

2

COVID-19 EMERGENCY MEASURES AND THE VIOLATION OF THE RIGHT TO HEALTH IN THE KENYAN COUNTIES

*Paul Ogendi**

Abstract

The COVID-19 pandemic has brought with it many challenges pertaining to the right to health. In developing countries, even before the COVID-19 pandemic, the right to health remained a mirage for many people due to lack of prioritisation and poor resource allocation. The COVID-19 pandemic has worsened this situation. Many countries are now struggling to mobilise necessary resources and capacity to fix the problem. In Kenya, county governments are expected to play a major role. However, the level of preparedness is very low as evidenced by frequent health worker strikes, lack of adequate medical equipment and personal protective equipment (PPEs), and hospital beds and ICU units in most counties. This situation paints a grim picture for the right to health. If unaddressed, the counties will be the main inhibitors and violators of the right to health, within the pandemic's context. All human rights institutions at the national, regional, and international level including the African Commission on Human and Peoples' Rights (ACHPR) and the Committee on Economic, Social and Cultural Rights (CESCR) should therefore intensify their efforts and support both the national and county governments in respecting the right to health.

1 Background

Alongside H1N1 flu and Ebola, COVID-19 is one of the six diseases the World Health Organisation (WHO) has declared as a public health emergency of international concern (PHEIC).¹ On 30 January 2020, while making the declaration, the WHO Director-General noted that their 'greatest concern is the potential for the virus to spread to countries

* Paul is lecturer, University of Nairobi and Advocate of the High Court of Kenya. He obtained his PhD the Centre for Human Rights, University of Pretoria.

1 'Coronavirus: Public health emergency or pandemic – Does timing matter?' (1 May 2020) <https://www.chathamhouse.org/2020/05/coronavirus-public-health-emergency-or-pandemic-does-timing-matter> (accessed 12 October 2020).

with weaker health systems, and which are ill-prepared to deal with it'.² It was not until 11 March 2020, after 118 000 people in 114 countries had contracted the virus and another 4 291 had died from the disease, that the WHO declared the COVID-19 outbreak a pandemic.³ During that address, the WHO Director-General noted that '[a]ll countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights'.⁴ Accordingly, even in pandemics human rights and, particularly, the right to health should be respected and implemented.

As of 12 October 2020, according to the WHO, 216 214 new cases had been reported bringing the total number of confirmed cases to 37 326 080 and the number of deaths to 1 073 973.⁵ Africa has not been as adversely affected by the pandemic as other continents.⁶ As of 11 October 2020, the total number of confirmed COVID-19 cases in Kenya stood at 41 546 and the number of deaths at 766. Surprisingly, countries with well-established health systems, like the United States, have continued to register much higher numbers of COVID-19 and deaths.

While it is unclear why countries like Kenya which have weaker health systems have not been as overwhelmed by the COVID-19 pandemic as the WHO feared, the Kenyan government has worked in tandem with all stakeholders in the country including the 47 counties in addressing the pandemic situation. This paper focuses on the counties and their obligations in safeguarding the right to health during the COVID-19 pandemic.

According to Clift in this article, the WHO's past experience of declaring H1N1 as a PHEIC in 2009 turned out to be 'premature and an overreaction [which] may have delayed the announcement of COVID-19 as PHEIC, which may have delayed appropriate government action'.

- 2 'IHR Emergency Committee on Novel Coronavirus (2019-NCoV)' [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-(2019-ncov)) (accessed 12 October 2020).
- 3 'WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020' <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed 12 October 2020).
- 4 As above.
- 5 'WHO Coronavirus Disease (COVID-19) dashboard' <https://covid19.who.int> (accessed 12 October 2020).
- 6 WHO (n 5). The worst affected region is the Americas with 17 912 705 cases followed by South-East Asia with 7 987 606 cases. Europe is third with 6 918 265 confirmed cases. The Eastern Mediterranean is fourth with 2 623 607 confirmed cases. Africa is fifth and the least affected region is Western Pacific with 655 437 confirmed cases.

The paper's main structure is as follows: the importance of counties in safeguarding the right to health; interpretation of the right to health; emergency measures and the right to health in Kenya; county governments and the right to health; and relevant institutions and their role in promoting the right to health.

2 Why should counties matter in relation to the right to health in relation to COVID-19 pandemic?

Following the constitutional reforms in the country in August 2010, Kenya adopted a new constitution that fundamentally altered the structure of government.⁷ Under chapter 11, article 176 of the Constitution establishes county governments in each of the 47 counties, consisting of a county assembly and a county executive. Under article 174(f), one of the objects of devolution is 'to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya'. Consequently, article 186 states that 'the functions and powers of the national government and the county governments, respectively are as set out in the Fourth Schedule'. Accordingly, protecting health is a shared function of both the national and county governments with the national government bearing responsibility for national referral health facilities and health policy whilst the county governments are largely responsible for county health services.

Article 58 of the Constitution read together with article 132(4)(d) allow the President to declare a state of emergency. However, the Kenyan government decided not to use this provision perhaps because of the stringent requirements that comes with it, to wit, article 58(1)(b) and 58(3) (b) stipulate that a state of emergency can be declared for only 14 days and this can be extended by National Assembly for only two months at a time. Moreover, the first extension must have a supporting vote of two-thirds of all the members of the National Assembly and subsequent extensions require at least three-quarters of all the members of the National Assembly. Therefore, it is obvious that either the executive did not wish to undergo the heavy burden of compliance or it wanted to monopolise the COVID-19 response since it opted instead to use the extensive powers presently available under the archaic Public Health Act, 1989 considering it was enacted before the current Constitution was promulgated. The

7 Kenya Law 'Constitution of Kenya, 2010' http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_11 (accessed 12 October 2020).

subsequent measure adopted by the government may therefore be prima facie legal but unconstitutional if tested.

In the absence of the government declaring a state of emergency under article 58 of the Constitution during the pandemic, the national and county governments are expected to work in tandem, especially concerning the implementation of measures the national government has put in place. In essence, the county governments have the critical role of implementing the health policies put in place by the national government. Indeed, section 5(1) of the County Government Act, 2012⁸ provides that '[a] county government shall be responsible for the functions assigned to it under the Constitution or by an Act of Parliament'. Pursuant to section 5(2)(c) of the legislation, the county governments' responsibility includes the health function provided under article 186 and the Fourth Schedule of the Constitution as discussed above.

The County Government Act, 2012 does not, however, substantively address the county's health function. Instead, the Health Act, 2017⁹ provides the framework county governments can use to organise and implement the health function. Section 19, for instance, provides for the establishment of a county executive department responsible for health answerable to the Governor and the County Assembly. Also, section 19(5) (a) provides that the County Director of health shall 'be the technical advisor on all matters relating to health within the County'. Regarding duties, section 20(a) provides that the county government shall be responsible for 'implementing the national health policy and standards as laid down by national government Ministry responsible for health'.

From the above, counties are significant in relation to the right to health because the Kenyan constitutional and legal framework bestows responsibility for the health function on both the national and county governments. So, through their actions or omissions, counties may affect the right to health in the context of the COVID-19 pandemic.

3 Interpreting the right to health in the context of epidemics/pandemics

In Kenya, the key right to health provision is found under article 43(1)(a) of the Constitution, which states as follows: '[e]very person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care'. Unlike in the past, the

8 12 of 2012.

9 21 of 2017.

right to health is now a constitutional imperative and a justiciable right, meaning that in the context of COVID-19, the government should comply with its obligations, amidst competing interests, or be held accountable.

Furthermore, under article 2(5) and (6) of the Constitution, international law is also part of Kenyan law. Article 12 is also instructive on the right to health. Concerning the pandemic, article 12(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires State Parties to do, among other things, ‘prevention, treatment and control of epidemic ... diseases’.¹⁰

The Committee on Economic, Social and Cultural Rights (CESCR), as the authoritative interpreter of economic, social and cultural rights, was established under ECOSOC Resolution 1985/17 of 28 May 1985. In its General Comment 14 at paragraph 16, the CESCR interprets the term prevention, treatment and control as follows:

‘The prevention, treatment and control of epidemic, endemic, occupational and other diseases’ (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States’ individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

The above description reveals three things. First, prevention targets behaviour-related health concerns as well as promoting the social determinants of health. Second, treatment involves creating an urgent medical treatment system and providing emergency reliefs as well as humanitarian assistance during emergencies. Third, control involves state-led measures such as surveillance, data collection and immunisation. Using the right to health framework, it is possible to criticise all government actions and omissions in the context of COVID-19.

10 ‘OHCHR | International Covenant on Economic, Social and Cultural Rights’ <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed 12 October 2020).

In a recent article, Dainius Pura, the special rapporteur on the right to the highest attainable standard of physical and mental health noted that '[t]he human right to the enjoyment of the highest attainable standard of physical and mental health provides binding normative guidance for health-care systems, broader social responses, and global solidarity'.¹¹ This approach is different because it focuses on the positive role human rights may play in promoting public health responses rather than on the COVID-19 restrictions' limitation of an individual's freedoms.¹² Ultimately, it is plausible that the right to health can provide a framework which ensures that the COVID-19 response recognises the people's right to the highest attainable standard of physical and mental health.¹³ Moreover, the right to health places more emphasis on the 'most marginalized groups' whose rights are more likely to be violated during the implementation of COVID-19 measures at both the national and county levels.¹⁴ Lastly, the right to health requires that both prevention, treatment, and control measures be implemented and that the most marginalised groups be remembered during the national and county governments' implementation. It is crucial to investigate the measures the government put in place to combat the COVID-19 pandemic.

4 Emergency responses, the COVID-19 pandemic, and the right to health

During the emergency measures, the President made addresses frequently, which revealed Kenya's strategy in tackling the COVID-19 pandemic. This section focuses on chronologically expounding the measures adopted to contain COVID-19 in Kenya, pertaining to the right to health.

The section is divided into four main periods: the first addresses the coronavirus pandemics' early stages, during which widespread panic, human rights violations, mistakes, and mishaps occurred; the second touches on the government's more sturdy responses focusing on enhancing the health system's and reaching vulnerable groups in the counties; the third focused mainly on curbing the virus' importation into the country particularly from Somalia and Tanzania, and hiring of more medical

11 D Pūras et al 'The right to health must guide responses to COVID-19' (2020) 395 *Lancet* 1888 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7259895/> (accessed 12 October 2020).

12 As above.

13 As above.

14 Committee on Economic, Social and Cultural Rights 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights' E/C.12/2020/17 (April 2020) para 2 <https://undocs.org/E/C.12/2020/17> (accessed 13 October 2020).

health workers to boost the healthcare system's capacity; the fourth and final period is the period of irreducible minimum before the government could consider reopening the economy could be considered and special focus being paid to the role of counties. These periods have been further analysed below in considerable detail.

4.1 The first period: Era of human rights violations, mistakes and mishaps

This period is crucial because for the first time Kenya had COVID-19 in its territory. Given the government's inexperience with such a pandemic, it acted irrationally, made many mistakes and violated human rights in wanton abandon. The people who were also generally panicking because of COVID-19 deaths, overwhelmed hospitals and health facilities, and disrupted livelihoods in the affected places. Thus, the situation necessitated far-reaching responses to combat the virus.

While the COVID-19 outbreak started in China in December 2019, the first case in Kenya was not confirmed until 12 March 2020.¹⁵ It was during the Ministry of Health's announcement of the first case that the government put a raft of emergency measures in place to change individual behaviour and promote hygiene. The measures included washing of hands or using alcohol-based hand sanitizers, maintaining social distance, and the recommendation to stay at home.¹⁶

On 25 March 2020, the First Presidential Address on COVID-19 was delivered at a time when the number of confirmed cases had reached 28 in Kenya.¹⁷ That address focused on saving the economy and the National Treasury was directed to provide relief to increase disposal income Kenyan people had. Relief included a '100% tax relief for persons earning gross monthly income of up to Ksh. 24,000'.¹⁸ During this address the National Security Council Public Order Number 1 directive was issued and ordered a daily curfew from 19h00 to 05h00 for all Kenyans except

15 'First case of coronavirus disease confirmed in Kenya – Ministry of Health' <https://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/> (accessed 14 October 2020).

16 As above.

17 'Presidential Address on the state interventions to cushion Kenyans against economic effects of COVID-19 pandemic on 25 March, 2020. | The Presidency' <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/> (accessed 14 October 2020).

18 As above.

medical professionals, other health workers, critical, and essential service providers.¹⁹

From a right to health perspective, the exemption of health providers from the curfew was crucial to allow them to provide critical health services. However, it later emerged that the curfew imposed on all other persons had important ramifications on the enjoyment of rights. Among other horrific stories, there were reports of women who delivered at home and died because of the curfew.²⁰ There were also reports of police beating and killing at least six people to enforce the curfew conditions that began on 27 March 2020.²¹ It is unclear whether those injured were afforded medical treatment. It is evident that many rights apart from the right to health were violated during the curfew.

On 6 April 2020, the President announced enhanced measures in his second address as the confirmed cases totaled 158 in Kenya.²² The government made wearing of masks outside homes or in public spaces mandatory and ordered a cessation of all movement in and out of the Nairobi Metropolitan Area and Kilifi, Kwale and Mombasa counties.²³ The health implications were that Kenyatta National Hospital (KNH), a national referral hospital located in Nairobi, was inaccessible to all patients in other counties. Indeed, some non-governmental organisations (NGOs), such as the International Commission of Jurists (ICJ), speaking before the Senate ad hoc committee on the COVID-19 situation addressed the issue of sick patients accessing health services during curfew hours and the need to allow patients to access health services in Nairobi and Mombasa.²⁴

19 As above.

20 S Team 'Expectant women experience painful pangs of night curfew' *The Standard* <https://www.standardmedia.co.ke/kenya/article/2001367134/expectant-women-experience-painful-pangs-of-night-curfew> (accessed 14 October 2020).

21 'Kenya: Police brutality during curfew' *Human Rights Watch* 22 April 2020 <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew> (accessed 14 October 2020).

22 'Presidential address on enhanced measures in response to the COVID-19 pandemic By HE Uhuru Kenyatta, CGH, President And Commander-In-Chief of Kenya Defence Forces On 6th April, 2020 | The Presidency' <https://www.president.go.ke/2020/04/06/17505/> (accessed 14 October 2020).

23 As above.

24 'State asked to exempt patients in Nairobi, Coast Region Lockdown' *People Daily* 16 April 2020 <https://www.pd.co.ke/news/national/state-asked-to-exempt-patients-in-nairobi-coast-region-lockdown-33070/> (accessed 14 October 2020).

On 2 April 2020, the World Bank disbursed \$50m to Kenya as part of the Kenya COVID-19 Emergency Response Project.²⁵ This funding was critical in providing

emergency funding for medical diagnostic services, surveillance and response, capacity building, quarantine, isolation and treatment centres, medical waste disposal, risk communications, and community engagement as well as strengthening of the country's capacity to provide safe blood services.²⁶

4.2 The second period: Stability, focus on health, vulnerable groups and enhanced collaboration with counties

This second period is unique since the government stabilised its response to the pandemic during this time. Indeed, it was during this period that the government began taking far-reaching measures to enhance the healthcare system's capacity and collaborate with the counties to address the unique circumstances of the vulnerable groups. Before this, the government depended on the police to enforce the curfew and other measures put in place while the healthcare system and vulnerable groups remained ignored. While many people were still fearful during this period, some had begun to adapt to the new emergency measures and observing the guidelines put in place.

On 16 April 2020 during the fourth address, the president announced that 11 people had died from the virus, about 1 000 people were in quarantine and 156 more were in isolation facilities.²⁷ There were reports that the quarantine facilities did not meet acceptable human rights standards with some accusing the government of 'forcefully quarantining tens of thousands of people in facilities that lack proper sanitation, protective equipment, and food'.²⁸

25 'Kenya receives \$50 million World Bank group support to address COVID-19 pandemic' *World Bank* 2 April 2020 <https://www.worldbank.org/en/news/press-release/2020/04/02/kenya-receives-50-million-world-bank-group-support-to-address-covid-19-pandemic> (accessed 16 October 2020).

26 As above.

27 'The Fourth Presidential Address on the coronavirus pandemic, 16th April, 2020 at State House, Nairobi. | The Presidency' <https://www.president.go.ke/2020/04/16/the-fourth-presidential-address-on-the-coronavirus-pandemic-16th-april-2020-at-state-house-nairobi/> (accessed 14 October 2020). Strangely, there is no trace of the Third Presidential Address online including on the State House' official twitter handle.

28 'Kenya: Quarantine conditions undermine rights' *Human Rights Watch* 28 May 2020 <https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights> (accessed 15 October 2020).

The government also announced that it had increased COVID-19 testing which was key in detecting and dealing with the pandemic since only about 10 000 people had been tested by then.²⁹ Additionally, medical technologies and equipment were manufactured in the country as universities, technical institutions and local industries fill the gap government-imposed import restrictions created.³⁰ Importantly, the government set up the COVID-19 Emergency Response Fund to ensure food and non-cash items could be distributed safely and responsively to the poor and marginalised groups.³¹

Food is a social determinant of health. Accordingly, the President announced that they had agreed with the Chairman of the Council of Governors, Governor Wycliffe Oparanya, together with County Commissioners in every county, to ensure that support was delivered to vulnerable citizens.³² Therefore, the counties' role became prominent, especially in reaching out to marginalised groups in keeping with the right to health expectations as had been suggested in the previous section. Other measures announced included: a welfare package for hospital staff which includes medical insurance companies' coverage for health workers. The counties were also given a 3-month waiver (for local sourcing) from Kenya Medical Supplies Agency (KEMSA) requirements for purchasing masks and PPEs to protect citizens and healthcare workers. A coronavirus crisis fund was also announced to support the counties' response and to cushion the most vulnerable people from the economic effects of the containment measures in place and to protect healthcare workers.³³ The abovementioned measures undoubtedly conform to the right to health requirements and should be commended.

The era of consolidation of measures taken to tackle the COVID-19 pandemic began with the fifth Presidential address delivered on 25 April 2020. In this address, the President announced the employment of 26 148 workers for the next 30 days to implement the first phase of the National Hygiene Programme.³⁴ This is important because promoting hygiene is

29 As above.

30 As above.

31 As above.

32 As above.

33 As above.

34 'The Fifth Presidential Address on the coronavirus pandemic at State House, Nairobi Saturday, 25th April, 2020 | The Presidency' <https://www.president.go.ke/2020/04/25/the-fifth-presidential-address-on-the-coronavirus-pandemic-at-state-house-nairobi-saturday-25th-april-2020/> (accessed 14 October 2020).

one way to combat the virus. This is also a major achievement because one of the main focuses of promoting primary healthcare is prevention.

4.3 The third period: Focusing on imported cases at the borders and hiring of more healthcare workers

The President gave the Sixth Presidential Address on 16 May 2020 and it focused on imported COVID-19 cases particularly at the borders with Tanzania and Somalia.³⁵ It ushered in the third period of the emergency measures the Kenyan authorities took to control the virus's spread. The Public Health Emergency Operation Centre had already calculated that thousands of infections and many fatalities were bound to take place in the country.³⁶ Consequently, the border was closed to migrating people and truck drivers were subjected to mandatory testing at the border areas.³⁷ The fact that 43 cases had been imported to Kenya from Somalia and Tanzania through the following borders: Wajir (14); Isebania (10); Namanga (16); Lungalunga (two); and Loitoktok (one) informed the border closure and restrictions imposed.³⁸

On 23 May 2020, during the Seventh Presidential Address, the President announced that health was the fourth target in the 8-point stimulus programme he launched. There were plans to hire about 5 000 healthcare workers with diploma or certificate-level qualifications for one year to enhance COVID-19 response capabilities and implement Universal Health Coverage (UHC).³⁹ Indeed, as COVID-19 infection rates soar, the health force dealing with the pandemic continues to be overwhelmed and so, recruiting more healthcare workers was necessary to prevent the system from collapsing. In addition to the recruitment, the President announced that Ksh 1.7billion was going to be set aside to expand bed capacity in various public hospitals and also provide additional resources to several medical research facilities for research purposes.⁴⁰ The President also

35 'The Sixth Presidential Address on the coronavirus pandemic at state house, Nairobi Saturday, 16th may, 2020 | The Presidency' <https://www.president.go.ke/2020/05/16/the-sixth-presidential-address-on-the-coronavirus-pandemic-at-state-house-nairobi-saturday-16th-may-2020/> (accessed 15 October 2020).

36 As above.

37 As above.

38 As above.

39 'The Seventh Presidential Address on the coronavirus pandemic: The 8-point economic stimulus programme Saturday 23rd may, 2020 | The Presidency' <https://www.president.go.ke/2020/05/23/the-seventh-presidential-address-on-the-coronavirus-pandemic-the-8-point-economic-stimulus-programme-saturday-23rd-may-2020/> (accessed 15 October 2020).

40 As above.

announced a plan to upgrade medical research institutions in the country to a world-class standard.⁴¹ It is important to note that in pandemics such as the present one, biomedical research plays an important role in combating the disease. Therefore, all interventions were supposed to be sanctioned by context-specific research.

In May 2020, the World Bank approved \$1 billion financing for Kenya which was critical in Kenya's war against COVID-19.⁴² The IMF also provided \$ 739m under its Rapid Credit Facility to support Kenya's COVID-19 responses.⁴³

4.4 The fourth period: The irreducible minimums, counties and partial reopening

This period was crucial because after some months of strictly enforced COVID-19 measures, the government began discussing the possibility of reopening the country and economy. It was in this period that the minimum conditions to be met before the measures could be eased was spelt out and the counties' roles became more prominent in the war against COVID-19.

On 6 June 2020, about three months after the country registered its first coronavirus case, the President delineated the minimum conditions that would allow for reopening as follows:⁴⁴

According to the professionals, the irreducible minimum for lifting the restrictions has three thresholds. One, to open up, the infections must have been contained and headed downwards. Two, our health care system must be prepared sufficiently to take on a surge in infections. It must not be overwhelmed at any one point during the pandemic. Access to testing,

41 As above.

42 'World Bank approves \$1 billion financing for Kenya, to address COVID-19 financing gap and support Kenya's economy' *World Bank* 20 May 2020 <https://www.worldbank.org/en/news/press-release/2020/05/20/world-bank-approves-1-billion-financing-for-kenya-to-address-covid-19-financing-gap-and-support-kenyas-economy> (accessed 16 October 2020).

43 'IMF executive board approves a US\$739 million disbursement to Kenya to address the impact of the COVID-19 pandemic' *IMF* 6 May 2020 <https://www.imf.org/en/News/Articles/2020/05/06/pr20208-kenya-imf-executive-board-approves-us-million-disbursement-address-impact-covid-19-pandemic> (accessed 16 October 2020).

44 'The Eighth Presidential Address on the coronavirus pandemic State House Saturday, June 6th, 2020 | The Presidency' <https://www.president.go.ke/2020/06/06/the-eighth-8th-presidential-address-on-the-coronavirus-pandemic-state-house-saturday-june-6th-2020/> (accessed 15 October 2020).

isolation and quarantine must be a bare minimum. Three, capacity for surveillance and contact tracing must be in place.

In essence, this period truly reflects the important role counties health systems played in the fight against COVID-19 because the counties were the ones who should have the capacity to satisfactorily implement the minimum conditions. Indeed, it is because of the lack of capacity at the county levels that reopening the economy did not happen as planned, as captured below:⁴⁵

While I consider the possibility of de-escalating the containment measures in place and conscious that Health is a shared function - between the National and County Governments, I, have convened an Extra-Ordinary session of the National and County Government Co-ordinating Summit on Wednesday the 10th day of June, 2020, to consider the following salient matters:

- (i) First, to review the effectiveness of the containment measures we have so far rolled out to break the chain of transmission of the Coronavirus Disease;
- (ii) Second, to secure the undertaking of every County Government to deliver isolation facilities with at least 300 bed-capacity.
- (iii) And thirdly, within 14 days, to develop time bound protocols for progressive re-opening of the economy.

The above suggests that establishing capacity at the county level remained key to defeating the virus and reopening the country's economy. The ball was now firmly in the counties' court. Indication the desire to reopen was also evident when the curfew, though extended for further 30 days,

45 Eighth Presidential Address (n 44). While arriving at this decision, the President noted as follows: 'The question we must ponder is whether we have met this threshold in order to lift the restrictions. Have the cases of infections taken a downturn, for instance? And the answer is NO. Nairobi and Mombasa are taking the lead with new infections. Have we met the second minimum of a prepared health system with isolation facilities? I will answer that question by giving you two examples. Siaya County has a ten (10) bed isolation facility and they have already admitted nine (9) COVID-19 patients from only one incident. Similarly, Busia County has a thirty-four (34) bed isolation facility. And by two days ago, it was full. If there is a surge in infections in these two counties, the health care system will be overwhelmed. The hard question to pose here, therefore, is whether Kenyans are prepared to nurse COVID-19 patients in their homes if our health care system cannot handle the numbers. Are they prepared to expose their children and the elderly to COVID-19 patients in the close proximity of home? And yes, we have disbursed Ksh 5 billion to the counties to increase their health care capacity in view of this pandemic. But to build the necessary health infrastructure for such undertakings requires time. We must get ahead of this pandemic by creating lead time.'

commencement time was changed ‘from 7:00 p.m. to 9:00 p.m.; with the end time for the same being varied from 5:00 a.m. to 4:00 a.m’.⁴⁶

On 10 June 2020, barely four days after the Eighth Address, at a meeting at the State House, the national and county governments reached an agreement on the logistics of reopening. The proposal to raise the number of isolation beds to 300 for each county was also confirmed.⁴⁷ Additionally, county governments were encouraged to review their fiscal and strategic plans to integrate COVID-19 prevention and control measures.⁴⁸ In the meeting, the Cabinet Secretary also noted that ‘cooperation is key in ensuring the country succeeds in dealing with the health crisis’.⁴⁹

On 25 June 2020, the President reminded the counties that the decision to reopen the country was highly dependent on how well prepared they were in another extra-ordinary summit the President convened.⁵⁰ The Chairman of the Council of Governors, Wycliffe Oparanya, in his report, stated that:⁵¹

Counties had attained a total of 6,898 isolation beds against the national target of 30,500 units. He said, 12 counties had met the 300 per county isolation beds threshold while 34 devolved units were on course to meet the target within the month. On human resources, Governor Oparanya reported that a total of 16,914 health personnel had been trained on COVID-19 management among them 59,449 community health volunteers. Speaking on behalf of the 47 County Governments, the Kakamega Governor said 36 counties have a cumulative sum of 343 ICU beds while 28 counties have a total of 337 ventilators.

He said the Council of Governors (CoG) working with the Ministry of Health and partners had developed a guideline on home-based COVID-19 management which is being rolled out. Therefore, it is apparent that had

46 As above.

47 ‘National and county governments agree on terms for gradual re-opening of the economy | The Presidency’ <https://www.president.go.ke/2020/06/10/national-and-county-gvts-agree-on-terms-for-gradual-re-opening-of-the-economy/> (accessed 15 October 2020).

48 As above.

49 As above.

50 ‘County COVID-19 response readiness to determine re-opening of economy, President Kenyatta tells governors | The Presidency’ <https://www.president.go.ke/2020/06/25/county-covid-19-response-readiness-to-determine-re-opening-of-economy-president-kenyatta-tells-governors/> (accessed 15 October 2020).

51 As above.

the national government rolled back measures it created to deal with the pandemic, counties would have been ill-equipped to deal with the crisis. On 6 July 2020, during the Ninth Presidential Address, the President reiterated that the irreducible minimums had not been met 100 per cent but a reasonable level of preparedness had been achieved throughout the country, and therefore reopening was possible.⁵² Accordingly, the cessation of movement in Nairobi, Mombasa, and Mandera county was lifted and local travel resumed. The President also made a national call to civic responsibility.⁵³

On 27 July 2020, during the Tenth Presidential Address, it appeared that the excitement from reopening had led to more infections. Accordingly, the President put measures in place to discourage socialisation including banning the sale of alcoholic drinks and beverages in eateries and restaurants and closing bars.⁵⁴ Due to the disease's severity, the Ministry of Health was tasked to 'develop a protocol to temporarily retain retired anaesthetists and ICU staff to support the medical staff assigned to dealing with serious COVID-19 cases in the Counties'.⁵⁵ The announcement of the death of the first health worker, Dr Doreen Adisa Lugaliki, marked a grim milestone of healthcare workers dying from COVID-19.⁵⁶ The lack of PPE accounted for many healthcare workers' deaths and this is tantamount to a violation of the rights to health and life.

On 26 August 2020, during the Eleventh Presidential Address, the address had a positive tone. The President noted that 'majority of Kenyans [had] exercised a reasonable level of civic responsibility in observing COVID Protocols'.⁵⁷ The positivity rate within the country had also fallen from 13 per cent in June to 8 per cent in August 2020, which was edging closer to the 5 per cent the WHO recommended before totally reopening

52 'The Ninth Presidential Address on the coronavirus pandemic, Harambee House, Nairobi Monday, July 6th, 2020. | The Presidency' <https://www.president.go.ke/2020/07/06/the-ninth-9th-presidential-address-on-the-coronavirus-pandemic-harambee-house-nairobi-monday-july-6th-2020/> (accessed 15 October 2020).

53 As above.

54 'The Tenth Presidential Address on the COVID-19 pandemic on Monday, 27th July, 2020 at State House, Nairobi. | The Presidency' <https://www.president.go.ke/2020/07/27/the-tenth-10th-presidential-address-on-the-covid-19-pandemic-on-monday-27th-july-2020-at-state-house-nairobi/> (accessed 15 October 2020).

55 As above.

56 As above.

57 'The Eleventh Presidential Address on the COVID-19 pandemic, Wednesday, 26th August, 2020 State House, Nairobi. | The Presidency' <https://www.president.go.ke/2020/08/26/the-eleventh-11th-presidential-address-on-the-covid-19-pandemic-wednesday-26th-august-2020-state-house-nairobi/> (accessed 15 October 2020).

a country.⁵⁸ Sadly, the good news came at a time when KEMSA was accused of corruption and the President ordered investigative agencies to conclude their examinations within 21 days and bring those responsible to book.⁵⁹ The President also addressed the issue of UHC and directed that the Cabinet Secretary for Health together with the Chairperson of the Council of Governors to constitute a National Reference Group on COVID-19 to review how successful the response has been in Kenya. Part of the team's mandate is to

formulate strategies to identify institutional weaknesses within the healthcare system at both tiers; recommend ways to increase the representation of the County Governments in the Boards of Healthcare Agencies; and recommend ways in which our national responses to healthcare emergencies can be improved.⁶⁰

Other tasks include giving preference to local manufacturers in the procurement of pharmaceutical and non-pharmaceutical products. Lastly, the team was also tasked with establishing the Kenya COVID-19 Vaccine Consortium to focus on the development and testing of COVID-19 vaccines for local and international use.⁶¹ From a right to health perspective, the vaccine is the only silver bullet that can eradicate COVID-19 and allow for the normal resumption of life because unless a vaccine is developed soon, COVID-19 will be with us for many years. Effort towards creating a vaccine via development or testing means that Kenyans will be able to benefit from it earlier than other countries and the COVID-19 situation may improve.

On 28 September 2020, the National Emergency Response on Coronavirus (NERC) convened the National COVID-19 Conference and the focus was on how to live with COVID-19 as the new normal. On the same day, the President also gave his Twelfth Address and announced that Kenya had achieved a 4.4 per cent COVID-19 positivity rate, which complied with the WHO recommendations for re-opening.⁶² The President

58 As above.

59 As above.

60 As above.

61 As above.

62 'The Twelfth Presidential Address on the COVID-19 pandemic on Monday, 28th September, 2020 At Kenyatta International Convention Centre (KICC), Nairobi. | The Presidency' <https://www.president.go.ke/2020/09/28/the-twelfth-12th-presidential-address-on-the-covid-19-pandemic-on-monday-28th-september-2020-at-kenyatta-international-convention-centre-kicc-nairobi/> (accessed 15 October 2020).

was however quick to remind Kenyans that while the battle had been won, the war was still far from over.⁶³

At the time, the number of ICU beds in the country was over 300 and isolation beds had increased to 7 411 and the country had also installed more medical equipment in the country in the last six months than it had done since independence.⁶⁴ A fifth National Referral Hospital – KU Teaching Referral and Research Hospital, was reopened and is now ‘part of [the] national response for specialized treatment of chronic diseases, notably: cancer and renal diseases ...’⁶⁵ The President then eased the restrictions by changing the curfew hours to start at 23h00 to 04h00, opened bars and lifted the ban on selling alcohol.⁶⁶ Having partially reopened the country, the challenge is now squarely on the counties to guarantee the right to health. The next section highlights some of the right to health violations that have been documented in the counties.

5 County governments and respect of the right to health in the context of the COVID-19 pandemic – Review of the gaps

Since the counties have now taken prominence in the fight against COVID-19, it is important to assess their performance concerning the right to health. Some counties such as Mombasa have performed very well in containing the virus. Many others are also working tirelessly to protect their people. However, despite the remarkable achievements in each county, criticism against violations of the right to health may be more useful in showing the counties areas that can be improved on. As noted before, health was never a political priority in Kenya and as such, it is expected that some violations would be present in counties.

5.1 Health infrastructure

Kenya lacks adequate healthcare resources. According to Barasa et al, ‘Kenya has 64,181 hospital beds across all sectors (public, faith-based, NGO, private for profit), only 37,216 (58% of these beds are in hospitals that have oxygen supply’.⁶⁷ Similarly, out of the 537 ICU beds, only

63 As above.

64 As above.

65 As above.

66 As above.

67 EW Barasa, PO Ouma & EA Okiro ‘Assessing the hospital surge capacity of the Kenyan health system in the face of the COVID-19 pandemic’ (2020) 15 *PLOS ONE* e0236308.

256 ventilators are available.⁶⁸ The situation is far more dire when one considers other missing factors in many health facilities in Kenya today like ‘a comprehensive package of required infrastructure, trained healthcare workers, medical supplies, and governance/institutional arrangements’.⁶⁹ Due to limited number of hospital facilities, schools, instead of hospitals, were used as quarantine or isolation centres, including: St Georges High School, Moi Girls High School (Kibera), Upper Hill High School, Dagoreti High School and Kenya High School.⁷⁰ The UN, in collaboration with the Nairobi Hospital and the Kenyan government, opted to a 160-bed facility in place in five to eight weeks for its staff (and possibly outsiders) who may be have been infected with the virus.⁷¹ On 18 November 2020, the President opened the ‘Sh846million facility, equipped with 150 beds including a 15 bed intensive care units and 45 bed high dependency units’ was eventually completed and officially opened to the public.⁷² It is critical that both the county and national governments build enough hospitals and other medical facilities in the country and only in critical cases resort to schools and other facilities. Each county should also have an infectious diseases centre to meet the requirements of the right to health.⁷³

5.2 Health equipment and ICUs

Many counties still lack specialist equipment. For example, only 22 out of 47 counties having Intensive Care Units (ICUs),⁷⁴ which are important for treating critical patients. There were reports that ‘[w]ealthy Kenyans, among them five governors, have installed Intensive Care Units (ICU) facilities in their private residences following a surge in COVID-19 infections which has seen leading private hospitals overwhelmed’.⁷⁵

68 As above.

69 As above.

70 ‘Education officials want people quarantined in schools transferred’ *Nation* 22 September 2020 <https://nation.africa/kenya/news/education/education-officials-want-people-quarantined-in-schools-transferred--2305574> (accessed 16 October 2020).

71 ‘UN to build 160-bed facility for staff who may suffer from COVID-19’ *Nation* 21 July 2020 <https://nation.africa/kenya/news/un-to-build-160-bed-facility-for-staff-who-may-suffer-from-covid-19-1901090> (accessed 16 October 2020).

72 ‘Opening of COVID hospital’ *Ministry of Foreign Affairs* 18 November 2020 <https://www.mfa.go.ke/?p=3648> (accessed 12 December 2020).

73 A Mohiddin & M Temmerman ‘COVID-19 exposes weaknesses in Kenya’s healthcare system. And what can be done’ *The Conversation* 27 July 2020 <http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356> (accessed 16 October 2020).

74 As above.

75 ‘COVID-19: Race against time as rich Kenyans install ICU beds in homes’ *People Daily* 10 July 2020 <https://www.pd.co.ke/news/covid-19-race-against-time-as-rich-kenyans-install-icu-beds-in-homes-43404/> (accessed 16 October 2020).

The other issue is access to PPE which has been a major challenge and has led to the death of several healthcare workers in Kenya and the infections of many others.⁷⁶ The fact that the market is flooded with substandard protective equipment which continues to endanger the lives of health care workers worsened the situation.⁷⁷ While Kenya lacks basic equipment, through KEMSA medical equipment, Kenya procured masks at ‘grossly inflated prices, handling billions of shillings in quick profits to a few individuals’.⁷⁸

On a positive note, some companies used innovations such as three-dimensional (3D) technology to try and bridge the equipment gap. For example, UltraRed Technologies, based in Nairobi, utilised open-source prototypes 3DVerkstan, a company in Sweden designed, to print plastic face shields to fill the gap because manufacturers were still unprepared to deal with demands for masks.⁷⁹ Some countries such as the US were also donating PPEs and hospital equipment like ‘N95 masks, surgical masks, coveralls, medical goggles, face shields and pulse oximeters worth Sh. 7.9million’ to public health facilities in Nairobi, Mombasa, Kisumu, Siaya and Nakuru.⁸⁰

5.3 Healthcare workers strike

Healthcare workers going on strike has become another major challenge that has persisted even during the COVID-19 pandemic. The main issues are that health insurance for healthcare workers was cut in July and some healthcare workers had not been paid for about six months even though they were expected to work for long hours during the pandemic.⁸¹ In August, amid the COVID-19 pandemic, ‘more than 300 doctors working

76 ‘Unions blame PPE shortage for COVID-19 infections among medics’ *Nation* 24 June 2020) <https://nation.africa/kenya/news/unions-why-medics-are-getting-covid-19-824876> (accessed 16 October 2020).

77 As above.

78 ‘COVID-19: Kenya paid double for protective kits’ *Nation* 2 August 2020 <https://nation.africa/kenya/news/-covid-19-kenya-paid-double-protective-kits-1911292> (accessed 16 October 2020).

79 ‘Kenya’s 3D printing community is making COVID-19 equipment to fill a deficit as caseloads rise’ *Quartz Africa* 15 April 2020 <https://www.medicestafrica.com/en/overview/news-and-articles/Kenya-3D-printing-community-is-making-Covid-19-equipment-to-fill-a-deficit-as-caseloads-rise.html> (accessed 16 October 2020).

80 ‘COVID-19: US donates equipment worth Sh7.9m to Kenyan hospitals’ *Nation* 2 July 2020 <https://nation.africa/kenya/news/covid-19-us-donates-equipment-worth-sh7-9m-to-kenyan-hospitals--1390808> ((accessed 17 October 2020).

81 AL Dahir ‘Kenya’s health workers, unprotected and falling ill, walk off job’ *The New York Times* 15 September 2020 <https://www.nytimes.com/2020/08/21/world/africa/kenya-doctors-strike-coronavirus.html> (accessed 16 October 2020).

in 20 public facilities in Nairobi, the country's capital, and thousands more across the country threatened to strike if their demands [were] not met'.⁸² Indeed, in at least two counties, Homa Bay and Central Embu, healthcare workers went on strike in August over delayed salaries, inadequate PPE supply, and lack of medical insurance.⁸³ The strike was called off after the Nairobi Metropolitan Services (NMS) and the healthcare workers reached an agreement resolving the issues raised through Kenya Medical Practitioners and Dentist Union (KMDDU), the healthcare worker's representative organisation.⁸⁴ Unfortunately, the medics resumed their strike on 15 September 2020 because NMS delayed 'their September salaries and [breached] a return-to-work formula signed on August 26'.⁸⁵ However, NMS explained that the funds had been delayed due to the revenue-sharing impasse at the Senate and the issue has since been resolved.⁸⁶ A similar situation was reported in Kiambu and as at 30 September 2020 it had been reported that the county was considering borrowing money to pay healthcare workers who had not been paid in two months.⁸⁷ In Kisumu, about 175 county government-contracted healthcare worker also went on strike demanding about Sh100m in salary arrears.⁸⁸ Other counties affected include Kericho and Embu.

Healthcare workers going on strike during the COVID-19 pandemic is regrettable. The stalemate at the county level on the revenue-sharing formula may have triggered the crisis. The national government, working together with its county counterparts, should ensure that all medics are sufficiently catered for, using funds borrowed from multilateral financial institutions (MFIs) like the World Bank and IMF so that the healthcare workers can focus on giving the much-needed care to those in need. Failing

82 As above.

83 G Obulutsa 'Dozens of Kenyan doctors strike over lack of PPE, delayed pay' *Reuters* 18 August 2020 <https://www.reuters.com/article/us-health-coronavirus-kenya-idUSKCN25E20Q> (accessed 16 October 2020).

84 'Nairobi doctors call off strike after inking pay deal with NMS' *Nation* 27 August 2020 <https://nation.africa/kenya/counties/nairobi/nairobi-doctors-call-off-strike-after-inking-pay-deal-with-nms-1926462> (accessed 16 October 2020).

85 '255 Nairobi doctors strike over salary delay, breached contract' *The Star* 15 October 2020 <https://www.the-star.co.ke/news/2020-10-15-255-nairobi-doctors-strike-over-salary-delay-breached-contract/> (accessed 16 October 2020).

86 As above.

87 'Kiambu coffers empty, we'll borrow money to pay you, striking health workers told' *The Star* 30 September 2020 <https://www.the-star.co.ke/news/2020-09-30-kiambu-coffers-empty-well-borrow-money-to-pay-you-striking-health-workers-told/> (accessed 16 October 2020).

88 'Kisumu health workers on strike over salary arrears' *Kenya News Agency* 24 September 2020 <https://www.kenyanews.go.ke/kisumu-health-workers-on-strike-over-salary-arrears/> (accessed 17 October 2020).

to provide healthcare workers with financial security they need to discharge their duties is tantamount to violating of the right to health. There is the case of a woman who had to give birth outside hospital premises because of the strikes, among other horrific patient experiences.⁸⁹ In a 2020 study, Watheka et al wrote that:⁹⁰

The recurrence of health worker strikes and the prolonged nature of the 2017 strikes highlights the underlying frustration and unrest amongst public sector health workers in Kenya. There is an urgent need for national and county governments to appreciate the complex adaptive nature of health systems and adopt systematic monitoring of different components and proactive thinking around possible effects (positive and negative) of interventions and policies.

5.4 Political rallies and health misinformation

Recently, a dangerous trend has emerged where politicians have been violating the COVID-19 preventive protocols. Politicians, including the President, have continued to hold rallies without following social distancing protocols, wearing masks, or other public health guidelines the Ministry of Health has put in place.⁹¹ In a shocking move, during a rally, the Migori Governor indicated that coronavirus was not in Kenya and that people in Tanzania, the neighbouring country, were living their lives without restrictions. These reckless behaviors and outrageous claims may undermine the progress that has been made concerning the COVID-19 pandemic responses. If the government acquiesces in this, then it will violate its obligations under the right to health.

It is because of these violations that the necessary national and international institutions should support the national government and counties to do their work.

89 'NMS apologises for Pumwani child birth fiasco, takes actions' *Nation*, 19 September 2020 <https://nation.africa/kenya/counties/nairobi/nms-apologises-for-pumwani-child-birth-fiasco-takes-actions-2303448> (accessed 19 October 2020).

90 D Waithaka et al 'Prolonged health worker strikes in Kenya – Perspectives and experiences of frontline health managers and local communities in Kilifi County' (2020) 19 *International Journal for Equity in Health* 23.

91 'Uhuru, Ruto, Raila lead Kenyans in flouting COVID-19 measures' *The Star* 10 September 2020 <https://www.the-star.co.ke/news/2020-09-10-uhuru-ruto-raila-lead-kenyans-in-flouting-covid-19-measures/> (accessed 17 October 2020).

5.5 Access to other healthcare services

When COVID-19 was reported in Kenya, the country seemed to have given all attention to tackling the Virus and ignored other diseases. Indeed, the country experienced ‘troubling low numbers of inpatients and outpatients’ and there were concerns that in the future, Kenya would be dealing with other significant challenges from diseases and conditions.⁹² According to SAYS, several factors can help explain the declining number of patients in healthcare facilities namely: media-generated, isolation of vulnerable groups, economic factors, the imposition of the curfews, and fear of hospitalisation costs.⁹³ In a recent human rights report, it was noted that patients suffering from chronic diseases complained about the interruption of access to services in referral facilities outside their counties because of restrictions of movements.⁹⁴

5.6 Stigma in COVID-19 testing and burials

It is unclear why many Kenyans are not very open to participating in the mass COVID-19 testing exercise the government has launched. In May 2020, a free testing exercise was launched in densely populated high-risk areas such as Eastleigh, Kawangware, and Kibera – yet very few Kenyans showed up for testing.⁹⁵ Consequently, the question that emerges is why Kenyans are not taking advantage of the free mass testing. Given that testing is free, it is obvious that cost is not the issue. The low patronage may signal that the type of testing being used is intrusive and could be why people are staying away. Perhaps, the stigmatisation of testing positive for COVID-19 drove Kenyans away from the testing centres.⁹⁶ The fact that COVID-19 victims who succumbed to the disease had their dignity stripped away from them and family members denied an opportunity to bury them decently exacerbated the fear of stigmatisation. Authorities dressed in PPEs took over the burial process and the deceased were

92 D Njue ‘Declining health service use in Nairobi has implications beyond COVID-19’ *Africa at LSE* 25 June 2020 <https://blogs.lse.ac.uk/africaatlse/2020/06/25/declining-health-service-use-in-nairobi-has-health-implications-beyond-covid-19/> (accessed 17 October 2020).

93 As above.

94 KNCHR ‘Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 Pandemic’ Situational Report 1 of 2020, at 48.

95 ‘Low turnout as Kenya offers free testing in feared coronavirus hotspots’ *Voice of America* 4 May 2020 <https://www.voanews.com/covid-19-pandemic/low-turnout-kenya-offers-free-testing-feared-coronavirus-hotspots> (accessed 19 October 2020).

96 ‘Kenya Rolls out Testing in Nairobi Slums, but Some Fear Stigma’ *Reuters* (27 May 2020) <https://www.reuters.com/article/us-health-coronavirus-kenya-testing-idUSKBN2331HZ> (accessed 4 October 2023)

hurriedly buried without coffins, a spectacle that was hitherto unheard of in some societies.⁹⁷

6 Relevant institutions and their roles in promoting human rights in Kenya in the context of COVID-19

The key national and international institutions should play a major role in promoting the right to health in Kenya, especially in the context of the COVID-19. These institutions are, the Kenya National Commission on Human Rights (KNCHR), the judiciary at the national level, the African Commission on Human and Peoples' Rights (ACHPR) at the regional level and the CESCR at the international level.

6.1 Kenya National Commission on Human Rights (KNCHR)

The KNCHR is established under article 59 of the Constitution and the Kenya National Commission on Human Rights Act, 2011 to promote and protect human rights. One of the goals set for the KNCHR is to 'enhance state's compliance with national, regional and international instruments'.⁹⁸ Indeed, the KNCHR is the agency that should ensure that Kenya complies with its obligations under the right to health even as it fights COVID-19. In line with its work, the KNCHR has continued to monitor compliance and has published a Situational Report 1 of 2020 entitled 'Pain and pandemic: Unmasking the state of human rights in Kenya in the containment of the COVID-19 pandemic'.⁹⁹ One of the areas covered in the report under thematic focus number 8 is health facilities and services.¹⁰⁰ In the report, KNCHR affirmed

that health facilities and services during the COVID-19 pandemic still need to meet the highest attainable standards. The government should therefore

97 'Social stigma adds to Kenya's COVID pain' *Mail & Guardian* 13 September 2020 <https://mg.co.za/africa/2020-09-13-social-stigma-adds-to-kenyas-covid-pain/> (accessed 19 October 2020).

98 Kenya National Commission on Human Rights 'About Us: Establishment' <https://www.knchr.org/About-Us/Establishment> (accessed 19 October 2020).

99 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' *Kenya National Commission on Human Rights* 30 June 2020 <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic> (accessed 19 October 2020).

100 KNCHR (n 94).

operate within the four components namely; *Availability, Accessibility, Acceptability and Quality*.¹⁰¹

Further, having looked at the government's efforts in this area, the KNCHR, established the following in terms of accessibility and affordability of healthcare services:¹⁰²

1. To balance between provision of essential health services and COVID-19 responses, the Ministry of Health has set standards by issuing a directive on continuity of these services during the pandemic.
2. There is a gap in implementation of the above directive. KNCHR has consistently been monitoring and receiving complaints from the public on interrupted access to healthcare services. Reports by media, professional bodies (e.g. KMPDU) and the Council of Governors point towards glaring gaps in the interventions deployed in the fight against the pandemic. According to the Council of Governors, counties have reported a drop of Reproductive, Maternal, Newborn and Child Health (RMNCH) services during the pandemic. In the month of April, counties reported a 39% drop of fourth antenatal clinic visits, 32% drop in delivery of skilled birth attendance and 34% drop in immunization. In addition, prevention of mother to child transmission has reduced by 31%.⁷³ This in itself is a worrisome trend that needs to be mitigated upon.
3. The curfew order and incidences related to use of excessive force by police officers has affected the uptake of essential services by community members. KNCHR recorded complaints from victims of police brutality who were not able to seek immediate medical attention.

More reports must be released in this regard. There should also be a deeper analysis of issues on right to health. Importantly, the KNCHR should bring together all civil society organisations working in this area to monitor and document human rights violations including the right to health.

6.2 The judiciary

The judiciary is also an important institution where protecting the right to health, which is now justiciable in Kenya, is concerned. Accordingly, there have been CSOs in Kenya such as KELIN Kenya filing public interest cases in court, Petition 81 of 2020, to among other things, establish 'that the state agents have failed to proactively provide information that is critical to secure the lives and health of Kenyans and have willfully

101 KNCHR (n 94) 47.

102 KNCHR (n 94) 48.

ignored requests for information'.¹⁰³ In Petition 151 of 2020 filed on 6 May 2020, under a certificate of urgency, KELIN Kenya together with others are also challenging how the mandatory quarantine is being implemented in Kenya.¹⁰⁴ Moving forward, CSOs at the grassroots level should consider filing cases against the county governments where violations are identified and can be substantiated.

6.3 The African Commission on Human and Peoples' Rights

Also crucial in promoting compliance with the right to health is the African Commission on Human and Peoples' Rights (the Commission). The Commission is established under the African Charter which also enshrines the right to health. Concerning COVID-19, the Commission, through its Working Group on the Rights of Indigenous Populations/Communities and the Working Group on Economic, Social and Cultural Rights, has particularly engaged the about

various reports of eviction that have taken place in Kenya in the context of the COVID-19 pandemic, affecting in particular, marginalized communities, notably the Ogiek and the Sengwer communities, and people in the Kariobangi North Sewerage settlement.¹⁰⁵

Housing is a social determinant of health. This direct engagement, such as state reporting and advocacy visits, should be extended to events happening at the county level. The Commission, in particular, should consider releasing guidelines for human rights compliance in relation to COVID-19 as the new normal.

6.4 Committee on Economic, Social and Cultural Rights

Lastly, the CESCR is at the international or UN level and is responsible for the interpretation of the ICESCR. It has been noted in the previous sections that CESCR has issued a statement on COVID-19 and Economic,

103 'KELIN, working with partners, asks the court to determine the state's obligation to publicise life and health saving information as part of the COVID-19 response' (7 July 2020) <https://www.kelinkenya.org/kelin-working-with-partners-asks-the-court-to-determine-the-states-obligation-to-publicise-life-and-health-saving-information-as-part-of-the-covid-19-response/> (accessed 19 October 2020).

104 KELIN 'More delay in an urgent case challenging the manner in which mandatory quarantine has been implemented' (6 July 2020) <https://www.kelinkenya.org/%ef%bb%bfmore-delay-in-an-urgent-case-challenging-the-manner-in-which-mandatory-quarantine-has-been-implemented/> (accessed 19 October 2020).

105 'African Commission on Human and Peoples' Rights' <https://www.achpr.org/pressrelease/detail?id=527> (accessed 19 October 2020).

Social, and Cultural Rights (ESCRs).¹⁰⁶ This kind of leadership in this area is welcome. CESCR should continue monitoring the situation in its member countries and provide appropriate guidance where necessary.

7 Conclusion

The COVID-19 pandemic is an unprecedented crisis and a global public health challenge. While developed countries appear to be disproportionately affected, developing countries remain in danger due to their poor healthcare systems and the unavailability of resources. Given that developing countries may continue to experience the brunt of COVID-19 for many years to come, focusing on the right to health may help to ameliorate the situation. Failing to integrate the right to health into policies and practice in the Kenyan health sector may only lead to catastrophic outcomes such as loss of lives, indignity, and human suffering as canvassed above. As it stands, the national government is slowly easing restrictions put in place to combat the disease. In line with the Constitution, county governments are slowly assuming more responsibilities in the healthcare sphere. However, this has revealed major weaknesses at the local level with many violations of the right to health being witnessed. County governments must familiarise themselves with their obligations. Lastly, national and international institutions should intensify their efforts and offer necessary support during the implementation of the right to health guidelines in place.

106 Committee on Economic, Social and Cultural Rights 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights' E/C.12/2020 (17 April 2020) para 2 <https://undocs.org/E/C.12/2020/1> (accessed 13 October 2020).

References

Journals

- EW Barasa, PO Ouma & EA Okiro 'Assessing the hospital surge capacity of the Kenyan health system in the face of the COVID-19 pandemic' (2020) 15 *PLOS ONE* e0236308
- Püras, D et al 'The right to health must guide responses to COVID-19' (2020) 395 *Lancet* 1888 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7259895/> (accessed 12 October 2020)
- Waithaka, D et al 'Prolonged health worker strikes in Kenya – Perspectives and experiences of frontline health managers and local communities in Kilifi County' (2020) 19 *International Journal for Equity in Health* 23

International Instruments

- ECOSOC Resolution 1985/17 of 28 May 1985
- General Comment 14
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1969
- Kenya National Commission on Human Rights Act, 2011

Legislation

- Constitution of Kenya, 2010,
- Health Act, 2017
- Public Health Act, 1989
- The County Government Act, 2012

Electronic sources

- AL Dahir 'Kenya's health workers, unprotected and falling ill, walk off job' *The New York Times* 15 September 2020 <https://www.nytimes.com/2020/08/21/world/africa/kenya-doctors-strike-coronavirus.html>
- A Mohiddin & M Temmerman 'COVID-19 exposes weaknesses in Kenya's healthcare system. And what can be done' *The Conversation* 27 July 2020 <http://theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356>
- Committee on Economic, Social and Cultural Rights 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights' E/C.12/2020/17 (April 2020) para 2 <https://undocs.org/E/C.12/2020/17>
- Coronavirus: Public health emergency or pandemic – Does timing matter?' (1 May 2020) <https://www.chathamhouse.org/2020/05/coronavirus-public-health-emergency-or-pandemic-does-timing-matter>

- 'County COVID-19 response readiness to determine re-opening of economy, President Kenyatta tells governors | The Presidency' <https://www.president.go.ke/2020/06/25/county-covid-19-response-readiness-to-determine-re-opening-of-economy-president-kenyatta-tells-governors/>
- 'COVID-19: Race against time as rich Kenyans install ICU beds in homes' *People Daily* 10 July 2020 <https://www.pd.co.ke/news/covid-19-race-against-time-as-rich-kenyans-install-icu-beds-in-homes-43404/>
- 'COVID-19: Kenya paid double for protective kits' *Nation* 2 August 2020 <https://nation.africa/kenya/news/-covid-19-kenya-paid-double-protective-kits-1911292>
- 'COVID-19: US donates equipment worth Sh7.9m to Kenyan hospitals' *Nation* 2 July 2020 <https://nation.africa/kenya/news/covid-19-us-donates-equipment-worth-sh7-9m-to-kenyan-hospitals--1390808>
- D Njue 'Declining health service use in Nairobi has implications beyond COVID-19' *Africa at LSE* 25 June 2020 <https://blogs.lse.ac.uk/africaatlse/2020/06/25/declining-health-service-use-in-nairobi-has-health-implications-beyond-covid-19/>
- D Pūras et al 'The right to health must guide responses to COVID-19' (2020) 395 *Lancet* 1888 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7259895/>
- 'Education officials want people quarantined in schools transferred' *Nation* 22 September 2020 <https://nation.africa/kenya/news/education/education-officials-want-people-quarantined-in-schools-transferred--2305574>
- 'First case of coronavirus disease confirmed in Kenya – Ministry of Health' <https://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/>
- G Obulutsa 'Dozens of Kenyan doctors strike over lack of PPE, delayed pay' *Reuters* 18 August 2020 <https://www.reuters.com/article/us-health-coronavirus-kenya-idUSKCN25E20Q>
- 'IHR Emergency Committee on Novel Coronavirus (2019-NCoV)' [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihremergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihremergency-committee-on-novel-coronavirus-(2019-ncov))
- 'IMF executive board approves a US\$739 million disbursement to Kenya to address the impact of the COVID-19 pandemic' *IMF* 6 May 2020 <https://www.imf.org/en/News/Articles/2020/05/06/pr20208-kenya-imf-executive-board-approves-us-million-disbursement-address-impact-covid-19-pandemic>
- 'Kiambu coffers empty, we'll borrow money to pay you, striking health workers told' *The Star* 30 September 2020 <https://www.the-star.co.ke/news/2020-09-30-kiambu-coffers-empty-well-borrow-money-to-pay-you-striking-health-workers-told/>
- 'Kisumu health workers on strike over salary arrears' *Kenya News Agency* 24 September 2020 <https://www.kenyanews.go.ke/kisumu-health-workers-on-strike-over-salary-arrears/>
- KELIN 'More delay in an urgent case challenging the manner in which mandatory quarantine has been implemented' (6 July 2020) <https://www.kelinkenya.org/%ef%bb%bfmore-delay-in-an-urgent-case-challenging-the-manner-in-which-mandatory-quarantine-has-been-implemented/>

- 'KELIN, working with partners, asks the court to determine the state's obligation to publicise life and health saving information as part of the COVID-19 response' (7 July 2020) <https://www.kelinkenya.org/kelin-working-with-partners-asks-the-court-to-determine-the-states-obligation-to-publicise-life-and-health-saving-information-as-part-of-the-covid-19-response/>
- 'Kenya's 3D printing community is making COVID-19 equipment to fill a deficit as caseloads rise' *Quartz Africa* 15 April 2020 <https://www.medicestafrica.com/en/overview/news-and-articles/Kenya-3D-printing-community-is-making-Covid-19-equipment-to-fill-a-deficit-as-caseloads-rise.html>
- Kenya National Commission on Human Rights 'About Us: Establishment' <https://www.knchr.org/About-Us/Establishment>
- 'Kenya: Police brutality during curfew' *Human Rights Watch* 22 April 2020 <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew>
- 'Kenya: Quarantine conditions undermine rights' *Human Rights Watch* 28 May 2020 <https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights>
- 'Kenya receives \$50 million World Bank group support to address COVID-19 pandemic' *World Bank* 2 April 2020 <https://www.worldbank.org/en/news/press-release/2020/04/02/kenya-receives-50-million-world-bank-group-support-to-address-covid-19-pandemic>
- 'Low turnout as Kenya offers free testing in feared coronavirus hotspots' *Voice of America* 4 May 2020 <https://www.voanews.com/covid-19-pandemic/low-turnout-kenya-offers-free-testing-feared-coronavirus-hotspots>
- 'Nairobi doctors call off strike after inking pay deal with NMS' *Nation* 27 August 2020 <https://nation.africa/kenya/counties/nairobi/nairobi-doctors-call-off-strike-after-inking-pay-deal-with-nms-1926462>
- '255 Nairobi doctors strike over salary delay, breached contract' *The Star* 15 October 2020 <https://www.the-star.co.ke/news/2020-10-15-255-nairobi-doctors-strike-over-salary-delay-breached-contract/>
- 'NMS apologises for Pumwani child birth fiasco, takes actions' *Nation* 19 September 2020 <https://nation.africa/kenya/counties/nairobi/nms-apologises-for-pumwani-child-birth-fiasco-takes-actions-2303448>
- 'National and county governments agree on terms for gradual re-opening of the economy | The Presidency' <https://www.president.go.ke/2020/06/10/national-and-county-gyvs-agree-on-terms-for-gradual-re-opening-of-the-economy/>
- 'OHCHR | International Covenant on Economic, Social and Cultural Rights' <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- 'Opening of COVID hospital' Ministry of Foreign Affairs 18 November 2020 <https://www.mfa.go.ke/?p=3648>
- 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' Kenya National Commission on Human Rights 30 June 2020 <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic>

- 'Presidential address on enhanced measures in response to the COVID-19 pandemic By HE Uhuru Kenyatta, CGH, President And Commander-In-Chief of Kenya Defence Forces On 6th April, 2020 | The Presidency' <https://www.president.go.ke/2020/04/06/17505/>
- 'Presidential Address on the state interventions to cushion Kenyans against economic effects of COVID-19 pandemic on 25 March, 2020. | The Presidency' <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/>
- 'State asked to exempt patients in Nairobi, Coast Region Lockdown' *People Daily* 16 April 2020 <https://www.pd.co.ke/news/national/state-asked-to-exempt-patients-in-nairobi-coast-region-lockdown-33070/>
- S Team 'Expectant women experience painful pangs of night curfew' *The Standard* <https://www.standardmedia.co.ke/kenya/article/2001367134/expectant-women-experience-painful-pangs-of-night-curfew>
- 'Social stigma adds to Kenya's COVID pain' *Mail & Guardian* 13 September 2020 <https://mg.co.za/africa/2020-09-13-social-stigma-adds-to-kenyas-covid-pain/>
- 'The Eleventh Presidential Address on the COVID-19 pandemic, Wednesday, 26th August, 2020 State House, Nairobi. | The Presidency' <https://www.president.go.ke/2020/08/26/the-eleventh-11th-presidential-address-on-the-covid-19-pandemic-wednesday-26th-august-2020-state-house-nairobi/>
- 'The Eighth Presidential Address on the coronavirus pandemic State House Saturday, June 6th, 2020 | The Presidency' <https://www.president.go.ke/2020/06/06/the-eighth-8th-presidential-address-on-the-coronavirus-pandemic-state-house-saturday-june-6th-2020/>
- 'The Fifth Presidential Address on the coronavirus pandemic at State House, Nairobi Saturday, 25th April, 2020 | The Presidency' <https://www.president.go.ke/2020/04/25/the-fifth-presidential-address-on-the-coronavirus-pandemic-at-state-house-nairobi-saturday-25th-april-2020/>
- 'The Fourth Presidential Address on the coronavirus pandemic, 16th April, 2020 at State House, Nairobi. | The Presidency' <https://www.president.go.ke/2020/04/16/the-fourth-presidential-address-on-the-coronavirus-pandemic-16th-april-2020-at-state-house-nairobi/>
- 'The Ninth Presidential Address on the coronavirus pandemic, Harambee House, Nairobi Monday, July 6th, 2020. | The Presidency' <https://www.president.go.ke/2020/07/06/the-ninth-9th-presidential-address-on-the-coronavirus-pandemic-harambee-house-nairobi-monday-july-6th-2020/>
- 'The Seventh Presidential Address on the coronavirus pandemic: The 8-point economic stimulus programme Saturday 23rd may, 2020 | The Presidency' <https://www.president.go.ke/2020/05/23/the-seventh-presidential-address-on-the-coronavirus-pandemic-the-8-point-economic-stimulus-programme-saturday-23rd-may-2020/>
- 'The Sixth Presidential Address on the coronavirus pandemic at state house, Nairobi Saturday, 16th may, 2020 | The Presidency' <https://www.president.go.ke/2020/05/16/the-sixth-presidential-address-on-the-coronavirus-pandemic-at-state-house-nairobi-saturday-16th-may-2020/>

- ‘The Tenth Presidential Address on the COVID-19 pandemic on Monday, 27th July, 2020 at State House, Nairobi. | The Presidency’ <https://www.president.go.ke/2020/07/27/the-tenth-10th-presidential-address-on-the-covid-19-pandemic-on-monday-27th-july-2020-at-state-house-nairobi/>
- ‘The Twelfth Presidential Address on the COVID-19 pandemic on Monday, 28th September, 2020 At Kenyatta International Convention Centre (KICC), Nairobi. | The Presidency’ <https://www.president.go.ke/2020/09/28/the-twelfth-12th-presidential-address-on-the-covid-19-pandemic-on-monday-28th-september-2020-at-kenyatta-international-convention-centre-kicc-nairobi/>
- ‘Uhuru, Ruto, Raila lead Kenyans in flouting COVID-19 measures’ *The Star* 10 September 2020 <https://www.the-star.co.ke/news/2020-09-10-uhuru-ruto-raila-lead-kenyans-in-flouting-covid-19-measures/>
- ‘UN to build 160-bed facility for staff who may suffer from COVID-19’ *Nation* 21 July 2020 <https://nation.africa/kenya/news/un-to-build-160-bed-facility-for-staff-who-may-suffer-from-covid-19-1901090>
- ‘Unions blame PPE shortage for COVID-19 infections among medics’ *Nation* 24 June 2020) <https://nation.africa/kenya/news/unions-why-medics-are-getting-covid-19-824876>
- ‘World Bank approves \$1 billion financing for Kenya, to address COVID-19 financing gap and support Kenya’s economy’ *World Bank* 20 May 2020 <https://www.worldbank.org/en/news/press-release/2020/05/20/world-bank-approves-1-billion-financing-for-kenya-to-address-covid-19-financing-gap-and-support-kenyas-economy>
- ‘WHO Coronavirus Disease (COVID-19) dashboard’ <https://covid19.who.int>
- ‘WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020’ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>