

# FACTSHEET ON THE LEGAL LANDSCAPE ON THE RIGHT TO HEALTH IN KENYA

## Definition of the Right to Health



The right to health is a fundamental human right. It is an inclusive right extending to timely and appropriate health care and the underlying social determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information.

## Right to Health Freedoms and Entitlements

- ✓ The freedoms include the right of a person to control their health and body (for instance, sexual and reproductive freedom) and the right to be free from interference (for example, the right to be free from torture, non-consensual medical treatment and experimentation).
- ✓ The entitlements include the protection of the right to a health system that provides equal opportunity for people to enjoy the highest attainable level of health.

## Key Elements of the Right to Health

- ✓ Availability - healthcare facilities, commodities programmes and services should be available in sufficient quantities within safe physical reach, within five Kilometers of the target population.
- ✓ Accessibility - health facilities and services should be accessible to all without discrimination, including physical accessibility, economic accessibility, and information accessibility.
- ✓ Acceptability - health facilities and services should be culturally appropriate, gender-sensitive, respectful of medical ethics, and confidentiality of an individual's health status.
- ✓ The quality of health facilities, commodities, and services should be good, scientific, and medically appropriate.



The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition

## Policy and Legal Framework on the Right to Health in Kenya

### The Constitution of Kenya 2010

- ✓ Article 43 (1)(a) provides every person with the right to the highest attainable standard of health, including the right to health care services and reproductive health care.
- ✓ Article 43(2) provides that a person shall not be denied emergency medical treatment.
- ✓ Article 46 (1) (c) provides that consumers have the right to the protection of their health.
- ✓ Article 53(1)(c) provides every child with the right to health care.
- ✓ Article 56(e) provides that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups have reasonable access to health services.
- ✓ Article 20 (5) provides that in applying any right under Article 43 (economic and social rights including the right to health) if the State claims that it does not have the resources to implement the right, it is the State's responsibility to show that the resources are not available. In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.
- ✓ Article 21(2) provides that the State shall take legislative, policy and other measures, including setting standards, to achieve the progressive realisation of the rights guaranteed under Article 43 (economic and social rights including the right to health).
- ✓ Fourth Schedule distributes health functions between the two levels of government. The National Government is responsible for national referral health facilities, health policy, capacity building and technical assistance to counties. The County Governments are responsible for county health services (county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; veterinary services (excluding regulation of the profession); cemeteries, funeral parlours and crematoria; refuse removal, refuse dumps and solid waste disposal).
- ✓ Article 2(5) and 2(6) provide for the application of the general rules of international law and any treaty or convention ratified by Kenya as part of the laws of Kenya. In this respect, Kenya is bound by the global and regional treaty and convention it has ratified that enumerate the duty of the State to realize the right to health.



## Legal Framework

Health Act, 2017 establishes a unified health system to coordinate the inter-relationship between the National Government and County Governments' health systems. It also seeks to regulate healthcare services, providers, products, and technologies. The Act seeks to give effect to the constitutional provisions on the right to health.

## Policy Framework

- ✓ Kenya Vision 2030, under the social pillar, seeks to improve the overall livelihoods of Kenyans by providing an efficient, integrated and high-quality affordable healthcare system.
- ✓ Kenya Health Policy 2014 – 2030 goal is to ensure universal coverage of services that positively contribute to the progressive realisation of the right to the highest attainable standards of health.
- ✓ Kenya Emergency Medical Care Policy 2020 - 2030 provides a framework for mainstreaming emergency medical care as a key component of universal health coverage.
- ✓ Kenya Community Health Policy 2020-2030 aims to empower individuals, families and communities to attain the highest possible standard of health by providing high-quality community health services.
- ✓ Kenya Primary Health Care Strategic Framework 2019 – 2024 provides guidelines for designing and implementing programmes that strengthen the primary health care system and services in Kenya.

## International and Regional Treaty and Convention Ratified by Kenya

- ✓ Universal Declaration of Human Rights of 1948 states that everyone has the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care, and necessary social services.
- ✓ International Covenant on Economic, Social and Cultural Rights of 1966 provides that State Parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- ✓ Convention on the Elimination of All Forms of Discrimination against Women of 1979 reaffirms the universal protection of the right to adequate health and details the special protections and considerations due to women.
- ✓ Convention on the Rights of the Child 1989 provides that State Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness, rehabilitation.
- ✓ Convention on the Rights of Persons with Disabilities 2006 provides that State Parties recognise that persons with disabilities have the right to enjoy the highest attainable standard of health without discrimination.

- ✓ Sustainable Development Goal three sets out the global agenda for health. It aims to ensure healthy lives and promote well-being for all ages by reducing the burden of priority diseases, reducing mortality, ensuring universal access to sexual and reproductive healthcare services and achieving universal health coverage.
- ✓ African Charter on Human and People's Rights 1981 states that every individual shall have the right to enjoy the best attainable physical and mental health.
- ✓ African Charter on the Rights and Welfare of the Child of 1990 states that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

## Challenges and Gaps Inhibiting the Full Enjoyment of Right to Health in Kenya

### Policy and legal obstacles to the realisation of the right to health include:

- ✓ Lack of adequate National and County legal and policy instruments to meaningfully give effect to the constitutional right to health care services, reproductive health care and emergency medical treatment.
- ✓ Lack of adequate intergovernmental mechanisms to ensure equitable access to health care services and referral among County Governments and between the National Government and County Governments.
- ✓ The lack of a national tariff policy for healthcare services leads to prohibitive medical costs with healthcare services tariffs that do not match the service provision costs.
- ✓ Lack of affirmative action and social health insurance policies and legislation to protect and cushion poor, vulnerable and marginalised groups from the risks of catastrophic health expenditures.
- ✓ Lack of health financing policy and guidelines on government budget allocations for the implementation of the constitutional right to health, reproductive health care, emergency medical treatment and health functions.
- ✓ Lack of a policy on implementation and effective management of concurrent health functions, including implementation of the constitutional right to health between National Government and County Governments.
- ✓ Lack of policy guidelines on the progressive realisation of the right to health as stated under Article 21(2) of the Constitution of Kenya and the UN CESCR General Comment N° 3 of 1990.

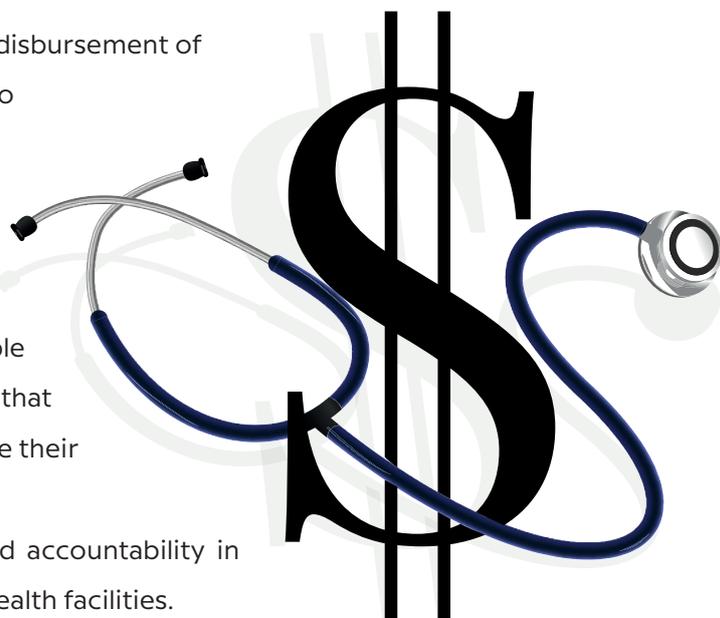


### The health system-related obstacles to the realisation of the right to health include:

- ✓ Weak regulation and monitoring of private healthcare services.
- ✓ Lack of a clear strategy for scaling up and sustainability of the universal health coverage pilot program.
- ✓ Lack of adequate healthcare workforce in health facilities contrary to norms and standards.
- ✓ Lack of efficient utilisation of the available human resources within the devolved health system.
- ✓ Weak supply-chain management systems for medical commodities, consumables, equipment and technologies are a significant challenge in delivering health services.
- ✓ Lack of formal recognition and integration of the community health system as a critical part of the health system.
- ✓ Lack of effective health emergency and referral services at the national and county levels.
- ✓ The health system management is not optimal since some of the sector's challenges result from the lack of coordination and cooperation within the devolved health system between the National Government and County Governments. The vertical governance arrangements between the two levels of government, with limited mechanisms and opportunities for intergovernmental cooperation and coordination in the health sector, remain a major impediment to ensuring effective working relationships and synergy in health service delivery and governance.

### Health financing gaps and challenges include:

- ✓ The National Treasury frequently delays the disbursement of the equitable share and conditional grants to County Governments. Whenever there is a delay in the disbursement of funds, County Governments struggle to fund their operations, including meeting the cost of managing healthcare since the equitable share revenue forms the bulk of resources that County Governments use to plan and execute their functions.
- ✓ Lack of adequate fiscal decentralisation and accountability in the management of revenues from county health facilities.
- ✓ Lack of fiscal decentralisation within County Governments, with the controlling fiscal powers centralised at the County Treasury departments limiting the ability of departments such as health and health facilities to offer quality healthcare services. The health funds are also not ring-fenced in most County Governments, and sometimes, the monies allocated for health are misappropriated or reallocated to other functions within the County Government systems.



- √ Despite the National Health Insurance Fund Act being touted as the major financing instrument for achieving universal health coverage, it still has not sufficiently addressed some of the critical issues that relate to social inclusion. For instance, the health benefits package provided in regulations does not cover some diseases and therefore does not benefit the affected Kenyans who need insurance. In addition, while seventy per cent of Kenyans seek health services at public health facilities, data from NHIF reportedly indicates that only thirty per cent of reimbursement payments are made to public health facilities. The NHIF pays more than seventy per cent of reimbursements to private health facilities.

#### Health workforce gaps and challenges include:

- √ Shortage of staff leads to overworked personnel in the public health sector.
- √ Lack of recognition and remuneration of community health volunteers as a critical part of the primary health care workforce.
- √ Poor attitude of some health workers, negligence, and absenteeism in the public health sector.

#### Emergency Treatment Challenges and Gaps

- √ Inadequate health system preparedness for health emergencies such as accidents and pandemics.

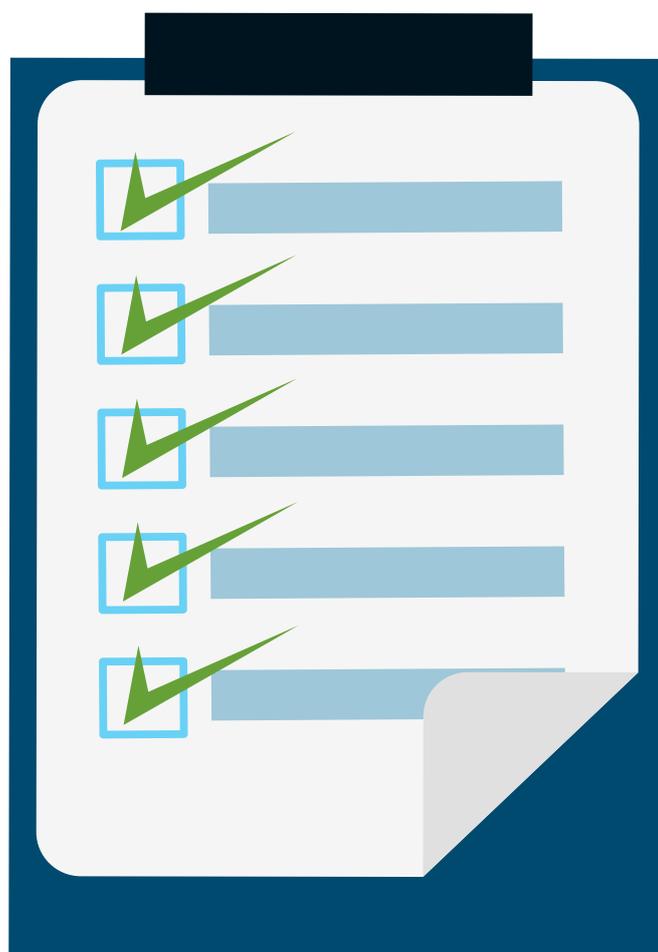
#### Health Information Challenges and Gaps

- √ The lack of clear policy and legal framework for privacy protection on health records and cross-sharing of patient history across facilities during case management is weak.
- √ Inadequate health information management system.
- √ Weak reporting from private healthcare providers.

## Recommendations

### Improve legislative and policy reforms and interventions that enhance the right to health

- ✓ Review health sector legislation and public policies to assess their consistency with human rights norms, standards, principles, and the capacity of institutional mechanisms to ensure the implementation and enforcement of the right to health as guaranteed by the Constitution of Kenya and attendant legislation.
- ✓ Clearly define the minimum essential elements of the right to health, including accessibility, availability, acceptability and quality of healthcare facilities, commodities and services to ensure universal health coverage.
- ✓ Develop policy, guidelines, and a roadmap for the progressive realization of the right to health as envisioned in the Constitution.
- ✓ Systematically integrate gender and human rights-based approaches to developing health sector public policies and strategies to reduce gender and social inequities in health.
- ✓ Enact and implement the Reproductive Health Bill, 2019 to provide recognition for reproductive rights and the Community Health Services Bill 2019 to provide a framework for regulating community health services that are instrumental in achieving preventive health care and ensuring access to health services.
- ✓ Review the concurrent function relating to health information systems and associated investments in technology and ensure equitable share of funds between the National Government and County Governments.



## Improve access to quality healthcare services

- ✓ Establish a capacity development and technical assistance strategy for County Governments to ensure effective health system management and delivery of quality health services.
- ✓ Operationalise the National Health Insurance Fund Act into a comprehensive national social health insurance scheme to ensure access to the highest attainable standard of health care services.
- ✓ Incorporate considerations for persons with disabilities in all the designs of health facilities, infrastructure and provision of services.
- ✓ Strengthen the capacities of regulatory authorities to ensure quality healthcare services, safety and efficacy of medicines, health products and technologies.

## Strengthening the health system and institutional environment for the right to health to improve service delivery

- ✓ Develop a national policy on implementation, coordination, joint action and management of concurrent health functions.
- ✓ Operationalise the Health Sector Inter-Governmental Consultative Forum and other health sector intergovernmental coordination mechanisms established under the Health Act 2017 for coordination of health sector in the National Government and County Governments.
- ✓ Strengthen mechanisms for multi-sectoral stakeholder and intergovernmental collaboration, cooperation and coordination at the national and county levels to address factors that inhibit the enjoyment of the right to health.
- ✓ Establish an independent Health Service Commission to effectively manage human resources for health, including the recruitment posting, promotion and remuneration of all health workers within a standardised framework for National Government and County Governments' health systems.
- ✓ Strengthen the National Government and County Governments' capacity to monitor and track health rights.
- ✓ Strengthen community-based capacity in participatory planning, monitoring and social accountability for effective participation in planning and tracking the right to health.
- ✓ Strengthen the public healthcare system's capacity to provide quality health services and ensure sufficient resources are mobilised, allocated and spent in an accountable, effective, efficient, equitable, participatory, transparent and sustainable manner.

## Strengthening the right to health during health emergencies and humanitarian situations

- ✓ Develop and implement regulations on the right to emergency medical treatment to operationalise the Kenya Emergency Medical Care Policy 2020 – 2030.
- ✓ Develop policy guidelines for response to health emergencies to guard against decisions and actions that endanger the human right to health while responding to health crises.
- ✓ Develop national policy guidelines on a rights-based approach to managing public health emergencies and protecting human rights and the right to health during health emergencies such as pandemics and disasters.
- ✓ Establish a national healthcare system capacity-strengthening strategy or program on health emergency preparedness and management that considers the needs of vulnerable groups during health emergencies.

## Enhancing awareness and understanding of the right to health

- ✓ Establish a public education program to increase awareness of the right to health and the social, religious and cultural practices that inhibit the realisation of the right to health, including sexual reproductive health.
- ✓ Promote and create safe spaces for citizens to actively and meaningfully participate in legislation, policy-making, and decision-making related to the right to health and the provision of health care services. Such efforts should be coupled with civic education to enable meaningful public participation.
- ✓ Promote and deepen the role of civil society in public interest litigation and thought leadership to encourage more people to approach the courts and claim and safeguard their health rights when such are threatened, violated or infringed upon.
- ✓ Develop information education and communication materials on the right to health and to package targeted information for diverse audiences such as the public and duty bearers.

## Financing for sustainable healthcare delivery

- ✓ Develop health financing regulations and policy guidelines on budget allocations to implement the right to health, reproductive health care and emergency medical treatment in accordance with the Constitution.
- ✓ Increase budgetary allocation for health by national and county governments to meet the Abuja declaration commitment to allocate at least 15 per cent of GDP to the health sector by 2030 through progressive budgetary scale-up in successive financial years. This is to accelerate access to health services to attain Universal Health Coverage.
- ✓ Fully cost the realisation of the constitutional right to health care services, reproductive health care and emergency medical treatment and the health functions under the Fourth Schedule in accordance with Article 187(2) of the Constitution on the principle of resources must follow and match functions.
- ✓ Establish County health services funds through enabling County legislation to safeguard and ring-fence revenues generated from various sources and funds appropriated by the County Assemblies.

- ✓ Enhance donor coordination for effective and efficient investment in implementing the right to health at both levels of government and with civil society.
- ✓ Promote strategic dialogue with the private sector on health financing, considering the obligation of the State under the African Commission on Human and Peoples' Rights to effectively regulate any private provision of social services to ensure that these actors prioritise the public interest rather than commercial interests.
- ✓ Ensure the implementation of the Kenya Health Financing Strategy 2020–2030 and its domestication at the County level to increase public spending in health. This will help rationalize health expenditure, improve aid effectiveness and ensure the provision of adequate safety-net mechanisms for the poor and vulnerable as the country works towards achieving universal health coverage and the constitutional right to health.

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