

Addressing statelessness in Kenya through a confluence of litigation, transitional justice, and community activism: reflecting on the cases of the Nubian, Makonde and Shona communities

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ABSTRACT: This article outlines the challenge of statelessness in Kenya and proceeds to focus on two seminal cases filed by the Nubian community against the Kenyan state: one before the African Commission on Human and Peoples' Rights and the other at the African Committee of Experts on the Rights and Welfare of the Child. Attention then turns to Kenya's transitional justice agenda and its interaction with the plight of stateless persons in Kenya. Through the experiences of the Nubian, Makonde and Shona communities, the article also explores the role of community-led activism in furthering the cause of ending statelessness in Kenya. It concludes with key lessons to be learned from utilising litigation, transitional justice and community-led activism as part of the struggle for the rights of stateless persons in Kenya. It relies on desk-review and research of the Nubian cases, Kenya's truth commission report and other official inquires, civil society reports, the 2010 Constitution and related laws.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'apport du contentieux, de la justice transitionnelle et de l'activisme communautaire à l'éradication de l'apatridie au Kenya: réflexion à partir des cas des communautés nubienne, makonde et shona

RÉSUMÉ: Cet article décrit le défi de l'apatridie au Kenya à travers l'examen de deux affaires importantes initiées par la communauté nubienne contre l'État kenyan: l'une devant la Commission africaine des droits de l'homme et des peuples et l'autre devant le Comité africain d'experts sur les droits et le bien-être de l'enfant. L'emphase est mise sur le programme de justice transitionnelle du Kenya et son interaction avec la situation critique des apatrides dans ce pays. Partant des expériences des communautés nubienne, makonde et shona, l'article explore également le rôle de l'activisme communautaire dans la promotion des activités tendant à éradiquer l'apatridie au Kenya. En conclusion, l'article tire les leçons principales que le recours au contentieux, à la justice transitionnelle et à l'activisme communautaire apporte à la cause des apatrides au Kenya. Différentes méthodes sont mobilisées pour répondre à la question de recherche, à savoir une étude documentaire et des recherches sur les affaires nubiennes, le rapport de la commission de vérité du Kenya et d'autres enquêtes officielles, des rapports de la société civile, la Constitution de 2010 et les lois connexes.

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KEY WORDS: statelessness, transitional justice, community led activism, litigation, Kenya

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1 INTRODUCTION

1.1 The concerns of stateless persons in Kenya

The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) defines a stateless person as one who is not considered as a national by any state under the operation of its law. This is complemented by the 1961 Convention on the Reduction of Statelessness (1961 Convention) which outlines the rules that govern the conferment and non-withdrawal of citizenship. There is also *de facto* statelessness which denotes people who are denied the rights and protections of citizenship due to being unable to obtain proof of their nationality, residency or other form of qualifying for citizenship.¹ Despite this guidance, the United Nations High Commissioner for Refugees (UNHCR) estimates that there are at least 3.9 million stateless people around the world and that this number could actually be as high as 10 million.²

Statelessness contravenes the right to nationality which is enshrined in the Universal Declaration of Human Rights, in other treaties, jurisprudence and state practice.³ With the right to nationality violated, stateless persons are consequently hindered from fully participating in public life and are denied access to basic rights such as education, health, property ownership and free movement.⁴ These

1 BK Blitz 'Statelessness, protection and equality' (2009) 3 *RSC Policy Briefing Series* 1.

2 <https://www.unhcr.org/blogs/better-statistics-to-help-end-statelessness/> (accessed 3 September 2021).

3 CA Batchelor 'Statelessness and the problem of resolving nationality status' (1998) 10 *International Journal of Refugee Law* 156.

4 Batchelor (n 3) 159.

challenges are compounded by the fact that numerous states are yet to institute procedures to determine statelessness, yet these are essential to facilitating a pathway to nationality for stateless persons.⁵ Additionally, some nationality laws have embedded discriminatory practices in relation to conferring of nationality and created gaps by failing to fully contemplate safeguards in relation to the acquisition, loss and deprivation of nationality. It is in this context that Kenya grapples with the issue of statelessness.

Both *de jure* and *de facto* statelessness have in fact been the experience for various communities in Kenya. The 2008 report of the Presidential Special Action Committee to address specific concerns of the Muslim community in regard to alleged harassment and discrimination in the application and enforcement of the law stated that

there are stateless persons of African origin, e.g. the Nubians, Makonde, Wachangamwe, Washirazi and other ethnic groups from East Africa, whose issues have not been resolved despite there being a constitutional provision on their right to apply for Kenyan citizenship.⁶

In 2016, UNCHR estimated that the population of stateless persons in Kenya stood at 18 500. The origins of statelessness for these communities lay in both legal and administrative causes. Prior to 27 August 2010, Kenya's constitution and legal framework on the acquisition, restoration, retention and loss of citizenship had gaps and insufficient safeguards which occasioned statelessness for some individuals.⁷

In addition to not ratifying the 1954 Convention, Kenya's laws had failed to domesticate the safeguards on statelessness that are in its treaty obligations under the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Kenya's laws on nationality were also discriminatory in as far as conferring citizenship to children and spouses was concerned. Illustratively, only Kenyan fathers were deemed as being capable of conferring citizenship to their children and in the case of marriage, foreign women, would gain citizenship only if they were married to Kenyan men.⁸

The lack of sufficient regulation as well as improper outcomes with regard to administrative practices on citizenship also occasioned statelessness.⁹ One such key example is the vetting policy which

5 A Edwards & L Van Waas 'Statelessness' in Fiddian-Qasimiyeh, Loescher, Long & Sigona (eds) *The Oxford handbook of refugee and forced migration studies* (2014) 5.

6 Truth, justice and reconciliation commission 'Volume IIC' (2013) 328.

7 Kenya National Commission on Human Rights 'Out in the shadows: towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya' (2010) 5.

8 Kenya National Commission on Human Rights (n 7) 38-39.

9 Kenya National Commission on Human Rights (n 7) 6.

precedes the acquisition of national identity cards and passports for selected groups. Against a historical backdrop of ethnic stigmatisation, some of the communities saw their right to nationality prejudiced rather than protected by this vetting policy. A seminal example of this was in the period of 13 November to 4 December 1989 when the Kenyan government through a legal notice subjected Kenyans of Somali descent to a screening exercise which resulted in many of them either being denied registration or having their already issued identity cards cancelled.¹⁰ Furthermore, a 2007 report by the Kenya National Commission on Human Rights (KNCHR) concluded that the vetting process in addition to not being properly anchored in law, introduced unjustified hurdles in accessing national identity cards for Kenyan Somalis, Nubians and Kenyan Arabs.¹¹

These legislative and administrative causes of statelessness have had far-reaching ramifications on the enjoyment of other fundamental rights and freedoms for the persons concerned. In July 2010 KNCHR indicated that stateless persons and those at risk of statelessness endured various degrees of curtailment of their right to education, the right to work and the right to property.¹² The affected communities have deployed various strategies to challenge the violation of their rights and seek legal reform. This article will now turn its attention to these strategies and how they intersected to bring about change, namely: strategic litigation, transitional justice and community activism.

2 ENFORCING THE RIGHTS OF STATELESS PERSONS THROUGH STRATEGIC LITIGATION IN THE AFRICAN HUMAN RIGHTS SYSTEM: THE NUBIAN CASES

Strategic litigation refers to ‘legal action in a court that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)’.¹³ In this sense litigation becomes an instrument of transformation to advance social progress and the lawyer a ‘social engineer and group interpreter’.¹⁴ Strategic litigation can be an essential tool in the promotion and protection of the fundamental

10 Kenya Human Rights Commission ‘Foreigners at home: the dilemma of citizenship in Northern Kenya’ (2008) 37.

11 Kenya National Commission on Human Rights ‘An identity crisis? A study on the issuance of national identity cards in Kenya’ (2007) 24.

12 Kenya National Commission on Human Rights (n 7) 5.

13 Open Society Justice Initiative ‘Strategic litigation impacts: insights from global experience’ (2018) 25.

14 CH Houston <http://law.howard.edu/brownat50/BrownBios/BioCharlesHHouston.html> (accessed 13 July 2021).

rights and freedoms for vulnerable groups as anchored on the respect for the rule of law and legal accountability.¹⁵ Over time, such litigation has acquired a credible track record of furthering the domestication of human rights norms by way of judicial recognition and enforcement.¹⁶

At its best, strategic litigation yields multi-dimensional impact which includes material changes to the case petitioners such as compensation; instrumental changes as reflected in policy, law, jurisprudence and institutional operations; and non-material changes such as indirect shifts in attitudes, behaviours, discourse, and community empowerment.¹⁷ At its worst, strategic litigation can be time consuming, frustrating and occasion backlash against the group seeking redress while also being ineffective towards reforms.¹⁸ It is in this context that two cases by the Kenyan Nubian community within the African human rights system, stand out as a pivotal turning point for the protection of stateless persons in Kenya and throughout the continent.

2.1 Communication 317/2006: *The Nubian Community in Kenya v Kenya*

This case was filed before the African Commission on Human and Peoples' Rights (African Commission) on 23 January 2006 by the Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA) on behalf of the Nubian community of Kenya as the complainants. The case stemmed from the historical plight of the Nubian community whose recognition as Kenyan citizens remained contested and occasioned challenges to accessing citizenship-related documents despite them being in the country for over a century. Estimated to be a population of around 100 000 at the time of filing the complaint, the Nubian community in Kenya are descendants of a group that was originally brought from Sudan to form part of the East Africa Rifles within the British colonial army. After discharging their responsibilities, the Nubians were neither granted British citizenship nor repatriated to their original home in the Nuba Mountains in the central part of the Republic of Sudan. Instead, they were allowed to settle in various parts of Kenya but with a considerable number of the community residing in what would become modern-day Kibera within Kenya's capital city Nairobi.

- 15 M Roa & B Klugman 'Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia' (2014) 44 *Reproductive Health Matters* 31.
- 16 CM Forster & V Jivan 'Public interest litigation and human rights implementation: the Indian and Australian experience' (2008) 3 *Asian Journal of Comparative Law* 1.
- 17 Open Society Justice Initiative (n 13) 19.
- 18 H Duffy 'Strategic human rights litigation: bursting the bubble on the champagne moment' (2017) <https://hdl.handle.net/1887/59585> (accessed 7 September 2021).

Kenya gained its independence on 1 June 1963 but the citizenship status of the Nubian community remained unresolved and cascaded into a series of grievous violations, the primary of which was their non-recognition as Kenyan citizens and denial of access to identity papers. This then opened the door to further violations in the realm of political participation and in the enjoyment of economic, social and cultural rights. It was on this basis that the Nubian community embarked on the journey to seek legal redress. The litigation commenced at the Kenyan judiciary but this was ultimately frustrated on procedural and substantive grounds.

Procedurally, the Nubian community saw its case, which was filed at the Kenyan High Court in March 2003, frustrated by a series of unreasonable administrative obstacles that would play out for over a year. Illustratively, the community was instructed to obtain 100,000 affidavits as a way of ascertaining the identity of the persons on whose behalf the case had been filed.¹⁹ Additionally, the case file was brought before five different judges but failed to proceed on to the merits; numerous correspondences to the Chief Justice to request for direction on the matter would go unanswered.²⁰ Substantively, the Kenyan Constitution prior to 27 August 2010 contained a Bill of Rights that only guaranteed the civil and political rights of the individual. This meant that there would be insufficient remedies at the national level to address the violations raised by the Nubian community that pertained to group rights and economic, social and cultural rights. It is on this basis that the community sought recourse before the African Commission.

In considering the admissibility of the case, the African Commission allowed the case to proceed and affirmed its well established test that local remedies ought to be available, effective and sufficient. It expressed itself as follows:²¹

A remedy is considered available if the petitioner can pursue it without impediment. After more than four years, there does not seem to be any realistic prospect of the Complainants' case being heard.

It also concurred that the Kenyan Constitution did not protect economic rights and group rights.²²

On the merits, the Kenyan state was found to have violated various rights under the African Charter with respect to the Nubian community. Kenya was held to have violated the right to freedom from discrimination (article 2) and the right to equality before the law and equal protection of the law (article 3) as it was established that the Nubian community had been subjected to the vetting process which was deemed arbitrary, lacking foundation in Kenyan law, prone to abuse and furthered marginalisation which made it both irrational and

19 *The Nubian Community in Kenya v Kenya*, Communication 317/2006, African Commission on Human and Peoples' Rights, Thirty Eighth Annual Activity Report (2015) para 31.

20 *The Nubian Community in Kenya v Kenya* (n 19) para 31 & 32.

21 *The Nubian Community in Kenya v Kenya* (n 19) para 55.

22 *The Nubian Community in Kenya v Kenya* (n 19) para 60.

unjustifiable.²³ This exposed the Nubian community to statelessness and hence a violation of the right to recognition of one's legal status as provided for under article 5 of the African Charter.

On the right to property under article 14 of the African Charter, the African Commission held that the occupation and use rights that were granted to the Nubians for over a century with respect to Kibera was sufficient for that land to be considered the Nubian's communal property. This was essential as the community had been subjected to a series of forced evictions under the guise that they were residing on government land.²⁴ In recognition of how obtaining identity documents were a facilitator to effective public participation and access to basic services, the African Commission held that Kenyan state was consequently liable for violating the Nubian community's right to freedom of movement, right to participate in government, right to work, right to health, right to education and the protection of the family and vulnerable groups.

In a decision rendered in February 2015, the African Commission instructed the Kenyan state to implement various remedies. First, they were required to put in place objective, transparent and non-discriminatory criteria and procedures for the determination of Kenyan citizenship. Second, they were required to accord recognition and security of tenure for the Nubian community with respect to Kibera while also ensuring that any evictions from Kibera were compliant with international human rights standards.

2.2 Communication 2/2009: Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya

This case was filed on 20 April 2009 in keeping with the overall plight of the Nubian community as stated in the case filed before the African Commission but this time with a focus on the Nubian children; hence its filing before the African Committee of Experts on the Rights and Welfare of the Child (African Committee) and reliance on the African Children's Charter. The essence of the case was that the right to nationality for Nubian children was prejudiced by their parent's difficulty to access identity documents on the basis of discriminatory practices by the state. Nubian parents who had difficulty in accessing identity documents themselves encountered difficulties in having the birth of their children registered. Additionally, under Kenyan law, a birth registration certificate was not proof of citizenship and thus Nubian children whose parents' citizenship status remained precarious would also have their status rendered ambiguous until reaching the of

23 *The Nubian Community in Kenya v Kenya* (n 19) para 133.

24 *The Nubian Community in Kenya v Kenya* (n 19) para 161.

18 years when they could themselves apply for a national identity card and be subjected to the vetting process.

As with the African Commission, the African Committee declared this case to be admissible on account of the fact that the Nubian community had endured unduly and unreasonably prolonged delays before the Kenyan High Court when they sought redress at the national level.²⁵ In the absence of a response from the Kenyan state, the African Committee proceeded to find them liable for various violations under the African Children's Charter. The fact that children of Nubian descent were essentially left without acquiring nationality until attaining the age of 18 years was deemed to be a violation of the right to acquire nationality as provided for in article 6 of the African Children's Charter. The African Committee further concurred with the complainants that despite the existing pathways to citizenship by birth, descent, registration and naturalisation, a significant number of Nubian children in Kenya had been left stateless.²⁶

The Kenyan state was also found to have violated the principle of non-discrimination under article 3 of the African Children's Charter. This violation stemmed from the lengthy and arduous process of vetting (including requiring them to demonstrate the nationality of their grandparents, as well as the need to seek and gain the approval of Nubian elders and governmental officials).²⁷

This was deemed to be a deprivation of any legitimate expectation of nationality and rendering them effectively stateless.²⁸ The vetting process was also castigated for its erosion of the dignity of Nubian children and its non-compliance with the principle of the best interests of the child. In addition to violating the right to nationality and the principle of non-discrimination, the Kenyan state was also found to have consequently violated the right to health and the right to education as enshrined in articles 14 and 11(3) of the African Children's Charter respectively.²⁹

The African Committee on 22 March 2011 pronounced a series of remedial measures to be undertaken by the Kenyan state. The Kenyan government was required to institute all necessary legislative, administrative and other measures to ensure that Nubian children who

25 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*, Communication 002/2009, African Committee of Experts on the Rights and Welfare of the Child, Seventeenth Session Report (2011) para 34

26 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 49

27 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 49.

28 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 55.

29 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (n 25) para 62 & 65.

had otherwise been rendered stateless could acquire Kenyan nationality and the proof of such nationality at birth. These measures were also required to promptly apply to existing Nubian children whose Kenyan nationality had not been recognised. The Kenyan government was directed to implement a non-discriminatory birth registration process that would see Nubian children registered immediately after birth. On health and education, the Kenyan government was directed to adopt a short term, medium term and long term plan for the realisation of these rights in consultation within the community.

2.3 The challenge of implementing the Nubian cases

The Nubian cases before the African Commission and African Committee are indicative of the transformative potential of strategic litigation as seen in the jurisprudential value they provided on the right to nationality and remedies for statelessness. The African Committee decision has been heralded as ‘a trailblazing interpretation of children’s right to a nationality that propels its justiciability in tandem with their economic, social and cultural rights (ESCRs).’³⁰ In a similar vein, the case at the African Commission affirmed that rendering someone stateless through legislative, policy or administrative processes was antithetical to the right to recognition of one’s legal status. In both cases, the adjudicative bodies prescribed legislative, policy and administrative measures of reform as part of the remedial actions to address the plight of the Nubian community while also tending to the material impact of strategic litigation by issuing directions on securing community land rights as well as the rights to health and education. These decisions were vital in bridging a gap of protection that lay in the non-responsiveness of the Kenyan government and a constitutional framework that did not sufficiently guard against the risk of statelessness.

Despite these jurisprudential gains, the familiar challenge of non-implementation of judicial decisions emerged in these cases. With respect to the Nubian Children case, a briefing paper submitted to the African Committee by the complainants in February 2014 (3 years after the decision was issued) painted a grim picture in terms of implementation:³¹

Three years after the Committee’s decision, the data gathered in Kibera shows that Nubians still face overtly discriminatory hurdles in obtaining birth certificates. Registration officers retain blanket discretion to request documentary proof before issuing identity documents including birth certificates, and Nubians are disproportionately required to provide additional documentation in support of applications. Requests for additional documents trigger multiple trips to different government buildings, additional travel costs and fees, and a prolonged and intimidating process.

30 E Fokala & L Chenwi ‘Statelessness and rights: protecting the rights of Nubian children in Kenya through the African Children’s Committee’ (2014) 6 *African Journal of Legal Studies* 358.

31 Open Society Justice Initiative ‘Briefing paper: implementation of *Nubian minors v Kenya*’ (2017) 2.

Similarly, a commentary sent to the African Commission by the complainants in February 2016 (one year after the decision was issued) indicated that despite a number of positive steps undertaken by the Kenyan government, it was yet to take the necessary steps required to address the African Commission's findings on discrimination in accessing identity documents, including access to proof of citizenship and; property rights and forced evictions.³²

Yet, occurring alongside these challenges was a pivotal turning point in Kenya's history that would enliven the prospects for constitutional reform and the redress of historical injustices; the reform agenda which emerged from the 2007-08 Post-Election Violence (PEV). The rendering of these decisions from the African human rights system fortuitously converged with an inflection point for the country that would see it reconsider the social contract and seek to further national cohesion and reconciliation. The next section will now turn attention to how the intersection of strategic litigation and transitional justice impacted the rights of stateless persons in Kenya.

3 KENYA'S TRANSITIONAL JUSTICE AGENDA, A CONNECTION WITH STRATEGIC LITIGATION AND ITS IMPACT ON THE RIGHTS OF STATELESS PERSONS IN KENYA

The African Union Transitional Justice Policy (AUTJP) defines transitional justice as

the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.³³

The measures utilised to this end include truth commissions, criminal prosecutions, reparation programmes, legal and institutional reforms and vetting of public officials but to name a few. In Kenya, while the discussion of establishing a truth commission was broached in 2003, the impetus to finally implement transitional justice measures emerged from the fallout of the country's 2007 general elections.

The 2007 Presidential elections were highly contested and ended in a dispute which triggered an unprecedented level of violence in the country. This caused an estimated 1 300 deaths and the internal displacement of 663 921 persons.³⁴ This violence attracted the intervention of the international community and the leadership of the

32 Open Society Justice Initiative 'The Nubian Community in Kenya v Kenya – Communication 317/06: Comments under Rule 112 relating to implementation' (2016) para 6.

33 African Union Transitional Justice Policy para 19.

34 Government of Kenya, Ministry of State for Special Programmes, 'Progress on resettlement of internally displaced persons' (2012).

African Union (AU) would see the intervention distilled into the Kenya National Dialogue and Reconciliation (KNDR) process which was mediated by a group of eminent personalities led by HE Kofi Anan. The KNDR mediation effort would ultimately see the protagonists of the dispute ratify a roadmap consisting of four agenda items as a pathway out of the crisis. The agenda items were: Immediate Action to Stop Violence and Restore Fundamental Rights and Liabilities (Agenda 1); Immediate Measures to Address the Humanitarian Crisis, Promote Reconciliation, Healing and Restoration (Agenda 2); How to Overcome the Current Political Crisis (Agenda 3); and Long-term Issues and Solutions (Agenda 4).³⁵

Through these agenda items and in particular Agenda 2 and 4, a transitional justice framework would emerge with the aim of furthering accountability, healing, reconciliation and undertaking reforms. They yielded the Commission of Inquiry into Post-Election Violence (CIPEV) which was mandated to identify those criminally responsible for the violence while also diagnosing the gaps within the country's security apparatus which had enabled the scale of the violence. The Truth, Justice and Reconciliation Commission (TJRC) was also established with a temporal scope of 12 December 1963 to 28 February 2008 and the mandate to inquire into human rights violations, economic crimes, historical land injustices and other historical injustices within that period. There were also institutional reforms aimed at various public sectors such as the judiciary, police and the electoral management body but to name a few. However, the centrepiece of reform was constitutional reform to usher in a new dispensation. While this article cannot exhaustively discuss the breadth of this transitional justice agenda, it will confine itself to highlighting aspects that had an impact on addressing the plight of statelessness.

3.1 How the transitional justice agenda addressed the rights of stateless persons

3.1.1 *The Truth, Justice and Reconciliation Commission*

With the breadth of its temporal scope and thematic mandates, the TJRC has been appreciated for providing 'an official record of the state's complicity in serial human rights violations'.³⁶ The TJRC discharged its mandate over a 4-year period from August 2009 to May 2013 and yielded a 4-volume report of 2 210 pages. The report was based on public hearings conducted across the country, 42 465 statements, 1 828 memoranda from Kenyans and an extensive review of past public inquiries and documentation from civil society. The report's findings were organised thematically and it is in this context

35 Kenya Human Rights Commission 'Wanjiku's journey: tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum' (2010) 14.

36 International Center for Transitional Justice 'Lessons to be learned: An analysis of the final report of Kenya's Truth, Justice and Reconciliation Commission' <https://www.ictj.org/publication/kenya-TJRC-lessons-learned> (accessed 28 July 2021).

that Volume II C addressed the issue of statelessness under the broader discussion of the gross violation of human rights experienced by minority groups and indigenous peoples. As a violation of the right to identity, the TJRC found that Kenya's legal provisions had historically been applied in a manner that excluded certain ethnic groups from accessing citizenship.³⁷

Previous reports such as those by KNCHR and indeed the arguments averred in the Nubian cases within the African human rights system were affirmed during the public hearings of the TJRC. Members of the Nubian community at these hearings decried the lack of effective political representation and participation as well as the loss of economic opportunities which came with the lack of access to identity documents.³⁸ Furthermore, the TJRC report acknowledged that the Nubians and other minority communities had been negatively portrayed within school curricula, government documents as well as in the public pronouncements of state officials and this had the effect of enhancing the discrimination endured by these communities.³⁹ The TJRC hearings also accorded the Nubians an opportunity to highlight the violation of their land rights as a result of the non-recognition of their claim to Kibera and the episodes of forced evictions that they had endured over time.⁴⁰

The Nubian cases were cited by the TJRC as a demonstration of the importance of rights-based education and legal literacy development as a facilitator of access to justice for minority communities. An essential dividend of litigation such as the Nubian cases was that 'they have been empowered to advocate on their own behalf using their understanding of their rights as a group and the Kenya government's duty to protect, promote and fulfil those rights'.⁴¹ The inordinate delays within the national justice system were also recognised by the TJRC as barriers to accessing justice for minority communities such as the Nubians.

Among its findings, the TJRC held that the Nubian, Somali, Galjeel and other Muslim communities in the country had suffered discrimination at the hands of the state due to provisions within laws and regulations on citizenship which denied them equality before the law.⁴² The TJRC also held that the state's non-implementation of judicial decisions eroded minority groups' confidence that the national justice system could in fact promote and protect substantive equality.⁴³ Taking cognisance of the Nubian cases as well as the testimonies adduced during the public hearings, the TJRC recommended that 'obstacles experienced by minority groups such as members of Somali and Nubian ethnic communities in accessing the national identity cards

37 Truth, Justice and Reconciliation Commission (n 6) 226.

38 Truth, Justice and Reconciliation Commission (n 6) 231.

39 Truth, Justice and Reconciliation Commission (n 6) 236.

40 Truth, Justice and Reconciliation Commission (n 6) 252.

41 Truth, Justice and Reconciliation Commission (n 6) 268.

42 Truth, Justice and Reconciliation Commission 'Vol IV' (2013) at 45.

43 Truth, Justice and Reconciliation Commission (n 42) 46.

be removed within 12 months of issuance of this Report'.⁴⁴ The implementation matrix developed by the TJRC for its recommendations then went on to emphasise that Nubian case decisions from the African Commission and the African Committee needed to be implemented within 12 months of the TJRC report's publication.

The findings and recommendations of the TJRC report point to the confluence of litigation and truth-seeking processes in a manner that mutually reinforced the objectives of each process. Through the Nubian cases, the TJRC was able to contextualise and make vivid, the discriminatory aspects of Kenya's legal framework pertaining to citizenship and the acquisition of citizenship documents. The Nubian cases and their affirming jurisprudence both enhanced the profile of the Nubian community within the TJRC process and strengthened the probative value of their submissions during the public hearings and through memoranda. As already highlighted, the petitioners in the Nubian cases did point to challenges in implementation of the decisions due to the non-responsiveness and non-compliance of the state with the directions issued by the African Commission and the African Committee. In explicitly referencing the implementation of these case decisions within the implementation matrix of the TJRC report, the TJRC provided renewed impetus and visibility for the cases which could aid the effort by the petitioners to compel the state to comply with the decisions. At this juncture, it is important to also assess the relevant constitutional, legislative and institutional reforms that took place contemporaneously with the TJRC process.

3.1.2 Constitutional, legislative and institutional reforms

Prior to 2008, there had been a sustained clamour for constitutional reform in Kenya going as far back as 1991.⁴⁵ This was part of a wider call from civil society and the political opposition, for the return to multiparty democracy in the country which had been under a *de jure* one-party state system since 1982.⁴⁶ While multiparty democracy would be restored by 1992, a contentious constitutional review process would eventually commence in 1998 under the steerage of the Constitution of Kenya Review Commission (CKRC).⁴⁷ This culminated in a 2005 referendum which saw the proposed constitution emerging from the process rejected by the electorate on a margin of 58.12 per cent voting no and 41.88 per cent voting yes.⁴⁸ The fallout from this

44 Truth, Justice and Reconciliation Commission (n 42) 47.

45 Kenya Human Rights Commission (n 35) 11.

46 N Gichuki 'Kenya's Constitutional journey: taking stock of achievements and challenges' (2016) 18 *RiA Recht in Afrika* | *Law in Africa* | *Droit En Afrique* 132.

47 Gichuki (n 46) 132.

48 'EISA Kenya: 2005 Constitutional referendum results' <https://www.eisa.org/wep/ken2005results.htm> (accessed 23 July 2021).

referendum triggered political realignments that then led to the highly contested 2007 elections and their fractious aftermath.⁴⁹

In the context of the KNDR, the resumption of constitutional reform was identified as one of the key prescriptions to address ‘the underlying causes of the prevailing social tensions, instability and cycle of violence’ that became devastatingly manifest in the aftermath of the country’s 2007 elections.⁵⁰ These underlying causes were cited to include poverty, inequitable distribution of resources and segments of Kenyan society feeling that they were the subject of historical injustices and exclusion. Therefore, constitutional reform in this context became an instrument of redressing past violations and ushering in socio-economic transformation as envisioned in the AUTJP.

Through the KNDR, the constitutional review process was revived by way of a legal framework which established a Committee of Experts (CoE) with a mandate to: harmonise prior draft proposals; identify contentious issues from the previous cycle of review and seek public input on these issues; conduct thematic consultations with various stakeholders; and submit a harmonised draft constitution to the National Assembly for approval after which the draft would be subjected to a referendum.⁵¹ The CoE discharged its mandate and the proposed constitution was ratified in a referendum on 4 August 2010 with 68.55 per cent of the votes cast being in favour of the proposal.⁵² On 27 August 2010 the Constitution (2010 Constitution) was promulgated.

In addition to being hailed for the consultative process that informed its promulgation, the 2010 Constitution is characterised as a transformative constitution with its provisions being informed by an appreciation of the historical injustices that the society sought to remedy and envision a just future.⁵³ The Supreme Court of Kenya acknowledged as much when it stated that ‘the avowed goal of today’s Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*.’⁵⁴ It is through this prism that we should appreciate the impact of the 2010 Constitution in addressing historical injustices in as far as statelessness is concerned.

49 A Songa ‘Locating civil society in Kenya’s transitional justice agenda: a reflection on the experience of the Kenya transitional justice network with the truth, justice and reconciliation commission’ in Brankovic & van der Merwe (eds) *Advocating transitional justice in Africa: the role of civil society* (2018) 19.

50 Truth, Justice, and Reconciliation Commission, ‘KNDR Documents - Statement of Principles on Long-term Issues and Solutions Updated with Implementation Matrix’ (2008) II Pre TJRC-Documents 5 <https://digitalcommons.law.seattleu.edu/tjrc-pre/5> (accessed 2 February 2022).

51 Gichuki (n 46) 132.

52 ‘EISA Kenya: 2010 Constitutional referendum results’ <https://www.eisa.org/wep/ken2010referendum.htm> (accessed 23 July 2021).

53 F Githiru, ‘Transformative constitutionalism, legal culture and the judiciary under the 2010 constitution of Kenya’ Doctoral dissertation, University of Pretoria 2015 at 51 (on file with the author).

54 *In the matter of the Speaker of the Senate & another* 2013 eKLR para 51.

One of the most impactful transformations brought about by the 2010 Constitution is in its bill of rights. It sets the purpose of the bill of rights as being ‘to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings’.⁵⁵ This heralded a significant departure from the previous constitutional order which accorded protections only to individual rights and catered only to civil and political rights.⁵⁶ The 2010 Constitution contains provisions on equality and freedom from discrimination and most notably for the Nubian cases, it requires the state to institute ‘legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination’.⁵⁷ Article 28 recognises every person’s inherent right to dignity while article 43 finally enshrines the economic and social rights which include the right to health, housing and reasonable standards of sanitation, adequate food of acceptable quality, clean and safe water in adequate quantities, social security and education.

Of note to the issues canvassed in the Nubian children’s case, article 53(1)(a) of the 2010 Constitution establishes that every child has the right to a name and nationality from birth. Article 56 proceeds to require the state to institute affirmative action programmes to the benefit of minorities and marginalised within the arenas of political participation, education and economic fields, employment, the furtherance of their cultural values, languages and practices and reasonable access to basic amenities. Recalling the hurdles that the Nubian community faced in filing their case at the high court, article 22(b) of the 2010 Constitution now expands *locus standi* in the enforcement of the Bill of Rights to include ‘a person acting as a member of, or in the interest of, a group or class of persons’. Furthermore, article 48 requires the state to ensure access to justice for all persons and that any related fees should not be prohibitive to this access.

Beyond the Bill of Rights, the 2010 Constitution at article 12(b) entitles every citizen to obtain a Kenyan passport as well as other documents of registration or identification that are issued by the state to citizens. This provides an opportunity to redress the historical discrimination and marginalisation faced by the Nubians and other marginalised communities as raised in the TJRC report. The 2010 Constitution also contains a provision on foundlings as article 14(4) states that ‘[a] child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.’

Legislatively, the Kenya Citizenship and Immigration Act, Cap 172 (KCA) provides a pathway for stateless persons to acquire citizenship by registration. Essentially, section 15 of the KCA allows stateless persons residing in Kenya to register as Kenyan citizens if: they have

55 Constitution (revised edition 2010) of Kenya art 19(2).

56 Constitution (repealed) of Kenya at chapter V.

57 Constitution (revised edition 2010) of Kenya art 27(6).

adequate knowledge of Kiswahili or a local dialect; have not been convicted of an offence and sentenced to an imprisonment term of 3 years or longer; they intend upon registration, to continue to be permanent residents of Kenya or to maintain a close and continuing association with the country; and they understand the rights and duties of a citizen. These provisions were then institutionally operationalised on 21 August 2019 by way of a National Taskforce for the Identification and Registration of Eligible Stateless Persons in Kenya as Kenyan Citizens (National Taskforce).

The National Taskforce was mandated to carry out six tasks: to identify all those claiming stateless persons status in Kenya; to develop vetting, verification and eligibility criteria to be utilised in conjunction with a comprehensive stateless persons database; to develop the modalities, timelines and establish the cost ramifications that come with the identification and registration of stateless persons in the country; to develop a sensitisation programme for Kenya host communities so as to enable the seamless integration of stateless persons; to examine and recommend an appropriate legal and policy framework for undertaking the process; and to identify contemporary international best practices with regard to the management of stateless persons in the context of national security.⁵⁸ The National Taskforce continues to undertake its mandate against the backdrop of an international commitment by the Kenyan government to 'complete legal reforms to address and remedy statelessness in Kenya permanently' by 2023.⁵⁹

These developments demonstrate how strategic litigation coupled with legal and institutional reforms as induced by a transitional justice agenda converged to provide normative progress in the protection of stateless persons and providing them with a pathway to citizenship. One more essential ingredient is embedded in this arc of progress and is an essential factor to realising the promise of this progress. This is the agency and activism of the affected communities. Therefore, it is important to reflect on the experiences of the Makonde and Shona communities as a barometer for the efficacy of the constitutional and legislative safeguards that now exist for stateless persons in Kenya.

58 'National taskforce for the identification and registration of eligible stateless persons in Kenya as Kenyan citizens?: Citizenship rights in Africa initiative' <https://citizenshiprightsafrika.org/national-taskforce-for-the-identification-and-registration-of-eligible-stateless-persons-in-kenya-as-kenyan-citizens/> (accessed 28 July 2021).

59 'Results of the high-level segment on statelessness', IBELONG (blog) <https://www.unhcr.org/ibelong/results-of-the-high-level-segment-on-statelessness/> (accessed 28 July 2021).

4 LEVERAGING REFORM TO OBTAIN REDRESS THROUGH COMMUNITY ACTIVISM: THE CASE OF THE MAKONDE AND SHONA COMMUNITIES

At the heart of the initiatives to advance the cause of stateless persons through litigation, the TJRC process and constitutional review, is community activism. Community activism denotes those initiatives that are aimed at structural transformation or the elimination of barriers with a view to improving lives at the individual and group level by eliminating prevailing conditions of discrimination or conditions of social, economic, political, cultural or environmental oppression.⁶⁰ Indeed, the impetus for the Nubian cases within the African human rights system was derived from the community itself which was already leading the charge to assert their “right to existence” as they decried discrimination at the hands of the Kenyan government.⁶¹

As already highlighted, the Nubian community alongside other minority communities represented themselves during the public hearings of the TJRC and vividly brought to light how citizenship-related discrimination opened the door to further violations of their civil and political rights. On constitutional review, the role of minority communities is aptly captured as follows:⁶²

Minorities engaged quite robustly with the constitutional review process from 2000 on. Their engagement focused on educating their communities on the review process, collecting community views and submitting memoranda to various institutions created to lead in Constitution making. There were common aspirations across many minority groups: juridical recognition of their identity, access to ancestral land and to participation in public life.

In addition to the direct agency exercised by communities, collaboration with non-governmental organisations (NGOs) has also been a key feature in accentuating the cause of stateless persons on various platforms. The Nubian cases were the result of collaboration between the community and NGOs who filed the cases on their behalf. It such collaboration that has emerged as essential in realising the promise of the post-2010 constitutional order. This section will now reflect on the collaboration between the Kenya Human Rights Commission (KHRC) and the Makonde and Shona communities in their quest to acquire Kenyan citizenship.

KHRC is considered as one of Kenya’s premier NGOs with its founders being among the ‘foremost leaders and activists in struggles for human rights and democratic reforms in Kenya’.⁶³ KHRC’s vision is

60 ‘An introduction to community activism’ <https://nursekey.com/an-introduction-to-community-activism/> (accessed on 28 July 2021).

61 ‘Nubians in Kenya appeal for their “right to existence”’ <https://www.opensocietyfoundations.org/newsroom/nubians-kenya-appeal-their-right-existence> (accessed 28 July 2021).

62 Minority rights group international ‘Kenya at 50: unrealized rights of minorities and indigenous peoples’ (2012) 16.

63 ‘KHRC – About’ <https://www.khrc.or.ke/about-us.html> (accessed 28 July 2021).

to realise a human rights state and society and a key aspect of this is to work at the community level, especially with Human Rights Networks (HURINETs) which they work with communities to establish and incubate into stand-alone organisations that can independently advance the protection of human rights. This approach is explained in their theory of change as follows:⁶⁴

It is by working with the people and communities at their own level, on what is of value to them; and enabling them to understand, articulate and defend their rights, that they can effectively hold violators and duty bearers accountable.

We remain persuaded that this people and justice-centred framework of engagement will go a long way in limiting the unequal power relations that deepen impunity

It is in this context that KHRC has worked on the issue of statelessness and partnered in particular with the Makonde and Shona communities in their quest to obtain Kenyan citizenship.

4.1 The Makonde and the great trek to end statelessness

The Makonde are a Bantu speaking community whose origins are in the Mwendé district of Cabo Delgado province of the Republic of Mozambique. As early as 1948, a section of the community migrated to Kenya first as labourers recruited during the British colonial era to work in sisal plantations in the Kwale, Kilifi and Taita Taveta regions of Kenya's coast.⁶⁵ They would eventually be joined by exiled freedom fighters from Mozambique's struggle for independence and refugees fleeing subsequent civil war in the country.⁶⁶ The Makonde community in Kenya is estimated to stand at 4 000 people.⁶⁷ In the aftermath of Kenya's independence, the Makonde working in the sisal plantations were neither repatriated, granted work permits nor granted Kenyan citizenship. In a similar fashion to the Nubian community, the Makonde then endured discrimination as well violations in the realm of public participation and with regard to their economic, social and cultural rights. However, the post-2010 legal framework on addressing statelessness provided an opportunity to finally redress the historical violations endured by the Makonde and other similar communities.

In August 2016, the Makonde approached KHRC for assistance in being duly registered as Kenyan citizens. In partnership with Haki Centre which began as one of its HURINETs, KHRC convened a civil society initiative to assist the Makonde and this commenced with a fact-finding mission to fully ascertain the conditions of the community. The fact-finding mission confirmed the community's reality of discrimination and exclusion that emanated from being stateless and

64 'KHRC – Theory of change' <https://www.khrc.or.ke/about-us/theory-of-change.html> (accessed 28 July 2021).

65 United Nations High Commissioner for Refugees (UNHCR) 'The Makonde of Kenya: the struggle to belong' (2015) 3.

66 UNHCR (n 65).

67 UNHCR (n 65).

KHRC embarked on engagements with county-based and national officials to see if the Makonde's plight could be immediately addressed. With these engagements having limited traction, the Makonde alongside KHRC and its partners resolved to mount a public campaign in the form of 'Trekking against statelessness', which would see the Makonde trek from their homes in Kwale County to State House in Nairobi where the President resides. In doing so, the Makonde were 'boldly and publicly stating their claim to Kenyan citizenship and asserting their right to state recognition as a moral as well as legal right'.⁶⁸

With their civil society partners in tow, the Makonde flagged off their trek to State House Nairobi on 10 October 2016. Almost immediately, the community encountered their first hurdle as the government's Coast Regional Coordinator halted the human convoy as he and the Kwale County Commissioner sought to dissuade the Makonde from proceeding with the trek.⁶⁹ However, the Makonde remained resolute with their chairperson, Thomas Nguli insisting: 'We have decided to go State House, Nairobi because all relevant government officials say all our issues can only be resolved in Nairobi'.⁷⁰ On 13 October 2016, the convoy made it to Nairobi where another convoy of friends and supporters seeking to stand in solidarity with the community joined them. A final standoff would ensue with the Nairobi police seeking to stop the convoy but this time, the Cabinet Secretary for Interior would intervene and announce to an elated group that President Uhuru Kenyatta had agreed to accord them audience.⁷¹

After years of seeking state recognition, the Makonde were escorted to State House under the protection of the police who had sought to disperse them only moments earlier. On arrival at State House, President Kenyatta acknowledged their plight and undertook to have them registered as Kenyan citizens by the close of 2016. He stated:⁷²

I apologize on behalf of my government and that of previous governments for having lived in this condition for so long. You are not visitors in this country, and I order that by the time I come to Mombasa in December the people should be registered.

On 1 February 2017, President Kenyatta visited Kwale County and presided over the issuance of 1 496 citizenship certificates, 1 176 identity cards and 1 731 birth certificates to the Makonde community.⁷³ In addition to declaring the Makonde the 43rd tribe of Kenya, President Kenyatta also directed that the community benefits from affirmative

68 Kenya Human Rights Commission 'Annual report 2016-2017' (2017) 33.

69 'KHRC - The Makonde community finally recognized as Kenyan citizens' <https://www.khrc.or.ke/2015-03-04-10-37-01/blog/561-the-makonde-community-finally-recognized-as-kenyan-citizens.html> (accessed 9 July 2021).

70 KHRC (n 69).

71 KHRC *The Journey of the Makonde to citizenship 14 mins English* https://www.youtube.com/watch?v=-PG8chfAX_U (accessed 29 July 2021).

72 KHRC (n 69).

73 'President Kenyatta issues key citizenship documents to Makonde community | The presidency' <https://www.president.go.ke/2017/02/01/president-kenyatta-issues-key-citizenship-documents-to-makonde-community/> (accessed 29 July 2021).

measures including being prioritised in the recruitment of the police and military as well as in other government jobs and that the elderly, orphans and persons with disability in the community be registered and benefit from the government's cash transfer programme.⁷⁴ The Makonde were also registered as voters. The Makonde experience stands out as an illustration of how a community's tenacity and resilience coupled with civil society support, harnessed the legacy of strategic litigation as well as reforms under a transitional justice agenda to obtain a positive outcome in the eradication of statelessness.

4.2 The Shona's pilgrimage to citizenship

On the back of a successful campaign with the Makonde, KHRC would in 2018 embark on a partnership with the Shona community in Kenya to aid in their quest for Kenyan citizenship. In fact, the community approached KHRC on the basis of a referral by a government official who had observed the successful efforts of the Makonde.⁷⁵ The work commenced with an assessment which had the primary aim of establishing the citizenship status of the community. The assessment also aimed to: generate a cohesive narrative on the life of the Shona in Kenya; to illuminate the economic status and cultural practices of the community; to ascertain the impact of statelessness on the community's enjoyment of human rights; to assess the interventions that had been undertaken thus far to address the community's statelessness; and to document individual stories of interest that would help shed a light on the overall plight of the community.⁷⁶

The Shona whose origins lie in Zimbabwe and parts of Zambia and Mozambique, came to Kenya as Christian missionaries with the initial group arriving between 1959 and 1961.⁷⁷ While they initially settled within the modern day Nairobi and Kiambu counties, they have since spread out to other areas of the country. Despite their presence pre-dating Kenya's independence, the stringent legal provisions on citizenship prior to 2010 meant the Shona did not acquire Kenyan citizenship. KHRC's assessment placed the Shona population in Kenya at approximately 2,300 and that it was only as recently as July 2019 that 597 Shona children were issued with birth certificates.⁷⁸

After concluding the initial assessment, KHRC published a report and proceeded to enhance the profile of the Shona and their plight by availing opportunities for conventional and social media coverage.⁷⁹ This was also accompanied with facilitating direct access to policy

74 The presidency (n 73).

75 'KHRC – End of statelessness for the Shona in Kenya: The journey towards citizenship' <https://www.khrc.or.ke/2015-03-04-10-37-01/blog/733-end-of-statelessness-for-the-shona-in-kenya-the-journey-towards-citizenship.html> (accessed 31 July 2021).

76 KHRC 'African missionaries in identity limbo: the Shona of Kenya' (2020) 1.

77 KHRC (n 76) 1.

78 KHRC (n 76) 3.

79 KHRC (n 75).

makers for the community to make their case. This yielded the positive result of the Kiambu County Assembly passing a motion calling on the national government to recognise the Shona and grant them Kenyan citizenship. The motion expressed as follows:⁸⁰

Guided by the principles of the intergovernmental relations structure and in particular, the requirement for consultations and cooperation as provided under Article 6(2) of the Constitution as well as institutionalized protection of marginalized groups; this Assembly therefore urges both levels of government through the relevant Organs to:

- (i) Recognize the existence of the Shona community and their contribution to the County of Kiambu and the Republic of Kenya; and,
- (ii) Take urgent legal and/or administrative measures to address the plight of this community including granting them Kenyan citizenship so as to ensure that their children born in Kiambu County are registered in order to access education, health care in case of admission to hospital and other public services.

This pivotal development was down to the direct agency and tenacity of the Shona community who collected signatures to aid the petition which moved the Kiambu County Assembly to pass the motion. They also made sure that a representation of the community attended the session in which the motion was discussed. With the help of KHRC and UNHCR, April 2019 would see two members of the Shona community accorded an opportunity to address the Ministerial Conference on the Eradication of Statelessness in the Great Lakes Region. The community representatives who spoke to the realities of lost education opportunities and non-recognition, extracted a commitment from Kenya's Ministry for Interior and Coordination and National Government to 'By 2020, recognise and register as Kenyan citizens members of the Shona community, who qualify for citizenship under the law'.⁸¹ This was a pivotal turning point for the Shona and the government began actualising this pledge by issuing over 600 young Shona community members with birth certificates in August 2019.⁸²

To maintain the momentum, the KHRC partnered with the Shona community to help them undertake a 3-day pilgrimage and prayer for citizenship from 14-16 October 2020 that targeted the Kiambu County government and assembly as well as the National Assembly. This culminated in an inter-faith prayer session at the iconic Uhuru Park in Nairobi.⁸³ Soon after, the National Taskforce requested KHRC and UNHCR to support the Shona in their citizenship applications. The result was 1 730 applications from the community to the immigration

80 Kiambu county assembly- second assembly (No 18) third session afternoon sitting (045), 20 March 2019 'Motion-recognition of Shona people a stateless community living in the county'.

81 'Outcome document – Ministerial conference on the eradication of statelessness in the Great Lakes Region (16-18 April 2019, Nairobi) – World' <https://reliefweb.int/report/world/outcome-document-ministerial-conference-eradication-stateless-ness-great-lakes-region-16> (accessed 2 August 2021).

82 'End of Statelessness in sight for Shona as Kenya issues birth certificates', *Reuters*, 8 October 2019, <https://www.reuters.com/article/us-global-rights-stateless-kenya-feature-idUSKBN1WN15Q>.

83 KHRC (n 75).

department.⁸⁴ On 12 December 2020 during Kenya's 57th *Jamhuri* day (the day Kenya was declared a republic) celebrations, President Kenyatta announced that 1 670 members of the Shona community would be granted Kenyan citizenship alongside 1 300 stateless persons of Rwandan descent.⁸⁵ On 28 July 2021, 1 649 Shona community members finally received their Kenyan national identity cards at a ceremony in Nairobi.⁸⁶

5 CONCLUSION

In the post-2010 era, Kenya has made huge strides towards the eradication of statelessness. This is evident in the provisions of the 2010 Constitution as well as in the legal and institutional frameworks that govern citizenship and migration issues. It is also evident that this journey is greatly informed by the efforts of the affected communities, their partners in civil society and the convergence of strategic litigation with transitional justice measures. The Nubian cases within the African human rights system served to amplify not only the plight of this community but that of other communities also affected by Kenya's discriminatory laws and administrative measures where citizenship was concerned. Beyond prescribing specific remedies for the Nubian community, the decisions in these cases also prescribed legal and institutional reforms which would benefit all stateless persons in Kenya. Importantly, these cases underscored that stateless persons in Kenya are protected by the African Charter even when such protections were not availed within the country's prevailing constitution.

When Kenya arrived at a transitional moment in 2008, the jurisprudence from the Nubian cases became valuable blueprints for the reforms to redress the historical injustices of statelessness that had been previously acknowledged but remained unaddressed. The TJRC utilised the Nubian cases to illustrate the problem of statelessness and echoed the recommendations for reform that were issued by the African Commission and the African Committee. In explicitly calling for these decisions to be implemented, the TJRC acknowledged that the Nubian community and other minority communities had utilised litigation as a tool for transformation and remedying the past.

While causation cannot be ascertained, it is evident that amplification of the Nubian cause through litigation and through the partnerships they enlisted along the way, saw the issue of discriminatory practices in the arena of citizenship raised during the constitutional review process. The result is the 2010 Constitution with

84 KHRC (n 75).

85 'UNHCR Applauds Kenya's decision to resolve the statelessness of the Shona and other communities – Kenya' <https://reliefweb.int/report/kenya/unhcr-applauds-kenya-s-decision-resolve-statelessness-shona-and-other-communities> (accessed 2 August 2021).

86 'Stateless Shona community gets Kenyan citizenship' <https://www.aa.com.tr/en/africa/stateless-shona-community-gets-kenyan-citizenship/2317077> (accessed 2 August 2021).

clauses that prohibit discrimination, advance access to justice and equality under the law and offers protection for marginalised groups within the bill of rights. Additionally, the chapter on citizenship reiterates every citizen's right to access identity documents, it eradicates gender-based discrimination in as far as conferring citizenship is concerned and provides a pathway to citizenship for foundlings.

Yet, the promise of the 2010 Constitution lies in whether the affected communities can effectively assert these rights and obtain remedies where these rights are violated. The experiences of the Makonde and Shona communities have demonstrated the importance of community-led activism in conjunction with strategic support from NGOs. The campaigns by these communities actualised these constitutional safeguards as many of them received identity documents for the first time. This has in turn unlocked access to essential services such as education and health while also making them eligible for affirmative measures to remedy decades of marginalisation. Through a blend of civic action and strategic engagement with state actors, the Kenyan government moved from an ambivalent implementer of its obligations on addressing statelessness to a proactive one as seen in the establishment of a National Taskforce and closely collaborating with NGOs to see that all stateless persons in the country are duly registered and obtain Kenyan citizenship.

The journey is far from complete. The Nubian community and other marginalised groups continue to experience discriminatory practices in the acquisition of identity documents at the administrative level. The government has also sought to integrate government services by issuing every individual with a *huduma* number, which they define as 'a unique and permanent personal identification number randomly assigned to every resident individual at birth or upon registration/enrolment and only expires or is retired upon the death of the individual'.⁸⁷ This is particularly worrying for those communities that have faced difficulties in accessing birth certificates and other identity documents since they would not be able to migrate to the *huduma* platform. At the time of writing, this issue was the subject of ongoing litigation at Kenya's Court of Appeal with one of the appellants being the Nubian Rights Forum, which is seeking to have the court address among other things, the risk of exclusion brought about by this system.⁸⁸

Ultimately, the issues of statelessness and citizenship related discrimination remain an ongoing concern in Kenya. However, unlike in the pre-2010 dispensation, the constitutional and legislative frameworks lean towards protection of the affected communities. Furthermore, the experiences of the Nubian, Makonde and Shona communities have revealed that the next phase of ensuring

87 'FAQs' *Huduma Namba* (blog) <https://www.hudumanamba.go.ke/faqs/> (accessed 2 August 2021).

88 *Nubian Rights Forum et al v the Honourable Attorney General of Kenya et al* <https://www.justiceinitiative.org/litigation/nubian-rights-forum-et-al-v-the-honourable-attorney-general-of-kenya-et-al-niims-case> (accessed 2 August 2021).

enforcement of these safeguards will be embarked on with a set of valuable assets to eradicate statelessness in Kenya: affected communities that are well sensitised on their rights and are emboldened by the successes seen so far; a growing constituency of NGOs and partners that are actively working to bridge the gap between affected communities and the state; and allies within the state in the form of legislators at the national and county levels as well as within the bureaucracy of citizenship and migration departments. The arc is long, but it continues to bend towards the eradication of statelessness.