

DEFENDING THE DEFENDERS

Human Rights Defenders
in conflict with the law

Kenya National Commission
on Human Rights

**European Instrument for Democracy & Human Rights (EIDHR)
and Non-State Actors & Local Authorities (NSA-LA)
Thematic Programmes for Kenya**



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Kenya National Commission on Human Rights

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LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
KNCHR	Kenya National Commission On Human Rights
UN	United Nations
EU	European Union
HRDs	Human Rights Defenders
LEAs	Law Enforcement Agencies
KWS	Kenya Wildlife Service
OSCE	Organization for Security and Co-Operation in Europe.
OCS	Officer Commanding Police Station
ODIHR	Office for Democratic Institutions and Human Rights
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights.
EACCM	East African Community Common Market
OB	Occurrence Book



EXECUTIVE SUMMARY

Human Rights Defenders (HRDs) are often subjected to arbitrary arrests and detentions, death threats, harassment and defamation, restrictions on their freedoms of movement, expression, association and assembly among many other violations of human rights. This has an effect on their critical role of defending, promoting and protecting human rights. In light of this, the Kenya National Commission on Human Rights (KNCHR) embarked on a monitoring and inspection exercise in places of detention to establish the situation of HRDs when in conflict with the law. The KNCHR considers it necessary to clarify that patterns have been established over time based on disturbing incidents that constitute violations of rights that is specifically targeted at human rights defenders based on the work that they do both at the community and the national level. While the forms have changed over time due to the various transformations that the country has undergone, human rights violations continue to be perpetrated against HRDs. Clear patterns are however decipherable as relates to those who commit the violations, when they are committed, why they are committed and the person or groups of persons who are the victims of the violations. It has also been noted with concern that the violations are extended to the families of HRDs as well as some members of the community who are the recipients of the services of HRDs.

The KNCHR wishes to emphasize that one of the most serious consequences of the violations targeting human rights defenders is that they are intended to intimidate and dissuade HRDs from engaging in the promotion and championing respect for human rights, to isolate the HRDs from society and ensure apprehension on the part of would be HRDs. In the long run, the violations cause a general fear in the public domain, spurs impunity, stifles the gains made in different fronts of human rights protection, and impedes the full realization of the rule of law and democracy which are key tenets of human rights defense.

The KNCHR further wishes to point out that grave violations of the HRDs have a direct intimidating effect on the processes of vindicating rights or denouncing violations. The attacks may produce an immediate halt to or almost total reduction of their activities, as defenders are at times forced to abandon the areas where they work and the work that they do, change their places of residence, change their social gatherings places and in extreme circumstances, leave the country for a certain period of time



or for good in dire situations. In addition, attacks and intimidations directed at the HRDs further lock them out of important opportunities in the society such as gaining from the devolved funds such as the Constituency Bursary Funds, social – exclusion within the community as well as attacks on their families that are both physical and emotional. All these have a detrimental impact on all other defenders, who even though not receiving the attacks directly, are victims of fear on seeing the situation of their colleagues, and are target of executions, torture and beatings committed against them by both the state and non - state actors who even include the members of the public. The report highlights the opportunities that agencies such as the NPSC, the NPS, and IPOA needs to contribute to the creation of an environment that is conducive to the work of HRDs.

Further the report urges the need of various mechanisms and special procedures that support the work of HRDs such as the UN Declaration on HRDs, the EU Guidelines on Human Rights Defenders and the Special Rapporteurs need to address the specific concerns regarding human rights defenders. The KNCHR acknowledges with much appreciation the financial support of the European Union that made this study possible as well as the HRDs and other actors who made the publication of this report possible.

Highlights of the Findings

While KNCHR notes that there is an improvement in how law enforcement agencies handle HRDs who are in conflict with the law, the following issues were reported during this assessment.

I. Violation of the constitutional rights of arrested persons:

Article 49 of the Constitution guarantees the rights of the arrested person, among them the right to be informed of the reason for arrest, to communicate with an advocate or any other person whose assistance is necessary, and not to be compelled to make any confession or admission. It was established that HRDs are subjected to inhumane treatment, roughed up and mishandled during arrests. While in detention in police cells, HRDs have been subjected to ill – treatment in an attempt to force them to confess to criminal activity or retract accusations made on human rights violations. In other cases, police present fabricated charges against HRDs leading to malicious prosecutions



II. Punitive bail terms:

The high Bond and Bail terms that are issued by courts against HRDs are punitive and have the effect of criminalizing the work of HRDs in the long run. For example, reports were received of 3 HRDs who were subjected to punitive bail terms of Kshs. 200,000. Inability to raise the money forced the HRDs to stay in custody longer. This is particularly disturbing considering that some of the HRDs might be from low economic backgrounds.

III. Impacts of the arrests on HRDs :

HRDs in conflict with the law suffer adverse and long term effects as a result of the arrests. These include fear, psychological harm and stigma. In situations where the HRD is the sole breadwinner, their incarceration leaves a vacuum at the family level. The manner of arrest is sometimes crude and brutal further stigmatizing family members and acquaintances.

IV. Misuse of provision on withdrawal of prosecution:

HRDs that have been arrested and have ongoing cases at various law courts are usually released under Section 87(a) of the Criminal Procedure Code. ¹HRDs who find themselves in this situation live in constant fear of being re – arrested should more evidence be unearthed on their specific cases. As a result, they cannot participate in any meaningful economic activity

V. Deterrence to other HRDS:

While HRDs exhibit immense courage in undertaking their work, continued and persistent attacks through the arrests discourages those who would like to engage in the same work and diminishes public support for HRDs who are perceived as trouble rousers.

1. 87: Withdrawal from prosecution in trials before subordinate courts

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.



VI. Profiling of HRDs & fabrication of charges:

HRDs working in coast and northern Kenya have been accused of belonging to outlawed groups such as Mombasa Republican Council. This reduces their self – esteem, affects their overall performance in the delivery of their duties, increases their vulnerability and diminishes public support for their work. Because law enforcement agencies are unable to prefer charges that would withstand the prosecution in a court of law they resort to charges such as assault, treason, incitement, creating disturbance, obstructing the police from doing their lawful duty, terrorism, drugs trafficking and illegal possession of firearms. This has an overall effect of intimidating HRDs from undertaking their work.

VII. Politicization of HRDs work:

There is a perceived relationship between HRDs and political affairs within the country. Some of those that have been arrested have been accused of working for certain political factions which makes them targets of frequent arrests. This linkage with political affairs has mostly been very prominent in the coast region.

In some instances, attacks to HRDs have extended to those serving within the Government systems. For instance, in the provincial administration local's chiefs have become susceptible to attacks due to the stand they take on issues that affects the general community. This was a common trend witnessed in Kwale County.

VIII. Lack of awareness on provisions of protection mechanisms:

There is little or lack of understanding of the international mechanisms providing assistance and protection to HRDs. As a result, HRDs often are exposed to danger and lack support when in danger emanating from their work. HRDs working in remote areas are particularly vulnerable as they lack resources to post bond or bail when required, flee from their areas when under threat, seek for relocation outside the Country when in serious cases and to seek the services of legal counsel when required.



IX. Self-representation:

The quest and need for self – representation is becoming a more acceptable way of representation for HRDs when in conflict with the law. This is particularly useful for HRDs who cannot access legal representation. Some of the HRDs explained that they are conversant with the court processes. However many lack this competence and therefore when faced with threats, they are completely vulnerable.

Recommendations

Based on the above findings the KNCHR presents the following key recommendations to the key actors with a view to creating a protective environment for HRDs in conflict with the law;

To the government of Kenya:

It is the state's duty to protect and provide an enabling environment for HRDs. KNCHR calls on the government to enact and adopt the HRD policy that shall create and consolidate a safe and enabling environment that empowers HRDs to exercise freely their right to defend human rights without fear of intimidation.

The KNCHR also calls for the domestication on the provisions of the UN Declaration on Human Rights Defenders into the national legislative and policy framework

To the Law Enforcement Agencies (Police, Prisons and Judiciary)

The training curriculum should incorporate awareness on HRDs and the unique circumstances that make them susceptible to human rights violations in places of detention. Specific training is needed on the provisions of the UN declaration on Human rights defenders

There should be put in place special measures to protect HRDs upon arrest including utilization of specialized officers with gender sensitivity
KNCHR calls for an end to the criminalization of the work of HRDS and the immediate investigations of officers implicated in such acts

Further, KNCHR calls on Security officers to strictly adhere to the normative framework



around the rights of suspects upon arrest and detention especially on the right to life and liberty, freedom from torture and other degrading treatment, presumption of innocence and right to a fair hearing. We call on the law enforcement agencies to incorporate the principles of the Luanda Guidelines on Conditions of arrests, police custody and pre-trial detention in their administrative and policy frameworks. In addition KNCHR proposes that a mechanism for supporting HRDs in conflict with the law is put in place. This should include fast-tracking cases of HRDS and proper and credible investigations into these violations.

To the Witness Protection Agency:

There is need to have provisions of emergency response and protection mechanisms for Human Rights defenders who are attacked or are at risk of imminent danger. This should be available at the national and community level and should extended to their families.



1.0. INTRODUCTION

The Kenya National Commission on Human Rights (KNCHR) is a constitutional body established under Article 59 of the Constitution of Kenya and Section 3 of the Kenya National Commission on Human Rights Act No 14 of 2011 (revised) 2012. It has the core mandate to develop a culture of human rights through the promotion and protection of human rights and fundamental freedoms in the Republic of Kenya. As part of its functions to realize this goal, KNCHR is mandated under Section 8 of the KNCHR Act to monitor state and non-state actors to ensure that they comply with both national and international laws and policies as well as human rights standards in all their undertakings. The KNCHR is further mandated on its own initiative or on the basis of complaints to investigate or research matters in respect of human rights, and make recommendations to improve the functioning of state organs;

The KNCHR with the support of European Union has been implementing a project entitled “Safeguarding Constitutional Gains, Human Rights Defenders and security in Kwale, Marsabit and Busia counties running from September 2014 – September 2016. This project was anchored on four main pillars that included capacity building and institutional strengthening, advocacy for effective implementation of comprehensive legislation and policy framework, strengthening custodial practices in prison facilities for better protection and promotion of the work of HRDs and investigations and redress. These four key pillars were to help in the achievement of the overall project goal which was to contribute to improved legal, social and communal environment for the protection and action of HRDs in Kenya by 2016.

Law enforcement agencies that include police officers, prison officers, members of the provincial administration and the judicial officers play an important role in the protection and promotion of human rights and thus are human rights defenders, a fact that has never been acknowledged by them. Further, the police and prison officers play an important role in acting as the first contact of admitting offenders into the criminal justice chain and thus the manner in which this admission is happens determines to a great deal how these offenders view the entire criminal justice chain. These offenders at times happen to be human rights defenders who are in conflict with the law due to their human rights defense work and are more often than not victimized, harassed and subjected to other human rights violations while being detained as well as at the point of arrest.



1.1. Objectives of the exercise

The KNCHR has a statutory mandate of visiting places of detention that includes police cells, prison facilities, holding cells among other gazetted facilities. The overall goal of this exercise is to improve the working conditions under which those who are in conflict with the law are held but specifically for this project is to improve the conditions under which the HRDs are held when in conflict with the law.

The specific objectives of this exercise included;

- I. To document the experiences of HRDs when in conflict with the law in the conduct of their work
- I. To make necessary recommendations to the different organs aimed at protecting and promoting the rights of human rights defenders.

1.2. Methodology

In executing the exercise, the following were the employed strategies;
Desktop review: KNCHR reviewed various publications and reports from other organizations working on the subject matter. Notable materials were derived from Muslims for Human Rights, National Coalition for Human Rights Defenders Kenya, East and Horn of Africa Human Rights Defenders Project and Protection International. The information derived from these secondary sources has been used to collate the primary sources of information from the field.

Meetings with law enforcement agencies, and networks of HRDs/organizations: The KNCHR held both individual and group meetings with the networks of human rights defenders that have been established through this project in Busia, Marsabit and Kwale. A total of 30 HRDs participated in the FGDs. Further, meetings were held with members of the National Police Service who included police officers of different ranks from various parts of the 3 project sites. The participation of the members of the National Police Service was drawn from both the Kenya Police and the Administration Police units and included both the senior and junior officers who interact with HRDs at different levels. A total of 25 members of the National Police Service were met during this process.

Key Informant Interviews with state actors: The teams visited Prisons in all the 3 project sites where individual interviews were carried out with the



respective officers in charge of Busia, Kwale and Marsabit prisons respectively. Key informant interviews with members of the provincial administration who included the area chiefs in Bunyala region in Busia and in Kwale County were also held. Two members of the judiciary one each from Marsabit and Kwale counties were also involved.

All the above were useful due to their interaction with Human Rights Defenders at different levels of the criminal justice system either at arrest, at reporting stage, at prosecution stage, at investigation stage and at the incarceration stage

Interviews and discussions with identified HRDs: KNCHR carried out individual interviews with HRDs who have in the past been in conflict with the law and whose cases have been determined, pending or thrown out. A total of 12 individual interviews were carried out. This was complemented by a self-administered questionnaire administered to 60 HRDs during the project exposure visit in Busia that provided an opportunity for the selected HRDs in all the project sites.

Visits to places of detention: The teams visited places of detention in the 3 project sites that included Busia GK Prison, Marsabit GK Prison and Kwale GK Prison, Marsabit Police Station, Amagoro AP Camp, Marsabit Police Station, Diani Police Station, Diani Chiefs Camp, Illeret Police Station, Busia Police Station, Diani Chief Camp and Kwale Police Station. The visits to the detention facilities were useful in determining the level of understanding of the work of HRDs by the leadership of these detention facilities and the treatment accorded to HRDs when in conflict with the law.



2.0. THE NORMATIVE FRAMEWORK ON HUMAN RIGHTS DEFENDERS

2.1. International and Regional framework

The Universal Declaration on Human rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the Convention against Torture (CAT) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) provide a broad normative framework on the fundamental human rights principles that should be protected and promoted by state parties at the international level. The provisions in these international instruments protect the right to life, liberty including freedom from arbitrary arrests and detention, fair trial, freedom from torture or cruel, inhuman or degrading treatment or punishment, right to freedom of association and expression among others. At the regional level, the African Charter on Human and People's Rights reaffirms these rights. Further the African Commission on Human and People's Rights has through various resolutions recognized the threats faced by HRDs and calls on State parties to put in place measures to ensure that all human rights defenders carry out their work without fear of any acts of violence, threats, reprisals, discrimination, pressure and any arbitrary acts by State or non-State actors as a result of their human rights activities.²

2.2. The UN Declaration on Human Rights Defenders and detention of HRDS

The specific instrument that elaborates the protection of human rights defenders is the UN declaration on Human Rights Defenders and detention of HRDS. Discussions around the declaration on human rights defenders began in 1984 and ended with the adoption of the text by the General Assembly in 1998. Of importance is the fact that the declaration is addressed not just to States and to human rights defenders, but to everyone including those that handle human rights defenders when in conflict with the law such as the law enforcement agencies, judicial officers and members of the provincial administration within the Kenyan context who interact with human rights defenders in one way or the other. It reminds all these duty bearers on the global human rights movement

² The African Commission on Human and Peoples' Rights (the African Commission or ACHPR) meeting at its 42nd Ordinary Session held from 15 - 28 November 2007, in Brazzaville, Republic of Congo; The African Commission on Human and Peoples' Rights meeting at its 50th Ordinary Session held from 24th October to 5th November 2011, in Banjul, The Gambia; Resolution 69 on the Protection of Human Rights Defenders In Africa



and the need to protect and promote the rights of human rights defenders because of the important role played by HRDs in the protection and promotion of human rights. Thus the Declaration's long title reads; "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms".

The UN Declaration on Human Rights Defenders in its Preamble defines HRDs as an individual, groups and associations contributing to the elimination of all violations of human rights including those working to promote or protect human rights from all sorts of professional backgrounds including individuals defending human rights in a professional or non-professional context. The text provides that the minimum standard's required of an HRD, is his/her acceptance of the universality of human rights and adherence to non-violent action.

Articles 3 and 4 of the Declaration on Human Rights Defenders outline the relationship of the declaration to national and international law with a view to assuring the application of the highest possible legal standards of human rights. States should therefore not subject human rights defenders to arbitrary deprivation of liberty because of their engagement in human rights activity.

The Declaration is not, in itself, a legally binding instrument. However, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding such as the International Covenant on Civil and Political Rights. Moreover, the Declaration was adopted by consensus by the General Assembly and therefore represents a very strong commitment by States to its implementation and thus the requirement that all law enforcement agencies adhere to the same when interacting with Human Rights Defenders.

2.3. The Declaration's Provisions.

The Declaration provides for the support and protection of human rights defenders in the context of their work. It does not create new rights but instead articulates existing rights in a way that makes it easier to apply them to the practical role and situation of human rights defenders. It gives attention, for example, to access to funding by organizations of human rights defenders and to the gathering and exchange of information on human rights standards and their violation. The Declaration outlines some specific duties of States and the



responsibilities of everyone with regard to defending human rights, in addition to explaining its relationship with national law. Most of the Declaration's provisions are summarized in the following paragraphs;

(a) Rights and protections accorded to human rights defenders

Articles 1, 5, 6, 7, 8, 9, 11, 12 and 13 of the Declaration provide specific protections to human rights defenders, including the rights:

- To seek the protection and realization of human rights at the national and international levels;
- To conduct human rights work individually and in association with others;
- To form associations and non-governmental organizations;
- To meet or assemble peacefully;
- To seek, obtain, receive and hold information relating to human rights;
- To develop and discuss new human rights ideas and principles and to advocate their acceptance;
- To submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may impede the realization of human rights;
- To make complaints about official policies and acts relating to human rights and to have such complaints reviewed;
- To offer and provide professionally qualified legal assistance or other advice and assistance in defense of human rights;
- To attend public hearings, proceedings and trials in order to assess their compliance with national law and international human rights obligations;
- To unhindered access to and communication with non-governmental and intergovernmental organizations;
- To benefit from an effective remedy;
- To the lawful exercise of the occupation or profession of human rights defender;
- To effective protection under national law in reacting against or opposing, through peaceful means, acts or omissions attributable to the State that result in violations of human rights;



- To solicit, receive and utilize resources for the purpose of protecting human rights (including the receipt of funds from abroad).

b) The Duties of States

States have a responsibility to implement and respect all the provisions of the Declaration. However, articles 2, 9, 12, 14 and 15 make particular reference to the role of States and indicate that each State has a responsibility and duty:

- To protect, promote and implement all human rights;
- To ensure that all persons under its jurisdiction are able to enjoy all social, economic, political and other rights and freedoms in practice;
- To adopt such legislative, administrative and other steps as may be necessary to ensure effective implementation of rights and freedoms;
- To provide an effective remedy for persons who claim to have been victims of a human rights violation;
- To conduct prompt and impartial investigations of alleged violations of human rights;
- To take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration;
- To promote public understanding of civil, political, economic, social and cultural rights;
- To ensure and support the creation and development of independent national institutions for the promotion and protection of human rights, such as ombudsmen or human rights commissions;
- To promote and facilitate the teaching of human rights at all levels of formal education and professional training.



c) The responsibilities of everyone

The Declaration emphasizes that everyone has duties towards and within the community and encourages us all to be human rights defenders.

Articles 10, 11 and 18 outline responsibilities for everyone to promote human rights, to safeguard democracy and its institutions and not to violate the human rights of others. Article 11 makes a special reference to the responsibilities of persons exercising professions that can affect the human rights of others, and

is especially relevant for police officers, lawyers, judges, etc.

While these provisions of the declaration are progressive and aim to provide the defenders with an enabling environment in delivering their human rights defense mandate, the operating environment has always presented challenges. Arbitrary arrests, intimidations, denial of bond/bail among others have characterized HRDs experiences when in conflict with the law.

2.4. National Framework

In the Kenyan Context, the Constitution provides under Article 2(5) and (6) that all international treaties and conventions ratified shall form part of the Kenyan law. Chapter 4 contains a progressive Bill of Rights that reiterates and reaffirms these rights as provided for in the international instruments including the right to life, liberty and fair hearing. However Kenya lacks an express policy or legislative framework that addresses the unique circumstances faced by HRDs in undertaking their important role.

2.5. Support Mechanisms for Human Rights Defenders

The Special Rapporteur on the situation of Human Rights Defenders repeatedly underlined the need to create and consolidate a safe and enabling environment for defenders and has elaborated on some of the basic elements that she believes are necessary in this regard. These elements include a conducive legal, institutional and administrative framework; access to justice and an end to impunity for violations against defenders; strong and independent national human rights institutions; effective protection policies and mechanisms paying attention to groups at risk; specific attention to women defenders; non-State actors that respect and support the work of defenders; safe and open access to international human rights bodies; and a strong and dynamic community of defenders.³

The Special Rapporteur had also expressed concern for the situation of human rights defenders in all countries, including both emerging democracies and countries with long-established democratic institutions, practices and traditions. Nevertheless, special emphasis has been placed on countries where: internal armed conflict or severe civil unrest exists; the legal and institutional

³ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, A/HRC/25/55



protections and guarantees of human rights are not fully assured or do not exist at all. The mechanisms are for use by the HRDs and it is thus paramount that the HRDs are aware of them and consequently makes use of them.



3.0. FINDINGS OF THE MONITORING EXERCISE

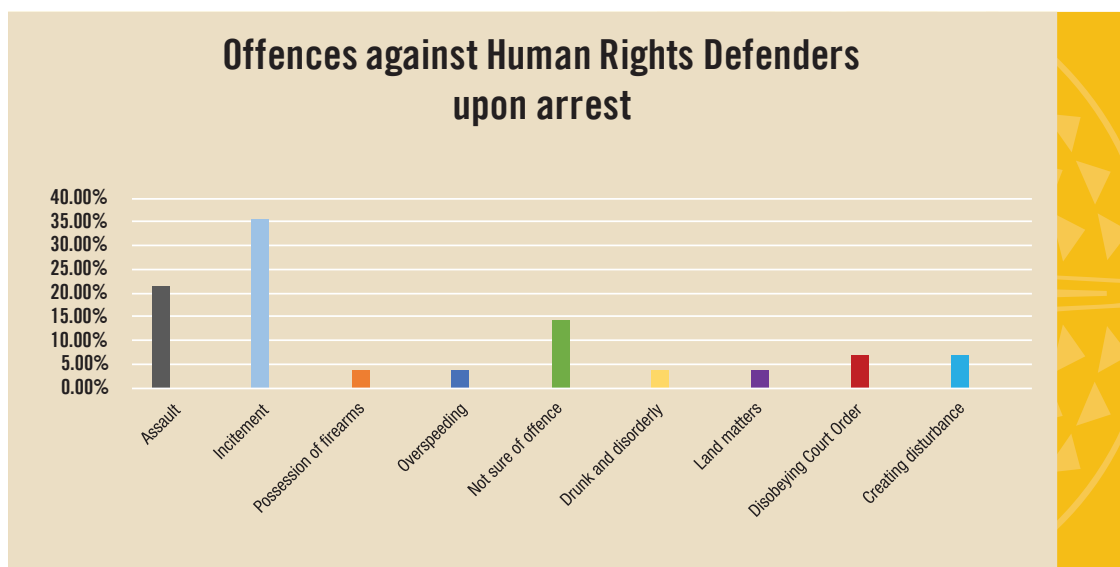
While the state has taken some measures in ensuring that the international provisions are taken care of as is required, challenges still persists that affect the work of HRDs which extends all the way to HRDs in places of detention or when in conflict with the law. In the last few years, and especially after the promulgation of the Constitution in 2010, a number of HRDs have been arrested prompting a sharp focus and scrutiny on the role of the state in protecting their rights. The data captured in this exercise emanated from questionnaires administered, interviews with key informants and focused group discussions. The monitoring exercise and compliance thereof was measured against the set parameters derived from the international human rights principles.



Photo 1: HRDs who participated in the FGD during the data collection for this report

3.1. Offences against Human Rights Defenders upon arrest

35% of the HRDs interviewed stated that they have been previously charged with incitement while 23% stated that they were charged with assault while the rest were charged with other offences such as incitement, possession of firearms, creating disturbance, disobeying court orders. This reflects the difficult working conditions for the HRDs in their pursuit of protection and promotion of human rights. In some instances, HRDS who find themselves in conflict with the law are not clear on the charges being preferred against them. Specifically, 14% indicated that they were not sure of the offences that they were charged with which makes it difficult to secure the support they need when faced with such circumstances. This can only be deemed to be an attempt to silence HRDs based on their stand on various matters affecting the society.



INTERVIEW

“In 2013, I complained that the head-teacher of Bukhalarire Secondary School had been hiking fees for unknown reasons and that the rate of teacher absenteeism was high. I mobilized parents of the school children in Bukhalarire Secondary School not to pay school fees. I was arrested and charged with incitement to violence and was released after posting bail. The criminal case was heard at the Busia Law Courts but was later dismissed.”

Interview with James Khadudu (HRD Busia County)



Photo 2: A section of HRDs during the FGD in Busia County

3.2. Malicious prosecution

Malicious prosecution has remained a challenge based on the work of HRDs within the Community. It mostly occurs in cases where HRDs are in conflict with the position taken by the state actors or their representative. In certain cases, malicious prosecution is undertaken so that the HRDs can withdraw some cases that are already under way within the criminal justice system. Thirty two of the HRDs interviewed during this exercise stated that they had faced malicious prosecution in one way or the other.



INTERVIEW

“I was arrested on 2nd June 2016 at around 8:30 pm by police officers from Marsabit Police Station and maliciously prosecuted for being a HRD. I was walking towards the Sub-County Hospital to visit a sick relative when I was confronted by two police officers in a GK Toyota land cruiser at Beijing area. I was asked to walk home or be whipped, so I asked the officers why they would whip me. One officer alighted and asked me who I was. He went back to the vehicle and came out with a whip and tried to assault me but I defended myself by holding the whip. The other officer who was in uniform and armed joined and they both assaulted me and forced me into the police vehicle. I was then taken to Marsabit Police Station and detained. At the station, one of the officers asked the arresting officers what they would charge me with. The arresting officer responded “huyo tutacharge na Bravo India”. This is a coined term used by law enforcement agencies to mean Bhang/Cannabis. I was detained and charged the next day with being in possession of narcotics (Case No 320/15). I was targeted because I had complained to the OCS Mr. Mwangi on several occasions that the officers attached to the station engaged in corrupt activities by receiving bribes from young men whom they arrested in town most evenings.”

Interview with Roselyn Nyeusi (HRD County HRD)

3.3. Treatment of HRDs while in places of detention

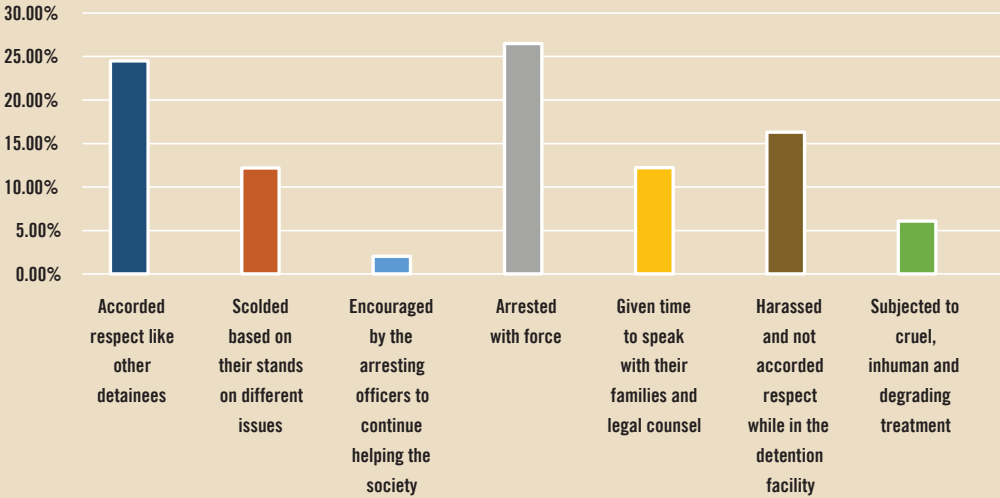
The UN Declaration on Human Rights defenders places high premium on the role of state in protecting the rights of HRDs when in conflict with the law and when they eventually happen to be arrested. According to the guidelines,⁴ the human rights defenders should not be held in temporary or administrative detention for the purpose of intimidation or coercion or to prevent them from carrying out their human rights work. The guidelines demand that Human rights defenders deprived of their liberty must always be treated with respect for and in accordance with international standards, without discrimination of any kind.

The following graph highlights the treatment of HRDs upon arrest and while at the police station before they are charged. Although 25% of the respondents indicated that the treatment they received was similar to that accorded to the other persons being detained, a similar percentage (25%) stated that they were forcefully arrested while 15% stated that they were harassed and not accorded respect while in detention. Upon further interrogation, 5% of these indicated that they were actually subjected to inhumane, cruel and degrading treatment.

4. By OSCE Office for Democratic Institutions and Human Rights (ODIHR)

All this points to the lack of appreciation of the work of HRDs by security agencies and the fact that often HRDs are treated as regular criminals a fact that goes to deepen the stigmatization and profiling of HRDs.

Maltreatment of HRDs while in places of detention



INTERVIEW

“I recall an incident in 1999 when I was arrested by police officers from Busia Special Branch for participating in a demonstration against the Government. The officers beat me badly and chained my hands to their vehicle after which they started driving the vehicle at a high speed and expected me to keep up with the vehicle’s speed. Twice, I fell and was pulled on the ground by the vehicle. I sustained very serious injuries but was not taken to hospital. I was detained at Busia Police Station for a day and was subsequently released without being charged.”

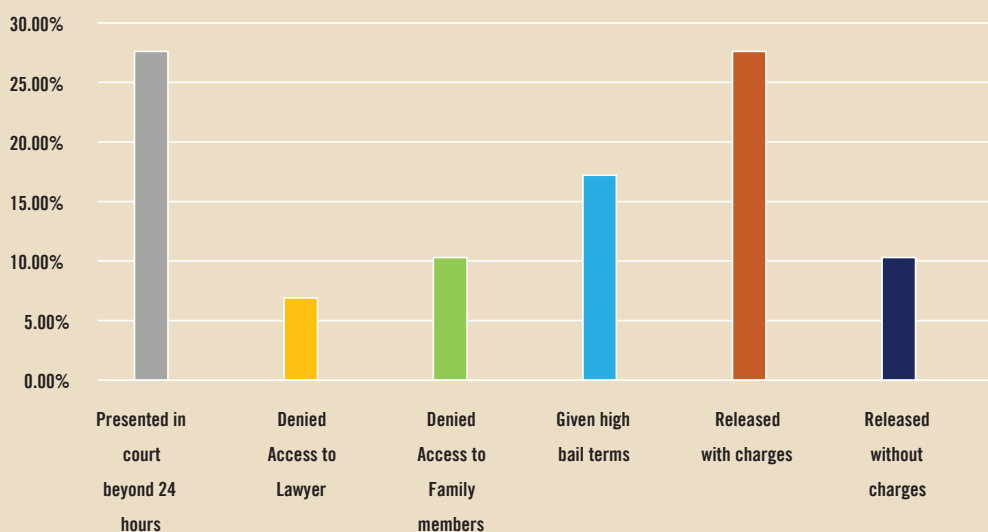
Interview with Brother John Kwoba (HRD Busia County)

3.4. Access to Justice and due process

HRDs face various challenges in accessing justice once they are arrested. In some instances, they have been presented in court beyond the prescribed time of 24 hours or released without charges. Specifically, 25% of the respondents reported that they were presented in court beyond the 24 hour constitutional requirement, while 25% stated that they were released without being charged. What this means is that the right to fair trial guaranteed under article 50 and those under article 48 on the access to justice of the Constitution continue to be violated. The right to legal counsel under was further violated as indicated by 25% of the respondents who stated that were denied access to their legal representative. This coupled with the fact that 15% of the respondents stated that they were subjected to high bail terms illustrates the difficulties HRDs experience in accessing justice. Further the high bail terms which have been described as punitive largely serve to discourage HRDs from doing their work. The overall effect of all this is the criminalization the work of HRDs and discourages those who might wish to engage in the human rights defense work. In some cases, HRDs were singled out for selective treatment/punishment to discourage them from their human rights work.



Access to Justice and due process



INTERVIEW

‘Because of the stand that I had taken on the various human rights violations that our people were being subjected to by the law enforcement agencies, I suspected of being part of the Mulungunipa uprising, a team that was causing political disturbance at the Coast.’ Mabavu wa Mabavu, a HRD from Kwale narrates how, the police came to his y family house at 3.00 am one morning to arrest him. A contingent of seven police cars d arrested him before taking him to Kwale Police Station where he stayed for 7 days. During the seven days of his stay at the police station, Mabavu was questioned about the witch doctor who was alleged to be administering oaths to MRC youth in Mulungunipa. I was later released without any charges being preferred against m and bonded to keep peace which I declined’ .

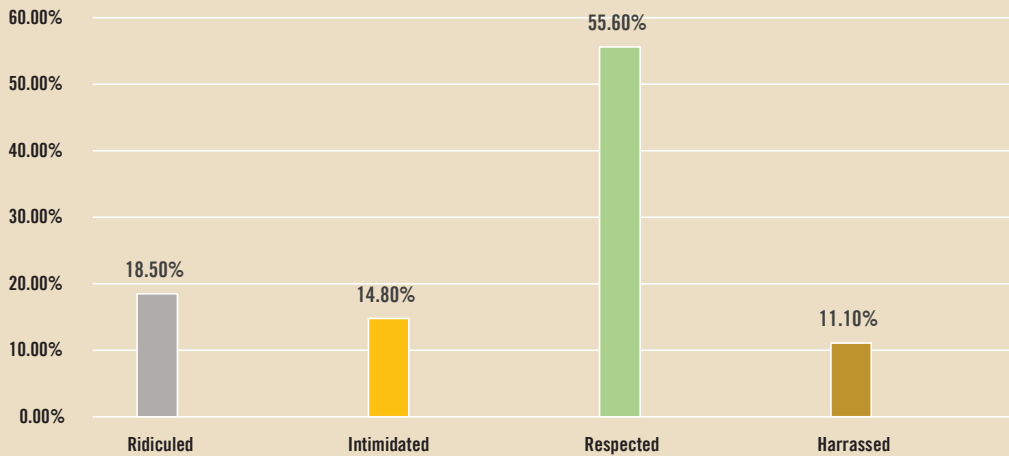
(Interview with Mabavu wa mabavu, HRD, Kwale County)

3.5. Treatment by other Detainees in the detention facility

While in remand and custody HRDs interact with persons detained or imprisoned for various offences. The population in prison is a microcosm of the population and therefore the treatment and perception of HRDs by other detainees is reflective of the general perception of the HRDS by the public. So for instance, fellow detainees not understanding their work, have gone on to bully and harass HRDs as depicted in the graph below. In some instances they provide paralegal support to detainees.



Treatment of HRDs by other detainees while in the detention facility



3.6. Effect of arrest on the families of HRDs

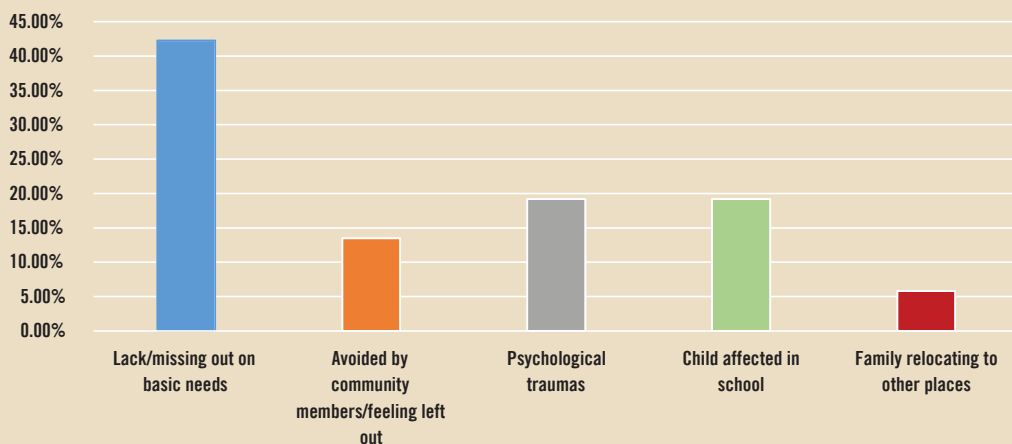
The families of HRDs are normally the hardest hit whenever the HRDs are arrested. This arises from the fact that majority of the HRDs are the heads of their families and thus have the responsibilities that goes with the same. It was observed that sometimes the risks associated with the HRDs extends to family members and acquaintances. This is compounded by the stigma and discrimination that families of the HRDs suffer as a result. In fact 5% of the respondents indicated that their families had to relocate on account of the discrimination that the families had suffered. This means that the work of HRDs on a number of occasions causes disruption to family life.

INTERVIEW


Police invaded my home with a gun pointed at my head and ordered me to stop cooking and accompany them to the police station. They told me that they had heard that I was a human rights defender and started searching my house. The officers destroyed everything they lay their hands on. Afterwards, the officers took me away, forcing me to leave behind my baby who was only two days old. My father-in-law and two brothers-in-law were also taken away for unexplained reasons. We were all taken to Amagoro AP Camp where we were accused of holding an illegal meeting. We were later transferred to Malaba Police Station where the officers wouldn't stop taunting me and threatening to charge me with very serious offences that would see me locked up for life. All this while, I had not been booked in the OB as required by law. In the end, I was released without being charged.

(Mary Amadau, HRD, Busia County)

Effect of arrest on the families of HRDs



3.7. Response and Community support of the work of HRDs



The community are the recipients of the work of the HRDs and thus it is important that they support the work of the HRDs in different aspects. The support that is required by the HRDs from the community includes visiting them while arrested, coming out as witnesses on the several cases facing HRDs, and publicly condemning the acts of intimidation and human rights violations committed on HRDs by the state among others.

Support by the professional groups such as the lawyers, the police, judges and others is also important. This includes giving preference to HRDs cases especially by the law enforcement agencies when it comes to investigating violations on the rights of HRDs, prompt investigations on HRDs when accused and have been arrested, prompt prosecutions of the cases by the police, prioritization of the cases against HRDs among other support.

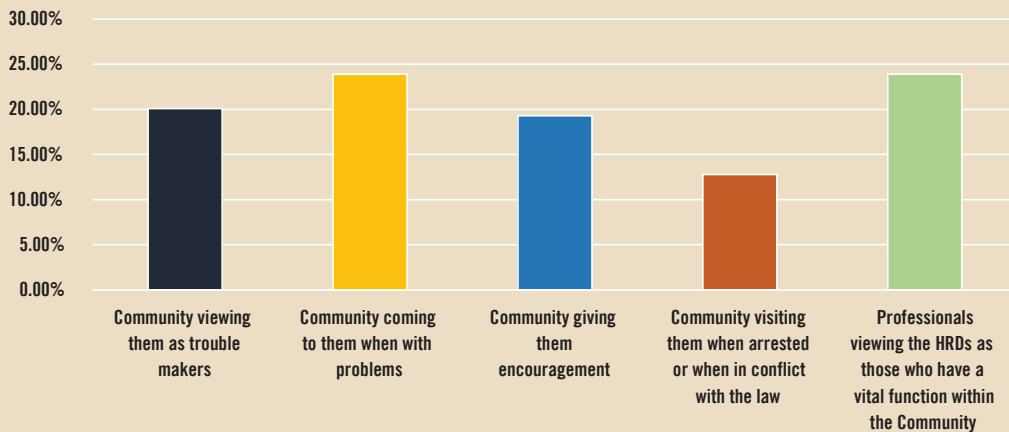
The community and the professionals support the HRDs in different aspects of their work.

3.8. Support mechanisms by the International Community

HRDs require support by the international community in different facets of their work especially when in conflict with the law. The support required differs in relation to the offences. This can include payment of bails/bonds, mobilizing for court attendances in solidarity, providing for asylum, speaking against the abuses that the HRDs are subjected to among others, asking the Government to



Response and Community support of the work of HRDs



provide for a favorable working environment to the HRDs among others. Discuss the graph

The work by the international community has been key in the HRDs work in the County and should be encouraged in all the fronts.



4.0. CONCLUSION AND RECOMMENDATIONS

Based on the above findings, the KNCHR hereby makes the following recommendations that are aimed at ensuring that the rights of HRDs are protected and promoted when in conflict with the law as well as to help in ensuring that human rights defence work is given the import that it deserves;

- a) The state has the primary responsibility of ensuring that there is protection and promotion of human rights and thus required to put in place the necessary mechanisms for carrying out this either in the form of legislation or practice. The Government of Kenya should thus put in place the necessary legislations such as a National Policy on Human Rights Defenders. It would only be through this that a favorable working environment would be ensured for the HRDs. Further, the state should take steps to prevent abuses including by public organs and institutions by openly condemning such acts and applying a policy of zero tolerance. The HRDs are important for the functioning of the state due to the checks and balances that they offer on the functioning of the various organs of the state.
- b) Law Enforcement Agencies plays an important role in the promotion and protection of human rights and thus are HRDs by the nature of this responsibility. However, LEAs do not see themselves as performing this important role. It is thus important for the LEAs to play an important role in working directly with the HRDs and avoid engaging in some of the acts like subjecting the HRDs to cruel, inhuman and degrading treatment when in conflict with the law. It would only be through the collaborative work between HRDs and LEAs that we shall expand the space under which human rights is enjoyed throughout the Country and by all Kenyans.
- c) Where criminal charges are brought against them, HRDs are entitled to a fair trial before a competent, independent and impartial tribunal. This includes the provision that human rights defenders accused of a crime have access to legal representation provided by a lawyer of their choice, are not put under duress to extract a confession and that



evidence, including witness statements, obtained through torture and other ill-treatment is excluded from legal proceedings. This is an aspect that needs to be taken into account by the judicial officers.

- d) The work that HRDs engage in is aimed at improving the conditions under which the general populace live. It is thus important that the general population provides maximum support to the HRDs when carrying out their duty as well as when in conflict with the law. This support is required in the form of visitation to detention facilities when detained, speaking against ills that the State may impose on the HRDs, encouraging members of the families of HRDs among others. It would only be through this that HRDs would get the required impetus to carry out their work and continue to benefit the overall community.
- e) There have been attempts to criminalize HRDs work through handing of very punitive bail and bond terms to HRDs when in conflict with the law which majority of the HRDs are unable to raise and thus may end up staying longer in detention facilities as members of their families or various organizations pool resources together to meet this requirement. It is important that judicial officers are sensitized on the important role played by HRDs so that favorable bail and bond terms are handed over to the HRDs when they appear before these judicial officers. Judicial officers should thus view the offences committed by HRDs with a human rights lens as opposed to viewing them as normal crimes.
- f) HRDs are members of respective communities that they serve and should thus be accorded the same treatment and services that the fellow community members are subjected to. The HRDs should thus not be subjected to any form of discrimination as has been witnessed in some of the regions such as in the allocation of devolved funds such as the CDF among others as well as intimidation by the community members should not be experienced by the HRDs . In cases where these are experienced, police and other state actors should be at the fore – front in carrying out prompt investigations and providing the necessary redress.



- g) Torture and any form of cruel, inhuman and degrading treatment is prohibited by various international laws and pieces of various local legislations despite the absence of a specific anti – torture legislation. To this end, it is important any allegation of torture that might be reported by HRDs based on their interactions with the state actors must be promptly investigated and the required action undertaken as required by law. Cases of HRDs being subjected to these treatment have been reported in the Country even beyond the area of this study with some leading to loss of life.
- h) Different authorities should take into account specific problems that HRDs face but more specifically women and other human rights defenders who are at particular risk may face in detention and thus endeavor protect them from gender-specific violations while in detention, including through the provision of gender sensitivity training for police and law enforcement personnel, and provide appropriate services in accordance with relevant international standards.



ANNEX 1: SELF – ADMINISTERED QUESTIONNAIRE FOR HRDS.

Introduction

The KNCHR with the support of the European Union has been implementing a two years project dubbed “Safeguarding Constitutional Gain, Human Rights Defender and Security” in the counties of Kwale, Busia and Marsabit. The project seeks to enhance the space under which the HRDs work playing close attention to the collaboration required by the HRDs to deliver on their mandate through working with various actors that include the media, the law enforcement agencies and the overall community.

An aspect of this project involves visiting places of detention to determine the conditions under which the HRDs are held with an aim of working towards making improvement in policies, laws, practices on these places for the benefit of the HRDs and the general members of the public.

This self – administered questionnaire seeks to fulfill this purpose by collecting the experiences which shall then be collaborated with data that has been collected through visits to prisons, chiefs camps, administration police camps, the courts, individual interviews with HRDs, individual interviews with HRD families and experts in the subject matter.

Instructions

Provide as short answers as is possible.

1. Have you ever been arrested or in conflict with the law?
2. How times have you been arrested?
3. What were the offences?
4. How were you treated by the arresting officer?
5. Did the arresting officer understand the rights of arrested persons?
6. Name the detention facility where you were taken?
7. How were you treated while in the detention facility?
8. How long did you take within the detention facility?
9. Were you presented in court? If yes, what was the charge preferred on you? If no, what explanation was provided by the police for not



preferring charges on you?

10. Did you get any legal representation?
11. Were you granted bond or bail? How much was it?
12. How did you raise the bond/bail?
13. While incarcerated in the Prison after being charged, how were you treated by the Prison Officers? Did they have the understanding of the rights of arrested persons?
14. How did your arrest affect your family?
15. What was the response of the community upon your arrest?
16. Have you ever been supported directly or indirectly by the international community when faced by any kind of danger due to the nature of your work? If yes, provide an explanation.
17. Have you faced any challenges in forming any association or group for purposes of advocacy? If yes, explain. Did this lead to your arrest?
18. Have you received the requisite support in terms of receiving all the information required for purposes of carrying out your advocacy work in respect to promotion and protection of human rights?
19. Have you participated in the running of the affairs of your administrative unit at the local level?
20. Have you at all times received the necessary remedy both from state and non – state actors when faced by any human rights violation? If yes, provide an explanation.
21. Have you ever been subjected to punishment of any adverse action based on your work of defending human rights? If yes, provide an explanation.
22. Have you ever contributed in any way to public awareness on human rights and fundamental freedoms? If yes, provide an explanation.
23. Provide your recommendations to different actors in dealing with HRDs when in conflict with the law as well as when in detention facilities.









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