

STATELESSNESS IN A STATE?

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BACKGROUND.

“I apologize on behalf of my government and that of previous governments for having lived in this condition for so long. You are not visitors in this country, and I order that by the time I come to Mombasa in December the people should be registered”¹

THE MAKONDE COMMUNITY.

The Makonde arrived in Kenya in the colonial period² mainly as labourers in sugar and sisal plantations at the coast. There are almost 10,000 members of the Makonde community at the Kenyan coast. Due to their lack of Kenyan nationality, the Makonde were unable to access national identity cards and are also unable to obtain services that require people to produce Identity cards.³

Over the decade they have tried in vain to acquire Kenyan citizenship. There have been at-least three attempts at registration that have stalled midway. The Makonde are recorded as having voted in the first elections in independent Kenya.⁴

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¹ See President Uhuru Kenyatta’s speech on the ‘Trek to end statelessness by the Makonde community.

² Generally, in the 1940s

³ See <http://www.khrc.or.ke/2015-03-04-10-37-01/blog/561-the-makonde-community-finally-recognized-as-kenyan-citizens.html>

⁴ See Kenya Human Rights Commission blog by Catherine Kamatu.

Supported by human rights activists the Makonde community staged a walk dubbed “Trekking against Statelessness” on 10th October 2016 from Kwale to State House, to seek audience with the president with regard to their statelessness.⁵

The President gave them audience and promised that all eligible Makonde people to be issued with national identity cards by December 2016.

DEFINITION OF TERMS.

Nationality – the relationship between a person and a state based on the place of birth. It can be inherited from parents and it is a condition that cannot be changed throughout the life of an individual. Citizenship refers to the legal condition which binds a person’s belonging to the social group making up a state’s population. A person can have multiple citizenships which can be obtained through a request and a person can be a citizen of various states. In other words, citizenship refers to the legal bond between a person and a state. A citizen is a person who owes allegiance to a state and enjoys legal rights and privileges granted by the state.⁶

NATIONAL LEGAL FRAMEWORK ADDRESSING STATELESSNESS IN KENYA.

The Constitution of Kenya addressed the problem of statelessness, decreeing that all stateless persons found in Kenya must be given Kenyan nationality in accordance with a law that Parliament was required to enact⁷.

⁵See <http://www.nation.co.ke/counties/Stateless-Makonde-march-to-State-House/1107872-3412406-13sf6pb/>

⁶ See <http://theydiffer.com/difference-between-nationality-and-citizenship/>

⁷ The said legislation is the Kenya Citizenship and Immigration Act 2011

Parliament passed a legislation to govern issues of statelessness⁸. The Act provides that within five years, all stateless persons must be registered as Kenyan citizens. The five-year period ended on 30th August 2016 without the Makonde receiving the registration as envisaged by the law.

The Constitution of Kenya 2010⁹ provides that a person who has been lawfully a resident in Kenya for a period of at least 7 years and who satisfies the conditions prescribed by Parliament may apply to be registered as a citizen. The Kenya Immigration and Citizenship Act, 2011¹⁰ provides that all who migrated to Kenya before 12th December 1963 are citizens. A person who voluntarily migrated to into Kenya before 12th December ,1963, and has been continuously living in Kenya shall be deemed to have been lawfully resident and may on application in a prescribed manner, be eligible to be registered as a citizen of Kenya if that person does not hold a passport or an identification document of any other country, has adequate knowledge of Kiswahili or a local dialect, intends upon registration as a citizen to continue to permanently reside in Kenya or to maintain a close continuing association with Kenya and the person understands the rights and duties of a citizen.¹¹

⁸ See the Citizenship and Immigration Act

⁹ See Article 15(2)

¹⁰ See Section 16 (1)

¹¹ See chapter 3 of the constitution of Kenya 2010.

INTERNATIONAL LEGISLATION ADDRESSING STATELESSNESS.

There are two International Conventions on Statelessness¹². A stateless person refers to a person who is not considered as a national by any State under the operation of its law.¹³

To be stateless is therefore is to be without nationality or citizenship either; De jure which means by operation of law or Defacto where a person formally possesses a nationality but is unable, for valid reasons, to avail themselves of the protection of the State. In other words, their nationality is not effective.

THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS.

This Convention sought to regulate and improve the status of stateless persons and to ensure that stateless persons enjoy the widest possible exercise of their human rights.

It covers the definition of stateless persons, ensures that stateless persons enjoy the widest possible exercise of their rights, prescribes basic standards of treatment for stateless persons, guarantees stateless persons access to the protection of the State they find themselves in, provides a framework to identify stateless persons, promotes recognition of the international legal status of “stateless persons” and the common international framework for protection and also gives the United Nations High Commissioner for Refugees the mandate to mobilize international support for the protection of stateless persons.

¹² See 1954 Convention relating to the Status of Stateless Persons, 1961 Convention on the Reduction of Statelessness.

¹³ See Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons

The Convention Relating to the Status of Stateless Persons provides for General obligations of stateless persons.¹⁴

Every stateless person has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order.

THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS.

The 1961 Convention elaborates clear, detailed and concrete safeguards to ensure a fair and appropriate response to the threat of statelessness and establishes specific obligations relating to prevention and reduction of statelessness. The Convention is concerned with reduction of statelessness through safeguards in national laws, addresses statelessness in the context of State succession and equips States to avoid and resolve nationality-related disputes, provides the legal framework for preventing statelessness at birth and later in life by:

Granting nationality to children within their territory who would otherwise be stateless, requiring prior possession of or assurance of acquiring another nationality before a nationality can be lost or renounced, prohibiting deprivation of nationality that results in statelessness except in specified circumstances.

HUMAN RIGHTS TREATIES.

Human rights treaties recognize the right to nationality. Every individual has a right to a nationality in order for him or her to enjoy all the rights that are due to citizen. They establish minimum standards for treatment of stateless persons. These treaties include;

¹⁴ See Article 2

Universal Declaration of Human Rights (UDHR)¹⁵, International Covenant on Civil and Political Rights (ICCPR)¹⁶, International Convention on Elimination of All Forms of Discrimination against Women (CEDAW)¹⁷, Convention on the Elimination of All forms of Racial Discrimination (CERD)¹⁸, Convention on the Rights of the Child (CRC)¹⁹ and the Convention on the Rights of Persons with Disabilities (CRPD)²⁰, among other treaties.

The African Charter on the Rights and Welfare of the of the Child recognizes the right to birth registration and the right to nationality²¹.

Human rights treaties complement the two Conventions governing statelessness.

NATIONAL LAWS THAT REGULATE CITIZENSHIP IN KENYA.

Justification for the presidential directive to register the Makonde Community.

A Kenyan is a citizen by birth if that Kenyan acquired citizenship under former Constitution²². Any person who was born in Kenya to parents who are citizens of the United Kingdom and its colonies or protectorates as of 11 December 1963, was to be considered as a Kenyan citizen, provided that one of his or her parents was born in the country.

Citizenship may be acquired through birth or registration.²³ Citizenship is acquired by birth if on the day of the person's birth the father or the mother is a Kenyan citizen irrespective of whether

¹⁵ See Article 15

¹⁶ See Article 24(3)

¹⁷ See Article 9

¹⁸ See Article 5

¹⁹ See Article 7

²⁰ See Article 18

²¹ Article 6

²² See Articles 87, 88(1) of the repealed constitution

²³ See Article 13(2) of the Constitution of Kenya 2010

the person is born in Kenya or not.²⁴ This also applies to a person born before the effective date whether or not the person was born in Kenya, if either the mother or father is or was a Kenyan citizen.

A child found in Kenya who appears to be less than eight years old and whose nationality and parents are unknown is presumed to be a Kenyan citizen by birth.²⁵

A person who has been married to a citizen for seven years can apply for to be registered as a citizen.²⁶

Half of the population of the Makonde community intermarried heavily with other coastal communities, hence meeting the requirement for acquisition of nationality as under Article 15(1) of the Constitution of Kenya.

Children borne by the Makonde people were entitled to citizenship by birth.

Kenya, though not party to the two leading International Conventions relating to the status of stateless persons and Reduction of Statelessness, is party to the Convention on the Rights of the Child, International Covenant on Civil and Political Rights, International Convention on Elimination of All Forms of Discrimination against Women and the Banjul Charter. This then means that, the state commits itself to promote and protect fundamental international human rights. All the above legal instruments give legitimacy to the presidential directive requiring registration of the Makonde community's eligible members.

²⁴ See A.14 (1) of the Constitution of Kenya 2010

²⁵ See Article 14(4) of the Constitution of Kenya 2010

²⁶ See A.15(1) of the Constitution of Kenya 2010

STATELESS PERSONS' SITUATION IN KENYA.

In Kenya, we have an estimated 20,000 stateless persons. Kenya is host to 2,000 stateless Shona's who originally fled from Zimbabwe when war broke out from their country. Some of these people have lived in Kenya for 50 years without documentation. They have gotten families in Kenya. This means that they do not have access to the rights and benefits that citizens enjoy. They live in poverty and at a risk of detention and discrimination. Few in the Shona community have a Kenyan birth certificate or identity card, necessary to attend school or university, open a bank account, get a job, passport or mobile phone, or enter government buildings. Without citizenship of either country they are; unable to travel back to Zimbabwe or buy land in Kenya. Kenya is home to some 100,000-stateless people from Zimbabwe, Mozambique, Rwanda, Burundi, Sudan, Somalia and Asia, according to the Kenya Human Rights Commission many of whom were brought to work on Kenya's highland tea and coffee estates in colonial times.²⁷

FACTORS LEADING TO STATELESSNESS.

Transfer of sovereignty, processes relating to state succession, though there is mechanism to avoid this situation²⁸ arbitral deprivation of citizenship, renunciation of nationality without acquisition of another nationality, gaps in citizenship laws for instance; No safeguards to prevent statelessness at birth and gender discrimination in citizenship laws.

There are administrative causes of statelessness in Kenya which show a difference between the law and actual practice. The lack of regulation to guide the vetting process leads to unrealistic deadlines and overly slow processing times, excessive fees, lack of appeal.

²⁷ <http://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html>

²⁸ [Convention on the Avoidance of Statelessness in Relation to State Succession.](#)

Common contributing factors include; Migration, lack of birth registration, inability to prove parents' nationality, ethnicity, religion, gender, race or political opinion when granting or denying nationality.

IMPLICATIONS OF STATELESSNESS.

For stateless persons, lack of recognized documentation can mean among others; Limited access to social and economic rights including work, education, housing and healthcare, exposure to protection risks which may lead to detention or expulsion, exclusion from political, civic processes such as voting since it is only available for enjoyment by citizens²⁹ Persons with undetermined nationality often face similar consequences that is, risk of statelessness. It is estimated that approximately 10 million people around the world are stateless, hence Stateless persons are persons of concern.³⁰

RECOMMENDATION.

The first step to solution of a problem is acknowledging its existence. Therefore, Kenyan law should define 'statelessness' and specify the rights of stateless persons as well as those at risk of statelessness.

The legal and administrative framework is not adequate to deal with the issue of statelessness, so, Kenya should accede to and domesticate the Stateless Persons Convention and the Convention on the Reduction of Statelessness to protect stateless persons and to prevent as well as reduce the occurrence of statelessness³¹. There is need to push for Law and Policy reform, and ensure realistic

²⁹ Article 38 of the constitution of Kenya expressly states that only citizens can take part in voting.

³⁰ See Equal Rights Trust, [*The Protection of Stateless Persons in Detention under International Law*](#) (Jan. 2009) 36-7 (Working Paper).

³¹ See United Nations General Assembly through Resolution 50/152 of 21 Dec 1995

administrative procedures, so that in the future, no person should plan a march to state house and rely on a presidential directive in order to gain nationality.³²

There is need for sensitization in Kenya that stateless persons and those at risk of statelessness are entitled to rights and an environment that confirms their nationality, just like other fortunate citizens. Civil society in Kenya should take up this role and also make critical observations and propose solutions to statelessness and act as linkage between the governments and communities or stateless individuals.

International agencies should raise the issue of statelessness as a humanitarian concern and should advance the protection of the human rights of stateless persons and the persons at risk of statelessness and also offer policy and technical support, dissemination of best practices, advocacy and awareness raising regarding statelessness.

The statelessness status is a global concern. This is evidenced by existence of global efforts to raise awareness regarding statelessness. One such initiative was the Global campaign launched in 2014 by United Nations High Commissioner for Refugees with other entities in order to end statelessness. More stakeholders should actively participate. In 2014, The UNHCR in consultation with States, civil society and international organisations developed a Global Action Plan to bring an end to statelessness within 10 years by resolving existing situations and preventing the emergence of new cases of statelessness.

³² See High Commissioner's Global Strategic Objectives including *"Ensuring... the adoption of nationality laws that prevent and/or reduce statelessness"*

The United Nations High Commissioner for Refugees is vested with the mandate to undertake activities to identify, prevent and reduce statelessness and to protect the rights of stateless persons³³, hence Kenya should take up the stakeholder's role to ensure that the objective is achieved.

Relevant video links and websites.

<http://www.unhcr.org/ibelong/>

<http://www.unhcr.org/ibelong/>

<https://www.youtube.com/watch?v=5JL1sp5XS-U>

What Does It Mean To Be Stateless?

<https://www.youtube.com/watch?v=RNWQYSSQpPg>

The Stateless Community – Komboni Village, Isiolo

<https://www.youtube.com/watch?v=FrrjfnDY25o>

<https://www.youtube.com/watch?v=k2Zw8pDuudg>

Refugee stories: stateless Nubians

https://www.youtube.com/watch?v=BT_KQCH77h4

Makonde People of Mozambique Descent to get Kenyan Citizenship

<https://www.youtube.com/watch?v=9x7KaMn8VbY>

³³ See The 1995 United Nations General Assembly Resolution 50/152