



**THE 57TH ORDINARY SESSION OF THE AFRICAN  
COMMISSION ON HUMAN AND PEOPLES' RIGHTS.**

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*Kairaba Beach Hotel, The Gambia 5th – 12th November, 2015.*

@2015

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## 1. INTRODUCTION.

The National Gender and Equality Commission (NGEC), is a Constitutional body established under Article 59 of the Constitution and operationalized by the National Gender and Equality Commission Act of 2011, with the core mandate of promoting equality and freedom from discrimination. Key among the NGEC mandate is to monitor and advice on the integration of the principles of equality and freedom from discrimination. NGEC is also mandated to work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights (ESC rights) with the view of making recommendations for the improvement of the functioning of the institutions concerned.

As a national human rights institution, NGEC is expected to act as the principal organ of the State to ensure compliance with all treaties and conventions ratified by Kenya relating to equality and freedom from discrimination and relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities and children.

The African Commission on Human and Peoples' rights is operationalized by the African (Banjul) Charter on Human and Peoples' rights. The Commission's mandate as set out in Article 45 of the Charter is to ensure that:-

- the protection of human and people's rights;
- the promotion of human and peoples' rights and;
- the interpretation of the African Charter on Human and Peoples' rights.

In line with its mandate of protection of human and peoples' rights, the Commission ensures protection of human and peoples' rights through its state reporting including considerations of shadow reports by Non Governmental Organizations.

There was a state reporting between 4<sup>th</sup> to 11<sup>th</sup> November, 2015, which was the 57<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights. Kenya was reporting on the progress made in terms of promotion and protection of human rights in line with the Banjul Charter.

### **Objectives of the Meeting**

- To report on the progress Kenya has made in realizing its human rights obligations;
- To understand how to better our interventions relating to our mandate.

## 2. BACKGROUND

Four state parties presented their periodic reports for consideration before the 57<sup>th</sup> Ordinary Session. These were Sierra Leone, Kenya, Burkina Faso and Algeria. Kenya submitted to the African Commission on Human and Peoples' Rights, its combined 8th- 11th periodic report covering the period 2008 - September 2014, in conformity with Article 62 of the African Charter on Human and Peoples' Rights. The report was prepared following wide consultations between the government officials, civil society organizations and independent national human rights institutions.

Following the submission of the report, the Committee considered the report of the Kenyan government in its 57th Ordinary Session scheduled for 4th to 18th November 2015 in Banjul, The Gambia, where the state was represented by the Office of the Hon Attorney General.

Kenya as a state party to the Banjul Charter is required to submit periodic reports to the African Commission on Human and Peoples' Rights. Similar reporting obligation on Human rights exist under other international human rights instruments such as the Covenant on Elimination of all forms of Discrimination Against Women (CEDAW), The Convention on the Rights of the Child among others.

In addition, the Constitution obligates the state to not only implement human rights enshrined under the Bill of Rights, but also it creates an institutional framework, under article 59(1) (g) for monitoring and reporting on the status of realization of human rights in the county and ensuring compliance with obligations under treaties and conventions relating to human rights. Further pursuant to Section 8 (c) of the National Gender and Equality Commission Act, the Commission is mandated to act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to the special interest groups including the minority groups and marginalized communities. NGEC therefore, as created, has the legal and institutional framework for monitoring and reporting on human rights through the National Gender and Equality Commission as discussed above.

For a long time in Kenya, enjoyment of human rights including promotion and protection of civil, political, economic, social and cultural rights has not been fully realized. Marginalized

and vulnerable groups such as women, children, and persons with disability, minorities and indigenous groups have particularly been excluded from accessing these rights.

Notwithstanding the foregoing, monitoring and reporting on progress on realization of human rights has faced some challenges especially in terms of implementation. This is partly because Kenya did not have a proper legal and institutional framework for implementation and monitoring realization of human rights until in 2010 when a new Constitution was adopted. Institutions that have specific mandate to implement the responses on human rights are faced with limited and/or inadequate structures and systems. However human rights is still a field that requires the cooperation of duty bearers and right holders to advance its course.

### 3. THE MEETING.

The membership of the African Commission on Human and Peoples' Rights are:

- |     |                         |                  |
|-----|-------------------------|------------------|
| 1.  | Faith Pantsey Tlakula   | Chairperson      |
| 2.  | Soyata Maiga            | Vice Chairperson |
| 3.  | Jamesina E. L. King     | Commissioner     |
| 4.  | Lawrence Murugu Mute    | Commissioner     |
| 5.  | Lucy Asuagbor           | Commissioner     |
| 6.  | Maya Sahli Fadel        | Commissioner     |
| 7.  | Med S. K. Kaggwa        | Commissioner     |
| 8.  | Pacifique Manirakiza    | Commissioner     |
| 9.  | Reine Alapini           | Commissioner     |
| 10. | Yeung Kam John Yeung    | Commissioner     |
| 11. | Zainabo Sylvie Kayitesi | Commissioner     |

The meeting sought to know the progress made by Kenya on civil, political, economic, social and cultural rights in totality and the progress made towards implementing these rights as envisaged in the Banjul charter which Kenya is a signatory to.

The representation by the Kenyan Government included :-

1. Ministry of Health
2. Ministry of Water
3. Office of the Attorney General, Department of Justice
4. National Gender and Equality Commission
5. Ministry of Lands

6. Council of Governors
7. The National Police
8. Kenya Prisons and
9. Ministry of Education

During the opening remarks before the Kenyan delegation made its submissions, the Chairperson Ms. Faith Tlankula welcomed the Kenyan delegation and appreciated the progress made in advancing human rights. Kenya's reporting was led by Commissioner Med S. Kaggwa, who stated that the Country had made progress in human rights agenda. Commissioner Lawrence Mute, a Kenyan abstained from asking any questions. His mandate was covered by the lead Commissioner responsible for Kenya Commissioner Kaggwa of Uganda.

Of particular interest to the National Gender and Equality Commission, the responses required were on the following thematic areas:-

- Equality and non-discrimination;
- Equality before the law;
- Right to health;
- Family rights and women rights in land use vis a vis traditional and cultural practices;
- Discrimination of women and children;
- Right to ECOSOC Rights and policy on abortion;
- Reporting under the optional protocol on Women's rights using the adopted guidelines as read together with Article 62 of the charter;
- The rights of minorities and marginalized including ethnic minorities and composition in civil service and the protection of indigenous smaller groups;
- Judicial invocation of the charter in rulings and judgements;
- Progress in fight against GBV and protection of domestic violence;
- Mandate on NGEN and how it differs from that of the KNCHR and their funding;
- Women and political representation; and
- Gender Statistics in representation.

#### 4. PRESENTATIONS AND PANEL DISCUSSIONS

There were 17 States that were present at the Session made statements concerning the state of human rights in their jurisdiction. They were able to put forth the gains and the challenges that

they were facing in protection, promotion and fulfilment of their obligations under the African Charter on Human and Peoples' Rights.

NHRIs were also given opportunities to make statements on the state of human rights in Africa through presentation of their Alternative Reports. The Kenya National Commission for instance presented its report before the Commission. Civil Society Organizations present shared their Shadow Reports that enumerated issues that required the government to report.

**Key Issues raised requiring Kenya's responses.**

The government delegation on the other hand held meetings with the view to discussing the report.

- ✓ On the right to health, the Commission sought to know strategies for achieving universal access to essential services for HIV prevention, treatment, care and support as key issues arising.
- ✓ Issues of domesticating the Maputo protocol which Kenya has ratified, the involvement of Civil Society Organizations in contributing to Kenya's report, execution of prisoners in line with the right to life.
- ✓ This question arose out of the respect for the right to life and the contradictory laws that provide for death penalty, statistics of female, male and juveniles as well as information regarding the conditions of detention of vulnerable groups, especially pregnant women, children in detention and inmates with disabilities.
- ✓ The Commission sought to establish data of victims of torture by the security agencies.
- ✓ The police and prison's department were asked to shed light on the question of composition, structure, configuration of human rights desks present in law enforcement agencies and questions on extrajudicial killings. The statistics, of cases of custodial deaths and what the Government is doing in order to ensure that those in custody are safe.
- ✓ The Commissioner for refugees sought to know why Kenya is yet to ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), owing to the large number of refugees that Kenya hosts.
- ✓ In terms of land issues, laws and policies protecting the Constitutional right to housing was raised.

*The aspects that focused on NGEC's mandate and the responses given are contained in the Annex.*

Below are a general select list of issues that arose including from the Alternative reports by the Kenya National Commission on Human Rights and Civil Society Organizations and the responses by Governments.

- ✓ The plight of indigenous communities was highlighted. Kenya was cited for the non-implementation of the decisions of the African Commission regarding the Endorois and the Ogiek communities.
- ✓ The issue of terrorism in Africa was addressed. The Commission was informed that various counterterrorism efforts in several member States have resulted in human rights violations.
- ✓ Threats to Human Rights Defenders in many countries including Eritrea, Kenya, Egypt and Lesotho. The trend is that Human Rights Defenders are detained without trial while others are killed.
- ✓ Freedom of expression and access to information is also of concern in Africa. In Kenya, the lack of an access to information legislation was highlighted. Kenyan government was also reported to have failed to respect freedom of expression and the freedom of the media.
- ✓ There were concerns raised on the participation of Women in Africa in public life, governance and development.
- ✓ 2016 has been declared as the year of Human Rights in Africa with great focus on Women Rights. The African Commission called on member States to support the activities to observe 2016 as the year of human rights in Africa.
- ✓ The situation of human rights in Burundi was highlighted. The African Commission indicated its intention to go for a fact finding mission in Burundi. It called on Burundi to stem the human rights violations that were occurring in the country.
- ✓ The African Commission lauded the successful elections and peaceful transition in Nigeria and Tanzania.

## 5. WAY FORWARD.

The Banjul Charter is a useful resource for NGEC staff to internalize to effectively enhance the understanding of their work effectively execute its constitutional and legal mandate on monitoring equality and nondiscrimination. As a Commission, NGEC should engage more with Civil Society Organization's as well as relevant government institutions to establish areas of collaboration in areas of existing interventions on the issues raised at the African Commission. The forum provided an opportunity to share NGEC's mandate and its role in holding government accountable in its interventions.

## 6. CONCLUSION.

The meeting presented good engagements on how to improve the human rights situation in the country and what mechanisms to put in place to enhance a society that upholds human rights in the country.

The concluding observations from the African Commission will be shared in due course and areas of possible intervention by NGEC.

## 7. USEFUL RESOURCES.

- a) [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf)
- b) [http://www.achpr.org/files/sessions/57th/info/communique57/final\\_communicu\\_of\\_the\\_57th\\_ordinary\\_session.pdf](http://www.achpr.org/files/sessions/57th/info/communique57/final_communicu_of_the_57th_ordinary_session.pdf)



## ANNEX 1

### RESPONSES BY NATIONAL GENDER AND EQUALITY COMMISSION ON ASPECT OF ITS MANDATE.

- **Equality and non-discrimination Article 2, 3, 4, 5 of the Charter**

The Kenyans Constitution and specifically the bill of rights replicates article 2 of the charter. Article 27, on equality and freedom from discrimination. It provides for enjoyment of equal rights and fundamental freedoms, equal treatment between men and women including access to equal opportunities. **Article 27 (4) outlines grounds forbidden for direct and indirect discrimination that include race, sex, pregnancy, health status, ethnic or social origin, colour, age disability, religion, conscience, culture dress, language or birth. This is binding for both public and private actors.**

**Article 10** of the Constitution of Kenya, outlines the national values and principles of governance that binds state officers and all persons whenever they apply or interprets the constitution. **These include patriotism, respect for rule of law, democracy, participation of the people, human dignity, equity, social justice, human rights and non- discrimination and transparency and accountability.**

- **Discrimination Of Women And Children And Family And Women Rights Vis As Vis Traditional And Cultural Practices**

These rights have been enhanced by the Constitution of Kenya 2010 and various enabling legislations that include the **Marriage Act of 2014 that amalgamates previous existing varied laws on marriages and provides for equality, Prohibition of FGM Act of 2011** that has seen about **10 people prosecuted and convicted on abetting the crime.** A board is established within the framework to undertake public education and sensitization on change of culture, traditions and attitudes. **The matrimonial Act 2013** has domesticated the women protocol that provides for equality during the marriage and dissolution.

- **ECOSOC Rights and Policy on Abortion**

For the first time, ECOSOC rights are acknowledged and provided for and are enforceable. NGENC has the mandate to work with stakeholder to develop standards for implementation of ECOSOC. There is also a draft bill being discussed to enforce the rights.

- **Draft guidelines on safe abortion.**

The ministry of health withdrew the same unfortunately because on intervention of the church. Broader guidelines have been developed through consensus of the stakeholders and should be launched to give medical practitioners guidance on providing safe abortion. The guidelines have taken into account the recent general comment issued by the African Commission.

- **Reporting under the Optional Protocol On Women's Rights using the adopted Guidelines as read together with Article 62 of the Charter**

Kenya ratified and signed the women protocol in October 2010 and the signature was deposited thereafter. It is true that Kenya has not complied with the reporting based on Guidelines for reporting under the Maputo protocol pursuant to article 26 of the Maputo Women Protocol and article 62 of the charter. We appreciate that the report has to be submitted after every two years. Therefore there has been lapse of two reporting periods and this is regretted. In accordance with the guidelines, these reporting ought to have been annexed as B. This is an omission on behalf of the state and we undertake to submit the report within one year.

- **Judicial invocation of the Charter in rulings and judgements**

**The Kenyan Courts especially the Constitutional and Human Rights.**

The Constitutional and Human Rights Division, which is mandated to look into human rights matters has invoked the charter in its rulings and judgements. This stems from Articles 2(5) and (6) of the Constitution where the general rules of international law and any treaty ratified by Kenya shall form part of the law in Kenya.

### **Examples of decisions**

1. **In High court Constitution Petition No. 390 of 2014;** Where IPOA sued the state bodies responsible for recruiting of police seeking to annual results of such recruitment citing various rights violated and aspects of discrimination. The court cited article 2 and 28 of the charter and Justice Lenaola said that in the ruling he was guided by the principles of equality and provided for in the charter and the Kenyan constitution and found that there was no discrimination on the ground alleged of pregnant women having been excluded in the recruitment process.

2. **In the supreme Court Advisory Opinion No 2 of 2012**, where the Hon Attorney General moved the court for advisory on the application of the two third gender rule provision in the National Assembly and the Senate in the 2013 elections. In his dissenting opinion the Chief Justice of Kenya paid attention to the article 2(6) of the constitution and the international and regional treaties ratified by Kenya and took cognisance of the social imperfection that led to provision of the affirmative action for women in the constitution.

- **Progress in fight against GBV and protection of domestic violence**

The Protection against Domestic violence Act was enacted in 2015. It is courtesy of the efforts of Government, CSOs and Parliament. It protects violence committed both in the public and private sphere in home. CSOs and NGEAC have intervened in various cases where there was laxity to prosecute and ended up with some convictions. A case in point is the Liz Case, where a minor had been gang raped and suffered fistula. On this note NGEAC convenes a stakeholders GBV working group that meets monthly to track issues of SGB. To this end NGEAC has launched a three year Campaign on Keeping the promise that targets duty bearers in the first year, survivors in the second year and general protection in the third year which will be the election year for Kenya. We also have developed a monitoring framework on GBV that was developed by all the stakeholders who submit their statistics to NGEAC. Next reporting should have comprehensive statistics.

Using public inquiries as a way for holding government to account, NGEAC is concluding the report on child pregnancies that reveals various violations on the right of the child. Recommendations will be given to both levels of the government on interventions that will guarantee the children's rights.

- **Mandate on NGEAC and how it differs from that of the KNCHR and their funding.**

The Kenya Constitution provided for the establishment of the Kenya National Human Rights and Equality Commission with functions of promoting respect for human rights and promoting gender equality and equity and promoting protection of human rights and observation of human rights in public and private institution among others. Article 59 (4) and (5) of the Constitution provided that Parliament may restructure the commission into two or more separate commissions and the legislation would assign different roles to the bodies created giving all of them the status of independence. In its wisdom in 2011, parliament created three commissions, the KNCHR, NGEAC and CAJ or the ombudsman.

The NGEC is the gender observatory body and has mandate to monitor audit and give advisory to both levels of government on matters of equality and discrimination on issues of the special interest groups or the vulnerable groups that are defined to include, women, PWDs, children, youth, elderly and the marginalized groups and communities. Specifically the commission promote gender equality and freedom from discrimination, monitor, facilitate and give advisories on the integration of the principles of equality and non discrimination, act as the principal organ of the state in compliance with the treaties ratified by Kenya on issues of equality and freedom from discrimination, it coordinates and facilitates issues of gender mainstreaming and mainstreaming disability and marginalized groups in national development agenda, it has investigative mandate in cases of violations, it receives and evaluates progress made by public institutions both at national and county governments through performance contracting. It conducts audits on the status of special interest groups and has to establish databases on issues relating to equality and freedom from discrimination for different affected interest groups for purposes of periodic reports, nationally, regionally and internationally on the progress made in realization of equality and freedom from discrimination.

On the other hand the KNCHR has the mandate to among others to promote respect for human rights and develop a culture of human rights, promote observance of human rights, monitor, investigate and report on observance of human rights, undertake research, act as principal organ of the state in reporting on human rights conventions except those related to special interest groups which is the function of NGEC. KNCHR is the registered NHRI of Kenya and enjoys status A

The three bodies enjoy similar funding from the government for running its functions. The law expects collaboration between the three in executing its mandate.

However it is acknowledged that the funding is low and a call has been made through parliament to increase funding for the independent bodies to enhance their accountability.

- **Ethnic Composition of the Civil Service**

The Constitution of Kenya provides for equality and non -discrimination in employment. The employment laws reinforce the principle. Article 232 of the constitution on the Value and principles of public service provides consideration that include professionalism, competence coupled with consideration of diversity that includes gender, disability, youthfulness, ethnic and marginalized groups.

The Public Service Commission and NGEN have separately provided guidance on recruitment and inclusion for the national government and the county government. It is admitted that previously a few communities were over represented. The balance is challenging in terms of the already employed people but the balance is being undertaken in new recruitment at both levels of government. NGEN has commissioned in line with its mandate the first evaluation and analysis of the status of inclusion and its expected that the report will be ready by mid next year and will form part of the next reporting.

NGEN is currently mapping inclusion for the marginalized groups and county levels and effectiveness in involvement at the county and national levels. County governments have been given advisories to identify the ethnic minorities within their counties and their level of inclusion. A status analysis commissioned by NGEN will give us the proper statistics.

- **Political Representation**

Kenya’s traditional and cultural practices have made it challenging for women to present themselves to be voted using the first past the post system Kenya has adopted. Subsequently the constitution provides for the proportional representation as well. The numbers fell short of the required threshold in the famous two third gender principle. The Supreme Court prior to the 2013 elections postponed the realization but asked the executive and the legislature to ensure a framework was in place by August 2015. The NGEN and partners working group prepared a bill that is pending before the National Assembly. They gave extension of one year to implement the law. It is hopeful that Parliament will pass the constitutional amendment bill to give Kenyan women and opportunity to sit at the decision making table.

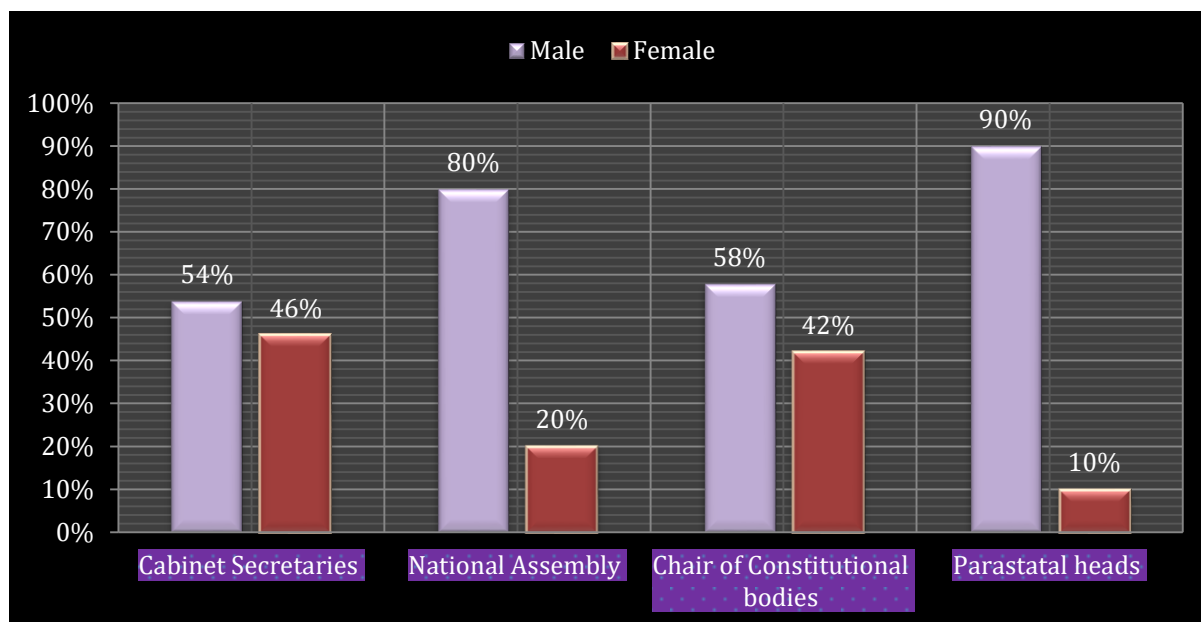
## Gender Statistics

### Statistics on Gender representation in Public and Property ownership in Kenya

National				
	Female	Male	Total	% % of females
Cabinet Secretaries	6	13	19	32
National	69	281	350	19.7

Assembly				
Chair of Constitutional bodies	5	7	12	42
Parastatal heads	3	28	31	10
<b>County Government</b>				
Senate	18	49	67	26.9
Governors	0	47	47	0
Deputy governors	9	38	47	19.2
Clerks to County Assembly**	7	40	47	15
County Secretaries *	10	37	47	21
County Commissioners	17	30	47	36.2
Sub-county commissioners	31	264	295	10.5
Members of county assemblies	768	1458	2226	34.5

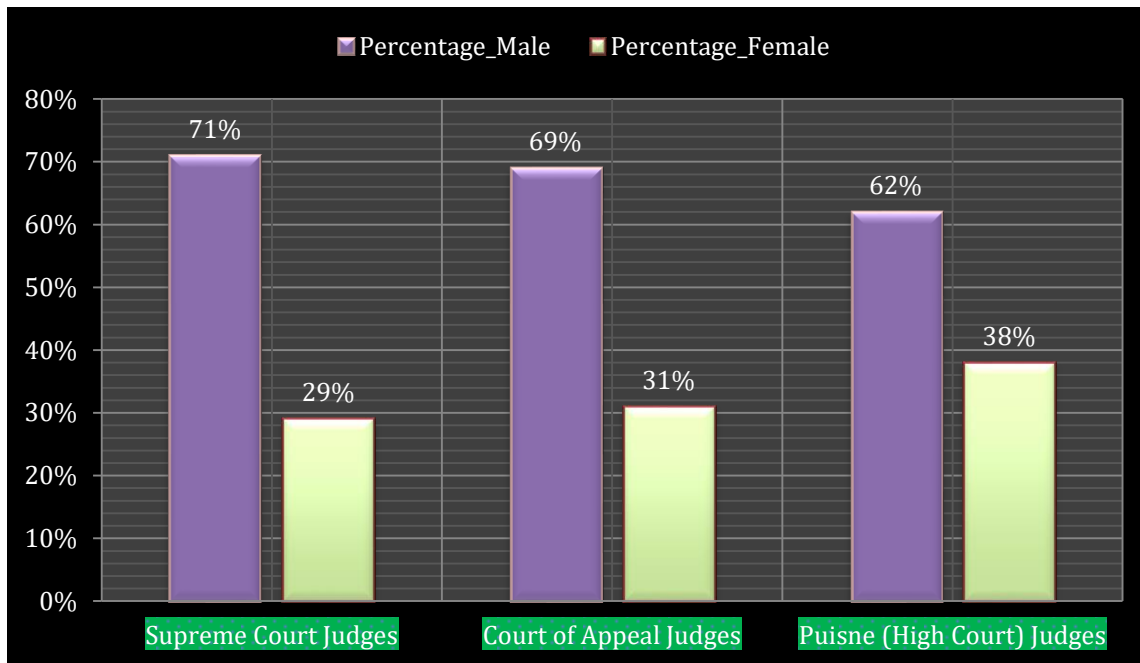
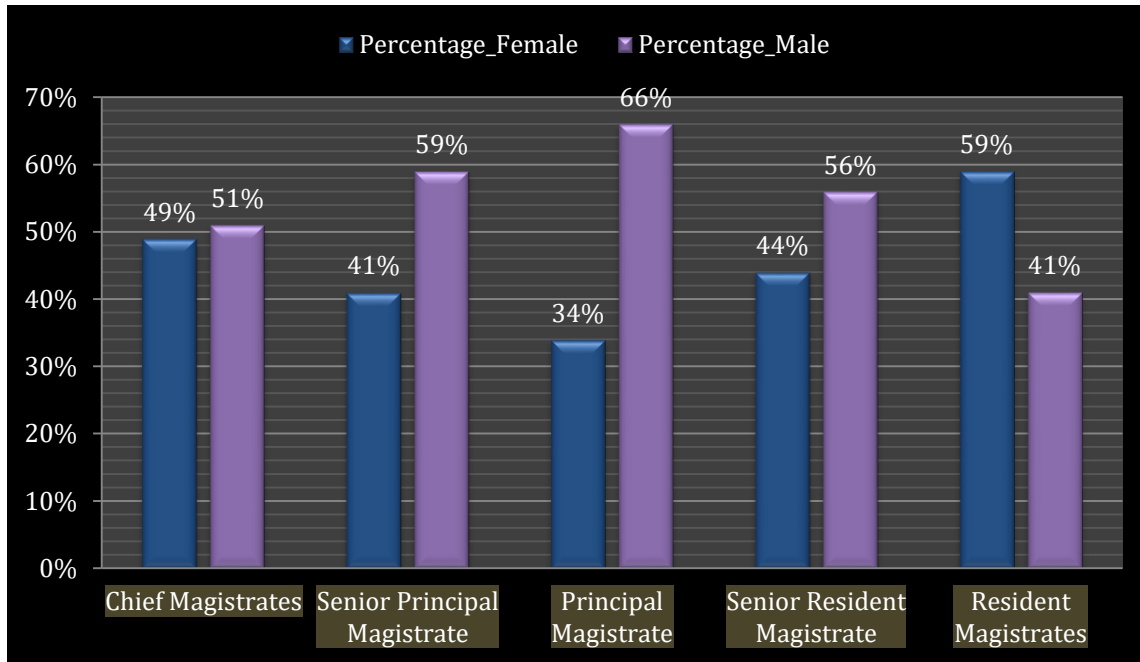
*NGEC data, June 2015*



Category of Magistrates	Female		Male	
Chief Magistrates	24	25	49	49
Senior Principal Magistrate	22	32	54	41
Principal Magistrate	29	56	85	34
Senior Resident Magistrate	46	58	104	44
Resident Magistrate	98	68	166	59
Chief Kadhi	0	1	1	0
Deputy Chief Kadhi		1	1	0
Principal Kadhi		2	2	0
Kadhi I		11	11	0
Kadhi II		20	20	0
District Magistrate (II)	0	0	0	0
<b>Category of Judges</b>				
Supreme Court Judges	2	5	7	29
Court of Appeal Judges	8	18	26	31
Puisne (High Court) Judges	37	60	97	38

Source: Judiciary 2014,

\* Provisional Data



From the above table, 49% of the Chief Magistrates are women,



Summary of Women Representation (Elected and nominated ) to the National Assembly and the Senate E				
	ELECTED		NOMINATED	
	MALE	FEMALE	MALE	FEMALE
NATIONAL ASSEMBLY	275	63	7	5
SENATE	47	0	2	18
Sub-Total	Nat. Ass.	338		12
	Senate	47		20
	Total	385		32
<b>TOTALS</b>				<b>417</b>
<b>PERCENTAGES</b>				
National Assembly	81.36	18.64	58.33	41.67
Senate	100.00	0.00	10.00	90.00

#### Political representation for Persons with disability in Kenya

Category	Total	County Assemblies		Total	Senate		Total	National Assembly	
		M	F		M	F		M	F
Elected	10	10	0	1	1	0	6	5	1
Nominated	79	35	44	2	1	1	3	2	1
Total	89	45	44	3	2	1	9	7	2

*Data Source: NGEC Database 2014*

#### Gender Distribution in selected State Departments In Kenya

Band Levels	Level	Gender				Total
		Female	% of Total	Male	% of Total	

A-H	Support Staff	3,240	39.5	4,971	60.5	8,211
J-N	Technical Staff	2,950	34.98	5,483	65.02	8,433
P-R	Management	234	25.74	675	74.25	909
S-V	Policy/Executive	37	23.4	121	76.58	158
Not Specified		1		1		2
<b>Grand Total</b>		<b>6,462</b>	<b>36.4</b>	<b>11,251</b>	<b>63.5</b>	<b>17,713</b>
<b>Grand Total</b>		<b>6,462</b>	<b>36.4</b>	<b>11,251</b>	<b>63.5</b>	<b>17,713</b>

Data source ; Rapid Survey -Public service Commission

#### Gender of CEO/MD by type of ownership of the Establishment

Type of Ownership of establishment	Gender of the CEO/MD		Total
	Male	Female	
Sole Proprietor	100	0	3.9
Partnership	96.4	3.6	9.9
Public Limited Company	96.2	3.8	9.1
Private Limited Company	85.9	14.1	60.1
Co-operative Society	80	20	3.6
Public Sector/Government Entity	64.7	35.3	6
Other	85.7	14.3	7.4
<b>Total</b>	<b>86.9</b>	<b>13.1</b>	<b>100</b>

*Notes: The proportion of female CEOs/MDs of the firms sampled was only 13.1% against a proportion of 86.9% for their male CEOs/MDs counterparts.*

*Data Source: Federation of Kenya Employers (FKE) Baseline Survey (2014).*

