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Update on Kenya's implementation of the decision in the *Nubian minors'* case

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Abstract

This paper provides an update on the Nubian minors' case after the decision in the Institute for Human Rights and Development in Africa (IHR-DA) and another, v Kenya (Nubian minors' case) Through a communication to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the Nubian minors alleged, first, the violation of their right to a name and nationality. Secondly, they claimed breach of the principle of non-discrimination by the Kenyan government which they stated had denied them equal access to education and health facilities. Lastly, the Nubian minors complained of a lengthy vetting process when applying for Kenyan identity documents which they alleged put them at risk of becoming stateless. The ACERWC found the Government of Kenya in violation of the rights; to a name and nationality, health and education and recommended that Kenya takes measures to ensure that Nubian minors acquire nationality and proof of such at birth and to implement birth registration in a non-discriminatory manner. Previous work has failed to address the extent of Kenya's adherence to the Nubian minors' decision post the Nubian minors' case. This paper provides a follow up after the Nubian minors' case by examining Kenya's reforms to comply with the decision in the Nubian minors' case and highlights the challenges hindering Kenya's full compliance with the decision.

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1. Introduction

Every person is entitled to a nationality under international law. Fokala and Chenwi argue that nationality is the foundation of the enjoyment of other rights.¹ It is the 'right to have rights.' The lack of nationality results in the deprivation of all other human rights.² Nationality refers to the place of birth of an individual which results into membership to a community; while citizenship denotes the legal status granted by a state to an individual once he or she complies with the legal formalities.³ Under international law, citizenship and nationality have been used synonymously to mean state membership, while nationality creates rights and duties under international law, citizenship mainly focuses on the relationship between a state and an individual and the social and political rights attached to the state membership.⁴ Therefore, nationality or citizenship is a legal bond between an individual and a state which confers rights to the individual while creating obligations between the individual and the state.⁵ In this paper, citizenship and nationality will be used synonymously to mean membership to a state which results in the enjoyment of rights and freedoms while requiring allegiance to the state and the fulfilment of citizens' obligations.

Nationality can be acquired through either birth on the territory (*jus soli*), descent (*jus sanguinis*), marriage, adoption or through habitual residence. An individual who lacks a legal identity with any state

¹ Elvis Fokala and Lilian Chenwi, 'Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee,' 6 *African Journal of Legal Studies* (2013) 361.

² Hannah Arendt, *The origin of totalitarianism*, Meridian Books, 1958, 264.

³ Nelli Piattoeva, 'Citizenship and nationality' in John Stone and others (eds), *The Wiley Blackwell Encyclopedia of Race, Ethnicity and Nationalism*, Wiley Blackwell Publishers, 2016, 1.

⁴ Michelle Foster and H el ene Lambert, *International refugee law and the protection of stateless persons*, Oxford University Press, 2019, 54.

⁵ Alice Edwards, 'The meaning of nationality in international law in the era of human rights. Procedural and substantive aspects', in Alice Edwards and Laura van Waas (eds), *Nationality and statelessness under international law*, Cambridge University Press, 2014, 11, 13. See *Nottebohm Case (Liechtenstein v Guatemala)*; *Second Phase*, International Court of Justice (ICJ), 6 April 1955.

becomes stateless. Therefore, a stateless person is an individual who is not legally considered as a national of any state under the operation of its law.⁶ Statelessness is a major global concern – approximately ten million people around the world do not possess a nationality.⁷ Statelessness may be caused by discrimination on the basis of gender, religious or ethnic component, conflict in nationality laws and creation of new states.⁸

Statelessness affects adults and children alike. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), one third of stateless person are children.⁹ Children born to stateless parents inherit the lack of a nationality from their parents resulting into childhood statelessness. Therefore, stateless children are not considered as nationals of any state under the operation of its laws.¹⁰ Discrimination, inadequate safeguards in citizenship laws which do not fully protect children from statelessness and non-functional civil registration systems are some of the causes of childhood statelessness.¹¹ Children with a nationality have better access to education, educational scholarships, health care, social welfare, economic and social facilities compared to stateless children.¹² Consequently, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has observed that statelessness is antithesis to the best interests of the child.¹³

⁶ Convention Relating to the Status of Stateless Persons, 28 September 1954, 360 UNTS 117, Article 1(1).

⁷ UNHCR 'Global action plan to end statelessness 2014-2024', 2014.

⁸ UNHCR 'This is our home: Stateless minorities and their search for citizenship', 3 November 2017.

⁹ UNHCR 'Statelessness around the world' <<https://www.unhcr.org/statelessness-around-the-world.html>> on 10 July 2021.

¹⁰ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Kenya* (2011), Comm No 002/2009. Also see Amal de Chickera and Deidre Brennan, *The girl who lost her country*, Wolf Legal Publishers, 2011.

¹¹ African Committee of Experts on the Rights and Welfare of the Child, General Comment No 2: Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality, 16 April 2014, ACERWC/GC/02.

¹² Jacqueline Bhabha, 'The importance of nationality for children' in Institute on Statelessness and Inclusion (ISI), *The world's stateless children*, Wolf Legal Publishers, 2017, 112-118.

¹³ *Children of Nubian descent in Kenya v Kenya*.

This case commentary focuses on childhood statelessness among the Nubians and provides an update after the decision in the *Institute for Human Rights and Development in Africa (IHRDA) and another v Kenya (Nubian minors' case)*. The case commentary proceeds as follows; section II discusses statelessness in Kenya while Section III provides an update on the *Nubian minors' case* and Kenya's reforms to comply with the decision in the *Nubian minors' case*. Section IV examines the extent of Kenya's compliance post the *Nubian minors' decision*. Lastly, section V provides concluding remarks.

2. Statelessness in Kenya

Members of the Nubian community, coastal Arabs and border populations undergo discriminatory vetting procedures before being granted identity documents (IDs) which puts them at the risk of becoming stateless.¹⁴ The vetting process is provided under the Registration of Persons Act where it requires persons residing in border areas or cosmopolitan areas who apply for an ID to undergo vetting to prove their links to Kenya. A vetting committee comprises of a deputy county commissioner, civil registration officer, registration officer, elders from the Nubian community and chiefs or assistant chiefs. The applicant upon turning 18 years if belonging to a community resident in the border or a cosmopolitan area is required to provide; their parents IDs, birth certificate or immunisation card, primary or secondary school certificate, the chief's and the elder's introduction letters.¹⁵ The applicant presents the documents to the Registrar who then issues a date for the applicant to appear before the vetting committee. On the granted date, the applicant appears before the vetting committee accompanied with his or her parent together with the originals documents earlier mentioned.¹⁶ The vet-

¹⁴ African Committee of Experts on the Rights and Welfare of the Child, 'Written comments on implementation: *Institute for Human Rights and Development in Africa and Open Society Justice Initiative v Kenya* (Kenyan Nubian Children, Case No 02/2009) 2017, 6.

¹⁵ National Assembly, 'Report on the public petition no 023 of 2021 regarding accessing national identity cards by the Nubian community', 2021, 19.

¹⁶ National Assembly, 'Report on the public petition no. 023 of 2021', 19.

ting committee ascertains whether the applicant has genuine links with Kenya, if such is ascertained the applicant is granted with a Kenyan ID.

Nubians, Kenyan Somalis and coastal Arabs are at risk of becoming stateless because they experience discriminatory practices when applying for IDs.¹⁷ Similarly, minors from non-indigenous communities like the Pemba, Waata, Shirazi, Galje'el¹⁸ (a sub clan of the Kenyan Somalis) and persons from the Congolese, Burundian, Rwandese communities face challenges proving their links with Kenya.¹⁹ Children from these communities face discriminatory practices when applying for IDs.²⁰ Without IDs persons from these communities are put at risk of becoming statelessness because they are unable to prove their links to Kenya.

3. Update on Nubian minors' case and Kenya's reforms to comply with the decision

Kenyan Nubians were originally from the Nuba Mountains in Sudan. They were forcibly conscripted into war by the British colonial government and demobilised in Kenya.²¹ The colonial government re-

¹⁷ Open Society Justice Initiative, 'Citizenship discrimination and the right to a nationality in Kenya' 2017, 4. See also Nikeeta Louise Joan, 'Statelessness and the rights of children in Kenya and South Africa: A human rights perspective' Unpublished LLM thesis, University of Western Cape, 2018, 44.

¹⁸ The Galje'el community which is Somali sub clan was stripped off their citizenship by the Kenyan government.

¹⁹ The UN Refugee Agency, 'Stateless persons' <<https://www.unhcr.org/ke/stateless-persons>> on 18 April 2021. See also, United Nations High Commissioner for Refugees, 'Integrated but undocumented: A study into the nationality status of the Amakonde community in Kenya' 2015. See also Brownen Manby, *Struggles for citizenship in Africa*, Open Society Institute, 2009, 19.

²⁰ Open Society Justice Initiative, 'Citizenship discrimination and the right to a nationality in Kenya' <https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/OSJI_UPR_KEN_S08_2010_OpenSocietyJusticeInitiative.pdf> on 12 April 2019. See also Louise Joan Nikeeta, 'Statelessness and the rights of children' 44. The Makonde used to be stateless until 2016 when they were granted citizenship status by President Uhuru Kenyatta. Similarly, Kenyans of Indian descent were at risk of becoming stateless, but they were recognised as the 43rd tribe in Kenya in 2017.

²¹ Johan Victor Adriaan de Smedt, 'The Nubis of Kibera: A social history of the Nubians and Kibera slums' Unpublished PhD thesis, Leiden University, 2011, 30. See also Aigel-

fused to repatriate them to Sudan, while successive post-independence governments denied them citizenship, limiting their access to human rights.²²

The Nubian minors through a communication to the ACERWC alleged multiple violations of the African Children's Charter which Kenya is a party to. The complainants alleged violation of the right to have their births registered and acquire nationality at birth (contrary to Article 6(2), (3) and (4) of the African Children's Charter) which resulted in unfair discrimination (in contravention of Article 3 of the African Children's Charter) and violated the Nubian minors' equal access to education and healthcare (breaching Articles 11(3) and 14 of The African Children's Charter).²³

The complaint also alleged violation of the Nubian minors' right to a name and nationality contrary to Article 6(2), (3) and (4) of the African Children's Charter²⁴ because the Nubian minors' parents faced challenges when registering for the birth of their children born in public hospitals. Since most public health officials refused to grant the Nubian minors' parents birth notifications which are a mandatory requirement when registering the birth of a child.²⁵

gel K Murbe, 'Rights of minorities: A case study of Nubians in Kenya' Unpublished Master of Arts thesis, University of Nairobi, 2011, 50. See also Adam Hussein Adam, 'Kenyan Nubians: Standing up to statelessness' *Forced Migration Review* (2009) 19.

²² Ebenezer Durojaye and Edmund Amarkwei Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' 12(2) *African Human Rights Law Journal* (2012) 564, 566.

²³ *Children of Nubian descent in Kenya v Kenya*, para 34.

²⁴ Article 6, African Charter on the Rights and Welfare of the Child, provides that:
'1. Every child shall have the right from his birth to a name; 2. Every child shall be registered immediately after birth; 3. Every child has the right to acquire a nationality; 4. States Parties to the present Charter shall undertake to ensure that their constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.'

²⁵ *Children of Nubian descent in Kenya v Kenya*, para 38.

Additionally, the complainants claimed that Kenya had violated Article 3 of the African Children's Charter²⁶ on non-discrimination because their children did not have a legitimate expectation of acquiring citizenship when they reached adulthood. Upon attaining adulthood, the Nubian minors were subjected to a discriminatory vetting process when applying for IDs which required them to prove their grandparents nationality and their eligibility for Kenyan citizenship before a vetting committee.²⁷ Lastly, the complaint alleged that Nubian minors had lesser access to basic education and health facilities compared to other children resulting in violation of Articles 11(3)²⁸ and 14²⁹ of the African Children's Charter.³⁰

The ACERWC found that Kenya was in violation of Articles 6(2), (3) and (4) (name and nationality), Articles 3 (non-discrimination), 14 (2) (b) and (c) and (g) (health and health services) and 11(3) (education) of the African Children's Charter.³¹ The ACERWC recommended for Kenya to take legislative, administrative and other measures to ensure that first, children of Nubian descent in Kenya, who are otherwise stateless, acquire Kenyan nationality and the proof of such a nationality at birth.³² Secondly, the ACERWC recommended that Kenya take measures to ensure that Nubian children without nationality are given priority in benefiting from the new measures.³³ The ACERWC also recommended that Kenya implements birth registration in a non-discriminatory manner and to ensure that children of Nubian descent are registered immediate-

²⁶ Article 3 of the ACRWC states: 'Every child shall be entitled to the enjoyment of the rights and freedoms ... irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

²⁷ *Children of Nubian descent in Kenya v Kenya*, para 55.

²⁸ Article 11(3) of the ACRWC provides that; 'State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of ...: (a) provide free and compulsory basic education.'

²⁹ Article 14 of the ACRWC states, 'Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.'

³⁰ *Children of Nubian descent in Kenya v Kenya*, para 62 and 65.

³¹ *Children of Nubian descent in Kenya v Kenya*, para 69.

³² *Children of Nubian descent in Kenya v Kenya*, para 69(1).

³³ *Children of Nubian descent in Kenya v Kenya*, para 69(2).

ly after birth.³⁴ In addition, it recommended Kenya to adopt measures to ensure the fulfilment of the right to health and education in consultation with the affected communities.³⁵ Lastly, it recommended that Kenya reports on the implementation of the recommendations within six months from the date of the decision.³⁶

4. The extent of Kenya's compliance with the Nubian minors' decision

Before discussing the extent of the Government of Kenya's (GoK) compliance with the *Nubian minors'* decision, it is worth noting that Nubians are now recognised as Kenyan citizens after the passing of the Constitution of Kenya, 2010 and were recognised as the 43rd tribe in Kenya. Nonetheless, the Nubians still face challenges regarding nationality which affects their access to education and health, more so they still have to undergo mandatory vetting.

As mentioned above, the ACERWC found the GoK in violation of the right to a name and nationality. The GOK also failed to apply the principle of non-discrimination and violated the right to health and education. The ACERWC recommended the GoK to take measures to ensure that first, children without nationality benefit from the said measures. Secondly, that the GoK implements birth registration in a non-discriminatory manner, and that Nubian minors are registered immediately after birth to ensure the fulfilment of the right to education and health.

4.1 Nationality

The Nubian community complained of the challenges faced when registering for the births of their children. Birth registration details in-

³⁴ *Children of Nubian descent in Kenya v Kenya*, para 69(3).

³⁵ *Children of Nubian descent in Kenya v Kenya*, para 69(4).

³⁶ *Children of Nubian descent in Kenya v Kenya*, para 69(5).

formation such as where a child was born and the date of birth, this information is crucial in providing a link between a person and a country and thus establishing nationality.³⁷ Consequently, registration of births is the first step in preventing childhood statelessness.³⁸ The GoK has taken measures to improve birth registration and the acquisition of birth certificates. The GoK through the Department of Civil Registration Services and the Ministry of Health has partnered with UNHCR and other entities to provide mobile registration systems in remote areas where stateless persons reside to provide registration of births. The initiative has increased accessibility of registration of births. Also, the births are registered free of charge to those who are unable to afford the fees for late registration. The GoK has trained its registration officials on the importance of registration of births and how it prevents statelessness.³⁹ Attaining birth certificates improves children's access to human rights and shields them from exploitation and abuse.⁴⁰ This initiative has increased the accessibility of the right to acquire citizenship by stateless communities including the Nubian minors' which has in turn prevented and reduced childhood statelessness in Kenya.

The GoK has put efforts into improving birth registration and ensuring that children from stateless communities have access to birth registration and acquire birth certificates. The exact effect of the acquisition of a birth certificate in formalising citizenship is, however, unclear. This is because while a birth certificate is an entitlement of citizenship,⁴¹ it is unclear if it is definitive proof of citizenship as the registration of births

³⁷ Bronwen Manby, "Legal identity for all" and childhood statelessness' in Institute on Statelessness and Inclusion (ISI), *The world's stateless children*, Wolf Legal Publishers, 2017, 313, 322. See also, UNICEF and ISI, *The child's right to nationality and childhood statelessness: Texts and materials*, 73.

³⁸ Caroline Opile 'Birth registration drive combats statelessness among Kenya's coastal Pemba community' UNHCR Kenya, 6 November 2017 <<https://www.unhcr.org/ke/12681-birth-registration-drive-combats-statelessness-among-kenyas-coastal-pemba-community.html>> on 14 July 2020.

³⁹ UNHCR, 'Ending statelessness within 10 years. Ensuring birth registration for the prevention of statelessness - Good practices paper Action 7' 1 November 2017.

⁴⁰ Simon Heap and Claire Cody 'The Universal Birth Registration campaign' *Forced Migration Review* (2009) 20.

⁴¹ Kenya Citizenship and Immigration Act (No 12 of 2011), Section 22.

in Kenya is not by law limited to the birth of Kenyan citizens.⁴² At the least, the acquisition of a birth certificate would make it easier to have one's citizenship recognised.

4.2 Non discrimination

As pointed out earlier, the complaint decried the denial of the legitimate expectation of acquiring Kenyan citizenship upon attaining adulthood due to the discriminatory vetting process. After the Nubian minors' decision, the Security Law (Amendment 2014)⁴³ amended the Registration of Persons Act to establish identification committees whose function is to perform vetting. As earlier mentioned, the applicant is required to provide documentation to prove their links to Kenya failure to which results in lengthy delays and the registration officials have been accused of soliciting bribes to manipulate the outcome of the vetting process.⁴⁴

A recent public petition presented by the Kibra Member of the National Assembly shed light on these difficulties, especially the discrimination of the Nubian community in accessing IDs.⁴⁵ The Petitioner recommended for the Cabinet Secretary for Interior and Coordination of National Government to issue guidelines to ensure that the vetting

⁴² Section 7 (1) of the Births and Deaths Registration Act, Cap 149, states: 'It shall be the duty of every registrar to keep a register of births and a register of deaths and to enter therein, respectively, the prescribed particulars of every birth and death notified to him.'

⁴³ Security Laws (Amendment) Act, 2014, Section 24.

⁴⁴ Abraham Sing'oei, 'Promoting citizenship in Kenya: The Nubian case' in Brad Blitz and Michael Lynch (eds), *Statelessness and the benefits of citizenship: A comparative study*, Oxford Brookes University, 2009, 37, 38. See also Samantha Balaton-Chrimes, 'Citizens minus: Rights, recognition and the Nubians of Kenya', unpublished PhD thesis, Monash University, 2012, 86; Kenya National Commission on Human Rights, 'An identity crisis: A study on the issuance of national identity documents in Kenya' 2007, 10. See also Ben Oppenheim and Brenna Powell, 'Legal identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya' Policy Paper, Open Society, 2015, 4 - < <https://www.justiceinitiative.org/uploads/0a6472de-a975-4a3b-b3ad-2b979891d645/legal-identity-2030-agenda-lessons-kibera-kenya-2051216.pdf>> on 14 July 2021.

⁴⁵ National Assembly, *Report on the Public Petition No 023 of 2021*, 5.

process is transparent and non-discriminatory.⁴⁶ This indicates that the *Nubian minors' decision* to grant the Nubians citizenship has not been fully implemented by the GoK.

4.3 Health and health services

Although the GoK granted Nubians Kenyan citizenship, as of the year 2021, the Nubian community Public Petition Number 023 of 2021, claimed that the GoK is yet to fully take affirmative action to ensure that they have access to water, health and education.⁴⁷ Therefore, it seems that GoK is yet to fully comply with the *Nubian minors' decision* regarding the access to health and services for the Nubian community.

4.4 Education

The *Nubian minors' case* stated that Nubian minors had lesser access to basic education compared to other children in Kenya. It is commendable that the GoK has made positive strides to ensure that children from stateless communities are registered. Consequently, the acquisition of a birth certificate by these children increases their chances of accessing basic education. Birth certificates are a prerequisite to all learners to join primary schools and also sit for the national examinations. Therefore, the GOK has made efforts to implement access to basic education for Nubian minors.

However, Nubian minors faced difficulties accessing higher learning because they are unable to access government scholarships, Higher Education Loans Board (HELB) loans which affects their access to higher learning.⁴⁸ Consequently, vetting has resulted in the delay of the acquisition of IDs which has negatively impacted the Nubian minors' access to higher education.

⁴⁶ National Assembly, *Report on the Public Petition No 023 of 2021*, 17.

⁴⁷ National Assembly, *Report on the Public Petition No 023 of 2021*, 6.

⁴⁸ National Assembly, *Report on the Public Petition No 023 of 2021*, 6.

5. Conclusion

The Kenyan government has made positive strides in adopting legislative measures with the aim of complying with the decision in the *Nubian minors' case*. However, the GOK has not fully implemented the decision in the *Nubian minors' case*. Although some minorities and non-indigenous communities have registered the births of their children, they are still put at risk of becoming stateless because acquisition of a birth certificate is not definitive proof of Kenyan citizenship.

More so, minorities and non-indigenous communities have to undergo lengthy vetting processes before identification committees pursuant to the provisions of the Registration of Persons Act which puts them at risk of becoming stateless. Access to birth certificates for Nubian minors has increased their access to basic education. However, they can only access basic education, because they require IDs to advance their education, the lengthy vetting process may impede their right for further education.

The GoK could consider amending the Registration of Persons Act to provide for a clear procedure on vetting and specify the documents required to acquire Kenyan citizenship in order to influence better administrative practices and eliminate discrimination in the vetting process. As shown above, the denial of citizenship leads to the denial of social goods – health (as they cannot acquire health insurance) and education (inability to acquire student financing through HELB and bursaries). The ramifications of the denial of documents of citizenship run deep, and it is incumbent upon the GoK to increase its efforts to better include this marginalised community.



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