

# **Achieving the Right to Food for Sustainable Development in Kenya**

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**Kariuki Muigua\***

**Abstract**

*Food and nutrition security for the poor is an important step towards achieving sustainable development and national development. A poor and hungry people cannot meaningfully participate in national economic development. This also affects human dignity which is considered key for self-determination. This paper discusses the challenges affecting the realisation of the right to food for the Kenyan people and especially the urban poor. It offers practical recommendations on how the country can become food secure through the diverse and concerted efforts of all stakeholders.*

**1. Introduction**

The main aim of this paper is to discuss the place of right to food security in law and the practical ways in which the right to food can be actualized for the Kenyans and especially the urban poor communities in Kenya as one of the ways of achieving the sustainable development agenda. This paper examines the international and national legal framework regarding the right to food, and the potential for the current national policy, legal and institutional framework on food security to achieve the right to food as guaranteed in the Constitution of Kenya 2010. The paper also offers a background on the justiciability of the right to food as a human right and the various elements of this right as envisaged by various writers and the international legal instruments on the right to food.

**1.1 Definition and Elements of Food Security**

The World Bank defines food security to mean access by all people at all times to adequate food for an active healthy life, and entails both the availability of food and the ability of all members to have access to adequate amount of food.<sup>1</sup> This definition is important to this discussion as it

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captures not only an element of availability of food but also the continued ability of people to fend for themselves.

At the household level, household food security has been defined as a household having assured sets of entitlement from food production, cash, income, reserves of food assets and/or government assistance programmes such as in times of need they will be able to maintain sufficient nutritional intake for physical well-being.<sup>2</sup>

According to the World Food Programme, people are considered food secure when they have availability and adequate access at all times to sufficient, safe, nutritious food to maintain a healthy and active life.<sup>3</sup> Furthermore, the World Food Programme associates food security with the following three main elements: - Food availability: food must be available in sufficient quantities and on a consistent basis. It considers stock and production in a given area and the capacity to bring in food from elsewhere, through trade or aid; Food access: people must be able to regularly acquire adequate quantities of food, through purchase, home production, barter, gifts, borrowing or food aid; and Food utilization: consumed food must have a positive nutritional impact on people. It entails cooking, storage and hygiene practices, individuals' health, water and sanitation, feeding and sharing practices within the household.<sup>4</sup>

According to the UN Commission on Economic, Social and Cultural Rights, the concept of *adequacy* is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant.<sup>5</sup> The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations. Thus, the precise meaning of “adequacy” is to a large extent determined by

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<sup>1</sup> Reutlinger, S. and Pellekaan, J.V.H., *Poverty and Hunger: Issues and options for food security in developing countries*, (The World Bank, 1986).

<sup>2</sup> Ngwira, F. and Majawa, F., “Disseminating Agricultural Information Services To Farmers For Attaining Food Security In Zombwe Extension Planning Areas (EPA) Mzuzu Agricultural Development Division (MZADD) Mzimba, Malawi,” pp. 597-615, at p. 598.

<sup>3</sup> World Food Programme, “What is food security?” available at <https://www.wfp.org/node/359289> [Accessed on 15/07/2018].

<sup>4</sup> Ibid.

<sup>5</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

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prevailing social, economic, cultural, climatic, ecological and other conditions, while “sustainability” incorporates the notion of long-term availability and accessibility.<sup>6</sup>

The Committee considers that the core content of the right to adequate food implies: the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>7</sup>

*Dietary needs* implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breastfeeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.<sup>8</sup>

*Free from adverse substances* sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.<sup>9</sup>

*Cultural or consumer acceptability* implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.<sup>10</sup>

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<sup>6</sup> Para. 7, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>7</sup> Para. 8, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>8</sup> Para. 9, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>9</sup> Para. 10, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>10</sup> Para. 11, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

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*Availability* refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.<sup>11</sup>

*Accessibility* encompasses both economic and physical accessibility:<sup>12</sup>

Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

The foregoing elaboration by the Commission therefore means that if any of the above elements is missing, then the right to food security cannot be said to have been achieved.

### 2. The Right to Food as a Human Right

Within the international law legal framework on human rights, the right to food is classified as part of the economic, social and cultural rights, popularly referred to as the second-generation rights, and specifically, they are enshrined in the *International Covenant on Economic, Social and Cultural Rights*<sup>13</sup>. Second-generation rights are also considered as rights which require affirmative government action for their realisation. They are also often styled as group rights or

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<sup>11</sup> Para. 12, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>12</sup> Para. 13, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>13</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

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collective rights, in that they pertain to the wellbeing of whole societies.<sup>14</sup> However, it must be pointed out that while it is not within the scope of this paper to discuss all the classifications of the international human rights in detail, these rights are interdependent, as affirmed in the international principles of human rights and are all geared towards ensuring human wellbeing.<sup>15</sup> For instance, the right to self-determination<sup>16</sup> and the right to a healthy environment are both important in realisation of economic, social and cultural rights, and especially the right to food. This interdependence was also affirmed by in the expansive definition given to the right to life by the Supreme Court of Pakistan in its decision in *Zia –v- Wapda PLD*<sup>17</sup>, where the Supreme Court of Pakistan stated with respect to the provisions of section 9 of the Pakistan Constitution that ‘no person shall be deprived of life or liberty except in accordance with the law’: *“The Constitution guarantees dignity of man and also right to ‘life’ under Article 9, and if both are read together, the question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment”* (emphasis added).

The argument that the right to life includes the right to livelihood was also affirmed in the definition of the right to life given in *Peter K. Waweru –v- Republic, High Court*<sup>18</sup>.

Furthermore, the Court in *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*<sup>19</sup>, quoted with approval the United Nations Human Rights Committee in its General Comment 6 on the right to life adopted on 27 July 1982 which observed that the right to life as guaranteed in the first paragraph of Article 6 of the International Covenant on Civil and Political Rights has been too often narrowly interpreted. It stated that the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States take all possible measures to reduce infant mortality and to increase life expectancy, especially in *adopting measures to eliminate malnutrition and epidemics* (Emphasis added).

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<sup>14</sup> Ruppel, O.C., "Third-generation human rights and the protection of the environment in Namibia." *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia (2008), pp.101-120 at p.102.

<sup>15</sup> Macklem, P., Human Rights in International Law: Three Generations or One? (October 28, 2014). Available at SSRN: <https://ssrn.com/abstract=2573153> or <http://dx.doi.org/10.2139/ssrn.2573153>

<sup>16</sup> See Article 1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and *freely pursue their economic, social and cultural development*.

<sup>17</sup> *Zia –v- Wapda PLD (1994) SC 693*.

<sup>18</sup> *Misc. Civil Application No. 118 of 2004(2006) 1 KLR (E&L) 677 at 691*.

<sup>19</sup> ELC Civil Suit No. 821 OF 2012 (OS).

## **2.1 International Legal and Institutional Framework on Right to Food**

The *Universal Declaration of Human Rights (1948)*, (UDHR) recognises the right to food as a fundamental human right. Article 25 thereof provides that; “*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood circumstances beyond his control*” (Emphasis added).

The *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>20</sup> commits each State Party to the Covenant to undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>21</sup> It also requires the States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.<sup>22</sup>

Regarding food security, ICESCR provides that the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It commits the States Parties to take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.<sup>23</sup> In addition, the States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, should take, individually and through international co-operation, the measures, including specific programmes, which are needed: to improve methods of production, conservation and distribution of food by making full use of

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<sup>20</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

<sup>21</sup> Article 2.1, *International Covenant on Economic, Social and Cultural Rights*.

<sup>22</sup> Article 3, *International Covenant on Economic, Social and Cultural Rights*.

<sup>23</sup> Article 11(1), *International Covenant on Economic, Social and Cultural Rights*.

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technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>24</sup>

The *Comment No. 12 on the 'The Right to Adequate Food'*<sup>25</sup> affirms the fact that the human right to adequate food is of crucial importance for the enjoyment of all rights. The UN Committee on ESCR accumulated significant information pertaining to the right to adequate food through examination of State parties' reports over the years and noted that while reporting guidelines were available relating to the right to adequate food, only a few States parties had provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization.<sup>26</sup> This general comment was therefore prepared with the aim of identifying some of the principal issues which the Committee considered to be important in relation to the right to adequate food. Its preparation was triggered by the request of Member States during the 1996 World Food Summit for a better definition of the rights relating to food in article 11 of the Covenant, and by a special request to the Committee to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.<sup>27</sup>

The Committee affirmed that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights.<sup>28</sup> It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.<sup>29</sup>

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<sup>24</sup> Article 11(2), *International Covenant on Economic, Social and Cultural Rights*.

<sup>25</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>26</sup> *Ibid.*

<sup>27</sup> Para. 2, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>28</sup> Para. 4, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>29</sup> *Ibid.*, Para. 4.

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The Committee also pointed out that despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food, a disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world.<sup>30</sup> In addition, the Committee observed that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries. According to them, fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world's population.<sup>31</sup>

According to the Committee, the right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement, and should therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.<sup>32</sup> Furthermore, the right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.<sup>33</sup>

The *African Charter on Human and People's Rights (ACHPR)*<sup>34</sup> guarantees that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.<sup>35</sup> Notably, however, is the omission to specifically guarantee the right to food, although this can be deduced from the right to economic and social development and also the right to enjoy the best attainable state of physical and mental health. The Charter requires States to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

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<sup>30</sup> Para. 5, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>31</sup> Para. 5, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>32</sup> Para. 6, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>33</sup> Para. 6, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>34</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>35</sup> Article 22, *African Charter on Human and Peoples' Rights ("Banjul Charter")*.

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The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*<sup>36</sup> guarantees the right of women to food security and requires States Parties to facilitate women's enjoyment of this right to nutritious and adequate food.

The *Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14 on The Right to the Highest Attainable Standard of Health*, recognises that the right to health is closely related to the economic rights and is dependent on the realization of the other rights including the rights to food, housing, water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information and other freedoms.<sup>37</sup>

The *Rome Declaration and Plan of Action*<sup>38</sup> provides that everyone should have access to adequate and safe food and be free from hunger, and action must be taken to assist the people without food to meet their basic needs. Furthermore, human rights, democracy and freedoms of all people are all crucial to supplying the world with enough food to go around, while poverty, environmental degradation, war, terrorism and corruption also cause insecurity in terms of food for all.<sup>39</sup>

The *Committee on World Food Security (CFS)* was set up in 1974 as a United Nations intergovernmental body to serve as a forum for review and follow up of food security policies.<sup>40</sup>

It is considered as the foremost inclusive international and intergovernmental platform for all stakeholders to work together to ensure food security and nutrition for all.<sup>41</sup> The Committee reports to the UN General Assembly through the Economic and Social Council (ECOSOC) and to FAO Conference.<sup>42</sup> Through a multi-stakeholder, inclusive approach, CFS develops and endorses policy recommendations and guidance on a wide range of food security and nutrition topics.<sup>43</sup> In addition, these are developed starting from scientific and evidence-based reports

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<sup>36</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

<sup>37</sup> The right to the highest attainable standard of health: . 11/08/2000. E/C.12/2000/4. (General Comments), para. 3. Available at [http://apps.who.int/disasters/repo/13849\\_files/o/UN\\_human\\_rights.htm](http://apps.who.int/disasters/repo/13849_files/o/UN_human_rights.htm)

<sup>38</sup> World Food Summit: The Rome Declaration and Plan of Action, Rome, 13-17 November 1996.

<sup>39</sup> Ibid.

<sup>40</sup> "The Committee on World Food Security: A Multi-Stakeholder, Evidence-Based Approach to Policy Making" available at [http://www.fao.org/fileadmin/templates/cfs/Docs1516/About/CFS\\_Multistakeholder\\_Approach.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs1516/About/CFS_Multistakeholder_Approach.pdf)

<sup>41</sup> Committee on World Food Security, available at <http://www.fao.org/cfs/cfs-home/en/>

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

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produced by the High Level Panel of Experts on Food Security and Nutrition (HLPE) and/or through work supported technically by The Food and Agricultural Organization (FAO), The International Fund for Agricultural Development (IFAD), World Food Programme (WFP) and representatives of the CFS Advisory Group.<sup>44</sup>

The outcome of the works of the committee and other stakeholders are thus important for the countries around the world to enable them fulfil their obligations as far as realisation of the right to food is concerned.

### 2.2 National Legal and Institutional Framework

The Constitution of Kenya 2010 provides that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.<sup>45</sup>

In addition, some of the national values and principles of governance as envisaged in the Constitution of Kenya include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and sustainable development.<sup>46</sup> These values and principles are relevant in any efforts geared towards realisation of food security in Kenya. While some of these may not be directly related, their realisation includes ensuring that people enjoy food security for them to enjoy any form of governance that purports to reflect these values. However, this seems to be in line with the *UN General Comment No. 12 on the Right to Food* which provides that the formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.<sup>47</sup>

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<sup>44</sup> Committee on World Food Security, available at <http://www.fao.org/cfs/cfs-home/en/>

<sup>45</sup> Article 19(2), Constitution of Kenya 2010.

<sup>46</sup> Article 10(2), Constitution of Kenya 2010.

<sup>47</sup> Para. 23, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

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Kenya's *National Food and Nutrition Security Policy 2011*<sup>48</sup> was formulated to add value, build synergies and assist with the implementation of existing national and sectoral policies and strategies to effectively address issues of food insecurity and malnutrition in Kenya.

The Constitution of Kenya 2010 also guarantees that every person has the right— to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.<sup>49</sup> The State is also obligated to provide appropriate social security to persons who are unable to support themselves and their dependants.<sup>50</sup>

Notably, the Constitution has provisions that directly relate to the Covenant on Economic, Social and Cultural Rights. It provides that in applying any right under Article 43 on economic and social rights, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles: it is the responsibility of the State 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; and the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.<sup>51</sup>

In addition to the foregoing, the State is obligated to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.<sup>52</sup>

Also relevant is the provision that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.<sup>53</sup>

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<sup>48</sup> Government Printer, Nairobi.

<sup>49</sup> Article 43(1), Constitution of Kenya 2010.

<sup>50</sup> Article 43(3), Constitution of Kenya 2010.

<sup>51</sup> Article 20(5), Constitution of Kenya 2010.

<sup>52</sup> Article 21(2), Constitution of Kenya 2010.

<sup>53</sup> Article 21(3), Constitution of Kenya 2010.

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As far as enforcement of bill of rights is concerned, the Constitution 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.<sup>54</sup>

Indeed, some of these provisions have been canvassed before the Kenyan courts. In the *Advisory Opinion Reference No. 2 of 2013, Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR*, the Supreme Court of Kenya observed that: *the Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, [10] fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities* (Emphasis added).<sup>55</sup> This means that the responsibility to deliver on these rights is both a national and county governments' responsibility.

In the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011 (Unreported) Mumbi Ngugi J. observed that, “53...*The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be ‘progressive realization’ of social economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights. 78... Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.*”<sup>56</sup>

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<sup>54</sup> Article 22(1), Constitution of Kenya 2010.

<sup>55</sup> Para. 193.

<sup>56</sup> *Mitu-Bell Welfare Society v Attorney General & 2 others*.

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Kenyan Courts have thus affirmed that even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question.<sup>57</sup>

### 3. Attaining Food Security in Kenya for Sustainable Development: Challenges and Prospects

The *General Comment No. 12: The Right to Adequate Food* elaborates on the nature of the legal obligations of States parties, where the principal obligation is to take steps to achieve *progressively* the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.<sup>58</sup>

The Committee rightly points out that the right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.<sup>59</sup>

Notably, some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food.<sup>60</sup>

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<sup>57</sup> See the case of Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR, Petition 94 of 2012, para. 16.

<sup>58</sup> Para. 14, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>59</sup> Para. 15, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>60</sup> Para. 16, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

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The Committee suggested that the most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.<sup>61</sup>

The effects of climate change and associated extreme weather events such as flooding and droughts affect food production, water supply, housing access, livestock production and general livelihoods of the people.<sup>62</sup>

Unsustainable use of land in urban and rural areas, such as unsuitable agricultural land use, poor soil and water management practices, deforestation and overgrazing, amongst others have led to reduced food production, thus pushing up the prices of food and effectively making it inaccessible to the poor in terms of unavailability and inaccessibility due to lack of purchasing power.

Poverty includes lack of access to food, clothing, shelter, education and health care, and it is a cause of hunger; poor people are always chronically hungry.<sup>63</sup> Poverty has been a major cause of food insecurity and sustainable progress in poverty eradication is critical to improve access to food through undertaking increased food production, including staple food.<sup>64</sup>

Poverty affects food sustainability, which requires long-term availability and accessibility.

Addressing these challenges requires the participation of all interested stakeholders. The UN Committee on Food Security has rightly argued that there is increasing recognition by the international community that participation can enhance the quality of decision-making, increase ownership of the decisions, improve accountability and transparency of processes and enrich

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<sup>61</sup> Para. 21, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

<sup>62</sup> *Environment Protection, Water and Housing Sector Report 2012*, p.62 (Government Printer, Nairobi, 2012).

<sup>63</sup> Ananda, D., - 2012, Chapter - II, 'Food Security: the Concept and the Issue', p. 8. Available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/4066/8/08\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/4066/8/08_chapter%202.pdf)

<sup>64</sup> Ibid.

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outcomes through a variety of views and experiences.<sup>65</sup> However, participation needs to be organized around clear institutional structures and rules of engagement in order to find the right balance between inclusiveness and effectiveness.<sup>66</sup>

This section offers some recommendations on some of the ways that Kenya overcome these challenges to achieve its goal and obligation to guarantee the right to food security for all.

### **3.1 Economic and Social Empowerment for Poverty Eradication**

Empowerment of communities can be achieved through different means such as ensuring that they have access to formal, informal or non-formal education to acquire skills and knowledge necessary to acquire jobs or start businesses or trade, having access to information, and generally improving the economy so as to amplify their possibilities to get or create a job or business, though access to resources such as micro-credit facilities, access to ICT networks amongst other initiatives geared towards poverty eradication. This is especially important amongst the marginalised groups of people.

An empowered people will not only have guaranteed access to adequate and quality food but will also have sustainable ability to fend for themselves.

There is need for the government entities responsible for education to work closely with the private institutions to offer tailor made formal, informal or non-formal education for empowering families to not only cater for their nutritional and food security but also ensure that they positively contribute to national development for achievement of the sustainable development agenda and Kenya's Vision 2030.

A survey within the communities can help engage the affected communities and get their ideas and opinions on how best to involve them and empower them. Setting up training centres within their localities as well as extending credit facilities to enable the poor access funds for setting up businesses can go a long way in empowering people to fend for themselves and contribute positively to economic growth.

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<sup>65</sup> "The Committee on World Food Security: A Multi-Stakeholder, Evidence-Based Approach to Policy Making," p.1. Available at [http://www.fao.org/fileadmin/templates/cfs/Docs1516/About/CFS\\_Multistakeholder\\_Approach.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs1516/About/CFS_Multistakeholder_Approach.pdf)

<sup>66</sup> Ibid., p.1.

### **3.2 Gender Equality and Equity for Food Security**

While it is important to empower both men and women, there is a specific need to put in special measures over and above the standard measures to empower women in the poor neighborhoods. It has been argued that many women entrepreneurs in developing countries are facing disproportionate obstacles due to lack of mobility, capacity and technical skills, with some experiencing several discrimination, hardship and exclusion.<sup>67</sup> Furthermore, when women are employed or have more control over household incomes, they tend to spend more than men do on food, health, clothing and education for their children and this expenditure can generate improvements in household nutrition, health and education.<sup>68</sup>

It is therefore important for the constitutional and statutory measures aimed at achieving gender equality, equity and empowerment of women to be actively implemented through programmes and plans especially for the women in marginalised and disadvantaged groups.

The government is also urged to give equal rights to men and women on agricultural education, food production, techniques on marketing and distribution, as well as ensuring that men and women have equal responsibilities in the fight against hunger.<sup>69</sup>

Furthermore, it is also suggested that there could be nutritional education for men in order to bring equality within the family.<sup>70</sup>

### **3.3. Enhancing Agricultural Production**

Agricultural production has continually deteriorated in Kenya due to different factors which include but not limited to climate change effects, changing land use tendencies, poor farming methods and rural urban migration, amongst others. As such, access and availability of food

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<sup>67</sup> Okechukwu, E.U., Gerald, N. and Eze, J., “Women Empowerment: Panacea for Poverty Reduction and Economic Development in Nigeria,” *Journal of Policy and Development Studies*, Vol. 10, No. 2, May 2016, pp. 31-41, at p.31.

<sup>68</sup> Petruney, T., Wilson, L.C., Stanback, J. and Cates Jr, W., “Family planning and the post-2015 development agenda,” *World Health Organization Bulletin of the World Health Organization*, Vol. 92, No8, 2014, p.548.

<sup>69</sup> Birdal, S., *Three generations of human rights of women in the 20th century: an analysis of international legal documents* (Doctoral dissertation, Bilkent University, 2014), p.67. Available at <http://www.thesis.bilkent.edu.tr/0007056.pdf> [ Accessed on 15/07/2018].

<sup>70</sup> Birdal, S., *Three generations of human rights of women in the 20th century: an analysis of international legal documents*, op cit., p.68.

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becomes a challenge and this is especially worsened by the ever-growing population and high levels of poverty.

Food security is considered to be a key component of sustainable development agenda and thus a priority area. Notably, improved agricultural production is one of the ways through which food security can be achieved. Indeed, as a way to end hunger, achieve food security and improve nutrition and promote sustainable agriculture, the *Agenda 2030 for Sustainable Development* requires states to ensure that by 2030, they double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment, amongst other measures.

Some of the challenges facing agricultural production in Kenya such as climate change effects, changing land use tendencies and poor farming methods can be addressed through dissemination of related agricultural information to farmers.

Scholars have argued that free flow of information is a right of people which enable them to participate effectively in the process of economic, social and political activities in the society and enhance education, knowledge and learning.<sup>71</sup> Accordingly, information and knowledge are considered key components of an improved agricultural sector since farmers require proper information in order to plan for their activities, make choice of the inputs and eventually on when and where to sell their products.<sup>72</sup> Thus, as a way to improve agricultural production for food security and self-sufficiency and subsequently improve the economy, information needs of farmers ought to be conveniently met and at an affordable cost while ensuring its timely availability.<sup>73</sup>

The Constitution of Kenya 2010 guarantees the right of every person to access information and this right includes access to information held by the State; and information held by another

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<sup>71</sup> Ngwira, F. and Majawa, F., “Disseminating Agricultural Information Services to Farmers for Attaining Food Security in Zombwe Extension Planning Areas (EPA) Mzuzu Agricultural Development Division (MZADD) Mzimba, Malawi,” op cit., at p. 598.

<sup>72</sup> Ibid., p.598.

<sup>73</sup> Ibid., p.598.

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person and required for the exercise or protection of any right or fundamental freedom.<sup>74</sup> This constitutional provision is to be actualized through the *Access to Information Act, 2016*<sup>75</sup>, which guarantees that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.<sup>76</sup>

The Government ought to ensure that farmers get adequate and up to date agricultural production information through such means as seminars, trainings, field extension services and publication of information in accessible language and format, amongst other means. There is thus a need to invest in research and adequate funding to get the relevant information and support to the farmers for improved and increased agricultural productivity.

### 3.4 Encouraging Family Planning for economic and Social Sustainability

It is believed that population is growing at alarming rate and with potentially devastating effects such as ameliorating environmental risks associated with climate change, water scarcity, biodiversity loss, and food and energy insecurity.<sup>77</sup>

As such, one of the goals of Agenda 2030 for Sustainable Development is to ensure that by 2030, there is universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes.<sup>78</sup>

It has been argued that family planning improves the health and overall well-being of women and families around the world.<sup>79</sup> Family planning is believed to have an impact on global goals such as poverty reduction, gender equity, and improvements in education, health and environmental conservation, so that with regard to sustainable livelihoods and job growth, family planning programmes can reduce unwanted fertility in resource-poor settings.<sup>80</sup> This, in turn,

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<sup>74</sup> Article 35, Constitution of Kenya 2010.

<sup>75</sup> Act No. 31 of 2016, Laws of Kenya.

<sup>76</sup> Sec. 4(3), Access to Information Act, 2016.

<sup>77</sup> Engelman, R., "An End to Population Growth: Why Family Planning Is Key to a Sustainable Future," *Solutions*, Volume 2, Issue 3, May 2011, pp. 32-41. Available at <https://www.thesolutionsjournal.com/article/an-end-to-population-growth-why-family-planning-is-key-to-a-sustainable-future/>

<sup>78</sup> Goal 3.7.

<sup>79</sup> Petruney, T., Wilson, L.C., Stanback, J. and Cates Jr, W., "Family planning and the post-2015 development agenda," op cit., p.548.

<sup>80</sup> Ibid., p.548.

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allows women greater opportunities to participate in paid employment and to increase their productivity and earnings.<sup>81</sup>

Family planning is not only important at the household level but also plays a crucial role as a planning factor in economic and social wellbeing and development of the nations. It therefore follows that encouraging and facilitating safe and reliable family planning especially among the poor can go a long way in enhancing food security in the poor households.

### **3.5 Inclusive Decision-Making and Policy and Law-Making Processes**

Since food security has multiple dimensions, eradicating hunger requires policy action that addresses all four dimensions, that is, availability, access, utilization and stability.<sup>82</sup> As such, there is a need for multiple actions<sup>83</sup> which may involve a variety of stakeholders, who often have diverging views and goals.<sup>84</sup> It has been suggested that the challenge is to improve stakeholders' coordination to enhance the effectiveness of actions to promote food security and nutrition. Furthermore, such coordination requires an enabling environment that creates incentives for all stakeholders and empowers them to participate in policy formulation and implementation.<sup>85</sup>

Article 118(1)(a) of the Constitution of Kenya requires Parliament to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and (b) to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. There is a need to put in place measures that ensure that communities meaningfully participate in decision making processes especially in matters that directly affect them.

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<sup>81</sup> Ibid., p.548.

<sup>82</sup> Committee on World Food Security, p.1. Available at [https://sustainabledevelopment.un.org/content/documents/15195Session%2012\\_Committee%20on%20World%20Food%20Security%20\(CFS%20Brief\)\\_May\\_2015.pdf](https://sustainabledevelopment.un.org/content/documents/15195Session%2012_Committee%20on%20World%20Food%20Security%20(CFS%20Brief)_May_2015.pdf)

<sup>83</sup> Ibid. These actions have been identified by the United Nations Committee on Food Security as including, depending on the specific context, actions aimed at increasing productivity, promote rural development and incomes, strengthen social protection mechanisms, improve infrastructure and invest in education and health.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

#### **4. Conclusion**

Realisation of the constitutionally guaranteed socio-economic rights and especially the right to food can be achieved through the concerted efforts of all stakeholders. Notably, food security cannot be achieved through disjointed sectoral approaches. This is because this is a social welfare issue as much as it is an economic and environmental issue. The political goodwill of the legislature and courts is also required to ensure enforcement and compliance with any policy and legal measures geared towards achieving food security for the poor households and the country in general.

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