



Devolution Manual

A human rights-based
Tool for governance



Published by:

Kenya Human Rights Commission (KHRC),
Opposite Valley Arcade, Gitanga Road,
P.O. Box 41079, 00100 GPO, Nairobi, Kenya.
Tel: +254 020-2106709 / 2044545 / 202106763
Fax: +254 020-3874997
Email: admin@khcr.or.ke
Website: www.khrc.or.ke

All parts of this publication may be reproduced freely, provided the Kenya Human Rights Commission is duly acknowledged.
KHRC 2015

Cover Illustration: Human rights based approach in devolution protects the interests of citizens in the counties.

Devolution Manual

A human rights-based Tool for governance

Table of Contents

| | | | |
|--|----|--|----|
| Acronyms | 3 | 3.4.1. National Social Security Fund Board | 22 |
| Glossary of Terms | 4 | 3.4.2. National Cereals and Produce Board (NCPB) | 22 |
| Overview | 6 | 3.4.3. National Labour Board | 23 |
| Acknowledgements | 7 | 3.5. Integrity, Transparency and Accountability | 23 |
| Executive Summary | 8 | 3.5.1. Office of the Controller of the Budget (OCoB) | 23 |
| Chapter 1 | 9 | 3.5.2. Commission for the Implementation of the Constitution (CIC) | 24 |
| 1.0. Devolved Governance | 9 | 3.5.3. Commission on Revenue Allocation (CRA) | 24 |
| 1.1. Dimensions of Devolution | 9 | 3.5.4. The National Treasury | 25 |
| 1.2. Objects and Principles of Devolution in the Kenyan Constitution | 9 | 3.5.5. The Office of the Auditor General | 25 |
| 1.2.1. Principles of Devolved Government | 10 | 3.5.6. Ethics and Anti-Corruption Commission (EACC) | 26 |
| 1.3. Powers of the County Government | 10 | 3.6. Access to Justice and Security | 26 |
| 1.4. Features of Devolution in Kenya | 10 | 3.6.1. The Attorney General (AG) | 26 |
| 1.4.1. Functions of the County Governor | 11 | 3.6.2. The Director of Public Prosecution (DPP) | 26 |
| 1.4.2. Roles of County Assemblies | 11 | 3.6.3. The Judiciary | 26 |
| 1.4.3. Roles of County Executive Committee | 12 | 3.6.4. The Kenya Defense Forces (KDF), the National Intelligence Service (NIS) and the National Police Service (NPS) | 27 |
| 1.5. Citizen Participation | 12 | 3.7. Tax Justice, Fiscal Prudence and Trade Development | 27 |
| 1.5.1. Structure for Citizen Participation | 12 | 3.7.1. The Salaries and Remuneration Commission (SRC) | 28 |
| 1.6. Structure of the National and County Government | 13 | 3.7.2. Central Bank of Kenya (CBK) | 28 |
| Chapter 2 | 14 | 3.7.3. Kenya Revenue Authority (KRA) | 28 |
| 2.0. Human Rights-Based Approach to Devolved Governance | 14 | 3.8. Natural Resource Governance | 28 |
| 2.1. Human Rights in Relation to Devolution | 14 | 3.8.1. The National Land Commission (NLC) | 29 |
| 2.2. Classification of Human Rights | 14 | 3.8.2. National Environment Management Authority (NEMA) | 29 |
| 2.3. Guiding Human Rights Principles | 15 | 3.8.3. Kenya Forest Service (KFS) | 29 |
| 2.4. Human Rights-Based Approach to Development | 17 | 3.8.4. Water Resources Management Authority (WARMA) | 29 |
| 2.4.1. HRBA Key Guiding Principles | 17 | 3.9. Other Fundamental Rights and Freedoms | 30 |
| 2.4.2. Key Issues in HRBA | 17 | 3.9.1. National Cohesion and Integration Commission (NCIC) ³⁴ | 30 |
| 2.4.3. Programmatic Explanation of HRBA | 18 | 3.10. Devolution of Power | 30 |
| 2.4.4. HRBA Vs the Needs-Based Approach | 18 | 3.10.1. Ministry of Devolution and Planning (MoDP) | 31 |
| Chapter 3 | 19 | 3.10.2. National and County Government Coordination Summit (NCGCS) | 31 |
| 3.0. Legal and Institutional Frameworks in Devolved Governance | 19 | 3.10.3. Intergovernmental Technical Committee (IGTC) | 31 |
| 3.1. People of Kenya | 19 | 3.10.4. Council of County Governors (CCG) | 32 |
| 3.2. The Transition Authority | 19 | Chapter 4 | 33 |
| The three key components of effective public participation are; | 20 | 4.0. Public Finance Management in Devolved Governance | 33 |
| • Public communication and access to information, | 20 | 4.1. Structure of Budget | 33 |
| • Inclusion of minorities and marginalized groups; | 20 | 4.2. Budget Process in Kenya | 34 |
| • Civic education | 20 | 4.3. County Budget Making Process | 35 |
| 3.3. Equality and Non-discrimination | 20 | REFERENCES | 39 |
| 3.3.1. The Kenya National Human Rights Commission (KNCHR) | 20 | | |
| 3.3.2. The National Gender and Equality Commission (NGEC) | 21 | | |
| 3.3.3. The Commission on Administrative Justice (CAJ) or 'The Ombudsman' | 21 | | |
| 3.4. Economic and Social Rights Development | 22 | | |

Acronyms

| | |
|-------|--|
| AG | Attorney General |
| BSP | Budget Policy Statement |
| CAJ | Commission on Administrative Justice |
| CAG | County Government Act |
| CBK | Central Bank of Kenya |
| CIC | Constitution Implementation Commission |
| CRA | Commission on Revenue Allocation |
| CCG | Council of County Governors |
| NCGCS | National County Government Coordination Summit |
| CPU | County Planning Unit |
| CIDP | County Integrated Development Plan |
| CE | County Executive |
| CEM | County Executive Member |
| CFSP | County Fiscal Strategy Paper |
| CBROP | County Budget Review and Outlook Paper |
| DB | Duty Bearer |
| DPP | Director of Public Prosecution |
| DE | Development Expenditure |
| ESCR | Economic Social and Cultural Rights |
| EACC | Ethics and Anti-Corruption Commission |
| EACA | Ethics and Anti-Corruption Act |
| HRBA | Human Rights Based Approach |
| IGTC | Intergovernmental Technical Committee |
| KDF | Kenya Defense Force |
| KFS | Kenya Forest Services |
| KRA | Kenya Revenue Authority |
| MDA | Ministries Departments and Agencies |
| MoDP | Ministry of Devolution and Planning |
| NGEC | National Gender and Equality Commission |
| NCIC | National Cohesion and Integration Commission |
| NSSF | National Social Security Fund |
| NCPB | National Cereals and Produce Board |
| NIS | National Intelligence Service |
| NPS | National Police Service |
| NLC | National Land Commission |
| NEMA | National Environment Management Agency |
| OCOB | Office of the Controller of Budgets |
| PFMA | Public Finance Management Act |
| SRC | Salaries and Remuneration Commission |
| TA | Transition Authority |
| TDGA | Transition to Devolved Government Act |
| WARMA | Water Resources Management Authority |

Glossary of Terms

Devolution - This is the transfer of functions, resources and power to the sub-national levels of government. It is a movement to place governmental power in the hands of elected or appointed managers operating at a level closer to the beneficiaries of government actions. Devolution seeks to bring the government closer to the people.

Administrative devolution - The devolution of decision making institutions: parliament and county assemblies.

Citizen Participation -The direct ways in which citizens and other stakeholders influence and exercise control in governance on matters that affect their lives. Participation therefore is regarded as a process, space and capacity for citizens and other actors to exercise their rights.

Fiscal Devolution -The decentralization of number and types of services delivered and the revenues assigned to each level of government.

Political Devolution - The transfer of political decision-making authority and accountability mechanisms available to the levels of government.

Human Rights - Basic entitlements; goods, services and circumstances, that a human being needs in order to survive and live in dignity

Human Rights-Based Approach - A development programming approach that is underpinned by human rights principles and standards. It considers the processes of planning, implementation, monitoring and evaluation.

Public Finance Management - All the phases of the budget cycle, for instance the preparation of the budget, internal control and audit, procurement, monitoring and reporting arrangements and external audit. The broad objectives of public financial management are to achieve overall fiscal discipline, allocation of resources to priority needs, and efficient and effective allocation of public services.

Development Expenditure- Also known as capital expenditure, it refers to the spending that results in the government acquiring or improving long-term assets such as schools, hospitals, or roads.

Recurrent Expenditure - The spending on goods and services required by the government in order to provide its services. They include the salaries and wages of employees, expenses incurred in procuring equipment, stationery, furniture and vehicles maintenance.

Budget Policy Statement (BPS) - A 'pre-budget statement' produced by the National Treasury by mid-February annually in the preparation phase of the budget cycle. It reflects the broad plans for the next financial year and in the medium term with details on macroeconomic trends such as

Overview

the size of the economy, inflation and interest rates to guide budget preparations. Based on these trends this document provides overall estimates of revenues and spending plans.

Budget Review and Outlook Paper - This budget document examines government's performance in the previous financial year with regard to the extent to which revenue and expenditure targets were met. In addition, it also discusses the outlook and updates of both revenue and expenditure for the forthcoming budget year as reflected in BPS.

Division of Revenue Bill (DoRB) - The Bill introduced in Parliament to determine how revenue raised by the national government will be shared between the national government and the county governments.

County Allocation of Revenue Bill, (CAoRB) - Based on the total amount indicated as money that will be transferred to all the 47 counties as indicated in the DoRB, this Bill is consequently tabled in parliament determine how this amount will be shared amongst each of the 47 counties. The equitable allocation to each county is based on the approved formula as recommended by the Commission on Revenue Allocation.

County Budget Review and Outlook Paper - This is the county equivalent of the Budget Review and Outlook Paper.

County Fiscal Strategy Paper - The equivalent of the BPS produced at the County level.
Debt Management Report - In pursuit of strengthening debt management and in line with reforms on public debt, a Debt Management Office was established. As part of its deliverables it produces a report as a way of disseminating public debt information.

The devolution process in Kenya has been touted as one of the most rapid and ambitious in the world. The process has been punctuated by new challenges and opportunities as the country builds county governments from scratch. Elections in March 2013 marked the official launch of devolution. Fourty counties governors and county assemblies were elected and embarked on the daunting task of setting up new institutions. A national senate, constituting of senators elected from each of the 47 counties, was also formed.

Kenya adopted devolution as a strategy to improve governance and remedy institutional deficiencies that engendered the former highly centralized regime. These include: bureaucratic inefficiencies, lack of accountability, unequal distribution of resources and low levels of community participation in local development.

In the devolved structure, the newly developed county governments have their raison d'être in the provision of goods and services whose consumption is limited to their own jurisdictions. Since outputs of such public goods and services are tailored to the particular preferences and circumstances of their counties, devolution is expected to increase the economic welfare of constituents.

A key challenge in the realization of the anticipated 'big bang' effect of devolution is lack of accurate information among stakeholders on the subject and how to engage and influence outcomes. In view of this glaring gap, the Kenya Human Rights Commission (KHRC) has developed this publication which will act as an information tool for stakeholders. The KHRC hopes that through this tool, it will ignite interest among readers, particularly on devolved governance, ought to deliver access to rights, service delivery and increase citizen participation which is a duty and right enshrined in Kenya's Constitution.

We hope that this publication will be useful to government officials, community-based social auditors and trainers, and citizens in understanding:

- a) The devolved system of governance;
- b) The Human Rights Based Approach (HRBA) to devolved governance; and
- c) The legal and institutional framework of devolved governance

This document is also expected to enlighten rights holders on the mandates of different institutions and offices created by devolution with the intention of empowering them to demand accountability and service delivery. Finally, this manual serves as a good reference document to educators, scholars and researchers interested in the subject of devolved governance.

Acknowledgements

The Kenya Human Rights Commission (KHRC) is most grateful to our community based human rights networks (HURINETs) at the counties, including our national partners from state and non-state actors and donors who repeatedly observed that there is a knowledge gap on Human Rights Based Approach to Devolved Governance amongst duty bearers and rights holders. Devolved governance is a new concept that Kenyans are implementing and the process is beset by a plethora of challenges and opportunities that we can learn from moving forward as counties grapple with their mandate to deliver services.

The KHRC is greatly indebted to Samwel Oyomo – Program Advisor - Accountability and Devolution for conceptualizing this project and ensuring a comprehensive compilation of this informative yet simple publication. We appreciate Nduta Kweheria; former Programme Manager - Economic and Social Rights, for overseeing the initial work around this project. We acknowledge Atsango Chesoni; Executive Director, for providing the requisite strategic and political support during the development of the manual and writing the foreword to this publication. KHRC appreciates Davis Malombe, the Deputy Executive Director and Elizabeth Kariuki; Programme Manager - Economic and Social Rights for providing the necessary technical guidance and editorial input. Special appreciation to Martin Mavenjina, Mukami Wangai, Githara Chuchu and Lyons Njenga for their extensive research and input in one Chapter of this manual. KHRC also thanks Audrey Wabwire - Communications Manager, for editing and overseeing the printing, publication and dissemination of this manual.

KHRC gives special thanks to Trocaire for the financial support that enabled the publication of this manual. We also appreciate other development partners for their support in respect of related projects and programmes of the commission. The views and perspectives expressed in this document are those of the KHRC.

Executive Summary

This manual breaks down various definitions of devolution in a bid to demystify this form of governance. The various roles and structures of leadership are defined in order to enable citizens to understand available avenues for participation and civic engagement.

The ‘Human Rights Based Approach in devolved governance’ is the aspirational terminology that refers to the duty bearer and right holder. This classifies certain human rights and explains the underpinning principles. The Human Rights Based Approach (HRBA) is highlighted herein to explore guiding principles and key issues that link human rights to development.

The discussion on governance institutions seeks to enhance users’ understanding on the roles mandated to respective public institutions. It provides users with a catalogue of institutions through which they can channel their grievances for redress.

Public Finance Management in Devolved Governance is broken down to explain the significant changes that the constitution has introduced in the budget making process from the principles of public management in Chapter 12 of the constitution. It concludes by outlining the 8-stages in the county budget making process by highlighting key documents and reports and spaces available for citizen engagement in the entire budget making cycle.

Finally, this manual complements KHRC’s Ten-Point Model County Award Criteria and Scheme which is a human rights-centred framework on devolved governance. This manual is offers a unique angle on devolution through consideration of human rights, and should thus be used as a point of reference in such matters.

Chapter 1

1.0. Devolved Governance

| | |
|------------|---|
| Objectives | <ul style="list-style-type: none">To explain the meaning of devolved governance, its structure and roles and responsibilities of elected and appointed state officers.To highlight spaces available for citizen participation in the management of the county government day to day affairs. |
|------------|---|

Devolved governance refers to the transfer of functions, resources and power to the sub-national levels of government. It is a movement to place governmental power in the hands of elected or appointed managers operating at a level closer to the beneficiaries of government actions. Devolution seeks to bring the government closer to the people. The devolved levels of government assume full responsibility and accountability for specific functions given by the constitution of Kenya Schedule 4. The purpose is to promote participatory democracy and sustainable development.

1.1. Dimensions of Devolution

There are 3 primary areas of devolution:

Administrative devolution – This refers to the devolution of decision making institutions such as the parliament and county assemblies.

Fiscal Devolution – This refers to the decentralization of number and types of services delivered and the revenues assigned to each level of government.

Political Devolution – This is the transfer of political decision-making authority and accountability mechanisms available to the levels of government.

1.2. Objects and Principles of Devolution in the Kenyan Constitution

The powers granted in Chapter 11 of the Constitution enables counties to govern themselves, including raising revenue, making laws and electing local leaders.

Article 174 of the Constitution outlines nine specific objects as follows:

- Promoting democratic and accountable exercise of power;
- Fostering national unity by recognizing diversity;
- Giving power of self-governance to the people and enhancing their participation in the exercise of the powers of state and in making decisions affecting them;
- Recognizing the right of communities to manage their own affairs and development;
- Protecting and promoting the interests and rights of minorities and marginalized communities;

- Promoting socio-economic development and providing easily and accessible services throughout Kenya;
- Ensuring equitable sharing of national and local resource throughout Kenya;
- Facilitating further decentralization of state organs, their functions and services from the Capital of Kenya;
- Enhancing checks, balances and separation of powers.

1.2.1. Principles of Devolved Government

Article 175 of the Constitution lists and describes the principles of devolution in Kenya;

County governments shall be based on democratic principles and the separation of powers. County governments shall have reliable resources so that they can govern and deliver services effectively and efficiently. The county government's representative bodies shall be comprised of not more than two-thirds of the same gender.

1.3. Powers of the County Government

The County Government Act, 2012 grants specific powers to County Governments as follows:

- Entering into contracts;
- Acquiring land;
- Delegating functions to county and sub-county institutions;
- Partnering with public or private institutions;
- Establishing agencies and departments for services and other functions

1.4. Features of Devolution in Kenya

The most prominent of these features are:

Level of Government – The sovereign power of the people is exercised at both the national and county levels of government. These two levels have distinct functions, roles and responsibilities. As much as they are distinct, the two levels of government are also connected to each other. According to Article 6(2) of the Constitution, the two levels shall be interdependent and conduct their affairs through consultation and cooperation. The national government is instrumental in ensuring that devolution delivers services to the people as outlined in Schedule 4 of the constitution. This is by providing resources through transfers and also giving policy guidance to the counties. The constitution has also created national institutions that are mandated to provide national government's functions at the counties.

Revenue Generation – Revenue sharing and generation are other distinct features of the Kenya’s model. Chapter 12 of the constitution declares that the 2 levels of government shall divide equitably the revenues raised nationally. Article 203 (2) of the constitution stipulates that 15% will be allocated to the 47 counties. Art 202(2) provides a possibility of county government receiving additional allocations conditionally or unconditionally.

Decision Making Organs – The constitution places national political power in the hands of national executive and Parliament. At the county level, the 47 county assemblies and county executive committees exercise the political power.

1.4.1. Functions of the County Governor

The Governor is charged with the following responsibilities:

- Implement both national and county legislations (Article 183);
- Raise money for the county;
- Use public funds prudently;
- To ensure equity in resource distribution in the county;
- Represent the county at the national level;
- Perform any functions of National Government transferred to County level in compliance with Article 187;
- Ensure the County is Secure: Article 239 (5) states that ‘National security organs are subordinate to civilian authority’. This means as the County’s Chief Executive, the Governor has a duty to play in securing the county;
- To give an Annual State of the County Report(Article 132);
- Ensure that the Deputy Governor, County Executive Committee and Public Service function competently
- Assent to Bills and Publish County Gazette;
- Ensure that the County is economically viable and competitive in local and international trade and relations;
- To control corruption and adopt measures that control inflation.

1.4.2. Roles of County Assemblies

As the legislative authority at the county level, the county assemblies are in charge of drafting and passing laws. In addition, clause 8 of the County Government Act, 2012 outlines additional roles as:

- Vetting and approving nominees for appointment to county public office;
 - Approving budget and expenditure of the county government;
 - Approving the borrowing by county government;
 - Approving county development planning.
- Clause 9(1) of the County Government Act, 2012 outlines specific roles for

members of the county assemblies as to:

- Maintain close contact with the electorate and consult them on issues before or under discussion in the county assemblies;
- Present views, opinions and proposals of the electorate to the county assembly;
- Attend functions of the county assembly and its committees;
- Provide a linkage between the county assembly and the electorate on public service delivery;
- Extend professional knowledge, experience or specialized knowledge to any issue for discussion in the county assembly.

1.4.3. Roles of County Executive Committee

Article 34 of the County Government Act, 2012, stipulates that:

“the County Executive Committee shall exercise the executive authority, in accordance with the constitution and relevant national and county legislations; for the well-being and benefit of the people; taking into account the objects and principles of devolution set out in articles 174 and 175 of the constitution; while enhancing self-governance for communities in the management of development programs; ensuring protection and promotion of interest of the minorities and marginalized communities; promote gender equity, social and economic development and equitable sharing of resource in the county”.

1.5. Citizen Participation

Clause 85 of the County Government Act, 2012 list specific principles as:

- Timely access to information related to policy formation and implementation;
- Reasonable access to formulating and implementing laws and regulations;
- Protect and promote the interest and rights of minorities, marginalized groups and communities;
- Review decisions or redress grievances with particular emphasis on persons of marginalized communities;
- Decision making between county governments and non-state actors is a balance of shared responsibility, ownership and oversight;
- Promote public private partnerships to encourage direct dialogue and determine action on sustainable development;
- Recognize and promote the valuable role of citizen participation in government facilitation and oversight.

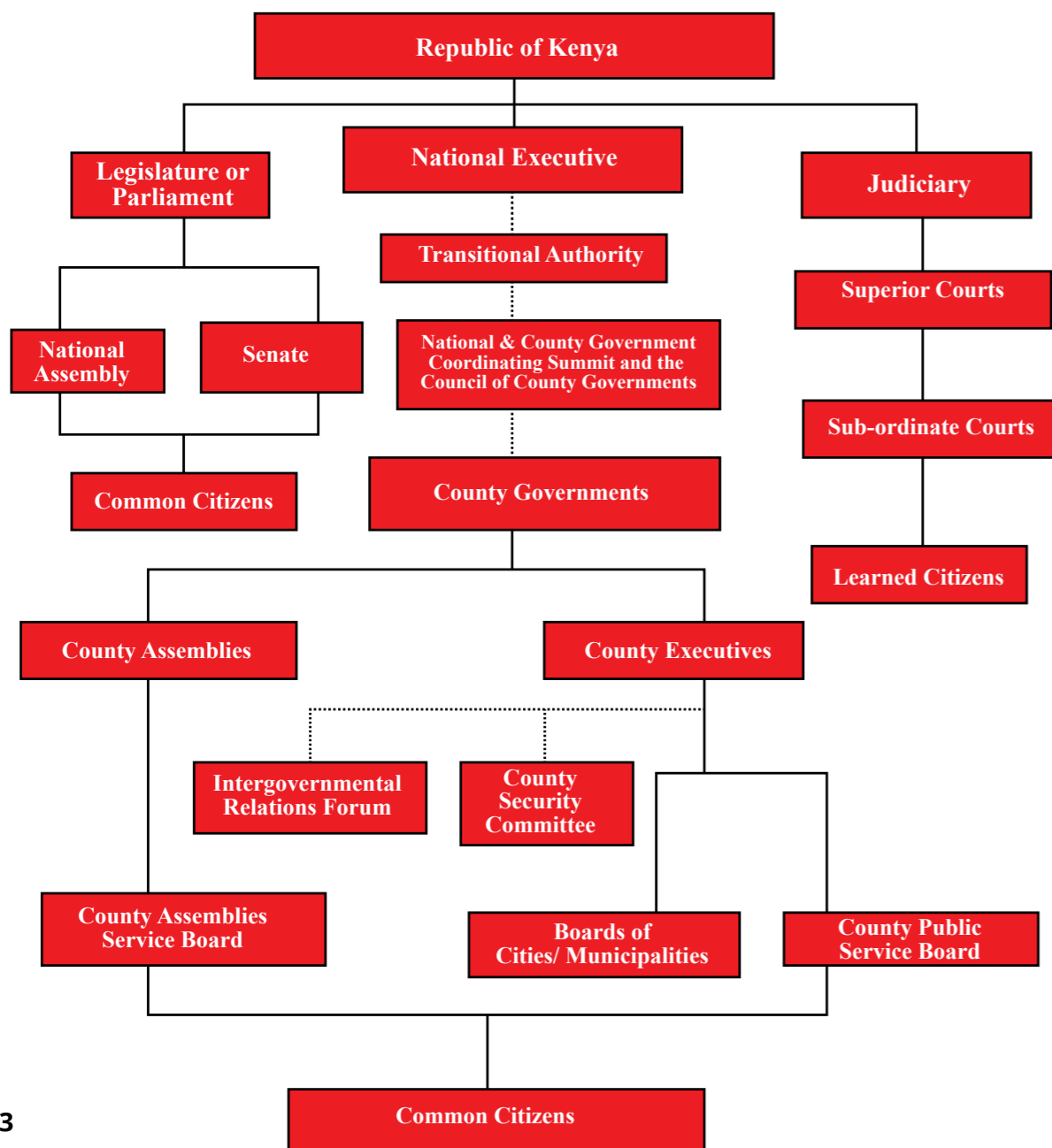
1.5.1. Structure for Citizen Participation

Clause 91 of the County Government Act, 2012 places responsibility for establishing structures for citizen participation:

Chapter 2

- Information communication technology based platforms;
- Town hall meetings; Budget presentation and validation foras;
- Notice Board: announcing jobs, appointments, procurements, awards and other important announcements of public interest;
- Development project sites;
- Avenues for the participation of people’s representatives including but not limited to members of the National Assembly and Senate;
- Establishment of citizen fora at county and decentralized units.

1.6. Structure of the National and County Government



2.0. Human Rights-Based Approach to Devolved Governance

| | |
|------------|--|
| Objectives | <ul style="list-style-type: none"> • To understand what human rights are and explain the link between Human Rights Based Approach to Development that devolution seeks to entrench at counties. |
|------------|--|

Kenya is a signatory to various international human rights instruments including the International Covenant on Economic, Social and Cultural Rights which Kenya ratified in 1972 and signed in 1976. International human rights conventions are legally binding instruments under international law. Article 2(6) of the Constitution of Kenya recognizes international and regional treaties that have been signed and ratified by Kenya as part of Kenyan laws. This convention and various others instruments relating to economic and social rights have been domesticated through their inclusion in the bill of rights under Article 43 in Constitution of Kenya, 2010.

2.1. Human Rights in Relation to Devolution

Human rights are defined as the basic entitlements such as goods, services and circumstances that a human being requires in order to survive and live in dignity

Two key components of this definition are;

Needs - Human rights are about needs not wants. These conditions are imperative for the survival of a human being.

Dignity - It is not enough to just be alive; one must also live with dignity as it has a direct bearing on the quality of life where dignity means. The shared perception that one matters, is recognized, respected, valued and appreciated in one’s community. Government bears the greatest responsibility of facilitating access to rights for all. Others duty bearers include citizens, institutions, companies or individuals. However duty bearers may become right holders with varying circumstances.

For Example

A child has a right to education (right holder). The Government, parents and teachers have a duty to deliver the right to education (duty bearers, while the child has a duty to learn – attend class punctually, be disciplined, do homework etc. (duty bearer).

2.2. Classification of Human Rights

Human rights are classified into;

1st Generation - Civil and political rights. These gives voice to citizens. They are captured

in the Bill of Rights Chapter 4 Articles 26 - 39 of the Constitution of Kenya.

2nd Generation - Economic, social and cultural rights (ESCR). These are provided for under Article, 41 and 43 and Chapter 5 of the Constitution of Kenya. These provisions secure the right of citizens to access basic services and own and manage productive resources for sustainable livelihoods.

3rd Generation rights - Developmental and group rights. These cater for minorities and marginalized groups. They are stipulated in the Constitution in articles 53- 57.

2.3. Guiding Human Rights Principles

Universality and Indivisibility - Human Rights apply to everyone. The entire premise of the framework is that people are entitled to these rights by virtue of being human. Equality and Non- Discrimination- All human being are born equal. Human rights must be guaranteed without discrimination of any kind. This includes not only purposeful discrimination, but also protection from policies and practices which may have a discriminatory effect.

Participation and Inclusion - People have a right to participate in decision making regarding protection of their rights. This includes but is not limited to, input on government decisions about rights. To ensure human rights, governments must engage and support the participation of civil society on these issues.

Accountability and Rule of Law- Governments must create mechanisms of accountability for the enforcement of rights. It is not enough that rights are recognized in domestic law or in policy rhetoric, effective measures must be executed so that the government is held accountable if rights are violated. Government decisions and administration of justice must at all times be guided by rule of law.

State or County Obligations - The State or County has the obligation to respect, protect and fulfill. This is known as the tripartite typology and should be looked at from the point of view of “obligations of conduct”. These are the guidelines which the duty holder should follow or abstain from and is all stipulated in the Constitution of Kenya Article 21. These obligations are discussed below.

- i. **Obligation to respect** - The State or County is expected to refrain from doing anything violating the integrity of the individual or his/her freedom of action. It should not to interfere with or impair their declared rights.
- ii. **Obligation to protect** - The State or County should guard and shield the rights-holder from having the enjoyment of their right taken away. The state should take legislative and other measures to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of individual. This is achieved by preventing third parties from violating human rights. Protection can be achieved through institutional

machinery such as the police, laws, and prisons, among others.

- iii. **Obligation to fulfill** - The State or County is required to adopt deliberate measures aimed at achieving access to education, work, health services, adequate living standards and other social goods and services. This can be achieved by putting in place appropriate legislation, judicial and administrative measures. It requires the State to expend funds and create the institutions that are necessary to promoting acceptance of the right

State / County Obligation Chart

| 5AQ State obligations | Availability | Accessibil- ity | Affordabil- ity | Acceptability | Adequacy | Quality |
|--------------------------|--------------|--------------------|--------------------|---------------|----------|---------|
| Obligation to respect | | | | | | |
| Obligation to protect | | | | | | |
| Obligation to fulfil | | | | | | |

Progressive realization of rights

The concept of ‘progressive realization’ seeks to describe the steps taken by the State to meet its obligations in connection to a particular right. The State has the obligation under the constitution and international rights treaties to take appropriate measures towards full realization of economic, social and cultural rights to the maximum of their available resources. This availability of resources recognizes that the realization of these rights can be hampered by a lack of resources. The State has to demonstrate that appropriate measures will be taken to address the inadequacy of resources so that it does not delay the realization of this right.

Lack of resources cannot justify postponement of this right. The State has to demonstrate that effort is made to improve the enjoyment of economic, social and cultural rights, even when resources are scarce. This effort must be reflected in target programmes to protect the poor, the marginalized and the disadvantaged.

Prohibition of Retrospectivity

The duty of progressive realization imposes a corresponding prohibition on retrogressive measures. This is a measure set according to available resources on retrospective measures.

2.4. Human Rights-Based Approach to Development

The Human Rights Based Approach (HRBA), is a development programming approach underpinned by human rights principles and standards. This approach takes the individual to the 'driver's seat', with human rights as the 'engine' of the development process.

2.4.1. HRBA Key Guiding Principles

The guiding principle of HRBA is that all programmes should contribute to the realization of human rights. Human rights standards should guide programming in all phases of the programming process. Programming should contribute to the development of capacities of claim-holders to claim their rights and of duty-bearers to meet their duties.

2.4.2. Key Issues in HRBA

| Key Issues and corresponding action | |
|-------------------------------------|--|
| Who has been left behind and why? | HRBA helps to identify patterns of discrimination and inequality, and describe the situation of groups excluded and made vulnerable due to denial of their rights. |
| Which rights are at stake? | HRBA's causality analysis helps to identify the immediate, underlying and root causes of the problem |
| Who has to do something about it? | Who has the obligation to act? (Both Duty Bearers (DBs) and Rights Holders (RHs)) |
| What do they need to take action? | HRBA's capacity gap analysis helps to establish the capacity needs of the DBs/RHs to take action to solve the problem |

2.4.3. Programmatic Explanation of HRBA

The development goal of HRBA is to contribute to, or further the realization of human rights.

The development process of HRBA is to ensure that human rights principles guide all development programming process.

The development outcome of HRBA focuses on development strategies that contribute to the development of capacities of duty-bearers to meet their human rights obligations and/or of rights-holders to claim their rights.

2.4.4. HRBA Vs the Needs-Based Approach

| Issue | Needs Approach | HRBA |
|--|---|---|
| Intervention focus | Meeting basic needs of people, without linkage with broader processes. | Protecting and fulfilling the rights of the poor and the marginalized. |
| NGO's role | Direct implementation of basic services. | Working to empower rights-holders; support to rights-holders to hold duty-bearers accountable. |
| Who drives change? | NGO | Rights-holders - especially the poor & marginalized. |
| How NGO sees the people it works with | Passive beneficiaries who 'deserve help'. | Capable, autonomous and able change agents, who are "entitled to enforceable rights" |
| How NGO understands poverty | Poverty as a result of lack of material needs. | NGO works to hold the government accountable, while supporting it to play its role effectively. |
| Approach to gender equality and women's rights | Ensure needs of both men and women are met, without necessarily challenging any prevailing unequal power relations. | Emphasis on gender empowerment to address unequal power relations/ imbalances. |
| Role of the beneficiaries | Passive beneficiaries, who can be invited to participate. | Active participants, as a right. |
| Responsibility to act? | Action is voluntary. | Action is mandatory. |
| Perception of needs | 'Needs' are contextual and open-ended. | Claims/entitlements are universal & legally established. |
| | Hierarchy of needs - Maslow's theory. | Rights are indivisible and interdependent, though practical prioritization may be required. |

Chapter 3

3.0. Legal and Institutional Frameworks in Devolved Governance

Objectives • To enhance users understanding on which public institutions are mandated to provide different services to various publics

- To provide various users with information on institutions and Human Rights Framework for grievance redress.

3.1. People of Kenya

As recognised under Article 10 and Article 35 of the Constitution, public participation and access to information are essential elements of an inclusive and citizen supported devolved system of governance. The Transition Authority's broad mandate includes the protection of the rights of citizens to participate in governance matters that affect their lives.

3.2. The Transition Authority

The Transition Authority (TA) was established under section 4 of Transition to Devolved Government Act (TDGA) 2012 as a statutory body with the mandate of facilitating and coordinating the transition to the devolved system of government . It is a constitutional body mandate of facilitate and coordinate the transition to the devolved system of government in Kenya pursuant to the provisions of the Transition to Devolved Government Act 2012 and Section 15 of the Sixth Schedule of the Constitution of Kenya 2010.

The constitutional provisions that guide the transition to devolved government include;

- National Values and principles of Governance – Article 10 (2) (b);
- Access to information – Article 35;
- Minorities and marginalized group participation - Article 56(a);
- Values and principles of public service Article 232(d);
- Public participation and county assembly - Article 196 of the Constitution.

Modalities and structure for public participation include;

- Information communication technology based platforms;
- Town hall meetings;
- Budget preparation and validation fora;
- Notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;
- Development project sites;
- Avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate;
- Establishment of citizen fora at county and decentralized units; and, Section

92(b) which requires governors to submit annual report on public participation.

The three key components of effective public participation are;

- Public communication and access to information,
- Inclusion of minorities and marginalized groups;
- Civic education

3.3. Equality and Non-discrimination

In addition to the constitutional guarantees of equality and non-discrimination under Article 10, Article 27 also provides for equality before the law and equal protection and equal benefit of the law. The following institutions are responsible for ensuring that all Kenyans enjoy these constitutional rights and fundamental freedoms of equality.

3.3.1. The Kenya National Human Rights Commission (KNCHR)

Article 10 of the constitution provides for inclusiveness, equality, non-discrimination and protection of the marginalized groups at all levels of decision making. Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit before the law. Articles 53 - 57 of the constitution elaborate rights for the special interest groups. In relation to this the constitution establishes The Kenya National Human Rights Commission under Article 59(4). It gives the commission responsibilities to:

- Promote respect for human rights and develop a culture of human rights in the Republic;
- Promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
- Promote the protection and observance of human rights in public and private institutions;
- Monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
- Receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
- Investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs, on its own initiative or on the basis of complaints.

The commission is also governed by the Kenya National Human Rights Commission Act of 2011.

3.3.2. The National Gender and Equality Commission (NGEC)

The constitution provides that Parliament shall enact legislation to give full effect to the Kenya National Human Rights Commission, and any such legislation may restructure the Commission into two or more separate commissions. To this regard, the National Gender Equality Commission is a constitutional Commission established by an Act of Parliament in August 2011, as a successor commission to the Kenya National Human Rights and Equality Commission pursuant to Article 59 of the Constitution.

NGEC derives its mandate from Articles 27, 43, and Chapter 15 of the Constitution; and section 8 of NGEC Act (Cap. 15) of 2011, with the objectives of promoting gender equality and freedom from discrimination. Article 10 provides for the national values and principles of governance, which include: human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination. Specifically, Article 27 of the Constitution sets out the principle of equality and freedom from discrimination by stating that, every person is equal before the law and has a right to equal protection and benefit under the law.

3.3.3. The Commission on Administrative Justice (CAJ or 'The Ombudsman')

This commission is established by the Commission on Administrative Justice Act, 2011 pursuant to Article 59 (4) of the Constitution of Kenya. The Commission has been given a wide mandate both by the Constitution and the Act. The CAJ is mandated to address all forms of maladministration, promote good governance and efficient service delivery in the public sector by enforcing the right to fair administrative action. They investigate abuse of power, manifest injustice and unlawful, oppressive, unfair or unresponsive official conduct. Its primary function is to ensure public officers and public institutions respect sovereignty of the people of Kenya. The mandate of the Commission can be summarized in 12 broad categories:

- Quasi-judicial mandate to deal with maladministration.
- Ensuring compliance with leadership, integrity and ethics requirements.
- Litigation and Amicus Briefs.
- Reporting Obligation.
- Training of Government Ministries Departments and Agencies (MDAs).
- Resolution of inter-governmental conflicts.
- Provision of advisory opinions and recommendations.
- Promotion of Constitutionalism and Human Rights advocacy and performance contracting.
- Protecting the rights of the minorities and marginalised.

- Jurisdiction over prisons and prisoners.
- Oversight on implementation of recommendations of task forces, commissions of inquiry and other specialised agencies on matters of improvement in public administration

Like all other Commissions and Independent offices under Chapter 15 of the Constitution, the Commission has a constitutional duty of securing observance of democratic values and principles of constitutionalism by all state organs (Article 249 (1) (b) and(c)).

The Act however takes it a step further by requiring the Commission, in conjunction with other state organs and Commissions, to facilitate, promote and protect the fundamental rights and freedoms of the individual in public administration (Sec. 8 (k)). The Commission is required to work closely with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in respect to their activities and to establish referral and collaboration mechanisms.

3.4. Economic and Social Rights Development

Article 43 of the Constitution declares the standard of economic and social rights to which every person has an entitlement. These rights give rise to an obligation by the national and county governments to ensure that all persons have adequate and acceptable access to health care services, housing, reasonable standards of sanitation, adequate food and water, social security and education. The following institutions are the instruments of implementation of this obligation at wake of the devolved system of governance.

3.4.1. National Social Security Fund Board

The National Social Security Fund (NSSF) Board is established under the National Social Security Act. The board is a trustee of the Pension Fund and the Providence Fund. The two funds are established for the purposes of enhancing access to social services as envisioned in Article 43(3) of the Constitution.

3.4.2. National Cereals and Produce Board (NCPB)

The National Cereals and Produce Board of Kenya is established under the National Cereals and Produce Board Act. Its main mandate as set out in Section 4 of that Act; is to regulate and control the collection, movement, storage, sale, purchase, transportation, marketing, processing, distribution, importation, exportation, disposal and supply of maize, wheat and scheduled agricultural produce. The board also has an advisory role with regards to the production of the aforementioned agricultural produce.

Additionally the board has to foster food security by buying, storing, importing, exporting or otherwise acquire the scheduled agricultural produce as required to fulfil requirements of producers and consumers in Kenya.

3.4.3. National Labour Board

The National Labour Board (NLB) is established under the Labour Institutions Act. The board has an advisory obligation to the Minister of Labour on all matters concerning employment and labour. This includes codes of good practice, general state of employment, training and manpower development in the country as well as the formation and development of policies affecting employment and labour and emerging issues. The Board is also responsible for the appointment of wage councils which set minimum wages and other conditions of employment in respect of employees in a particular sector nationally or within a specific area.

3.5. Integrity, Transparency and Accountability

The principles of integrity, transparency and accountability as protected under Article 10, 73, 232 and others in the Constitution are critical to ensuring that county governments are delivering people-centred development at the county level. The institutions below are together responsible for the operation of a devolved system of governance that is in line with these governance principles.

3.5.1. Office of the Controller of the Budget (OCoB)

The Office of the Controller of the Budget was established under Article 228 of the Constitution of Kenya 2010. The OCoB became operational upon the appointment of the Controller of Budget on 27 August 2011.

The core mandate of the OCoB is to oversee implementation of the budgets of the National and County Governments by authorizing withdrawal from public funds. The core mandate is carried out through the following roles and functions as stipulated in the Constitution:

- Oversight: Monitors the use of public funds in-year and reports to Parliament on how the funds have been utilized.
- Controlling: Authorizes the withdrawal of public funds, which include the Consolidated Fund, County Revenue Fund and Equalization Fund.
- Reporting: Preparation of quarterly, annual and special reports to the legislature and executive on budget implementation matters of the national and county governments as provided by law according to (Article 228 (6)).
- Advisory: Gives advice to Parliament on financial matters where a Cabinet Secretary has stopped transfer of funds to a State organ or public entity. The

suspension of funds cannot be lifted or sustained before the Controller of Budget gives a report to Parliament which will form the basis of the decision to approve or renew the decision to stop the funds transfer.

- Investigatory: Conduct investigations on its own initiative or following a complaint made by a member of the public on budget implementation matters (Article 252(1)(a)).
- Arbitration/Mediation: Facilitate conciliation, mediation and negotiation (Article 252(1)(b)).
- Public sensitisation: Dissemination of information to the public on budget implementation at both national and county levels as stipulated under section 39(8) of the Public Finance Management Act, 2012. This supports the Article 35 right to information in the Constitution and the Article 201(a) which sets out public participation as one of the guiding principles of public financial management.

3.5.2. Commission for the Implementation of the Constitution (CIC)

The Commission for the Implementation of the Constitution (CIC) was established under Section 5 (6) of the Sixth schedule of the Constitution.

The mandate of CIC is stipulated in Section 5 of the Sixth Schedule and in the Commission for the Implementation of the Constitution Act (CIC Act), 2010 . The CIC mandate is to:

- Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement this Constitution;
- Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution;
- Report every three months to the Constitutional Implementation Oversight Committee on progress in the implementation of this Constitution; and any impediments to its implementation.
- Work with each Constitutional Commission to ensure that the letter and spirit of this Constitution is respected and;
- Exercise such other functions as are provided for by the constitution or any other written law.

3.5.3. Commission on Revenue Allocation (CRA)

The Commission on Revenue Allocation (CRA) is an independent Commission established under Article 215 of the Constitution of Kenya 2010.

The CRA's core mandate is to recommend the basis for equitable sharing of revenues raised nationally between the national and the county governments,

and among the county governments.

The functions of the Commission also include recommending on matters concerning the financing and financial management of both the national government and county governments. The CRA envisions that its mandate will be achieved through supporting intergovernmental fiscal systems that contribute to the provision of equitable services through devolved government that promotes development in Kenya.

3.5.4. The National Treasury

The National Treasury is mandated under Sections 99-103 of the Constitution to provide proper budgetary and expenditure management of government resources. The main function of the National Treasury is to formulate and maintain financial and economic policies that support socio-economic development. In addition, the Treasury is responsible for the regulation of the financial sector.

3.5.5. The Office of the Auditor General

The Office of the Auditor General was established under Article 229 of the Constitution. The Office is established as an independent office by Article 248 section 3 and Article 249 section 2(a) and (b) of the Constitution.

The Office of the Auditor General is required to audit and report within 6 months after the end of each financial year:

- The accounts of the national and county governments;
- The accounts of all funds and authorities of the national and county governments;
- The accounts of all courts;
- The accounts of every commission and independent office established by this Constitution;
- The accounts of the National Assembly, the Senate and the county assemblies;
- The accounts of political parties funded from public funds;
- The public debt; and
- The accounts of any other entity that legislation requires the Auditor-General to audit.

The Auditor-General may audit and report on the accounts of any entity that is funded from public funds. Any report shall confirm whether or not public money has been applied lawfully and in an effective way and shall be reported to Parliament or the relevant county assembly. Within three months after receiving an audit report, Parliament or the relevant county assembly shall debate and consider the report and take appropriate action.

3.5.6. Ethics and Anti-Corruption Commission (EACC)

The Ethics and Anti-Corruption Commission (EACC) is established under Section 3(1) of the Ethics and Anti-Corruption Commission Act, 2011 (EACA, 2011).

The EACC is mandated to combat and prevent corruption and economic crime in Kenya through the use of law enforcement mechanisms, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption.

Under section 13(2) of the EACA, 2011, the EACC has powers to:

- Educate and create awareness on any matter within the Commission's mandate;
- Undertake preventive measures against unethical and corrupt practices;
- Conduct investigations on its own initiative or on a complaint made by any person, and,
- Conduct mediation, conciliation and negotiation.

3.6. Access to Justice and Security

The Legal provisions are enshrined in the constitution under Article 29 that provides for freedom and security of a person, Article 47 that provides for Fair Administrative Action, Article 48 that provides for Access to Justice, Article 49 that provides for Rights of an Arrested Person, Article 50 that provides for Fair hearing and Article 51 that provides for Rights of persons detained held in custody or imprisoned. Chapter 10 and 14 of the Constitution provide for the Judiciary and National Security. The following institutions are established as a result of the above legal and constitutional Provisions.

3.6.1. The Attorney General (AG)

The office of the Attorney General is one of the institutions that are constitutionally established to effect the above legal provisions.

The mandate of the Attorney General is the principal legal advisor to the Government; shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and shall perform any other functions conferred on the office by an Act of Parliament or by the President. The Attorney General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party. The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest. The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or specific circumstances.

3.6.2. The Director of Public Prosecution (DPP)

This is an institution established under Article 157 of the Constitution of Kenya.

The mandate of this institution is to; direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction .

The other functions of this institution are:

- Institute and undertake criminal proceedings against any person before any court (other than a court martial), in respect of any offence alleged to have been committed;
- Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority,
- With the permission of the person or authority; and subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions.

3.6.3. The Judiciary

Established under Article 159 of the Constitution of Kenya, the mandate of the Judiciary is enshrined under paragraph 159(2) and is to the effect that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause.

3.6.4. The Kenya Defense Forces (KDF), the National Intelligence Service (NIS) and the National Police Service (NPS)

These institutions are established under Article 239 and the primary mandate of these three institutions is to promote and guarantee national security in accordance with the principles mentioned in Article 238 (2) .

3.7. Tax Justice, Fiscal Prudence and Trade Development

The Legal provisions for the above captioned refer are enshrined under the following Articles of the Constitution of Kenya . Article 201 provides for the principles of Public Finance, Article 202 provides for equitable sharing of National Revenue. Article 203 provides for equitable share and other Financial Laws. Article 209 provides for Power to impose taxes and charges. Article 210 provides for Imposition of Taxes. Article 212 of the Constitution of Kenya provides for Borrowing of Revenue. Article 217 provides for Division

of Revenue and Article 219 provides for Transfer of Equitable Share. The institutions set out below are established as a result of the above legal and constitutional above.

3.7.1. The Salaries and Remuneration Commission (SRC)

This Commission is established under Article 230 of the Constitution of Kenya. Its mandates are enshrined under Article 230(5) and they include;

- The need to ensure that the total public compensation bill is fiscally sustainable;
- The need to ensure that the public services are able to attract and retain the skills required to execute their functions;
- The need to recognize productivity and performance; and transparency and fairness.

3.7.2. Central Bank of Kenya (CBK)

This institution is established under Article 231 of the Constitution of Kenya. Its mandate is:

- Formulating monetary policy
- Promoting price stability
- Issuing currency;
- Performing other functions conferred on it by an Act of Parliament .

3.7.3. Kenya Revenue Authority (KRA)

This is an institution that is created by an Act of Parliament, The Kenya Revenue Authority Act. The mandate of this institution shall be an agency of the Government for the collection and receipt of all revenue. In the performance of its functions under subsection (1), the Authority shall administer and enforce, all provisions of the written laws set out in Part I of the First Schedule. For that purpose it shall assess, collect and account for all revenues in accordance with those laws. The provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws. It shall advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule. It shall perform such other functions in relation to revenue as the Minister may direct.

3.8. Natural Resource Governance

The obligation with respect to the protection and preservation of natural resource in Kenya is vested upon the state by Article 69 of the Constitution of Kenya. It is in this regard

that the following institutions with devolved functions are established.

3.8.1. The National Land Commission (NLC)

The National Land Commission is established under Article 67 of the Constitution and the National Land Commission Act to manage public land on behalf of the national and county governments. Further it recommends national land policy to the national government; to conduct research related to land and the use of natural resources, and to make recommendations to appropriate authorities. The National Land Commission is also tasked with initiating investigations, on its own initiative or on complaints, into present or historical land injustices, and recommending appropriate redress.

3.8.2. National Environment Management Authority (NEMA)

The Authority is established under the Environmental Management and Coordination Act. Its main mandate under section 9(2) of that Act is to exercise a general supervision and coordination over all matters relating to the environment and is the principal government institution involved in the implementation of all policies relating to the environment. It also promotes integration of sound environmental considerations in development. It additionally takes stock of the natural resources in Kenya and their utilization and conservation.

3.8.3. Kenya Forest Service (KFS)

The Kenya Forest Service is established under section 4 of the Kenya Forests Act which provides for the establishment, development and sustainable management including conservation and rational utilization of forest resources for the socio-economic development of the country.

The main mandate of the service is to formulate policies and guidelines regarding the management, conservation and utilization of all types of forest areas and bio diversity in the country. The service also manages all the state forests and enforces conditions and regulations pertaining to logging, charcoal making and other forest utilization activities.

3.8.4. Water Resources Management Authority (WARMA)

The water resources Authority is established under Section 7 of the Water Act. The Authority has a main mandate of developing principles, guidelines and procedures for the allocation of water resources, monitor and regularly reassess the national water resources management strategy, regulate and protect the quality of water resources from any adverse impacts as well as manage and

protect water catchments. The Authority has the power to undertake criminal prosecution for offences committed under that Act.

3.9. Other Fundamental Rights and Freedoms

Sections 32 – 39 of the Constitution protects freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, freedom of association, the right to assembly, demonstration, picketing and petition and freedom of movement and residence within the counties.

County governments can ensure that other rights and freedoms are protected and promoted for better governance and development by having regard to the laws, policies, and guidelines provided by the institutions below.

3.9.1 National Cohesion and Integration Commission (NCIC)

The NCIC is established under the National Cohesion and Integration Act, 2008. NCIC's core mandate is to promote national unity in Kenya. The NCIC facilitates processes and policies that encourage elimination of all forms of ethnic discrimination irrespective of background, social circle, race and ideological belief(s), and by so doing, enhances the capacity for Kenyans to accept each other in appreciating the significance of diversity.

In light of the urgency that Kenyans be educated about non-violence conflict resolution processes and on the values of human dignity, mutual respect and tolerance, the NCIC aims to unify and integrate Kenyans into a cohesive society guided by national values and the principles of governance contained in Article 10 of the Constitution.

The NCIC provides the following operational frameworks to carry out this mandate:

- A schedule of roles for various stakeholders in the operationalization of the national cohesion and integration process, and establish how these stakeholders can be mobilized to play their roles effectively;
- An organizational framework for the implementation of the policy's strategic objectives; and
- A framework for mainstreaming national cohesion and integration into national development programmes, projects and activities including infusing cohesion principles into laws and policies as stipulated in the NCI Act.

3.10. Devolution of Power

The process of devolution of power shifts specified government powers and functions from national to county governments. The mechanisms for the devolution of power are set out in Chapter 1, the Fourth Schedule and Articles 48, 50, 51, 52, 53 and 54 of the Constitution.

The overriding authority responsible for devolution of power is the Transitional Authority. The Ministry of Devolution also facilitates intergovernmental relations and the development of legislation and policies to implement devolution. Further, various intergovernmental structures establish a framework for consultation and co-operation between the national and county governments and amongst county governments as well as mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution .

3.10.1. Ministry of Devolution and Planning (MoDP)

The Ministry's mandate includes management of intergovernmental relations, such as between national government and county governments, and capacity building in the Counties. The Ministry is thus responsible for the initiation and development of policies, legislation and administrative procedures required to implement devolution.

Due to the nature of Devolution, all Ministries are required to address the areas of their functions that are affected by determining how the two levels of government will work together for effective implementation of devolution.

3.10.2. National and County Government Coordination Summit (NCGCS)

The National County Government Coordination Summit is established as the apex body for intergovernmental relations under section 7 of the Intergovernmental Relations Act, 2012. The Summit is to comprise of the President (the Deputy President in his absence) and Governors of the 47 counties. The chairperson of the Council of County Governors will sit as the vice-chair of the Summit.

As well as foster consultation and cooperation between national and county governments, the Summit is mandated to evaluate the performance of national and county governments, consider issues relating to intergovernmental relations referred to the Summit by a member of the public and recommending measures to be undertaken by the respective county government and co-ordinate and harmonize the development of county and national governments' policies.

The Summit is to meet at least twice a year (section 9) and submit an annual report to the National Assembly, the Senate and the county assemblies within three months after the end of each financial year.

3.10.3. Intergovernmental Technical Committee (IGTC)

The Intergovernmental Technical Committee is established under section 11 of the Intergovernmental Relations Act, 2012. The Technical Committee's functions include the day to day administration of the Summit and of the Council, in

particular facilitation of their activities and implementation of decisions.

Crucially, the Technical Committee is to take over the residual functions of the transition entity established under the law relating to transition to devolved government after dissolution of such entity.

The Technical Committee may establish committees for the better carrying out of its functions and is required to submit quarterly reports to the Summit and the Council of County Governors.

3.10.4. Council of County Governors (CCG)

The Council of County Governors is established under section 19 of the Intergovernmental Relations Act, 2012. Under section 20 of the Act, the Council is mandated to facilitate consultations among county governments including the sharing of information for learning and best practices, receiving reports and monitoring the implementation of inter-county agreements on inter-county projects, consideration of matters referred to the Council by a member of the public and consideration of reports from other intergovernmental forums on matters affecting national and county interests or relating to the performance of counties.

The Council may also establish other intergovernmental forums including inter-city and municipality forums, committees for the better carrying out of its functions.

The Council is required under section 21 to meet at least twice a year. Section 22 stipulates that the Council shall submit an annual report to the Summit, the National Assembly and the Senate. The annual report will be submitted to county assemblies within three months of the end of every financial year.

Chapter 4

4.0. Public Finance Management in Devolved Governance

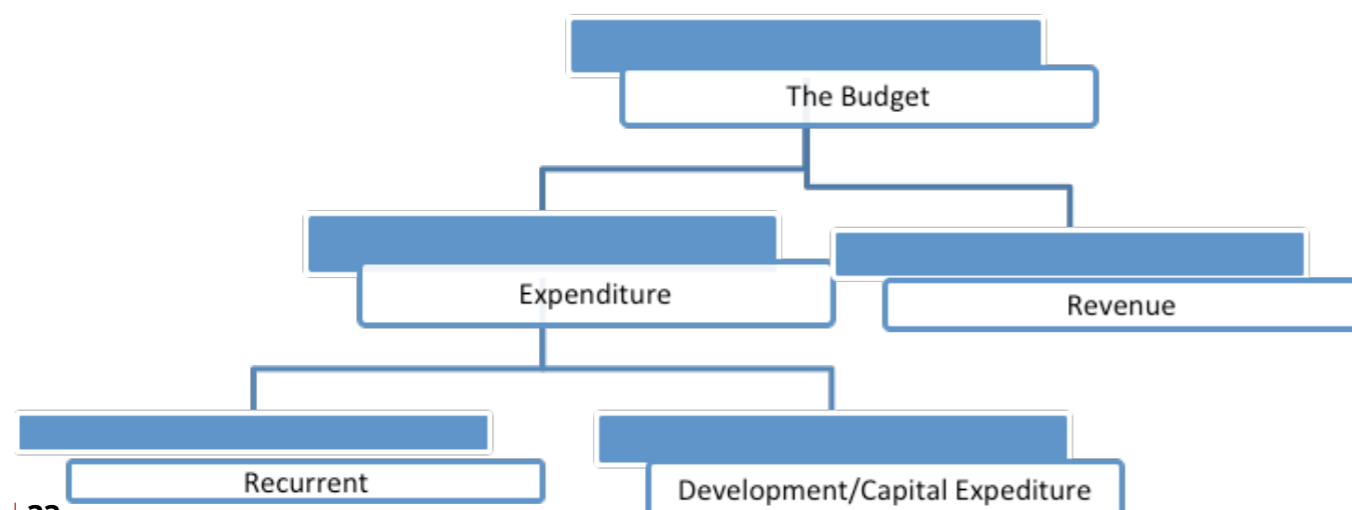
| | |
|------------|--|
| Objectives | <ul style="list-style-type: none"> To show significant changes that the constitution has introduced in the budget making process. To highlight the 8 stages in the county budget making process and avenues for citizen participation. To link citizen participation to budget making process for accountable and efficient service delivery. |
|------------|--|

Public finance management is important to the relations between citizens and the Government. In Kenya, there has been low public participation in Public finance management in the past leading to inefficiencies and misallocation of resources. However, the Constitution of Kenya (2010) and the Public Finance Management Act 2012 provide avenues through which citizens can effectively influence policies on public finance. Chapter 12 of the constitution of Kenya 2010 (Article 201) introduces principles of public finance among them openness and accountability including public participation in financial matters. These principles, if strictly adhered to, can alter policy formulation and management of public resources for the improved livelihoods

According to Article 203 (2) of the Constitution not less than 15% of revenue raised nationally (audited and approved total ordinary revenue that comprises taxes and non-tax revenue) shall be shared equitably among each level of government to enable it to provide services and perform functions allocated to them.

4.1. Structure of Budget

The Budget has two parts, namely, the revenue and expenditure sections.



Budget expenditure comprises two categories: recurrent and development expenditure which is also referred to as Capital Expenditure (CE). Recurrent Expenditure (RE) also refers to that spending on goods and services required by the government in order to provide its services. They include the salaries and wages of employees, expenses incurred in procuring equipment, stationery, furniture, vehicles, etc.

Development Expenditure,(DE) also known as capital expenditure refers to the spending that results in the government acquiring or improving long-term assets such as schools, agriculture, training for staff, hospitals, roads. Investment in public –private commercial ventures such as mining, buying of shares are also considered development expenditure.

4.2. Budget Process in Kenya

Public finance management landscape and indeed the budget process in Kenya has changed considerably since the promulgation of the new constitution in August 2010. Planning and budgeting is governed largely by Chapter 12 of Public Finance in the constitution. Some of the significant changes that have a bearing on the budget process include:

- Transition from a central government system to a two tier system of government. This introduces devolution with the arrangement of a national government and 47 county governments as a way of bringing the government closer to the community
- Clarity in roles and responsibility for the 3 arms of government; the executive, the legislature and the Judiciary who will each independently prepare and submit their respective budgets to parliament.
- Parliament shifting from a unicameral (one chamber of national assembly) to bicameral system (National Assembly and County Assemblies). In departure from the past, the constitution strengthen parliament’s role in the budget process.
- As a way of addressing past challenges of weak transparency and accountability, the constitution strengthens the accountability process by providing for checks and balances in public finance management.

In addition, Article 201 of the constitution lays down some key public finance principles including the need to ensure that there is openness and accountability in all public financial matters and that public participation will be emphasized in the whole budget process and indeed in the decision making processes. The other principle speaks to the issues of ensuring that public finance promotes an equitable society where burdens and benefits from the use of public resource will be share equitably. Finally, the principles advocate that public money shall be used in a prudent and responsible manner and that this should be accompanied by clear financial reporting.

4.3. County Budget Making Process

The County Budget Process as provided for in sections 125 -168 of the Public Finance Management Act, 2012.

Stage I: PLANNING - SETTING BROAD POLICY DIRECTIONS

When: 1st September

Objective: Reflect county medium term priorities and plans and a basis for all budgeting and planning at the county

Budget Activity: County Planning Unit (CPU) to co-ordinate the preparation of long and medium plans. County Planning unit to prepare annual county development plan
Key Reports and Budget Documents: County Integrated Development Plans (CIDP) (5years), and other plans including: County Sectoral Plans (education, health and so on), County Spatial Plans and Cities and Urban Areas Plans and County Development Plan

Entry Points: Participate during mid-stream review and evaluation of medium term plans and during development of new Medium Term Plans every five years. County Development Plan must be made public 7 days after submission to the County Assembly

Actors: The Ministry of Devolution and Planning, County Planning Officers, line ministries and the public. County Executive for planning is responsible for the development of county plan.

Stage II: OVERALL ESTIMATION OF COUNTY GOVERNMENT REVENUES AND EXPENDITURES

When: August and February

Objectives: To start budget process and set guidelines and schedule for preparation of budgets by county entities as well as set guidelines for public participation. The County Fiscal Strategy Paper is to set broad strategic priorities and policy goals that will guide budget formulation.

Budget Activity: County Executive Member (CEM) of Finance issues a Call Circular to all County government entities by August 30th. By February, County Treasury should prepare County Fiscal Strategy Paper (CFSP) aligned to the BPS highlighting aggregate projected county revenue, spending and borrowing plans. The County Assembly has 14 days to debate and in the process consult with the public before approving it.

Key Reports and Budget Documents: Call Circular is issued by County Executive Member (CEM) of Finance to all county entities by 30th August for priorities .
County Treasury to prepare County Fiscal Strategy Paper (CFSP) to be submitted

to the County Assembly by 28th February

Entry Points: Civil society or the public can download the circular from the County Government website. The Public and other stakeholders should be involved in the formulation of County Fiscal Strategy Paper (CFSP).

Actors: County Executive Member for Finance, Commission on Revenue Allocation and interested groups and the public.

Stage III: ESTABLISHING FINANCIAL AND ECONOMIC PRIORITIES FOR THE COUNTY

When: September

Objectives: To review previous year's budget and updates outlook for the forthcoming budget year

Budget Activity: By the end of September, County Treasury prepares Budget Review and Outlook Paper

Key Reports and Budget Documents: County Budget Review and Outlook Paper

Entry Points: The Public can assess the document before it is approved by the County Assembly to understand actual performance for the previous year and the explanation for not meeting planned objectives

Actors: County Executive Committee, County Assembly and the public

Stage IV: PREPARATION, CONSOLIDATION AND SUBMISSION OF ITEMIZED BUDGET TO COUNTY ASSEMBLY

When: March to April

Objectives: To finalize estimates of expenditures for submission in parliament.

Budget

Activities: The CEM for Finance submits budget estimates and supporting documents to the CEC for approval. Upon approval, CEM for Finance submits budget estimates, supporting documents

Key Reports and Budget Documents:

County Budget Estimates and Final County Budget Estimates

Entry Points: Process is exclusively a County Executive Committee affair

Actors: County Executive Committee

Stage V: ENACTING EXPENDITURE AND REVENUE PROPOSALS

When: May-June and June-Sept

Objectives: To scrutinize budget in adherence to fiscal responsibility and public finance principles (May-June)

To authorize revenue collection (June-September)

Budget

Activities: Through the Budget Committee, County Assembly debates and approves of budget estimates. This is followed by the introduction of the Appropriation Bill by the CEM for Finance of the approved budget. Debate and approval of the County Finance Bill as was submitted by the CEM for Finance.

Key Reports and Budget Documents: County Appropriation Bill and County Appropriation Act, Finance Bill and Budget Summary (May-June). County Finance Act & report of the Finance Committee (June-September)

Entry Points: Public hearings held by County Assembly committees. Citizens have an opportunity to give their input into the County Finance Bill before it is approved by 30th September

Actors: County Assembly and its department committees, CEM for Finance and the public (May - June). County Assembly - County Executive Committee and the public (June - September).

Stage VI: BUDGET IMPLEMENTATION

When: June to July (Throughout the year)

Objectives: To facilitate implementation of activities, projects and programs as per approved budget before authorizing spending Key reports and budget documents: Procurement Plans, Quarterly County Budget Implementation Reports by the Office of the Controller of Budget

Entry Points: Monitor budget implementation or track budget by reviewing whether it is in line with approved budget.

Actors: County Entities, County Treasury; Office of the CoB, the National Treasury and the public

Stage VII: BUDGET REPORTING, ACCOUNTING AND MONITORING

When: July-June

Objectives: To establish whether spending was as per approved budget and reasons for variances.

Budget

Activities: The accounting Officers must file quarterly reports to the Controller of Budget who in turn uses the reports to consolidate budget implementation reports for all the counties.

Key reports and Budget Documents: Procurement Plans, Quarterly County Budget Implementation Reports by the Office of the Controller of Budget

Entry Points: Review and analyse quarterly budget implementation reports

Actors: County entities, Office of the Controller of Budget, the National Treasury and the public

Stage VIII: BUDGET EVALUATION AND AUDITING

When: July to December

Objectives: To establish whether spending was as per approved budget and to oversight use of public funds

Budget

Activities: The County Treasury shall four months after the end of each financial year submit the consolidated financial statement for each county government entity to the Auditor General. Finally, Auditor General assesses and prepares audit report. County Assembly through watch dog committees scrutinizes audit reports and gives recommendations

Key reports and Budget Documents: Audit report for the each of the 47 County Governments and County Annual Appropriation Accounts

Entry Points: Review of the audit report by civil society and general pressure and follow up by the media, civil society and the public on implementation of recommendations on the audit report by the watch dog committees.

Actors: County Treasury, Office of the Auditor General County watchdog committee and county executive committee

REFERENCES

- Government of Kenya (2010), Constitution of Kenya, Government Printer, Nairobi
- Government of Kenya (2010), County Government Act, 2012, Government Printer, Nairobi
- Government of Kenya (2010), Public Finance Management Act, 2012, Government Printer, Nairobi
- International Republican Institute (2012), The Citizen Handbook, Nairobi, Kenya
- Institute of Economic Affairs (IEA) (2011), Applied Budget Work - Training of Trainers' Manual, IEA, Nairobi
- Institute of Economic Affairs (IEA) (2014), Citizen Alternative Budget, IEA, Nairobi
- Institute of Certified Public Accountants of Kenya (ICPAK) (2014), Public Finance Building Blocks for Devolution
- Kenya Human Rights Commission 2014, Functions of Elected State Officers, KHRC, Nairobi (2nd Ed.)
- Mungai, Opiata and Kanyi, (2013), Citizen Participation in the Budget Process, KHRC, Kenya

The KHRC takes full responsibility in respect of the contents therein.
For comments and further information do not hesitate to contact us via:



Valley Arcade, Gitanga Road
P.O BOX 41079-00100, Nairobi, Kenya
Tel: +254-020 2044545/020 2106709/ 020 2106763
Mobile No: 0733629034, 0722264497
Fax: +254-020 -3874997
Email: admin@khrc.or.ke
Website: www.khrc.or.ke



Valley Arcade, Gitanga Road
P.O BOX 41079-00100, Nairobi, Kenya
Tel: +254-020 2044545/020 2106709/ 020 2106763
Mobile No: 0733629034, 0722264497
Fax: +254-020 -3874997
Email: admin@khrc.or.ke
Website: www.khrc.or.ke