



**PERMANENT MISSION OF THE REPUBLIC OF KENYA
TO THE UNITED NATIONS**

No. 389/13

The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the Office of the United Nations High Commissioner for Human Rights (Secretariat of the Working Group on Arbitrary Detention) and with reference to Note Ref. G/SO 218/2 dated 17th June, 2013, has the honour to forward herewith the response by the Attorney-General of the Republic of Kenya to the questionnaire.

The Permanent Mission of the Republic of Kenya to the United Nations avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights (Secretariat of the Working Group on Arbitrary Detention), the assurances of its highest consideration.

New York – September 16, 2013

**Office of the United Nations High
Commissioner for Human Rights
1211 Geneva 10, Switzerland**

Fax: +41 22 917 9006





**RESPONSE OF THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
ON THE QUESTIONNAIRE RELATED TO**

**THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST
OR DETENTION TO BRING PROCEEDINGS BEFORE COURT, IN ORDER
THAT THE COURT MAY DECIDE WITHOUT DELAY ON THE
LAWFULNESS OF HIS OR HER DETENTION AND ORDER HIS OR HER
RELEASE IF THE DETENTION IS NOT LAWFUL**

1. (a) Whether Kenya is a State party to the International Covenant on Civil and Political Rights and If so, how we have domesticated Article 9 (4) of the Covenant. Reference should be made to the specific provisions, including their wording and date of adoption.

Kenya *is* a State Party to the International Covenant on Civil and Political Rights (1966) having ratified it on **1st May 1972**. *Article 9 (4)* of the Covenant provides that: "*Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*"



The **Constitution of Kenya 2010** which was promulgated and adopted in Kenya on **27th August, 2010** is the Supreme law of Kenya. **Chapter Four** of the Constitution of Kenya contains the Bill of Rights and specifically **Article 49** of the same sets out the rights of arrested persons. **Article 49 (1) (f)** of the Constitution of Kenya is the provision that domesticates Article 9 (4) of the Covenant. This Article provides that: "**49. (1)An arrested person has the right—**

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;"

The **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** whose commencement date is the **1st of August, 1930** also has almost similar provisions to the Constitution on the same matter. The following sections in Part III of the Criminal Procedure Code on Arrest, Escape and Retaking also have provisions similar to **Article 9 (4)** of the Convention:



Section 33 of the Code which provides that: *“A police officer making an arrest without a warrant shall, without unnecessary delay and subject to the provisions of this Code as to bail, take or send the person arrested before a magistrate having jurisdiction in the case or before an officer in charge of a police station.”*

Section 32 (3) of the Code which deals with a situation where a person arrested by a police officer refuses to give them their name and residence provides in this regard that: *“Should the true name and residence of the person not be ascertained within twenty-four hours from the time of arrest, or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be taken before the nearest magistrate having jurisdiction.”*

Section 37 of the Code has an obligation as follows: *“Officers in charge of police stations shall report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations, whether those persons have been admitted to bail or not.”*

Section 66 of the Code gives all courts in Kenya powers to cause a person arrested to be brought before them. It provides as follows: *“Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed*



within Kenya, or which according to law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction."

2. **Whether the domestic mechanisms provided apply to all forms of deprivation of liberty, such as administrative detention, including detention for security reasons, involuntary hospitalization, immigration detention, or any other reason. If yes, please provide the list of the forms of detention to which the mechanism is applicable.**

Yes, the domestic legislations apply to all forms of deprivation of liberty. This is because the freedom of liberty is a right protected within the Bill of Rights and since these rights are universal and apply to all human beings equally, then administrative detention including detention for security reasons and immigration detention among other reasons is also covered. See **Article 20 (2) of the Constitution of Kenya**, it provides that: "Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom."

In answer to part two of the question, since the freedom of liberty is protected under the Bill of Rights, then each and every form of detention is



exhaustively covered here. The Bill of Rights does not discriminate on any form of detention being more superior to any of the others. Therefore, *all forms of detention* are protected by the **Constitution of Kenya**.

- ()
- 3. Whether the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court is available for individuals subjected to preventive detention measures.**

Yes, this right is available to everyone, even individuals subjected to preventive detention measures. This is because the application of the Bill of Rights is equal to all persons. See **Article 22 (1) of the Constitution of Kenya** which provides that: "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

- ()
- 4. Whether these mechanisms provide for any particular remedies and in particular release and compensation for unlawful detention. If yes, please state and explain the relevant remedies.**

Yes, these mechanisms provide for remedies for unlawful detention. These remedies include a provision for release and compensation for unlawful detention. **Article 165** of the Constitution of Kenya has provisions relating to the High Court and at **Article 165 (3)** it provides that: "*Subject to clause*



(5), the High Court shall have—(a) unlimited original jurisdiction in criminal and civil matters; (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; ...” (emphasis added)

Article 165 (5) on the other hand provides that: “The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

Article 23 of the Constitution of Kenya deals with the authority of courts to uphold and protect the Bill of Rights. **Article 23 (3)** sets out the remedies that a court may award to a person who has applied to it alleging infringement or violation of a right protected under the Part. The Article provides that: “In any proceedings brought under Article 22, a court may grant appropriate relief, including— (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review.”

A declaration of rights- A declaration is an authoritative pronouncement by



a court in respect of a person's right to property or his or her status. Such a declaration is binding on the parties to the suit and persons claiming through it respectively. Courts grant a declaration of rights in order to ensure and protect the interests of people at large.

An **Injunction**- this is a kind of coercive remedy. When a court issues such a remedy, the court commands the Defendant/Respondent to act or to refrain from acting in a certain way. For example, a person who is infringing on the rights of another may by order of a court be prevented or estopped from continuing to carry out the infringement.

A **Conservatory Order**- Such an Order is meant to maintain the status quo until final determination of the application made alleging the infringement or violation of a right. Where such an Order is granted, the person or body complained of is estopped temporarily from continuing with the violation or infringement of the Applicant's right complained of until the suit is determined.

An **Order for Compensation**- the High Court can make such an order which directs that the Applicant's injury and suffering caused by the violation or infringement complained of is compensated in monetary terms. The amount of compensation is determined by the court depending on the extent of the injury.



An **Order of Judicial Review**- Judicial review proceedings are institute so that the High Court can re-examine a decision reached by a public body and state whether the decision was reached procedurally and lawfully or not. In such proceedings, the court may issue an order of Certiorari to quash the decision in issue, an order of Prohibition stopping that public body from engaging in the activity that led to the violation at hand or an order of Mandamus compelling the public body to do a particular thing in order to protect and uphold the Applicant's rights. Any or all or some of these orders may be granted on an application to the court.

The remedy of **release** for unlawful detention, though not specifically mentioned in the **Article 23 (3)** of the Constitution of Kenya 2010, however the part provides that a court may grant appropriate relief upon an application to it. The reliefs mentioned therein are *some* of the reliefs that could be granted. The list is however, not exhaustive so release and any other remedies are also included.

5. **Whether there are persons, in the domestic law, other than the detainee who can initiate the procedure on behalf of the detainee. If yes, please state who.**

Yes, there are persons who can initiate the proceedings on behalf of the



detainee. **Article 22 (2)** of the Constitution of Kenya in this regard provides that: "*In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—* (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members."

6. The formal requirements and procedures for a detainee to invoke the right to bring proceedings before court. Please cite relevant domestic legislation.

A detainee who wants to challenge the lawfulness of his or her detention may make an application to the Constitutional Court by way of a **Constitutional Petition**. In addition, the other rules are set out in **Article 22 (3)** of the Constitution of Kenya which provides that: "*The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—* (a) the rights of standing provided for in clause (2) are fully facilitated; (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; (c) no fee may be



charged for commencing the proceedings; (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.”

When the detainee has been in custody for longer than the statutorily prescribed without trial, the detainee or their representative makes an application to court for the issuance of an **Order of Habeas Corpus**, through a Notice of Motion application so that the detainee is produced in court and his or her case is heard and determined. This application is made under **Article 25 (d) of the Constitution of Kenya** and **section 389 of the Criminal Procedure Code (Cap. 75 of the Laws of Kenya)**.

If the detainee is making an application against a public body, they may make an application for any or all of the **judicial review orders** under **Article 23 (3) (f) of the Constitution of Kenya 2010** and **Order 53 of the Civil Procedure Rules 2010 (Cap. 21 of the Laws of Kenya)**. The formal requirement for this is that a party must first seek leave by way of a Chamber Summons application.



7. Whether the legislations provide a time limit for submitting such applications to court. If so, please indicate the maximum time.

The Order 53 rule 2 Civil Procedure Rules 2010 provides that when a detainee is applying for the judicial review order of **Certiorari**, he or she must make the application for leave to apply for the same within a period of **six (6) months** of the date of filing the application.

8. Whether there are any major decisions of the country's Constitutional or Supreme Courts concerning the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court. If yes, please provide the date and number of the decision(s) and, if possible, a copy of the decision(s).

Yes there are decisions from the Superior courts on the same. In the **Court of Appeal** case of *Albanus Mwasia Mutua versus Republic* Criminal Appeal No. 120 of 2004 the Appellant was held in custody for eight (8) months before he was taken before a court. The Court of Appeal in allowing the appeal and quashing the conviction observed that *"...unexplained violation of a constitutional right will normally result in an acquittal irrespective of*



receive such evidence as he thought fit in order to inform himself as to the proper sentence to pass."


GITHU MUIGAI, SC, EGH
ATTORNEY GENERAL