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“RIGHT TO BE FREE FROM HUNGER”; ANALYSING THE LAWS GOVERNING RIGHT TO FOOD IN KENYA

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ABSTRACT

Food is one of the basic needs that human beings require for survival. The right to food is so fundamental that human beings cannot live without its enjoyment. Not only do human beings require food for survival but they also need access to adequate food that meets safety and quality standards for a dignified life. Relying on the principle of interdependence of human rights, the right to food supports the enjoyment of other human rights and fundamental freedoms. However, a majority of people in the world and Kenya, in particular, does not enjoy the right to food. The FAO 2022 Report revealed that at least 5.4 million people in Kenya are facing acute food insecurity. Sadly, 32% of all Kenyans are facing the challenge of either lack of food or the food accessible by them does not meet the minimum nutritional standards. Access to food is a human right that is encapsulated under international human rights conventions, regional treaties and the Constitution of Kenya, 2010. Domestically, the right is envisaged under Article 43(1) (c) of the Constitution which states that “every person has the right to be free from hunger, and to have adequate food of acceptable quality.” This paper interrogates the legal framework on the right to food both at the national and international levels with a bias on the national legal framework. This is achieved by analysing the laws, policies, reports and scholarly work on right to food. The paper finds that the right to adequate food of acceptable quality and standards is broadly safeguarded in our laws. However, the nation lacks proper implementation strategies thereby continuing to deprive the citizenry of this important right. On the same note, the country has not specifically provided for legislation to actualize this right. This paper recommends that legislative and administrative measures need to be taken to safeguard the population from hunger and consumption of food that do not meet the prescribed quality and standards. Stakeholders are also called upon to support the realization of the right to food in the country.

Keywords: *Right to food, adequate food, legal framework on food, quality food, hunger, acceptable food*

INTRODUCTION

As the world climate is rapidly changing so is the state of food security in the world. The world is food insecure yet food is one of the basic things that human beings need for survival. Realisation of the right to food is the determinant of enjoyment of all other rights since a hungry person cannot be able to live to enjoy other rights. Food security exists where every person regardless of their status can access enough quality food whenever they need it. However, food insecurity greatly affects the African continent where nations are still developing. In Kenya, close to half of the population is grappling with access to food. FAO reports that about 36% of Kenyans live below the poverty line and

are thus struggling to get food.⁶⁶ Kimani et al report that 68% of people in Kenya are food insecure.⁶⁷ According to Johanna *et al*, a sizeable number of people in Kenya are still experiencing challenges related to food either they are not able to get enough food or the food they get is not of nutritional value.⁶⁸ Despite the challenge food security in Kenya, there exists legal, institutional and policy frameworks on the enjoyment of the right to adequate and quality food. This paper sought to establish the legal, institutional and policy framework on the right to adequate food of quality standards and how the same is being implemented in Kenya.

The main law which provides for the right to adequate and quality food in Kenya is the Constitution of Kenya, 2010.⁶⁹ The Constitution provided a timeframe within which its provisions would be implemented.⁷⁰ Ultimately upon legislation, the law would give the organs of governance an obligation to implement such requirements.

⁶⁶ Food and Agricultural Organization of the United Nations.

⁶⁷ Kimani et al *Human Rights-based Approach to food security in Kenya and South Africa* (2023) Berlin: TMG Research.

⁶⁸ Jacobi, Johanna, Stellah Mukhovi, Aymara Llanque, Markus Giger, Adriana Bessa, Christophe Golay, Chinwe Ifejika Speranza et al. "A new understanding and evaluation of food sustainability in six different food systems in Kenya and Bolivia." *Scientific reports* 10, no. 1 (2020): 19145.

⁶⁹ Article 43 (c) of the Constitution.

⁷⁰ The Constitution of Kenya, 2010 under the 5th schedule provides a timeframe requiring implementation of its various provisions through legislation.

Sadly, more than 13 years since its promulgation, Kenya has not passed legislation on the actualisation of the right to food as provided under Article 43(c) of the Constitution. It is within this context that this paper sets out to investigate the legal framework for the right to food and to be free from hunger. In achieving this, the paper investigates both the national and international framework governing the realisation of the right to food. The paper commences by looking at the international instruments and principles relating to a right to food before narrowing down to the domestic perspective. The paper therefore briefly looks at the legal framework, institutional mechanisms, and policies addressing the right to adequate food of quality standards in Kenya. The paper analyses different reports and documents providing information that supports the objective of the paper. The findings of the paper are that a majority of Kenyans are still grappling with a lack of food or access to food of acceptable quality. The paper makes a conclusion that enactment of legislation on the right to food and its implementation would go a long way in dealing with security in the country. The paper also offers recommendations that need to be taken to actualise the right to food in the country and beyond.

The Case for the Right to be Free from Hunger

Human rights are statements of basic needs which are politically significant as grounds for protest and justification for reforming laws and policies. This study argues that there is a need for the formulation of national policies, strategies and legislative instruments to guarantee the effective implementation of the right to food. It is hereby argued that since human rights significantly differ from appeals to benevolence and charity as they invoke ideals like justice and equality, a right holder has grounds for grievance when it is denied. The study is based on the assumption that despite the existing legal framework does not sufficiently address the issue of food security in Kenya.

As earlier noted, access to adequate and nutritional food is essential in sustaining human life and ensuring that people live a dignified life.⁷¹ Human beings not only require food but they also need access to adequate and nutritious food. As such, the food accessible to people should be enough, it should fulfil their dietary needs and they should be able to have it whenever they need it. The right to food is at the centre of the enjoyment of all other human rights and freedoms thus, analysis of the legal protection of this right is inevitable. Such a proclamation was made at the World Food Summit held in 1996.⁷² The right to food is given adequate recognition both nationally and internationally. This paper will start by analyzing the normative content of food as envisaged under international instruments before delving into the national framework.

International Framework on the Right to Food

The international community realised the importance of recognising the right to food in enhancing food security in the world and hence incorporated the right in a wide of treaties and conventions. Firstly, the right to food is recognised under Article 25 of the Universal Declaration of Human Rights which stipulates that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care. Broadly interpreted, this Article provides for the framework for enjoyment and protection of basic

needs that human beings require for survival. According to Asbjorn, the provision of these rights under the UDHR provides a basis for their implementation and enforcement.⁷³ The right to food is a socio-economic right which is also encapsulated under Article 11 (1) of the International Covenant on Economic Social and Cultural Rights (ICESCR). The Article states that “*every person has the right to an adequate standard of living which includes the right to food.*” Article 11 (2) of the ICESCR goes further to *engender states to put in place measures geared towards the progressive realization of the right to adequate food.* Through the Committee on Economic and Social and Cultural Rights, states are required to take measures to be taken using maximum available resources to attain progressively the realization of rights provided under the Covenant. These measures include legislative and administrative steps whether individually or taken in cooperation with other actors and stakeholders. By virtue of this provision, several states have made different strides in the protection and progressive realization of the right to food in their jurisdictions.

The right to food is also provided for under Article 28 of the International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disability.⁷⁴ This provision sets out that, *state parties to the Convention*

⁷¹ T Keifer and Roaf, “The Human Right to water and Sanitation: Benefits and limitations” citing *M Mancisor* (2005).

⁷² World Food Summit.

⁷³ Eide Asbjorn, The Right to an Adequate Standard of Living Including the Right to Food. in *Economic, Social and Cultural Rights* (pp. 133-148) 2001 Brill Nijhoff.

⁷⁴ International Convention on the Protection and Promotion of the right of Persons with Disabilities , 20006.

recognise that persons living with disabilities have a right to adequate food. This provision is important in championing affirmative action processes and mechanism that enables persons experiencing certain challenges to be specially considered in realizing this important right.⁷⁵ Further, Article 24 of the Convention on the Rights of the Child also acknowledges that children have the right to nutritious food.⁷⁶ Children require special assistance to have access to food that meets their dietary needs. To prevent exploitation and abuse by adults, the Convention specifically provides for a right to adequate food of nutritious value to children. According to fact sheet 34 of the United Nations, children require safe and nutritious food to facilitate their mental and physical growth.⁷⁷

Regionally, the right to food may be deduced from Article 16 of the African Charter on Human and People’s Rights which stipulates that “*every individual has the right to enjoy the best attainable state of physical and mental health*”.⁷⁸ Although the right is not expressly provided for under the Charter, Article 22 also provides for the right to economic, social and cultural development. It further provides for the enjoyment of the right in a culturally accepted environment responsive to African people’s needs. Further, the African continent through the African Union has made various commitments towards achieving the right to food. Additionally, the African states made a declaration in Maputo to the effect that the African states would allocate at least 10% of the national budget to agriculture.⁷⁹ The Protocol emphasizes the empowerment and realization of rights of women in Africa. This is so noting that majority of people in the food production sector are women. However, according to Winfred exclusion of women, children and vulnerable persons in certain sector of the society have adverse implications.⁸⁰ The elements of the right to food have been set out and elaborated by the Committee on Economic, Social and Cultural Rights in paragraph 7 of General Comment No. 12 to include, “availability, adequacy, access and quality.” This means that the right to food can only be said to have been actualized if every person at all times can to access adequate quality food. In order to realize the right to food, states must perform the duties advanced by General Comment No 15 to the ICESCR. The state should respect, protect and fulfil the enjoyment of the right.”⁸¹ According to Muigua this requires states to take legislative, administrative and policy measures in enhancing compliance with their international obligations.⁸² This paper thus proceeds to analyse the position of the right to food within the Kenyan legal framework.

National Framework on the Right to Food

To enhance implementation of the right to food the drafters of the Constitution of Kenya, found it important to include it in the Bill of Rights. The Constitution under Article 43 provides that “*every person has the right to be free from hunger, and to have adequate food of acceptable quality.*” The right is also envisaged under Article 53 of the Constitution which provides for the right of children, it states that, “every child has the right to basic nutrition ” As earlier noted, the right to food is a socio-economic right which is positive to the state and its actualization engenders the state to make necessary steps including legislation. This is further buttressed by Article 21(2) of the Constitution which requires the state to take legislative, policy and other measures to achieve the progressive realisation of socio-economic rights. Social economic rights as noted above are provided under Article 43 of the Constitution inclusive of

the right to adequate food of acceptable quality. In this regard, the Kenyan government has developed various policies including the National Food Security Policy 2011 and developed the Food Security Bill of 2014. However, since 2014, the Bill has not yet been passed into law leaving a lacuna in the implementation of the right to food.

⁷⁵ Kimani Murage et al Human Rights based Approach to food security in Kenya and South Africa, (2023) Berlin: TMG Research.

⁷⁶ Article 24 and 27 of the Convention on the Rights of the Child.

⁷⁷ United Nations...fact sheet 34.

⁷⁸ Adopted by members of the Organization of African Union in Banjul, the Gambia; opened for signature in 1981 and came into force in 1986.

⁷⁹ Protocol to the African Charter on Human and Peoples Rights also known as Maputo Protocol provides for women rights that are relative to the African people.

⁸⁰ Kamau Winfred, 'Customary Law and Women's Rights in Kenya' (2008) pp 8.

⁸¹ Henry Shue, "Basic Rights; Subsistence, affluence and U.S foreign Policy"(1980); Committee on Economic, Social and Cultural Rights; General Comment No 15.

⁸² Kariuki Muigua, Achieving the Right to Food for sustainable development in Kenya

Further, to achieve food security, the Kenyan government should perform the duties envisaged under Article 21 (1) of the Constitution. The state and all its organs should observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.⁸³

The duty to respect requires the government to refrain from any acts that may interfere with the people's enjoyment of the right to food. In *Centre for Minority Rights Development & Minority Rights Group International v. Kenya*,⁸⁴ the African Commission noted that "the Kenyan government had violated the right to development, right to life, right to natural resources and the right to food of the Endorois people by evicting them from ancestral land and environment in which it was their ancestral home." This thereby denied them the ability and capacity to exploit their natural habitation and land that ensured their survival. Thus, deprivation of such means also affected their ability to meet basic needs inclusive of right to food.

The duty to protect requires the state to ensure that non-state actors do not limit the enjoyment of the right to food. The government should ensure that food available to Kenyans by farmers, producers, manufacturers, consumers and distributors meets the set quality and that the prices are reasonable. This is also well supported by Article 46 of the Constitution of Kenya which provides for the provision of goods and services to consumers that protect people's health, safety and economic interests. Kenya Bureau of Standards (KEBS) and Anti-counterfeit Authority are the main institutions charged with ensuring that goods and services offered within the country meet the requisite standards and quality, and goods and services offered to consumers are genuine respectively. The KEBS together with the Anti-counterfeit Authority and pursuant to the above constitutional provision, Standards Act,⁸⁵ Anti-counterfeit Act⁸⁶ and other enabling laws must strictly guard against the consumption of substandard or unsafe food by the population. Additionally, the state should not be complicit in violation by third parties. Further, the state should also provide effective remedies in case of violation of its obligations in the enjoyment of human rights. In *Centre for Minority Rights Development & Minority Rights Group International v. Kenya*,⁸⁷ the African Commission observed that: "the government of Kenya had failed in its duty to protect the rights of the Endorois by failing and being complicit to the mining of ruby in Endorois land by a private company... The mining had serious ramifications on Endorois land; it had caused pollution to a river which was their source of water and the mining had been allowed by the government without an impact assessment study...Further, no action had been taken by the government against the company after the Endorois people complained..."⁸⁸

Under the duty to promote, the state should create a conducive environment for the observance and enjoyment of human rights. The state should thus create awareness of existing legal and policy frameworks on the right to food. The state is duty bound to put in place measures and programmes that not only ensure the progressive realisation of the right to food but equip people with the capacity to access adequate and quality food by themselves.⁸⁹ The state should

empower individuals to access the food on their own. This may be achieved through job security since the lack of meaningful income to support people's livelihood exposes people to food insecurity, especially during periods of crisis. The state should also boost food production, distribution, sale, storage and consumption. Bodies and institutions such as Agriculture and Food Authority, Department of Public Health, Kenya Dairy Board, Kenya Agricultural and Livestock Research Organisation, Kenya Bureau of Standards (KEBS), Kenya Agricultural Research and Innovation (KARI), Meteorological Department, Kenya Plant Health Inspectorate Services (KEPHIS), Weights and Measures Department (WMD), Government Chemist's Department, Department of Veterinary Services (DVS), Horticultural Crops Development Authority *inter alia* must diligently play their roles in delivering quality and adequate services and products to the population.⁹⁰ These bodies must take measures in empowering the population with adequate and right information that will enable them meet their needs and create food security in the country. Institutions charged

⁸³ Article 21(2) of the 2010 Constitution of Kenya.

⁸⁴ Centre for Minority Rights Development, African Commission on Human & Peoples Rights 276/2003.

⁸⁵ Cap 496 laws of Kenya.

⁸⁶ No 13 of 2008, laws of Kenya.

⁸⁷ Centre for Minority Rights Development (n 190 above).

⁸⁸ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya.

⁸⁹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya.

⁹⁰ Oloo, J. E. O. "Food safety and quality management in Kenya: An overview of the roles played by various stakeholders." *African Journal of Food, Agriculture, Nutrition and Development* 10, no. 11 (2010).

with the production of products and services must give quality ones that enable the population to meet their production needs. Further, it should develop climate change mitigation strategies, and make it possible for farmers to access affordable seeds, fertilizers and other farm inputs.⁹¹ Court in *Mathew Okwand V. Minister of Health and Medical Services & 3 others*,⁹² stated that a state is supposed to take measures towards realization and enjoyment of human rights.

In this regard, Kenya has also made several food security policies starting with Sessional Paper No. 4 of 1981 through to Sessional Paper No. 2 of 1994 and finally, the Food Security Policy of 2011.⁹³ Each of these policies advocated for different ways of alleviating hunger in Kenya. The National Food and Nutritional Security Policy of 2011 was made as an attempt to comply with Article 43 constitutional provision of the right to food. In its nine chapters, to a great extent, the policy tries to provide a framework for regulating food security in the country but not without some drawbacks. However, the implementation of these policies has been the greatest impediment to the realization of food security in the country. After the promulgation of the Constitution of Kenya in 2010, it appeared to many Kenyans that food insecurity would be a thing of the past since the supreme law envisaged the right to adequate and nutritious food under the Bill of Rights. The Constitution also required Parliament to enact legislation to give effect to Article 43 (c) of the Constitution. An attempt to actualise this was seen through the drafting of the Food Security Bill, 2014. However, this law has not been passed 13 years on, and the non-existence of this important legislation contributes to non-realization of food security and production in Kenya.

The obligation to fulfil obligates the state to employ its available resources to guarantee the progressive realization of the right to food.⁹⁴ Pursuant to this obligation, the government should provide direct food aid to individuals who cannot access food on their own and subsidies on food production. This is so especially when the population are unable to access food.⁹⁵ Rarieya and Kim opine that the government has a role in taking food security measures in situations of climate change impacts.⁹⁶ The Social Assistance Act was enacted by parliament pursuant to Article 43 of the Constitution of Kenya to enhance social assistance to groups and individuals in need. This Act thus empowers such individuals with requisite assistance to enable them to realize their basic needs. Under the state obligation to fulfil, this Act enables the adoption of measures to provide social assistance to people who are unable to realize the same.

According to the Constitution of Kenya, 2nd Schedule, whereas agricultural policy is a national government function under Part I, Part II provides agriculture as a county government function. Thus counties are mandated in making rules and policies that support the agricultural sector. Some counties have thus developed legislations to cater for food

security and agricultural practices in general in compliance with the Constitution. This paper noted that more than 30 counties have so far enacted laws to govern matters related to agriculture. However, a close review reveals that some of the county legislations are not specific in enhancing food security or actualising the right to food in their jurisdictions. For example, the Bungoma County agricultural law is concerned about collecting produce cess as opposed to assisting farmers in enhancing their production and output. Similarly, some counties made good progress in terms of legislation in promoting agricultural activities in their areas. For example, Busia County enacted the Busia County Agriculture Development Fund Act 2014 and the Busia County Agriculture Development Amendment Act 2015 to enhance agricultural practices within the county.

⁹¹ The obligation to promote is viewed as part and parcel of the obligation to fulfill as noted by Japhet Biegon et al, "Judiciary Watch Report, Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and opportunities for Kenya,"(eds) Kenya Section of the International Commission of Jurists(2011) 10.

⁹² (2013) eKLR.

⁹³Nyoro James, "Agriculture and rural growth in Kenya." *DFID Kenya commissioned study, Tegemeo Institute, Egerton University* (2002).

⁹⁴ Committee on Economic, Social and Cultural Rights General Comment No. 15 of 2002.

⁹⁵ Rarieya Marie and Kim Fortun. "Food security and seasonal climate information: Kenyan challenges." *Sustainability science* 5 (2010): 99-114.

⁹⁶ Rarieya Marie and Kim Fortun. "Food security and seasonal climate information: Kenyan challenges." *Sustainability science* 5 (2010): 99-114.

Vision 2030 was adopted by the government of Kenya as a blueprint towards moving the country in the specified direction with the objective of improving people's livelihoods.⁹⁷ The Vision is anchored under 3 pillars. These pillars are political, social and economic. The Vision recognises that agriculture plays an important role in driving the country's economy, reducing poverty and boosting food security.

In 2017, the government of Kenya adopted the Big 4 Agenda as a strategic plan or government's set of priorities programs and reforms. The 4 Agendas that the government gave priority were manufacturing, affordable housing, affordable healthcare, and food security. Under food security, according to Macharia, the government aimed at ensuring that the country is food-secured and in turn enhance the right to food by all persons.⁹⁸ Though the plan stayed in force for five years, this paper notes that the same was not able to offer a meaningful solution as the population continued suffering from hunger and lack of adequate food. The Constitution of Kenya, under Article 21 provides that obligations placed to actualise enjoyment of human rights are borne by the state and all persons. Specifically state organs and bodies are required to ensure the enjoyment of these rights. In this regard, several bodies and institutions are established in the country to enhance the administration and implementation of various roles. Some of their mandates include undertaking food security programmes, promotion, and production and service delivery. The institutional mechanism in the realisation of the right to food includes both constitutional and statutory bodies. The role of non-governmental organisations and private entities cannot be overlooked they play an important role in enabling the citizenry to realise their right to food.

Kenya National Human Rights and Equality Commission is established by the Constitution as the body charged with enhancing implementation and compliance with human rights in the country.⁹⁹ The body among other things is mandated to promote respect for human rights and develop a culture of human rights in the country. Noting that the right to food is provided as a human right, and as stated by Nyoro, a fundamental right from which the basis of enjoying other rights stems, it is important for the Commission needs to put more effort towards its actualisation.¹⁰⁰ Bodies such as Agriculture and Food Authority, Kenya Agricultural and Livestock Research Organisation, Kenya Agriculture Reforms and Innovations are best placed in steering the country towards a food secure state. This will also translate to the enjoyment of the right to food by majority of the population. Consumer Federation of Kenya also plays a role in promoting an environment where consumers access and take food that is safe for human consumption.

The Meteorological Department is entrusted with carrying out scientific research in weather and climate events and advising the government and citizenry on measures and programmes to be undertaken. This becomes important in adopting strategies for food security, production and provision in the country. With the right weather information farmers and government planners can significantly participate in agricultural production.

Though previously discussed, courts play an important role towards the interpretation and enforcement of human

rights. As provided under the Constitution of Kenya, courts stand tall in the realisation of the right to food. Through the mandate placed on the High Court, enforcement of rights inclusive of the right to adequate food of acceptable quality can be achieved. Courts have been faced with a number of cases related to the application and enforcement of social economic rights. Though the cases have not been In the case of *Consumer Federation of Kenya (COFEK) v Attorney General & 4 others*,¹⁰¹ court stated that the intent of Articles 22 and 23 of the Constitution was to provide a platform in approaching the court in enforcing fundamental rights and freedoms. The court went further to state that Article 258 provides a *locus standi* for challenging violation or threat to the Constitution. In *Mathew Okwanda v Minister of Health and Medical Services & 3 others*,¹⁰² court reiterated its constitutional role of enforcing social economic rights in the country. In *Kabui Mwai and 3 others v Kenya National Examinations*

⁹⁷ Vision 2030 available at <https://vision2030.go.ke/>.

⁹⁸ Macharia James "Sustainable Development in Kenya." *Horizons: Journal of International Relations and Sustainable Development* 13 (2019): 172-183.

⁹⁹ KNHREC is established under Article 59 of the Constitution with various mandates as outlined in the provision.

¹⁰⁰ Nyoro

¹⁰¹ [2012]eKLR.

¹⁰² [2013] eKLR

*Council & Other*¹⁰³ court emphasized on the need for realizing social economic rights in addressing the needs of the poor and disadvantaged members in the society.

Situation and Compliance to the Dictates of the Right to Food in Kenya

As noted by the Food and Agriculture Organisation, the right to food in the world is threatened by food insecurity. This is caused by many factors ranging from drought, famine, insecurity, and government failure in its obligation to enhance food security among others. The right to food cannot be realised by all people without the government taking its role in adopting measures of empowering the population to realise the same. As noted, the Constitution provides for the right to adequate food of acceptable quality. The dictates of law provide that this is supposed to be realised progressively.¹⁰⁴ This is through legislative, administrative and policy measures for achieving food security in the country.

This paper notes that there is an existing policy on food security in the country. It also finds that some policies have been adopted by the government over the years. The latest of such policies is the National Food and Nutrition Policy of 2011. However, it is noted that most people have continued languishing in hunger. Efforts to enact legislation to strengthen the existing policy have not been successful. Such an attempt was made through the drafting of the Food Security Bill of 2014 that have not yet seen the light of the day despite being re-introduced in the Senate in 2017. The sad situation is that the country does not have an Act to actualize the constitutional provision guaranteeing everyone's right to adequate food of acceptable quality. The legal framework on the right to food may be ineffective or counter-productive (poorly enforced) in situations where a section of the population is not able to enjoy the same. The United Nations as a body has made contributions and commitments in pushing states to take measures to safeguard the right. This commenced with the establishment of international instruments recognising the right and providing mechanisms for its fulfilment. In addition, the United Nations agency is empowered with dealing with food and agriculture sectors in the world, FAO has been instrumental in assisting states in putting legislative and policy frameworks as well as administrative measures.

Weak regulations and policies formulation and their implementation have also negatively affected adherence to the right to food. The measures that have been adopted by states do not provide binding obligations on stakeholders. Despite right to food being provided as a justiciable right, it becomes hard to hold individuals who fail to comply with their duties accountable. In *Mathew Okwanda v Minister of Health and Medical Services & 3 others*,¹⁰⁵ despite the court noting that the petitioner was experiencing challenges related to meeting basic needs, it held that there was no clear way of holding the respondents accountable. As noted in the *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others*¹⁰⁶ it is complex to hold relevant government agencies for the failure to take measures in fiscal measures such as addressing high fuel prices that impact prices of common goods thereby threatening right to be free from hunger. However, court affirmed its important position in enforcing social economic rights.

Reflecting on the Food Security Policy, its wording seems to exonerate government responsibility about the right to food. For example, its preamble states that the governments role in implementing the right to adequate food is subject to the availability of resources. This undermines the obligation of the state to do extra in looking for resources or

effective allocation of resources towards alleviating hunger and production of food. Such wording makes it hard to hold government accountable for its failure to provide social economic rights in the country. The government may thus hide in the excuse of constraints in resources and thus fail to meet its constitutional obligation.

Unequal distribution of resources has also affected the realisation of the right to food by certain quotas in the country. The provision of an Equalisation Fund in the Constitution was meant to partly address historical injustices that have been subjected to some regions, groups and people over the years such a fund was meant to assist them to get basic services such as water, and infrastructures *inter alia*.¹⁰⁷ This runs contrary to equalisation principles (equalisation fund, minority and marginalised groups).

¹⁰³Kabui Mwai, Petition No. 15 of 2011 [2011]eKLR.

¹⁰⁴ See Article 21 of the Constitution and Article..of the ICESCR.

¹⁰⁵ [2013] eKLR

¹⁰⁶ Consumer Confederation of Kenya (COFEK case) High Court Petition No. 88 of 2011.

¹⁰⁷ Constitution of Kenya, 2010 Article 204 read together with Articles 27 and 56.

There are also several barriers that may be hindering certain quotas of the population in participating or attaining basic needs such as food. policies and practices that deny women, children, persons with disabilities, and marginalised and minority communities to participate or engaging in realising food security for themselves and their families. Ingutia writes on factors that negatively hinder women from enjoying their right to food one being discriminatory cultural practices.¹⁰⁸ According to Isabella et al, such eventually denies them the ability to realise their goals which include enjoyment of the right to food.¹⁰⁹ Such barriers have as well been experienced in sectors such as poor and weak enforcement of land policies (including forests and wetlands).¹¹⁰ Some groups that have faced historical injustices due to discriminatory practices

Other factors have to do with misappropriation and misallocation of resources (payment delays, mismanagement of food resources by parastatals such as National Cereals and Produce Board.¹¹¹ This sometimes pushes farmers to hold their produce despite lack of capacity to store them under recommended conditions. This leads to the wastage of food that would have helped in safeguarding food security in the country.

Climate change and environmental degradation have also affected food production and security in the country. According to Hermans, prolonged droughts and famine have adversely affected farmers' production level and capacity.¹¹² This requires the government to lead in addressing the negative adverse effects of climate change. As noted by Johanna *et al* food sustainability in Kenya has negatively been affected by challenges associated with climate change.¹¹³

In situations where the population is unable to get food, government and its partners are supposed to assist people in enjoying their right to food. According to Gualtieri, compliance with the international obligation of the right to food is achieved only when all people can access and get food of the right quality.¹¹⁴

Pathway to the Realisation of being Free from Hunger in Kenya

The above review shows that Kenya lacks proper implementation strategies for the realisation of the right to food. Since the promulgation of the Constitution in 2010, the state has not specifically provided for legislation to provide direction for actualising the right to food. This lack of an Act hinders the realisation of the right to adequate of acceptable quality by a large number of people. Thus, such legislation should be undertaken on a priority basis.

Rights-based approach to development remains the right path towards feeding the nation. Isabella et al write on the importance of promoting the right to food in situations of food insecurity, vulnerability and human rights failure.¹¹⁵ Empowerment and inclusion of drivers of food production and consumers ensures sustainability. This is an approach that incorporates all people in sharing the natural resources. These equitable benefits must address the specific needs of vulnerable persons, women, children and persons with disabilities.

¹⁰⁸ Ingutia Rose and John Sumelius "Determinants of food security status with reference to women farmers in rural Kenya." *Scientific African* 15 (2022): e01114.

¹⁰⁹ Rae Isabella, Julian Thomas and Margret Vidar. "The right to food as a fundamental human right: FAO's experience." In *Food Insecurity, Vulnerability and Human Rights Failure*, pp. 266-285. London: Palgrave Macmillan UK, 2007.

¹¹⁰ Kariuki Muigua Achieving the Right to food for a sustainable in Kenya (2018)

¹¹¹ Lawendi Shamilla. "Influence of Corporate Governance on Service Delivery: a Case Study of the National Cereals and Produce Board, Kenya." PhD diss., University of Nairobi, 2021.

¹¹² Hermans Kathleen and Robert McLeman (2021) Climate change, drought, land degradation and migration: exploring the linkages. *Current opinion in environmental sustainability*, 50, 236-244.

¹¹³ Jacobi Johanna, Stellah Mukhovi, Aymara Llanque, Markus Giger, Adriana Bessa, Christophe Golay, Chinwe Ifejika Speranza et al. "A new understanding and evaluation of food sustainability in six different food systems in Kenya and Bolivia." *Scientific reports* 10, no. 1 (2020): 19145.

¹¹⁴ Gualtieri Donato. "Right to food, food security and food aid under international law, or the limits of a right-based approach." *Future of Food: Journal on Food, Agriculture and Society* 1, no. 2 (2013): 18-25.

¹¹⁵ Rae Isabella, Julian Thomas and Margret Vidar. "The right to food as a fundamental human right: FAO's experience." In *Food Insecurity, Vulnerability and Human Rights Failure*, pp. 266-285. London: Palgrave Macmillan UK, 2007.

The state must always comply with its obligations in the enjoyment of human rights. Right to food is one of the social economic rights and should be treated with greater weight as other human rights. As noted by Rose et al, the right to food is a survival rights in which without food, the enjoyment of other rights will be a mirage.¹¹⁶ The state must take up its role in protecting, promoting, fulfilling, respecting and making reparation where the right to food has been denied. The government should put in place measures for the progressive realisation of the right to food and related aspects.

Kenya as a state must rethink its obligation in enacting laws and policies that are geared towards the realisation of the right to adequate food of acceptable quality as envisaged by the Constitution. The existing National Food and Nutrition Security policy, as noted is not adequate in meeting constitutional requirements on the right to adequate food of acceptable quality. Noting that courts have found it hard to enforce social economic rights without proper legislation; such can be cured by parliament enacting such legislation.

CONCLUSION

Enjoyment of the right to food is an important aspect and obligations placed on the state and other persons by the Constitution. At the international level right to food is recognised and protected in instruments such as the Universal Declaration of Human Rights, and International Covenant on Economic Social and Cultural Rights among others. Regionally many people in Africa are still experiencing challenges associated with lack of food and related challenges. The African Charter on Human and Peoples Rights does not explicitly provide for this right. It however together with other instruments such as Maputo Protocol generally require measures to be taken to address people's needs and rights from a social and economic perspective.

In Kenya, the right to adequate food of acceptable quality is provided under the Constitution. Sadly, the realization of this constitutional provision has majorly been left to policy frameworks that have not provided a meaningful impact in the realization of the right to food. This is seen in a number of cases reviewed where courts agree to having jurisdiction to enforce social economic rights but are constrained in forcing government to legislate on such laws. This is the case even though majority of people are still experiencing chronic hunger and suffering associated with lack of adequate and safe food. The paper notes that legislative and administrative measures taken in the country are not adequate as they have not meaningfully resolved the issue of food security. There have been challenges and laxity in implementing policy framework developed to safeguard the right to food in Kenya. The findings of the research indicate that it is pertinent for legislation to be enacted with urgency to answer to the dictates of constitutional provisions.

RECOMMENDATIONS

Based on the above findings, this study recommends the following measures and mechanism to be undertaken in order to realise the constitutional intention of right to food and to be free from hunger;

➤ Enactment of a comprehensive legislation to enable the population enjoy right to adequate food of acceptable quality. Legislations made by parliament wield a stronger force of law. Parliament being a house of people's representative is also able to oversee how state organs and responsible stakeholders are complying with national legislations. Enactment of such a law can be picked from where the Food Security Bill 2014 halted.

➤ Adoption of workable policies and measures of enhancing right to adequate food of acceptable quality in the country and beyond. The government should be able to evaluate the success or lack of it in measures and programmes put in place. Close monitoring ensures that only policies and strategies that positively contribute in improving peoples livelihoods are in place. Where gaps and challenges are experienced, the state should devise better strategies inclusive of borrowing best practices from other jurisdictions.

- Establishment of a body or authority mandated in overseeing food situation in the country. Such a body should be involved in planning and strategising on food security, production, monitoring compliance and improving on areas where plans have not impacted realisation of right to food.
- Establishment of a multi-sectoral agency in addressing food shortage and quality in the country and offer appropriate directions that the country needs to take. This will be supported by the findings that might be provided by a body established as per the above recommendation.

¹¹⁶ Rose Nick, William Angliss, Rebecca Lindberg and Martin Caraher. "The human right to food." *Parity* 29, no. 2 (2016): 13-15.

- Community empowerment and involvement. The role that community plays in enhancing food security in the country cannot be underestimated. As the end user of framework in food security and enjoyment of right to food, the state must continuously involve them in decision making, implementation and service delivery.
- The state must strive to ensure that the members of the public are educated and made aware of the strategies and food programmes in place. They must as well be informed and empowered on their role in ensuring that the country is food secure.
- Measures must be put in place for enhancing inclusiveness and equitable opportunities to all persons. This is the case especially in protecting and promoting the vulnerable members of the society. Equality and equity mainstreaming should be prioritised among women, children, persons with disabilities and minority and marginalised groups.
- Government must put in place measures of improving agricultural production and sustainability in the country. This can be achieved through education, training, empowerment, provision of inputs and services, storage and credit facilities.