KITUO Newsletter

October 2013 ISSUE No. 2 of 2013 We Care For Justice

Westgate attack in Nairobi

Dadaab Refugees are not Terrorists and Somalia is yet to be secure for return

INSIDE

We continue to condole with those that lost their loved ones – our sympathies and get wishes of quick recovery to those injured by the scoundrels and quitters at the Westgate attack last week. As a nation we hope that the trauma inflicted on us all will fizzle out to shame these villains. While we do these and now that the siege is over as an aftermath hard questions are being asked. The questions are many and they are directed not only to the actors in the malt-agency operation but also to the owners of the Westgate shopping and Kenyans at large. These questions are critical if we must mitigate, avoid or eliminate threats posed by terror groups like Al-Shabaab. They will inform our preventive and response policies, laws and regulations. The questions and answers will also affect how we relate to each other - particular how we relate to strangers regardless of the 'strangers' origin or descent. I say origin and descent because of the rapid mutative nature of the 'face' of terrorists. We now have suspects who are identified by the colour of their skin – white widow- (sic), or their nationality primary or secondary and their perceived religion among other.

The danger with this sort of description to terror suspects is not obvious to many. The labelling is born out of emotions, fury, outrage and frustrations resulting from the perpetrators barbaric attacks. These knee-jack reactions from an ordinary Kenyan could pass unnoticed – but they cannot go unquestioned when the same reactions come from the policy

and law makers.

The reactions, solutions and answers from law and policy makers must be deep. Their utterances must be reflective of their role in providing credible solutions, be it in the boardroom or a media conference. They should be born out of in-debt analysis of the facts and evidence available, not just from the Westgate mall, which are not available at the moment, but the past attacks in Kenya and elsewhere. To attain this, if the policy makers don't have the requisite expertise in the area, they must rely on the technocrats with requisite expertise for their pronouncements. Otherwise as they say - as long as a word remains unspoken, you are its master; once you utter it, you are its slave. The effect is worse when uttered by a law or policy makers.

Participants during a National Forum on Refugees

Calls to close Daadab Refugee Camp

For the many proposals coming from the policy and law makers that seek to make Kenya safer from terror attacks one is of particular concern to me. This is coming from the Committee on Admiration and National Security. Reports from the media today indicate that the committee is calling for closure of Dadaab refugee Camps in Northern Kenya and arrangement for safe return of Somalis. We acknowledge the security challenge that foreigners pose to any country- not least a developing country like Kenya. However, the proposal makes fundamentally incorrect assumptions that may not necessarily leave us secure as a nation that aspires to respect democracy, human rights and good governance – values that Al-Shabaab frown on. Here are my five conclusions by this committee that gets one concerned. The first one is;

That Dadaab Refugee Camp is a 'nursery' for terrorist;

The Hon. Asman Kamama lead committee has concluded that Dadaab Refugee Camp is a fertile breeding ground for terrorists. It is very easy to sell this proposal because the home to Al Shabaab is perceived to be Somalia and the majority of refugees in Daadab are from Somalia the nexus should be obvious.

For starters, Kenya has played host to Somalia refugees for now close to 24 years. For close to two decades of this period Kenya did not have a law regulating asylum or refugee status despite Kenya being a signatory to the 1951 Convention on Refugee Status. For 17 years Kenya had no legal framework to regulate asylum and refugee status – luckily the cases of terror attacks were also uncommon. In an attempt to neat up and clean the chaos of the asylum system and address security concerns then, parliament passed a law – the Refugee Act of 2006- that law is aimed at allowing genuine refugees to enter Kenya gracefully to avoid persecution by Al Shaabab and other belligerent parties while guaranteeing Kenyans safety. It is now slightly over eight years since this law came into force.

To further tighten the loose ends and navigate the thin balance between Kenya's international obligation to accord asylum to civilians under threat of persecution, on one hand, and the towering national primary responsibility of the state to provide security, proposal for amendments to this law were made last year. They are sitting at the AG office awaiting law maker's action- passing into law. No evidence is available that the camps are breeding grounds for terror groups.

To the contrary camps and Humanitarian workers and refugees, like shoppers at the Westgate Mall and other Kenyans, have been attacked by terrorist in the past. This and the abduction of the French tourist precipitated Operation Linda Inchi currently going on in Somalia and the eventual AMISON intervention. Additionally, genuine refugees in the camps have been vetted and issued with requisite documentation. No evidence is available of the alleged breeding of extremism in the camps. Not that are known to the public. All the terrorist seem to be well resourced individuals living outside of Daadab and never having lived in Daadab. In fact the terrorist seem to be keen on recruiting unemployed, idle Kenyan youths in Nairobi and Mombasa. The question is; can Asylum/Refugee status and Kenya security coexist or for Kenya to be safe refugees must go? The two are not mutually exclusive – a more desirable and rational response is to tighten the law and policy to attain the much needed balance. The second assumption by national security committee is;

That Keeping Daadab Refugee Camp Open is Respecting the Human Rights of Refugees at Kenyans' expense:

There is no doubt, Dadaab is one of the largest Refugee Camps in the world. This illuminates Kenya's magnanimity and hospitality record to the rest of world. It is also true that the challenges of such huge camp are enormous and requires a water tight asylum system. For an ordinary Kenyan who has watched the pitiless killings at the Westgate attack on local TV, U-tube and other international media, listened to heart ranging

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

testimonies of survivors including the toddler who could recognize and admonish one of the villains as a Bad Man- this statement could not be more 'truer and apt'. These sentiments paint a false picture of a country that is under siege from international obligations that are competing with national interests. Perhaps even a country that has its priorities wrong by treasuring 'foreigners' more than its citizens or simply a state that doesn't understand that its primary responsibility to its people.

The truth of the matter is the direct opposite. Protecting asylum space is a demonstration that Kenya as a member of the international community values life and human rights of all- it values the human rights of Kenyans who fled to Uganda during the 2007-2008 Post Election Violence and were welcomed by our good neighbour Uganda with open arms– complete with a small piece of plot to farm. A number of them are yet to return even when we would say Kenya is safe. It also respects the human rights of the Kenyans that fled last month to Ethiopia when they were attacked. Kenya has kept the sacred asylum space promise for the last 24 years of Somalia's riotous and muddled past – this is because we value life, choose democracy, good governance and human rights as the centre of our oneness.

To do the contradictory is reacting to terrorist with state sanctioned terror against the Kenyan Constitutional values. Closing down of Daadab will not guarantee Kenya security. Many more 'white widows' (sic)will continue terrorise us as they were not in Dadaab. Many more recruitment of disgruntled Kenyan youths in Majengo (Mambasa and Nairobi) will go on unabated because we will have gotten rid of 'terrorists' in Daadab. A more rational and desirable policy response would be to ensure we have a water tight asylum system that is corruption free and an immigration policy that keeps terrorists and all other undesirable migrants outside of our borders zealously. This will keep Kenyans in Daadab, Mandera, Wajir, Marsabit, Turkana, Moyale, Mombasa, Nairobi and other areas across the country secure. The third insinuation is;

That Somalia is Secure and safe for refugees to return;

The assumption that Somalia is safe and secure for return of legitimate refugees that Kenya has granted asylum is also inaccurate. There seems to be only two options on the table for policy makers on this issue – Somalia Refugees must return to the areas that the AMISON forces have pacified or return anyway- that is why we sent KDF to Somalia – to make it safe for the refugees to return. It is true that under international law when conditions of persecution change and a free, democratic government that respects Human Rights, Good governance and the rule of law is in place refugees should voluntarily return. The processes of return must be voluntary and will include some of the refugees being facilitated to go and ascertain that conditions of persecution that lead to their fleeing have changed.

What is not accurate is the presumption that Somalia is safe enough for refugees to voluntarily return. Again here we have no evidence that Somalia is secure and the new government is fully in control of its entire territory, but more importantly its ability to provide protection for the returnees against persecution is untested. To the contrary, humanitarian workers trying to deliver aid to some IDPs in Somalia have reported otherwise. Some organisations are pulling out of some areas erstwhile thought to have been pacified.

More amiable policy response could be to continually intensify the security operation in Somalia, deal a really blow to Al Shabaab and weaken their influence substantially while strengthening the embryonic Somilia government control over its territory to guarantee minimum safety and conditions for return. This should run parallel to plans and programs in Daadab aimed at changing and winning out a whole generation of refugees who have been brought up in (Dadaab) a highly dependence environment to be independent and productive citizens of Somalia capable of contributing and participating in development of their country. Kenya did it for South Sudan – though we still have some of the Sudanese and South Sudan refugees in Kenya. Kenya can do it for Somalia as well in an orderly version without seeming to victimise Somalis. This is our only claim to the leadership we continue to show in the region and the continent. The fourth hypothesis is;

That Mopping up refugees from urban areas of Nairobi, Mombasa, Malindi and elsewhere in Kenya to an enclosed camp in the short run will provide instant security;

This assumption is also erroneous as recently declared by the High Court of Kenya in a constitutional Petition number 65 of 2013. This presumption is closely tied to the one above that Somalia is safe and secure for refugees to return and Kenyaas the host may as well start reducing their distance home – by temporally holding them at the Dadaab Camp that the Hon. Kamama Committee now proposes to close down. The court affirmed a number of positions above. It found that refugee rights are human rights and because refugees are a vulnerable category whose rights can easily be breached, they must be protected as provided in the Kenyan law and international law. They cannot be forcefully returned to frontiers of war where they may be harmed or persecuted. This will contravene our own laws and the international law. The court did not mince its words on the need for consultation and participation of stake holders when fundamental decisions affecting these vulnerable categories are made. One cannot fail to notice the contrast in the image of a refugee to a rational court of law which is drastically different from the image cut by Hon. Asman Kamama led committee, which paints a picture of armed terror combatants' practicing with simulators in Daadab Camp. The fifth supposition is;

That Asylum is a privilege and act of charity that Kenya can withdraw at will and not an obligation that manifests in individual rights capable of vindication.
Again this assumption has been rebutted by the constitutional court case I referred to above. For beginners; the laws of war- yes war has laws too, must be distinguished with the asylum laws. When security agents mix these two legal regimes there is temptation to treat vulnerable unarmed and defenceless civilian, who are victims fleeing war, as armed combatants in a war situation. The distinction, critical as it is – is very difficult to make. This is because a war field like Somalia Al Shabaab's perceive base has Somalis, who share the same language, religion, race, colour and heritage with the Al Shabaab. This is the danger in ascribing terrorism to a certain religion, colour, race or even language. This profiling will lead to stereotype, prejudice and ostracism that eventually leads to xenophobic sentiments and attacks.
Xenophobia is the irrational or unreasoned fear of that which is perceived to be foreign or strange. It comes from the Greek words xenos, meaning "stranger," "foreigner," and phobos, meaning "fear." Our policy and legislative response to terror must not be driven by xenophobia. Terrorist thrive in instilling fear that is why our policies in response, cannot be born of fear – if they do, the terrorist win and we leave the war with bloody faces and bowed heads!
Asylum law protects individuals fleeing situations of war or generalised violence. Those that access asylum must demonstrate well-founded fear of persecution and not fear of prosecution. Those that meet this test and are issued documentation for protection. Refugees in Dadaab camp, must be protected from any policy that seeks to take away this protection without due process of the law. It is not an act of charity that can be withdrawn at will by the state. The documents issued by the UN agency for refugees or the department of Refugee Affairs are testimony that the holders have been vetted and found worth of the state protection. These documents bestow certain set of rights on the holders and one of those rights is the right not to be arbitrary returned/deported to an insecure territory where their lives will be endangered.
led committee, which paints a picture of armed terror combatants'practicing with simulators in Daadab Camp. The fifth supposition is;

That Asylum is a privilege and act of charity that Kenya can withdraw at willand not an obligation that manifests in individual rights capable of vindication.
Again this assumption has been rebutted by the constitutional court case I referred to above. For beginners; the laws of war- yes war has laws too, must be distinguished with the asylum laws. When security agents mix these two legal regimes there is temptation to treat vulnerable unarmed and defenceless civilian,who are victims fleeing war, as armed combatants in a war situation. The distinction, critical as it is – is very difficult to make. This is because a war field like Somalia Al Shabab's perceive base has Somalis, who share the same language, religion, race, colour and heritage with the Al Shabaab. This is the danger in ascribing terrorism to a certain religion, colour, race or even language. This profiling will lead to stereotype, prejudice and ostracism that eventually leads to xenophobic sentiments and attacks.
Xenophobia is the irrational or unreasoned fear of that which is perceived to be foreign or strange. It comes from the Greek words xenos, meaning "stranger," "foreigner," and phobos, meaning "fear." Our policy and legislative response to terror must not be driven by xenophobia. Terrorist thrive in instilling fear that is why our policies in response, cannot be born of fear – if they do, the terrorist win and we leave the war with bloody faces and bowed heads!
Asylum law protects individuals fleeing situations of war or generalised violence. Those that access asylum must demonstrate well-founded fear of persecution and not fear of prosecution. Those that meet this test and are issued documentation for protection. Refugees in Dadaab camp, must be protected from any policy that seeks to take away this protection without due process of the law. It is not an act of charity that can be withdrawn at will by the state. The documents issued by the UN agency for refugees or the department of Refugee Affairs are testimony that the holders have been vetted and found worth of the state protection. These documents bestow certain set of rights on the holders and one of those rights is the right not to be arbitrary returned/deported to an insecure territory where their lives will be endangered.

Laban Osoro - Deputy Executive Director

BEATRICE OSIMBO VS LANDLORD

Beatrice Osimbo is a woman of close to 50 years, She came to the office after being referred by Caroline Osunga, a paralegal at the Kibera Community Justice Centre. Her house in Lindi village was in bad shape after part of the roof had been removed for failure of paying rent for four years. A window and grandmother to children was out in the cold during the short rains of December 2012. The coordinator, Caroline Osunga and the client visited the landlord who lives in Makina. The matter was discussed at length and the landlord accepted to have ordered the removal of the iron sheets to motivate the tenant to pay rent. Mrs Beatrice Osimbo is a victim of post-election violence. Her husband and daughter were killed and left with no caretaker. She was infected with HIV. Having no source of income, she does domestic work within the slum to earn her living, but it is not enough to pay for rent. The landlord agreed that she returns the iron sheets at her cost and that the increase be cleared in installments for the next four months. An agreement was written to this effect.

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

SUCCESS STORY OF AGNES MAWEU AND COMPANY

Agness Mweu and two others absent were employees of S.O Ogutu and Clarkson Notcutt in Nairobi city for 24years. She was a senior secretary for the joint company. Upon completion of her service in 2003, she was supposed to be paid Kshs. 325, 384 as a severance pay at a rate of 15 days for every completed year of service for the 24 years she had worked according to her contract of employment. However, their employer refused to pay them going against their earlier engagement.

Years passed and there was no sign of any payment or statement from the employer. Things got worse when he employed other staff implying that the company was doing well and if he at all had will to pay them he would have. However, on approaching him to demand the payment, he rubbished them away saying that he owed them nothing.

In anger and pain, they did not know where to turn after it dawned on them that they were on the brink of losing their payment. Moreover, they had been terminated from work without any notice or payment. This got worse as they were thriving in poverty banking their hopes that their boss might one day have a divine touch and pay yet. But it seemed that divinity was far from him.

They embarked on legal battle with the help of a labor officer who unfortunately did not succeed in forcing the company to pay them.

After failing apart with the employer, there were hopes of securing the payment for these people. However, the labor officer referred them to Kituo Cha Sheria where they were welcomed by the two lawyers, Boniface Muinde and Faith Rotich who gave them legal advice and assistance enabling them to file another case in the court.

Today, she is all smiles after the company was ordered by the Court to pay them a total of Kshs. 352 384 each as service pay for 24 years that they had worked for the company.

She is jubilant as she receives a cheque of her first installment of payment from the company.

She thanks Kituo Cha Sheria for the aid accorded.

Samuel Irungu - Media Intern

Boniface Mutie and Faith Rotich of Kituo giving Agnes the Cheque she received

Muthurwa Residents jubilant as Court rules in their favour

Muthurwa residents couldn't be happier than sitting in a chamber listening a judge ruling in their favour. On Friday 30th August, the court concluded that the evictions were unlawful because the evictions did not follow the international eviction guidelines. Moreover, there were no independent observers during the evictions. The parties had waited for almost three years for this judgment and this obviously explained the joys of spring among the residents.

The 11 Petitioners led by Former Kituo Cha Sheria director, Priscila Nyokabi, Kituo lawyers and residents from Muthurwa thronged Milimani Law Courts early in the morning in order to know their fate. Jubilant mood was in the air as the judge read the judgment terming the forceful evictions as unlawful and called on the parties involved to halt the activity until proper modalities have been established.

Earlier, there was an actual attempt to forcefully evict and demolish their residential houses through the use of tractors and caterpillars belonging to the scheme in July 2010 which was stopped by the high court through Kituo Cha Sheria lawyers and volunteer advocates. This matter attracted attention of international experts on land rights, evictions, homelessness and right to adequate housing.

Virtually, the residents were not against evictions but were against the way the evictions were being executed; they were not served with the right notice, neither were they involved nor were there any promise of compensation. In addition, the evictions were being carried out at night and during the midterm.

Delivering the judgment prepared by Justice Isaac Lenaola, Lady Justice Mumbi Ngugi termed the evictions unlawful and directed the Attorney General to file an affidavit with the states policies on eviction within ninety days of 30th august 2013.This will allow proper modalities to be deliberated regarding the evictions.

As the residents applauded the verdict, lawyers expressed mixed reactions as the judgment did not touch on any forms of say compensation, resettlement or any benefit that could be accrued by the residents. The judgment only termed the evictions unlawful and gave a directive that proper modalities be established to eventually carryout out the said evictions.

During Caucus held on 11th September, 2013 at Panafric, the lawyers decided to make more demands considering that residents had pinned their hopes on the outcome of the judgment.

The judgment should be a win-win on both sides but not merely describing evictions as unlawful. For example, methods of compensating the residents should be well stipulated if at all the evictions will take place. This is because lawyers were not ready to go back on their word but wanted to ensure that the affairs of Muthurwa folks were well addressed to end the wrangles that had existed in the area for years.

Kituo cha Sheria has taken the initiative of interpreting the judgment to the residents to bring them back to the reality since some of them had started striking a happy medium-thinking the court had allowed them to start building and selling their plots.

Some of the residents outside the Court during the ruling

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

SUCCESS STORY OF HENRY KIPRONO BUSIENEY

Kituo has been on the forefront in ensuring individuals get access to justice. It is on this mission that Kituo came into the case of Henry Kiprono Busieney.

A volunteer paralegal from Kamukunji Community Justice Center met a desperate Henri Kiprono Busieney in Pumwani in Kamukunji District. At first he was not willing to openly share and shared his predicaments and thoughts with the paralegal and was referred to the Kamukunji Community Justice Offices.

This was labor case between Mr. Albert Nyabuto, Forest Coordinator, and Nandi North, Kenya Forest Service. Albert Nyabuto hired and contracted Henry Kiprono Busieney alias (Bingwa), to construct new staff houses and two toilets for Forest Warden / Staff. He had also been instructed to do some repair works at the Kenya Forest Warden Staff houses. He verbally accepted the contract and commit to do the work. He immediately approached a friend and borrowed a sum of Kshs 500,000/- to jumpstart the construction work. He immediately begins the construction work in January 2012. He never signed any agreement. He was also not issued with Local Purchase Order or a Covering letter by Kenya forest Service but Mr. Albert Nyabuto promised and committed to pay him soon after the completion of the work. The construction work was completed five months later in May, 2012. Three weeks later, Head of Conservancy (HOF) from Eldoret Office confirmed and approved project. He thereafter instructed Mr. Albert Nyabuto to process and immediately pays him. He thought perhaps everything would be fine since the Forest Coordinator was a long-time friend.

His predicaments began soon after the completion of construction work. Mr. Albert Nyabuto was instructed to process the pay and he declined. He instead begins to threaten, harassing and using vulgar language towards him. This forced Mr. Busieney to seek advice from Head of Conservancy who later directed him the Director, Mr. David Mbugua, at Kenya forest Service Headquarters in Nairobi.

The Director, Kenya Forest Service instructed advised Mr. Busieney to submit photographs of the houses that he had constructed and invoices to his office for direction. The Director then referred him to Mr. Simiyu Wasike; Deputy Director, Kenya Forest Service. Mr. Simiyu Wasike later referred him again to Mr. Albert Nyabuti and instructed him to issue Henri with a covering letter for ease of reference but he refused. He had to close his business because he had spent all the little money he had on the project. He had spent a lot of money on transport pursuing the matter from Kapsabet to Nairobi and back for more than six months. He lost all hope and eventually his children were sent away from secondary school and University. His business premises were closed down for lack money to pay accrued rents.

On 28thFebruary 2013, Mr. Henri Kiprono Busieney approached Kamukunji Community Justice Centre (KCJC) office for legal advice and possible representation. KCBONET intervened and issued a demand letter to the Director, Kenya Forest Service to pay dues owing to Henri Busieney amounting to Kshs. 1,748,901.00.Two weeks later, The Director, Mr. David Mbugu, Mr. Wasike Simiyu, Deputy and Mr. Albert Nyabuto, Forest Coordinator Nandi South/North convened an urgent meeting in Eldoret and the matter was discussed. Albert Nyabuto was immediately sent on compulsory leave and later transferred to Kitale.

On 22ndApril 2013, authority was granted by Mr. David Mbugua, Director, Kenya Forest Service to Busieney through his company, Ngusero Investment Company to salvage over mature materials (Trees) and remove timber to pave way for immediate replanting of the area and given up to thirty (30) days to harvest P. Patula827 trees amounting to Kshs 2,796.433.80 to sell and recover Kshs. 1,455,877.80less compensation for repair and construction offices of in Nandi County1,340,556.00 and complete the exercise. The Ecosystem Conservator Nandi County was instructed to supervise the exercise. Case has been settled through Alternative Dispute Resolution Mechanism.

Elizabeth Ojina - Communication & Media

Robert Mwangangi VS Beams Hotel

Mr. Robert Mwangangi came to the office asking for assistance against his former employer; Beams Hotel. He had resigned verbally and without notice due to harassment by the finance clerk. He left his job promptly due to cuts on his salary on issues unsatisfactorily to him. The centre coordinator intervened by writing a demand letter stating that he be paid his dues and issues and issued with a certificate of service. He had worked with the hotel for close to seven years. Mon presenting the demand letter, no action was taken by the management. He came to the centre's office and reported the succeeding events. The coordinator visited Beams and met the personnel office in the presence of Mwangangi. He was paid his money a week later. He brought other clients whose labour rights had been infringed by the hotel.

A memorable day for Urban Refugees

June 27 will remain a day of reckoning for urban refugees in Kenya. Nigerian first lady H.E Dr. Patience Good Luck Jonathan was in town, yes, Nairobi National Museum. She had jetted into Kenya with a special mission; to support the Urban Refugees by donating some food items to them.

Essentially, Kenya hosts over 650, 000 refugees most of whom reside at the two camps in Kakuma and Dadaab. There are about 60, 000 urban refugees. Unlike camp refugees, urban have to provide for their own needs. They believe that they are the forgotten lot yet they go through a hell with some being branded as agents of terrorism. Whenever such opportunities arise, priority is normally given to the camp refugees. Therefore, it is a rare occasion for someone to think of giving a helping hand to the urban refugees. Hence, this was a rare event.

The Kenyan first lady H.E Margaret Kenyatta, some heads of African missions in Kenya, representatives from the Department of Refugee Affairs, UNHCR, Kituo Cha Sheria and other stakeholders in the refugee sector embraced this occasion to assist urban expatriates.

It was a state event and security was tight. Never before had an event of such a magnitude whose focus was urban refugees' welfare ever been held in Kenya. It was an initiative of the African first ladies chaired by the chief guest, H.E Dr. Patience Good Luck Jonathan.

National anthems from respective countries were sung followed by prayers. With all protocols observed, speeches from the dignitaries were given.

Then, the most waited moment came when representatives from the refugee community were called to the stage to receive the donation on behalf of the urban refugees. In the auditorium were representatives of the host community, various organizations working in the refugee sector, refugee from Somalia, D.R. Congo, Eritrea, Rwanda, South Sudan, Burundi, and Ethiopia among others.

The Nigerian first Lady and her Kenyan counterpart then donated seven million donations of food items to the said refugee representatives. It was a Kodak moment! A moment for pomp and substance!

Urban refugees had many reasons to give thanks. To God for peace and the gift of life, to Kenya for continuing to host them, to the African first ladies association through their chairperson and chief guest, H.E Dr. Patience Good Luck Jonathan and co-host host H.E Margaret Kenyatta, the Kenyan first lady for the rare gesture.

The gratitude of urban refugees seemed to take sequence this year. Just seven days before the refugee community had congregated at the Nairobi university grounds to commemorate the World refugee day that was marked by pomp and pageantry. As the event went on, there was a clear picture in everyone's' mind of how Kituo cha sheria with other partners had moved the High Court of Kenya to reverse the Government decision to compel all urban refugees back to the camps. It was a reprieve for urban refugees because they had the promise of living peacefully despite their condition of being expatriates.

Justice D.S Majanja on 26th July 2013 delivered a landmark ruling which in summary, the court held that the Government Directive was a threat to the refugees' fundamental rights and freedoms

Kituo Staff assisiting the Refugees receive their donation

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

including the freedom of movement, right to dignity and infringes on the right to fair and administrative action and is a threat to the non-refoulement principle incorporated by section 18 of the Refugees Act, 2006. The directive also violates the State responsibility to persons in vulnerable situations under Article 24. The court found further that the state has a legal obligation as encompassed in Article 10 of the Constitution on national values and principles of governance to consult the public in making and implementing public policy affecting refugees.

And as we reflect back to jog our memory, it will be hard for the urban refugees to forget year 2013. Crucial events have happened that have twisted their lives. First, they had lived with the belief that they are the forgotten lot, but the visit and donation from the first ladies from Nigeria and Kenya changed their perception. Secondly, at the point that the government wanted to forcefully evict them from urban centers, human rights organizations lead by Kituo Cha Sheria joined hands and marched forward with a strong stand that refugees are just like any other Kenyan hence their rights should be upheld. It is their human and basic right to live in Kenya and enjoy government protection.

Ferd Moyomba - Program Officer FMP &

Ojuni Ojullu - Paralegal Officer FMP

Kituo Staff from the Forced Migration Program with some of the donated foodstuffs

Henry Harambe Lifali vs Junior Golf Foundation

The above mentioned presented a labour case to the Kibera Community Justice centre coordinator on 29th august, 2012. He was employed in august 2008 as a general clearer at the golf course by junior golf foundation. The contract agreement stipulated that he could be employed permanently and his salary reviewed after a probation period of six months. He claimed that this was not done but continued to work up to the date he wrote the resignation letter in June 2012. Some of the reasons he wrote a resignation letter was the increase of the workload at low pay and unfavourable working conditions. Even after the elapse of the period in the letter, he had not received any communication from the management of junior golf foundation. He was advised accordingly and in a demand latter written to the foundation asking his prayers be effected. On receiving the demand letter from the justice centre, the general manager called the coordinator asking that Mr. Harambee collects his cheque from their offices. His dues and service were duly paid. He thanked the justice centre for the help.

Securing victims' rights in Kenya through a new accountability mechanism

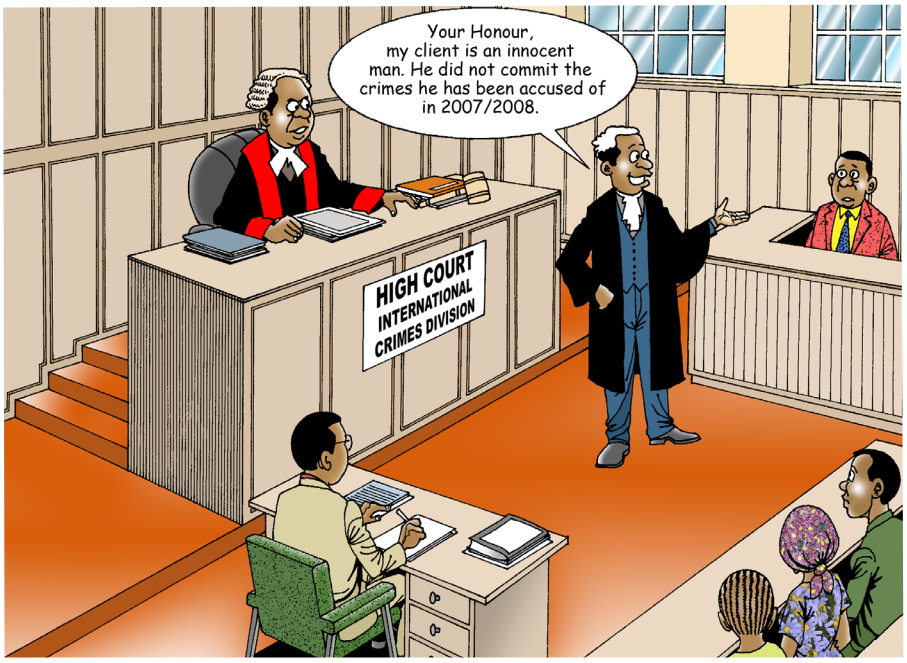
Current debates related to the establishment of an International Crimes Division of the High Court focus on the legal basis of these mechanisms, the modalities of its creation and to what extent legislative changes will be necessary to address specific questions such as the possible presence of international judges sitting beside Kenyan judges. If the ICD is to be an effective mechanism capable of delivering meaningful justice to victims, it is essential victims' rights are central and upheld in the design and functioning of the ICD. More attention should be paid at those early stages to the rights and needs of victims.

The jurisdiction of the ICD should be carefully defined to include PEV related crimes that are qualified as international crimes in order to adequately recognise their scale and nature. Prosecuting those violations and abuses as domestic crimes could adversely affect the objectives of delivering justice and reparation to victims.

Kituo and the undersigned organisations strongly hold that victims' voices must be central to the administration of justice with respect to PEV related cases. The ICD must take into consideration and uphold victims' rights and their special needs to ensure their effective and meaningful access to justice.In that regard, necessary legislative amendments required to ensure a victim centred approach in the design of the ICD, as well as the provision of specific measures for victims' participation in the functioning of this mechanism should be carefully considered. To this end we propose that the process establishing the ICD should focus on the following victims' rights:

1. Victims' right to information

From the outset, it will be necessary for the ICD to communicate its mandate and work clearly. To begin with it will need to clarify its relationship with the ICC, given growing misconceptions that the ICD is a branch of the ICC. Victims have a right to be informed of decisions and available mechanisms. The ICD must include adequate resources to conduct a strong outreach strategy to explain its mandate, including with regard to victims' rights. It should for example disseminate through public and private communication means information on all available remedies (legal, medical, psychological, social) for victims and reparation mechanisms. To manage victims' expectations, the ICD will have to articulate its role, mandate and acknowledge its limitations and expected challenges. Victims must also be informed on how to participate in the ICD process as well as be given information on Court proceedings. For there to be effective communication to and from the ICD, an outreach/ information contact point must be assigned to receive and respond to questions and issues raised from various victim groups, broader civil society as well as the media. It must also be acknowledged that communicating with internally displaced groups and social and economically disempowered communities residing in remote areas may be difficult because these communities are far removed from customary sources of information or may not be able to access the relevant information. To address this, the ICD should form partnerships with various victim groups around the country and conduct a mapping and sensitization exercise at constituency level in order to reach a large number of victims who have various needs. Special consideration must be given to disabled victims, child victims as well as women victims. Consultations should therefore be held broadly with victims in the design of the



KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

ICD and more specifically in this case to identify the information needs of victims and affective communities and the most effective strategies of disseminating information to a range of victims. Information should include details on how to contact the court for support and access to proceedings.

2. Victims' right to access to justice

In providing proper assistance to victims seeking access to justice, the ICD must provide victims with relevant information (on their rights, available mechanisms) in an accessible, language that can easily be understood by victims. While current Kenyan law provides very limited options for victims to participate in the proceedings, the establishment of the ICD should be an opportunity to introduce a meaningful participation of victims, in order to have their views and interests heard by the judges.

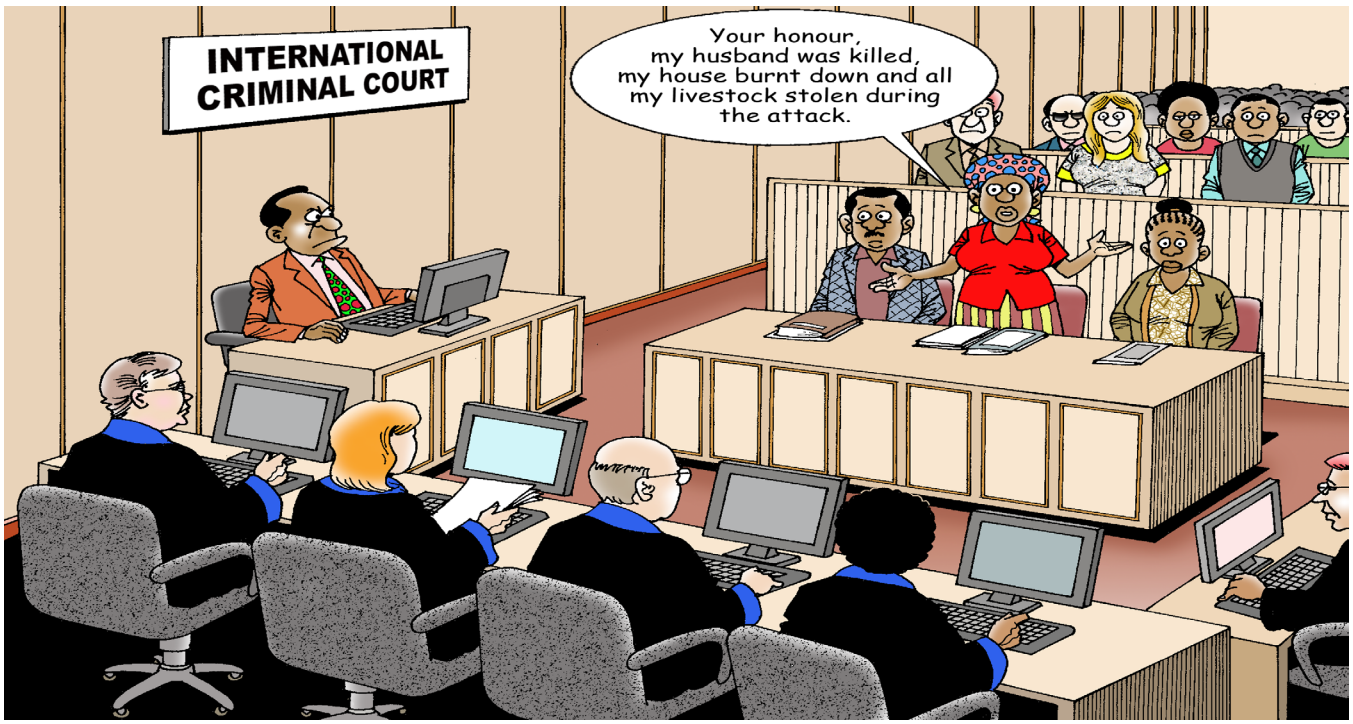
The ICD must identify innovative ways of bringing justice closer to the people. In so doing, the ICD must give special consideration to women, children and disabled victims. Further, victims must not be subjected to walking long distances to the Court to access justice especially in remote areas.

The ICD must also take into consideration the possibility of there being child perpetrators and a high number of low level perpetrators. Strategies will need to be developed in order to enable the rights of large numbers of victims as well as perpetrators. For example, some of the cases brought forward might not meet the threshold of prosecution as set by the high court but can instead be heard at magistrate level. The same standards applied at the ICD division of the high court must be applied to lower courts. The ICD should consider the use of a traditional justice system, provided they respect victims' rights and human rights standards for certain cases alongside the judicial process to broaden access to justice.

Lastly, there must be effective and speedy judicial remedy for the harm suffered. In that respect, meaningful participation is crucial for victims to be able to share information on the harm suffered and the consequences of the crimes and for the full victimisation to be reflected before the ICD.

3. Victims' right to protection

There is a justified concern over the protection of witnesses and victims during judicial proceedings, especially when powerful parties are involved. This might adversely affect witness cooperation with the Court and victims' participation as a whole. In view of the challenges faced by the Kenyan Witness Protection Agency, the establishment of the ICD must include a specific mandate to protect victims and witnesses, including the power and related resources totake measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims. The ICD must undertake an honest analysis of its capacity to adjudicate cases while providing witness/ victim protection. This will then inform strategies on working with other State institutions to ensure



victims' right to protection as the cases proceed. The ICD must also conduct an assessment of victims security needs

4. Victims' right to assistance and support, including legal aid and representation

To ensure meaningful and effective participation, the ICD must provide the requisite support for victims such as legal aid services, representation and psychosocial support. Some victims in recounting their stories can be re-traumatized and in some cases some victims have never received any psychosocial support for the harm they suffered. A consequence of this is that victims will not be in a position to effectively participate in the Court processes without appropriate support and assistance. The ICD should make adequate provision to support victims to access justice. In partnership with victims' groups, it should consult victims on their immediate needs and must inform victims about their right to this assistance and support.

5. Victims' right to reparation

The ICD should also have a specific mandate to order reparation that can take various forms, not just limited to financial compensation. In the provision of reparation, the ICD should develop procedures to allow victims to present claims for reparation and to receive reparations as appropriate. It is a general principle of law that reparation must be made to wipe out the effects of violations. Reparations should therefore be proportional to the gravity of harm suffered. Consultations with victims will identify what victims prefer/want as reparation. Due to the limited number of cases related to PEV to be handled by the ICD, reparations under the framework of this mechanism should not preclude the need to design a reparation programme with broader scope to address the situation of victims of PEV crimes. This means that there ought to be:

- Effective and meaningful participation of victims in the design, development and implementation of the reparation programme bearing in mind the gender perspective, the need to protect the dignity of those participating, and avoid situations likely to cause re-traumatisation.
- Identification and selection of the beneficiaries of the programme taking particular attention to victims of sexual crimes, physical and mental injuries, women, girls, the youth and the vulnerable groups.
- Information: Victims should be informed on their rights and give their informed consent to apply for and participate in the reparation processes.
- Non-discrimination and Equality: the process of reparations should be guided by the principle of non-discrimination and equality for all victims applying for reparations.

Kituo and the undersigned organisations are committed to promoting access to justice and reparation for victims and as such we express our willingness to work with and support the Judicial Service Commission as they establish the ICD.

Signed,

1.Centre for Conflict Resolution- Nakuru
2.Centre for Human Rights and Democracy – Eldoret
3.Centre for Restoration and Human Rights/Democracy – Kitale
4.CSO Network- Kisumu
5.IDP Network- Kuresoi
6.IDP Network- Nyamira County
7.Ikonye IDP's New Network- Nyamira
8.International Centre for Policy and Conflict- Nairobi
9.Kamukunji Community Based Organizations Network- Nairobi
10.Kenya Community Paralegal Association- Siaya
11.Kenya Youth Against Gender Violence Programmel- Nakuru
12.Kericho Human Rights Defender Network- Kericho
13.Kituo Cha Sheria
14.Lutheran Outreach Community Based Organization – Kisii
15.Naivasha Victims' Network – Naivasha
16.Njia ya Nuru Centre for Community Justice and Reconciliation- Nakuru
17.Nyanza IDP Network
18.Siaya Community Support and Accountability Program- Siaya
19.The Centre for Community Dialogue- Kisii
20.Umoja Sosiani Community Based Organization- Eldoret
21.Vihiga Peace- Vihiga

Aimee Ongeso - Program Officer - AGCP

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

Labour Laws recognizes Domestic Workers just like any other worker

The constitution and the new labour laws have opened new vistas for all who practice law. The slew of statutes of labour law passed in 2007 treats all workers equal irrespective of the level or nature of work.

Domestic workers are one group of laborers who more often than not are ignored and un-thought of when people speak about labor rights. Surprisingly, these people play a pivotal role in contributing to the national growth. It's painful that some of these hard working Kenyans are not regarding to have the rights to enjoy the privileges provided by the labor statutes.

This is no exception for foreigners who come to the country to work of course after getting a work permit are bound by the laws of the land and this follows as all the laws that stem from the Constitution.

Thus, Employment Act 2007 intertwines all laborers in Kenya. What does this then mean? It simply means that, when an employer terminates the services, they will then be expected to follow the discharge dictates to the letter with no expectations. It is all clear that ignorance is not a defense in Law thus there should be aware of all that is expected of them as provided for by Article 41 of the constitution and all the other Laws thereof that emanate from Labour related issues.

Parliament passed Legal Notice No. 9 of 2009 for the simple sake of employees who would render their services from months turning to years but be dismissed from employment, without any regards to having an "ex-gratia" payment to the employees for their services.

In addition to that, any employer who just started paying for N.S.S.F. even after the employee has been rendering services for a number of years already should note that service will be calculated for the years that N.S.S.F. was not remitted. Thus, employers should make haste before the sun rises and start remitting N.S.S.F funds to save their skin.

Lady Justice Monica Mbaru held that a 'house girl' was entitled to service pay even though her contract was oral and not necessarily documented over the years she served as "a Ayah" to an Indian family in Nairobi. They should as well note that our honorable courts take judicial notice of the fact that most employers do not issue their employees with contracts and therefore oral contracts as well stand.

Domestic workers just like any other workers are entitled to maternity leave and the yearly leave just like any other employee. Section 29(1) entitles each female employee to maternity leave. Moreover, section 29 (7) clearly states that no female employee shall forfeit her annual leave at any time. Leave entitlement under section 28 on account of having taken her maternity leave.

For domestic workers who do not stay with their families, they are entitled to housing allowance from the employer calculated using 15% of the basic salary just as it is the case with others workers.

Employers should follow the salary scale set by the Government and always renewed on Labour Day each year otherwise an employee is allowed to claim underpayment as per the scale. This way, employers will be not rub the law the wrong way.

All in all, employers especially the foreigners in domestic arena should not for one second believe that they are spared the dictates of labour laws regulations. This will all be followed to the letter just like any other citizen to avoid any embarrassment caused in case of termination of employment.

Emma Mumma - Legal Intern

Title

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

KITUO CHA SHERIA
The Centre for Legal Empowerment
we care for justice

KITUO CHA SHERIA

The Centre for Legal Empowerment

we care for justice

Head Office - Nairobi

Ole Odume Rd, Off Argwings Kodhek Rd

P.O. Box 7483 - 00300

Nairobi, Kenya.

Tel. : 254-020-3874220, 387419, 3876290

Mobile: 0734874221, 0727773991

Fax: 254-020-3876295

E-mail: info@kituochasheria.or.ke

Website: www.kituochasheria.or.ke

Facebook: Facebook@Kituochasheria

Twitter handle @kituosheria

Branch Office - Jogoo Rd, Nairobi

Forced Migration Program (FMP)

Hashi Energy Building

Jogoo Road

Tel: 202451631, 0736867241, 0720806531

Fax: 254-020-3876295

Email: info@kituochasheria.or.ke

Regional Office - Mombasa

Fidelity House, Kaunda Avenue

P. O. Box 89065

Mombasa, Kenya.

Tel. : 254-041-2230282, 0731129739

0700638379

Fax: 254-041-2230283

E-mail: msa@kituochasheria.or.ke