

**THE RIGHT TO EDUCATION AND THE CONVENTIONS
INTERPRETATIONS IN KENYA.**

A CASE STUDY OF CHILDREN WITH DISABILITY IN NAIROBI COUNTY.

BY

KARIUKI CAROLINE WANGUI

REG. NO: LLB/41771/91/DF

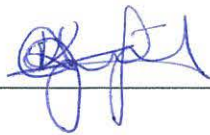
**A DISSERTATION SUBMITTED TO KAMPALA INTERNATIONAL
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SUPERVISED BY MR. OGWAL SAMUEL

JULY, 2013

DECLARATION

"This dissertation is my original work and has not been presented for a Degree or any other academic award in any University or Institution of Learning."



KARIUKI CAROLINE WANGUI

LLB/41771/91/DF

29/07/2013

DATE

APPROVAL SHEET

"I confirm that the work reported in this dissertation was carried out by the candidate under my supervision."

Ogwali Samuel

MR. OGWAL SAMUEL

SUPERVISOR

5th Sep. 2013

DATE

DEDICATION

It is my humble privilege to dedicate this piece of work to my beloved parents,
Mr. and Mrs. Kariuki for their tireless efforts to ensure that I have the best in all.

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I would first and foremost like to acknowledge and thank the Almighty God for enabling me to come this far and finish well.

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ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ANDY	Action Network for the Disabled
CA	Children's Act
DPO	People with Disabilities and Parents Organization
EAACE	East African Advanced Certificate of Education
EACPE	East African Certificate of Primary Education
EARC	Education Assessment Resources Centres
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRPD	International Convention on Rights of People with Disabilities
ILDK	Initiative for Learning Disabilities Kenya
IP-ERS	Investment Plan for Economic Recovery Strategy
KACE	Kenya Advanced Certificate of Education

KCPE	Kenya Certificate of Primary Education
KCSE	Kenya Certificate of Secondary Education
KEMNOD	The Kenya Media Network on Disability
MTP	Medium Term Plan
NCPWD	National Council for Persons With Disabilities
NGO	Non-Governmental Organizatio
OHCHR	Office of the High Commissioner for Human Rights
PDA	The Persons with Disabilities Act
PWD	Person's With Disabilities
RDWIN	Deaf Women Initiatives Network
SEP	Special Education Professionals
UDHR	Universal Declaration of Human Rights
UDPK	United Disabled Persons of Kenya
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

WHO World Health Organization

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CHAPTER ONE

1.0 Introduction

The chapter presents the background, problem statement, purpose, specific objectives, research questions, corresponding hypothesis, scope and significance of the study.

Disability means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.

1.0 Background

Historically disability was viewed as a source of disgrace and shame upon a society in the African traditional setting. An individual who was found to have a disability was shunned from society and treated as an outcast, in some societies, the individual was seen as a sign of a curse upon the society and could be killed or completely ex-communicated from the society.

Child disability was seen as a sign of evil in society and most children born with any sign of disability were thrown away or left in the forest to die.

The Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. In accordance with its article 42, the Convention and its Optional Protocol opened for signature by all States and by regional

integration organizations at United Nations Headquarters in New York on 30 March 2007. The opening began with a solemn ceremony in the United Nations General Assembly hall.¹ Under Article 7 of the Convention, it provides for the rights of children, stating; States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children, the best interests of the child shall be a primary consideration and States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.²

The Person's with Disabilities Act was enacted in Kenya in 2003 and established the National Council for Persons with Disabilities in November 2004 to promote the rights of persons with disability in Kenya and mainstream disability issues into all aspects of national development.

Under section 18 of the Act, it provides for the rights to education for person's with disabilities, stating; no person or learning institution shall deny admission to a person with a disability to any course of study by reason only of such disability, if the person has the ability to acquire substantial learning in that course, learning institutions shall take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical

¹ www.un.org, Convention on the Rights of Persons with Disabilities, opening for signature.

² www.un.org, Convention on the Rights of Persons with Disabilities

education requirements and other similar considerations and special schools and institutions, especially for the deaf, the blind and the mentally retarded, shall be established to cater for formal education, skills development and self-reliance.³ However, the Act is silent on children with disabilities.

The Children's Act was enacted in Kenya on 2001 and it provides under section 5 that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.⁴

Under section 7 (1), it provides that every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents, it further states under subsection (2) that every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.⁵

Under section 12 of the Act, it provides that a disabled child shall have the right to be treated with dignity and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible.⁶

From the above, one can conclude that Kenya has upheld the regulations set by the Convention by enacting the Person's with Disabilities Act as well as

³ The Persons with Disabilities Act, 2003

⁴ The Children's Act, 2001

⁵ Supra

⁶ Supra

establishing the Council, and also the provisions laid out by the Children's Act, however, as will be discussed, this implementation has not been seen especially in the education sector in regards to children. One might say that the maxim '*the law is to be seen not heard*' does not hold water in this area.

2.0 Statement of the problem

Child disability is a reality that is rising in the Kenyan society today. With the main Act, that is, the Persons with Disabilities Act itself being silent on the rights of children, it goes to say that their rights might not be enforced as would those of adults.

Free Primary Education was introduced for all in Kenya. It was a step in the right direction, but were all children taken into account when the program was introduced? Are the physically challenged able to access education in Kenya? Many parents or guardians with disabled children watch helplessly as they grow up having no hope for their future. The majority of children living with disabilities have not been able to go to schools that can meet their needs hence have been marginalized. The focus in the education sector in Kenya has mostly been on "normal" children with very little attention being paid to those with special needs. Thousands of these children, especially those from poor families, do not have access to proper education either because disabilities prevent them from going to school or their families sideline them.⁷

⁷ Education for Disabled Children, Hakijamii, Human Rights, Kenya's Free Primary Education, August 17th 2010.

.0 Hypothesis

Kenya having signed the Convention on the Rights of Persons with Disabilities upon its implementation 7 years ago, is still not established in its provision of the protection of the rights for children even with the establishment of free primary education. The laws as established, that is, the Persons with Disabilities Act and Children's Act have done little if not much for the rights of these children in line with education and also the National Council itself has not been seen to move to aid disabled children.

.0 Justification of the Study

The study with the regard to the increasing cases of child disability in Kenya, seeks to see if the International Convention on the Rights of Persons with Disabilities has been adhered to and the way forward for its implementation. The substantive laws must be seen to be line with the Convention and those laws that lack provisions for the rights of children with disability should have the law amended.

.0 Objectives of the Study

This study aims at comprehensively analyzing the concept of child disability in Kenya in line with the new provision for free education in Kenya. Specific objectives include:

-) To establish whether the Kenyan domestic laws have implemented the international Convention they signed.
- i) To determine whether the laws are active or not and if so;

- ii) To make recommendations available which will improve on the implementation of the laws.

8.0 Research Methodology

The methodology to be used is the qualitative method of making research mainly because of the limited time students have in their final year at the University. It is hard to use quantitative method because it requires one to go to the field and carry out a research yet students have limited time hence my preference of qualitative method in conducting my research.

This study shall utilize data obtained from reports by both national and international non-governmental organizations.

8.0 Scope of the Study

This study is limited to the concept of child disability rights in accordance to the implementation of free education in Kenya. The study shall further confine itself to the provisions of the International Convention on the Rights of Persons with Disabilities as well as the Persons with Disabilities Act 2003 and the Children's Act 2001. It will also observe the work done by the National Council for Persons with Disabilities along with articles discussed regarding the rights of disabled children in Kenya to education.

9.0 Chapterisation

This research paper is divided into 4 chapters as seen below:

Chapter 1

It outlines the overview of my research, the introduction which also provides the background of the study, the statement problems in the study, the hypothesis, the study objectives, the significance of the study, research methodology, scope of study and lastly the chapterlization of my research.

Chapter 2

This chapter contains the literature review which helps to review on the difference literature written by different scholars of law.

Chapter 3

This chapter will observe the history of education in Kenya, history of disability rights in Kenya and the application of the laws and instruments into domestic legislation as well as its applicability.

Chapter 4

This chapter contains recommendations for the future of the judicial independence and conclusions of the research.

CHAPTER 2

10.0: LITERATURE REVIEW:

Many authors have written articles and reviews on the different forms, types, causes, and responses to disability. However, little almost close to none has been explored in the area of child disability. I will view a few of these authors as well as the judicial system and how it has handled the said topic and also their views on child disability and education.

According to **William Aseka**; There is no outright definition of what education means, however commentators such as Milter has defined it as, an act, process or experience that systematically promotes learning, knowledge and development. By the same token, writers such as Mialeret have defined education from a much narrower view than the above stated, to mean formal instruction of knowledge within recognised and well-structured system of institutions and programmes. This definition by Mialeret is also seen in the 1997 International Standard Classification of Education. Therefore, having known what education means, then the question that comes next is: *what is the right to education?*

General Comment No. 13 of the Committee on Economic Social and Cultural Right (CESR) defines education as both a human right itself and an indispensable means of realising other human rights. The committee goes further to state that as an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. These economically and socially marginalised groups include children with

disabilities in Kenya and all over the world. This essentially means that children with disabilities are well protected and are entitled to education and it is not a favour that any government would be doing to these groups.

The right to education is well provided for in a number of international treaties such as the 1948 Universal Declaration of Human Rights (UDHR) under Article 26 (though not having legal effect), 1966 International Covenant on Economic, Social and Cultural Right Article 13, United Nation Convention on the Rights of the Child Article 28, African Charter on Human and Peoples Right Article 18, African Charter on the Rights and Welfare of the Child Article 11 and Convention on Rights of People with Disabilities Article 24. All these instruments are applicable to Kenya for two main reasons:-

- i. Kenya is state party to all these instruments and
- ii. That vide Article 2(6) of the Constitution of Kenya 2010 which provides:-

'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution' (Emphasis mine)

Children with disabilities are a unique group of individuals who need care and are entitled to human rights which must be guaranteed by the state, as provided under UDHR. From the above provisions in various international human rights instruments, there is no provision which states that if one is disabled then one should not be entitled to education. In fact, under Article 54 of Constitution of Kenya, discrimination on the basis of disability is prohibited. Hence it can be concluded from the above that the right to education for (disabled) children is

compulsory. The concept of compulsory education has at least two main elements. Firstly, it entails that parents or guardians and the state are not entitled to consider the decision of access of a child to education as optional. Hence, it is a mandatory requirement to ensure that all children access primary education. Secondly, it implies access to education without discrimination.

Then why is that the education for children with disabilities is not guaranteed in Kenya? There are several reasons to support the above question. These range from poverty, poor planning by the government of Kenya and the most important approaching disability from a 'medical model' rather than a 'social model'. The medical model presupposes that children with disabilities are a problem and they need to be 'fixed'. In this fixing, the model says that they need to be in excluded locations and systems. On the other hand, a social model supports the notion of inclusive education. A social model further dictate that children with disabilities are not a problem and it is the environment that is a problem. Hence in trying to solve the problem, the government should fix the environment rather than excluding children from mainstream education. The social model has been closely linked with the human rights model which looks at the individual as a human being with rights and not a problem to be 'fixed'.

The concept of inclusive education, which should be the primary way in which the Kenyan government should approach education for children with disabilities, presupposes that their education should be in mainstream schools where they and other children learn together. The approach focuses on the school environment and its barriers. It perceives the impediments in mainstream

education and school environment as challenges faced by children with disabilities. It aims at identifying and eradicating such hindrances to enable all children, including children with disabilities, to attain education. Therefore, the inclusive education approach seeks to 'fix' the school system to accommodate the learning of children with disabilities.⁸

In the case leading case of *ROSE MORAA & ANOTHER V AG* 2006 eKLR, the definition of discrimination was laid down by Justice J.Nyamu as 'the term discrimination as used in the Covenant (International Covenant on Civil and Political Rights) should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose of nullifying or impairing the recognition, enjoyment or exercise by all person, on an equal footing of all rights and freedoms.'⁹

One would therefore conclude that denying disabled children education is thereby discriminating against them.

According to Shia and Annika Nilsson; Since 2003, the government of Kenya has prioritised Education for All, including *free primary education*. It has resulted in a large increase of enrolment rates within primary school and made the government apply a similar approach to special education and schools for children with disabilities.

⁸ Education for all even for children with disabilities in Kenya, William Aseka, AfricLaw, 2013

⁹ National Council for Law Reporting, Kenya Law Reports, Case Search

However, only 26 000, or 1.7% of the estimated 1.5 million children with disabilities in Kenya, have actual access to some form of education, according to UNDP. This means that the majority of Kenyan children with special needs are not receiving any educational support. Reasons for this include poverty, long distance to school, parental ignorance, limited training of teachers and lack of assistive devices, like Braille books. The substantial international support to special education since the eighties has failed to secure the rights to education of girls and boys with disabilities. EARC—Education Assessment Resource Centres, have been established in 72 out of 149 districts to facilitate the identification, assessment, referrals and placement of children with disabilities with support from Danida. Unfortunately in most cases they have failed to reach children with disabilities and to assist them correctly, according to a study at the University of Oslo, Norway.¹⁰

According to **John Burnett**; An estimated 1.3 to 1.8 million Kenyan children are disabled, according to Special Education Professionals (SEP), a group of international therapists and special needs teachers who help children with disabilities in Kenya and other developing countries.

"Traditional beliefs can cause parents ... to ignore or even hide away their child," a recent SEP report says. "Lack of knowledge about their child's condition can mean they do not know how to provide quality care and do not realize that significant improvement and progress is possible."¹¹

¹⁰ Report on Disability Rights in Kenya, Revised 2011-01-30, NIDS/MSK to HRBA

¹¹ Kenya's Youngest 'Outcasts' emerge from shadows, John Burnett, 2012

According to **Alessandra Bergamin**; In Kenya, families with a disabled child are shunned from their village, yet more than half a million children have a disability. It is estimated that 800,000 Kenyan children under 17 have a disability.

These statistics however, do not provide an accurate picture as most children are kept indoors because a disabled child is viewed as a curse that brings shame to the family.

Due to a lack of therapy and schooling facilities in Kenya, most disabled children never receive any kind of therapy.¹²

Franzen Bjorn (1990); observed that in some communities in Kenya and Zimbabwe, "a child with a disability is a symbol of a curse befalling the whole family. Such a child is a "shame" to the whole family, hence their rejection by the family or the community. Children who are met by those beliefs and attitudes can hardly develop to their full potential: "They get less attention, less stimulation, less education, less medical care, less upbringing and sometimes less nourishment than other children." ¹³

Thomas (1957); Sees societal perceptions and treatments of persons with disabilities within cross- cultural settings as a kaleidoscope of varying hues that reflect tolerance, hatred, love, fear, awe, reverence and revulsion. The most consistent feature in the treatment of persons with disabilities in most societies is

¹² Kenyan children suffer in silence, Alessandra Bergamin, 2010

¹³ Franzen Bjorn, 1990, pg 21-26

the fact that they are categorized as "deviants rather than inmates by the society."

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The desire to avoid whatever is associated with evil has affected people's attitudes towards people with disabilities simply because disability is associated with evil. Most of these negative attitudes are mere misconceptions that stem from lack of proper understanding of disabilities and how they affect functioning. "These misconceptions stem directly from the traditional systems of thought, which reflect magical-religious philosophies that can be safely called superstition"¹⁵

In addition to other perceptions, social attitudes towards persons with disabilities are reflected in the family, which teaches by example customs and institutionalized values.

Gellman (1959); strongly believes that child-rearing practice tend to predetermine an adult's behavior towards persons with disabilities. This concept is consistent with cross-cultural research conducted by Whiting and Charles (1953), which provides evidence that child-rearing practices influence attitudes towards illness and disability. Their findings show that beliefs about illness are influenced by significant early relationships between children and parents that deal with the child's conformity to adult standards behavior. Their investigations examined the relationship between theories held in a culture to account for illness and the severity of child-rearing practices devised to instruct children to

¹⁴ Lippman, 1972, pg 89

¹⁵ Abosi, 2002

conform to adult standards. Intense social training was found to be related to oral, anal and genital functioning. It was hypothesized that those areas of child development which were most severely disciplined would create high levels of anxiety and would also be incorporated in theories of illness within the society. This hypothesis was supported. Also supported was the hypothesis that societies with the most severe socialization practices would create the highest degree of anxiety and guilt, and therefore would tend to blame the patient as the cause of illness.¹⁶

Our own judicial system has equally not been left behind, as was noted in the ruling delivered by **D. S. MAJANJA JUDGE** in *DUNCAN OTIENO WAGA V HON. ATTORNEY GENERAL*[2012]eKLR, where the judiciary noted that the previous constitution did not apply in the said case as it provided little in the are of discrimination against those with disabilities and allowed the inclusion of the PDA and CA in defending the case. The ruling of the learned Judge was as follows;

The petitioner has a right not be discriminated against by the State and the State had an obligation to protect the petitioner under the *Persons with Disabilities Act*. This Act was enacted in 2003 and was intended to specifically provide for rights of persons with disabilities which were lacking protection in the former Constitution. Though the Act is an elucidation of rights of persons with disabilities, it is a separate statutory regime and to be read and applied within the statutory context.

¹⁶ Disabilities Studies Quarterly, the first journal in the field of disability studies, 2012

Article 19(3) provides that the Bill of Rights does not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights. This means that other rights conferred by statutes like the *Persons with Disabilities Act* and the *Childrens Act* can be enforced independently of the Bill of Rights and so also international treaties and conventions which confer certain rights and which are applicable by virtue of **Article 2(6)**.¹⁷

¹⁷ National Council for Law Reporting, Kenya Law Reports, Case Search

CHAPTER 3

11.0: Historical background of education in Kenya

Historical records not only from the travels of Johann Ludwig Krapf and Johannes Rebmann reveal that Kenyans had access to education as far back as 1728 with a Swahili manuscript *Utendi wa Tambuka* (Book of Heraclius) attesting to the fact. The CMS missionaries interacted with locals in the coastal town of Mombasa and set up one of the earliest mission schools in the country at Rabai in 1846.

With the expansion of the railway from Mombasa to Uganda, the missionaries expanded their work into Kenya's interior. An attempt to set up a school and mission at Yatta in 1894 was resisted by the Kamba tribe. The missionaries then penetrated into western Kenya and set up schools and missions. The first school in western Kenya was established at Kaimosi in 1902. During the colonial era, the number of Kenyans with exposure to education steadily increased and a good number of them were privileged to proceed abroad for further education. Among those who furthered their education abroad in the colonial era were Jomo Kenyatta, who attended Woodbrooke College and London School of Economics, Charles Njonjo, who attended Grays Inn Law School, Peter Mbiyu Koinange, who attended Columbia University, Mwai Kibaki who attended London School of Economics, R. Mugo Gatheru who attended Roosevelt University, Tom Mboya, who attended Ruskin College, Oxford, Masinde Muliro, who attended University of Cape Town, Julius

Gikonyo Kiano who attended Stanford University, Paul Ngei and Barack Obama Sr., who attended the University of Hawaii at Manoa. Julius Gikonyo Kiano was the first Kenyan to obtain a PhD. He returned to Kenya and was instrumental in establishing a school in Githunguri. The trend steadily rose over the years and by the time of independence in 1963, 840,000 African children were attending elementary school.

Kenya began a campaign for free primary education after independence in 1963. Since then, the system of education has undergone transformation twice. Before independence elementary education was based on the colonial system of education.

In 1967, Kenya, with Uganda and Tanzania, formed the East African Community. The three countries adopted a single system of education, the 7-4-2-3, which consisted of 7 years of primary education, 4 years of secondary education, 2 years of high school and 3-5 years of university education. Under the system, which was similar to the British system of education, children began their elementary (primary) education at the age of 7 and completed at the age of 13 after sitting for a regional examination known as the East African Certificate of Primary Education (EACPE). After primary education those who passed very well proceeded to secondary school which ended four years later with the writing of the East African Certificate of Education examination (EACE). The highest level of education that qualified one to attend university was attained after two years of high school at that time distinct from secondary school with students sitting for the East African Advanced Certificate of Education (EAACE).

With the collapse of the East African community in 1977, Kenya continued with the same system of education but changed the examination names from their regional identity to a national identity. The East African Certificate of Primary Education became the Certificate of Primary Education (CPE), the East African Certificate of Education became the Kenya Certificate of Education (KCE) and the East African Advanced Certificate of Education became the Kenya Advanced Certificate of Education (KACE).

In 1985 President Daniel arap Moi, introduced the 8-4-4 system of education, which adopted 8 years of primary education, 4 years of secondary education and 4 years of university education. With the introduction of the 8-4-4 system CPE became KCPE (Kenya Certificate of Primary Education) while KCE became the Kenya Certificate of Secondary Education (KCSE).

Since 1985, public education in Kenya has been based on an 8-4-4 system,¹⁸ with eight years of primary education followed by four years of secondary school and four years of college or university.

12.0: Factors affecting education in Kenya.

In 1963 the Kenyan government promised free primary education to its citizens. In the early 70s primary school fees were abolished but in the mid 80s cost-sharing measures between the government and its citizens led to the re-introduction of minor fee charges by primary schools. As the trend continued with schools requiring parents to pay fees such as PTA, harambee, textbooks,

¹⁸ Eshiwani, G.S. (1990). *Implementing Educational Policies in Kenya*. Africa Technical Department Series Discussion Paper (85). World Bank.

uniforms, caution fees, exam fees and extracurricular activity fees, most parents became overburdened and unable to raise such fees. Those who could not afford the money to pay for their children's school fees often had their children drop out of the school. Many children were also forced to drop out of school when teachers would not allow them to take exams. To pressurise parents to pay fees, schools often sent children home during the final exams.

Due to the raise in costs in education, many children were found not to attend school as parents could not afford it. This led the then 'Kibaki government' to implement free primary education so as to ensure that children got a basic education.

13.0: Introduction and implementation of free primary education in Kenya.

In January 2003, Kibaki introduced a free primary education initiative, which brought over 1 million children who would not have been able to afford school the chance to attend.¹⁹ The initiative received positive attention, including praise from Bill Clinton, who would travel to Kenya to meet Kibaki.

14.0 How free education has impacted disabled children in Kenya.

Free Primary Education was introduced for all in Kenya. It was a step in the right direction, but were all children taken into account when the program was introduced? Are the physically challenged able to access education in Kenya? Many parents or guardians with disabled children watch helplessly as they grow up having no hope for their future. The majority of children living

with disabilities have not been able to go to schools that can meet their needs hence have been marginalized.

The focus in the education sector in Kenya has mostly been on “normal” children with very little attention being paid to those with special needs. Thousands of these children, especially those from poor families, do not have access to proper education either because disabilities prevent them from going to school or their families sideline them.

The obstacles hindering accessibility of education to the disabled stem from poor access to facilities, lack of transport, lack of funding, and unavailability of equipment such as children’s wheelchairs. A majority of these children come from informal settlements. Some require expensive daily medication that their unemployed parents/guardians cannot afford.

One such parent is Beatrice Atieno Oginga who lives in Kibera settlement (slum), Nairobi with a mentally challenged child. She has this to say, “My son Eric Ouma Oginga is 23 years old now and bringing him up to this age has not been easy. I came to find out of his condition when he was only four years old. Since then he has been in and out of the hospital. He takes medication on a daily basis and is expected to do so for the rest of his life. Eric is a pupil at *Nakuru Hills Special School* for the mentally handicapped. He started school at *Jacaranda Special Day School*, but I had to transfer him to a boarding school due to the expenses. He would commute daily to the school which meant I had to pay his bus fare every day and that became too expensive for me. Taking him to school has been very difficult especially since I am not employed and depend on odd

jobs. His medication comes to about Ksh200 a day. I have to feed him as well which adds on to the many expenses. It used to be a bit easier when his father was alive since we could help each other. There are many parents like me who want their disabled children to have a brilliant future, but do not have the facilities/resources. I wish the Government would assist us by making education accessible to our children. The Government needs to include special schools for such children, within the informal settlements, to enable them to live a normal life. We as parents try hard, but the expenses are too many and in most cases the children do not enroll in any school because their parents cannot afford it.

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15.0: The laws regulating child disability rights.

There are various other organizations, especially Non-Governmental Organizations that are established in Kenya which are geared towards the protection of the rights of those who are disabled, however, this research will only focus on the main bodies from which most of these bodies derive their power and mandate.

15.1 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106. In accordance with its article 42, the Convention and its Optional Protocol opened for signature by all States and by regional

²⁰ Education for Disabled Children, Hakijamii, Human Rights, Kenya's Free Primary Education, August 17th 2010.

integration organizations at United Nations Headquarters in New York on 30 March 2007. The opening began with a solemn ceremony in the United Nations General Assembly hall.²¹ Under Article 7 of the Convention, it provides for the rights of children, stating; States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children, the best interests of the child shall be a primary consideration and States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.²²

On 12th – 14th September 2012, the Conference of State Parties to the Convention on the Rights of Persons with Disabilities held the Fifth session to discuss the *implementation of the Convention on the Rights of Persons with Disabilities*. They observed every Country individually seeking to see how they had implemented the Convention into domestic laws, in Kenya it was observed that the following has been implemented in view of the Convention:

- i) The Constitution of Kenya, 2010, **Article 54** provides substantive provisions on the rights of persons with disabilities and gives effect to the provisions of the CRPD, seeking to minimize barriers to equalization of opportunities in all aspects of social-cultural, economic and political life.

²¹ www.un.org, Convention on the Rights of Persons with Disabilities, opening for signature.

²² www.un.org, Convention on the Rights of Persons with Disabilities

- ii) The Persons with Disabilities Regulations, 2009, focuses on access to employment, services and facilities; requires the National Council on Persons with Disabilities in collaboration with relevant Government departments, research institutions, development partners and local authorities, to undertake, promote and sponsor research on a number of issues relating to persons with disabilities, and on-sale modifications in offices and factories.
- iii) The Employment Act, 2009, explicitly prohibits an employer to discriminate directly or indirectly, against an employee or prospective employee, or harass an employee on ground of disability.
- iv) The Sexual Offences Act, 2003, extends protection to persons with disabilities by providing that in case of sexual offences where the alleged victim is a person with a mental disability, the concept of a 'complainant' is extended to include a person who lodges a complaint on behalf of the alleged victim where the alleged victim is, on account of the disability, unable or inhibited from lodging and following up a complaint of sexual abuse.
- v) The National Disability Policy, 2006, aims to create a conducive environment for persons with disabilities to realize their full potential and contribute to development of society; the Policy touches on most of the areas addressed by the Convention.
- vi) Special Needs Education Policy, seeks to improve the quality of and access to education provided to children with disabilities, in recognition that

where the right to education is guaranteed, the rights of persons with disabilities to access to and enjoyment of other rights are better secured.²³

During the discussion paper for roundtable two, titled, *Children with Disabilities* the following was noted by the chair as in his opening remarks, the highlighted the vulnerability of children and stated that children with disabilities required more attention, greater care and nurturing, tolerance and guidance. Yet too often, children with disabilities were subject to discrimination and abuse.²⁴

Marta Santos Pais (Special Representative of the Secretary-General on Violence against Children) echoed the Chairman's sentiments by outlining the patterns of violence against children with disabilities, stating they had less access to justice, violence against them was often invisible and perpetrators acted with impunity. Also due to stigma and prejudice, violence against them was often portrayed as less serious than violence against others. Girls with disabilities were particularly vulnerable, often suffering physical violence as children, followed by sexual violence later in life.²⁵

15.2 The Universal Declaration on Human Rights

The **Universal Declaration of Human Rights (UDHR)** is a declaration adopted by the United Nations General Assembly on 10 December 1948 at Palais de Chaillot, Paris. The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all

²³ Conference of States Parties to the Convention on the Rights of Persons with Disabilities, New York, 12-14 September 2012, CRPD/CSP/2012/CRP.2,

²⁴ Supra

²⁵ Supra

human beings are inherently entitled. The full text is published by the United Nations on its website.²⁶

It consists of 30 articles which have been elaborated in subsequent international treaties, regional human rights instruments, national constitutions and laws. The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. In 1966 the General Assembly adopted the two detailed Covenants, which complete the International Bill of Human Rights; and in 1976, after the Covenants had been ratified by a sufficient number of individual nations, the Bill took on the force of international law.²⁷

Article 26 (1) of the UNDHR states, "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

15.3 International Covenant on Economic, Social and Cultural Rights

The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 3 January 1976. It commits its parties to work toward the granting of economic, social, and cultural rights (ESCR) to

²⁶ www.wikipidea.com

²⁷ Supra

individuals, including labour rights and the right to health, the right to education, and the right to an adequate standard of living. As of 2013, the Covenant had 160 parties. A further seven countries, including the United States of America, had signed but not yet ratified the Covenant.²⁸

The ICESCR is part of the International Bill of Human Rights, along with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), including the latter's first and second Optional Protocols.²⁹

The Covenant is monitored by the UN Committee on Economic, Social and Cultural Rights.

Article 13 states the following:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.³⁰

²⁸ Supra

²⁹ Supra

³⁰ <http://www.ohchr.org>

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:³¹

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or

³¹ Supra

approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.³²

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.³³

15.4 The Person's with Disabilities Act

The Person's with Disabilities Act was enacted in Kenya in 2003 and established the National Council for Persons with Disabilities in November 2004 to promote the rights of persons with disability in Kenya and mainstream disability issues into all aspects of national development.

Under section 18 of the Act, it provides for the rights to education for person's with disabilities, stating; no person or learning institution shall deny admission to a person with a disability to any course of study by reason only of such disability, if the person has the ability to acquire substantial learning in that course, learning institutions shall take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations and special schools and

³² Supra

³³ Supra

institutions, especially for the deaf, the blind and the mentally retarded, shall be established to cater for formal education, skills development and self-reliance.³⁴

However, the Act is silent on children with disabilities.

In an overview of the Disability Rights Movement in Kenya, the following was reported;

It is now emerging that the Persons with Disabilities Act is apparently plagued with inherent operational and legal impediments to its utilization. In fact, one may reach a *prima facie* conclusion that the Act that has already been in existence for more than a year was not meant to be enforced in the short term.³⁵

There are a few factors which render the Act immediately not able to be implemented. Firstly, the commencement of the Act is designed to take place in piecemeal. As of now, the Minister of Gender Sports Culture and Social Services has already gazetted commencement of the said Act with the exclusion of section 24, 25, 35(1) (2), 39, 40 and 41.³⁶

This means that the Act is to be implemented in more than one phase. Yet, some of the excluded sections are at the core of the progressive rights guaranteed to all persons with disabilities under the Act. On the other hand, a number of persons with disabilities have already been thrown in to mental anguish by this state of affairs as they are unsure how to interpret the Act in respect to their retirement.

³⁴ The Persons with Disabilities Act, 2003

³⁵ Section 3, Disability Rights Promotion International, Overview of the Disability Rights Movement in Kenya, 2007

³⁶ *Supra*

Some persons with disabilities attained retirement age during the commencement of the Act, while others are still attaining the same months after. Not even the Council is aware as how to deal with this crisis.³⁷

Secondly, there seems to be a very high cost associated with the implementation of the Act. The excluded sections have serious fiscal implications both for the government and for the private sector. The Council has yet to formulate any guidelines with respect as to their application.³⁸

Thirdly, from the very onset of the Act, experts determine that the Act is incapable of enforcement without first amending portions of the same. The Act abounds with legal and philosophical inconsistencies, which may affect the operation of the Act. The most classic example is the requirement by the Act all aggrieved parties ought to file their cahiers with Industrial court instead of the High Court. This position, adapted by the Act, could open counterproductive legal arguments when subjected to a test of law. In addition, the Act is too liberal with its discretionary provisions and thereby predestines the Act to a future of uncertainties.³⁹

Fourthly, the constitution and the subsequent inauguration of the Council have not necessarily guaranteed the persons with disabilities of exponential enforcement of the Act. In the first place, the council is to be composed of 27 members whose representation is specified in the Act. The equilibrium desired

³⁷ Supra

³⁸ Supra

³⁹ Supra

by the Act is not met by these appointments but has instead rekindled factional distrust among the members of the disabilities movement in Kenya.

Further the criteria used to appoint council members is known only to the minister, neither does anyone have the capacity to verify whether the appointees were people of high integrity as required by the Act. One would have expected the minister to demand of them a declaration of wealth before assuming such an important office. We also note that the secretariat has not been established and without it the council is perpetually trapped in its own indolence.⁴⁰

Finally, another factor that renders the Act unenforceable is the fact that the Act is too apt in giving discretionary powers where mandatory powers seemed the only viable alternative. The use of such phrases as ... *to the maximum of its resources* ... or 'suitable' creates room for a lot of discretion on whoever is bent on abusing the Act. This misgiving runs consistently throughout the Act and needs a legal expert to detect and cure. It is being in the Act is detrimental to the entire Act and the users.⁴¹

15.5 National Council for Persons with Disabilities.

The Person's with Disabilities Act was enacted in Kenya in 2003 and established the National Council for Persons with Disabilities in November 2004 to promote the rights of persons with disability in Kenya and mainstream disability issues into all aspects of national development.

⁴⁰ Supra

⁴¹ Supra

The Council derives its mandate from the PWD ACT, 2003 which established the Council and outlined its core functions as follows:⁴²

- i. Formulating and developing measures and policies designed to achieve equal opportunities for PWDs;
- ii. Cooperating with the government during the National Census to ensure that accurate figures of PWDs are obtained;
- iii. Issuing orders requiring the adjustment of buildings that are unfriendly for use by PWDs;
- iv. Recommending measures to prevent discrimination against PWDs;
- v. Encouraging and securing the rehabilitation of PWDs within their own communities and social environment;
- vi. Registering persons with disabilities and institutions and organizations giving services to PWDs; and
- vii. Raising public awareness regarding PWDs.

The core institution that was created by the government after the implementation of the Persons with Disabilities Act (NCPWD), in its core functions does not go ahead to provide specifically for the rights of disabled children, even with the introduction of free primary education. One then tends to wonder, who then monitors and ensures that disabled children access the free primary education offered if the institution implemented on their behalf does not in itself provide for their rights.

⁴² <http://ncpwd.go.ke/aboutncpwd/functions-of-ncpwd/>

Upon research on the latest reports from the NCWPD not much has been reported as the last survey that was done by the council was in 2007. In this report, it is stated that according to the World Health Organization (WHO), disability affects 10% of every population. An estimated 650 million people worldwide, of whom 200 million are children experience some form of disability.⁴³ The report went further to observe the responses of society on disabled persons and went even as far as looking into environmental factors and employments of such persons, sadly the report did not have any data to report on children with disabilities.

15.6 People with disabilities and Parents organizations (D.P.O.s)

Although Kenya Union of the Blind is the oldest D.P.O., the real involvement of people with disabilities in the fight for inclusion in the society can be traced to 1964. In that year a group of people with disabilities spent a whole night camping outside state house in Nairobi, the now official residence of the president. The group was seeking audience with the audience with the first prime minister who later that year the first president of Kenya, Mzee Jomo Kenyatta.

The group of people with disabilities wanted Kenyatta to intervene in their circumstances of extreme exclusion from the society. In answer to the disabled community, that same year Kenyatta created the Ominde Commission to look into the situation of people with disabilities and advice him and the government appropriately.

⁴³ Kenya National Survey for Persons with Disability, Preliminary Report, National Coordinating Agency for Population and Development, 2008

Over the next two decades, disability activism went into a lull up to the late 1980s when a number of national and community based D.P.O.s began advocacy work. Incidentally, the major spurt of disability activism was in tandem with the global phenomenon where national people with disabilities organizations were forming to promote independent living.

These D.P.O.s formed and managed by persons with disabilities to advocate and to pressurize for services and participation in national development. They create awareness; act as representatives of persons with disabilities and press for service provisions.

There are various other organizations, especially Non-Governmental Organisations that are established in Kenya which are geared towards the protection of the rights of those who are disabled, however, this research will only focus on the main bodies from which most of these bodies derive their power and mandate.

16.0 Implementation of the laws

16.1 The International Society

The Millennium Development Goals, drawn from the Millennium Declaration adopted in 2000, call on all stakeholders to take action towards achieving eight key developmental goals by 2015. The goals focus on reducing extreme poverty, improving health and education and environmental sustainability to improve the lives of the world's poorest populations. The Goals are also an expression of fundamental human rights,

encompassing universally accepted human values and rights for all. The commitment of the United Nations to the rights of persons with disabilities since its inception has been codified into an international human rights convention in 2006. The newly adopted Convention on the Rights of Persons with Disabilities, together with the World Programme of Action and the Standard Rules on Equalization of Opportunities for Persons with Disabilities, provides for a strengthened international normative framework for disability-inclusive development. It has provided an impetus and unique platform from which to engage the broader global development community.⁴⁴

In realising the increase in disability in society today and also the suffering endured, the Millennium Goals have addressed the said challenges as follows:

1. Against the backdrop of multiple global crises and emerging challenges, Governments, along with the development community, have responded in various ways through taking specific policy measures, and new initiatives. The challenge is to fully take into account the situations of persons with disabilities and to incorporate their needs and concerns into crisis-related adjustments to make responses available to everyone.⁴⁵

⁴⁴ Keeping the promise; realizing the Millennium Development Goals for persons with disabilities towards 2015 and beyond, UN General Assembly, 65th Session, A/65/173, 26th July 2010.

⁴⁵ Keeping the promise; realizing the Millennium Development Goals for persons with disabilities towards 2015 and beyond, UN General Assembly, 65th Session, A/65/173, 26th July 2010.

2. In response to the global financial crisis, economic stimulus packages have been put in place in different countries to generate employment, provide diverse income support and increase expenditure on social services. Whereas these packages aim to be ostensibly “pro-poor”, it remains uncertain to what extent they have been able to address and incorporate the needs of persons with disabilities who live in poverty.⁴⁶
3. During the humanitarian crisis or conflict, persons with disabilities tend to remain invisible and therefore often excluded from relief efforts. It is crucial to ensure equal access to water and nutrition for all persons with disabilities, while making strategic arrangements to reach out to persons with mobility-related disabilities. The United Nations *World Public Sector Report 2010* highlights the importance of including all populations, including persons with disabilities, in every aspect of socio-politico-economic development efforts in post-conflict situations.⁴⁷
4. As planning for major reconstruction gets under way in many post-disaster countries, the situation of persons with disabilities and their needs should be included at the very beginning of planning, designing and building permanent shelters, schools, health clinics and other buildings to

⁴⁶ supra

⁴⁷ Supra

ensure accessibility to all. It is more cost-effective to design a barrier-free building than to renovate an existing building to make it fully accessible to persons with disabilities.⁴⁸

5. While the economic stimulus packages and other crises-concerned measures are short-term responses, they offer opportunities to set the stage for broader and lasting reforms to develop the disability-responsive socio-economic policies and budgeting frameworks. Behind each crisis there exists an opportunity to advance disability-inclusive development goals, including the Millennium Development Goals, to benefit all members of the society in the long run.

The UN has accomplished the following in protecting and promoting the human rights of persons with disabilities thus far;

1. In order to advance the agenda for mainstreaming disability into the Millennium Development Goals and other development frameworks, organizations of the United Nations system have taken initiatives and actions, focusing on raising global awareness, promoting policy discourse, supporting regional and national capacity-building and enhancing institutional capability at different levels. Organizations work collaboratively within the system and

⁴⁸ supra

also partner with Governments, NGOs and organizations of persons with disabilities, as well as academic and other institutions, to foster development to achieve the Goals.⁴⁹

2. The United Nations Secretariat has provided new forums for new and traditional stakeholders to exchange ideas and experience in the field of disability and development, with a view to making further progress towards the realization of the Millennium Development Goals for persons with disabilities. To that end, the Department of Economic and Social Affairs organized several meetings and discussions along with Governments, international development agencies, civil society and other stakeholders. The events, held in conjunction with the sessions of the General Assembly, the Economic and Social Council and the Commission for Social Development, as well as the annual commemoration of the International Day of Persons with Disabilities, contributed to ongoing efforts towards mainstreaming disability in Millennium Development Goal processes and other international development goals in the operational activities of the United Nations at the country levels.⁵⁰

3. The United Nations Development Programme (UNDP) Strategic Plan 2008-2011 has included persons with

⁴⁹ supra

⁵⁰ supra

disabilities and the United Nations Population Fund's (UNFPA) Strategic Plan 2008-2011 makes explicit reference to women with disabilities. The Office of the United Nations High Commissioner for Refugees (UNHCR) is pursuing its Age, Gender and Diversity Mainstreaming Strategy, which aims at achieving equality for all persons of concern, including persons with disabilities.⁵¹

4. The Joint United Nations Programme on HIV/AIDS (UNAIDS), OHCHR and WHO launched a new policy brief on disability and HIV. The brief, developed in consultation with persons living with HIV and persons with disabilities, discusses the actions needed to increase the participation of persons with disabilities in the HIV response and ensures that they have access to HIV services on an equal basis with others.⁵²
5. The Task Team of the Inter-Agency Support Group for the Convention on the Rights of Persons with Disabilities/United Nations Development Group has developed a draft guidance note on disability for the United Nations country teams with a view to promoting the inclusion of the rights of persons with disabilities in the United Nations programming at the country level.⁵³

⁵¹ supra

⁵² supra

⁵³ supra

The UN went a step further and in adapting certain resolutions made in regards to persons with disabilities. It urged its Member States, and invited international organizations and regional organizations, regional integration organizations, financial institutions, the private sector and civil society, in particular organizations representing persons with disabilities, as appropriate, to promote the realization of the Millennium Development Goals for persons with disabilities by, inter alia, explicitly including and mainstreaming disability issues and persons with disabilities in national plans and tools designed to contribute to the full realization of the Goals.⁵⁴ It went a step further and requested the United Nations system to facilitate technical assistance, within existing resources, including the provision of assistance for capacity-building and for the collection and compilation of national and regional data and statistics on disability, in particular to developing countries, and in this regard requests the Secretary-General, in accordance with existing guidelines on disability statistics, to analyse, publish and disseminate disability data and statistics in future periodic reports, as appropriate, on the realization of the Millennium Development Goals for persons with disabilities.⁵⁵

16.2 Kenya

With the establishment of the new laws already discussed above, the government of Kenya went a step further to establish the following;

⁵⁴ Resolution adapted by the General Assembly on realizing the Millennium Development Goals for persons with disabilities towards 2015 and beyond, UN General Meeting, 65th Session, A/RES/65/186, 4th February 2011

⁵⁵ *supra*

1. National Development Fund.

The National Development Fund aims to eradicate the link between poverty and disability by providing financial support to organisations and individuals. Find out more about how the Fund is helping here. The Fund currently supports the following funding categories:

- 1. Assistive devices and services** – To improve mobility and access . Includes wheelchairs, crutches, surgical shoes, hearing aid, white cane and others.
- 2. Educational assistance** – Scholarships for persons with disabilities who wish to pursue education but cannot do so because of financial difficulties.
- 3. Economic Empowerment & Revolving Fund** – Help for groups of persons with disabilities to set up small businesses or revolving fund schemes.
- 4. Infrastructure & Equipment** – Assistance or social care and education institutions that provide services to Persons with Disabilities.
- 5. Cash transfers** - Support for households of persons with severe disabilities who are in extreme poverty.

2. Kenya Disability Directory

The Kenya Disability Directory not only serves as a reference publication but also as a networking tool which ensures that at any one given time and place, those who seek assistance know where to source it from.

The Directory has over the years served to link individuals and organizations from all walks of life that for one reason or the other require information and services on various subjects relating to disability.

Those listed under the directory include: Action Aid, Action Network for the Disabled (ANDY), African Braille Centre, African Medical and Research Foundation, Association of the Physically Disabled in Kenya, Autism Society of Kenya, Blind and Low Vision Network, BrianResource Centre, Care International in Kenya, Cerebral Palsy Society in Kenya, Christoffel Blinden Mission, Community Eye Services Organisation, Deaf Empowerment Kenya, Deaf Initiatives Network Kenya, Deaf Women Initiatives Network (RDWIN), Disability leadership and resource centre, Disabled Child Monitor, Discovered Potential in Disability Organisation, DPA Kenya, Ecumenical Disability Advocates Network, Eden Lifestyle and Community Centre, Embakasi Deaf Women Group, Federation of Deaf Women Empowerment Kenya, Fred Hollows Eastern Africa, Furaha Centre for The Deaf, Global Deaf Connection, Gracious Rehabilitation Centre, Handicap Bidii Self Help Group, Handicap International, Hisan, Initiative for Learning Disabilities Kenya (ILDK), ICEVI, Itac Consulting Limited, Jaipur Foot Project, Joint Epilepsy Foundation, Kenya Albino Association, Kenya Association for Parents of the Deaf, Kenya Association for the Intellectually Handicapped, Kenya Community Centre for Learning, Kenya Deaf Welfare Society, Kenya Institute of the Blind, Kenya National Association of the Deaf (KNAD), Kenya National Deaf Women Peace Network, Kenya Society for Deaf Children, Kenya Society for the Blind, Kenya Union of the Blind, Kenyan Paraplegic Organization, Lea Toto, Leonard Chesire Disability, Light and Hope for the Disabled Children, Lifeskills Promoters, Liverpool VCT, Care and Treatment, Nairobi Family Support Services, Nairobi Parents of the Deaf Blind Self Help Group, Nairobi Family Support Services, National Council for People

With Disabilities, National Spinal Injury Hospital, Network of Parents of Persons with Disability, Sense International (East Africa), Shield Women Empowerment and Development, Sight Savers International, Special Education Professionals, Spina Bifi da and Hydrocephalus Association of Kenya, The Kenya Media Network on Disability – KEMNOD, United Disabled Persons of Kenya, Voluntary Services Overseas, Women Challenged to Challenge, Youth on the Move... among others.

In the directory each Organization gives its location of activities, contact person, field of work, activities offered disabilities targeted among other credentials.

3. Legislation to promote opportunities for people with disabilities has been drafted.

These include:

- **The Draft Equity Bill, 2000**, which aims to combat discrimination faced by various groups, including people with disabilities. The Bill also prohibits employers from paying employees differently for work of equal value.
- **The Draft Affirmative Action Bill 2000**, which guarantees minority groups, including disabled people, a minimum of 33 per cent of representation in Parliament and on local authorities.
- **The Draft National Disability Policy**, which operationalizes the Persons with Disabilities Act 2003 by providing guidelines for the implementation of the Act.

- **The Draft Special Needs Education Policy**, which provides a roadmap for the education of children with disabilities.

-**The Social Protection Draft Policy**. About 46 per cent of all Kenyans live below the poverty line while 19 per cent live in extreme poverty. This draft policy aims at cushioning the most vulnerable citizens against the ravages of poverty. The policy also identifies orphans and vulnerable children, persons with disabilities and older persons as the priority targets for social protection.

4. Poverty Reduction Strategy

The Government of Kenya prepared their first Interim Poverty Reduction Strategy Paper in 2000-2001, without any involvement of DPOs. In connection with the next strategy—*The Economic Recovery Strategy for Wealth and Employment Creation* 2004-2007—Civil Society organizations were consulted, but persons with “physical” disabilities were only mentioned in a list of marginalised groups: Under clause 2.4 the poor are clustered in certain socio-economic categories that include small farmers, pastoralists in Arid and Semi-Arid Land areas, agricultural labourers, casual labourers, unskilled and semiskilled workers, female-headed households, and *people with physical disabilities*.⁵⁶

The IP-ERS—*Investment Plan for Economic Recovery Strategy*—later formally accepted as Kenya’s strategy for poverty reduction—has since then been

⁵⁶ HRBA, Disability Rights in Kenya, 2011

reviewed twice and two annual progress reports been published with no mention of disability.⁵⁷

Recently the Government completed a Medium Term Plan 2008-2013, based on visions for 2030. The MTP mentions disability in a few places. Despite the low attention in the overall poverty reduction plans, Kenya has since 2000 increased overall attention to disability in national development and the government shows increased willingness to secure and advance the rights of people with disabilities. However, activities addressing disability are fragmented and scattered, making it difficult to track real progress.⁵⁸

17.0 Downside of the implementation process

Although the Government of Kenya has tried to establish laws as well as regulations that are geared towards upholding the rights of disabled persons in society, these laws have not been implemented in view of child disability.

1. National Development Fund

The fund as established for usage and aid for the disabled has not set aside an allocation for children with disability and also, there is no committee regulating the release and use of the said allocated funds.

Recently in Kenya the **United Disabled Persons of Kenya (UDPK)** along with the **National Council for Persons with Disabilities** were accused of using funds sent to them from NGOs and also allocated to them by the government for their

⁵⁷ Supra

⁵⁸ supra

own benefit. The said case against them is ongoing. However, it is sad that both organizations are run by disabled persons and they themselves are accused of robbing from their own. While they get richer, those with actual needs suffer more.

2. Laws

The new established laws do not specifically provide for the rights of disabled children thereby creating a loophole. Also the newly established 'free education' does not make mention of the rights or provisions for children with disabilities hence not giving a sure guarantee of them receiving the same.

3. Institutions

The Government has not made provisions for new Special Needs Schools for children with disabilities with the new provision for 'free primary education', for unlike normal children, they cannot attend the regular schools but need a special needs school that can attend to their needs.

Also, in order to cater for the needs of these children, the government too would have to make adjustments to infrastructure. That would mean that buildings would have to be fitted with ramps as well as the double doors that can fit a wheel chair and also the lavatories would have to undergo changes to ensure that there is a lavatory for a special needs child. Changes of which are yet to be seen or made in the Schools.

Also, the materials that are provided to children such as books and stationery would have to be included with special needs materials for disabled children, like brail books for the children who are blind. This too has remained silent in the implementation stage by the government.

Lastly, special needs children would also require special needs teachers. This then goes to the government to make new regulations to include the addition of special needs teachers in the Schools. Something yet to be seen and implemented as the government was recently unable to manage the teachers they have as it is when they went on strike for close to a month for lack of payment.

CHAPTER 4

This chapter provides the conclusions of this research paper and the recommendations for the future implementations of laws regarding the rights of disabled children.

18.0 Conclusions

This research paper has looked at how the rights of disabled children has been addressed and also viewed from the International Convention to its implementation into domestic laws in Kenya. With the passing of the new laws in regards to 'free primary education for all', this brought about the question if this too was available for children with disabilities.

As discussed above, while having the discussion on the children with disabilities by the States Parties during the fifth session, child disability is a crucial and vital area of concern with grave amounts of violence reported. During their views on implementations it was noted that not many African Countries have been able to implement the strict laws regulating rights to disabled and this has been mostly accredited to poverty and still being in the developmental stages.

Kenya as a Country, has come from the 'dark shadows' of the days when disability was viewed as a taboo and omen and those with disabilities better off hidden and kept away to having also representatives in the current government. The laws that have been implemented are being enforced daily with the disabled being more and more aware of their rights. In the employment field, one will

seldom be denied a job in view of his or her disability and many establishments have not only a handicap parking but also a handicap lavatory facility.

However, in view and light of all the development, little attention has been given to children with disability with many parents still keeping them in locked doors. Despite the provisions of the law, little has been seen in the infrastructure in view of children with disabilities. With the passing of the new education law, not many new Special Needs Schools have come up nor have there been any allocation by the Government of teachers who can attend to the special needs of these children. In the given government institutions available at the moment, most of the schools are either two or three storey buildings with no ramps making it inaccessible for children with disabilities. Also with the way government schools are holding close to 100-200 students in a given class , this overwhelms the teacher who himself not by their own mistake will end up not paying close and more attention to the disabled child who is needs more care.

19.0 Recommendations

19.1 Implementation of the current laws

The laws as they are could be argued to be just on paper, an action to have the stated laws actually working for the benefits of those with disabilities would be upholding the famous saying by Lord Denning; the law should not just be seen but also be heard.

19.2 Amendment of the laws

Laws such as the Persons with Disability Act and the Education Act should be amended to specifically provide for the rights of children with disabilities.

19.3 Sensitization of the laws

Many Kenyans are not aware of the laws that are set out to protect them and would not be aware when their rights are violated. Those who are called upon to uphold the law, judiciary, should sensitize those who are found in remote areas and are not able to access the laws by holding seminars in the rural areas. The laws should also be made readily available to the public and the public made aware where they can access these laws.

19. 4 Partnership to strengthen programs with children with disabilities.

There are very many organizations established in Kenya that are looking out and trying to uphold the rights of disabled children, this would be better achieved if the organizations had a partnership and worked together.

19.5 Strengthening of D.P.O.s' Capacity in Addressing Human Rights

There is an urgent need for D.P.O.s and other organizations to design and implement human rights specific interventions in order to reverse the indicators illustrated in this study. The components of such action will be:

Peer Mechanisms for Self Advocacy

A peer mechanism self advocacy programme (P.M.A.P.) works at the level of the

individual disabled person to provide human rights information and education on significant barriers. Such obstacles include discriminatorily attitudes, abuse and violence in the family, school, workplace, the community at large and public authorities. A P.M.A.P. also offers information on barriers to communication, access to education, public services and authorities, as well as aspects of the physical environment such as transport systems and workplaces.

2. *Collaborative networks*

D.P.O.s should engage in building strong collaborative networks amongst themselves. Such networks and Coalitions would be more effective in protecting and promoting the rights of disabled people.

19.6 Mainstreaming Disability Rights in Public Service

The lack of a constitutional provision that directs government bodies to mainstream disability issues needs to be addressed.

The government should mainstream disability issues by incorporating information about the human rights of disabled children in all training curricula for its officers. This would allow individual officers to be responsive to reports of human rights violations by disabled children.

The government should develop and implement a disability training curriculum for civil servants as a further strategy for mainstreaming disability. Such a curriculum would take a human rights approach to development as a strategy for creating equity in Kenyan society. This would ensure that government agencies and employers respond to disability issues promptly, intelligently and in ways that respects the rights and dignity of disabled people.

3. The government should incorporate disability in its national development strategy.

19.7 Legal Support and Arbitration

1. Children with disability should have access to the court process in order to challenge disability discrimination. This could be done through a disability legal aid system that offers representation to disabled people. The Legal Aid Clinic could also take up public interest cases that would increase the impact through precedent setting of elimination of disability discrimination. The Legal Aid Clinic should also train judicial officers and lawyers on disability and human rights, and build a national network of disability paralegals to provide legal advice to disabled people and to act as arbitrators.
2. In cases where abuse has occurred it is important that the government develop referral mechanisms to direct people to support services and recovery Centers in order to receive counseling for post violation trauma.

19.8 Advocacy

1. All law and policy should reflect the principles of disability as a human rights issue.
2. Disabled people, through their organizations, should effectively participate in all levels of decision-making and in turn also have a representative for children with disabilities.
3. The government should promote equal opportunity for children with disabilities and respect for difference in all spheres of life.

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