



A Human Rights-Based Approach to Food Security in Kenya and South Africa



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List of Acronyms

APHRC:	African Population Health Research Center
CESCR:	Committee on Economic, Social and Cultural Rights
COFEK:	Consumer Federation of Kenya
COG:	Community Organised Group
CoK:	Constitution of Kenya
COVID-19:	Coronavirus disease of 2019
FAO:	Food Agriculture Organisation of the United Nations
ICESCR:	International Covenant on Economic, Social and Cultural Rights
KEBS:	Kenya Bureau of Standards
KNCHR:	Kenya National Commission on Human Rights
NGOs:	Non-Governmental Organisations
NSNP:	National School Nutrition Program
SABS:	South Africa Bureau of Standards
UDHR:	Universal Declaration of Human Rights

1. INTRODUCTION

The right to adequate food is a human right recognized under global, regional, Kenyan, and South African legal frameworks. It safeguards all people's right to feed themselves in dignity, whether through food production or purchase (FAO, 2005). It was first recognized as a fundamental human right by the United Nations (UN) Universal Declaration of Human Rights (UDHR) in 1948 as part of the right to a decent standard of living (Universal Declaration of Human Rights, 1948). Article 11 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides for two aspects of the right to food – the fundamental right to be free from hunger and the right to adequate food as part of the right to an adequate standard of living. As defined under the General Comment No. 12 of the Committee on Economic, Social and Cultural Rights (CESCR) defines the right to food as: “The right to adequate food is realized when every man, woman, and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement” (CESCR General Comment No. 12, 1999). Article 2 of ICESCR provides for the obligation of State Parties for the progressive realization of the rights recognized under the convention including the right to Food. States are expected to take progressive measures, particularly through judicial, legislative, and policy frameworks, to realize the right to food. The right to food imposes three types of obligations on the State: the obligations to protect, respect and fulfill. General Comment 3 of 1990 of CESCR elaborates on the nature of the State's obligations.

The right to food is enforceable in Kenya, based on the ICESCR, which was ratified and incorporated into domestic law. Article 43 (1c) of the Kenyan Constitution, 2010 (COK, 2010) stipulates that: “every person has the right to be free from hunger and to have adequate food of acceptable quality.” Article 53 further provides for child nutrition as a right. The right to food is also enshrined in South Africa's Constitution, under sections 27 and 28. Section 27 (1) (b) states that “everyone has the right to have access to sufficient food.” The Constitution also includes a provision for children in Section 28(1) (c) which states that “every child

has the right to basic nutrition” (Constitution of South Africa, 1996).

Despite the constitutional provisions for the right to food in Kenya and South Africa, food insecurity remains a challenge, and the actualization of the right to food is far from reality. According to the State of Food Security and Nutrition in the World report 2021, 68% and 45% of the population in Kenya and South Africa respectively is food insecure. While the rural poor are heavily affected by food insecurity, the urban poor are also particularly affected because of high levels of poverty, and they are almost entirely dependent on the cash economy for their food needs which puts them at high risk because of its volatility, especially during economic shocks. Unstable food prices, and the fact that the majority of the urban poor work in low-paying and insecure jobs exacerbate this situation (Center for Strategic and International Studies, 2020; Mberu et al., 2014). Evidence indicates that over 80% and over 50% of households are food insecure in urban poor settlements in Nairobi and Cape Town respectively (Kimani-Murage et al., 2014; Paganini et al., 2021).

At the 1996 World Food Summit, it was declared that reducing hunger and food insecurity was a critical component of the international development agenda. The International Code of Conduct on the Human Right to Adequate Food, originally proposed before the World Food Summit, articulated a commitment to the right to food. Concerned nongovernmental organizations were the forerunners of the International Code of Conduct (NGOs). The proposal, in essence, introduced a rights-based approach to food security.

To combat hunger and malnutrition, the world has realized that a human rights-based approach is required (Sampson et al., 2021) as it repositions our understanding of food insecurity to acknowledge and actively address its social and economic determinants. It also provides an avenue for public participation in the food and nutrition discourse from people most affected by food insecurity. Most importantly, it provides a mechanism through which the general public can

hold the government accountable for making progress in ending food insecurity. The human rights framework also opens new avenues for identifying, analyzing, and resolving the issues at the root of hunger. Individuals and civil society are empowered by the rights-based approach to participate in decision-making, assert their rights, and seek redress, while governments and public officials are held accountable for their policies and actions. The realization of the right begins with individuals who are empowered to assert their rights and, as a result, cause changes that, in the end, transform their food security situation.

The premise of a human rights-based approach to food security is to empower poor and food-insecure people. The approach shifts away from the benevolence model of food aid and instead emphasizes enabling environments that help people feed themselves in dignity which relieves states of the full burden of food provision (McClain-Nhlapo, 2020). A rights-based approach to promoting food security is advantageous on Human Rights, 2006). Those advancing a human rights framework in public health around the world have had success in promoting health, well-being, and dignity by focusing on three key principles: government accountability, public participation, and non-discrimination for vulnerable groups (Chilton & Rose, 2009; Krieger & Gruskin, 2001;

multiple levels. It incorporates the well-established principles of nondiscrimination and equality into international human rights law; it promotes a number of other fundamental human rights, such as the right to the best health possible and the right to life; and it significantly improves human dignity and democracy. This approach also focuses on the most vulnerable. It necessitates the early detection of hunger pockets and, more importantly, the causes of food insecurity. In short, the approach necessitates a perspective that addresses both the consequences and causes of food insecurity (McClain-Nhlapo, 2020).

The Human rights framework is based on seven principles that guide the development and implementation of national strategies for the right to food. These include universality and inalienability; indivisibility; interdependence and interrelatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law (United Nations High Commissioner for

Farmer, 1999; Mann & Tarantola, 1996). We base our arguments in this paper on these three core principles, focusing on the urban poor in Kenya and South Africa, these principles have been shown to play important role in the implementation of the human rights-based approach (Broberg & Sano, 2018)

2. State obligations Vis a Vis enjoyment of the right to food in Kenya and South Africa

Before we discuss the principles of the human rights-based approach and State obligations, we outline the key pillars of the right to food that cut across production to consumption in the food system. These include food availability, accessibility, adequacy and sustainability (CESCR, 1999). These pillars ought to be met for the right to food to be realized (Kariuki Muigua, 2018).

Food availability refers to the presence of food in sufficient quantity, of good quality, and of nutritional value in the home or at the market. Food is available either through food production or through other means of obtaining food, such as fishing, hunting, or gathering.

Food accessibility has two components: economic and physical access. Economic access implies that food is affordable, and that all financial costs incurred in obtaining food for an adequate diet do not hinder or endanger the realization of other basic needs (e.g housing, health, education). Physical access implies that everyone, including vulnerable members of the community such as infants and young children, the elderly, and the physically disabled or ill, has access to adequate food.

Food adequacy refers to an individual's dietary needs, which must be met not only in terms of quantity but also in terms of the nutritional quality of the available food. It also includes the significance of non-nutritional values associated with food, whether cultural or consumer concerns including food acceptability.

Food sustainability refers to the availability and accessibility of food in a sustainable manner, for both current and future generations.

The State bears primary responsibility for the realization of the right to food. Governments are obligated to take all appropriate steps that are "deliberate, concrete, and targeted towards the realization of the right to food for all under its jurisdiction.

The obligation to respect the right to food requires states to refrain from taking any actions that would prevent individuals from having access to food. In Kenya, our public engagement project on the Right to Food among the urban poor carried out between 2020 and 2021 in the context of the COVID-19 pandemic, revealed that the government violated its obligation to respect when it imposed strict measures to halt the virus's spread. Respondents expressed how government response measures impacted their food security and violated their human right to food. Loss of livelihoods and movement restrictions hampered access and food supply, resulting in limited access to safe, adequate, and nutritious food. Business hours were restricted due to the curfew. As a result, one would be unable to obtain food after curfew, because food kiosks and markets were closed. Some people would return home late at night after a long day of work, intending to buy food for their families, only to discover that the stores were closed. Despite earning enough money to buy food, some people slept hungry due to lack of access to food.

"...Also you would find that for the vegetable sellers, I would have money after doing my job and earning from it but I cannot buy food because of the curfew and they (food vendors) have closed. So, I would sleep hungry and yet I have the money..." FGD, adult males, Korogocho, Nairobi, 2021

The violations of the obligation to respect could also occur if a government arbitrarily evicted people from their land, especially if the land was their primary source of subsistence. The history of South Africa during the Apartheid era, which included spatial segregation determine South

Africa's settlement and planning patterns, which had implications on food security (Strauss, 2019). These are still apparent in Cape Town's cityscape. Spatial planning practices created 'White-only' spaces, in 1994, after the end of the apartheid era, where 86% of South African agricultural land was

owned by White, while 13% of the state-owned homelands were assigned to Black people (Karriem & Hoskins, 2016). As a result, blacks and people of color were concentrated in dense, unsafe, and unhealthy living settlements with no or limited opportunities for farming (Harrison et al., 2007; Strauss, 2019). Laws such as the Land Act 27 of 1913 and the Group Areas Act 36 of 1966 made it illegal for Black South Africans to own and

cultivate land in almost every part of the country during the apartheid era (Skweyiya, 1989; Novendwe and Odeku, 2014). Because of these laws, Black South Africans were denied access to agricultural land, and many were unable to produce food for themselves and others as they had previously, resulting in hunger and malnutrition (Wylie, 2001; Novendwe and Odeku, 2014).

“... It is painful being a landless farmer in my country of birth. At 61 years of age, I don't know what it is to hold a land title in my country of birth. That is my colonial legacy; the same legacy that left our White peers with almost 90% of the South African landscape, especially productive farmland. As an adult, I tried to own property. I remember very well the application refusal. That was painful in my life. I lost my dignity. Painfully. I lost self-respect...” A male land activist in Cape Town, 2021

Under the duty to protect, States have a positive obligation to protect the enjoyment of the right to food from third-party interference (such as private individuals, private enterprises, and other entities). The obligation to protect extends to ensuring that food placed on the market is both safe and nutritious. As a result, States must establish and enforce food quality and safety standards, as well as ensure fair and equitable market practice (United Nations High Commissioner for Human Rights, 2010). The Kenyan and South African governments have food safety regulatory bodies in line with this obligation. The Kenya Bureau of Standards (KEBS) was established through an Act of Parliament known as the Standards Act, Chapter 496 of the Kenyan Laws in 1974 while, the South African Bureau of Standards (SABS) was established in terms of the Standards Act, 1945 (Act No. 24 of 1945) and continues to operate in terms of the latest edition of the Standards Act, 2008 (Act No. 29 of 2008). KEBS, in the last one year removed unfit-for-consumption products from the shelves, from brands of meat laced with lethal chemicals to brands of [peanut butter](#) high in aflatoxin and [maize flour](#). Despite these efforts, unsafe foods are still in the market which shows that the governments have failed in their mandate to protect their citizens from unsafe food products.

The municipality in South Africa regulates and controls informal trading spaces based on health and safety standards. Informal traders must obtain trading permits and are only permitted to operate in specific areas. Street vendors selling food products must also obtain a business license and

adhere to local health standards (Social Law Project, 2014 Tawadzera, 2019). These measures seek to protect consumers from unsanitary food but also restrict informal trade, limiting the ability of other food insecure people to earn an income. According to a study conducted by Zogli et al., 2021 on the challenges faced by informal street traders in Durban, South Africa, the informal traders expressed concerns about the continued intimidation and harassment by enforcement officers who confiscate their goods. Occasionally, they lose all of their stock in the process. During the Covid 19 pandemic, the situation worsened. Several participants mentioned constant harassment of informal traders by law enforcement officers, even when they were operating with trading permits. The harassment included confiscation of goods: "It was difficult because the local police, the metro police, used to take their stock" (11 KII Informal Traders Association) (Rwafa-Powela et al., 2022). Regulations that are meant to help end up violating street vendors' right to food because their source of income, which allows them to access food, is hampered.

Our public engagement in Kenya revealed poor food safety in urban informal settlements. Foods, including maize meals, cereals, french fries, and fish among others are prepared and sold in unsanitary conditions which makes them unsuitable for human consumption. This demonstrates a failure of the government's obligation to protect, as the safety of the food consumed by the urban poor is not guaranteed.

“...If you look at Nyalenda for example and just walk around there is poor hygiene. If you walk around you will just see sewage passing through and then you come across people selling vegetables and food just next to the

sewage and the food has already been contaminated. When we buy it to go and consume it later it is harmful to our health...

FGD youth, Kisumu, 2021

The obligation to *fulfill* is made up of both an obligation to *facilitate* and an obligation to *provide*. The obligation to facilitate requires States to engage in activities intended to strengthen people's ability to access means and resources to secure their livelihood including food security. People living in poverty in urban areas are very vulnerable to violations of this obligation. This is because most get their food by purchasing it. Jobs are hard to come by and their wages are pitiful so they cannot afford food and other basic needs, such as health care, education, and housing. Their

enjoyment of the right to food is likely to be undermined as they have no other means of getting food. According to our public engagement participants, the majority of urban informal residents get their food by purchasing it. They also live hand to mouth, with little or no savings, and rely on small businesses and casual labor for a living. Response measures such as lockdown and curfew resulted in a reduction in livelihoods. Due to limited purchasing power, this hampered food access. Food prices rose as a result of market scarcity of food.

"...Personally COVID-19 has really affected us because my husband lost his job, the business I had was also affected because the customers also lost their jobs, so they didn't have money – the few that are there all ask goods on credit and they don't even repay it sooner. You need food but don't have money to buy the food so it really affected us."

FGD adult females, Viwandani Nairobi, 2021.

If you look at something like Omena, we used to buy 2kgs at KES 200. Now it has gone up to KES 350. So for someone in business when they bring it to the local market you will not find amounts for as low as KES 50. Yet before you could buy Omena for KES 50 and have a meal. But now you cannot find that. The prices start at KES 100 going upwards. When you look at vegetables, one cabbage now is KES 50 and that is the small one. Yet before you could buy cabbage for KES 20 or even KES 15. Tomatoes are the same story. You cannot find tomatoes for KES 20. You find that for KES 20 you have only bought one tomato or two small tomatoes.

FDG Women, Nyalenda Kisumu, 2021

"...The prices of things that people use daily such as food, water and soap were hiked due to the curfew and change in business hours due to COVID-19. So, you find that if you were buying a sack of maize at two thousand shillings, now it costs two thousand five hundred because they (vendors) have risked bringing it from the farms and the measures also make it such that if they were to bring five sacks of maize in a day, they end up bringing two or three because of cessation of movement during curfew time. So, the products found in the shops also had their prices hiked because the transportation time has been reduced..."

Photovoice mixed group, Viwandani, Nairobi, 2021.

Whenever an individual or group is unable to enjoy the right to adequate food through the means at their disposal for reasons beyond their control, states have the obligation to directly fulfill (provide) that right. This obligation also applies to victims of natural or man-made disasters or pandemics. For example, during the pandemic, governments in both Kenya and South Africa fulfilled their obligations in part by providing food aid to the vulnerable urban poor. This was accomplished by providing food assistance and cash transfers to the most vulnerable households/individuals but this was not adequate.

In Kenya, apart from cash transfers, the government also launched an economic empowerment program called "*Kazi mtaani*" that targeted jobless youth. The youth were enrolled in the program and assigned paid work in the community, primarily in environmental cleanup. Although both measures were well received by members of the community, the processes were said to be characterized by lack of transparency, limited population coverage, irregularities, and discrimination in distribution including [nepotism](#); and the social protection measures were only in place for about four months.

“The food aid was quality because they would give out even a kilo of rice and a kilo of sugar and that would be good – also they would give out a kilo of beans so you would boil the rice and beans and that would be a good meal so even those who brought food aid really tried to give out balanced diet” FGD adults male, Korogocho Nairobi, 2021

“...Kazi mtaani has really assisted youths – not only those youths, but they also have parents, and some have really assisted their parents through the earning though kazi mtaani...” KII Senior Chief, Korogocho, Nairobi, 2021.

“There was some cash transfers that was supposed to be sent to the citizens, the truth of the matter is that the officials are the ones getting the cash transfers. When an administrative leader comes, they are bribed – when food is brought for distribution, the administrative leader takes most of it” FGD youths mixed group, Korogocho Nairobi, 2021.

While there were positive attitudes among the urban poor in Kenya towards food aid provision, the situation was different in South Africa. Participants in our South African study decried the contents of food parcels as “not food,” expressing outrage in the Photovoice research feedback. They discussed how people tried to hide their embarrassment at receiving this assistance, as well as their embarrassment at responding to the research questionnaire on household poverty, hunger, and education levels. This tapped into a

number of past and present indignities and injustices that continue to oppress people along racial, cultural, and gender lines (Paganini et al., 2021). However, it is important to note that in Kenya the government provided food aid to vulnerable households through cash transfers.

As demonstrated in Kenya and South Africa, the State failed to meet some of its obligations to realize the right to food, and there is thus a need to hold the government accountable.

3. Government accountability redress mechanism in Kenya and South Africa

Accountability in the context of human rights is “the means by which individuals and communities take ownership of their rights and ensure that States as primary duty-bearers, respect, protect and fulfill their international and national obligations” (United Nations High Commissioner for Human Rights, 2010). Human rights accountability is therefore concerned with rights-holders ability to hold duty-bearers to account according to their obligations.

At the national level, accountability is primarily ensured through a variety of institutions and mechanisms in place that can and have been used to hold duty-bearers accountable for their responsibilities. These include parliamentary committees; administrative accountability mechanisms such as charters and codes of conduct for public servants or citizen consultation groups; independent oversight bodies such as human rights commissions and ombuds offices; and social accountability mechanisms such as community-based auditing. When individuals or communities are harmed by development policies or violation of human rights, mechanisms should be in place to allow them to pursue their claims against those in power and seek appropriate redress if their rights have been violated.

Kenya and South Africa have institutional, judicial, and policy mechanism in place to hold the government accountable.

3.1. Institutional Framework

The Kenya National Commission on Human Rights (KNCHR) and the South African Human Rights Commission are independent National Human Rights Institutions established by the respective Human Rights Commission Act, as mandated by the respective Constitution. The commissions are committed to promoting, observing, and protecting human rights for all without fear or

favor. The Human Rights Commission in Kenya and South Africa monitors state government institutions, conduct investigations into alleged human rights violations and provide redress to those whose rights have been violated in appropriate cases. The KNCHR also acts as an advisory body. The Commission advises the Kenyan government on how to improve human rights promotion and protection. It also monitors legislation enactment in Kenya and recommends that existing legislation be reviewed to ensure compliance with human rights standards. The Commission is also tasked with investigating complaints from organizations or individuals who believe their rights have been violated. The possibility of filing complaints with the commission could be a means of obtaining redress for victims of violations of the right to food as well as raising national awareness of the right.

In its report, the Committee on Economic, Social, and Cultural Rights praised the South African Human Rights Commission's efforts to promote and protect the rights enshrined in the Covenant. However, the Committee expressed concern about the South African Human Rights Commission's insufficient budgetary resources to effectively carry out its mandate. The Committee recommends that the State provide the South African Human Rights Commission with adequate financial resources to enable it to carry out its mandate effectively.

3.2. Judicial Mechanism

A judicial mechanism is also in place in both countries to hold the government accountable. Article 22 (1) of the Kenyan Constitution gives people the right to institute court proceedings to claim denial, violation, infringement, or threat thereof to a right or fundamental freedom in the Bill of Rights. Cases involving the right to food are increasingly being heard in domestic courts. The Consumer Federation of Kenya (COFEK) sued the government in 2011 for failing to stabilize high fuel

prices, which caused a spike in food prices. The petitioners claimed that this was a violation of Article 43 of the Constitution, which guarantees citizens the right to adequate food of acceptable quality. It was a bold case that served as one of the first litmus tests for a new Constitution. COFEK's decision to sue was based on the Constitution, which establishes the courts as the guardians of the highest law of the land, as well as the primary body charged with the protection of fundamental rights and freedoms. Although COFEK was unsuccessful in its petition, the court's decision affirmed its jurisdiction to hear cases involving economic and social rights by stating the rights' inclusion in the Bill of Rights.

In South Africa, in the more than 20 years since the constitution was adopted, only four cases have been brought to the courts that cite the right to food in their cases against the state. One of the most notable cases was when a group of individuals and organizations representing 5,000 artisanal fishers filed a case alleging that the emphasized that children's rights to basic nutrition and education are fundamental rights that require more than just a reasonable plan – these rights require an immediate plan. This case exemplifies how the judiciary can enforce and entrench the fulfillment of the right to food, particularly for vulnerable groups.

The judiciary is more often a country's ultimate guarantor of human rights, including the right to food, and plays an important role in ensuring their protection. However, it is unclear why so few legal cases have been filed to challenge the government's failure to realize the constitutionally guaranteed right to food. This could be due to the nature of court proceedings, which are time-consuming, expensive, and difficult for individuals to access (for example, by requiring a high level of legal expertise for representation, and it could also be due to aggrieved individual or group lack of awareness of the judicial redress mechanism).

3.3. Policy and legal framework

The national policy and legal framework is critical for ensuring the right to food is implemented. Many countries have explicitly or implicitly included the right to food in their constitutions, either separately or as part of the provisions on the right to a decent standard of living (United Nations High Commissioner for Human Rights, 2010).

government failed to provide them with equal access to fishing rights, resulting in violations of a number of basic socio-economic rights, most notably the right to food. Based on South Africa's international and national legal obligations, the High Court issued an order in 2008 stating that the policy framework developed by the government for the allocation of fishing rights must accommodate the socioeconomic rights of artisanal fishers and ensure their equitable access to marine resources (United Nations High Commissioner for Human Rights, 2010)

The National School Nutrition Program (NSNP) in South Africa, which provides at least one meal per day to up to nine million identified vulnerable learners, was suspended during the first six months of the COVID-19 lockdown. The claimants accused the Minister of Basic Education and the Education Ministers of eight provinces of violating learners' constitutional right to food in the NSNP basic education system. In its decision, the court

Several countries are working to create a framework law on the right to food. In General Comment No.12, the CESCR stated that states should enact right-to-food framework laws that include recourse measures as part of accountability. As a socio-economic right whose actualization benefits the state, the realization of the right to adequate food of acceptable quality necessitates state governments to develop necessary legislation to promote the right's actualization. Kenya has enacted a national food and nutrition security policy in this regard. The policy's preamble aligns with the constitutional provision on the right to food and states that "Subject to the availability of necessary resources, the government will ensure that every Kenyan is free from hunger and has an adequate supply of food of acceptable quality." (Njiru 2020; Kenya National Food and Nutrition Security Policy, 2011) This policy is important in realizing the right to food, but it cannot be implemented in the absence of a parliamentary act on the subject.

The Food Security Bill in Kenya was tabled in parliament due to the need for legislation. In 2014, and then again in 2017, although the law has not been enacted. The Bill's purpose was to create a legal framework that would give effect to Article 43 (1) (C) of the Constitution. The bill establishes a legal framework for realizing the right to food by encouraging food production and ensuring that all

Kenyans have access to adequate and nutritious food at all times. The bill establishes a mechanism for the National Food Policy and other food security programs within the country, as well as measures to promote the eradication and prevention of discrimination in food access and distribution. However, because the bill has not yet been passed into law, Kenya lacks a framework law to implement the constitutionally guaranteed right to food.

Despite repeated calls from civil society, South Africa has also yet to enact a framework law for the implementation of the right to food as recognized in the Constitution (Joala and Gumede, 2018). This essentially means that the scope of the content of the right to food is not currently legally defined. This makes determining the responsibilities of state and private sector actors on the right to food difficult, limiting the ability to hold these actors accountable. Recently, the CESCR made specific recommendations to South Africa on how to strengthen and fulfill the right to food for all South Africans, including the need for a framework law to implement and protect the right to food. The CESCR recommended that South Africa adopt framework legislation protecting the right to adequate food and nutrition, as well as develop a national food and nutrition security strategy, taking into account the [2004 FAO Voluntary Guidelines](#) that provide practical guidance to States towards the implementation of the progressive realization of the right to adequate food in line with the Committee on Economic, Social and Cultural Rights General Comment No. 12 (1999) that expounds on the ICESCR provisions on the right to adequate food.

3.4. Public participation (Kenya and SA)

Accountability is inextricably linked to public participation because it ensures that public participation serves a purpose - holding governments and organizations accountable. While participation implies that people are actively involved in the economic, social, cultural, and political processes that affect their lives, it may also imply that people have partial or indirect control over these processes. The most important thing is that people have constant access to decision-making and power. A human rights approach is based on the idea that people have the right and duty to participate in civic life, including policy development, implementation, and evaluation (Chilton & Rose, 2009; FAO, 2006; Zielger, 2001). Citizens must be aware of their rights and redress mechanisms in order to actively participate. Citizens and stakeholders who want to participate or make decisions cannot do so effectively unless they are aware. It is critical that citizens understand their rights and have access to information to enable them to make the best possible contributions to their rights. In the last four years, APHRC has been doing public engagement on the right to food among the urban poor in Kenya. Many of the participants in our public engagement work were unaware of the existence of the right to food, or whether the State has a responsibility towards its actualization. The awareness of fundamental rights is critical to the implementation of the right in question. Ignorance of one's rights is a barrier to their realization.

"...That article that one you have said 43, here in Kenya it is like it is not used. We have never heard. Even if we have heard maybe it was during that time we were taught issues of the constitution but that thing is not considered..." FGD Adults, Nairobi urban slums, 2019

"During our discussions, we realized that many community members are unaware of their right to food..." Director of a Community Organized Group (COG) in Nairobi, 2021

"The community, including myself, got to know that the Right to Food is in the Kenyan Constitution." Head of a COG in Nairobi, 2021

The urban poor were generally aware that the new constitution protected a wide range of rights but could generally not name one in particular. The first step in empowering the urban poor to realize their right to food is to raise awareness of their rights and provide information on the existing

redress mechanism, as mentioned above, when their rights are violated, allowing them to exercise their rights through public participation.

3.5. Non-discrimination for vulnerable groups

Realizing the right to food necessitates paying special attention, through law and policy, to those who are most marginalized in society and are most likely to have their right to food violated. Many peoples, groups, social classes, and communities have been socially excluded, impoverished, and politically marginalized as a result of long histories of structural discrimination. The people of color, racialized communities, people with disabilities, the elderly, children, youth, and others to realize their right to food is hampered by structural marginalization (Civil Society Report, 2018; The World Conference on Indigenous People, 2014).

The Committee on Economic, Social, and Cultural Rights defined discrimination as "any distinction, exclusion, restriction, or preference, or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and has the intention or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of Covenant rights" (General comment No.12 para 7, 1976). The Committee insists on State parties' obligation to eliminate all forms of discrimination, both formally and substantively. In the context of the right to food, it requires States to revise their legislation, particularly those dealing with access to food, social assistance, or productive resources, to ensure that no discriminatory provisions are included (General comment No.12 para. 18, 1976).

Both countries have constitutional provisions promoting non-discrimination of the vulnerable. Article 27 of the Kenyan Constitution prohibits discrimination on any grounds. Further Article 21 (3) of the Kenyan Constitution states that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of specific ethnic, religious, or cultural communities (COK, 2010). While Sections 9 (3) and 9 (4) of the South African Constitution state that no person or state may directly or indirectly discriminate against anyone on one or more grounds. These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age,

disability, religion, conscience, belief, culture, language, and birth. Section 9 (4) further states that national legislation must be enacted in order to prevent or prohibit unfair discrimination (Constitution of South Africa, 1996).

Both countries have legal and policy mechanisms in place to promote the realization of the right to food among vulnerable groups. Although, as stated earlier in the policy and legal framework, Kenya has yet to enact the framework law on the right to food, the bill tabled in parliament aims to provide a framework to promote access to food for marginalized groups. It also aims to provide a framework and mechanisms for county governments to implement national food security policies, plans, and programs, as well as to establish an institutional framework for doing so.

The national food and nutrition security policy in Kenya recognizes the vulnerabilities of the urban poor in terms of food insecurity, recognizing the rapid growth of urban and peri-urban dwellers and urban poverty, and thus the need for special consideration with regard to their food access, including the enhancement of employment opportunities.

The South African National Food and Nutrition Security Policy also includes a component that focuses on effective food assistance networks that serve vulnerable populations. The policy recommends that both government and non-government organizations participate in effective food assistance networks to ensure that everyone has access to food. These effective food assistance networks include an expanded and improved school nutrition program, food fortification, and the use of food banks and food kitchens. In addition, the Department of Social Development provides various types of cash transfers (more commonly known as social grants) through the Social Assistance Act (2004). These have become an important source of social support for South Africa's poor and marginalized. South Africa has one of the world's most extensive social welfare systems among developing countries (Goldblatt, 2005). In 2019, an estimated 18 million people received some form of government social grant (Galal, 2022). Despite these provisions, as evidenced by the violations identified earlier, the vast majority of vulnerable urban poor continue to

struggle with food insecurity, food safety, and unemployment, all of which have been exemplified by the COVID-19 pandemic.

Food insecurity persists in Kenya and South Africa among the vulnerable urban poor, despite constitutional provisions for the right to food. In order to combat hunger, governments in the two countries should take a human rights-based approach that encourages people's participation and accountability; empowers local communities to participate in decision-making and hold the state accountable for its obligations and encourages people to take direct responsibility for themselves so that they rely on State assistance only when absolutely necessary. This strategy is possibly the most effective way to increase food security. It also enables claimants to assert and claim their rights, ushering in a critical shift from treating hunger and food insecurity as charitable endeavors to recognizing adequate food as a legal right.

In this brief, we show that the right to food is being violated in Kenya and South Africa, and the two

4. Conclusion

governments should take steps to ensure that the right to food is progressively realized. We have also shown that generally, citizens are unaware of the existence of the right to food, the State obligations, and the existing redress mechanisms. Governments should educate their citizens about the right to adequate food and the rights-based approach to achieve this goal. The components of the right to food as well as the duties and obligations of the State associated with realizing the right to food should be covered in the creation of awareness, as well as violations and the mechanisms in place for redress. This encourages accountability on the part of the government, which is responsible for promoting, protecting, and fulfilling the right to food. The two countries should move with urgency to put in place the framework laws, as well as other mechanisms necessary to realize the constitutionally guaranteed right to food.

5. References

- Broberg, M., & Sano, H. O. (2018). Strengths and weaknesses in a human rights-based approach to international development—an analysis of a rights-based approach to development assistance based on practical experiences. *The International Journal of Human Rights*, 22(5), 664-680.
- Chilton, M., & Rose, D. (2009). A rights-based approach to food insecurity in the United States. *American Journal of Public Health*, 99(7), 1203-1211.
- FAO. (2013). Right To Food - Making It Happen - Progress & Lessons Learnt Through Implementation.
- FAO. (2005). Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the 127th Session of the FAO Council, 2004. 2005.
- Farmer, P. (1999). Pathologies of power: rethinking health and human rights. *Am J Public Health*. 89:1486–1496.
- Galal, S. (2022). Social grant recipients in South Africa 2019, by province. <https://www.statista.com/statistics/1116081/population-receiving-social-grants-in-south-africa-by-province/>
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
- Joala, R. & Gumede, N. (2018). Realising The Right to Food in South Africa.
- Jung, C., Hirschl, R., & Rosevear, E. (2014). Economic and social rights in national constitutions. *The American Journal of Comparative Law*, 62(4), 1043-1094.
- Kigwiru, V. K. (2020). Enforcement of the Right to Food in Kenya: Shifting Focus from Rural Poor to the Urban Poor (February 9, 2020). Available at SSRN: <https://ssrn.com/abstract=3534980>
- Kimani-Murage, et al. (2015). "Evidence of a Double Burden of Malnutrition in Urban Poor Settings in Nairobi, Kenya," *PLoS One*, vol. 10, no. 6
- Krieger, N., Gruskin, S. (2001). Frameworks matter: ecosocial and health and human rights perspectives on disparities in women's health—the case of tuberculosis. *J Am Med Womens Assoc*:56:137–142.
- Mann, J., Tarantola, D. (1996). From epidemiology, to vulnerability, to human rights. In: Mann J, Tarantola D eds. *AIDS in the World II*. New York, NY: *Oxford University Press Inc* pp427–476.
- Mberu, B., Ciera, J., Elungata, P. & Ezech, A. (2014). Patterns and Determinants of Poverty Transitions among Poor Urban Households in Nairobi, Kenya. *African Development Review*, Volume 26, Issue 1. pp 172-185. <https://doi.org/10.1111/1467-8268.12073>
- Muigua, K. (2018). Achieving the Right to Food for Sustainable Development in Kenya.
- Njiru, G. (2020). *Implementing Article 43 (1)(c) of the constitution; right to food in Kenya* (Doctoral dissertation, UoN).
- Paganini, N., Hansmann, J., Mewes, A., Reich, V., Reigl, M., & Sander, L. (2021). Covid-19 Lockdown and the Impact on Local Food Systems: Food Security and Nutrition in South Africa's Marginalised Communities—A Food Justice Perspective from the Cape Flats and St. Helena Bay. <https://doi.org/10.18452/22877>
- Peoples' Food Sovereignty Act: No 1 of 2018: South African Food Sovereignty Campaign.
- Rwafa-Ponela, T., Goldstein, S., Kruger, P., Erzse, A., Abdool Karim, S., & Hofman, K. (2022). Urban Informal Food Traders: A Rapid Qualitative Study of COVID-19 Lockdown Measures in South Africa. *Sustainability*. 14(4), 2294.
- Shisana, O., Labadarios, D., Rehle, T., Simbayi, L., Zuma, K., Dhansay, A., et al. (2013). The South African National Health and Nutrition Examination Survey (SANHANES-1). Cape Town: Human Sciences Research Council.
- Social Law Project. (2014). Street Vendors' Laws and Legal Issues in South Africa. WIEGO Law and Informality Resources. *Cambridge, MA, USA: WIEGO*.
- Strauss, M. (2019). A historical exposition of spatial injustice and segregated urban settlement in South Africa. *Fundamina*. 25(2), 135-168.
- Tawodzera, G. (2019). Food vending and the urban informal sector in Cape Town, South Africa. Waterloo, Ontario: Hungry Cities Partnership Discussion, Paper, (23).
- United Nations. Universal Declaration of Human Rights. (1948).
- Zogli, L. K. J., Dladla, N., & Dlamini, B. (2021). Assessing the challenges faced by informal street traders operating in Durban, South Africa. *IJEBD International Journal Of Entrepreneurship And Business Development* eISSN 2597-4785 pISSN 2597-4750, 4(4), 412-417.