



LEGAL LANDSCAPE ANALYSIS: **TB LAWS AND LEGAL REMEDIES**

KENYA

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I. Introduction and Acknowledgments

This legal landscape analysis is part of the Lawyers Alert Challenge Facility for Civil Society (CFCS) round 11 regional project for Anglophone Africa. The project aims for greater accountability among tuberculosis (TB) decision-makers and access to justice for people affected by TB in five African countries: Ghana, Kenya, Malawi, Nigeria, and Zimbabwe.

This memorandum outlines the TB legal framework in Kenya, analyzing constitutional law, legislation, and administrative law to identify legal remedies and accountability mechanisms available to people affected by TB. The analysis further considers whether TB laws and policies adopt a human rights-based approach, fulfilling the right to health, prohibiting TB-based discrimination, and protecting privacy and confidentiality, among other things.

Brian Citro, CFCS 11 Expert Legal Consultant, researched and wrote this memorandum. **[Complete after KELIN's review].**

II. Key Takeaways and Action Items

This section lists the key takeaways and action items from the Kenya legal landscape analysis, highlighting existing legal remedies, accountability mechanisms, gaps, and opportunities for reforms. Each action item includes a link at the end to the section in the memorandum where it is discussed.

1. People affected by TB have legal standing under articles 22 and 23 of the Constitution to bring claims in the court, including with legal representation by KELIN or others, for violations of their rights in Chapter 4's Bill of Rights, seeking a variety of legal remedies including injunctions and damages, with reference to their rights to a fair hearing and to access justice in sections 50 and 48 of the Constitution (see section Chapter 4: Bill of Rights **Error! Reference source not found.**below).
2. People affected by TB may bring claims in court for violations of their right to health under article 43(1)(a) related to challenges experienced before, during, or after their TB diagnosis, treatment, care, or support, building on the holdings and legal theories in the judgments discussed below in section Health Rights Jurisprudence with reference article 56 of the Constitution on the right of marginalized groups to "reasonable access



to health services,” and with reference to the *Health Act* sections 3 and 5 and the new *Primary Health Care Act* section 3 (see sectionsArticle 43: Economic and Social Rights,Health Rights Jurisprudence, and Legislation **Error! Reference source not found.**below).

3. People affected by TB may bring constitutional claims in court for violations of their right to equality and freedom from discrimination by the State of private individuals “on any ground, including ... health status” under articles 27 of the Constitution for stigmatizing or discriminatory treatment in health care, employment, education, housing, or other areas of life (see sectionsChapter 4: Bill of Rights below).
4. People affected by TB subject to involuntary or compulsory isolation, hospitalization, detention, or imprisonment may appeal the decision and seek redress before a court under their rights to freedom and security of person, freedom of movement, administrative justice, and a fair hearing in articles 29, 39, 47, and 50 of the Constitution, in accordance with the High Court’s ruling in *Daniel Ng’etich v. Attorney General* and the Ministry of Health’s “National Tuberculosis, Leprosy and Lung Disease Program Tuberculosis (TB) Isolation Policy” (see sectionsChapter 4: Bill of Rights, Enforcement, Remedies, Limitations, and Access to Justice Health Rights Jurisprudence **Error! Reference source not found.**below).
5. People affected by TB may bring legal claims in court for violations of their rights to privacy and confidentiality related to TB case finding, contact tracing, screening, diagnosis, treatment, care, or support under article 31 of the Constitution, with reference to section 5(2) of the *Health Act*, Part VI of the new *Digital Health Bill*, and the High Court’s ruling in *C.O.M. v. Standard Group Limited and Anor.* (see sectionsChapter 4: Bill of Rights, Health Rights Jurisprudence, and Legislation below).
6. Children affected by TB may bring constitutional claims in court for violations of their rights as children to health care, education, non-discrimination, and privacy under articles 27, 31, 43, and 53 of the Constitution and the *Children Act* sections 16, 9, and 13, with reference to the High Court’s ruling in *KELIN v. Cabinet Secretary Ministry of Health and Ors.* (see sectionsChapter 4: Bill of Rights,Part 2: Specific Application of Rights, Health Rights Jurisprudence, andOther Laws below).
7. Workers affected by TB may bring legal claims in the Industrial Court or lodge a complaint with a “labour officer” for discrimination, unfair termination, wrongful dismissal, refusal to grant sick leave, or other unfair labor practices under their rights to freedom from discrimination and unfair labor practices in articles 27 and 41 of the



Constitution and sections 5, 45, 46, 47, and 49 of the *Employment Act* (see sections IV(B), *Employment Act* below).

8. People affected by TB, KELIN, and their partners should consider advocating in the Parliament of Kenya for reforms to the *Public Health Act* to amend, update, and expand Parts III and IV on infectious diseases to lay the foundation for a rights-based, people-centered TB response, reducing health authorities' power to take intrusive and restrictive actions, and establishing legal rights for people affected by TB enforceable in court through a private right of action similar to the rights of people living with HIV enshrined in the *HIV and AIDS Prevention and Control Act* (see sections *Public Health Act*, *HIV and AIDS Prevention and Control Act* below).
9. People affected by TB, with support from KELIN and other partners, may test whether the health rights enshrined in Part II of the *Health Act* are enforceable in court, and they may lodge complaints at health facilities or with the Kenya Health Professions Oversight Authority pursuant to *Health Act* sections 14 and 48 for challenges experienced before, during, or after their TB diagnosis, treatment, care, or support, with reference to the right to fair administrative action in article 47 of the Constitution (see section *Health Act* and *Enforcement, Remedies, Limitations, and Access to Justice* below).
10. People affected by TB covered by the new Social Health Insurance Fund may file complaints with the Social Health Insurance Authority and the Dispute Resolution Tribunal under section 5 and Part V of the new *Social Health Insurance Act* for challenges experienced before, during, or after their TB diagnosis, treatment, care, or support, and they may appeal the Tribunal's decision to the High Court pursuant to section 43 of the act (see section *Social Health Insurance Bill* below).
11. People living with HIV/TB co-infection, people affected by TB perceived to have HIV, and TB survivors living with HIV may lodge complaints with the HIV and AIDS Tribunal to defend their rights to health care, non-discrimination, privacy, confidentiality, and others under the *HIV and AIDS Prevention and Control Act* (see section *HIV and AIDS Prevention and Control Act* below).
12. People affected by TB, with support from KELIN and other partners, may lodge complaints [online](#), by phone (020-2717908, 0726610159), or in writing (P.O. Box 74359/00200 Nairobi) with the Kenya National Commission on Human Rights seeking redress for violations of their rights in the Constitution (see sections *Kenya National Commission on Human Rights* below).



III. Legal System Overview

Kenya is a multi-party democracy. The Constitution of Kenya establishes a representative, presidential, democratic republic with a separation of powers between the executive, legislature, and judiciary. The President of Kenya heads the executive branch and is both head of state and head of government. The people of Kenya elect the President directly for a five-year term. The President appoints a cabinet to assist in governing the country.

The legislative branch of Kenya consists of a bicameral Parliament, comprised of the National Assembly and the Senate. The National Assembly has 349 members elected directly by the people for five-year terms. The Senate has 67 members, 47 of whom are elected directly by people from each of Kenya's counties. Political parties nominate the remaining 20 members of the Senate in proportion to their share of seats in the National Assembly.

The judiciary of Kenya is independent of the executive and the legislative branches. The Supreme Court is the highest court in the land and has the power to strike down unconstitutional laws. Kenya's legal system is based on English common law and incorporates elements of customary law, the traditional law of Kenya's ethnic groups. Customary law still applies in family and land matters and other areas.

IV. Constitutional Law

This section examines constitutional law in Kenya, analyzing the text of the national constitution and judicial opinions. Article 2(1) of the 2010 Constitution of Kenya establishes that the "Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government." Article 2(4) declares that any "law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." Article 2(6) states that any "treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

A. National Values and Principles of Governance



Article 10 of the Constitution contains “National values and principles of governance.” The values and principles in Article “bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution ... enacts, applies or interprets any law ... or makes or implements public policy decisions.” The values and principles include “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized” (article 10(2)(b)). Article 10 also highlights “devolution of power, the rule of law, ... participation of the people,” and “transparency and accountability.”

B. Chapter 4: Bill of Rights

Chapter 4 of the Constitution sets forth a “Bill of Rights.” Article 19 explains that the “purpose of [the Bill of Rights] is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.” Article 20 states that the “Bill of Rights applies to all law and binds all State organs and all persons.” Article 21 declares that it is the “fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.” Article 21 further pronounces that all “State organs and ... public officers have the duty to address the needs of vulnerable groups within society, including women, ... persons with disabilities, children, ... [and] members of minority or marginalized communities.”

Part 2 of Chapter 4 contains a list of rights and fundamental freedoms. The following rights and freedoms are particularly relevant to people affected by TB:

- Right to life (art. 26)
- Equality and freedom from discrimination, including a prohibition of discrimination by the State and private persons “on any ground, including ... *health status*” (emphasis added) (art. 27)
- Right to human dignity (art. 28)
- Freedom and security of person, including the right not to be “deprived freedom arbitrarily or without just cause,” “detained without trial, except during a state of emergency,” or “treated or punished in a cruel, inhuman or degrading manner” (art. 29)
- Right to privacy, including the “right to not have ... information relating to ... private affairs unnecessarily required or revealed” (art. 31)
- Access to information, including a requirement that the “State shall publish and publicise any important information affecting the nation” (art. 35)
- Freedom of movement and residence (art. 39)
- Right to fair labour practices (art. 41)



- Right to a clean and healthy environment (art. 42)
- Economic and social rights (more detail below) (art. 43)
- Consumer rights, including the right “to goods and services of reasonable quality” (art. 46)
- Right to fair administrative action (more detail below) (art. 47)
- Access to justice (more detail below) (art. 48)
- Right to a fair hearing (more detail below) (art. 50)

1. Enforcement, Remedies, Limitations, and Access to Justice

Article 22 establishes rules for the enforcement of the Bill of Rights. Provisions 1 and 2 of article 22 recognize the right of individuals to enforce their constitutional rights and fundamental freedoms in court:

- “1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:
- a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.”

Article 23 establishes the “Authority of courts to uphold and enforce the Bill of Rights,” recognizing the jurisdiction of the High Court “to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.” Article 23(3) also speaks to legal remedies, stating:

- “3. In any proceedings brought under Article 22, a court may grant appropriate relief, including:
- a. a declaration of rights;
 - b. an injunction;
 - c. a conservatory order;
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e. an order for compensation; and
 - f. an order of judicial review.”



Article 24 on “Limitation of rights and fundamental freedoms” declares that a “right or fundamental freedom ... shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.” The freedoms from slavery and torture and cruel, inhuman, or degrading treatment and the rights to *habeas corpus* and a fair trial may not be limited under any circumstances (article 25).

Articles 47, 48, and 50 in the Bill of Rights are integral to access to justice for people affected by TB. Article 47 provides the right to “fair administrative action,” including the right “to be given written reasons” for an administrative action that adversely affects or is likely to adversely affect a constitutional right or fundamental freedom (article 47(2)). Article 48 recognizes the right of access to justice, declaring that the “State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” Article 50 protects the right to a “fair hearing,” including “the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

People affected by TB have legal standing under the Constitution to bring suit in the High Court for violations of their constitutional rights, seeking various remedies and judicial orders. They may file suit as members of a class or group of similarly situated people or obtain legal association from KELIN or other partners. People affected by TB also have a constitutional right to fair administrative decisions and processes such as those involving the Ministry of Health or the National Tuberculosis, Leprosy and Lung Disease Program.

2. Article 43: Economic and Social Rights

Article 43 enshrines “Economic and social rights,” including the right to “the highest attainable standard of health, which includes the right to health care services, including reproductive health care” (article 43(1)(a)). Article 43 further enshrines the rights to “reasonable standards of sanitation,” education, and others (article 43(1)(b, f)). Article 43(2) declares that “a person shall not be denied emergency medical treatment,” and article 43(3) requires the State to “provide appropriate social security to persons who are unable to support themselves and their dependents.”



Article 20 on the “Application of Bill of Rights” addresses the application of article 43’s economic and social rights:

“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles

- a. it is the responsibility of the State to show that the resources are not available;
- b. in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- c. the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

Article 22(2) establishes the State’s obligation to “progressively realize” article 43 rights, declaring:

“The State shall take legislative, policy and other measures, including the setting of standards, to achieve the *progressive realisation* of the rights guaranteed under Article 43.” (emphasis added)

People affected by TB have a justiciable constitutional right to health, including health services and emergency treatment, under article 43 of the Constitution, requiring the government to take legislative and policy measures and set standards to realize the right progressively.

3. Part 2: Specific Application of Rights

Part 3 of Chapter 4 of the Constitution establishes the “Specific Application of Rights” “to ensure greater certainty as to the application of ... rights and fundamental freedoms to certain groups of persons” (article 52). The part addresses the application of Chapter 4 constitutional rights to children, persons with disabilities, youth, minorities and marginalized groups, and older members of society. Article 53 recognizes the children’s right to “basic nutrition, shelter and health care.” Article 56 enshrines the right of minorities and marginalized groups to “have reasonable access” to water and health services.

The constitutional right to health of people affected by TB is further strengthened by Part III of Chapter 4 of the Constitution, which recognizes children’s right to health



care and the right of minorities and marginalized groups to reasonable access to health services. Part III of Chapter 4 also enshrines the rights of people affected by TB to the underlying determinants of health, including nutrition, education, and water.

4. Kenya National Human Rights and Equality Commission

Part 5 of Chapter 4 establishes the Kenya National Human Rights and Equality Commission. Article 59(3) declares that “Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” Article 59 further enumerates the functions of the Commission, including:

- “a. to promote respect for human rights and develop a culture of human rights in the Republic;
- b. to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
- c. to promote the protection, and observance of human rights in public and private institutions;
- d. to 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;
- e. to receive and investigate complaints about alleged abuses of human rights and *take steps to secure appropriate redress* where human rights have been violated;
- ...
- g. to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
- h. to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;
- i. to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;
- j. to report on complaints investigated under paragraphs (h) and (i) and take remedial action.” (emphasis added)

See section Kenya National Commission below for more information on the Commission.

C. Health Rights Jurisprudence

The courts in Kenya have applied and interpreted constitutional and statutory health rights in a range of cases, including the rights to health, privacy, non-discrimination,



and liberty. A full discussion of Kenyan health rights jurisprudence is beyond the scope of this memo. Instead, we provide a short list of significant cases with links to the full opinions in the Kenya Law Database. These judgments are vital to this CFCS project promoting accountability and access to legal remedies in the TB response.

[*Gichuru v. Package Insurance Brokers Ltd*](#) (2021, Supreme Court of Kenya) on health status- and disability-based employment discrimination, unfair and wrongful dismissal, and the constitutional and statutory right to be free from discrimination.

[*J.O.O. \(also known as J.M.\) v. Attorney General and Ors.*](#) (2018, High Court of Kenya at Bungoma) on inhumane and degrading treatment and poor-quality maternal health care and the constitutional rights to dignity, health, and freedom from cruel, inhuman, and degrading treatment.

[*Daniel Ng'etich v. Attorney General*](#) (2016, High Court of Kenya at Nairobi) on involuntary isolation and imprisonment of people affected by TB and the constitutional rights to health, liberty, and freedom of movement.

[*KELIN v. Cabinet Secretary Ministry of Health and Ors.*](#) (2016, High Court of Kenya at Nairobi) on children living with HIV, the constitutional right to privacy, and the principle of children's "best interests."

[*M.A.O and Anor. v Attorney General and Ors.*](#) (2015, High Court of Kenya at Nairobi) on women's health care, women living with HIV, detention for failure to pay the bill for medical services, and the constitutional rights to dignity, health, liberty, non-discrimination, freedom of movement, and freedom from torture, cruel, and degrading treatment.

[*C.O.M. v. Standard Group Limited and Anor.*](#) (2013, High Court of Kenya at Nairobi) on nonconsensual HIV status disclosure and the constitutional and statutory rights to dignity and privacy.

[*Patricia Asero Ochieng and Ors. v. Attorney General*](#) (2012, High Court of Kenya at Nairobi) on access to HIV medicines and the constitutional rights to life, dignity, and health.

In *Daniel Ng'etich v. Attorney General*, the Court ordered the government to "develop a policy on the involuntary confinement of persons with TB and other infectious diseases that is compliant with the Constitution and ... incorporates [international] principles."¹ In February 2018, the Ministry of Health, through the National

¹ *Daniel Ng'etich v. Attorney General*, para. 77, Petition No. 329 of 2014, [2016] eKLR.



Tuberculosis, Leprosy and Lung Disease Program, promulgated the “National Tuberculosis, Leprosy and Lung Disease Program Tuberculosis (TB) Isolation Policy.”²

People affected by TB may bring suit in the High Court and other venues with support from KELIN and other partners for violations of their constitutional and statutory health rights, building on the holdings and legal theories in these and other relevant cases.

V. Legislation

This section surveys legislation in Kenya, considering health laws, including three new laws from this year, employment legislation, and a few others. A comprehensive analysis of each law is beyond the scope of this memo. Instead, we highlight the relevant legal rights in each law and whether the legislation expressly provides for access to justice and legal remedies.

A. Health Act

The *Health Act* of 2017 aims to “establish a unified health system, to coordinate the ... national government and county government health systems, to ... regulat[e] ... health care service and health care service providers, health products and health technologies.” In accordance with the Constitution, section 3 of the legislation declares the objects include to:

- “b) protect, respect, promote and fulfill the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health, including reproductive health care and the right to emergency medical treatment;
- (c) protect, respect, promote and fulfill the rights of children to basic nutrition and health care services contemplated in Articles 43 (1) (c) and 53 (1) (c) of the Constitution;
- (d) protect, respect, promote and fulfill the rights of vulnerable groups as defined in Article 21 of the Constitution in all matters regarding health.”

Section 5 on the “Standard of health” states:

² The policy is available here <https://www.tbonline.info/media/uploads/documents/kenya-tb-isolation-policy-2018-1.pdf>.



"(1) Every person has the right to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services.

(2) Every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and this Act."

Part II of the *Health Act* sets forth "Rights and Duties," including the rights to reproductive health, emergency treatment, health information, informed consent, and confidentiality. Section 14 on "Complaints" establishes that every "person has a right to file a complaint about the manner in which he or she was treated at a health facility and have the complaint investigated appropriately." The provision calls on the national and county governments to "establish and publish the procedure for the laying of complaints within public and private health care facilities" (section 14(2)). Section 14 further states:

"(3) The procedures for laying complaints shall—

(a) be displayed by all health facilities in a manner that is visible for any person entering the establishment and the procedure must be communicated to users on a regular basis; and

(b) be primarily handled by the head of the relevant facility or any person designated by the facility as responsible for handling user complaints."

Every complainant "has a right to be informed, in writing and within ... three months from the date the complaint was lodged, of the action taken or decision made regarding the complaint" (section 14(4)). If a health facility or another authority is unable or unwilling to resolve a complaint to the satisfaction of the complainant, the Kenya Health Professions Oversight Authority "shall take necessary action" (section 14(5)). The act establishes that one of the duties of the Kenya Health Professions Oversight Authority is to "receive and facilitate the resolution of complaints from patients, aggrieved parties and regulatory bodies" (section 48(d)). However, the act does not mention the kinds of remedies or redress available to complainants under the law.

The *Health Act* does not appear to create a private right of action, allowing individuals to bring legal claims directly in court for violations of their rights under the law. Some sections include provisions establishing penalties for violators, and section 111 creates a "General penalty" for a "person convicted of an offence under [the legislation] for which no penalty is provided." But the law is otherwise silent on



enforcement. More research is needed to understand how individuals may enforce their rights in the *Health Act*.

People affected by TB, KELIN, and their partners may test whether the health rights enshrined in the *Health Act* are enforceable in court. People affected by TB should also try filing complaints about challenges experienced before, during, or after their TB diagnosis, treatment, care, or support using the procedures called for in the act.

B. Public Health Act

The *Public Health Act* of 1921, revised as recently as 2020, simply states its purpose as an act “to make provision for securing and maintaining health” (preamble). Parts III and IV address the notification, prevention, and suppression of infectious diseases, including TB. Parts V, VII, and VIII cover specific diseases – venereal diseases, leprosy, and smallpox.

The *Public Health Act* does not lay the foundation for a rights-based, people-centered TB response. It does not recognize the rights of people affected by infectious diseases or establish standards for treatment, care, and support. Instead, the law primarily empowers medical officers and public health authorities to take intrusive and restrictive actions against people “suffering from infectious disease,” including removal, isolation, and inspections (sections 21, 26-27). Section 28 creates a “Penalty for exposure of infected persons and things” for any person who:

“(a) while suffering from any infectious disease, wilfully exposes himself without proper precautions against spreading the said disease in any street, public place, shop, inn or public conveyance, or enters any public conveyance without previously notifying the owner, conductor or driver thereof that he is so suffering;

...

(c) gives, lends, sells, transmits or exposes, without previous disinfection, any bedding, clothing, rags or other things which have been exposed to infection from any such disease.”

The penalty consists of “a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or to both” (section 28).

The *Public Health Act* does not appear to create a private right of action to enforce the provisions of the law, nor does it recognize any legal rights that apply to people



affected by TB. The provisions in the final part of the law on enforcement only speak to the prosecutorial powers of the State to enforce the law against individuals and further elaborate on the powers of medical officers and other health authorities.

C. New 2023 Health Legislation

Kenya enacted a flurry of new health legislation in October 2023: the *Digital Health Act*, *Social Health Insurance Act*, *Primary Health Care Act*, and *Facility Improvement Financing Act*.³ The President of Kenya announced the new laws and stated, “These laws will transform healthcare in Kenya; they will save lives, empower communities and make us a stronger and healthier nation.”⁴ A detailed analysis of all four laws is beyond the scope of this memo. The author could only locate official copies of the bills, not the final versions of the enacted laws published in the Kenya Gazette. Nonetheless, we highlight a few aspects of the *Digital Health*, *Primary Health Care*, and *Social Health Insurance* bills based on a quick review of the instruments.

1. *Digital Health Bill*

The *Digital Health Bill* creates the Digital Health Agency, provides a framework for digital health services, and establishes a “comprehensive integrated digital health information system” (preamble). Section 4 sets forth guiding principles to implement the law:

- (a) health data is a strategic national asset;
- (b) safeguard of the privacy, confidentiality and security of health data for information sharing and use;
- (c) digital health shall facilitate data sharing and use for informed decision-making at all levels; and
- (d) the digital health ecosystem shall serve the health sector and facilitate in a progressive and equitable manner, the highest attainable standard of health.

Part VI addresses data confidentiality, privacy, and security, charging the Cabinet Secretary of the Ministry of Health to protect “all sensitive personal data held in the system” (section 30). However, the bill does not expressly create enforceable legal

³ See Republic of Kenya, *President Ruto: New Healthcare Plan Will Leave No One Behind* (Oct. 19, 2023), <https://www.president.go.ke/president-ruto-new-healthcare-plan-will-leave-no-one-behind/> (accessed Oct. 24, 2023).

⁴ *Ibid.*



rights for data subjects, i.e., the individual users of the health system. Section 37 directs health care providers to obtain consent to “process sensitive personal data.” But the provision does not clearly establish whether individuals own their health data and have a legal right to informed consent before the processing of their data. The *Digital Health Bill* also does not appear to create a private right of action, allowing individuals to bring legal action directly in court for violations of the law, nor does it mention a grievance and redress system to handle individual complaints under the law.

2. *Primary Health Care Bill*

The *Primary Health Care Bill* is a relatively short instrument with just three main sections on primary health care services, primary health care workforce, and management of primary health care services. The preamble states that the bill “provides a framework for the delivery of and access to and management of primary health care.” Among other things, section 3 states that the objects of the law are to:

“(a) promote and fulfill the rights of all persons in Kenya towards the progressive realization of their right to the highest attainable standards of health care; [and]
(e) provide for the role of community health officers, community health assistants and community health promoters in the provision of community based primary health care services.”

The bill defines “community health care services” to include health education, disease prevention, community-based surveillance, and psycho-social support. The instrument establishes roles and responsibilities for the national and county governments in managing primary health services, and it delegates legislative power to the Cabinet Secretary responsible for health to promulgate implementing regulations. The *Primary Health Care Bill* does not appear to create a private right of action, allowing individuals to bring legal action directly in court for violations of the law, nor does it mention a grievance and redress system to handle individual complaints under the law.

3. *Social Health Insurance Bill*

The purposes of the *Social Health Insurance Bill* are to “establish the framework for



the management of social health insurance; to provide for the establishment of the Social Health Authority; [and] to give effect to Article 43(1)(a) of the Constitution,” enshrining the right to health. The bill declares that “Every Kenyan shall register as a member of the Social Health Insurance Fund” and a “person shall only access healthcare services under this Act where their contributions to the ... Fund are up to date and active” (sections 26). The bill also creates an “Emergency, Chronic and Critical Illness Fund” to “defray the costs of management of chronic illnesses after depletion of the social health insurance cover” and “cover the costs of emergency treatment” (section 28).

The bill empowers the Social Health Insurance Authority to “receive and address complaints that may arise from the implementation” of the law (section 5(i)). The bill does not contain further details about the complaints mechanism or procedures. Part VIII of the bill establishes a “Dispute Resolution Tribunal” for “the purpose of hearing and determining complaints, disputes and appeals” under the law (sections 44(1)). The bill does not describe the kinds of remedies or redress available to people covered by the Social Health Insurance Fund who lodge complaints under the law. The bill does explain that a “person who is not satisfied with an order made by the Tribunal ... may appeal to the High Court within twenty-one days from the date the order is made” (section 43(3)).

With support from KELIN and other partners, people affected by TB covered by the Social Health Insurance Fund may file complaints with the Social Health Insurance Authority and the Dispute Resolution Tribunal about challenges experienced before, during, or after TB diagnosis, treatment, care, or support.

D. HIV and AIDS Prevention and Control Act

The *HIV and AIDS Prevention and Control Act* of 2006 provides measures for the prevention, management, and control of HIV, the protection and promotion of public health, and “the appropriate treatment, counseling, support and care” of people living with HIV (preamble). Part II of the act provides for “HIV Education and Information.” Part IV addresses HIV testing and access to health services, recognizing the right to informed consent and prohibiting compulsory HIV testing, including for health care, employment, education, and marriage (sections 13-14). Section 19 establishes the right of people living with HIV to access health services on a non-discriminatory basis, stating:



“Every health institution, whether public or private, and every health management organization or medical insurance provider shall facilitate access to healthcare services to persons with HIV without discrimination on the basis of HIV status.”

Part V of the law contains four sections on confidentiality, recognizing the rights to privacy, confidentiality of health records, and informed consent to disclose HIV test results (sections 20-22). Part VI criminalizes HIV transmission for people who “knowingly and recklessly ... place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected” (section 24(2)). Part VIII of the HIV act addresses “Discriminatory Acts and Policies,” prohibiting HIV-based discrimination in health care, employment, education, travel, housing, public service, and credit and insurance services (sections 31-36).

The *HIV and AIDS Prevention and Control Act* does not appear to create a private right of action allowing people living with HIV to bring legal claims directly in court for violations of their rights under the law. Instead, Part VII of the HIV law establishes the HIV and AIDS Tribunal with jurisdiction to “hear and determine complaints arising out of any breach” of the act and to “hear and determine any matter or appeal as may be made” under the law (section 26). Section 27 states that the Tribunal “shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.” The Tribunal has the further powers to summon expert evidence, award the costs of the proceedings, and make orders “as may be appropriate in the circumstances,” including awarding damages. (section 27). Section 43 creates a “General penalty” for violations of the law:

“A person convicted of an offence under this Act for which no other penalty is provided shall be liable for imprisonment for a term not exceeding two years or to a fine not exceeding one hundred thousand shillings or to both.”

The *HIV and AIDS Prevention and Control Act* does not explicitly apply to people affected by TB. However, people living with HIV/TB co-infection, people affected by TB perceived to have HIV, and TB survivors living with HIV are all directly protected by the law. With support from KELIN and other partners, they may lodge complaints with the HIV and AIDS Tribunal to defend their rights under the law.



E. Employment Act

The *Employment Act* of 2006 establishes and defines the “fundamental rights of employees,” provides basic conditions of employment, and regulates the employment of children (preamble). Section 5 in the part on “General Principles” states that it “shall be the duty of the Minister of Labour, labour officers and the Industrial Court ... to promote equality of opportunity in employment in order to eliminate discrimination in employment.” Section 5(3) declares:

“(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee–

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

Part V on “Rights and Duties in Employment” establishes “basic minimum conditions of employment,” including sick leave and maternity leave (sections 26, 29-30).

Sections 45 and 46 prohibit unfair termination and disciplinary measures based on:

“(b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;

...

(g) an employee’s race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;

(h) an employee’s initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.”

Section 47 explains that employees unfairly terminated or disciplined may submit a complaint to a “labour officer” pursuant to the procedures established later in the law, discussed below. Section 47 further clarifies:

“The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.”

Section 49 enumerates a list of remedies available to employees for wrongful dismissal and unfair termination, including lost wages and reinstatement. Oddly,



section 48 states that “no advocate shall represent a party in the proceedings before a labour officer,” seemingly prohibiting an employee from obtaining legal representation when lodging a complaint under the law.

Part XII sets forth dispute settlement procedures, empowering aggrieved workers to “complain to the labour officer or lodge a complaint or suit in the Industrial Court” (section 87). Section 87 further establishes that only the Industrial Court may hear complaints or suits under the law, except when the issue is secondary to other legal claims.

Employees affected by TB may lodge complaints with a labour officer or file suit in the Industrial Court seeking various remedies for violations of their rights under the *Employment Act*, including unfair termination or refusal to grant sick leave. They may obtain legal representation when filing suit in court but not when lodging a complaint with a labour officer.

F. Other Laws

Several other pieces of legislation are potentially relevant for people affected by TB and may establish enforceable rights and legal remedies. An analysis of these laws is beyond the scope of this memo, but we hope KELIN and other partners might look more carefully at these statutes to consider how they may support people affected by TB in Kenya.

The *Access to Information Act* of 2016 gives effect to the right of access to information in article 35 of the Constitution. It confers oversight and enforcement authority to the Commission on Administrative Justice. The law empowers the Commission to “investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions” of the act (section 21(1)(a)).

The *Occupational Health and Safety Act* of 2007 provides for the workers’ safety, health, and welfare and establishes the National Council for Occupational Safety and Health. The law requires medical professionals who believe a patient is suffering from an occupational disease to notify the Director of Occupational Safety and Health Services, sharing information about the patient’s disease and workplace (section 22). Part IV on “Enforcement” empowers “occupational health and safety officers” to



receive, examine, and investigate complaints about unhealthy or unsafe workplaces (sections 32-42).

The *Children Act* of 2022 gives effect to article 53 of the Constitution to provide for children's rights and parental responsibility, regulate the administration of children's services, and establish the National Council for Children's Services. Part II of the act enshrines children's rights, including the right to healthcare, non-discrimination, and education (sections 16, 9, 13). Part VIII empowers the Chief Justice children's courts in counties and sub-counties with jurisdiction to conduct civil proceedings on matters under the law (sections 90-91).

VI. Administrative Law

This section briefly considers the usefulness of the Kenya National Commission on Human Rights in promoting access to rights and legal remedies for people affected by TB in Kenya.

A. Kenya National Commission on Human Rights

As noted above, the Constitution establishes the Kenya National Human Rights and Equality Commission in Part 5 of Chapter 4. The *Kenya National Human Rights Commission Act* of 2011 restructured the Commission and established the Kenya National Commission on Human Rights. Among other things, the Commission is empowered to:

- "(c) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic;
- (d) receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discriminations under the gender and equality commission, and take steps to secure appropriate redress where human rights have been violated;
- (e) on its own initiative or on the basis of complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs;
- (f) act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination." (section 8 of the act)



The Commission's responsibility to "take steps to secure appropriate redress where human rights have been violated" allows people affected by TB to engage the Commission to access legal remedies for rights violations (section 8). Section 27 of the act grants the Commission "powers of a court" to:

- "(a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission."

Section 29 states that the Commission "shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation," but if it cannot be resolved this way, "the Commission shall make such recommendations as it deems fit." Section 30 limits the Commission's jurisdiction, declaring that the Commission "shall not investigate ... a matter pending before any court or judicial tribunal."

Sections 32 and 33 establish rules for lodging complaints with the Commission. Section 32 states:

- "(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).
- (2) A complaint may be made on behalf of an aggrieved person—
 - (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
 - (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a), is entitled to make the complaint on behalf of the aggrieved person."

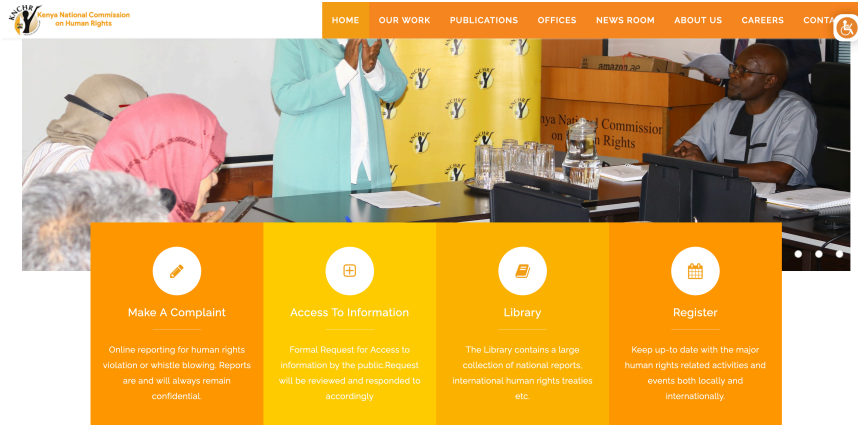
Section 33 details the permissible form of complaints, stating that a "person wishing to lodge a complaint alleging violation of human rights may do so orally or in writing." The Commission's website provides a link on the homepage to "Make a Complaint":⁵

⁵ Kenya National Commission on Human Rights, <https://www.knchr.org/> (accessed Oct. 26, 2023).



Promoting Human Rights!

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The link leads to a page titled “Report Violation” that provides a detailed complaint form that people affected by TB can submit to the Commission electronically:⁶

⁶ Kenya National Commission on Human Rights, *Report Violation*, <https://www.knchr.org/Report-Violation> (accessed Oct. 26, 2023).



Report Violation

The [admissibility criteria](#) will give you a guide on complaints filed at KNCHR. To file a complaint you can either visit our offices to record your complaint, send as a letter on the contacts provided, use our online complaints page or send the complaints to following email address: complaint@knchr.org
All human rights violations reported to us are and will always remain confidential. Should you need further guidance on this please free to contact us

Name: *

Name

Email: *

Email

Tel No.: *

Telephone Number

Idno/Passport: *

Gender: *

==Please select==

Sexual Orientation:

==Please select==

Age: *

Postal Address:

Marital Status: *

==Please select==

Nationality: *

==Please select==

County: *

==Please select==

SubCounty: *

==Please select==

Ward:

Occupation:

Present Physical Address:

Education Level: *

==Please select==

Type of Complaint: *

==Please select==

Lodging Complaint As: *

==Please select==

Summary of Facts of Human Rights Violation: *

Messages


Attachments:

Add Files

Start Upload

0% 0 kb

☐ I'm not a robot

 reCAPTCHA
Privacy Terms

Submit

Reset

Frequently asked questions

Download Admissibility Criteria

Standard Operating Procedures

The "Report Violation" page also provides links to "[admissibility criteria](#)" and "[frequently asked questions](#)" about the complaint procedures. The page also contains an email address to which complaints may be emailed: complaint@knchr.org. The admissibility criteria explain that individuals can also lodge complaints by writing to or phoning the Commission at:

P.O. Box 74359/00200 Nairobi



Phone#: 020-2717908

Mobile#: 0726610159

The “Report Violation” page states, “All human rights violations reported to us are and will always remain confidential.”⁷

People affected by TB, with support from KELIN and other partners, may lodge complaints online, by phone, or in writing with the Kenya National Commission on Human Rights, seeking redress for violations of their rights in the Constitution of Kenya.

⁷ Ibid.