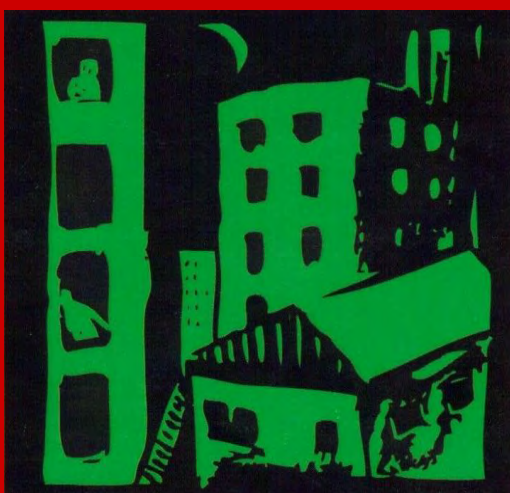
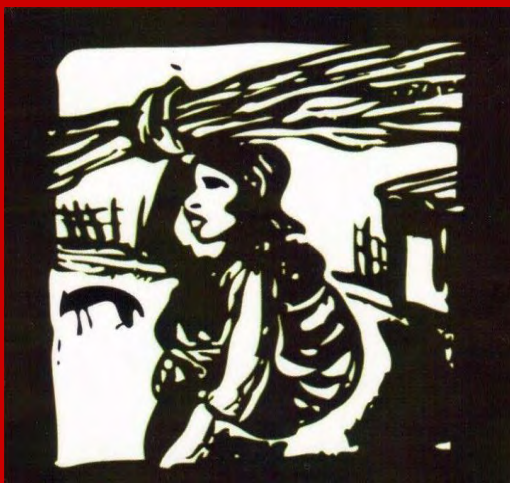


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## A critique of the efficacy of the right to shelter for street children in Kenya

LEAH ALEXIS NDIMURWIMO

*Associate Professor, Nelson Mandela University, Gqeberha, South Africa*

<https://orcid.org/0000-0002-0305-2573>

ESTHER NASIMIYU WANJALA

*LLD candidate, Nelson Mandela University, Gqeberha, South Africa*

<https://orcid.org/0009-0000-7717-4621>

ASANDE FELIX MAKORI

*Lecturer, University of Embu, Kenya*

<https://orcid.org/my-orcid?orcid=0009-0006-2781-5383>

### ABSTRACT

*The right to housing or shelter is a fundamental right that has been given recognition at national, regional, and international levels. In Kenya, everyone's right to access adequate housing and basic shelter is enshrined in the Constitution of Kenya, 2010 and various international and regional human instruments, but there is no specific legislation or policy that caters to the right of street families and children to access housing or shelter. The gap that exists in law and policy deepens the vulnerability of street families and children, who are being left behind and not included in governmental socio-economic programmes and interventions*

*targeting vulnerable and marginalised persons. For example, street children are often excluded from planning, budgeting, and national decisions relating to socio-economic rights that include shelter. This article considers how Kenya's street children's right to shelter may be protected. Accordingly, it recommends measures that could be taken to protect their right to shelter, as well as other socio-economic rights, and thereby create a pathway to realising the values of equality and human dignity enshrined in the Constitution.*

**Keywords:** street children, shelter, non-discrimination, minimum core obligations, sustainable development, Kenya.

## 1 INTRODUCTION

### 1.1 Housing as a fundamental right

Housing is recognised as a fundamental human need alongside that for food and clothing, and is viewed as key to survival – a position reflected in the Kenya National Housing Policy 2016 (hereafter, KNHP 2016).<sup>1</sup> The Vancouver Declaration of 1976<sup>2</sup> recognises that adequate shelter and services are basic human rights and that states are under an obligation to ensure that these rights are realised for all through government programmes.<sup>3</sup> The centrality of the right to shelter was also emphasised by the United Nations (UN) in the Global Strategy for Shelter to the Year 2000 (GSSY),<sup>4</sup> which noted the need for direct governmental involvement in this regard, as well as for measures to encourage role-players in other sectors, such as non-governmental organisations, to facilitate the realisation of the right to shelter.<sup>5</sup> The Geneva Declaration of the Rights of the Child of 1924 recognised the importance of protecting the rights of children, a category which implicitly includes homeless or street children. Additionally, the UN Declaration of the Rights of the Child of 1959 states that every child must enjoy the benefits of social security, benefits which include adequate housing.<sup>6</sup> Ahmed and Bulmer thus rightly observe that socio-economic rights for all are guaranteed under a variety of international human rights instruments.<sup>7</sup>

Street families are among the most vulnerable members of society, and endure poverty, disease, exposure to drug abuse and sexual exploitation, and unsustainable livelihoods.<sup>8</sup>

<sup>1</sup> See Chapter 1 of the KNHP at 1.

<sup>2</sup> Part 111 of the Vancouver Declaration of 1976 at para 8.

<sup>3</sup> See KNHP 2016. See also article 25(1) of the Universal Declaration of Human Rights.

<sup>4</sup> Adopted by the General Assembly on 20 December 1988, Resolution A/RES/43/181 available at <https://www.refworld.org/docid/3b00f1831c.html>. (accessed 28 June 2023).

<sup>5</sup> See para 13 of the GSSY.

<sup>6</sup> Principle 4 of the UN Declaration on the Rights of the Child of 1959.

<sup>7</sup> Ahmed D & Bulmer E *Socio and economic rights* Institute for Sweden: International IDEA (2017) at 6–10.

<sup>8</sup> Kenyan Draft National Policy on Rehabilitation of Street Families 2020 at 4 available at <http://sfrtf.socialprotection.go.ke/wp-content/uploads/2020/12/Draft-Policy-on-Street-Families.pdf>, (accessed 29 June 2023). See also Ibrahim A “Characteristics of street children” (2012) *E-international relations: Students* available at <https://www.e-ir.info/pdf/30870> (accessed 25 February 2023).

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Article 21(3) of the Constitution of Kenya, 2010 (hereafter, Constitution) lists categories of vulnerable persons, who include women, children, older members of society, and persons with disabilities. This study is, however, limited to street children. Society's future lies in its children and the current situation faced by street children is likely to persist and reflect into their adulthood,<sup>9</sup> for that reason, there is a need to safeguard street children's rights from the outset so that their future can be secured to prevent them from ending up raising their future generations on the streets.

The article is divided into six sections. Section 1 starts with a general introduction and discusses legal and policy frameworks on the protection of street children's right to housing and shelter. Section 2 defines street children in the context of Kenya and as per the committee on the UN Convention on the Rights of the Child (CRC), and considers the factors that push children out onto the streets. Section 3 deals with the realisation of the rights of children in Kenya, with the emphasis on the right to shelter. Section 4 discusses minimum core obligations in the context of the right to shelter, as well as affirmative-action measures that could be adopted to protect the rights of street children. Section 5 examines the UN Sustainable Development Goals (SDGs) in relation to the right to shelter and access to adequate housing. The article ends with some concluding remarks and recommendations.

### **1.2 Legal and policy frameworks on right to housing and shelter**

Several international legal instruments serve to protect the right to housing and shelter. These include the Universal Declaration of Human Rights (UDHR), 1948; the International Covenant on Economic Social Cultural Rights (ICESCR), 1966; the CRC, 1989; and the International Covenant on Political and Civil Rights (ICCPR), 1966. Similarly, at the regional level, these rights are provided for in the African Charter on Human and Peoples' Rights (Banjul Charter), 1981, the African Charter on the Rights and Welfare of the Child (ACRWC), 1990, and various national constitutions, such as the Constitution of Kenya, 2010. While these human rights instruments do not expressly provide for socio-economic rights for street children, they implicitly guarantee children's rights by virtue of using the phrase, "the rights of all persons". Kenya is a member state of the UN,<sup>10</sup> the African Union (AU),<sup>11</sup> and the East African Community (EAC).<sup>12</sup> It is a state party to international and regional human rights instruments, and in having acceded to them, has assumed the obligation thereof under article 2(6) of the Constitution.

Notwithstanding the legal assurances found in national legislation and the international and regional human rights instruments mentioned above, street children remain the

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<sup>9</sup> Kenya Judiciary Child Justice Strategy 2023–2030 at 7.

<sup>10</sup> Since 16 December 1963, following the attainment of independence.

<sup>11</sup> 25 May 1963.

<sup>12</sup> Kenya became a member state of the EAC in 2000 when the Treaty for the Establishment of the EAC entered into force.

most hidden and invisible human beings in the world.<sup>13</sup> Their invisibility is due to a lack of reliable data concerning their number and identities, a lack which it makes it difficult for government authorities to ensure that they access basic services such as health care, education, and housing or shelter.<sup>14</sup> The invisibility of street children is further perpetuated by individuals who view them as representations of societal failure.<sup>15</sup> As a result of their invisibility, they suffer social exclusion and are left out from enjoying the benefits of public services. Such exclusion in Kenya does not accord with the notion that “no one should be left behind”.<sup>16</sup> The UN Sustainable Development Group (UNSDG) observes that many people are left behind due to discrimination; by implication, individuals, families, and communities are marginalised and excluded.<sup>17</sup> This is contrary to the objectives of the SDGs, specifically Goal 11(1), which emphasises people’s access to adequate safe and affordable housing and which entails upgrading slums and improving access to basic services.

The Kenyan Children Act takes a welfare approach towards street children, describing them as children in need of care and protection.<sup>18</sup> However, the Act contradicts the CRC and constitutional standards that advocate for a child’s-right approach to be applied to all children. Premised as it is on the welfare approach, the Act has only made provision for temporary shelter in form of alternative care as a component of social security. By failing to provide for shelter as a substantive right for street children, the Act may raise concerns about discrimination. The purpose of the Social Assistance Act is to ensure that social assistance is rendered to persons in need,<sup>19</sup> a category which should have been extended to include street families and street children. Likewise, the Housing Act<sup>20</sup> and the KNHP 2016 limit ownership of shelter and housing on the basis of income, and thereby exclude street children, who lack income. The Kenya National Children Policy 2010, having been in force for more than a decade, has failed to be of benefit to street children. The Street Families Rehabilitation Trust Fund was established in 2003 and,

<sup>13</sup> Consortium for Street Children “Making invisible populations count – The development agenda of the 21<sup>st</sup> Century” (2018) available at <https://www.streetchildren.org/news-and-updates/making-invisible-populations-count-the-development-agenda-of-the-21st-century/> (accessed 25 April 2023).

<sup>14</sup> Council of Europe “Building a Europe for and with children” available at [https://www.coe.int/t/dg3/children/violence/streetChildren\\_en.asp](https://www.coe.int/t/dg3/children/violence/streetChildren_en.asp) (accessed 25 April 2023).

<sup>15</sup> Council of Europe “Building a Europe for and with children”.

<sup>16</sup> United Nations Sustainable Development Group (UNSDG) “Universal values: Leave no one behind” available at <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> (accessed 30 July 2021). The theme of “leaving no one behind” is the central, transformative promise of the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs). It represents the unequivocal commitment of all UN member states to eradicate poverty in all its forms, end discrimination and exclusion, and reduce the inequalities and vulnerabilities that leave people behind and undermine the potential of individuals and of humanity as a whole.

<sup>17</sup> UNSDG “Universal values: Leave no one behind” available at <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> (accessed 30 July 2021).

<sup>18</sup> Sections 142 and 144(ee) of Act 29 of 2022.

<sup>19</sup> See preamble and section 2 of Act 24 of 2013.

<sup>20</sup> Cap 117 Revised edition 2012 (1990).

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though having been in force for over two decades, has fared dismally in protecting and promoting the rights of street children and street families.

The Kenya Draft National Policy on Rehabilitation of Street Families 2020 was developed to address the concerns of street families, who for long have faced exclusion from governmental socio-economic interventions targeting vulnerable persons.<sup>21</sup> However, it has taken a long time indeed for the 2020 policy to be approved. As a result, street children and families continue to suffer while awaiting approval and implementation of the policy. In contrast to the National Street Families Policy, the discourse around the affordable housing programme in Kenya contravenes the vulnerability principle provided for under the Constitution because street children and families as vulnerable groups cannot meet the criteria of affordable housing. This is because the programme targets income earners, but street children do not earn income that can qualify them for to programme, and it also requires birth registration, notwithstanding that most street children lack documents such as national identity cards.<sup>22</sup>

Street children in Kenya suffer the plight of being excluded from benefiting from policies and programmes that ought to support them in realising their socio-economic rights<sup>23</sup> envisaged under regional and international instruments as well as articles 43 and 53 of the Constitution. Consequently, they face difficult living conditions<sup>24</sup> and lack basic facilities, including shelter. As such, their right to access adequate housing or shelter – which is generally and theoretically recognised under various international, regional, and national legal frameworks such as the UDHR,<sup>25</sup> ICESCR,<sup>26</sup> CRC,<sup>27</sup> Banjul Charter,<sup>28</sup> ACRWC,<sup>29</sup> and the Constitution – is not guaranteed in a practical sense. The Constitution of Kenya provides for the protection and promotion of children's rights,

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<sup>21</sup> Kenyan Draft National Policy on Rehabilitation of Street Families 2020 at 48.

<sup>22</sup> Boma Yangu available at <https://www.bomayangu.go.ke/> (accessed 24 January 2024).

<sup>23</sup> Draft National Policy on Rehabilitation of Street Families 2020 at 16–17.

<sup>24</sup> Draft National Policy on Rehabilitation of Street Families 2020 at 16–17. The policy notes that, while on the streets, street families face a myriad hardships, which include lack of food, clean water, shelter, sanitation and health care.

<sup>25</sup> Article 25(1) on the right to a standard of living adequate for health and well-being and including housing.

<sup>26</sup> Article 11(1), which reiterates the contents of the UDHR provisions.

<sup>27</sup> Article 27(1) the right of every child to a standard of living adequate for his or her physical, mental, spiritual, moral, and social development. See also article 27(3), which obligates state parties, in accordance with national conditions and within their means, to take appropriate measures to assist parents and others responsible for the child to implement the right stated under article 27(1) and, in case of need, provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

<sup>28</sup> Article 18(3) obligates state parties to protect the rights of the child as stipulated under international declarations and conventions.

<sup>29</sup> Article 3 on non-discrimination, article 4 on the best interests of the child, and provisions regarding the protection of the right to life, survival, education and development (to name but a few).

including the right to basic shelter.<sup>30</sup> The right to housing for all, provided for under article 43(1)(b) of the Constitution, in essence includes street children. The Children Act stipulates how street children like orphans, abandoned, beggars, victims of violence and harmful cultural practices should be protected against all kinds of neglect, abuse or exploitation. The Act states how these children must be provided with various kinds of shelter.<sup>31</sup> However, street children have no shelter, as by definition they live on the streets. Adequate housing is one of the core prerequisites for a basic standard of living,<sup>32</sup> along with water and sanitation facilities as well as access to health and educational services. Yet the Committee on the Rights of the Child, in its General Comment No. 21, observed that street children do not benefit from the CRC's provisions,<sup>33</sup> which, as per its article 27(1), include the right to shelter.

Given that Kenya is a state party to international and regional human rights treaties, it is under an obligation to adopt measures that promote the realisation of the right of shelter for street children. This includes protecting other socio-economic rights as a pathway to equality and human dignity, as enshrined in the Constitution, and meeting the international minimum core obligations. The article now proceeds to assess the extent to which street children in Kenya enjoy their right to access adequate housing or shelter and identifies hindrances to their enjoyment of this right. Thereafter, it considers various approaches that may be adopted to promote the right to shelter for street children.

## 2 STREET CHILDREN

### 2.1 Definition in Kenya

Street children in Kenya are referred to pejoratively as "*chokoraa*,"<sup>34</sup> which translates both as "street child" and "curse". "*Chokoraa*" is a negative label assigned by society to children in street situations, one that devalues their individual identities. Derived from the Kiswahili language, *chokoraa* also connotes the idea of "garbage pickers", given that street children are often seen picking from public garbage cans.<sup>35</sup> The term "*chokoraa*" serves to stigmatise street children, who are viewed as "other" and unfairly discriminated against or treated differently from children who are not in street situations. In short, "*chokoraa*" is a negative label and its usage paves the way for discrimination against street children.

The pejorative label of *chokoraa* is linked to undesirable characteristics or negative stereotypes; because *chokoraa* are viewed as dangerous, people distance themselves

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<sup>30</sup> Article 53(1)(c) of the Constitution.

<sup>31</sup> Sections 142 and 144 of Act No. 29 of 2022.

<sup>32</sup> See KNHP 2016.

<sup>33</sup> CRC Committee General Comment 21 of 2017 on Children in Street Situations.

<sup>34</sup> Gayapersad A et al. "Using a sociological conceptualization of stigma to explore the social processes of stigma and discrimination of children in street situations in western Kenya" (2020) 139 *Child Abuse & Neglect*.

<sup>35</sup> Gayapersad A et al. (2020) at 5–6.

from them.<sup>36</sup> The negative socially constructed identity imposed on street children devalues their social status, hence reducing their life chances.<sup>37</sup> Society views these children as devious and rebellious delinquents who do not want to follow the rules and go to school but want the “freedom” of being on the streets.<sup>38</sup> Examples of terms that are used when referring to street children include “children on the street”, “children of the street”, “runaway children”, “throwaway children”, “children living and/or working on the street”, “homeless children” and “street-connected children”.<sup>39</sup>

## **2.2 Definition adopted by the Committee on the Rights of a Child**

The Committee on the Rights of the Child, in its General Comment No. 21 of 2017, adopted the term “children in street situations”. This term includes children who depend on the streets to live and/or work, whether alone, with peers, or with family; it also includes a wider population of children who have formed connections with public spaces and for whom the street plays a vital role in their everyday lives and identities.<sup>40</sup> The Committee recognised that this wider population includes children who periodically – that is, not always – live and/or work on the streets and children who do not live or work on the streets but who regularly accompany their peers, siblings, or families in the streets. The Committee observed that, concerning children in street situations, “being in public spaces” includes spending a significant amount of time on streets or in street markets, public parks, public community spaces, squares, and bus and train stations. It does not include public buildings such as schools, hospitals, or other comparable institutions.<sup>41</sup>

In this article, the term “street children” will be used, despite its negative connotations, because it is the term which is commonly used in Kenya. The article explores how negatively labelling street children in Kenya has harmed them by “othering”, stigmatising, and stereotyping them as criminals, delinquents, and drunkards.<sup>42</sup> Street children have suffered unfair discrimination and social exclusion that has hampered their access to socio-economic rights and violated their constitutionally entrenched rights to dignity, equality, and to not to be unfairly discriminated against.<sup>43</sup> “Othering”, as Powell and Menendian explain, is a process in which persons who are considered

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<sup>36</sup> Gayapersad A et al. (2020) at 8.

<sup>37</sup> Gayapersad A et al. (2020) at 8.

<sup>38</sup> Gayapersad A et al. (2020) at 8.

<sup>39</sup> CRC Committee General Comment No. 21 at para 4.

<sup>40</sup> CRC Committee General Comment No. 21 at para 4.

<sup>41</sup> CRC Committee General Comment No. 21 at para.4.

<sup>42</sup> Brons LL “Othering, an analysis” (2015) 6(1) *Transcience a Journal of Global Studies* at 26–27. See also Makofane M “A conceptual analysis of the label: Challenges for the helping professions” (2014) 50(1) *Social Work/Maatskaplike Werk* 134–145.

<sup>43</sup> See articles 27 and 28 of the Constitution.

different from us become increasingly alien and distant, as a result creating a wall of division between “insiders” and “outsiders”, with the ones who are viewed as outsiders being perceived as “others” and less-than-wanted.<sup>44</sup> Street children are categorised as “other” via the labels assigned to them, a process of marginalisation that harms their life prospects and deepens their social exclusion.

### 2.3 Factors that push children to the streets

A range of factors push children to the streets.<sup>45</sup> According to a study conducted in Nairobi,<sup>46</sup> these include corporal punishment, mistreatment, lack of food, parental conflicts, peer pressure, poverty, parental alcoholism, broken families, divorce, separation, harmful cultural practices (such as early marriage and female genital mutilation), large families, truancy, academic challenges, stubbornness, single parenthood, challenges due to parental illness (especially among parents with HIV/AIDS), drug abuse, orphanhood, lack of school fees, lack of parental care (neglect), and search for freedom or leisure. Another cause of homelessness in Kenya is forced eviction (which is discussed in subsequent sections).

Article 27 of the Constitution guarantees that everyone is entitled to equal protection and benefit under the law.<sup>47</sup> The Constitution prohibits direct and indirect discrimination on stated grounds.<sup>48</sup> More importantly, the Constitution places an obligation on the state to take measures that include affirmative-action programmes and policies to redress disadvantage suffered by individuals or groups due to discrimination in the past.<sup>49</sup> Similarly, section 9(1) of the Children’s Act<sup>50</sup> prohibits discrimination on grounds including “other status”, in the context of this article “ the ground of “other status” means street children. The above provisions suggest that the prohibition of discrimination is supported by legislation and that street children should not be considered as “others” and be discriminated against. That is why, in the case of *Gabriel Nyabola v Attorney General & Others* on the right to basic education, the court

<sup>44</sup> Powell J A & Menendian S “The problem of othering: Towards inclusiveness and belonging” (2016) 1(1) *Othering & Belonging* 14–39.

<sup>45</sup> Consortium for Street children “Street children are some of the most vulnerable children on the planet” (n.d) available at <https://www.streetchildren.org/about-street-children/> (accessed 24 January 2024). See also Hassen I & Madelyn RM “Socio-economic conditions of street children: The case of Shasheme Town, Oromia National Regional state” 2018 10(8) *International Journal of Sociology and Anthropology* 1.

<sup>46</sup> Miriti MM “An investigation in the challenges of rescuing, rehabilitating and reintegrating street children: A case study of rehabilitation centers within Nairobi” (Master’s thesis, University of Nairobi, 2013) at 56. See also Kieni SK *Factors influencing influx of street children in urban areas: A case of street children projects in Meru Town-Kenya* (Master’s thesis, University of Nairobi, 2015) at 5.

<sup>47</sup> Article 27(1) of the Constitution.

<sup>48</sup> Article 27(5) of the Constitution.

<sup>49</sup> Articles 27(6) and 56 of the Constitution. See also section 10 of the Children’s Act No. 29 of 2022.

<sup>50</sup> The Children’s Act No. 29 of 2022.



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emphasised that the right not to be discriminated against is a right that has to be fulfilled immediately and is not subject to progressive realisation.<sup>51</sup>

It is important to note that protecting street children's rights in Kenya has not been effective. The precarious position of street children demands that they should enjoy greater visibility in terms of protection and promotion and that there should be accountability for the violation their rights. In view of Kenya's membership of the UN, AU, and EAC, and the underlying obligation on it to comply with human rights standards, street children should be given support through the adoption of measures to elevate their socio-economic status. In other words, because the importance of protecting the rights of street children has been recognised at the international and regional level, Kenya has to comply with the obligations imposed by human rights treaties with respect to protecting street children's right to adequate housing or shelter.

### 3 THE REALISATION OF THE RIGHT TO SHELTER FOR STREET CHILDREN

The UN Committee on Economic Social Cultural Rights (the Committee), in its General Comment No. 4 on the right to adequate housing, observed that the right to adequate housing must be interpreted broadly to mean more than just having a roof over one's head. As such, the right to adequate housing or shelter entails that the beneficiary must have a sense of security, peace, and dignity – all of which is at odds with the conditions in which street children and families live.<sup>52</sup> The Constitutional Court of South Africa, in *Government of the Republic of South Africa and Others v Grootboom and Others*,<sup>53</sup> held that the right to access housing cannot be seen in isolation, since it is closely linked to other socio-economic rights, and that the state's action must consider human dignity.<sup>54</sup> In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*,<sup>55</sup> the Court underlined that taking away a person's right to housing, be it through eviction or another means, causes such person to suffer an indignity. Furthermore, in *Sarrahwitz v Martiz N O and Others*,<sup>56</sup> the Court stressed that access to adequate housing is linked to dignity and self-worth; conversely, the loss of one's home causes one to suffer an indignity.

In Kenya, the Supreme Court held in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*<sup>57</sup> that the inability of citizens to acquire title to land condemns them to the indignity of being dwellers in an "informal settlement". Therefore, Kenya has an obligation to protect the dignity of informal-settlement dwellers or street children, in keeping with article 28 of the

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<sup>51</sup> [2014] eKLR.

<sup>52</sup> CESCR General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant). Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights on 13 December 1991 at para 7.

<sup>53</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC).

<sup>54</sup> *Grootboom* (2001) at para 24.

<sup>55</sup> *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

<sup>56</sup> *Sarrahwitz v Martiz NO and Others* 2015 (4) SA 491 (CC).

<sup>57</sup> [2021] e KLR.

Constitution which recognises the protection of the inherent right of dignity. Worldwide, more than 100 million people are homeless, and more than one billion inadequately housed, with there being no indication that this number will be decreasing.<sup>58</sup> This is relevant in Kenya, where the right to adequate housing or shelter for homeless people and street children has not been prioritised.

Street children who have no place to call home often become homeless due to many factors – including forced evictions. In *Ibrahim Sangor Osman and 1,122 others v The Minister for Internal Security and Provincial Administration, Minister for Lands, Attorney General and Municipal Council of Garissa*,<sup>59</sup> police and municipal officials had evicted the applicants from land they had occupied since 1940 in the Medina Location of Garissa Municipal Council. Their houses were demolished, leaving them without alternative accommodation. The victims of the evictions included children, women, and the elderly. Some of the children were forced to live and sleep either in the open or in temporary shelters, where they were exposed to harsh conditions and lacked access to basic entitlements by right, such as health-care services, security, food, water and sanitation, and education.

The *Ibrahim Sangor case* serves as an example of how the rights of individuals affected by forced eviction in Kenya, although not explicitly addressing street children, can indirectly impact street children, particularly those residing in the eviction areas which may include their basic right to shelter. Given the extent of the rights violations at issue, the case attracted the involvement of diverse human rights organisations;<sup>60</sup> that sought to intervene as *amicus curia* in order to uphold the rights and freedoms enshrined in the Constitution.<sup>61</sup> This was a matter that drew global attention to the applicants' struggle to access adequate shelter. As the Committee on Economic, Social and Cultural Rights has emphasised, "[A]dequate shelter means adequate privacy, space, security, adequate lighting and ventilation, infrastructure and location with regard to work and basic facilities at a reasonable cost."<sup>62</sup> The indicators of adequacy listed by the Committee relate to legal security of tenure; the availability of services, materials, facilities and

<sup>58</sup> UN "First-ever United Nations' resolution on homelessness" (2020) Department of Economic and Social Affairs Social Inclusion available at <https://www.un.org/development/desa/dspd/2020/03/resolution-homelessness/> (accessed 20 June 2023).

<sup>59</sup> HCCP No. 2 of 2011–Embu.

<sup>60</sup> The Global Initiative for Economic, Social and Cultural Rights, Socio-Economic Rights Institute, Community Law Centre, Centre for Economic and Social Rights, Centre for Equality Rights in Accommodation and the Social Rights Advocacy Centre, members of the International Economic, Social and Cultural Rights Network (ESCR-Net), Adjudication Working Group, and Malcolm Langford, Co-Coordinator of the ESCR-Net Adjudication Working Group and Director of the Socio-Economic Rights Programme (Norwegian Centre for Human Rights, University of Oslo).

<sup>61</sup> Such as articles 22(1), (2) and (3), 23(1) and (3), 165(1) and (3), 26(1) and (3), 27(1) and (2), 28, 29(c), (d), and (f), 35, 40(1)(a), (b), (3) and (4), 43(1)(b), (c) and (f), 45(1), 47(1) and (2), 50(1), 53(c), (d), and (2), and 57(b) and (c) of the Constitution.

<sup>62</sup> Paragraph 7 of General Comment No. 4, which refers to the Commission on Human Settlements as well as the GSSY – both of which emphasise the need for adequate shelter.

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infrastructure; affordability, habitability, accessibility, and location; and cultural adequacy.

As stated earlier, the Constitution provides a framework for the protection of the right to shelter<sup>63</sup> for every person, including street children.<sup>64</sup> The expectation, in view of international human rights law and the constitutional framework, is that Kenya shall respect, protect, promote, and fulfil the realisation of the right to shelter in its laws, policies, and practices.<sup>65</sup> However, there is no clear policy guidance on addressing homelessness in Kenya, a problem which is aggravated by the presence of street families and street children in urban areas.<sup>66</sup> The gaps persist in various areas including laws, policies, programs, knowledge, and information, among other factors; concerning discriminatory practices against street children in Kenya. These shortcomings impede the complete achievement of adequate shelter for this marginalised group.<sup>67</sup> The Kenya National Census for Street Families Report 2018 indicated that there were 46,639 people in street families at the time of the census, with ages ranging from 10 to 34 years; however, the report failed to mention how many persons in total below the age of 18 were on the streets. It defined “street families” as persons who experience homelessness and are subjected to living on the streets in cities, towns, market centres, and the like.

The report<sup>68</sup> noted that the issue of homelessness stemmed from the pre-independence era when segregation and unfair discrimination were practised by colonialists, who reserved the right to housing first for Europeans, then Asians, and lastly Africans; as a result, many Africans suffered homelessness,<sup>69</sup> a problem that persists to this day given that, in the post-independence era, solutions to it have been hampered by challenges such as poverty and rapid population growth.<sup>70</sup> Notwithstanding these challenges, the right to access adequate housing or shelter, as required by law, must be enjoyed by every person, street children included. However, the Office of the High Commissioner for Human Rights (OHCHR) has observed that people are still inadequately housed.<sup>71</sup> Similarly, the United Nations Children’s Fund (UNICEF) has estimated that there are approximately 100 million street children worldwide, with that number constantly

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<sup>63</sup> Article 43(1)(b) of the Constitution.

<sup>64</sup> Article 53(1)(b) of the Constitution.

<sup>65</sup> Rabar B & Wambu P “Assessment of the realisation of the right to housing in Kenya 2011–2012” (2012) *Hakijamii* available at <https://www.humanitarianlibrary.org/sites/default/files/2013/07/assessment.pdf> (accessed 16 June 2023). See also article 21(1) of the Constitution.

<sup>66</sup> Rabar & Wambu (2012) at 35.

<sup>67</sup> Rabar & Wambu (2012) at 35.

<sup>68</sup> Kenya National Census for Street Families Report 2018. See also KNHP 2016.

<sup>69</sup> See KNHP 2016.

<sup>70</sup> See KNHP 2016.

<sup>71</sup> OHCHR “The right to adequate housing” Fact Sheet No. 21 of 2009/ Rev. 1 at 1.

growing.<sup>72</sup> Street children are acutely vulnerable and marginalised, and experience severe and persistent human rights violations.<sup>73</sup> In turn, the World Bank Institute (WBI) has stated that street children are an alarm bell signaling the dire need for social development and poverty-reduction policies to improve the situation in the community at large and prevent more young people from becoming marginalised.<sup>74</sup> The WBI further noted that while preventive interventions are essential, those children already facing the hardships of street life need immediate opportunities for human development via special protection programmes.<sup>75</sup>

Considering the importance of the right to access adequate housing<sup>76</sup> and the interrelatedness or indivisibility of rights,<sup>77</sup> it follows that a violation of the right to shelter for street children in Kenya amounts to a violation of their other human rights.<sup>78</sup> In the KNHP 2016, the Kenyan government acknowledged that the provision of housing can break the vicious cycle of poverty that so often forces poor children to be on the streets.

The UN Department of Economic and Social Affairs – Social Inclusion (UNDESASI) indicated that homelessness and inadequate housing, unsafe environments, and social discrimination and exclusion are among the manifestations of poverty.<sup>79</sup> Consequently, various interventions ought to be put in place in line with national strategies to ensure that access to socio-economic rights such as adequate housing is prioritised.<sup>80</sup> Street children are exposed to many social challenges, including drug abuse, violence,

<sup>72</sup> Cyc-online “Street children and homelessness” (2004) available at <https://cyc-net.org/cyc-online/cycol-0904-homelessness.html> (Accessed 22 January 2023).

<sup>73</sup> Consortium for Street Children “Street children are some of the most vulnerable children on the planet” available at <https://www.streetchildren.org/about-street-children/> (accessed on 30 April 2023).

<sup>74</sup> Volpi E “Street children: Promising practices and approaches” (2002) World Bank Institute available at <https://bettercarenetwork.org/sites/default/files/Street%20Children%20-%20Promising%20Practices%20and%20Approaches.pdf> (accessed 22 January 2023).

<sup>75</sup> Volpi (2002).

<sup>76</sup> OHCHR available at <https://www.ohchr.org/en/special-procedures/sr-housing/human-right-adequate-housing> (accessed 24 January 2023).

<sup>77</sup> Vienna Declaration and Plan of Action 1993.

<sup>78</sup> The UN Committee on Economic, Social and Cultural Rights engaged at its fourth session in a “general discussion on the right to housing” (E/C.12/1990/3), during which it noted that the right to housing is bound to be violated. See also paragraph 9 of General Comment No. 4 of the CESCR, where the committee observes that the right to adequate housing cannot be viewed in isolation from other human rights contained in the two international covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination.

<sup>79</sup> UNDESASI “Eradication of poverty” at para 19 available at <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995/wssd-1995-agreements/pawssd-chapter-2.html> (accessed 28 February 2023).

<sup>80</sup> UNDESASI at para 25. See also KNHP 2016 at 1–3.

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exploitation, and sexual abuse.<sup>81</sup> Many of them live and work on the street and become victims of human trafficking.<sup>82</sup>

The AU<sup>83</sup> noted with concern the seriousness of the injustices widely suffered by children in Africa, and recognised that even though certain steps have been taken, a gap remains between policy and practice. African children, and street children in particular, deserve protection against threats to their lives and human dignity. The Kenya National Human Rights Commission is among the constitutional commissions mandated to promote and protect children's rights<sup>84</sup> as part of its wider mandate to receive complaints, investigate, redress, monitor, and report on the country's observance of human rights in all spheres of life, both public and private. The National Gender and Equality Commission<sup>85</sup> is another constitutional commission with a mandate to promote equality and non-discrimination, and its functions are stipulated in section 8 of the National Gender and Equality Act 2011. Yet despite these legal assurances, street families in general and street children in particular do not benefit from the two commissions' interventions. Owing (in part) to the problem of inaccurate data, street families and street children are not included in planning, budgetary allocations, and decision-making. The commissions have failed to act within their mandate in regard to assisting the street children and street families.

Article 10(2)(b) of the Constitution enshrines inclusiveness among the national values and principles of good governance that bind all state organs. However, Alan et al.<sup>86</sup> note the difficulties that are associated with discussing the concept of social inclusion without social exclusion. They posit that social exclusion is synonymous with poverty, inadequate social participation, lack of social integration, and lack of power.<sup>87</sup> Sen, for his part, has noted that social exclusion may also occur as a result of a lack of the capabilities that are required for one to participate in experiences that lead to social inclusion.<sup>88</sup> Evans and Deluca opine that, owing to that non-participation, children

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<sup>81</sup> Chimdessa a & Cheire A "Sexual and physical abuse and its determinants among street children in Addis Ababa, ethiopia 2016" (2018) 18(1) *BMC pediatrics* 304 <https://doi.org/10.1186/s12887-018-1267-8>.

<sup>82</sup> First session of the AU Conference of Ministers in Charge of Social Development Windhoek, Namibia 27–31 October 2008 at 31.

<sup>83</sup> Second Pan-African Forum on Children: Mid-Term Review 29 October – 2 November 2007 Cairo, Egypt.

<sup>84</sup> Article 59 of the Constitution.

<sup>85</sup> Established by article 248(2)(a) of the Constitution, as well as the National Gender and Equality Act 15 of 2011.

<sup>86</sup> Alan H, Gray M & Edwards B "Social inclusion: Origins, concepts and key themes" (2008) at 4 available at <https://apo.org.au/sites/default/files/resource-files/2008-10/apo-nid8799.pdf> (accessed 15 February 2023).

<sup>87</sup> Alan et al. (2008).

<sup>88</sup> Sen A *Social exclusion, concept, application, and scrutiny* Asian Development (2000) at 4–5.

suffer from social exclusion when their rights listed under the CRC are violated due to their inability to participate in society on equal terms.<sup>89</sup>

The absence of children's participation in dialogues concerning social exclusion can result in the intricacies highlighted by Levitas et al,<sup>90</sup> who argue that social exclusion is a multifaceted and intricate process. The inability to participate affects both the quality of life of individuals and the cohesion of society as a whole.<sup>91</sup> Alan et al. observe that, in order to alleviate social exclusion and embrace social inclusion, interventions have to be developed to respond to the needs of particular groups, in this case street children.<sup>92</sup>

The World Bank understands social inclusion as the process of improving the terms on which individuals and groups take part in society, one that enhances the opportunities and dignity of those who are disadvantaged based on their identity.<sup>93</sup> Social inclusion therefore implies an aspiration to empower and promote the social, economic, and political inclusion of all members of society, all of which is in line with Goal 10 of the SDG Agenda of 2030.

The Constitution under article 10(2)(a) enshrines the participation of the people, while article 10(2)(b) goes further to state that human dignity, social justice, inclusiveness, equality, non-discrimination, and protection of the marginalised are components of the national values and principles that bind everyone, including all organs of the state.<sup>94</sup> It is no secret that street children worldwide are socially excluded and marginalised members of society,<sup>95</sup> but the problem is severe in developing nations, where the lack of adequate social infrastructure and socio-economic programmes threatens the developmental needs of street children. Street children are marginalised and the least assisted in society.<sup>96</sup> During their early childhood, they lack access to major institutions such as family, education, health-care services, and adequate housing, and are also underprivileged in social relations and access to resources. This combination of factors indicates that they are socially excluded.<sup>97</sup> The scenario is no different in Kenya, as documented in the Street Families Census Report 2018 and the Draft Street Families Rehabilitation Policy 2020.

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<sup>89</sup> Evans P & Deluca M *Social exclusion and children-creating identity capital: Some conceptual issues and practical solutions* (2000) at 4 available at <https://www.oecd.org/education/school/1856627.pdf> (accessed 11 March 2023).

<sup>90</sup> Levitas R et al. *The multi-dimensional analysis of social exclusion* Department for Communities and Local Government (DCLG) (2007) at 18, 21 & 25.

<sup>91</sup> Levitas et al. (2007).

<sup>92</sup> Alan et al. (2008).

<sup>93</sup> Volpi (2002).

<sup>94</sup> Article 10(1) of the Constitution.

<sup>95</sup> Fantahun T & Taa B "Children of the street: The cause and consequence of their social exclusion in Gondar city, North-West Ethiopia" (2022) 8(1) *Cogent Social Sciences* at 2.

<sup>96</sup> Adeyemi OS & Oluwaseun O "Cultural factors promoting streetism among urban children in Ibadan Metropolis, Nigeria" (2012) 2 (9) *Research on Humanities and Social Sciences* 41–47.

<sup>97</sup> Adeyemi & Oluwaseun (2012).

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This article argues that if social inclusion were to be embraced in housing laws, policies, and programmes, as envisaged in the international, regional, and national legal frameworks, it would go a long way to alleviating the suffering of Kenya's street children, the right to shelter is central to achieving basic human rights and is essential for Kenya to fulfill its minimum core international obligations.<sup>98</sup>

### 4 MINIMUM-CORE OBLIGATION APPROACH AND THE RIGHT TO SHELTER

The minimum core obligation implies the level of socio-economic provision required to fulfill people's fundamental rights and needs, where such needs can be understood as the universal preconditions necessary for every human being's survival.<sup>99</sup> The essence of the legal obligation required by any government is to strive to attain economic and social aspirations by prioritising basic needs such as health-care services, adequate housing, nutrition, and education.<sup>100</sup> The priority of the rights of survival and basic needs is a natural consequence of the right to personal security.

In *Government of the Republic of South Africa & others v Grootboom & others*, the Constitutional Court of South Africa had to interpret how socio-economic rights have the potential to affect the lives of persons who are economically disadvantaged and vulnerable. The judicial approach to the right of access to adequate housing ought to recognise a minimum core obligation. In considering how socio-economic rights (such as the right to access adequate housing) should be interpreted in terms of the ICESCR,<sup>101</sup> the Committee responsible for the interpretation and application of the Covenant has released general comments that seek to give content to the obligations imposed by the Covenant.<sup>102</sup> The Committee has stated that socio-economic rights contain a minimum core obligation that must be fulfilled by state parties. Such an obligation requires every state party to fulfil certain minimum essential levels of the rights in question; a failure to do so constitutes a *prima facie* failure to discharge the obligations under the ICESCR.<sup>103</sup> In his judgment, Yacoob J referred to the approach adopted by the General Committee.<sup>104</sup> Although it did not reject the minimum-core-obligation approach outright, the judgment left room for its development and adoption in the future.

<sup>98</sup> See ICESCR Committee General Comment No. 3 of 1990.

<sup>99</sup> See Bichat D "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 119(3) *South African Law Journal* 484.

<sup>100</sup> Annual Report 1979–1980, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.50, doc. 13 rev. 1 at 2 (1980) available at <http://www.iachr.org/annualrep/79.80eng/chap.6.htm>. (accessed 28 June 2023).

<sup>101</sup> See general comments 3 and 4 of the ICESCR Committee.

<sup>102</sup> See General Comment No. 3 at para 10.

<sup>103</sup> *Grootboom* (2001) at para 24. See also Mutinda P "On the right to adequate food vis-a-vis the requisite duty to respect in Kenya" (2016) *Nairobi Law Monthly* 22 August 2016 (FN 111).

<sup>104</sup> *Grootboom* (2001) at paras 30–34.

The minimum core obligation therefore applies in cases where certain groups of people are underprivileged due to their social status in the community, for instance children and elderly people. In this context, the state is required to meet its obligation in ensuring that the essential needs of the underprivileged members of society are met.<sup>105</sup> In *Ntandazeli Fose v The Minister of Safety and Security*,<sup>106</sup> the court held that appropriate awards can be made to compensate injured persons for the loss that they suffered as a result of the violation of their constitutional rights. At the same time, the CRC Committee, in its General Comment No. 21<sup>107</sup> expounding on state obligations under article 4 of the CRC, held that states parties are under a duty to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. Furthermore, the CRC Committee expects states to interpret “development” as a holistic concept that encompasses the child’s physical, mental, spiritual, moral, psychological, and social development. However, street children have a limited range of activities and behaviours from which to choose for their survival and development.<sup>108</sup> The lack of available resources often is used by the states as a shield for not complying with the minimum core obligations, as expressed in the *Grootboom* case. Yet the government’s regressive measures, as demonstrated in *Ibrahim Sangor* mentioned above, contradict the minimum-core obligation requirement.

The Supreme Court of Kenya, in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*,<sup>109</sup> a case dealing with the rights of more than 3,000 residents of Mitumba village who had been evicted, held that Kenya has an obligation to ensure the progressive realisation of their right to housing. However, the right of the residents to non-discrimination was an immediate obligation, which implies that any housing laws and policies which are discriminatory to vulnerable persons such as street children should be addressed straight away so as to meet the minimum core obligation of non-discrimination in regard to the right to housing or shelter for street children.

Courts in various jurisdictions have interpreted the minimum core obligation differently.<sup>110</sup> Chowdhury refers to South Africa, the United States of America, Columbia,

<sup>105</sup> Mutinda (2016).

<sup>106</sup> *Ntandazeli Fose v Minister of Safety and Security* (case CCT 14/96). See also *Minister of Police vs Vongani Sharon Mboweni & Another* (657/2013) ZASCA 107; *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* CCCT 20/04.

<sup>107</sup> General Comment No. 21 of 2017 on children in street situations provides authoritative guidance to states on developing comprehensive, long-term national strategies on children in street situations by using a holistic child-rights approach that addresses both prevention and response in line with the CRC.

<sup>108</sup> General Comment No. 21 of 2017 at para 31.

<sup>109</sup> Petition 3 of 2018, Judgement of the Supreme Court of 11 January 2021 (eKLR).

<sup>110</sup> See Chowdhury J (2009) “Judicial adherence to a minimum core approach to socio-economic rights: A comparative perspective” Cornell Law School Inter-University Graduate Student Conference Papers (Paper 27) at 7 available at



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and India, and notes that certain courts are willing to embrace the minimum-core approach, as is the case with the Colombian Constitutional Court and, to a lesser extent, the New York Court of Appeals and the Indian Supreme Court; by contrast, the Constitutional Court of South Africa is reluctant to fully embrace the concept of minimum obligations.<sup>111</sup> From these few examples, it would appear that judicial adherence to the minimum core obligations is uncertain and not explicit. The South African Constitutional Court has expressly rejected the minimum-core approach, yet the notion of minimum core obligations seems to be an inconsistent premise, depending on which socio-economic rights are subject to litigation.

The Colombian Constitutional Court explicitly embraces the minimum-core approach in socio-economic rights litigation. However, the Indian Supreme Court makes no explicit mention of the minimum core, although it uses the concepts such as “the essential minimum of the right” and “what is minimally required” to mean the minimum core.<sup>112</sup> Thus, there is a more domesticated understanding of the concept, one which has been confirmed by scholars as constituting the minimum core. Ironically, the court in *Grootboom* rejected the minimum-core approach used by the CESC. <sup>113</sup> This position was taken in *Minister of Health v Treatment Action Campaign*,<sup>114</sup> which challenged the government’s policy of restricting the provision of Nevirapine, a drug for preventing mother-to-child transmission of HIV, to a limited number of pilot sites.

It is argued that the prioritisation of the socio-economic needs of vulnerable groups such as street children found in article 20(5)(b) of the Constitution coincides with the minimum core obligation that it is linked to the standard of progressive realisation of basic human rights. Likewise, article 43 of the Constitution provides that everyone is entitled to economic and social rights; similarly, article 53(1)(c) provides that every child has a right to basic shelter. Therefore, the two articles refer to non-discrimination and shelter or adequate housing, which are within the minimum core obligation that must be used as guideline in the promulgation of laws and policies in Kenya on protecting the rights of street children.

It is on the above grounds that this article advocates for Kenyan compliance with the minimum core obligations that must be adhered to by law- and policy-makers, interpreters, adjudicators, and implementers to ensure that street children’s right to shelter and other rights are fulfilled as envisaged by the CESC in General Comment No 3.<sup>115</sup> Special or affirmative-action measures, enshrined in articles 27(6) and 56 of the Constitution, are effective, as demonstrated by the implementation of special assistance

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[https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps\\_clacp](https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_clacp) (accessed 29 June 2023).

<sup>111</sup> Chowdhury (2009) at 12.

<sup>112</sup> Chowdhury (2009) at 12.

<sup>113</sup> *Grootboom* (2001) at para 24.

<sup>114</sup> *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

<sup>115</sup> General Comment No. 3 of 1990 at para 10.

programmes in Kenya that support the most vulnerable members of society, including orphaned and vulnerable children, and which are anchored on affirmative-action principles.<sup>116</sup> However, these programmes have not been extended to benefit street children. Similarly, the 2006 Presidential Decree is among the country's success stories because it provided that, in all public service appointments and promotions in senior positions, 30 per cent of them are reserved for women.<sup>117</sup> Likewise, in 2013, a presidential decree stipulated that 30 per cent of government procurement contracts are to be allocated to women without competition from established firms, a measure which has empowered women financially.<sup>118</sup> Furthermore, with the establishment of the Women Enterprise Fund in 2007 and the UWEZO Fund as a flagship programme in 2020, women have been able to access affordable credit from the government together with training, which has boosted their businesses and empowered them.<sup>119</sup> These are but a few examples that demonstrate how this model has been successful; if it were applied to street children, it could contribute to the promotion of their right to shelter as well as their other human rights.

## 5 THE SDGS AND THE RIGHT TO SHELTER AND ADEQUATE HOUSING

Adequate and affordable housing leads to benefits in health, education, and economic opportunities.<sup>120</sup> It is a ladder out of poverty, which is why it is an important component of the 2030 agenda for sustainable development and a driver for achieving many of the SDGs. SDG 1, which calls to end poverty in all its forms everywhere,<sup>121</sup> underlines the connection between poverty and homelessness. The latter violates the right to human dignity set out in articles 1 and 22 of the UDHR.<sup>122</sup> Additionally, energy poverty is a specific form of housing poverty, with social, environmental, and health impacts on

<sup>116</sup> Vision 2030 "Affirmative Action" (n.d) available at <https://vision2030.go.ke/project/affirmative-action/> (accessed 29 January 2024).

<sup>117</sup> Kilonzo EM & Ikamari L "Impact of affirmative action on quality of service delivery in the public sector of Kenya: A comparative case study of the ministry of state in the office of the president and ministry of higher education" 2015 *Journal of Education and Practice* 6(3) at 114.

<sup>118</sup> Pietilä H *The Unfinished Story of Women and the United Nations: Human Rights are Women's Rights* NGLS Development Dossiers [TD/]UNCTAD/NGLS/2007/1 New York; Geneva: UN, Non-Governmental Liaison Service (2007) at 21 available at <https://digitallibrary.un.org/record/592517?ln=en> (accessed 17 April 2024).

<sup>119</sup> Country position paper at 21.

<sup>120</sup> Habitat for Humanity "Housing and the Sustainable Development Goals: The transformational impact of housing" (n.d) at 5 available at <https://www.habitat.org/sites/default/files/documents/Housing-and-Sustainable-Development-Goals.pdf> (accessed 20 May 2023); Shulla K & Kószeghy L (2021) *SDG booklet: Housing ensures Sustainable Development* available at [https://www.habitat.org/sites/default/files/documents/SDG%20booklet\\_1.pdf](https://www.habitat.org/sites/default/files/documents/SDG%20booklet_1.pdf) (20 May 2023).

<sup>121</sup> Crisis "How Crisis' work relates to the Sustainable Development Goals" available at <https://www.crisis.org.uk/media/247232/crisis-and-the-un-sustainable-development-goals.pdf> (accessed 27 May 2023). See also Habitat for Humanity at 8.

<sup>122</sup> OHCHR Special Rapporteur on the Right to Adequate Housing "Homelessness and human rights" (n.d) available at <https://www.ohchr.org/en/special-procedures/sr-housing/homelessness-and-human-rights> (accessed 20 May 2023).

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wider communities – contrary to SDG 7.<sup>123</sup>

SDG 3 underscores the importance of ensuring healthy lives and promoting well-being for everyone, including those who are homeless and street children. It is undeniable that the experiences faced by homeless persons and street children significantly affect their physical and mental health. People who are homeless are three times more likely than the general population to live with chronic health conditions. Furthermore, homelessness has a significant impact on people's life expectancy. Despite this, people experiencing homelessness face barriers to accessing health care, so there is a need for the health and social care system to play its full role in ending homelessness. The components of healthy living include access to safe and affordable water and sanitation, both as a human right and in line with SDG 6.<sup>124</sup> Inadequate housing is a major cause of exposure to hazards and health threats resulting from inadequate services. To achieve SDG 6, affordable housing is needed in order to improve the management of waste generated by cities.<sup>125</sup> SDGs 2, 4, 10, 11, and 16 are also relevant in addressing issues of adequate housing, social inequality, hunger, quality education, peace, justice, and strong institutions. For example, making cities and human settlements inclusive, safe, and resilient is in line with SDG 11. It is emphasised that lack of access to safe, stable, affordable housing is one of the main drivers of homelessness for street children.<sup>126</sup>

### 6 CONCLUSION

Street children are the most vulnerable members of society. This article examined the situation of such children in Kenya, and highlighted that their right to shelter and adequate housing, along with other basic rights, is not being prioritised by the government. During the drafting of the Kenyan Constitution, it became clear that, in addition to civil and political rights, socio-economic rights such as housing, food, water, medical care, and education had to be expressly included in it. However, there is still a huge disparity between the affluent, on the one hand, and, on the other, disadvantaged groups such as street children, who are vulnerable due to living in harsh conditions and being exposed to social exclusion (including stigmatisation), sexual abuse, and human trafficking. It has been noted that the courts are not capacitated enough to enforce street children's rights. As a result, the constitutional guarantee of these rights remains an empty promise.

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<sup>123</sup> Habitat for Humanity at 8

<sup>124</sup> Habitat for Humanity.

<sup>125</sup> Okitasari M, Mishra R, Masuda H & Suzuki M (2021) *Harnessing adequate, safe, and affordable housing for the urban poor to achieve the SDGs in cities* United Nations University Institute for the Advanced Study of Sustainability, Policy Brief No. 29 of 2021 at 2 available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://collections.unu.edu/eserv/UNU:8558/UNU-IAS-PB-No29-2021.pdf> (accessed 3 July 2023).

<sup>126</sup> Crisis "How Crisis' work relates to the Sustainable Development Goals" at 11. The organisation stresses the importance that housing has in attaining the SDGs, and asserts that access to adequate housing is central to achieving inclusive, safe, resilient and sustainable cities.

This contradicts the constitutional obligation on the state to respect and promote human rights, as required by international and regional human rights laws. Socio-economic rights were cautiously included in the Constitution by using the wording from international human rights instruments. Such inclusion (in the case of South Africa) has allowed a number of court judgments – such as those in *Grootboom* and *Treatment Action Campaign* – to attempt to address issues of access to socio-economic rights, including those to adequate housing. While these can be seen as victories for the judicial organ of the state, it is a common cause, of course, that courts cannot build houses, hospitals, and schools for street children. As such, political will and the effective implementation of the affirmative-action measures envisioned in the Constitution of Kenya are necessary in order to meet the minimum core obligations. In keeping with this, the government must implement legislative and other measures to ensure the progressive realisation of street children’s rights to adequate housing and other basic services.

The phenomenon of street children is clearly more than a legal problem, and hence the solution lies not only in law but in the adoption of a multifaceted approach. Nevertheless, law and policy are the starting-point for the development of a framework that would enable multiple approaches to be taken. For instance, programmes under the Social Assistance Act, such as cash transfers<sup>127</sup> to vulnerable persons, could be extended to benefit street families and street children – similarly so with other services under the Act, such as rehabilitation, counseling, adoption, day-care services, and community development.<sup>128</sup> Street children and families could also benefit from the Social Health Insurance Act,<sup>129</sup> which envisages universal health for all persons.

The main challenge with these programmes, however, is that registration under them is mandatory and linked to identification documents, which street children often do not have, resulting in their exclusion. It is suggested, then, that existing governmental systems such as the children's offices which fall under the Directorate of Children's Services (DCS) which was established in terms of the Children Act of 2022 must ensure the protection and welfare of children. For example, the DCS must have effective mechanisms that deal with rescuing children who need care and protection, such as victims of human trafficking and harmful cultural practices, keep records, and provide alternative care and shelter for abandoned or any child who needs refuge or safety. Similarly, the DCS can trace the parents or guardians of any lost or abandoned children and facilitate their reunion or return them to their lawful residences. Similarly, arrangements to intervene on behalf of children who need care and protection and are in danger of imminent injury or harm, where possible, secure the removal of such children and take them to a place of safety. Such interventions can include providing legal assistance, especially for street children who have been arrested or placed in

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<sup>127</sup> Section 2 of the Social Assistance Act 24 of 2013. See also Kenya National Social Assistance Policy 2011.

<sup>128</sup> Section 2 of the Social Assistance Act.

<sup>129</sup> Sections 2, 25, 26 and 27(c) of the Social Health Insurance Act 16 of 2023.

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police custody. Other interventions can include; providing mediation services for family-related disputes that involve street children and their parents or guardians and reconciling them while providing proper supervision to the street children's rehabilitation centres and homes promoting the welfare of any children admitted therein.<sup>130</sup>

In addition to that, the government should create registers of, and develop unique identification methods for, street children so as to enable them to benefit from the programmes, or work in collaboration with other existing systems such as gender and children departments at the county governments or the chiefs' offices in the villages.

The minimum core obligation as regards shelter or adequate housing is set out in the CESCR's General Comment No. 4.<sup>131</sup> It entails an obligation on states to request international cooperation and assistance in accordance with articles 11(1), 22, and 23 of the ICESCR to ensure that the basic rights of vulnerable groups in society such as street children are met. In terms of the CESCR's stipulations, Kenya must give priority to those social groups living in unfavorable conditions, such as street children, in line with minimum core obligations and the SDGs. Although various international instruments address different dimensions of the realisation of the right to adequate housing,<sup>132</sup> article 11(1) of the ICESCR appears to be the most comprehensive provision of all. It requires that the Kenyan government be more proactive and put in place an implementation framework that considers street children's perspectives and seeks to ensure that their specific needs and rights are realised in actuality rather merely be set out on paper.

This article urges that, in the spirit of the global call for sustainable development, no one in Kenya – least of all street children – should be left behind. Street children should be included in the national developmental agenda so as to ensure the protection and promotion of their basic rights, specifically the right to adequate shelter. Further to this, the government should develop accurate statistics in regard to homelessness and the inadequacy of housing. Likewise, it must put mechanisms in place to monitor and evaluate the implementation of the right to shelter for street children, as provided in the CESCR,<sup>133</sup> mechanisms which the country currently appears to lack. Homelessness can

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<sup>130</sup> The Children Act aims to give effect to Article 53 of the Constitution by addressing various aspects of children's rights, parental responsibilities, and alternative care options such as guardianship, foster care, and adoption. It also provides for the care and protection of children, including those involved in conflicts with the law. Additionally, the Act regulates the administration of children's services and establishes the National Council for Children's Services, along with other related matters.

<sup>131</sup> CESCR General Comment No. 4 at paras 10 & 11.

<sup>132</sup> See article 25(1) of the UDHR; article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women; article 27(3) of the CRC; article 10 of the Declaration on Social Progress and Development; section III(8) of the Vancouver Declaration on Human Settlements, 1976; article 8(1) of the Declaration on the Right to Development; and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115).

<sup>133</sup> CESCR General Comment No. 4 at para 12.

be tackled through various strategies, such as increasing investment in the supply of social-rented housing, overcoming barriers to the allocation of social housing, improving security of tenure and conditions in the private rented sector, and ensuring that housing benefits cover the cost of rent in order to protect street children's right to shelter in line with the minimum core obligations and the SDGs.

#### **AUTHORS' CONTRIBUTIONS**

All three authors conceptualised and developed the manuscript. Ndimurwimo LA was responsible for drafting sections 4, 5 and 6 of the article, Wanjala EN, for sections 1 and 2, and Makori AF, for section 3. The authors each contributed equally to editing and finalising the article.

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### **BIBLIOGRAPHY**

#### ***Books***

Ahmed D & Bulmer E *Socio and economic rights* Sweden: International IDEA (2017)

Levitas R, Pantazis C, Fahmy E, Gordon D, Lloyd-Reichling E & Patsios D *The multi-dimensional analysis of social exclusion* Department for Communities and Local Government (DCLG) (2007)

Sen A *Social exclusion: Concept, application and scrutiny* Manila, Philippines: Asian Development Bank (2000)

#### ***Journal articles***

Adeyemi OS & Oluwaseun O "Cultural factors promoting streetism among urban children in Ibadan Metropolis, Nigeria" (2012) 2(9) *Research on Humanities and Social Sciences* 41–47

Bilchitz D "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 119(3) *The South African Law Journal* 484–501

Brons LL "Othering, an analysis" (2015) 6(1) *Transcience a Journal of Global Studies* 69–90

Chimdessa A & Cheire "A sexual and physical abuse and its determinants among street children in Addis Ababa, Ethiopia 2016" (2018) 18(1) *BMC Pediatrics* 304 <https://doi.org/10.1186/s12887-018-1267-8>

Fantahun T & Taa B "Children of the street: The cause and consequence of their social exclusion in Gondar city, North West Ethiopia" (2022) 8(1) *Cogent Social Sciences* 1–12

Gayapersad A et al. "Using a sociological conceptualization of stigma to explore the social processes of stigma and discrimination of children in street situations in western Kenya" (2023) 139 *Child Abuse & Neglect* 1–11

Hassen I & Madelyn RM "Socio-economic conditions of street children: The case of Shasheme Town, Oromia National Regional state" (2018) 10(8) *International Journal of Sociology and Anthropology* 1

Kilonzo EM & Ikamari L "Impact of affirmative action on quality of service delivery in the public sector of Kenya: A comparative case study of the ministry of state in the office of the president and ministry of higher education" (2015) 6(3) *Journal of Education and Practice* 114

Makofane M "A conceptual analysis of the label: Challenges for the helping professions" (2014) 50(1) *Social Work/Maatskaplike Werk* 134–146

Mutinda P "On the right to adequate food vis-a-vis the requisite duty to respect in Kenya" (2016) *Nairobi Law Monthly* 22 August 20

Powell JA & Menendian S “The problem of othering: Towards inclusiveness and belonging” (2016) 1(1) *Othering & Belonging* 14–39

***Legislation and policy instruments***

Children’s Act No. 29, 2022

Constitution of Kenya, 2010

Draft National Policy on Rehabilitation of Street Families, 2020

Housing Act cap 117 (revised 2012)

Kenya Judiciary Child Justice Strategy 2023–2030

Kenya National Census for Street Families Report, 2018

Kenya National Housing Policy, 2016

Kenya National Social Assistance Policy, 2011

Kenyan Draft National Policy on Rehabilitation of Street Families, 2020

Social Assistance Act No. 24, 2013

Social Health Insurance Act No. 16, 2023

The Kenya National Children Policy 2010

The Street Families Rehabilitation Trust Fund, 2003

***International instruments***

African Charter on Human and Peoples’ Rights, 1981

African Charter on the Rights and Welfare of the Child, 1990

ICESCR General Comment No 4: The Right to Adequate Housing, 1991

CRC Committee General Comment No. 21, 2017

Declaration on the Rights of the Child, 1959

Geneva Declaration of the Rights of the Child, 1924

Global Strategy for Shelter to the Year 2000, 1988

ICESCR General Discussion on the Right to Housing (E/C.12/1990/3)

International Covenant of Political and Civil Rights, 1966

International Covenant on Economic Social Cultural Rights, 1966

OHCHR “The right to adequate housing” Fact Sheet No. 21 of 2009/ Rev. 1

Second Pan-African Forum on Children: Mid-Term Review 29 October – 2 November 2007 Cairo, Egypt

UN General Assembly (UNHCR) 20 December 1988, Resolution A/RES/43/181 available at <https://www.refworld.org/docid/3b00f1831c.html> (accessed 28 June 2023)

UN Sustainable Development Goals, 2030



## A CRITIQUE OF THE EFFICACY OF THE RIGHT TO SHELTER TO FOR STREET CHILDREN IN KENYA

UN Sustainable Development Goals, 2030

United Nations Convention of Rights of Child, 1989

Universal Declaration of Human Rights, 1948

Vancouver Declaration, 1976

Vienna Declaration and Plan of Action, 1993

### **Case law**

*Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC)

*Ibrahim Sangor Osman and 1,122 others v The Minister for Internal Security and Provincial Administration, Minister for Lands, Attorney General and Municipal Council of Garissa* HCCP No 2 of 2011- Embu

*Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005(2) SA 140 (CC)

*Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC)

*Minister of Police v Vongani Sharon Mboweni & Another* (657/2013) ZASCA 107

*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] e KLR

*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* Petition 3 of 2018, Judgement of the Supreme Court of 11 January 2021 (eKLR)

*Ntandazeli Fose v The Minister of Safety and Security* Case CCT 14/96

*President of the Republic of South Africa & Another vs Modderklip Boerdery (PTY) LTD* CCCT 20/04

*Sarrahwitz v Martiz N.O. and Others* (CCT93/14) (2015) ZACC

### **Theses**

Kieni SK *Factors influencing influx of street children in urban areas: A case of street children projects in Meru Town-Kenya* (Master's thesis, University of Nairobi, 2015)

Miriti MM *An Investigation in the challenges of rescuing, rehabilitating and reintegrating street children: A case study of rehabilitation centers within Nairobi* (Master's thesis, University of Nairobi, 2013)

### **Internet sources**

Alan H Gray M & Edwards B "Social inclusion: Origins, concepts and key themes" (2008) available at <https://apo.org.au/sites/default/files/resource-files/2008-10/apo-nid8799.pdf> (accessed 15 February 2023)

Boma Yangu (n.d) available at <https://www.bomayangu.go.ke/> (accessed 24 January 2024)

Chowdhury J (2009) “Judicial adherence to a minimum core approach to socio-economic rights: A comparative perspective” Cornell Law School Inter-University Graduate Student Conference Papers (Paper 27) available at [https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps\\_cla\\_cp](https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_cla_cp) (accessed 29 June 2023)

Consortium for Street Children “Making invisible populations count: The development agenda of the 21<sup>st</sup> Century” (2018) available at <https://www.streetchildren.org/news-and-updates/making-invisible-populations-count-the-development-agenda-of-the-21st-century/> (accessed 25 April 2023)

Consortium for Street Children “Street children are some of the most vulnerable children on the planet” (n.d) available at <https://www.streetchildren.org/about-street-children/> (accessed 30 April 2023)

Crisis “How Crisis’ work relates to the Sustainable Development Goals” (n.d) available at <https://www.crisis.org.uk/media/247232/crisis-and-the-un-sustainable-development-goals.pdf> (accessed 27 May 2023)

CYC-Online “Street children and homelessness” (2004) available at <https://cyc-net.org/cyc-online/cycol-0904-homelessness.html> (accessed 22 January 2023)

Evans P & Deluca M “Social exclusion and children-creating identity capital: Some conceptual issues and practical solutions” (2000) available at <https://www.oecd.org/education/school/1856627.pdf> (accessed 11 March 2023)

Habitat for Humanity “Housing and the Sustainable Development Goals: The transformational impact of housing” (n.d) available at <https://www.habitat.org/sites/default/files/documents/Housing-and-Sustainable-Development-Goals.pdf> (accessed 20 May 2023)

Ibrahim A “Characteristics of street children” (2012) *E-international relations: Students* available at <https://www.e-ir.info/pdf/30870> (accessed 25 February 2023)

OHCHR Special Rapporteur on the Right to Adequate Housing “Homelessness and human rights” (n.d) available at <https://www.ohchr.org/en/special-procedures/sr-housing/homelessness-and-human-rights> (accessed 20 May 2023)

Pietilä H *The Unfinished Story of Women and the United Nations: Human Rights are Women’s Rights* NGLS Development Dossiers [TD/]UNCTAD/NGLS/2007/1 New York; Geneva: UN, Non-Governmental Liaison Service (2007) available at <https://digitallibrary.un.org/record/592517?ln=en> (accessed 17 April 2024).

Rabar B & Wambu P “Assessment of the realization of the right to housing in Kenya 2011–2012” (2012) *Hakijamii* available at <https://www.humanitarianlibrary.org/sites/default/files/2013/07/assessment.pdf> (accessed 25 April 2023)

Shulla K & Kőszeghy L (2021) *SDG booklet: Housing ensures sustainable development* available at

## A CRITIQUE OF THE EFFICACY OF THE RIGHT TO SHELTER TO FOR STREET CHILDREN IN KENYA

[https://www.habitat.org/sites/default/files/documents/SDG%20booklet\\_1.pdf](https://www.habitat.org/sites/default/files/documents/SDG%20booklet_1.pdf) (20 May 2023)

United Nations Economic Commission of Europe (UNECE) Housing and Land Management Unit “Right to housing, homelessness no more” (2018) available at [https://unece.org/fileadmin/DAM/hlm/prgm/other/2018\\_World\\_Habitat\\_Day/Panel\\_event\\_proposal\\_draft.pdf](https://unece.org/fileadmin/DAM/hlm/prgm/other/2018_World_Habitat_Day/Panel_event_proposal_draft.pdf) (accessed 24 May 2023)

United Nations Sustainable Development Group (UNSDG) “Universal values: Leave no one behind” (n.d) available at <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> (accessed 30 July 2021)

Vision 2030 “Affirmative action” (n.d) available at <https://vision2030.go.ke/project/affirmative-action/> (accessed 29 January 2024)

Volpi E “Street children: Promising practices and approaches” (2002) World Bank Institute available at <https://bettercarenetwork.org/sites/default/files/Street%20Children%20-%20Promising%20Practices%20and%20Approaches.pdf> (accessed 28 June 2023)