

SHADOW REPORT

Submitted by Muslims for
Human Rights (MUHURI) –
Observer Status No. 452

Abstract

This shadow report is submitted in response to paragraphs 190 & 191 of the Kenya State Report for the 12th and 13th period submitted to the African Commission in April 2020. The two paragraphs pertain to Article 23 of the African Charter on Human and Peoples' Rights (The Right to National and International Peace and Security).

This submission demonstrates that the Government of Kenya has been in violation of other rights as enshrined in the Banjul Charter as it carries out operation pertaining to national and international security.



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Introduction

Muslims for Human Rights (MUHURI) is a Non-Governmental Organization (NGO) based at the coast of Kenya. It began in 1997 with the objective of contributing towards the promotion, protection, and enjoyment of human rights among marginalized social groups, with a view to contribute towards the national and international struggle to promote and protect the enjoyment of human rights and civil liberties by all. MUHURI submits this shadow report on Kenya pursuant to Rule 68 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (ACHPR), with a view to contributing to the examination of the Initial Report of the State of Kenya for the 12th and 13th period submitted in April 2020.

This report focuses on the dire state of the right to fair hearing to accused persons as well as the continuing cases of arbitrary arrests and forceful disappearances of terrorism suspects¹.

1. Habeas Corpus

Access to justice is the cornerstone of the Kenyan criminal system and is so provided for in the constitution². The state is mandated to ensure that every person has access to justice and the same is within the 24 hours in cases of arrested persons. Recently and with great frequency there has been a rising number of people being arrested and the same not being presented to court within the stipulated time periods and without permission from court for prolonged detention. Cases have similarly been recorded of extrajudicial killings and executions mostly perpetrated by state officers.

Article 6 of the Banjul Charter places responsibility on member states to ensure the right to liberty and the security of a person is guaranteed unless deprived by lawful means.

¹ Article 50 of the constitution of Kenya 2010

² Article 48 of the constitution of Kenya 2010



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- a) Lobby groups acting within Kenya and more particularly in the area of human rights have documented cases of extrajudicial executions and disappearances committed by security agents³. Most of these cases go unresolved due to the slow nature with which independent organs investigate them. A case in point is that of Caleb Espino, a Mombasa tout, killed on September 17, 2018, while in police custody at Changamwe police station. The case was brought to court on September 20, 2021, for plea-taking, three years after Espino's in-custody murder⁴.
- b) Under the guise of war against terror, the Anti-terror police unit (ATPU)⁵ have been operating beyond the limits of the law by abducting suspects who they believe to be sympathizers of the Al-Shabaab or any other terror-related groups and detaining or even torturing them in an attempt to force their confessions. The Constitution of Kenya 2010 places habeas corpus as a non-limitable right⁶. The constitution places the family as the natural and fundamental unit of society and the necessary basis of social order.
- c) By having a key member of the family abducted, and there being no reasonable explanation as to why the same happened, breeds a cycle of distrust and anguish that in a way negatively influences the remaining members to view the government as an enemy. Critically, there is no closure for the affected. It is unhelpful that when some of the families decide to go to court and obtain orders for their keen to be brought before court, the state disobeys such orders. Some of these matters include:
 - i) Misc. Hcc App No 91 Of 2018 (Mombasa Law courts) MUHURI and Mohamed Avukame Haron Vs Inspector General of Police and Director of Public Prosecutions (Habeas Corpus) A Habeas corpus application seeking to have the government explain the mysterious disappearance of 43-year-old Mohamed

³<https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/743-a-police-service-gone-rogue-torture-extra-judicial-killings-and-enforced-disappearances.html>

⁴ <https://muhuri.org/court-orders-mental-test-for-cops-linked-to-touts-in-custody-murder/>
<https://muhuri.org/muhuri-sues-former-changamwe-ocs-over-brutal-in-custody-murder-of-a-tout/>

⁵ <https://www.cid.go.ke/index.php/sections/formations/atpu.html>

⁶ Article 25 of the constitution of Kenya 2010



Avukame Haroun. Mr Haroun is said to have been abducted by men in a black Toyota Prado to an unknown destination⁷.

- ii) Constitutional Petition 168 Of 2018 Muslims for Human Rights Vs the Attorney General, The Inspector General and The Director of Public Prosecutions-A Habeus corpus application filed after Mr, Abubakar Abdukadir who was heading to his evening prayers on 17th November 2017 in Malindi was abducted by unidentified men who forced him into their vehicles and drove off.⁸
- iii) Yasir Mahmoud Ahmed: He's 43-year-old, abducted by people believed to be security agents at Mkunumbi on the Lamu-Witu-Garsen road on June 19, 2021. MUHURI made an habeas corpus application at Malindi High Court. Judge Reuben Nyakundi twice ordered police to release him. They did not.⁹
- iv) Bakari Mbwana Mwanyota: He was abducted on February 23, 2021, from his home in Likoni, Mombasa by security agents. His wife said two white men were involved. An habeas corpus application made by MUHURI at Mombasa High Court will be heard October 12, 2021.¹⁰

2. Others – Enforced Disappearances

- i) Taimur Kariuki Hussein. Arrested on his way to Witu by police officers, charged in Lamu for resisting arrest, the charges were then dropped, and he was taken to Nairobi where he mysteriously disappeared case¹¹.
- ii) Abdulhakim Sali Sagar who was abducted in broad daylight in Mombasa by officers believed to be attached to the Anti-terror police unit. Even though he got released, he's not spoken to human rights organizations or media, ostensibly after being threatened by his abductors¹².

⁷ <https://muhuri.org/publication/habeas-corpus-mohamed-avukame-haron-case/>

⁸ Constitutional Petition No. 168 of 2018

⁹ <https://muhuri.org/wp-content/uploads/2021/06/Malindi-HCCHPet-No-1-of-2021-final.pdf>

¹⁰ <https://muhuri.org/wp-content/uploads/2021/06/Bakari-Mwanyota-Copy-of-Application-and-Petition.pdf>

¹¹ Misc. Criminal Application No. E212 of 2021

¹² <https://twitter.com/muhurikenya/status/1428050274564907009>



3. Questions to the Government of Kenya

- a) Why is the National Coroners Service Act yet to be implemented?
- b) Why has there not been a commission of enquiry established to investigate incidences of extrajudicial executions and enforced disappearances seeing as the cases have become so rampant?
- c) Why is Kenya yet to ratify the International Convention for the Protections of All Persons from Enforced Disappearance?
- d) Why is there no statute specifically criminalizing enforced disappearance in Kenya?

4. Recommendations to the Government of Kenya

- a) Prioritize and expedite matters of habeas corpus and enforced disappearances before the court.
 - b) Comprehensively implement the National Coroners Service Act 2017 and the Prevention of Torture Act 2017.
 - c) Prioritize the need for law reform on sanctions for government officials' failure to obey court orders for production in habeas corpus cases.
 - d) Enact a law on enforced disappearances or amend the existing legislation to criminalize enforced disappearances. The law should include recourse and reparations for victims and their families.
 - e) Ratify the International Convention for the Protection of All Persons from Enforced Disappearance.
 - f) Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).
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List of Attachments:

1. Misc. Criminal Application No. E2 of 2020 (Caleb Espino)
2. Misc. Criminal Application No. 91 of 2018 (Mohamed Avukame Haron)
3. Constitutional Petition No. 168 of 2018 (Abubakar Abulkadir)
4. Criminal Petition No. 1 of 2021 (Yasir Mahmoud Ahmed)
5. Petition No. E027 of 2021 (Bakari Mwanyota Mbwana)
6. Misc. Criminal Application No. E212 of 2021 (Taimur Hussein)