabilities, including mental disabilities, in order to guarantee the exercise of civil rights.¹²*

Questions for the Kenyan government

- a. **Please explain how the government will amend the 2014 Marriage Act to ensure that it:**
 - **Does not discriminate against persons with psycho-social disabilities and persons with intellectual disabilities.**
 - **Does not deny the right to marry for people with psycho-social disabilities and persons with intellectual disabilities.**

- b. **Please provide information on the strategies or measures adopted by the Kenyan government to combat and eradicate legal, cultural and social barriers in relation**

¹¹ Kenyan Star, ‘How Kenyans living with mental health conditions lost the right to marry’, 21 October 2014, available online at: <http://www.the-star.co.ke/news/article-190888/how-kenyans-living-mental-health-conditions-lost-right-marry>.

¹² UN CRPD Committee, Concluding Observation of the Committee: Peru, 16 May 2012, CRPD/C/PER/CO/1.

to marriage for persons with disabilities and to guarantee that the right is enjoyed on an equal basis with others, and to guarantee protection for family and reproductive rights.

Article 12 in relation to Article 17, 15 and 23: Forced and coerced sterilisation

18. *Testimony of persons with disabilities we spoke to during our investigation in Kenya show that women with mental disabilities experience intersectional discrimination on the basis of their disability and their gender. One woman who lived with other women in a missionary centre said told researchers: "I don't think I would get children. I will tell you something, you see here [lifts up the blouse and reveals a scar on her stomach] here I was made an operation. This is contraceptive, all of us had been done like this, we cannot get children. Nobody asked me. They should have asked me, because I love children [...]. I feel bad, but what can I do now?" (emphasis added) This testimony alleges that women with mental disabilities, in particular women with intellectual disabilities, are sterilised without their free and informed consent.*¹³
19. *Forced and coerced sterilisation against women with HIV has also been reported and is currently being challenged in the Kenyan courts.*¹⁴
20. *To the best of our knowledge no specific research has been carried out on the use of forced or coerced sterilisation against women and girls in Kenya. However, these sources of information suggests that it is a common occurrence in the country, and that the State has not taken concrete action to prohibit such practices.*
21. *The CRPD Committee considers forced sterilisation to be a violation of Article 23 of the CRPD which relates to the right of persons with disabilities to found a family and to retain their fertility on an equal basis with others.*¹⁵
22. *Article 17 of the CRPD in conjunction with Article 12 requires that the Kenyan government should support women with disabilities to ensure that they make decisions relating to their sexual and reproductive rights, and that practices such as sterilisation should never take place without the voluntary informed consent.*¹⁶ *The Kenyan government has an obligation to prevent forced sterilisation, ensure and promote the full realisation of the rights of women with disabilities under Article 15 (prohibition of torture), Article 17 (mental and physical integrity) and Article 23 (right to family). In conjunction with Article 12, the government is under an obligation to combat discrimination on grounds of disability and gender, to prosecute perpetrators and provide redress to victims.*

Questions for the Kenyan government

- a) **Please provide information on measures/mechanisms that the government has taken to prohibit the sterilisation of women and girls with disabilities without their prior, informed and free consent. How effective are these mechanisms? What actions has the government taken to raise awareness about the sexual and**

¹³ USPK, KAIH, MDAC, *The right to Legal Capacity in Kenya* (Budapest: 2014, MDAC), p. 46, 66. A full testimony from this interviewee is contained in the report.

¹⁴ Kenya Legal and Ethical Issues Network on HIV (KELIN), '5 cases of forced and coerced sterilization filed in the High Court of Kenya', news article available at: <http://gem.or.ke/5-cases-of-forced-and-coerced-sterilization-filed-in-the-high-court-of-kenya/>.

¹⁵ UN CRPD Committee, *Concluding Observation of the Committee, China, 15 October 2012, CRPD/C/CHN/CO/1*.

¹⁶ UN CRPD Committee, *Concluding Observation of the Committee: Argentina, 8 October 2012, CRPD/C/ARG/CO/1*.

reproductive rights of persons with disabilities, including in places where people with disabilities receive services such as hospitals and schools?

- b) Explain how the government will ensure that women and girls with disabilities have access to information on their sexual and reproductive rights.**
- c) What information is available to doctors, medical personnel and others who carry out evasive medical procedures including sterilisation on the need for full and informed consent, the obligation to provide support to women and girls with disabilities in making decisions relating to their sexual and reproductive rights, and avenues to seek redress before courts for violation of these rights?**
- d) What steps has the government taken:**
 - **to investigate allegations of forced sterilisation of women and girls with disabilities, and to punish perpetrators?**
 - **to gather data on the prevalence of forced sterilisation and other practices which impact on the sexual and reproductive rights of women and girls with disabilities, disaggregated by gender, age, disability and impairment type?**
 - **to address forced sterilisation publicly and to tackle and challenge stereotypes, prejudices, misconceptions and cultural and social norms which allow such practices to take place?**

Article 12 in relation to Article 13: Access to justice

- 23. The Constitution guarantees everyone the right to access justice (Article 48), to a fair trial and public hearing (Article 50 and Article 50(m)) and to institute court proceedings in cases of violations of rights guaranteed in the Bill of Rights (Articles 22(1) and 22(3)(b)).**
- 24. However, laws such as the Civil Procedure Act and its accompanying Civil Procedure Rules treat people who are considered to be of “unsound mind” as incapable of pursuing or defending their rights before courts, including in respect of proceedings related to their legal capacity.**
- 25. Laws in general fail to protect people with mental disabilities from unwanted interference by family members who prevent them from accessing to justice. People with psycho-social disabilities and people with intellectual disabilities have little support in order to access justice.**
- 26. Article 13 of the CRPD obliges States to guarantee people with disabilities effective access to justice on an equal basis with others, including procedural and age-appropriate adjustments so that they can effectively participate in any legal proceedings (civil or criminal, regardless of trial stage) in any role in which they may find themselves: victims, witnesses, plaintiffs or defendants. The CRPD Committee has added that persons with disabilities should be able to participate in judicial and other proceedings as subjects of rights, and not objects of protection.¹⁷**

Questions for the Kenyan government

- a. What steps have been taken to review and amend judicial practices and rules to ensure that all persons with disabilities can access justice on an equal basis with others?**

¹⁷ CRPD Committee, Concluding Observation of the Committee: China, 15 October 2012, CRPD/C/CHN/CO/1.

- b. What steps have been taken to train those working in the administration of justice, for example, through the creation of compulsory modules for police officers, lawyers, members of the judiciary and court personnel on how to work with people with intellectual disabilities and people with psycho-social disabilities? What measures has the government taken towards the creation of professional standards for State authorities working with people with mental disabilities in the justice system?**
- c. Describe the measures taken, or planned, to ensure that persons with disabilities can access justice in rural or semi-rural areas.**
- d. How does the government ensure, or envisage it will ensure, that all persons with disabilities are entitled to and provided with free legal assistance?**
- e. What steps will the government take to ensure that justice mechanisms are accessible for persons with intellectual disabilities and persons with psycho-social disabilities, and that they can access the necessary support to take cases where their rights have been violated? How will the government challenge barriers to exercising the right to access justice, such as preventing interference by family members or carers?**

Article 12 in relation to Article 25: Denial of health care choices

- 27. Kenya's law and practices restrict and deny the right to decide in relation to health care decisions for persons with intellectual disabilities and persons with psycho-social disabilities. In the majority of cases, relatives and carers make health care decisions on a substitute basis. Article 43(a) of the Constitution guarantees the highest attainable standard of health and health care services for all Kenyans, and Section 20 of the 2003 Disability Act prohibits discrimination against persons with disability in the provision of health services.**
- 28. The majority of people we spoke to in our investigation reported being involuntarily admitted to hospitals. The Mental Health Act allows people suspected of having a "mental disorder" to be involuntarily admitted. Police officers can detain someone on the basis that they believe that person has a "mental disorder" and any person's spouse, relative (in their absence) or any other person can make an application for involuntary admission to a psychiatric hospital.¹⁸**
- 29. Article 25(d) of the CRPD is clear on consent to treatment and the CRPD Committee has repeatedly stated that States must adopt measures to ensure that "all health care services provided to people with disabilities, including all mental health care and services, are based on the free and informed consent of the individual concerned and that laws permitting involuntary treatment and confinement, including upon the authorization of third party decision-makers such as family members or guardians, are repealed".¹⁹**

Questions for the Kenyan government

- a. Please provide information on steps taken to stop involuntary admission and treatment of persons with psycho-social disabilities and to prevent health care**

¹⁸ Mental Health Act (CAP 248), Section 16, 16(1) & 14(1).

¹⁹ CRPD Committee, Concluding Observation of the Committee: China, 15 October 2012, CRPD/C/CHN/CO/1.

decisions being made on behalf of persons with disabilities by carers/relatives/support persons against their will and preferences.

- b. Please provide information on plans to work with people with psycho-social disabilities and persons with intellectual disabilities to guarantee access to support in making health care decisions and having their decisions respected.*
- c. Please explain any measures in place to educate and raise the awareness of health care professionals and relatives/carers about the rights of persons with disabilities to consent on an equal basis with others to any medical intervention.*
- d. Please explain measures the State has taken to ensure that mental health care services and a variety of support measures, including crisis and recovery supports, multidisciplinary, home-based and assertive outreach care and a comprehensive range of relevant medical, psychological and social therapies for service users and their families are provided within their communities.*

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