

**THE RIGHT TO PROPER HEALTH CARE FOR THE MENTALLY  
HANDICAPPED**

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By

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**DECLARATION**

I, THENGE TABITHA WACU do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

PROFESSOR DAVID SPERLING.

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## **DEDICATION**

I dedicate this work to my parents, siblings and friends for their unending support and encouragement during the course of writing this dissertation. Without them, I would not have had the strength or motivation to complete this project.

May Almighty God bless you all abundantly!

## **ABSTRACT**

The Constitution of Kenya recognises socio-economic rights under Article 43. Among these rights is the right to proper health care for the mentally handicapped. The recognition of this right aims at protecting and improving the well-being of the mentally handicapped persons of Kenya who form part of the most vulnerable people in our society.

This study discusses: the state and circumstances of health care for mentally handicapped persons in Kenya; whether the State is playing its role in ensuring that adequate health care is being provided and the rights accorded mentally handicapped people are being fulfilled; and whether the present and proposed laws regarding the mentally handicapped people in Kenya are appropriate, up to date and reflect standards set by international practice.

This study also assesses the obligations placed on the State by the Constitution of Kenya, the judicial enforcement of the right to proper health care for the mentally handicapped and the challenges faced in the judicial enforcement of this right.

Finally, the study makes several recommendations regarding ways in which the judiciary and the national and county governments of Kenya can help ensure the constitutional rights of the mentally handicapped people of Kenya are fully achieved and implemented.



## **LIST OF ABBREVIATIONS**

ICESCR	International Covenant on Economic, Social and Cultural Rights
ACHPR	African Charter on Human and Peoples' Rights
CESCR	Committee on Economic, Social and Cultural Rights
NCLR	National Council for Law Reporting
KNHRC	Kenya National Human Rights Commission
NGOs	Non-Governmental Organisations

## **LIST OF CASES**

*John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, Nairobi Petition No. 15 of 2011 [2011] eKLR.

*Kenya Society for the Mentally Handicapped v Attorney General and Others* [2012] eKLR.

*Mitu-Bell Welfare Society v Attorney General and 2 Others*, Nairobi Petition No. 164 of 2011 (Unreported).

*Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*, Petition No. 133 of 2013.

*Soobramoney v Minister of Health (Kwazulu Natal)* [1998] 1 SA 765 (CC).

*Government of the Republic of South Africa. & Others v Grootboom & Others*, [2000] 11 BCLR 1169. (CC)

*Minister of Health and others v Treatment Action Campaign and Others*, [2002] 10 BCLR 1075 (CC).

*Eldridge v British Columbia*, [1997] 3 SCR 624, 1997 Can LII 327 (SCC).

*Lindiwe Mazibuko and Others v City of Johannesburg and Others*, [2009] CCT 39/09

## **CHAPTER ONE: INTRODUCTION**

### **1.1 Background**

Persons with mental disabilities in Kenya have various rights accorded to them by the law, both domestic and international. Among these rights is the right granted by Article 43 (1) (a) of the Constitution of Kenya which states: “Every person has the right to the highest attainable standard of health, which includes the right to health care services...”<sup>1</sup>

With regard to international law, Article 2 (5) & (6) of the Constitution of Kenya states that the “general rules of international law” and “any treaty or convention ratified by Kenya” shall “form part of the law of Kenya.”<sup>2</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights<sup>3</sup> and Article 16 of the African Charter of Human and Peoples Rights<sup>4</sup> accord everyone the right to the enjoyment of the best attainable standard of physical and mental health. Since Kenya has ratified the International Covenant on Economic Social and Cultural Rights and the African Charter of Human and Peoples Rights, their provisions form part of the law of Kenya.

Article 27 (1) of the Kenya Constitution states: “Every person is equal before the law and has the right to equal protection and equal benefit of the law.” Article 27 (4) states: “The State shall not discriminate directly or indirectly against any person on any ground.” Article 27 (6) states: “...the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”<sup>5</sup> Article 28 states that every person has inherent dignity and the right to have that dignity respected and protected.<sup>6</sup>

Taken all together the Articles of the Kenya Constitution cited above make it clear that the Government of Kenya has the responsibility to ensure that mentally handicapped citizens enjoy the rights accorded to them by the Constitution and other legal instruments. The nature and scope of the State’s obligation is brought out even more

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<sup>1</sup> Article 43 (1) (a), Constitution of Kenya (2010).

<sup>2</sup> Article 2(5) & (6), Constitution of Kenya (2010).

<sup>3</sup> Article 12 ICESCR.

<sup>4</sup> Article 16 ACHPR.

<sup>5</sup> Article 27, Constitution of Kenya (2010).

<sup>6</sup> Article 28, Constitution of Kenya (2010).

directly in Article 21 (1) which states: “It is a 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.”<sup>7</sup> Article 20 (5) (b) states that in applying the right to the best attainable health care that is provided for in Article 43, if the State claims that it does not have resources to the implementation of a right, it shall give priority to ensuring the widest possible enjoyment of the right.<sup>8</sup>

Article 174 of the Constitution outlines the objects of devolution. These objects, in relation to the mentally handicapped people are: to protect and promote the interests and rights of minorities and marginalised communities<sup>9</sup>; and to promote social and economic developments and the provision of easily available services throughout Kenya.<sup>10</sup>

## **1.2 Statement of the Problem**

The 2011 Report of the Kenya National Human Rights Commission (KNHRC) concluded that persons with mental disabilities have been neglected and abandoned in mental health facilities and that the legislative, policy and budgetary steps of the government have been ineffective in improving the standard of mental health care.<sup>11</sup>

National legislation regarding mental health is in dire need of review. The current Mental Health Act 1989 has not been amended since 1991 and some of its provisions are outdated. Section 5 (h) of the Act states that one of the functions of the Kenya Board of Mental Health is to “initiate community or family-based programmes for the care of persons suffering from mental disorder” but there is no evidence that the Board has ever taken any action to implement such a scheme or fulfil this function. This would be a much better alternative to the hospitalisation of patients that do not have severe conditions.

The majority of the mentally handicapped people of Kenya are unaware of their constitutional rights. Even where they are aware of those rights, they would be unable to defend themselves in the event of their rights being violated. Who then can defend and speak for them?

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<sup>7</sup> Article 21 (1), Constitution of Kenya (2010).

<sup>8</sup> Article 20 (5) (b), Constitution of Kenya (2010).

<sup>9</sup> Article 174 (e), Constitution of Kenya, 2010.

<sup>10</sup> Article 174 (f), Constitution of Kenya, 2010.

<sup>11</sup> KNHRC, *Silenced minds; the systematic neglect of mental health systems in Kenya; A Human Rights Audit of the Mental Health Systems in Kenya*, 2011.

There are also many issues related to the adequacy of present legislation and the evident lack of political will shown by the Government of Kenya in addressing the problems of the mental health care sector. The Mental Health Bill 2014<sup>12</sup>, for instance, has been under discussion in Parliament for more than two years and there seems to be no prospect that it will be passed during the current session of the legislature.

A question arises, with reference to the Fourth Schedule of the Kenya Constitution, PART 2 – COUNTY GOVERNMENTS, Article 2, which devolves a number of functions and powers related to health services to the Counties, as to whether mental health should be a function devolved to the county government and persons with mental handicaps should be looked after in their own counties. The community based rights provided for by Section 5 of the Mental Health Act 1989 may finally be realised if the provisions of Part II, Section 6 of the Mental Health Bill 2014 lead to a greater involvement by County governments in mental health care.

### **1.3 Justification of the Study**

In spite of the fact that there is a Mental Health Bill 2014 now before Parliament, many questions related to the provision of health care for the mentally handicapped citizens of Kenya remain unanswered. Who speaks for them? What are the prevailing circumstances in this sector and who is responsible for addressing them? Are the laws related to this sector adequate and is the Government of Kenya concerned about the sector and about ensuring that related laws are relevant, up to date and in keeping with international standards and criteria? How exactly will the national and county governments coordinate provisions for the care of the mentally handicapped? Would it be preferable to devolve this function fully to the county governments which are much closer to the local communities on the ground? This study addresses a broad range of important issues faced by mentally handicapped people and will gather evidence with a view to recommending the best way to improve care for them.

### **1.4 Statement of Objectives**

The following are the objectives for my research paper:

- To assess the state and circumstances of health care for mentally handicapped persons in Kenya

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<sup>12</sup> Mental Health Bill, 2014

- To determine whether the State is playing its role in ensuring that adequate health care is being provided and the rights accorded mentally handicapped people are being fulfilled.
- To assess whether the present and proposed laws regarding the mentally handicapped people in Kenya are appropriate, up to date and reflect standards set by international practice.
- To come up with recommendations to improve the current situation regarding the health care circumstances of mentally handicapped persons in Kenya.

### **1.5 Research Questions**

The following are my research questions:

- What is the present state and scope of health care for mentally handicapped persons in Kenya?
- Is the Government of Kenya and are the county governments paying sufficient attention to the issue of health care standards for mentally handicapped citizens?
- Are the laws, or proposed laws, regarding mental health care in Kenya adequate and appropriate? Do they reflect international standards and practices?
- What measures might be taken to improve the social and economic circumstances and the proposed legislation related to mentally handicapped persons in Kenya?

### **1.6 Hypotheses**

This study is premised on the following hypotheses:

1. In spite of the constitutional Article 20 (5) (c), Constitution of Kenya, 2010. right to the highest attainable standard of health care in Kenya, violations of this right are rampant and the present state and scope of healthcare for the mentally handicapped is deficient;
2. The Government of Kenya and the county governments is pay adequate attention to the issue of health care standards for mentally handicapped citizens;
3. The laws, or proposed laws, regarding mental health care in Kenya are adequate and appropriate and reflect international standards and practices;
4. There are measures that can be taken to improve the social and economic circumstances and the proposed legislation related to mentally handicapped persons in Kenya

### **1.7 Limitations**

The economic, social and cultural rights introduced under the Constitution of Kenya 2010 are still fairly new. As a result of this, not much has been written regarding these rights in Kenya. There are also very few court decisions in Kenya regarding mental health care and socio-economic rights in general and the rulings in these cases have relied in South African precedence. In addition to this, there is limited material written about mental health care in Kenya. This made it difficult to determine the stand of the Kenyan judiciary with regard to socio-economic rights, particularly, the right to mental health care.

This research was carried out at a time where the doctors in the country had a strike. As a result, it was difficult to secure interviews with the practitioners who work in the mental health sector.

### **1.8 Chapter Summary**

This chapter gives a brief background of the study. It discusses the problem at hand, the objectives of the study and the methods that will be used to carry out the research. The challenges that were faced while carrying out this research have also been discussed in brief.

## **CHAPTER TWO: THEORETICAL AND CONCEPTUAL FRAMEWORK AND METHODOLOGY**

### **2.1 Introduction**

The right to the enjoyment of the highest attainable standard of mental health is a fundamental right accorded everyone. It is recognised by both domestic law and international human rights law. This chapter discusses the content of the right to mental health and the State's obligations towards the realisation of this right. The discussions will be based on the theory of human rights. This chapter also discusses the methodology used to carry out this research.

### **2.2 The Human Rights Theory**

This study is based primarily on the theory of human rights. This theory replaced the notion of natural law theory and natural rights in the twentieth century. It views rights as something natural derived from the very dignity and nature of the human person. When applied to life in society governed by a political authority, the theory considers the State to be the duty bearer with regard to human rights; thus, the State has the obligation to respect, protect and fulfil these rights. The obligation of the State to respect human rights pertains to the State's obligation to refrain from interfering with the enjoyment of the rights. The obligation to protect requires the State to prevent the violations of such rights by third parties. The obligation to fulfil requires the State to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.<sup>13</sup>

Article 21 of the Kenya Constitution 2010 embodies the theory of human rights when it states: (1) it is a fundamental duty of the State to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights; and (2) 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.<sup>14</sup>

Amartya Sen states that a theory of human rights must address certain questions. These questions are: What kind of a statement does a declaration of human rights make? What makes human rights important? What duties and obligations do human rights generate? Through what forms of action can human rights be promoted, and in particular, whether

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<sup>13</sup> Nowak M, *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, 2003.

<sup>14</sup> Article 21 (1) and (2), Constitution of Kenya (2010).



legislation must be the principal, or even a necessary, means of implementation of human rights? Can economic and social rights be reasonably included among human rights? How can proposals of human rights be defended or challenged and how should their claim to a universal status be assessed, especially in a world with much cultural variation and widely diverse practice? If these questions are affirmed, then that constitutes a human rights theory.<sup>15</sup>

Amartya Sen states that human rights generate reasons for action for agents who are in a position to help in the promotion or safeguarding of the underlying freedoms. The implementation of human rights can go beyond legislation and a theory of human rights cannot be confined within the juridical model.<sup>16</sup>

### **2.3 Key Aspects of the Right to Mental Health Care**

Johnathan Arwa (2013) states that the new Constitution has entrenched a wide array of socio-economic rights that were non-existent in the old constitution. Among them is the right to the highest attainable standard of health. The fact that these rights are expressly referred to in the Constitution means that they are justiciable and enforceable. Arwa states that if all the national human rights institutions created under the new Constitution faithfully discharged their mandates, the social, political and cultural environment promoting socio-economic rights would change for the better.<sup>17</sup>

The right to health refers to the right to both physical and mental health care. The CESCR underscores that this is an inclusive right which not only obliges state parties to provide timely and appropriate health care but also to address the underlying determinants of health such as access to safe and portable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information including sexual and reproductive health.<sup>18</sup>

Leary (1994) sees human rights as interdependent and depending on other human rights for their fulfilment. The right to health care, for instance, cannot be effectively protected without respect for other recognised rights such as the prohibition of discrimination. She also states that the concept of rights stems from a perception of the inherent dignity of

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<sup>15</sup> Sen A, 'Elements of a Theory of Human Rights' *Philosophy and Public Affairs* 2004, 315

<sup>16</sup> Sen A, 'Elements of a Theory of Human Rights', 315

<sup>17</sup> Arwa J.O., 'Litigating socioeconomic rights in domestic courts, The Kenyan experience,' Volume 17, 2013, 421.

<sup>18</sup> CESCR General Comment No. 14, The Right to the Highest Attainable Standard of Health, 11 August 2000, 11.

every human being. In addition to this, the dignity of every individual must be central in all aspects of health including health care and medical experimentation.<sup>19</sup>

The right to health care contains both freedoms and entitlements. The freedoms include the right to control one's health, including the right to be free from non-consensual medical treatment and experimentation. The entitlements include the right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable standard of health.<sup>20</sup>

#### **2.4 The State's Obligation towards the Realisation of the Right to Mental Health Care**

The Constitutional Court in South Africa has held that in socio-economic rights litigation, the question should not be whether or not the rights are justiciable, but rather how to realise them in a given case.<sup>21</sup> In *Soobramoney v Minister of Health*, the South African Constitutional court ruled that the State must ensure that it manages its limited resources in order to address all claims regarding health rights. The court stated that the State should adopt a holistic approach to the larger society rather than focus on the specific needs of particular individuals within the society.<sup>22</sup> The same position was adopted by the High Court in Kenya in the case *John Kabui Mwai and 3 others v Kenya National Examinations Council & Others*.<sup>23</sup>

Lawrence lists three kinds of responsibilities the State has that are crucial for understanding what countries owe to their people. The State has the responsibility to; spend a reasonable proportion of its national budget on health services as part of its international human rights obligations; govern justly and without conflict of interest and; allocate resources fairly and efficiently among competing health priorities.<sup>24</sup>

Hunt and Mezquita (2006) state that States should devote a much more significant part of their budgets to mental health. It is important for States to give greater attention to

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<sup>19</sup> Leary VA, 'The Right to Health in International Human Rights Law' *Health and Human Rights*, Vol. 1, No. 1 (1994), 39.

<sup>20</sup> <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx> accessed on 15 November 2016.

<sup>21</sup> Mbazira C, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*, Pretoria University Law Press, 2009, 57.

<sup>22</sup> *Soobramoney v Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC).

<sup>23</sup> *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, Nairobi Petition No. 15 of 2011 [2011] eKLR.

<sup>24</sup> Gostin LO, 'What duties do Poor Countries Have for the Health of Their Own People?' *The Hastings Centre Report*, Vol. 40, No. 2 (2010), 9.

monitoring mental healthcare and support services and strong accountability mechanisms that can provide proper opportunities for those with mental disabilities to seek redress.<sup>25</sup>

Article 21 of the Constitution of Kenya outlines the State's obligations. It discusses the manner in which the State is expected to implement the rights and fundamental freedoms accorded the citizens of Kenya. Article 21 (1) states that the State and state organs have a duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.<sup>26</sup> The State is also expected to take legislative, policy and other measures in order to achieve progressive realisation of the rights accorded the citizens by Article 43.<sup>27</sup> State organs and public officers are tasked with the duty to address the needs of vulnerable members of the society including persons with disabilities.<sup>28</sup> General Comment 14 establishes 3 obligations that the State has. They are: the obligation to respect, to fulfil and to protect.<sup>29</sup>

#### **2.4.1 Obligation to Respect**

States have the obligation to respect the right to the highest attainable standard of health. They do this by refraining from denying or limiting equal access for all persons and abstaining from enforcing discriminatory practices as a state policy. This obligation also includes the State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness. These exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.<sup>30</sup>

#### **2.4.2 Obligation to Protect**

This refers to the State's duty to adopt legislation or to take any other measures that will ensure equal access to health care and health related services provided by third parties. This obligation requires that the State ensures that the privatisation of the health sector

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<sup>25</sup> Hunt P and Mesquita J, 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health' *Human Rights Quarterly*, Vol 28, No. 2 (May, 2006), 342.

<sup>26</sup> Article 21 (1), Constitution of Kenya, 2010.

<sup>27</sup> Article 21 (2), Constitution of Kenya, 2010.

<sup>28</sup> Article 21 (3), Constitution of Kenya, 2010.

<sup>29</sup> CESCR General Comment 14, 13.

<sup>30</sup> CESCR General Comment 14, 34.

does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities and to ensure that the medical practitioners meet the required standards of education, skill and ethical codes of conduct.<sup>31</sup>

### **2.4.3 Obligation to Fulfil**

This obligation requires the State to give sufficient recognition of the right to health in the national, political and legal systems. This may be done through implementation of legislation and adoption of a policy with a detailed plan for realising the right to health. States should also ensure that there is appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services with due regard to equitable distribution throughout the country.<sup>32</sup>

This obligation also requires the State to take positive measures that assist individuals and communities to enjoy the right to health. State parties are obliged to fulfil a specific right when individuals are unable, for reasons beyond their control, to realise that right themselves by their own means.<sup>33</sup>

### **2.4.4 Progressive Obligations**

S Verma (2005) interprets progressive realisation as meaning that a State has a duty to examine legal, administrative, operative and financial barriers to accessing socio-economic rights and where possible to lower them over time.<sup>34</sup> At the same time Robinson (2004) points out that the progressive realisation of economic, social and cultural rights requires an interaction of policies and programmes.<sup>35</sup> The right to physical and mental health is subject to progressive realisation and resource constraints. Hunt and Mezquita (2006) observe that many elements of the rights to physical and mental health are subject to progressive realisation and resource availability, however,

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<sup>31</sup> CESCR General Comment 14, 35.

<sup>32</sup> CESCR General Comment 14, 36.

<sup>33</sup> CESCR General Comment 14, 37.

<sup>34</sup> Verma S, 'Justiciability of Economic Social and Cultural Rights; Relevant Case Law' International Council On Human Rights Policy Review Meeting, (15 March 2005).

<sup>35</sup> Robinson M, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' *Human Rights Quarterly*, Vol. 26, No. 4 (2004), 871.

countries can still work towards the realisation of this right even with limited and scarce resources.<sup>36</sup>

Gostin (2004) considers that in order to determine what acts or omissions violate the right to health care, it is important to distinguish between the state's inability to comply, due to lack of resources, and its neglect or unwillingness to comply with its duties. A violation by the State may include its failure to take appropriate steps to realize everyone's right to the enjoyment of the highest available standard of physical and mental health care.<sup>37</sup>

The duty to progressively realise socio-economic rights is based on the fact that the resources available are scarce. This unavailability of resources constrains the State as it attempts to realise the socio-economic rights owed to its citizens. In this light, it is important to distinguish between the inability and the unwillingness of a State party to comply with its obligations. Article 2 (1) of the ICESCR provides that a State has an obligation to progressively achieve the full realization of the rights under the Covenant.<sup>38</sup>

The term 'progressive realisation' recognises the fact that the full realisation of all economic, social and cultural rights is generally not achievable over a short period of time. This imposes an obligation on the State to move as expeditiously and effectively as possible towards the full realisation of the right(s) in question.<sup>39</sup>

In the Grootboom case, the South African Constitutional Court stated that the term 'progressive realisation' meant that the right could not be realised immediately. The term means that the State must take steps to achieve this goal. Accessibility should be progressively facilitated and legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.<sup>40</sup>

The Constitution of Kenya uses the words 'the highest attainable standard' which implies that the economic and social rights granted under Article 43 may not be

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<sup>36</sup> Hunt P. and Mesquita J, 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health' *Human Rights Quarterly*, Vol 28, No. 2 (May, 2006), 342.

<sup>37</sup> Gostin LO, 'The Human Right to Health: A Right to the "Highest Attainable Standard of Health"' *The Hastings Center Report*, Vol. 31, No. 2 (2001), 30.

<sup>38</sup> Article 2 (1), UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993.

<sup>39</sup> CESCR General Comment 3, The nature of States parties obligations, 1990, 9.

<sup>40</sup> Government of the Republic of South Africa v Grootboom, [2000] 11 BCLR 1169 (CC) para 45.

immediately achievable but rather achieved only over a period of time. The word ‘attainable’ contextualises the right, which adapts itself to the political, economic and social circumstances of the country. The economic and social rights cannot be realised by the State immediately due to insufficient funds or resources, however, principles are set out that guide the courts, tribunals and other authorities in determining whether the implementation of these rights has been limited if the State claims that it does not have the resources to implement a right. This is because the State needs to set out the minimum standards for achieving those rights despite the limited nature of public resources.<sup>41</sup>

In allocating resources, the State is obliged to give priority to the realisation of rights under Article 43 having regard to the prevailing circumstances such as the vulnerability of particular individuals or groups. The court should also be careful when looking into resource availability, not to encroach into the executive function of policy and budgetary allocation, which is an executive function checked by the legislature.<sup>42</sup>

States therefore have an obligation to make use of the resources available to realise the fullest enjoyment of socio-economic rights.

#### **2.4.5 Minimum Core Obligations**

State parties to the ICESCR have an obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the covenant, including primary mental health care. The minimum core obligation basically describes the minimum level below which the provision of a right should fall. This obligation also includes the obligation to ensure the right of access to health facilities on a non-discriminatory basis, especially for the vulnerable or marginalised groups and the obligation to ensure that there is equitable distribution of health facilities.<sup>43</sup>

#### **2.5 Research Methodology**

I consulted and used both primary and secondary sources. The primary sources were the Constitution of Kenya, international legal instruments such as the ICESCR and the ACHPR, any relevant national or international statutes and case law. My original intention of interviewing medical practitioners specialists in the field of mental health

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<sup>41</sup> Lumumba PLO, Franceschi L, *The Constitution of Kenya: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 199-200.

<sup>42</sup> Lumumba PLO, Franceschi L, *The Constitution of Kenya: An Introductory Commentary*, 200.

<sup>43</sup> CESCR General Comment 14, 43.

did not materialize as the doctors' strike meant they were not at work and accessible for interviews.

The secondary sources were documents and literature produced by scholars with regard to mental health and the rights accorded to the mentally handicapped. These sources included journal articles, dissertations and theses, books, treatises, conference papers, blogs written by professionals in that field, and credible newspaper publications. I also looked at the Hansard reports of the debates in Parliament on the Mental Health Bill 2014.

## **2.6 Conclusion**

The State has an obligation to respect, protect and fulfil the right to proper health care for the mentally handicapped persons and it should work towards fulfilling those obligations. The State, in fulfilling these obligations, should ensure that the provision or fulfilment of this right should not go below a certain minimum level. This is necessary to ensure that the mentally handicapped receive adequate health care.

## **2.7 Chapter Summary**

This chapter has looked at the human rights theory. It has discussed the key aspects of the right to mental health care and the various concepts of what this right entails in relation to the obligations that the State has to ensure the realisation of this right. This chapter has also outlined the research methodology.

## **CHAPTER THREE: CASE STUDY AND COMPARATIVE ANALYSIS**

### **3.1 Case Study**

#### **3.1.1 Introduction**

A shift of emphasis has occurred regarding the health care of the mentally handicapped, from hospital care to community-based care. There has also been a growth in interest in the non-institutional form of treatment regime for those suffering mental illnesses. In the developed world, this type of care has gained in popularity, where day care units and sheltered workshops form part of a system of community-based care, however, it has failed to pick up in developing countries where there are very few facilities. In Kenya and other developing countries, the majority of people living with mental handicaps are taken care of by members of their family.

Family members who choose to take care of their mentally handicapped relatives experience various burdens such as disruption of their routines in careers, financial costs and even physical violence.<sup>44</sup> Kenya, which is a developing country, is rich in social, extended family and cultural resources, however, this is beginning to change as there is a shift from an egalitarian economy and extended family-based social support system to a nuclear-based westernised family system.<sup>45</sup>

#### **3.1.2 A Case Study of the Mathari Hospital**

A study was carried out by professionals from the Africa Mental Health Foundation on the mentally ill patients at Mathari Hospital and their relatives.<sup>46</sup> This study gives a good idea of the scope and state of healthcare for the mentally handicapped in Kenya. The study, which looks at the patients who were admitted in Mathari Psychiatric Hospital in June 2004, shows that at that time the hospital had a capacity of 600 beds and a majority of the patients admitted were from Nairobi and its environs. The hospital had only seven psychiatrists, of whom two were occupied on a full time basis by administrative duties. Patients admitted at the hospital were those who could not afford

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<sup>44</sup> Clausen JA, Yarrow MR 'The impact of mental illness on the family' *JSoc Issues* 1955, 11.

<sup>45</sup> Ohaeri JU, Fido AA 'The opinions of caregivers on aspects of schizophrenia and major affective disorders in a Nigerian setting' *Soc Psychiatr Psych Epid* 2001; 493-499.

<sup>46</sup> DM Ndeti, M Pizzo, 'Perceived economic and behavioural effects of the mentally ill on their relatives in Kenya: a case study of the Mathari Hospital' *African Journal of Psychiatry*, November 2009, 2.



private in-patient psychiatric facilities. The patients at the hospital who participated in the study were those with the capacity to understand and respond to the questionnaires used in the study. Relatives of the patients also participated. The interviews were of a conversational nature and were not time limited.<sup>47</sup>

The study showed that there were more male patients admitted to the hospital which caused a disproportionate allocation of beds. There was a higher rate of admission for male patients possibly because there is a greater social intolerance to physically aggressive males compared to females. The study also showed that the patients were generally younger than their relatives.<sup>48</sup>

Various effects of mental illness had put the families of the persons affected by mental illness at a disadvantage. Where persons living with mental handicaps lost their jobs as a result of their handicap/illness, they became dependants of their relatives. The family status worsened since relatives had to reduce their working hours to take care of their relatives who were patients at the hospital. The family's financial resources were even more affected as they had to incur the cost of the patient's treatment as well as their own transport to the health facility.<sup>49</sup>

This study concluded that community facilities not only reduce transport costs but they are also a means of educating family members of patients on how to reduce the stigmatisation of the mentally ill. A programme involving the development of community facilities would, however, call for a revised approach to mental health care service provision. Family and community support is a common practice in developed countries, however such support is only likely to be implemented if it is adopted as part of policy and practice in Kenya.<sup>50</sup>

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<sup>47</sup> DM Ndetei, M Pizzo, 'Perceived economic and behavioural effects of the mentally ill on their relatives in Kenya: a case study of the Mathari Hospital' *African Journal of Psychiatry*, November 2009, 2.

<sup>48</sup> DM Ndetei, M Pizzo, 'Perceived economic and behavioural effects of the mentally ill on their relatives in Kenya: a case study of the Mathari Hospital', 5.

<sup>49</sup> DM Ndetei, M Pizzo, 'Perceived economic and behavioural effects of the mentally ill on their relatives in Kenya: a case study of the Mathari Hospital', 6.

<sup>50</sup> DM Ndetei, M Pizzo, 'Perceived economic and behavioural effects of the mentally ill on their relatives in Kenya: a case study of the Mathari Hospital', 7.

## 3.2 A Comparative Analysis: Mental Health Care in South Africa and Canada

### 3.2.1 South Africa

South Africa's Constitution (1996) provides for social and economic rights, among them the right to health care.<sup>51</sup> The provision of the social and economic rights by the State is dependent on the availability of resources which means that the provision of this right is limited by virtue of the lack of resources. Article 27 (2) of the South African Constitution (1996) states that the State ought to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.<sup>52</sup>

The South African Judiciary, in several cases, has interpreted the concept of progressive realisation of social and economic rights.

In *Soobramoney v Minister of Health (Kwazulu-Natal)*, the court held that the obligations imposed on the State by the constitution regarding access to health care, food, housing, water and social security are dependent on the availability of resources for such purposes. A purposive approach was to be used to interpret the Constitution. This approach is one that calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the Bill of Rights. The court further stated that the State has to manage its limited resources in order to address the claims brought to it. Where reasonable resource limitations diminish the extent of a constitutional right, such limitations must be proven to the court.<sup>53</sup>

In *Government of the Republic of South Africa and others v Grootboom and Others*, the Constitutional Court held that where the resources are not available, the State should have a reasonable plan of action to progressively fulfil the right and must devote reasonable resources to implement that plan. The court further stated that any plan that leaves the marginalised or vulnerable communities out is unreasonable. It was held that the Constitution obliges the State to provide access to housing, health care, sufficient

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<sup>51</sup> Article 27 (1), Constitution of South Africa, 1996.

<sup>52</sup> Article 27 (3), Constitution of South Africa, 1996.

<sup>53</sup> *Soobramoney v Minister of Health (Kwazulu Natal)*, [1998] 1 SA 765 (CC).

food and water and social security to those that are unable to support themselves and their dependants.<sup>54</sup>

In *Minister of Health and others v Treatment Action Campaign and Others*, the court stated that it may be impossible to give everyone access to a core service, however, the State ought to act reasonably to provide access to the social and economic rights on a progressive basis. In this case, it was held that, the State is obliged to take reasonable measures progressively in order to reduce and eventually eliminate the large areas of severe deprivation that affects the country. The court's function as regards social and economic rights is to ensure that legislative and other measures taken by the State are reasonable.<sup>55</sup>

In *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, the court stated the State needed to take reasonable legislative and other measures progressively to achieve the rights accorded the citizens by the Constitution of South Africa. The court added that the concept of progressive realisation requires that the policies made by the State ought to be reviewed and if need be, revised in order to ensure that the socio-economic rights are progressively realised.<sup>56</sup>

### **3.2.2 Canada**

Jurisprudence in Canada shows that the courts have addressed at large the need to ensure that there is progressive realisation of socio-economic rights.

In *Eldridge v British Columbia*, the appellants were hearing disabled persons who wished to have the use of translators with their doctors in hospitals covered by their health insurance. They sought a declaration that the failure by the hospitals to provide sign language interpreters as an insured benefit under the medical services plan was unconstitutional. They stated that this violated their right to the equal protection and benefit of the law without discrimination as provided by section 15 (1) of the Canadian Charter of rights and Freedoms. The court stated that the government has an obligation to ensure that the disadvantaged groups are able to benefit equally from government services. The court further stated that the government ought to justify any limitation of a right by establishing that the limitation is prescribed by law and any avenues used to

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<sup>54</sup> *Government of the Republic of South Africa. & Others v Grootboom & Others*, [2000] 11 BCLR 1169. (CC)

<sup>55</sup> *Minister of Health and others v Treatment Action Campaign and Others*, [2002] 10 BCLR 1075 (CC).

<sup>56</sup> *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, [2009] CCT 39/09 (CC).

arrive at the legislative goals are reasonable and justifiable in a free and democratic society.<sup>57</sup>

### **3.2.3 Discussion of Comparative Analysis**

The government has the obligation to prove that any violation of rights is reasonably connected to the aim of the legislation. It does this in order to show that any means chosen by the legislature are reasonable and justifiable. The government ought to ensure that the legislation minimally impairs the rights and there is some proportionality between the effect of the measure and its objectives so that attainment of the legislative goal is not outweighed by the limitation of that right.<sup>58</sup>

The jurisprudence in both South Africa and Canada has encouraged the progressive realisation of socio-economic rights. It has also encouraged the development of the use of ‘reasonableness’ for adjudicating the duties imposed on the state by the socio-economic rights. This has resulted in the courts recognising the roles played by the other branches of government; the executive and legislature, and their role in ensuring that the socio-economic rights are realised.

### **3.3 Chapter Summary**

This study has looked at a case study that was carried out on the Mathari Hospital by professionals from the Africa Mental Health Foundation. It discusses the state of the hospital and the challenges faced by the patients. A comparative analysis has also been carried out where case rulings from both South Africa and Canada were looked at.

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<sup>57</sup> *Eldridge v British Columbia*, [1997] 3 SCR 624, 1997 Can LII 327 (SCC).

<sup>58</sup> American Bar Association, ‘Human Rights, Social Justice and State Law: A Manual for Creative Lawyering’ 2008, 26.

## **CHAPTER FOUR: JUDICIAL ENFORCEMENT OF THE RIGHT TO PROPER HEALTH CARE FOR THE MENTALLY HANDICAPPED UNDER THE 2010 CONSTITUTION OF KENYA**

### **4.1 Introduction**

The first Kenyan Constitution of 1963 had various conventional and political rights, however it had no provisions regarding socio-economic rights. Very little attention was given to these rights.<sup>59</sup> These circumstances attracted the attention of the United Nation's Committee on Economic, Social and Cultural Rights. During its 41<sup>st</sup> session in November 2008, the Committee addressed the situation in Kenya and made specific recommendations to the Government of Kenya, including the recommendation that it include clauses related to social and economic rights in the new Constitution whose review process had already begun.<sup>60</sup>

The current Constitution of Kenya 2010 is a much celebrated document for a number of reasons, among them the fact that it contains a Bill of Rights which is declared to be “an integral part of Kenya's democracy and the framework for social, economic and policies.” The promulgation of the Constitution on 27 August 2010 ushered in a new era that aimed at enhancing the protection of human rights.<sup>61</sup> This was also a great milestone towards the improvement of mental health standards, given the recognition in Article 43 (1) (a) that “every person has the right to the highest standard of health, which includes the right to health care services...”

The implementation of the right to health care for the mentally handicapped may be enabled and achieved through legal, institutional and policy framework.<sup>62</sup>

### **4.2 The Right to Mental Health Care and its Enforcement under the Constitution of Kenya**

The Judiciary has a duty to protect human rights, the Constitution and the rule of law.<sup>63</sup> One of the ways to keep human rights safe is by preserving the prevailing role of the

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<sup>59</sup> Arwa JO, 'Litigating socioeconomic rights in domestic courts, The Kenyan experience' Volume 17 (2013), 420.

<sup>60</sup> Committee on Economic, Social and Cultural Rights, Report on the Fortieth and Forty-first Sessions, 2008, 362.

<sup>61</sup> Orago NW, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes', 2013, 1

<sup>62</sup> Mbicha EA, 'Judicial Enforcement of the Right to Health Under the Constitution of Kenya' Unpublished LLM Thesis, University of Nairobi School of Law, October 2014, 40

Judiciary. If the Judiciary does not play its role in supporting human rights activities and promoting the protection of the rights of individuals, citizens and human rights organisations may become an easy target for unfair restrictions made by the government.<sup>64</sup>

Article 20 (3) (a) of the Constitution states: “In applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom”.<sup>65</sup> Clause (b) of the same article states that “a court should adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”<sup>66</sup>

The courts face various challenges in the enforcement of the right to health. These challenges include balancing the doctrine of the separation of powers, interpretation on the normative content, assessing appropriate remedies and how to craft them and which approach to adopt between the reasonable test and the minimum core approach.<sup>67</sup>

The courts have to ensure that in the enforcement of socio-economic rights, they do not upset the doctrine of the separation of powers.<sup>68</sup> The Constitution states that the court should refrain from interfering with a decision made by a State organ concerning the allocation of available resources on the basis that it (the court) would have reached a different conclusion.<sup>69</sup>

Article 22 of the Constitution grants *locus standi* to every citizen whose right has been violated. It grants anyone whose right has been violated or infringed on, or a person acting on behalf of another who cannot act in their own name, the right to institute proceedings in a court of law.<sup>70</sup>

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<sup>63</sup> J Patrick White, Warren Court Under Attack: the Role of Judiciary in a Democratic Society’ (1959) 19 Maryland Law Review 180

<sup>64</sup> Abdul-Ethem F, The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective, Volume 26, Issue 3, 2002, Article 8.

<sup>65</sup> Article 20 (3) (a), Constitution of Kenya, 2010.

<sup>66</sup> Article 20 (3) (b), Constitution of Kenya, 2010.

<sup>67</sup> Biegon J and Musila G, ‘Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues’ 10th Series of ICJ Kenya’s Judiciary Watch Reports Series, Kenyan Section of the ICJ 2013.

<sup>68</sup> Mbicha EA, ‘Judicial Enforcement of the Right to Health Under the Constitution of Kenya’ Unpublished LLM Thesis, University of Nairobi School of Law, October 2014.

<sup>69</sup> Article 20 (5) (c), Constitution of Kenya, 2010.

<sup>70</sup> Article 22 (1) and (2) (a), Constitution of Kenya, 2010.

In Article 23, the Constitution lists the remedies that are afforded persons who suffer a human rights violation. They are: a declaration of rights, an injunction, a conservatory order, a declaration of any law that violates, infringes or threatens a right or fundamental freedom in the Bill of Rights, an order for compensation and an order for judicial review.<sup>71</sup>

Socio-economic rights are protected by Article 43 of the Constitution. Article 43 (1) (a) grants every citizen the right to the highest attainable standard of health care.<sup>72</sup> The provision of health care in Kenya is a function that is divided between the National Government and County Government. The National Government is tasked with coming up with health policies<sup>73</sup>, while the County Governments are in charge of county health facilities, in particular, county health facilities and promotion of health care.<sup>74</sup>

Article 21 of the Constitution outlines the obligations of the state. They are: to protect, promote and fulfil the rights and fundamental freedoms granted to the citizens by the Bill of Rights.<sup>75</sup> In *Kenya Society for the Mentally Handicapped v Attorney General and Others*, the petitioner stated that the economic and social rights of persons living with a mental handicap had been violated. The court held that its purpose was not to prescribe policies but to ensure that the policies that were followed by the State met the constitutional standards. The court further stated that the State should meet its obligations to observe, respect, promote and fulfil the rights and fundamental freedoms of the people on whose behalf the petition was brought.<sup>76</sup>

Article 21 (2) of the Constitution places an obligation on the State to take legislative, policy and other measures, including the setting of standards to ensure progressive realisation of rights provided by Article 43. In *Mitu-Bell Welfare Society v Attorney General and 2 Others*, Justice Mumbi Ngugi stated that Article 21 and 43 of the Constitution require the progressive realisation of economic, social and cultural rights. This means that the State must take steps towards the realisation of these rights. She further stated that these rights are progressive in nature, however, the State has a constitutional obligation, when confronted with such a matter, to go beyond the

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<sup>71</sup> Article 23, Constitution of Kenya, 2010.

<sup>72</sup> Article 43, Constitution of Kenya, 2010.

<sup>73</sup> Part 1, Fourth Schedule, Constitution of Kenya, 2010.

<sup>74</sup> Part 2, Fourth Schedule, Constitution of Kenya, 2010.

<sup>75</sup> Article 21, Constitution of Kenya, 2010.

<sup>76</sup> *Kenya Society for the Mentally Handicapped v Attorney General and Others*, 2012, eKLR

standard objection. The State is required to show the court how it is addressing or intends to address the rights of citizens to attain their socio-economic rights. The State also has an obligation to show what policies, if any, it has put in place to ensure that there is progressive realisation of these rights.<sup>77</sup>

Where the State asserts that it does not have the resources to implement a right guaranteed under Article 43 of the Constitution, the court is guided by the principles provided by Article 20 (5) of the Constitution. These principles are that: 1) it is the responsibility of the State to how that the resources are unavailable; 2) in allocating resources, the State is to give priority to ensuring the widest possible enjoyment of the rights or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and 3) the court may not interfere with a decision by a State organ concerning the allocation of available resources.<sup>78</sup> In *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 Others*, it was held that, the government should demonstrate the political and financial commitment towards the realisation of the right and the actions taken towards the progressive realisation of that right.<sup>79</sup>

In the *John Kabui case*, the High Court held that the inclusion of the socio-economic rights in the Constitution is aimed at advancing the socio-economic needs of Kenyans, especially the poor, in an attempt to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equitable distribution of resources.<sup>80</sup>

### **4.3 Findings**

The state of health care for mentally handicapped persons in Kenya is rather dire. Persons with mental disabilities have been neglected and abandoned in mental health facilities and the legislative, policy and budgetary steps of the government have been ineffective in improving the standard of mental health care

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<sup>77</sup> *Mitu-Bell Welfare Society v Attorney General and 2 Others*, Nairobi Petition No. 164 of 2011 (Unreported).

<sup>78</sup> Article 20 (5), Constitution of Kenya, 2010.

<sup>79</sup> *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*, Petition No. 133 of 2013.

<sup>80</sup> *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, [2011] eKLR.



The State has an obligation to respect, protect and fulfil the rights granted by the Constitution of Kenya. These obligations include ensuring that the law regarding mental health care is up to the standard set out by the international human rights law. The current law regarding mental health care is thoroughly outdated.

The State should also ensure that a mental health policy is in place. A National Mental Health Policy was drafted in 2003, however, it is yet to be adopted. This shows a failure on the part of the State to implement a policy that would improve the mental health situation in Kenya. Judging from the state of the mentally handicapped people in Kenya and the current laws, it is evident that the State is not playing its role in ensuring that adequate health care and the rights accorded mentally handicapped people are fulfilled.

The current Mental Health Act came into operation in 1989 and it brought about a significant change in the health care of persons living with mental disorders. This Act however has not been amended since 1991 and, as a result, the majority of its provisions are rather outdated. Its provisions do not reflect international practice. The Health Act is silent on matters regarding mental health.

#### **4.4 Conclusion**

The right to proper health care for the mentally handicapped is a socio-economic right and is provided for under Article 43 of the Constitution of Kenya 2010. The fact that this right is provided for under the Constitution means that it is justifiable and if this right is violated, the citizen may seek redress from the High Court.

The judiciary can also have checks and balances on the other arms of government in order to ensure that this right and all other socio-economic rights are implemented.

There are various challenges that face the adjudication of this right in Kenya. In spite of these challenges, this right may still be actualised and this may be done if the State ensures that it takes steps that will see the progressive realisation of this right.

#### **4.5 Chapter Summary**

This chapter discusses the enforcement of the right to mental health care by the courts in Kenya. It outlines the obligations placed on the judiciary by the Constitution of Kenya regarding socio-economic rights. The Constitution also gives remedies to human right violations and this has been discussed in this chapter.

## **CHAPTER 5: DISCUSSION OF CHALLENGES FACING THE ENFORCEMENT AND ACHIEVEMENT OF THE RIGHT TO PROPER HEALTH CARE FOR THE MENTALLY HANDICAPPED.**

### **5.1 Introduction**

Various challenges face the litigation of socio-economic rights and make it difficult to enforce the right to proper health care for the mentally handicapped in Kenya. They are:

- a) A hostile judicial attitude towards socio-economic rights litigation;
- b) Judicial conservatism;
- c) Lack of a procedural framework for the enforcement of socio-economic rights;
- d) Lack of adequate case reporting;
- e) Judicial tendency to copy emerging jurisprudence from South Africa

#### **5.1.1 Hostile Judicial Attitude towards Socio-economic Rights Litigation**

Some Kenyan Courts still seem to doubt the justifiability of socio-economic rights despite the fact that these rights are expressly provided for in the Constitution of Kenya 2010. This may be as a result of the historical hostility of the Kenyan courts towards human rights and their enforcement. The judges that served under the era of the old Constitution still serve under the new Constitution. In addition to this, the jurisdiction that was developed by the courts under the old Constitution, which was quite hostile to human rights, is sometimes still used as precedent.<sup>81</sup> The lack of judicial independence together with the hostile tendencies of the State after independence caused the development of a generally hostile attitude towards the litigation of socio-economic rights by the judiciary.<sup>82</sup>

The courts resort to procedural technicalities in order to cover up their hostility towards human rights enforcement. In *Kenya Aids Society v Arthur Obel*, the plaintiff went to court seeking protection of their right to health, however, the case was dismissed on

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<sup>81</sup> Arwa JO, 'Litigating socioeconomic rights in domestic courts, The Kenyan experience' 425.

<sup>82</sup> Ojwang J & Otieno-Odek J "The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya" (1988) 35(1) Netherlands International Law Review 29 at 36.

technical grounds even though evidence showed that there was a violation of the plaintiff's right to health care.<sup>83</sup>

### **5.1.2 Judicial Conservatism**

Judicial conservatives firmly believe that judicial authority extends only to judicial enforcement of the law either statute or the Constitution. They state that since the law is enacted by the representatives of the people, the enactment represents the voice of the people and it should be interpreted according to what the people intended.<sup>84</sup>

In the *John Kibui case*, the court stated that among the challenges to the realisation of socio-economic rights was the fact that the resources were limited and were not enough to facilitate immediate provision of these rights to everyone on demand. The court was of the opinion that a holistic approach that focuses beyond the individual was to be adopted in the provision of these rights.<sup>85</sup> The High Court stated that, in adjudicating socio-economic rights, the court should focus on the impact its decision will have on all the citizens instead of an individual applicant. This is likely to discourage people whose rights have been violated from seeking redress from the High Court because the court will not be interested in the rights of the individual, instead, it will be interested in the impact that its decision will have on all the citizens and their rights.

### **5.1.3 Lack of a Procedural Framework for the Enforcement of socio-economic rights**

Article 22 of the Constitution states that the Chief Justice is required to make rules that provide for court proceedings related to the enforcement of the Bill of Rights.<sup>86</sup> In spite of this provision, no rules have been promulgated by the Chief Justice in order to govern the enforcement of socio-economic rights. This makes litigation of these rights before the courts more difficult.<sup>87</sup>

### **5.1.4 Lack of adequate case reporting**

Litigation of socio-economic rights in the Kenyan courts has been greatly hampered by the lack of adequate case reporting. The National Council for Law Reporting (NCLR) was established recently to undertake law reporting. The NCLR, however,

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<sup>83</sup> Kenya Aids Society v Arthur Obel, 1997 LLR 598.

<sup>84</sup> Barnett RE, Judicial Conservatism v. A Principled Judicial Activism: Foreword to the "Symposium on Law and Philosophy", Georgetown University Law Center, 1987, 275.

<sup>85</sup> John Kabui Case

<sup>86</sup> Article 22 (3), Constitution of Kenya, 2010.

<sup>87</sup> Arwa JO, 'Litigating socioeconomic rights in domestic courts, The Kenyan Experience', 430.

only reports major cases and this leaves many cases unreported. As a result of this, legal research becomes more difficult and in one way or another, litigation of socio-economic rights is hampered.<sup>88</sup>

### **5.1.5 Judicial tendency to copy emerging jurisprudence from South Africa**

The Bill of Rights in the Kenyan Constitution was heavily borrowed from that of the Constitution of the Republic of South Africa. This has resulted in the Kenyan courts using South African precedent in coming up with rulings.

In the *John Kabui Case*, the High Court relied on the case of *Soobramoney v Minister of Health (Kwazulu Natal)* which is a South African case in spite of the fact that the provisions of Article 20 (5) of the Kenyan Constitution give the guiding principles that the courts should take. The High Court ought to have been guided by the principles laid out under Article 20 (5). Instead, it relied on the ruling of the *Soobramoney case* that, the state did not have adequate resources to provide what was demanded by the petitioners.<sup>89</sup>

## **5.2 Conclusion**

There are various challenges (discussed above) facing the enforcement of the economic, social and cultural rights in Kenya. This negatively affects the fulfilment of rights that mentally handicapped persons have to receive proper health care. Each of the challenges listed above should be looked at and eradicated in order to ensure the fulfilment of the socio-economic rights.

## **5.3 Chapter Summary**

This chapter discusses the challenges that are faced by the Kenyan courts in the enforcement and achievement of the right to proper health care for the mentally handicapped.

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<sup>88</sup> Arwa JO, 'Litigating socioeconomic rights in domestic courts, The Kenyan Experience', 431.

<sup>89</sup> Arwa JO, 'Litigating socioeconomic rights in domestic courts, The Kenyan Experience', 428-430.

## **CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS**

### **6.1 Introduction**

This chapter outlines the conclusion and recommendations of the study. It answers the research questions and proposes actions and activities that the Kenyan courts and the State should undertake in order to ensure that the right to proper health care for the mentally handicapped is fulfilled.

### **6.2 Conclusions**

This study has achieved its objectives and responded to the statement of problem. The following were the objectives for this study:

- i. To assess the state and circumstances of health care for mentally handicapped persons in Kenya
- ii. To determine whether the state is playing its role in ensuring that adequate health care is being provided and the rights accorded mentally handicapped people are being fulfilled.
- iii. To assess whether the present and proposed laws regarding the mentally handicapped people in Kenya are appropriate, up to date and reflect standards set by international practice.
- iv. To come up with recommendations to improve the current situation regarding the health care circumstances of mentally handicapped persons in Kenya.

#### **Objective i**

This study highlights the challenges faced by the mentally handicapped people in Kenya as reported by the Kenya National Human Rights Commission. Chapter Three of the study discusses a case study of the Mathari Hospital which highlights the state of the hospital, the facilities available and the number of practitioners who work there.

This study concludes that persons with mental disabilities have been neglected and abandoned in mental health facilities and the legislative, policy and budgetary steps of the government have been ineffective in improving the standard of mental health care. This shows that the state of mental healthcare is dire. The State ought to take the steps necessary to ensure that the standards in the hospitals are improved and more facilities are made available.

## **Objective ii**

This study has shown the role that the State has in fulfilling the rights that are granted the mentally handicapped people by the Constitution of Kenya. It has also shown the challenges faced in the enforcement of these rights.

The obligations that the State has include ensuring that the laws regarding mental health care are up to the standard set out by the international human rights law and that there is a mental health policy in place. The current laws regarding mental health care are rather outdated and the mental health policy that was drafted in 2003 has not been adopted.

This study concludes that there is a failure on the part of the State to fulfil its obligations that should ensure adequate health care and the fulfilment of rights accorded mentally handicapped.

## **Objective iii**

This study has discussed the current laws regarding the mentally handicapped. It has also discussed the laws provided by the international legal instruments and how these laws fit in and relate to Kenyan legislation.

This study concludes that the laws regarding the mentally handicapped in Kenya are rather outdated and they do not reflect international standard. In order to remedy this, these laws ought to be reformed in a manner that ensures that they reflect international standard.

## **Objective iv**

This study has come up with recommendations (listed in the next sub-section) that may be undertaken in order to improve the circumstances of the mentally handicapped in Kenya.

### **6.3 Recommendations**

In order to ensure that the right to health care for the mentally handicapped provided under Article 43 of the Constitution of Kenya is enforced, the following recommendations are made.

The Kenyan courts ought to recognise the justifiability of this right under the Constitution of Kenya 2010. The Constitution is the supreme law of the land. This

means that the validity of its provisions may not be challenged. Instead, they should be upheld.<sup>90</sup> The Kenyan courts should work towards ensuring that the mentally handicapped are able to receive basic health care and that other State organs or policies do not infringe on this right.

The Kenyan courts are given the mandate by Article 20 of the Constitution, to interfere with the allocation of resources by State organs provided that this interference is not only on the basis that they would have reached a different conclusion.<sup>91</sup> Given that the courts have the mandate to interfere with resource allocation decisions made by the other branches of government, they should ensure that this allocation is done in a manner that fulfils the rights granted by the Constitution of Kenya.

As seen in the emerging jurisprudence in Kenya on socio-economic rights, Kenyan courts tend to rely heavily on South African Jurisprudence. South Africa has not ratified some of the treaties that Kenya is party to and, as a result, cases in Kenya are decided differently than they should. Instead, Kenyan courts should harmonise the Constitution of Kenya with the international human rights law in accordance with Articles (5) and (6) of the Constitution. The international human rights framework will give insight on how socio-economic rights should be interpreted. This will go a long way in helping the courts to interpret the law in a manner that favours the mentally handicapped and ensuring that they receive adequate health care.

In order for there to be a full realisation of the right to proper health care for the mentally handicapped, the courts ought to take on a hybrid approach in the interpretation of the right to health. This approach includes the minimum core approach and the reasonable test approach. The courts may be guided by international law in adopting these approaches in order to ensure that this right is fulfilled to the best of the State's ability.

Institutions such as the Kenya National Human Rights Commission should work towards creating awareness to the public on socio-economic rights. In particular, they should educate the parties on the the role of the State and of individual persons and organizations in realising these rights. KNHCR should work with NGOs to educate the

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<sup>90</sup> Article 2 (1) & (3), Constitution of Kenya, 2010.

<sup>91</sup> Article 20 (5) (c), Constitution of Kenya, 2010.

public on how to seek redress from the court when their rights are violated and remedies are available to them under the Constitution of Kenya.

There should be established a Council for Reporting Cases related to Socio-Economic Rights. The National Council for Law Reporting only reports major cases. A special council created to report cases related to socio-economic rights will make research on these rights more efficient as more cases regarding these rights will be reported.



## **BIBLIOGRAPHY**

### **BOOKS**

Bradley AW and Ewing KD, *Constitutional and Administrative Law*, 15th ed, Pearson Education Publishing, New York, 2011.

Lumumba PLO, Franceschi L, *The Constitution of Kenya: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014.

Manfred N, *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, 2003.

Mbazira C, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*, Pretoria University Law Press, 2009.

### **CASE LAW**

*Eldridge v British Columbia*, [1997] 3 SCR 624, 1997 Can LII 327 (SCC).

*Government of the Republic of South Africa. & Others v Grootboom & Others*, [2000] 11 BCLR 1169. (CC)

*John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, [2011] eKLR.

*Kenya Aids Society v Arthur Obel*, [1997] LLR 598.

*Kenya Society for the Mentally Handicapped v Attorney General and Others*, [2012] eKLR.

*Lindiwe Mazibuko and Others v City of Johannesburg and Others*, [2009] CCT 39/09 (CC).

*Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*, Petition No. 133 of 2013.

*Minister of Health and others v Treatment Action Campaign and Others*, [2002] 10 BCLR 1075 (CC).

*Mitu-Bell Welfare Society v Attorney General and 2 Others*, Nairobi Petition No. 164 of 2011 (Unreported).

*Soobramoney v Minister of Health (Kwazulu Natal)* [1998] 1 SA 765 (CC).

## **LEGISLATION**

Constitution of Kenya (2010)

Constitution of the Republic of South Africa (1996)

Mental Health Act (1989)

Mental Health Bill (2014)

## **DISSERTATIONS**

Mbicha EA, 'Judicial Enforcement of the Right to Health Under the Constitution of Kenya' Unpublished LLM Thesis, University of Nairobi School of Law, October 2014.

## **INTERNATIONAL INSTRUMENTS**

African Charter on Human and Peoples' Rights.

Committee on Economic, Social and Cultural Rights, Comment No. 14, The Right to the Highest Attainable Standard of Health, 11 August 2000, 11.

Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of state parties' obligations (Fifth session, 1990).

International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 3 January 1976.

## **INTERNET SOURCES**

<http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>

## **JOURNAL ARTICLES**

Abdul-Ethem F, The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective, 26, 2002, Article 8.

American Bar Association, 'Human Rights, Social Justice and State Law: A Manual for Creative Lawyering' 2008.

Arwa JO, 'Litigating socioeconomic rights in domestic courts, The Kenyan experience' 17 (2013).

Clausen JA, Yarrow MR. The impact of mental illness on the family, *J. soc. Issues*, 1955.

DM Ndeti, M Pizzo, 'Perceived economic and behavioural effects of the mentally ill on their relatives in Kenya: a case study of the Mathari Hospital,' *African Journal of Psychiatry*, November 2009

Gostin LO, 'The Human Right to Health: A Right to the "Highest Attainable Standard of Health"' *The Hastings Centre Report*, 31(March- April, 2001).

Gostin LO, 'What duties do Poor Countries Have for the Health of Their Own People?' *The Hastings Centre Report*, 40 (March- April 2010).

Hunt P and Mesquita J, 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health' *Human Rights Quarterly*, 28 (May, 2006).

J Patrick White, Warren Court Under Attack: the Role of Judiciary in a Democratic Society, 19 *Maryland Law Review* 180 (1959).

Leary VA, 'A Right to Health in International Human Rights Law' *Health and Human Rights*, 1 (1994).

Ohaeri JU, Fido AA 'The opinions of caregivers on aspects of schizophrenia and major affective disorders in a Nigerian setting' *Soc Psychiatry Psych Epid* (2001).

Robinson M, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' *Human Rights Quarterly*, 26 (Nov 2004).

Sen Amartya, Elements of a Theory of Human Rights' 32,4 *Philosophy and Public Affairs* 315 (2004).

## **REPORTS**

KNHRC, Silenced minds; the systematic neglect of mental health systems in Kenya; A Human Rights Audit of the Mental Health Systems in Kenya, 2011.

Committee on Economic, Social and Cultural Rights, Report on the Fortieth and Forty-first Sessions, 2008.

**WORKING PAPER**

Verma S, 'Justiciability of Economic Social and Cultural Rights; Relevant Case Law' *International Council on Human Rights Policy Review Meeting*, (15 March 2005).