

UNIVERSITY OF NAIROBI
INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES (IDIS)

**A SITUATION OF STATELESSNESS IN KENYA: A CASE OF MAKONDE
COMUNITY**

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REG: R52/81681/2015

**A Research Project submitted in partial fulfillment for award of the degree in Masters
in International Conflict Management, Institute of Diplomacy and International
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DECLARATION

This research project is my original work and has not been presented for any other academic work award in any other institution of learning.

Signed: Date:

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This research project has been submitted for Examination with my approval as University Supervisor.

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Dr. Rosemary Anyona

Supervisor

DEDICATION

This work is dedicated to my siblings, and husband whose words of encouragement and support gave me the motivation to pursue my studies to the end.

ACKNOWLEDGEMENT

I would first like to thank my supervisor, Dr Rose Anyona for her support while undertaking the research project. Her support was key to me as it enabled me, a novice in research to undertake my research project. I would also like to thank my loving husband, Joseph Wambwa. I am forever grateful for the undying support he offered during my research. Without his encouragement and support I would not successfully complete my research project.

ABSTRACT

Stateless persons often find themselves in vulnerable situations in their host country or country of origin, with this occasioned by their lack of nationality. The lack of nationality commonly results to discrimination of stateless populations and this goes against human rights principles. Such discrimination is usually compounded by the reason that minorities lack power to influence as the majority does always. Attempts have been made to address stateless in Africa, and Kenya in particular. Despite, these attempts, there still exists lack of clarity on the situation of stateless persons in Kenya. Thus this study sought to explore the rights of minorities and stateless persons in Kenya, with a focus on Makonde community. The study was based on two John Burton theories of Basic Needs. The research used quantitative research methodology, with case study research design used in the study. A sample size of 8 was used in the study, with key informants guide used in the study as research tool. The findings of the study indicated that stateless persons are found across the world, with Africa having a significant proportion of stateless persons. The findings of the study also revealed that Statelessness is an issue in Kenya, with the results indicated that statelessness in Kenya is caused by both legal and administrative factors. The study demonstrated that granting of citizenship to Makonde has given the community members right to enjoy some of the rights provided for in the constitution. The findings revealed that the Makonde have benefited from access to employment opportunities, freedom of movement, access to education and right to vote. It emerged from the findings that although the acquisition of IDs among has resulted in Makonde enjoying citizenship rights, the Makonde it was established still face some challenges in enjoying full citizenship rights, with these including limitation to own property. The study concludes that attempts have been made to enhancing the minority rights protection among statelessness persons. Further the study concludes that granting of citizenship rights to stateless persons does not result to full enjoyment of citizenship rights. The study recommends that

LIST OF ACRONYMS

UDHR:	Universal Declaration on Human Rights
ICHI:	Independent Commission on International Humanitarian Issues
UNHCR:	United Nations High Commission for Refugees
ICCPR:	International Convention on Civil and Political Rights
CRC:	Convention on the Rights of the Child
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CERD:	Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Convention on Economic, Social and Cultural Rights
KNCHR:	Kenya National Commission on Human Rights
UN:	United Nations
FRELIMO:	Front for the Liberation of Mozambique
UNWGM:	United Nations Working Group on Minorities
OSCE:	Organization for Security and Cooperation in Europe
HCNM:	High Commissioner on National Minorities
MENA:	Middle East and North Africa
DRC:	Democratic Republic of Congo
AU:	African Union
EU:	European Union
NGO:	Non-Governmental Organization
OSJI:	The Open Society Justice Initiative

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CHAPTER ONE

Introduction to the Study

1.1 Background

Nationality acts as the linkage between a citizen and the international system through domestic laws. Nationality, traces its roots to the history of human race with human beings having a sense of belonging to a nation/country and hence the nationality to which an individual belongs guarantee him rights to citizen rights. Although, every person can have the right to nationality the same has not been experienced by every individual in the world, a situation that has led to some individual been stateless in their host country.¹

The Challenge of statelessness started gaining increased attention in the 20th century after the end of Second World War which resulted in many communities, groups and individual dispersed to different countries. Efforts to formally guarantee the protection of stateless individual can be linked to the promulgation of the Universal Declaration of Human Rights ('UDHR') which declared right to nationality to every person. In subsequent years of 1954 and 1961 convention more efforts were made to protect and reduce statelessness globally, with 1954 convention furthering protection of statelessness while 1961 furthering reduction of stateless persons.² Despite the convention on statelessness, little recognition of stateless persons continued till 1970s and after the cold war era.³

The events of post-cold war are thus positively associated with the global recognition by UNHCR that stateless persons posed a security risk, and thus it was recognized that there is need to address statelessness. Outside Europe, the challenges of statelessness also became a major problem in the Middle East and South-East Asia. The definition of stateless persons through the convention of 1954 and 1961 was deficient at it defined stateless person through the refugee definition. By early, late 1990's, UNHCR had broadened its mandate explicitly to include dealing with the problem of statelessness and in 2006 through the UNGA resolution, the UNHCR with explicit functions to identify, prevent and reduce stateless persons in the world⁴. Apart from the 1954 and 1961 convention on stateless persons, many treaties across

¹Brubaker, Rogers (1992). Citizenship and Nationality laws.

²Costamagna, Francesco (2013). "Statelessness and conflict in Europe.

³Sigona, Nando. 2015. "Statelessness in Italy and Japan. Journal of Ethnic and Migration Vol2 (3)

⁴Groot, René (2013). Statelessness and Nationality through Naturalization Background paper, UNHCR.

the globe and from different region have emerged to guarantee protection of statelessness⁵. These treaties, include European Conventions, human right treaties children rights convention, among others.⁶

Statelessness is a global phenomenon with approximately 12 million persons being statelessness. Internationally, the phenomenon is defined by the 1954 stateless person convention and the 1961 statelessness reduction convention. Although these treaties have been ratified by only a limited number of States, their role is complimented by many international and regional human rights ratified by state parties. The convention, with the ratified treaties form an international regime that guides on how stateless persons should be treated. States are expected as part of their sovereignty to set rules that govern the process of acquisition, loss and change of nationality. Nevertheless, sovereign states are bound by ratified by international treaties and conventions to which they are signatories.⁷

According to the count by UNHCR, the number of stateless persons in sub-Saharan Africa is approximately 721,303. Out of this, Côte d'Ivoire account for (701,000), Kenya (21,000), while Burundi accounts for 1,303. From the report, it was acknowledged that states are 6 countries that include: Democratic Republic of Congo, Eritrea, Ethiopia, Madagascar, South Africa, and Zimbabwe are unquantified.⁸ The number of stateless persons in Kenya is not group specific but include: Makonde community, Nubian, Somali among others⁹. In the light of foregoing, there is needed to understand the rights of the minority regarding statelessness in Kenya.

1.2 Statement of the Problem

Stateless persons often find themselves in vulnerable situations in their host country or country of origin, with this occasioned by their lack of nationality. The lack of nationality commonly results to discrimination of stateless populations and this goes against human rights principles. Such discrimination is usually compounded by the reason that minorities lack power to influence as the majority does always. A situation that has led to rise in human

⁵Eliassi, Barzoo. 2016. "Statelessness in a World of Nation-States: The Cases of Kurdish Diasporas in Sweden and the UK". *Journal of Ethnic and Migration Studies* 42 (9): 1403-1419. doi:10.1080/1369183x.2016.1162091.

⁶Manly, Mark (2014). "UNHCR's mandate and activities to address statelessness", *Journal of conflict resolution* Vol 3(4).

⁷ Ibid

⁸ Ibid

⁹KHRC. (2016). *the Arduous Journey of the Makonde to Kenyan Citizenship*.

right grievances by minorities across the globe. The level and extent of the human rights challenges experience by stateless persons differs within a country and between countries.¹⁰

Approximately 20,000 persons are stateless in Kenya, with stateless groups including Makonde, Nubians, Galjeel, Pemba, Waata, Coastal Arabs and Somali Kenyans. The Makonde originated from Mozambique in 1930 and have lived in Kenya ever since. According to a study carried out by KNCHR (2015), there are about 10,000 stateless persons in coastal region with the Makonde constituting almost half of the stateless persons. According to a study conducted by KNCHR, approximately 3% of Makonde are adult population have national identity cards, with majority of those who have acquired citizenship having gotten their citizenship through virtue of marriage to a local.¹¹

The presence of stateless persons in the country has been viewed as a security challenge that needs to be addressed from the rights perspective as well as from the security perspective. This was highlighted in the report by KNHCR on stateless persons at the Coast province. Accordingly, stateless persons may fall prey to terrorist recruiters with this exacerbating the prevailing insecurity situation in coast region. Stateless persons, especially the Somalis are viewed as the most vulnerable to been recruited as terrorists. In addition to security threats posed by terrorism, stateless has the potential to worsen the volatile security problem at the coast between locals and non-locals.¹²

Kenya has significantly strengthened minority rights protection through the new constitutions and act of citizenship targeted towards the stateless. Further to strengthening the rights of the minorities, attempts have been made to grant citizenship to the stateless, with the Makonde granted citizenship in December 2016. Although granting citizenship should result in stateless persons enjoying their full rights this necessarily does not happen in most cases. This begs the question has granting of citizenship to Makonde resulted in their full rights as minorities.

Considering the citizenship granted to the Makonde community, this study seeks to analyze the rights of minorities and stateless persons in Kenya.

¹⁰Harvey, Alison (2010). Statelessness Definition and Concepts. *Nationality Law journal* , Vol.24, No.3, pp.257-264

¹¹Korir, S. (2014). *Kenya at 50: unrealized rights of minorities and indigenous peoples*.

¹²Ibid

1.3 Objectives of the Study

The general objective of this research is exploring the rights of minorities and stateless persons in Kenya, with a focus on Makonde community.

1.3.1 Specific Objectives

This will be achieved through analyzing the following specific objectives:

1. to document the implementation of minority rights in Kenya.
2. To examine the situation of statelessness nationality laws touching on statelessness persons in Kenya.
3. To assess the statelessness in Kenya with a focus on the Makonde group in Kenya.
4. To analyze minority right protection of stateless person in Kenya with a focus on citizenship rights by Makonde community.

1.3.2 Research Questions

This will be achieved through analyzing the following specific objectives:

1. What are the minority rights protections in Kenya?
2. Are there national laws touching on stateless persons in Kenya?
3. What benefits have been accrued to the Makonde because of citizenship?
4. What barriers limit the full enjoyment of citizenship rights by the Makonde community?

LITERATURE REVIEW

1.4 Introduction

Minorities experience various challenges that have impacted on their rights. Statelessness persons continue to face challenges in regard to access rights under international law and national law. Rights of minorities under the international law have been implemented through united national and various regional bodies, with state parties expected to ratify and sign the conventions that protect minority rights. This section documents the rights of minorities under international law and national law.

1.5 Implementation of Minorities Rights under International Law

The commitment towards advancing minority rights is at the core of the UN agenda. To date, normative standards, mechanisms and initiatives protecting persons belonging to minority groups have been put in place. This section will devote attention to the contemporary human rights standards and mechanisms established internationally and regionally in respect to minority rights.¹³

The 1992 UN Declaration on personal rights is the main reference document at international level. It not only guarantees protection of rights, but makes mention of substantial exercise of rights such as participation in various aspects of life. .These expansive guarantees provide a basis for empowerment and personal autonomy of persons belonging to minority groups¹⁴. Furthermore, the declaration explicitly obligates states to adopt specific measures to allow minority participation in economic progress and development, to allow adequate use of mother tongue and to create favorable conditions to enable them express and develop their culture. The declaration thus introduces positive elements for collective recognition of minority groups. However, the implementation of the declaration remains unclear since it is non-legally binding on states and thus does not result in a legally binding obligation. But importantly, it can be of persuasive value in advocating for protection of minority rights.¹⁵

¹³Banton, Michael. 2003. "Reports on Minority Rights". *Ethnic and Racial Studies* 26 (1): 173-176. Doi: 10.1080/01419870022000025324.

¹⁴European Union. 2012. *Mainstreaming minority protection in the EU.*

¹⁵ Ibid

The ICCPR and article 27 protect the rights of minority groups. Based on the article and convention, individuals belonging to minority groups have the right to exercise their language and religion with other members of the minority group. Indeed, the adoption of the ICCPR has strengthened international provisions in respect to minority rights through its legally binding obligation on state parties. It recognizes the rights of persons belonging to minority groups and guarantees the enjoyment of their right. Although it refers to rights of minorities, the human rights committee also emphasizes the need for state to comply with the convention. It however, remains silent on specific measures to be taken by state parties in case of inequalities that may arise thus failure to offer explicit guidance to state parties.¹⁶

Various conventions/treaties address rights from which protection of minority persons can be inferred. Almost all the human rights documents including the UN Charter and UDHR prohibit discrimination and this is reflected in article 2 (2) of ICESCR, article 1 of the Anti-racial discrimination convention, article 39 of Children's right's convention, and article 1 and 2 of the International Labor Organization Convention No 111.¹⁷ Ideally, state parties have the duty to remove all discriminatory barriers and ensure equality in all spheres of life. If implemented, members of minority groups stand to benefit from such provisions which guarantee their rights as any other persons in the society.

In ensuring that states fulfil obligations, various mechanisms have been set to enforce implementation of the UN Declaration on minority rights. In 2005, the minority independent expert by the UN was established. The OHCHR identified the best cooperation opportunities and practices regarding minority rights. Ideally, this function raises awareness for minority concerns within governments and provides a forum for constructive dialogue on challenges, and best practices in respect to minority issues. It thus compels governments in question on implementation of the UN Declaration of minority rights.¹⁸

The council on human rights, particularly the periodic council on human rights provide an avenue for interactive dialogue for states on progresses made in relation to protection of minority rights. Ultimately, the inferred rights contained in the conventions

¹⁶May, Stephen. 2003. "Rearticulating the Case for Minority Language Rights". *Current Issues in Language Planning* 4 (2): 95-125. Doi: 10.1080/14664200308668052.

¹⁷Mihandoost, Fatemeh, and Bahman Babajanian. 2016. "Minorities rights in International Law". *Journal of Politics and Law* 9 (6): 15. Doi: 10.5539/jpg.v9n6p15.

¹⁸Zubair, Muhammad, and Rehman Hidayat. 2011. Critical analysis of Minority right under international laws. *International Research Journal of Social Sciences* 2 (7).

have mechanisms such as state reporting and monitoring compliance for which minority rights can be deduced, hence fulfilled. To realize the protection of minority rights in Africa the charter envisions that states will undertake progressive realization of minority rights protection. However, the rights are not explicitly addressed in the Africa charter.¹⁹

Kenya's 2010 Constitution guarantees right protection that includes social-economic and political rights under the bill of rights section. The bill of rights places major emphasis on human rights as agents for the preservation of communal and individual dignity, realization of human potential, promotion of social justice and the constitutions mandate to inhibit attempts to limit rights. Through Article 24, the constitution states that human rights which are constitutionally enacted can be restricted only by a law, and that such restrictions will be acceptable²⁰.

Through the constitution courts are therefore required to ensure that the existing statutes are in line with the constitution in particularly the section of bill of rights and Article 24. Another notable way through which rights of minorities is enshrined is through the bill of rights which states that all private persons have rights which state is obligated to keep. This puts the state under pressure not to violate the rights of the minority who are viewed as private persons²¹.

The bold step taken by the constitution 2010 first is recognition of the minority and marginalized communities, the problems they faced and the provision to eradicate those challenges. In a great departure from the past, the constitution guarantees equality to all persons. The consequence of this provision is that, all Kenyans, regardless of ethnic or social origin, race or other status will be protected equally. The state and other persons shall not discriminate any person on the grounds of, ethnicity, health or other social status. The realization of the right has been effected under article 27, which provides that states should guarantee rights protection of all²².

The Constitution of Kenya (2010) sought to address the problem of statelessness. Subsequently, Parliament passed the Citizenship and Immigration Act of 2011 as the law to

¹⁹Gans, Chaim. 2015. "On Patten's Theory of Minority Rights". *Jerusalem Review of Legal Studies* 12 (1): 66-80. doi:10.1093/jrls/jlv014.

²⁰Korir, S. (2014). *Kenya at 50: Analysis of minorities rights in Kenya*

²¹KHRC. (2016). *the Arduous Journey of the Makonde to Kenyan Citizenship*.

²²Ibid.

govern issues of statelessness. The Act provides that within 5 years, all stateless persons must be registered as Kenyan citizens. The five-year period prescribed in the statute in Citizenship lapsed on 30th August 2015 without the Makonde or any stateless persons receiving the registration that the law promises.

1.6 Nationality Laws and Statelessness

Statelessness and minority rights have often been coupled together. Even though, statelessness can occur without discrimination, very often one has followed the other. Discrimination can be the cause and a result of statelessness, meaning that statelessness can both arise due to discrimination and be a reason for a person to be discriminated against. Discrimination in terms of the conferral of nationality can occur on many grounds, such as gender, race, religion, political affiliation and citizenship. The discrimination against a certain ethnic group can both perpetuate and cause their statelessness.²³

Nationality laws or procedures that treat a group unfavorably might render them stateless or create serious obstacles in their access to nationality. However, ethnic groups that at risk of statelessness, often face discrimination both based on their nationality status and ethnic origin. Such discriminatory deprivation of nationality or lack of access to nationality based on ethnic discrimination, as we will show, is in breach of international law.²⁴

Every international convention and declaration that contains the right to a nationality also indicates that every right should be ensured based on non-discrimination and no distinction based on, among other things, ethnicity, race, color, religion and sex. However, when establishing their nationality policies states must discriminate against, or more precisely differentiate among, some to be able to delineate their group of citizens. The matters relating to nationality have traditionally been considered as exclusively falling under the sovereignty of states. This means that states have been free to decide upon the criteria that will be applied to distinguish between nationals and non nationals. However, the rapid development of human rights standards and treaties since the establishment of the United Nations has altered

²³Bianchini, Katia. 2017. Nationality and Statelessness in the International Law of Refugee Status. *Journal of Refugee Studies* 30 (1): 153-156. doi:10.1093/jrs/fex012.

²⁴VanKrieken, Peter. 1994. Integration of Stateless Person *Netherlands Quarterly of Human Rights* 12 (1): 23-33. Doi: 10.1177/016934419401200103.

this position with states subject to international convention and treaties which they are party to.²⁵

Nationality laws which do not grant the minority group the privilege of citizenship have provided ground that has encouraged statelessness thus being a cause of worry for UNHCR. In the past century, most nationality laws did not guarantee right of minorities and stateless persons. However, this changed from 1979 with the adoption of the statelessness convention. Through the convention, discrimination against the minorities was limited and equal protection of rights was guaranteed. As a result, there has been an increased commitment by states to act on statelessness.²⁶

The discriminatory element that has been exhibited in most countries is occasioned by the nationality laws inherited from colonial masters. In most countries, a review of nationality laws has not occurred, with Kenya been an exception in Africa. However, in countries where nationality laws have been reviewed, this has been done to include extension of citizenship to the stateless persons. An example cited in the case of Kenya is the 2010 constitution of Kenya. Under the prior Kenyan Constitution, the minority groups in Kenya were not recognized as Kenyan nationals. However, the current constitution's guarantee stateless persons the right to citizenship as other Kenyans.²⁷

Traditionally, states could had the power to determine their nationality practices themselves. However, with the enactment of UDHR, this changed and the state's power to carry out their own nationality laws was limited through article 15 of the declaration. This has helped in ensuing that the rights of minorities towards statelessness are not violated. Statelessness is prohibited under most legal international instruments.²⁸. Despite the UDHR declaration on statelessness, statelessness is still a challenge in many countries including Kenya.

The fact that someone is not a national nationality should not lead exclude one to right enjoyment. Nevertheless, this does not always happen, identity document are used as prerequisite to ones enjoyment of rights. Thus it can be said that certain rights are reserved

²⁵Rawlings, Gregory. 2012. "Statelessness, Human Rights AndDecolonisation". *The Journal of Pacific History* 47 (1): 45-68. doi:10.1080/00223344.2011.647397.

²⁶Sigona, Nando. 2015. Statelessness in Italy: Status, Rights, and Camps. *Racial Studies* 39 (6): 263-279..

²⁷Lesaiyor, Marcelino. 2013. *To what extent has the constitution 2010 protected the rights of the minority and marginalized communities.*

²⁸ Article 15, *UDHRs*, 10 December 1950

for the nationals. Although the principle of no-discrimination in international human rights law does not remove distinction between national and non-nationals. This is not the reality since most countries are yet to ratify or even adhere to the principles of the convention.²⁹

As much as the convention on statelessness helped create awareness on statelessness, the convention was limited in very ways. First, most of the countries with high prevalence of statelessness are yet to be signatories to the convention on reduction of statelessness. Second, many of rights guaranteed qualifies, and applies to persons living in a country. And third, the convention itself is silent on many critical issues, and as such it has been argued that the convention cannot guarantee full enjoyment of rights as expected of all citizens.

The 1961 reduction of stateless convention is the only legal document that seeks to end stateless internationally. The document address various issues regarding stateless including It provides many standards regarding acquisition and loss of nationality, including nationality renunciation, loss and deprivation. The Convention was originally made with a focus on status of refugees as opposed to the 1954 Convention, whose focus was on reducing statelessness.

1.7 Stateless Persons in Kenya

The Makondes, Nubians, Somalis, Shonas, Indians and pockets of Rwandese and Burudians that fall under stateless persons and minorities whose rights are being infringed regarding nationality status. The Nubian Community who is among the largest minorities in Kenya with an estimate population of 100,000. Based on census that was conducted in 2009, the group which came from Sudan has been in Kenya since 1900.³⁰ However, some the Nubian community members are unable to procure legal nationalization documents. Apart from the Nubians the other group that have dominated the scene as stateless persons in Kenya are the Somalis who because of War in Somalia have come into Kenya in droves. However, there number in Kenya is still vague but UNHCR estimates shows upward of 100,000 stateless Somalis. Other groups such as Burundians, Rwandese and Congolese are small as stateless persons in Kenya.³¹

²⁹BronwenManby, BronwenManby. 2010. *Citizenship in Africa* .

³⁰KHRC. 2016. *The Arduous Journey of the Makonde to Kenyan Citizenship*.

³¹ Ibid

The Makonde community in Kenya arrived in Kenya in two stages with the first group arriving as laborers in sugar and sisal plantations in 1940's from Mozambique with majority of them settling in Tanzania while the rest moved in Kenya. The second group of Makonde arrived in Kenya because of the fight for independence struggle in Mozambique. In 1965 the Front for the Liberation of Mozambique (FRELIMO), started the fight of independence and this lasted for a period of 10 till 1975 when Mozambique attained independence. During the fight for independence period many Mozambique fled from their country to neighboring Tanzania. One such group was the Makonde group that moved into Tanzania. The Makonde live on both sides of the river Ruvuma, which forms the border between Tanzania and Mozambique and as of 1993 the Makonde speakers were totaling 900,000. From Tanzania, some of the Makonde community members moved into Kenya and settled in the coast.³²

The challenges of legislative and policy gaps limited the recognition of Makonde as citizens during independence and after independence. A fact attributable to ethnic and racial discrimination; this is because only 42 tribes considered indigenous to Kenya, Indian settlers and English settlers were recognized as citizens. The Makonde have thus for over 50 years lived as stateless persons. The Makonde did vote in the first general elections of independent Kenya. They have been promised nationality by each successive government in Kenya. So far there have been 3 attempts by government to register the Makonde or issue them with identity documents, but none of the attempts has resolved their statelessness situation for them.³³

The Makonde have been rendered Stateless during their period of residence in the country. Their children who have attained the age of 18 cannot apply for Identification Cards and the birth of every child in their community is not recognized by the issuance of Birth certificates.

³²KNCHR. 2012. Ensuring the rights of *stateless persons in Kenya*.

³³Korir, Sing'Oei. 2014. *Kenya at 50: Unrealized Rights of Minorities and Indigenous Peoples*.

1.8 Justification of the Research

Minority right protection is an area that has attracted renewed interest with scholars conducting studies to generate new knowledge on multi ethnic minority right protection. This study offer an opportunity for increased knowledge on mufti ethnic minority right protection in developing countries. In addition, the study

This study will shade new light on the need for the Kenyan Government and key policy makers to consider laws and policies that will address the plight of minorities and especially groups that are considered de facto statelessness in Kenya. It is important for these minority groups to be recognized by the people of Kenya and Government. On the international level, it will be crucial to understand and gain new insight into human rights policies regarding minorities. This will cover the aspect of statelessness and discrimination of minorities which can pose a security risk to not only the country but the region. This study will form the platform for future research in conflict prevention studies among minority groups. In addition, the study can be used in the pool of academic articles and journals on the history and analysis of minorities in Kenya the Nubian community and the source of their conflicts.³⁴

This study will be important in the understanding of the need for collective and individual laws at both the national and international level that will address the current trends facing minorities at risk. Furthermore, it will add new knowledge to the field of international conflict management: minority rights studies and national law and conflict prevention among minorities at risk. A lot of academic journals may have been written on minority rights around the world however, there is very little literature which focuses on Nubian minority case study in Kenya.

1.9 Knowledge Gaps

Reviewed literature show that it is acknowledged that statelessness is a massive problem that results in the rights of minorities to be violated. Attempts have been made to understand explore the rights of stateless persons in international regime. To address the rights of minorities, many conventions and treaties have been adopted globally and regionally, most of the treaties adopted by UN and EU. Some countries in Africa such as

³⁴Lesage, Marcelline. 2013. *To what extent has the constitution 2010 protected the rights of the minority and marginalized communities.*

Kenya, Senegal have ensured minority right protection to some stateless groups, albeit partially. Despite the various attempts to address the rights of stateless persons in Africa question still abound as to whether granting of citizenship results to full enjoyment of rights to stateless persons. To address this gap, this study will be carried out to analyze the rights of minorities and stateless persons in Kenya.

1.10 Hypotheses

1. Stateless persons in Kenya do not enjoy minority right protection in Kenya.
2. Stateless persons have limitation in regards to enjoying full rights. .

1.11 Theoretical Framework

The study will be based on John W Burton theory of Basic Needs.

Theory of Basic Needs

The theory sees the individual as the basic unit of consideration and with the individual the major actor and making up structures. The individual is expected to interact with other individuals, and through the process of reciprocity the individual are expected to pursue their own needs as argued by ³⁵ Burton, drew attention to struggle that individual experiences as he seek for control, identity and security in the society. As individual struggle for these needs they pursue these needs as individuals first, and later as group members, a common attribute experienced among stateless groups.³⁶

Burton, opines that there is difference between values, needs and interests, with values acquired along the life as the individual experienced satisfaction from his/her needs. Values are related to one's environment, customs and belief in communities. Needs to him, are related to growth and development. Interests relates to the social, political and economic aspirations of the group members in a social system. Needs are individual based, thus are negotiable according to individual. On the contrary, interests are not negotiable, since they

³⁵ Burton, John. "Human needs theory." *Conflict: Resolution and Prevention* (1990): 36-37.

³⁶ Fisher, Ronald J. "Generic principles for resolving intergroup conflict." *Journal of Social Issues* 50, no. 1 (1994): 47-66.

are group based. This is what defines a community desire to be granted their rights to nationality as common among stateless groups.³⁷

Burton concludes that conflicts in most cases lead to statelessness, and in some instances states use it as a way to limit the guarantee to stateless person. The HNT theory views the presence of stateless persons as a condition that can provide ground for conflict. The HNT theory argues that to prevent conflict there is need for the need of stateless individuals to be met. Disputes are related to interests, such as the need to own property among the stateless persons, as such granting of nationality reduces conflicts associated with statelessness.³⁸

The ideas of human rights and basic human needs are closely connected in the lives of humans, stateless persons. The lack of these needs among stateless persons only shows human rights violation therefore providing grounding for human rights. This is the basis of statelessness which relates to the absence of needs fulfillment and human rights violation in the study. Attempt to provide solution towards statelessness are borne with the recognition that granting citizenship will not only grant stateless person their rights but will also fulfill their needs as exemplified in the hierarchy of needs theory. Thus, this theory will prove an overarching framework to understand the plight of stateless persons, solution to statelessness, citizenship benefits and challenges limiting full rights enjoyment. Overall, this theory will contribute to understanding on the level to which minority rights and nationality laws touching on stateless persons in Kenya have been implemented.

1.12 Methodology of the Research

The research used quantitative research methodology. This allowed for the use of inductive methods to collect data. This method was preferred as it allowed broad and diverse reasoning in my research. This method was preferred because the study used qualitative research as its basis and to establish an understanding of rights of minorities with key focus on formulating a hypothesis on the case study of Makonde in Kenya. The study used case study design. Case study was used in the study as it offered the study the opportunity to understand minority rights protection and statelessness in Kenya in detail. Makonde group is selected because they have been on the limelight with their agitation for citizenship since

³⁷ Salla, Michael E. "Conflict Resolution, Genetics, and Alchemy-The Evolution of Conflict Transmutation." *The Online Journal of Peace and Conflict Resolution* 3, no. 3 (2000).

³⁸ Ibid

2010 and were granted citizenship last year by the president. This forms a good case to understand the plight of stateless persons and life after acquiring citizenship.

The study had a sample of 8 that will include 4 group leaders of the Makonde community, 2 officials of the KNCHR and 2 officials of the UNHCR. The study used purposive sampling to select research participants in the study. Purposive sampling was used since it allowed the researcher to select participants with rich information. The study had inclusion criteria that guided the selection of participants. The study relied on both primary and secondary sources of data collection. Primary data collection was be collected through interviews while secondary data was be collected from journals, reports, government publications, UNHCR report and other relevant material.

Content Analysis was used in the study and this entailed the following procedure. The first step was to document selection and sampling. Sampling was used to select document selection of the published documents and the responses that were received from the informants. After selection of important text the researcher converted them into readable format in word. The researcher then used the word document to develop word frequency count based on similarity and differences in words used. This was used to develop themes to provide answer to research objectives and hypothesis.

1.13 Chapter Outline

This study is comprised of five chapters structured as follows:

The first chapter is on the introduction of the study and will focus on the following; background, problem statement, objectives, research question, hypothesis, justification of the study, literature review, knowledge gaps and methodology.

The second chapter focused on the situation of statelessness. This chapter delved into the situation of statelessness across the globe.

Chapter three documents the Makonde and statelessness in Kenya. The chapter gives an overview of statelessness in Kenya, and Makonde in particular. It will also highlight the process of facilitating acquisition of citizenship in Kenya.

Chapter four focused on a critical analysis of minority rights protection of stateless persons in Kenya, and will focus on benefits of citizen acquisition and challenges limiting the enjoyment of citizenship rights of the Makonde community through analysis of the data collected.

The fifth chapter is on a summary of findings, conclusions and Recommendations.

CHAPTER TWO

The Situation of Statelessness: An Overview

2.1 Introduction

The situation of statelessness raises problem across the globe that has raised questions on solution to statelessness. Statelessness arises from different causes, and with the causes linked to social, political and economic contexts. Bringing statelessness to an end entails the support of various stakeholders at both the local, regional and international level. There are many different lenses through which the worlds stateless can be explored and it is the intention of the study to provide an analysis of the statelessness situation in Kenya. Statelessness varies across the globe and this variation presents itself different. The problem of statelessness became an agenda of international concern after the Second World War as it was confused with the refugee problem. After the Second World War, refugee problem became a major issue in the global discourse. However, statelessness continued to receive little attention. Despite, the little attention given statelessness the international community, through UN and UNHCR began to give attention to statelessness from early 1960's.

Significant changes that occurred in the post-cold war era in Europe further contributed to raising attention to statelessness in Europe and the former Soviet Union. This was compounded by the independence of many countries across the world and conflict and war that resulted in displacement in 20th century. As a result the problem of statelessness became a global problem that required attention of internal. This study provides an overview of statelessness; exploring, analyzing statelessness and solutions to statelessness.

2.2 Statelessness under international law

After the 'minority treaties' system of the League of Nations, various procedures, norms and mechanisms involving minorities were gradually developed by the UN. The core of the UN human rights protection is the Universal Declaration of Human Rights (UDHR). The Declaration (adopted by the United Nation General Assembly on December 10th, 1948 involving fifty-six votes where 48 voted in its favor, 8 abstentions and none against) underlines the universal character and validity of all human rights, considered the most significant documents of the 20th century enumerating all important human rights comprising the varying human rights categories. These were later spited into the International Covenant

on Economic, Social and Cultural Rights (ECOSOC) and the International Covenant on Civil and Political Rights. It has a decisive influence on the human rights debate in many states in the following decades.³⁹

On December 16th, 1966, the United Nation General Assembly adopted the International Covenant on Civil and Political Rights and the International Covenant on Civil and Political Rights (ICCPR) (considered part of the International Bill of Human Rights) and become effective three months later as from March 24rd 1976, after the 35th ratification was deposited, representing an effort by UDHR to give human rights binding legal character under international law.⁴⁰ The adoption of UDHR in 1948 provided the need for the development of legally binding human rights instrument.⁴¹

On the April 26th, 1954, the ECOSOC approved a Resolution to organise a session of Plenipotentiaries to "whose aim was to ensure regulation and improvement of stateless individuals status through an international arrangement". The subsequent Session held on September 28th, 1954 approved the 'Convention relating to the Status of Stateless Persons'. The resolution approved is an international treaty whose aim is to ensure protection of stateless persons and it was effective as from June 6th, 1960. A stateless individual is defined in Article 1 of the 1954 treaty as a person who is not considered a citizen by any country as laid down by the applicable laws. Article 2 says the convention shall not apply to persons who inter alia enjoy rights equal to citizens and any person who is convicted of war related crimes. However, there are issues being deliberated since there is no any universal definition as to what really constitutes a negative in every given state. Therefore, applying an appropriate standard of proof is the only way this complicated issue can be dealt with. However, laws are currently not able to assist with interpreting the definition.⁴²

ICCPR provided one of the earliest foundations in protection of minority rights as is focuses on the rights to self-determination, implementation of the covenant by state parties, substantive rights enshrined in the covenant, reference terms for human rights committee and the interpretive rule for the covenant. The negative experiences of minority protection under the League of Nations and the emphasis on the universality of human rights in this covenant,

³⁹ Sohn, Louis B., and Thomas Buergenthal. *International protection of human rights*. Indianapolis: Bobbs-Merrill, 1973.

⁴⁰ Sohn P *Protection of minority rights* 1973.

⁴¹ Xanthaki, Alexandra. *Indigenous minority rights* Vol. 52. Cambridge University Press, 207.

⁴² Ibid

gives in general the reason why it differs from the Universal Declaration of Human Rights, which does not include a clause on minorities.⁴³

The UN adopted a declaration geared at addressing the rights of minorities, with the declaration defining minority rights as enshrined in article 17 ICPPR.⁴⁴ The ICCPR declaration is the main reference on minority rights protection as it provides: right to participate in social, cultural, economic and political life, right to establish associations, right to exercise their rights, protection of linguistic identity, Protection, by States, of their existence and their national or ethnic, cultural, religious and linguistic identity. The declaration further provides measures that states should undertake to ensure minority rights protection.⁴⁵

The United Nations Working Group on Minorities (UNWGM) has also played a role in minority protection, having been established in 1994 as a subsidiary body of the UN Sub-Commission on the Promotion and Protection of Human Rights. In 1989 the Sub-Commission decided to request authorization to initiate a study on peaceful and constructive approaches to situations involving minorities. The study was carried out over a period of three years and focused on providing recommendation on how best statelessness can be addressed. The main achievements of the Working Group have been related to the elaboration of principles and guidelines for minority protection, based on the text of the Declaration. Nevertheless, it had an important function in addressing the highly sensitive issues.⁴⁶

The Organization for Security and Co-operation in Europe (OSCE) is primarily a security organization. It originates in the Conference on Security and Co-operation in Europe (CSCE), initiated as an intergovernmental diplomatic conference aiming to establish common ground between the opposed blocs of Eastern and Western Europe. The then (in the middle of the Cold War) 35 participating States reached agreement on the Final Act of Helsinki on 1 August 1975, while the West achieved some formal recognition that human rights and fundamental freedoms were a legitimate international interest and subject of East West discourse. Broad areas of interest were divided into three 'areas' concerning: 1) security

⁴³ Alfredsson, Gudmundur, and Alfred Maurice De Zayas. *Minority rights: protection by the United Nations*. 1993.

⁴⁴ Hannum, Hurst. "Contemporary Developments in the International Protection of the Rights of Minorities." *Notre Dame L. Rev.* 66 (1990): 1431.

⁴⁵ Ibid

⁴⁶ O'Nions, Helen. *Minority rights protection in international law: the Roma of Europe*. Routledge, 2016.

questions (military matters); 2) economic and environmental concerns; and 3) 'human contacts, information and human rights'.⁴⁷

In principle, the international laws passed through the declarations to protect minorities were effective according to the capacity of organizations that formed them i.e. the United Nations. However, the challenge then and even now is on how to apply these principles effectively in the national laws of countries to ensure that protection of minorities is carried out effectively. From past experiences of how these treaties have failed in protecting minorities, for example, the case of Rwanda and Yugoslavia's genocide, there is a need to provide proper frameworks not only on the international level but most importantly on the national levels of application of laws governing minorities. Understanding national minorities is therefore of great concern to the appreciation of how these minorities are defined and protected by individual states.⁴⁸

Based on the principles governed on the UNDR regarding minority groups, these principles must be applied the laws of the countries. Based on Article 1, the existence of minority groups must be protected by states. Equally, legislative as well as other essential measure must be adopted to realize the objectives. Declaration is a non-binding treaty; however, it is important that states aim to abide by these principles in their respect of national minorities and the need to address their concerns. The challenge facing this reference of Article 1 is that, the article declares the capacity of states to define and respect minorities however there are no indications on the measures to be taken on the implementation of minority protection laws. National laws are very important for the understanding of minorities. National laws allow one to able to fully appreciate the capacity to which a state is taking towards a redress to the concerns of minorities.⁴⁹

According to International law, minorities are seen to carry an autonomous meaning. Thus, for a state to be seen to have minorities, this will need to be judged according to the international standards set. However, the challenge here remains on whether the international standards set are effective enough for states to apply the same principles on their national laws. Member states of the United Nations have played a key role in the appreciation of the

⁴⁷ Renteln, Alison Dundes. *International human rights: universalism versus relativism*. Quid Pro Books, 2013.

⁴⁸ Xanthaki, Alexandra. *Indigenous rights and United Nations standards: self-determination, culture and land*. Vol. 52. Cambridge University Press, 2007.

⁴⁹ May, Stephen. "Language policy and minority rights." *An introduction to language policy: Theory and method* 1 (2006): 255-272.

principles of the protection of minorities. Their membership in the organization has acted as a basis to monitor how the principles will be translated into their national laws and carried out effectively in the protection of minorities.⁵⁰

The challenge with the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic was that in as much as a Working Group was appointed to monitor the implementation of this Declaration into national laws of countries; many countries have not played their part and if anything have failed to address the protection of their national minorities. The international standards set on the declaration are what can judge whether a state has implemented the protection of minorities or not. However, there is a need for more stringent measures to counter national laws of states which cannot abide by the international principles of minority protection.⁵¹

Various states adopted minority protection on their national law which was facilitated by Religious and Linguistic Minorities principles. Looking at the Kenyan national law, it is thus important to identify how Kenya has been able to apply the Declaration's minority protection to fit her national laws and how this has been effective in the protection of nationalities living in Kenya. With this in mind, looking at Kenya's first constitution which came into force after independence, the rights and protection of individuals are stipulated under Article 70 states; "In Kenya, every individual is guaranteed of their individual fundamental rights and freedom despite tribe, background, race, tribe, political opinions, sex, and residence or other local connection, or creed but subject to respect for the rights and freedoms of others and for the general interest, to each and all of the following. Namely liberty, Life, security of individuals and the protection of the law; Freedom of expression, freedom of conscience, and freedom of assembly and association".⁵²

Furthermore, under Article 74 (1) it further stipulates that, "No person shall be subject to torture or inhuman or degrading punishment or other treatment." The challenge that faced the first constitution of Kenya was that the rights of minorities were not clearly spelt out in the national law. The first constitution defines the general rights of citizens however it failed to directly address the concerns of minorities and their protection. The first constitution not

⁵⁰ James, Stephen. *Human rights*. John Wiley & Sons, Ltd, 2008.

⁵¹ Ibid

⁵² Lumumba, P. L. O., and John Osogo Ambani. *The constitution of Kenya: contemporary readings*. African Books Collective, 2011.

only meant that minorities were not regarded as different from the rest of the citizens but it meant that there were no human rights protection laws against discrimination of minorities. The first constitution did not look at the individual nor collective rights of minorities; instead it addresses the rights of all citizens. Minorities are not mentioned anywhere in the constitution but instead the constitution refers to the non-discriminatory and equal rights of all individuals in Kenya. The challenge with the first constitution was that, minorities would not have been able to challenge the law in favor of their protection.⁵³

In comparison to the new constitution that was passed last year, the new constitution seems to have defined specific human rights aspects that need to be respected and which can be used as a general framework for the protection of minorities. It is important to note that human rights definition forms the backbone for protection of minorities. By defining the areas to which a human being deserves equal human rights this also defines the areas a minority group or individual requires protection from. The Universal Declaration of Human rights in this case formed the backbone for the appreciation of the universal framework for minority rights grievances to be addressed.

In the new and current constitution of Kenya, under chapter 4, Bill of Rights, Article 19 (2) it states that protection of fundamental liberties and human rights preserves individuals and communities dignity and promotes social justice. This constitution defines the human rights aspects that need to be respected. However, it still fails to address certain details that would form a background for minority protection. For instance, it does not define who a minority is nor does it directly talk about how minorities should be protected.⁵⁴

However, it does refer to the fair and equal rights as well as the need to respect human rights of all individuals.⁵⁵ This is important in not only respecting the aspect of human rights which forms the core in the protection of minorities but under the Bill of rights, the Kenyan law has been seen to given precedence to the need for protection against discrimination and human rights violations of all forms. For minorities living in Kenya, the “freedom of citizens to exercise their political rights "can be used to their advantage especially in fighting for

⁵³ Ibid

⁵⁴ Kenia. *The Constitution of Kenya: 2010*. Chief Registrar of the Judiciary, 2013.

⁵⁵ Maingi, Grace. "The Kenyan constitutional reform process: A case study on the work of FIDA Kenya in securing women's rights." *Feminist Africa 15 Legal Voice: Special issue* (2011).

equal representation and equal rights in political activities including the right to vote, right to citizenship and the right to political freedom. In comparison to the old constitution, the new constitution can be seen to be more tolerant to the representation of minorities under the freedom of expression, and representation. Though the constitution may not have defined minorities and the methods to which their protection is safeguarded, the national law gives room for the growth and precise definition of minorities. It is worth noting that from the articles that specifically talk about the bill of rights this gives room to address minorities concerns in Kenya.

On the national perspective of Kenya, the current constitution provides a basis to address minorities. Minorities may not have been defined directly but in principle human rights sections on the constitution allow for all Kenyan citizens to receive equal and fair treatment on the bill of rights. On the international level, Kenya is in a non-binding treaty with the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and to that capacity Kenya should have applied some of the principles stipulated on the Declaration on its constitution. This may not be the case on the current constitution however the challenge on both national and international laws on protection of minorities is that which law should be given precedence over the other when dealing with matters of minorities especially if a state is signatory to both international laws and national laws governing minority rights protection.

2.3 Situation Analysis of Stateless Person in Africa

Based on the UNHCR around 721,303 individuals are stateless in the sub-Saharan region. However, most stateless persons have not been accounted for and the number could be slightly higher. The current UNHCR's stateless report majorly contains data from two countries. Nonetheless, six African nations have been included in the by the UNHCR as having a critical situation in terms of statelessness in the region. Nonetheless, there is no sufficient data from the countries.⁵⁶ Some of the factors leading to stateless include restrictive colonial legacy and post-colonial policies. Equally, current issues regarding state succession have contributed to statelessness. Moreover, minority and supposed immigrant group face discrimination, particularly from some laws in African countries that restrict the rights of citizenship based on ethical racial basis. As such, the statelessness risk is increased

⁵⁶ Weissbrodt, David S., and Clay Collins. "The human rights of stateless persons." *Human Rights Quarterly* 28, no. 1 (2006): 245-276.

significantly by displacement and migration.⁵⁷ Women discrimination also contributes towards statelessness in some states in Africa. Notably, around 8 countries in Sub-sahara Africa deny women their rights in comparison to men.

The main causes of statelessness in southern Africa can be linked to the historical injustices met against migrants and their descendants who have been discriminated based on law, race and ethnicity. These causes are related to the colonial boundaries that were set by the colonialists who set borders therefore excluding certain communities from certain regions.⁵⁸ In addition to setting colonial boundaries that excluded some communities, colonialists also carried out forced migration, particularly of due to communal labour in Africa. This led to movement of people to places that were not originally theirs.⁵⁹

The European empires also left behind legal systems that had created a stratified society that was based on class, ethnicity and racial discrimination. The basis of colonial domination was racy and ethnic discrimination. A feature that was transferred to the colonies after independences, with most countries guided by racial and ethnic division. As a result a number of ethnic groups who were not viewed as natives were classified as outsiders. Some person and ethnic groups were not viewed as nationals and thereby treated as second class citizens who were excluded from enjoying rights of citizenship.⁶⁰

After the independence of countries in Southern Africa, most countries adopted their nationality laws from their colonial masters. Majority of countries in Southern Africa were colonized by British, and a result most of the countries in Southern Africa borrowed heavily from Britain nationality laws and common wealth laws.⁶¹ The laws borrowed from Britain made it possible for nationality to be acquired through three ways; namely, automatic citizenship acquisition, and special citizenship acquisition and through the process of naturalization. Those who acquired citizenship through the first process were predominantly

⁵⁷ Frelick, Bill, and Maureen Lynch. "Statelessness: a forgotten human rights crisis." *Forced Migration Review* 24 (2005): 65-66.

⁵⁸ Thompson, Daniel K. "Scaling Statelessness: Absent, Present, Former, and Liminal States of Somali Experience in South Africa." *PoLAR: Political and Legal Anthropology Review* 40, no. 1 (2017): 86-103.

⁵⁹ Ibid

⁶⁰ Yahaya, Aliyu. "Colonialism in the stateless societies of Africa: A historical overview of administrative policies and enduring consequences in southern Zaria districts, Nigeria." *African Social Science Review* 8, no. 1 (2016).

⁶¹ Ibid

natives of the countries while immigrants were limited to the acquisition of citizenship through the two process.⁶²

Across the Middle East and North Africa, there are several sizeable stateless populations, with the estimate of stateless across the MENA region approximating 200,000, with numerous groups existing in the region. Statelessness in the region has affected the lives of persons with statelessness and their families.⁶³ State succession has long been major cause of statelessness in the MENA region. The formation of states at independent resulted in creation of condition that created stateless persons in the region. The nationality acts adopted from the colonial masters heavily resulted in creation of stateless persons directly or indirectly through the existing nationality laws. For example, the establishment of border points across countries resulted in excluding some community members of same ethnic community from a given nationality. Directly, countries application of existing nationality laws resulted in exclusion of migrants from countries previously unknown to certain population.⁶⁴

Another considerable cause of statelessness in the region is the gender biased national laws. While increased attempts have been made to reduce the gender bias of nationality laws in the region. Gender discrimination is still a major cause of discrimination in the region. A case in point is in Lebanon, where children of women married to non-Lebanese are often limited in acquiring nationality under the existing laws. The MENA region has been slow in reducing the gender effect on statelessness, as most countries are yet to review their nationality laws that are predominantly based on the Muslim culture. Despite, most countries in the region still slow to review their laws to improve minority right protection, some countries such as Egypt have been at the fore front with amendments targeted at addressing statelessness.⁶⁵

Most countries in the MENA region lack special law and regulation that cater for stateless persons, and this has resulted in stateless persons been dealt with under the laws that apply to non-nationals. A situation that has hampered the acquisition of citizenship by

⁶² Thompson, Daniel K. "Scaling Statelessness: Absent, Present, Former, and Liminal States of Somali Experience in South Africa." *PoLAR: Political and Legal Anthropology Review* 40, no. 1 (2017): 86-103.

⁶³ Dible, Jeri L. *The Social and Political Consequences of another Stateless Generation in the Middle East*. US Army School for Advanced Military Studies Fort Leavenworth United States, 2016.

⁶⁴ Minahan, James. *Encyclopedia of the stateless nations: DK*. Vol. 2. Greenwood Publishing Group, 2002.

⁶⁵ Berkeley, Bill. "Stateless people, violent states." *World Policy Journal* 26, no. 1 (2009): 3-15.

stateless persons. In a number of countries in MENA region, special provision has been created to deal with stateless among children born the countries of the region. For instance, United Arab Emirates have special laws that are used to grant nationality to children born to parents who are not national in their country.⁶⁶

The UNHCR began the program of determining the number of stateless persons globally in 2006. Based on the convention's report, sub-Saharan region has around 721,303 stateless persons. Most of the stateless persons in the UNHCR report came from Ivory Coast and Kenya. Kenya has around twenty-thousand stateless persons while Ivory Coast has approximately seven-hundred thousand stateless persons. In Burundi, 1,303 persons were considered stateless while only one person was recorded in Liberia. Statelessness persists in six other countries which include DRC, Ethiopia, Madagascar, Zimbabwe and South Africa.⁶⁷

The estimate of stateless persons in DRC does not exist. Based on the UNHCR, stateless has existed in DRC since 2005, nonetheless, the problem existed before this time. Nonetheless, records regarding the situation do not exist because of many years of civil war in the country. Equally, the issue is politically sensitive in DRC. In fact, a national census has not been conducted in DRC since 1984. Some of the persons that are affected by statelessness in DRC include members of the Banyarwanda population. The nationality law in DRC was reviewed a number of times so as deal with various concerns regarding the Banyarwanda community. ⁶⁸

Stateless is also prevalent in Madagascar. The country has a large population of Indo-Pakistan based Muslims who are commonly known as the Karana. The persons have been in Madagascar for over four generations but have not acquired citizenship. In Nigeria, stateless persons who are affected by the dispute between Nigeria and Cameroon is around 150,000 persons. In 2006, however, the two countries made a deal with Cameroon promising not force Nigerians living in the Bakasi peninsula to return back to Nigeria or change nationality. The bilateral agreement did not result in reducing statelessness in Nigeria as expected.⁶⁹

⁶⁶ Reno, William. "External Relations of Weak States and Stateless Regions in Africa." *African Foreign Policies: Power and Process* (2001): 185-205.

⁶⁷ Ibid

⁶⁸ Yahaya, Aliyu. "Colonialism in the stateless societies of Africa: A historical overview of administrative policies and enduring consequences in southern Zaria districts, Nigeria." *African Social Science Review* 8, no. 1 (2016).

⁶⁹ Ibid

2.4 Solution in Addressing Stateless

The challenge of statelessness has received tremendous success in the recent past. For instance, the UNHCR launched the I Belong Campaign in November 2014. The purpose of the campaign was to end statelessness within a decade. Two years from 2014, the campaign has intensified stateliness awareness around the globe and roused political channels to deal with the challenge. As such, an early momentum has been provided by the Abidjan based statelessness eradication campaign and the Brazil Declaration and Plan of Action. The initiatives have sensitized other nations to begin and develop their own National Action Plans to deal with statelessness.⁷⁰

Moreover, since 2014, some countries have undertaken policy and legislative changes even without National Action Plans. In terms of solution to current statelessness issues, governments throughout the world have conferred or granted thousands stateless persons nationality in the past two years. By September 2016, around ten states to the UN statelessness convention since 2014. As such, signatory members on status of stateless individuals and statelessness reduction has increased to 89 and 68 respectively.⁷¹

Various actors have made massive contributions towards the statelessness debate. The strategies for realizing the UNHCR's Campaign's goals depend on enhanced civil service coordination, enhanced diplomacy and more involvement by global organizations. Internationally, the right to nationality resolution was embraced the council of human rights in June and received around 100 co-sponsors. Regionally, African Union, through African Commission on Human and Peoples' Rights adopted a draft Protocol that will provide framework on how states can guarantee nationality in Africa.⁷²

In Asia, through the Bali process, ASEAN countries have developed a framework that would bind states to universal civil registration. In Europe, following the adoption in 2015 of the first ever EU Council Conclusions on Statelessness, most countries in EU ratified and ensure implementation of statelessness in Europe. Further, the United Nations embarked on a

⁷⁰ Spiro, Peter J. "Nationality and Statelessness under International Law." (2016): 148-152.

⁷¹ Ibid

⁷² Sigona, Nando. "Everyday statelessness in Italy: status, rights, and camps." *Ethnic and Racial Studies* 39, no. 2 (2016): 263-279.

campaign dubbed “I belong” in 2014 whose mandate was to create awareness on statelessness and end statelessness.⁷³

In June 2016, an agreement was signed among several dozen NGOs, the result of the agreement was increased cooperation to make more effective the campaign against statelessness across the globe. This resulted into the launch of a coalition formed to campaign against statelessness. Over the past two years, civil societies have emerged and, in turn, completed the American and European civil societies. Various UNHCR’s complementary initiatives have been developed by NGOs to sensitize the statelessness of children. For example, the European Network on Statelessness launched an innovative Stateless kids Campaign in 2015.⁷⁴

⁷³ Fiddian-Qasmiyeh, Elena. "On the Threshold of Statelessness: Palestinian narratives of loss and erasure." *Ethnic and Racial Studies* 39, no. 2 (2016): 301-321.

⁷⁴ Ibid

CHAPTER THREE

The Stateless Situation of The Makonde

3.1 Introduction

Kenya like other countries in Africa has stateless persons across the counties. Stateless persons in Kenya come from diverse background and reside in different counties. The Makonde community in Kenya arrived in early 1940s as labourers for plantation in coast province. After independence, the Makonde community found themselves statelessness owing to gaps in legislative and policy gaps. This was further aggravated by ethnic and racial discrimination at the coast province. Makonde have stayed in Kenya for over 50 years, and during the same period they have been statelessness. The Makonde have over the past four decades attempted to acquire citizenship through successive government. Despite, these attempts the Makonde failed in their attempts.

The passing of the constitution in 2010, gave hope to the stateless persons in Kenya, with the renewed interest from the Makonde community to seek for nationality under the Kenyan. The journey to grant nationality to the Makonde community begun in 2014 through the effort of human rights organization in coast province. The Makonde got a boost of their initiative to acquire citizenship in 2015 when the Kwale county government recognized the efforts of Makonde community, and thereafter petitioned the President to recognize the Makonde as citizens and issue them with identity documents. As a result of the petition, the president established a taskforce to explore the situation of statelessness and to recommend solution thereof. Although the report on task force is yet to be implemented, the task force provided increased momentum for Makonde to agitate for their rights. This section will document the challenge of statelessness among the Makonde with an aim of documenting statelessness among the Makonde, and understanding how the Makonde were granted nationality.

3.2 Makonde Community

Kenya is not a party to either 1954 convention of stateless persons or the 1961 convention on the reduction of statelessness. It is, however, party to promoting and protecting fundamental international human rights such as the 1990 African charter on the rights and welfare of children. UN convention on eliminating all forms of discrimination against women

and the international covenant on civil and political rights of the child. According to the UNHCR statistics, stateless in Kenya is estimated at approximately 20,000, with these been mainly minority groups. However, there exists lack of clear documented evidence on the number of stateless persons in Kenya.⁷⁵ These include the Makonde, Nubians, Coastal Arabs, Somalis and Sudanese. These minority groups all struggle with statelessness and discriminatory citizenship laws and practices, many these groups are unable to participate in the political, economic and social life of the country. Some of the stateless persons in Kenya are included among refugees further compounding the problems of citizenship in the country. The official causes of statelessness in Kenya can be grouped into two broad categories of legal and administrative.⁷⁶

The national laws of Kenya concerning the acquisition, restoration, retention and loss of citizenship still have shortcoming that fail to prevent statelessness. Kenya adopted a new constitution in 2010, and the new constitution removed gender discrimination in nationality while allowing for dual nationality for the first time. A new citizenship act in 2011 also created a temporary procedure for statelessness that have lived in Kenya since independence and could trace their ancestry in the country and apply for citizenship. The recognition of stateless person is now recognized and contained in section 15 of the Kenya citizenship and immigration Act, No 12 of 2011.⁷⁷

No regulations have yet to be adopted to help in the implementation of the law. Likewise, very few cases of recognition have been reported based on the new provisions, except for the case of Makonde community. There are some groups under threat of non-recognition of Kenyan nationality. These include those of Somali descent and Muslims in coastal and north-eastern regions. Persons from these groups, face additional screening which is time consuming whenever they apply for nationality recognition.⁷⁸

Kenya laws remain deficient in addressing the issue of statelessness and citizenship discrimination. This is manifested through the administrative causes of statelessness in Kenya, with this revealing that there is a difference between law and actual practice. Persons

⁷⁵ KHRC. (2016). *The Arduous Journey of the Makonde to Kenyan Citizenship*

⁷⁶ Mwangi, Oscar Gakuo. "8 Statelessness, ungoverned spaces and security in Kenya." *Understanding Statelessness* (2017): 117.

⁷⁷ Ibid

⁷⁸ Bloom, Tendayi, Katherine Tonkiss, and Phillip Cole, eds. *Understanding statelessness*. Taylor & Francis, 2017.

may be at risk of becoming stateless due to the defective operations or under regulated nature of Kenya's administrative practices regarding citizenship. For example, there are not sufficient regulations that guide the vetting process to which certain groups in Kenya are subjected to.⁷⁹

In Kenya, it is rather difficult to make a clear distinction between de jure and de facto stateless persons. Some of Kenya's statelessness can be classified as. There is a link between lack of documents on one hand and statelessness on the other hand. In Kenya, some of ethnic minority groups have been on the fringes of Kenyan citizenship due to discrimination, bureaucracy and lack of documentation that have made these groups struggle for long time.⁸⁰ While some of the group members have acquired citizenship, many have not. Thus, it can be concluded that many suffer varying degree of ineffective nationality. Nevertheless, the nationality status of persons within these minority groups is fluid and hence it's difficult to make a distinction between and de facto statelessness.

The Kenyan state for instance imposes strict registration processes of Kenyan Somalis.⁸¹ This can be explained by the suspicion that is exhibited towards the Somalis, following decades of conflict in Somalia. In conclusion, although Kenyan is party to many conventions that promote fundamental human rights, it is not a party to convention of statelessness. The laws concerning the citizens have shortcoming that have failed to address statelessness, a situation compounded by administrative challenges.⁸²

Based on the 1963 and 2010 constitution, the Nubi community is entitled to the Kenyan citizenship. However, the besides the Nubian community, other groups have been denied citizenship in the country since independence.⁸³ While each Kenyan is allowed to freely apply for citizenship, the minority groups are discriminated in terms of applying for IDs. For Nubians and the Makonde as well as other similar communities worldwide including Biharis in Bangladesh, research and advocacy over the past decade have led to improvements in constitutional rights to citizenship and registration processes.⁸⁴

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Korir, S. (2014). *Kenya at 50: unrealized rights of minorities and indigenous peoples*.

⁸² Hussein, Adam. 2017. *Kenyan Nubians: Standing Up To Statelessness*

⁸³ KNCHR. 2010. *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*.

⁸⁴ Ibid

The identification regime in Kenya contains both repressive and emancipatory potential. The British colonies system, which was largely influenced by the Afrikaners, adopted an approach of identifying males under their jurisdiction. The first identification system in Kenya (Kipande) was introduced in the Native Registration Ordinance of 1915. The kipande system included a copper tin that contained registration documents that were worn around the neck. The system was loathed by most Kenyans. In 1947, male registration was made mandatory under the Registration of Persons Ordinance. Subsequently, in 1978 all women were required to be registered, with the age of registration been raised from 16-18 years. Although the primary aim of the registration was to monitor the labour force, especially persons working in plantations and mines, identification was extended to include other spheres of life. For instance, besides controlling labour, the kipande system was used to monitor movement and identify people's home. The kipande system was used to foster ethnic identity by identifying persons based on their Native Reserves, and ensuring that such persons remained their under the supervision of Native Authority.⁸⁵

Currently, the Kenyan law requires residents to secure a national ID within ninety days after attaining the age of eighteen years. As such, the persons must procure an application form from the office of the local chief. Once the form is completed it must be submitted to the National Bureau of Registration's local branch where persons are required to documents that prove their age and parents which entitle them to citizenship in the country. Nonetheless, the ID is not sufficient proof of citizenship. In fact, there is no one document that can be used as sufficient evidence for Kenyan citizenship. Nonetheless, the ID is one of the most significant documents along with other documents such as passports, birth certificate and other identical documents. Besides, IDs are required documents for citizenship in the country. While nationality cannot be completely proofed through the ID, most persons in the country do not understand this. Instead, most citizens believe that the country's citizenship must be proved through the ID.⁸⁶

The Kenyan constitution of 2010 is a good example which contains simple reforms that may be adjusted to suit the minorities. Under the prior Kenyan Constitution of 2001, the minority groups in Kenya were not recognized as Kenyan nationals. However, the current

⁸⁵ Korir, S. (2014). *Kenya at 50: unrealized rights of minorities and indigenous peoples*.

⁸⁶ Mwangi, Oscar Gakuo. "8 Statelessness, ungoverned spaces and security in Kenya." *Understanding Statelessness* (2017): 117.

constitution's guarantee stateless persons the right to citizenship as other Kenyans. The international law clearly establishes the right to nationality. To Start with the UDHR, subsequent international and regional treaties, in the ICCPR, CRC, the Convention on the rights of Persons with Disabilities ('CRPD'), CERD and the CEDAW as well as the ACRWC, provide various provisions which aims to uphold the right to citizenship. However, it is only the substance of right to nationality which is provided for in the International law. This is because various procedural aspects, mostly those which elaborate on acquisition of nationality as well as definition of nationals, are administered by laws of a given state on citizenship and registration of individuals.⁸⁷

To obtain a Kenyan citizenship, several governing processes are involved. Three major modes by which an individual may attain a Kenyan citizenship which are by birth, by naturalization and by registration are prescribed in the current constitution. Chapter 6, of the Kenyan Constitution, which details the principles about citizenship, begins by describing who was to be considered as a Kenyan citizen at the time of independence in 1963. In this case, individuals born in Kenya to the United Kingdom citizens and its colonies or protectorates as of 11 December 1963 and whose any of their parents was born in Kenya parents, were considered to qualify as Kenyan citizens automatically.⁸⁸ A person born abroad would also be a Kenyan citizen, if the person's fathers 'becomes, or would but for his death have become a citizen of Kenya at independence. December 13th, 1965 was designated as a deadline date for all those individuals with a Kenyan connection to apply for Kenyan citizenship since they were considered eligible. However, any eligible person who failed to apply for Kenyan citizenship by December 13th, 1965 lost their chance of acquiring Kenyan citizenship and their children could not apply especially where the child both parents were non-nationals.⁸⁹

Acquiring Kenyan citizenship by birth is only applicable individuals born in Kenya the country gained its independence on December 12th, 1963. One of the parents must be a Kenyan citizen for one to be eligible as a citizen on this ground. As provided under Section 89 of the Kenyan Constitution: 'Every individual born in Kenya after December 11th, 1963 shall automatically attain a Kenyan citizenship provided that at the date of his/her birth one of

⁸⁷ Lindley, Anna. "Between a protracted and a crisis situation: Policy responses to Somali refugees in Kenya." *Refugee Survey Quarterly* 30, no. 4 (2011): 14-49.

⁸⁸ Balaton-Chrimes, Samantha. "Counting as citizens: Recognition of the Nubians in the 2009 Kenyan census." *Ethno politics* 10, no. 2 (2011): 205-218.

⁸⁹ Ibid

his parents is a Kenyan citizen.⁹⁰ However, there exist some additional requirements for those whose fathers are foreigners. First, the person requiring becoming a Kenyan citizen must demonstrate without doubt that his or her foreign father does not 'have immunity from legal suit process as is rendered to the envoy of a foreign nation accredited to Kenya'. Moreover, the applicant for Kenyan citizenship must show that the country to which his/her father belong is not a citizen of a at war with Kenya.⁹¹

Becoming a Kenyan citizen by descent applies those persons mainly born abroad after the country gained its independence. There are certain restrictions which are imposed by Kenyan constitution regarding this category of individuals as it is with others who are born abroad. In this case, the applicant's father is the focus. According to the Constitution, it is only fathers of Kenyan origin who can transmit citizenship under this category. As per section 90 of the constitution: 'A person born outside Kenya after December 12th, 1963 shall become a Kenyan citizen at the date of his birth provided that at that date his father is a citizen of Kenya.' Thus, Kenyan mothers who give birth abroad with foreign husbands are not eligible to become a Kenyan citizen by descent.⁹²

Citizenship can also be acquired by registration. Under this mode, an individual is required to show that both of his/her parents is a Kenyan citizen and the other is a citizen of any of the commonwealth countries or any stated African country. Despite this, some set residency requirements must also be met. Kenyans married to foreigners can also have their partners registering for Kenyan citizenship. However, there are restrictions on this mode of gaining Kenyan citizenship imposed by the constitution whereby only women who are married to Kenyan citizens are eligible for such application. It therefore means foreign men who are married to Kenyan men are not eligible to gain Kenyan citizenship under this mode. This mode of obtaining Kenyan citizenship, thus, poses a fundamental problem for those children born abroad to a Kenyan mother and a foreign father.⁹³

There are various practices and procedures involved in registration of persons though they are not captured in the parent or subsidiary law. Registration of Persons Act is the

⁹⁰ Balaton-Chrimes, Samantha. "The Nubians of Kenya: citizenship in the gaps and margins." *Citizenship, belonging, and political community in Africa: dialogues between past and present* (2016): 149-178.

⁹¹ Ibid

⁹² Balaton-Chrimes, S., 2012. Citizens minus: rights, recognition and the Nubians of Kenya. *Unpublished PhD thesis, Monash University.*

⁹³ Ibid

legitimate legal framework that is currently governing the issuance of identity cards in Kenya. However, other major laws especially the Kenya Citizenship Act (Cap 170 Laws of Kenya) and the Kenya's constitution are also applicable in the registration process.

As per Section 2 of the Registration of Persons Act, all Kenyan citizens who have attained the majority age of eighteen years are allowed by the Act to be registered as Kenyan citizens. The process of attaining the Kenyan citizenship is either through naturalization or by registration is well provided for under the Kenya Citizenship Act whereas the Sixth Chapter of the Constitution of Kenya is the principle framework of Kenyan Citizenship.⁹⁴ A person age and the proof of citizenship are the essential requirements of the registration process. For a person to prove that they have attained the majority age for registration, rule 4(2) (a) of the Registration of Persons Act, requires the registering officer to demand the production of an age assessment certificate or birth certificate issued by a Government medical officer, or a baptismal certificate issued by a minister of a renowned religious organization in Kenya at the point of his/her birth or any other evidence to prove age as acceptable the registration officer.⁹⁵

The extent to which a person enjoys his/her fundamental rights and freedoms within the Kenyan borders is determined by being in possession of an Identity Card which has a vital link to Kenyan citizenship. The significance of being in possession of an identity card in Kenya is well provided for under Section 10 of the Registration of Persons Act (Cap 107, Laws of Kenya). The section states that any relevant authority may require a person to produce their identity cards while applying for issuing of any permit, license, or other documents, and while exercising any lawful or judicial tasks. Nevertheless, the Kenyan law makes it mandatory for all Kenyan citizens who have attained the age of at least eighteen years to apply and be issued with national ID failure to which it constitutes a criminal offence punishable by law.⁹⁶

Every individual right to belong to a nation is guaranteed by the human rights framework. However, the Kenyan constitution on domestic law provides that for a person to live and enjoy their rights and freedoms as Kenyan residents, it is a must for one to be

⁹⁴ Lindley, Anna. "Between a protracted and a crisis situation: Policy responses to Somali refugees in Kenya." *Refugee Survey Quarterly* 30, no. 4 (2011): 14-49.

⁹⁵ Ibid

⁹⁶ Open Society Justice Initiative. "Nationality and Discrimination: The Case of Kenyan Nubians." *New York: Open Society Justice Initiative* (2011).

registered and be issued with a valid Kenyan identity card. Therefore, because identity card is of such significance in Kenya, it should be issued to all citizens who have attained majority age as matter of their rights.⁹⁷

The Makondes, Nubians, Somalis, Shonas, Indians and pockets of Rwandese and Burudians that fall under stateless persons and minorities whose rights are being infringed regarding nationality status. The Nubian Community who is among the largest minorities in Kenya with an estimate population of 100,000 according to 2009 census originally from Sudan with a current population of about 100,000 people has been in Kenya since 1900.⁹⁸ Some of them claim to experience bottlenecks in registration or obtaining national identification documents. Apart from the Nubians the other group that have dominated the scene as stateless persons in Kenya are the Somalis who because of War in Somalia have come into Kenya in droves. However, there number in Kenya is still vague but UNHCR estimates shows upward of 100,000 stateless Somalis. Other groups such as Burundians, Rwandese and Congolese are small as stateless persons in Kenya.⁹⁹

The Makonde are a Bantu speaking community who live on both sides of river Ruvuma which forms the border of Tanzania and Mozambique. The community originated from the Northern part of the Republic of Mozambique mainly from Mwendé district of Cabb Derogado province. A small group of Makonde migrated to Kenya in the early part of the twentieth century, and have remained ever since. The Makonde community in Kenya arrived in Kenya in two stages with the first group arriving as labourers in sugar and sisal plantations in 1940's from Mozambique with majority of them settling in Tanzania while the rest moved in Kenya.¹⁰⁰ The second group of Makonde arrived in Kenya because of the fight for independence struggle in Mozambique. In 1965 the Front for the Liberation of Mozambique (FRELIMO), started the fight of independence and this lasted for a period of 10 till 1975 when Mozambique attained independence. During the fight for independence period many Mozambique fled from their country to neighbouring Tanzania. One such group was the Makonde group that moved into Tanzania. The Makonde live on both sides of the river Ruvuma, which forms the border between Tanzania and Mozambique and as of 1993 the

⁹⁷ Ibid

⁹⁸ KHRC. 2016. *The Arduous Journey of the Makonde o Kenyan Citizenship*.

⁹⁹ Ibid

¹⁰⁰ Mwangi, Oscar Gakuo. "8 Statelessness, ungoverned spaces and security in Kenya." *Understanding Statelessness* (2017): 117.

Makonde speakers were totalling 900,000. From Tanzania, some of the Makonde community members moved into Kenya and settled in the coast.¹⁰¹

The Makonde community lost their formal working jobs in the sisal firms and sugar plantations in the 1990s. During this time, there was an order by the government to the employers regarding employment of non-Kenyans. All employers were to ensure that their foreign employees were registered with the government and had work permits. Given the high fees required for work permits vis a vis the remuneration, most companies opted to terminate their contracts with the foreign workers including Makonde community members.¹⁰² After Kenya's independence, they were neither repatriated nor given Kenyan identification. However, they were given DC1 cards five years after independence. These allowed them to work and pay taxes. This situation changed when there was a change in political regime. They were given alien cards thereby formally recognising them as foreigners. These cards were meant for identification especially when encountering the police.¹⁰³

The Kenyan Makonde are estimated to be 5000 people. The Makonde population lives in scattered locations across a relatively large area in Kwale, Kilifi and Mombasa Counties. The majority live in Kwale County. Makonde community in Kenya are known to cover four generations that live in coastal Kenya, with the first generation having arrived several decades ago, the second generation are those who came with their parents, the third generation relates to grandparents who initiated migration while the fourth generation are the Makonde whose great parents came to Kenya.¹⁰⁴

Makonde community members have over the past years approached both Kenyan officials as well as officials from the Mozambican High Commission and Consulate in Kenya for documentation. However, according to a KNHCR study conducted in 2013, the prevalence of identity documents of any is less than 15% of the total population of Makonde community, with either ownership of Mozambican or Kenyan identity cards. Some of the Makonde community members have also acquired identity cards through marriage, more so

¹⁰¹KNCHR. 2010. *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya.*

¹⁰² Ibid

¹⁰³ A study into the nationality status of the Makonde community in Kenya. KNHCR (2015)

¹⁰⁴ Ibid

the women who have acquired identity cards by marriage to Kenyan men. ¹⁰⁵The Makonde have thus for over 50 years lived as stateless persons. The Makonde did vote in the first general elections of independent Kenya. They have been promised nationality by each successive government in Kenya. So far there have been 3 attempts by government to register the Makonde or issue them with identity documents, but none of the attempts has resolved their statelessness situation for them. ¹⁰⁶

The Makonde have been rendered Stateless during their period of residence in the country. Their children who have attained the age of 18 cannot apply for Identification Cards and the birth of every child in their community is not recognized by the issuance of Birth certificates. Access to the Kenyan national identity card is regarded as a key step for a person to prove his citizenship and access the related rights and benefits. However, this access has been a challenge for the Makonde community members. This was asserted through the interviewers which show that majority of the community members have not held a Kenyan national identity card, and with most of the community members who identity cards being women. ¹⁰⁷

Before the issuance of identity, some of the study participants stated that Mozambican consular card was very popular among the community members. The prevalence of Mozambican documentation was established to be higher among the community members than the Kenyan documentation. Some of the respondents commented that the reason why the community members opted for the Mozambican documents had to do with the difficulty in accessing Kenyan documents. The Mozambican consular card is the identification document issued by Mozambican officials in Kenya, namely the High Commission in Nairobi and the Consulate in Mombasa. The consular card does not equal a Mozambican passport, nor does it allow access to Kenyan services according to the respondents. ¹⁰⁸

It was reported that before the granting of citizenship to Makonde, most of the community members have approached Kenyan officials in order to receive documentation, specifically the national identity card. The area chiefs and assistant chiefs are the most common focal persons in search for documentation. The success rate for applications of

¹⁰⁵ Ibid

¹⁰⁶ Korir, Sing'Oei. 2014. *Kenya at 50: Unrealized Rights of Minorities and Indigenous Peoples*.

¹⁰⁷ A study into the nationality status of the Makonde community in Kenya. KNHCR (2015)

¹⁰⁸ Ibid

documentation among the Makonde community has been relatively low according to some of the interviewers. One of the most common reasons attributed to rejection of Makonde community members in search for identity cards, is lack of entitlement among the Makonde community members.¹⁰⁹

Makonde community members have over the past four decades made attempts to receive identification documents through formal and informal methods. Formal methods involve vetting the community members who apply for documentation. It emerged from the participants that Makonde community members who apply for identity cards undergo a vetting process. The majority of respondents specified that they had been subject to vetting as part of their application for national identity cards. Vetting process in the community have taken place between 1970 and 2013. Although, most of the community members have attempted applied for documents through formal process, some of the community members have applied for identity cards via the informal means. This was confirmed by one of the participants.¹¹⁰

Before the issuance of identity cards by the government, application of identity cards was both formal and informal but after the issuance, community members use formal means of identity card application.

Multiple respondents referred to the consequences related to the inaccessibility of Kenyan documents. One consequence is the blockade to accessing the formal job market. Some respondents said that before they were given IDs, they had received job offers, but they had difficulty been employed as the employer could not hire them due to lack of ID or work permit. Other respondents stated that the other challenges the community members experienced had to do with access to justice and ownership of land, especially in situations where neighbors with Kenyan identification documents had challenged their ownership.

Claims to land are difficult to establish and the Makonde have not had access to titled deeds during recent years unlike their neighboring tribes. With regards to security, fear of arrest is still common due to lack of documentation, although some participants stated that the situation has significantly improved from the era of president Moi.¹¹¹

¹⁰⁹ Interview held with Makonde community leader

¹¹⁰ Interview held with community Makonde community leader

¹¹¹ Ibid

Beyond insecurity, multiple respondents felt a sense of humiliation because they feel to be Kenyans, but perceive to be treated as foreigners. The lack of documentation has over the past years affected the formal integration of the Makonde, despite the high level of integration in their everyday life.

In the words of one respondent: “A Makonde cannot be elected a leader due to lack of IDs”.

With regards to the registration process, concerns were also raised about an alleged cost of Ksh 2,000 to launch the registration for citizenship application. This according to some of the community leaders was a major limitation towards the Makonde accessing such service since most community members are poor. Another respondent stated that in their struggle for citizenship, some have been unable to access Kenyan identity documents although their father was a recognized Kenyan citizen. As a result before the granting of citizenship, the Makonde viewed acquiring Mozambique document easier than Kenya. According to one respondent, community members to the Mozambique card due to frustration in the Kenyan process.¹¹²

Fear of arrest as well as perceived inability to access Kenyan documents, often combined with multiple attempts of application either by oneself or close relatives, were equally mentioned as reasons why Makonde preferred Mozambique documentation than the Kenya IDs before they were granted citizenship. Other respondents highlighted that Mozambican officials have actively approached their communities with regards to registration. Reasons related to the despair of the current situation and inability to access documentation through formal ways were also mentioned as reasons for seeking out to fraudulent means in achieving documentation, such as indicating a fake name or tribe. Some respondents expressed their concern of what will happen to persons with fake documentation for example in the case of a registration exercise and how this will influence the assessment on the regularization of their nationality status.¹¹³

The study participants acknowledged that over the past decades, majority of community members had approached Kenyan Government officials to register for Kenyan documentation, predominantly the national identity card, but in most cases their application

¹¹² Interview with director KNHCR, coast region on 19th October 2017

¹¹³ Interview with makonde community leader on 20th October 2017

was either rejected or not acted upon. A minority of respondents had obtained documents issued by officials of the Government of Mozambique in Kenya, such as consular cards and emergency travel certificates.¹¹⁴

It remains unclear, whether these documents alone can constitute sufficient proof of Mozambican nationality, including access to entitlements to the same extent as for example with a Mozambican national identity card or a Mozambican passport. It was reported by the participants that although some of the community members have evidence of possession of a Mozambican passport or national identity card, either valid or expired. The documents it emerged have not helped them regularize their status in Kenya in any form.¹¹⁵

¹¹⁴ Interview with UNHCR official in Mombasa on 19th October 2017

¹¹⁵ Interview with Makonde community leader on 20th October 2017

CHAPTER FOUR

The protection of the Makonde Community: A Critical Analysis

4.1 Introduction

This chapter provides a discussion on the minority rights protection among the Makonde. The chapter discusses the benefits and challenges that have been occasioned by granting of identity cards to Makonde. The Makonde community have Kenya arrived in early 1940s as and have been known to be stateless, and this occasioned by lack of political will, legal and administrative. The Makonde have over the past four decades attempted to acquire citizenship through successive government. Despite, these attempts the Makonde failed in their attempts.

Following the passing of the constitution in 2010, the constitution recognized that each and every individual has equal right. The journey to grant nationality to the Makonde community begun in 2014 through the effort of human rights organization in coast province. The Makonde got a boost of their initiative to acquire citizenship in 2015 when the Kwale county government recognized the efforts of Makonde community, and thereafter petitioned the President to recognize the Makonde as citizens and issue them with identity documents. As a result of the petition, the president established a taskforce to explore the situation of statelessness and to recommend solution thereof. Although the report on task force is yet to be implemented, the task force provided increased momentum for Makonde to agitate for their rights.

The Makonde were granted nationality through a presidential decree in December 2016, and with this came the privilege to enjoy right like other Kenya. This section therefore documents the rights that the Makonde have enjoyed as a result of citizenship been granted to them. The section also highlights some of the challenges that have limited the Makonde from enjoying full rights after acquiring nationality.

4.2 Benefits Accrued to Makonde Community

Freedom of Movement

It is mandatory for individuals to have Freedom of movement. However, when such a vital right is denied, persons are unable to exercise other rights such freedom of association, expression, work, education and association. As such, freedom of movement has a significant role in the livelihood and lives of individuals. Based on UDHR's Article 13 each individual is granted liberty to move within the confines of a country. The ICCPR, among other international human rights convention also promotes the protection and respect of freedom of movement. Equally, similar rights for non-residential are provided by soft law including the DHRI.¹¹³

Moreover, section 39 of Kenya's current constitution is in harmony with the international law in regard to the movement of persons. Based on this law, every individual is guaranteed freedom of movement. In addition, every person has the right to exit the country. Moreover, each resident has the liberty to enter, remain in and live in any part of the country.

However, stateless persons in Kenya are not allowed to move freely within the country regardless of the stipulations in the constitution. This is largely due to lack of self-identification documents. It was reported that one of the immediate benefits that the Makonde community members have enjoyed is the freedom to move without exposure too intimidation, extortion, arbitrary arrest and detention by law enforcement officials. Before granting of identity cards, this was a common experience among the community members, with frequent harassment by the police enforcers.

It was reported that before the issuance of identity cards, some of the locals who could not part with bribes limited their travels to local areas for fear of victimization in other areas. However, with the issuance of identity cards, the locals are free to move to far flung areas and even engage in business that will take them to far areas. The fact that stateless persons are have been recognized as citizens of Kenya has made it possible for some of the community members to acquire passports and travel outside the country. This experience raises several issues that can facilitate the acquisition of Kenyan travel documents. The fact that a person holds an ID does helps an individual to get passport.

Economic Entitlements: Access to the Employment Market and Property

Based on international law on human rights each person has the freedom to work. Based on UDHR Article 23, every individual has the freedom to work, choose employment and be protected from unemployment. This right is recognized by ICESCR and other international covenants. For instance, the ICESCR requires each signatory state to protect this right. Notably, signatory states of various international conventions safeguarding the freedom to work are required to enact programmes and policies that will ensure each person is guaranteed employment. Equally, the governments must ensure that the freedom to enjoy the right to work is not hindered. The 1996 South African constitution and the Afghanistan constitution of 2004 are some of the constitutions that protect this right. In Kenya, employment issues are protected by the 2007 Employment Act. Notably, besides defining the basic rights of workers, the act declares such rights. Based on these rights, governments are supposed to establish a conducive environment that will enhance the realization of self and formal employment.

All the respondents underscored the importance that acquisition of identity cards has had on the employment of Makonde community members. The purpose of employment is to ensure that each person receives a wage that enables them to meet their basic needs. Equally, through various taxes levied on workers, government would obtain revenue that should be used to enhance development.

For non-residents residing in Kenya, the government requires such persons to procure work permits so as to secure employment in the country. However, individuals under the statelessness risk lack legal documents that can enable them to secure formal employment. However, with the granting of identity cards, the community members have been free to seek employment opportunities locally and outside their county of residence. According to one of the participants, some have been able to secure employment. He shares his experience in the following words:

As a result been made citizens of Kenya. I have an ID which means I cannot just sit and do nothing the whole day but can look for employment with confidence.

Besides, access to employment opportunities that has opened to the Makonde community as a result of granting of citizenship through identity cards, the community

members are now able to seek support from financial institutions. Community members are now able to open account wherein they can save and borrow money. This been used to further their business opportunities. However, lack of IDs prevents the persons from securing financial loans because they cannot open or maintain an account with such institutions in case they do not have the appropriate documents.

The findings of the study also showed that the granting of identity cards to Makonde community members has improved their social and financial support network in the community. Joining a local support 'group' was one of the main challenges that the Makonde community members have faced, as they could not participate effectively in the local groups, more so where money collection was needed as it happens in most groups. After the issuance of identity cards, some of the community members have freely joined the support group and benefited financially. Through the support groups, community members get an opportunity to apply for a loan. Most Kenyans receive vital assistance from support groups in the country. Such groups are lenient and do not require persons to have to have collateral so as to secure loans. Equally, the support groups have a lower interest rate requirement in comparison to most lending institutions. Furthermore, the groups create a conducive environment idea exchange and socializing.

“According to one participant, getting of identity cards has enabled more women join women group which have helped many open new business”

The fact that some of the Makonde community have join support group , able to open bank accounts or apply for loans has impacted positively on the livelihood and lives of the community members. Further, the findings revealed that due to lack of identity cards, the community members could not freely send money to friends and relatives and in cases where they had to send they had to rely on friends who had identity cards. However, as a result of identity cards, sending of money has become easier for them since they have identity cards to register for Mpesa service. Therefore it is evident from the findings that the granting of identity cards to Makonde community has promoted financial inclusion among the community members. According to one participant,

‘A number of community members have registered and are using MPESA service freely and this allow them to send money to friends’ and family members”

Before I got the ID card, my phone number was registered in the name of my friend whose ID I used to withdraw cash. Today, I'm registered with my own."

The findings also demonstrated that as a result of the Makonde community acquiring identity cards the community members have been able to access national employment opportunities, particularly in national youth service, Kenya police service and the Military. It was established that after the issuance of cards to the Makonde community, the community now has its allocation of community members in the above mentioned institutions. This emerged as a sense of pride to community members who feel that they fully belong to Kenya, and that the community has its representation like other ethnic communities in Kenya.

"Six of our young men have been employed in police and military after the issuance of IDs."

Right to Education

Education right is another important freedom for human existence. Through good education, individuals are able to secure employment. Notably, such education provides persons with critical skills that be applied in their practical life. Based on the ACRWC, quality education must ensure that children are able to develop their talent, personality and physical and mental well-being fully¹¹⁶ In fact, international law focusing on education emphasises that education must be used to prepare children and other persons to operate responsibly in a free society. As such the education must stress on the spirit of tolerance, dialogue, understanding, friendship and mutual respect all peoples, tribal, religious and ethnic groups. Furthermore, the economic prosperity of countries relies on the level of expertise and literacy skills.¹¹⁷

Since education is critical in people's lives and the well-being of a country, international conventions enforce all measures to protect this right. For instance each person is guaranteed the right to access quality education by Articles 13, 17 and 26 and the ICESCR, Banjul Charter and UDHR. Such stipulation from international conventions pressurise signatory members to ensure that persons under their territory have access to quality education. Equally, the states are prohibited from undertaking any activity that will endanger the realization of this right. This right has been fleshed by subsequent human rights

¹¹⁶ Interview held with regional director, UNHCR on 19th September 2017 in Mombasa

¹¹⁷ Interview held with KNCHRI director, on 22th September 2017 in Nairobi

conventions. For instance, the CRC and ACRWC promote this right by urging governments to provide free and compulsory basic education to each person in their territory. Equally, member countries are encouraged to enhance the availability and accessibility of secondary education.¹¹⁸

Most international conventions that safeguard the education right have been ratified in the country and form part Kenya's laws. For instance, Article 53 (1) (b) of the country's constitution states that each child is entitled to basic education that is free and compulsory. Equally, the article articulates that it is mandatory for the state to ensure young persons have access to pertinent training and education. Based on Article 56 (b) marginalized and minority groups are guaranteed special privileges in terms of education. It was evident that the Makonde community members have not felt marginalized in the pursuance of primary and secondary education. However, the community members have been limited in pursuing college and university level of education due to lack of identity cards. Additionally, the community members have before faced difficulties in accessing the local bursaries for their children. To this end, the issuance of identity cards to the community members has allowed many community members to have identity cards, and pursue higher education. As a result of acquisition of identity cards, the community members now have right to apply for bursaries like other community members. This has enhanced equity in educational opportunities among the Makonde community.

Right to Vote

Despite the Makonde community members living in Kenya for many decades, majority of the community members have been limited in expressing their constitutional rights. However, with the acquisition of identity cards, most of the community members were able to express their first constitutional right in the August 8, 2017 general election. This presented the community members with an opportunity to participate in the election of national and local leaders. A source of pride, this was to the community members who feel that after years of exclusion they can now feel like other Kenyans.

“For the first time, we have were able to vote in the general election something that has never happened before”

¹¹⁸ Ibid

4.3 Challenges limiting the Enjoyment of Citizenship Rights among the Makonde community

Although the acquisition of citizenship by the Makonde community members has helped the community members to enjoy various rights. The same cannot be said concerning the right to own property, particularly land. Community members still face hurdles in land ownership, the processing of land ownership documents is still a challenge to the Makonde community members. It emerged from the findings that land ownership is still a big issue among the Makonde who are viewed by the natives as outsiders. The locals feel that the Makonde community are foreigners who are not supposed to own land in such places. The local communities have yet to fully accept the Makonde as one of them but view them as group that was granted citizenship due to politics even though they did not merit.

This has fuelled suspicion between the various ethnic groups which still view the Makonde group as inferior to them. While acquisition of citizenship among the Makonde has enable the community to enjoy some of the rights. These rights are yet to be fully enjoyed by the community members. Lack of political representation is one of the ways through which the enjoyment of rights has been limited among the Makonde community. It was revealed that members of Makonde community are viewed as outsiders in political representation, as such the community members are castigated in their attempts to vie for any local position. A case in point was cited in the study where one of the Makonde community members attempted to vie for member of county assembly position, but opted out after the natives vowed not to allow the person from Makonde community to be elected.

“One of us tried vying in the MCA position but had to drop out because of threat from locals who viewed him as outsiders”

The directive to issue identity cards was limited to document persons only. As a result the undocumented persons in Makonde community have been excluded from enjoying the benefits. Attempts have been made by the undocumented persons to acquire citizenship but this has come to nought. The study findings revealed that the directive that was issued by the president granting the community IDs did not include undocumented persons in the community. The result of this has been the undocumented failing to get IDs limiting the enjoyment of rights among all community members.

4.4 Summary

From the findings of the study it can be concluded that the Makonde community have enjoyed a number of benefits that have come with the acquisition of citizenship. These benefits include: freedom of movement, right to vote, economic entitlement and right to education. However, from the findings it emerged that acquisition of citizenship has not resulted in full enjoyment of rights as expected. In particular, the findings show that the Makonde still have limitation in so far as enjoying right to own property in their areas of residence.

CHAPTER FIVE

Findings, Conclusions and Recommendations

5.1 Introduction

Makonde have experienced high levels of discrimination due to their statelessness. This is against the minority right protection as enshrined in a number the constitution. Based on their ethnic identity, Makonde have experienced various forms of discrimination that have been meted against this group. It is therefore important to not only understand the plight and concern of the minorities but also important to understand the process of citizenship acquisition and the benefit of citizen acquisition to minorities in Kenya. The Makonde community in Kenya can be classified as a minority group based on the earlier definitions and descriptions given. Makonde have experienced forms of rejection and discrimination from not only the Kenyan Government but the mainstream society as well. Over the past few years attempts have been made to seek redress against their discrimination through seeking for citizenship. A realisation that became true in December 2016 when the president of republic of Kenya granted the Makonde citizenship, with these came benefits of citizenship. Granting of citizenship to stateless persons is in line with minority rights protection. However, granting of citizenship to the Makonde has not been without its challenges in so far as enjoyment of Makonde community rights is concerned.

5.2 Summary of Findings

The findings of the study indicated that stateless persons are found across the world, with Africa having a significant proportion of stateless persons. However, the study revealed that statelessness is more pronounced in Sub-Saharan Africa than other parts of Africa. Further, the findings indicated that actual statistics on statelessness in Africa is still not clear, with countries lacking up to date data on stateless persons. It emerged that in recognition to the problem of statelessness, efforts have been expended on trying to reduce the burden of statelessness. These attempts the study findings showed have taken the form of agreement, signing to convention, campaigns, initiative by local NGOs and development of national action plan by countries.

The findings of the study also revealed that Statelessness is an issue in Kenya, with the results indicated that statelessness in Kenya is caused by both legal and administrative

factors. Statelessness it was revealed exists among Nubians, Somalis, Sudanese, and Makonde among other communities in Kenya. From the findings it was evident that attempts have been made to grant the Makonde their citizenship rights. However, these attempts have failed over the past years thereby denying the Makonde enjoyment of their rights as minorities. Statelessness is emerged has denied the Makonde freedom of movement, right to education, access to employment opportunities and right to own property.

The study demonstrated that granting of citizenship to Makonde has given the community members right to enjoy some of the rights provided for in the constitution. The findings revealed that the Makonde have benefited from access to employment opportunities, freedom of movement, access to education and right to vote. It emerged from the findings that although the acquisition of IDs among has resulted in Makonde enjoying citizenship rights, the Makonde it was established still face some challenges in enjoying full citizenship rights. Right to own property is still a challenge among the Makonde. Additionally, the difficulty in granting of citizenship rights to the undocumented Makonde emerged as a challenge that Makonde continues to face even after the directive of president for granting citizenship rights.

5.3 Concluding remarks

Whereas previous, attempts have been made to document the number of statelessness persons in Kenya. These study concludes that clear situation on the state of statelessness is still lacking in Kenya. Attempts have been made to address the situation of stateless in countries thereby showing that minority rights protection of statelessness in Kenya has been effect albeit partially. From the findings the study concludes that minority right protection has been ensured for the Makonde County. However, the study also concludes that minority right protection for stateless process persons still faces some limitation. The government continues to fail to address any of their concerns and this has become a risk as to how the community perceives of not only itself but the majority population as a whole.

5.4 Recommendation

Based on the study findings, the study has the following recommendation:

There is need for the government and other stakeholders to regularly carry out regular assessment on the stateless persons in Kenya. This is because there exists lack of clarity on the actual person who are stateless.

In regard to the statelessness in Kenya, there is need for the government to develop a national action plan that will address situation of statelessness. This will help provide a framework to address statelessness in Kenya.

There is need for the government to develop laws and regulations that will guarantee stateless persons full enjoyment of their rights. The current legal framework is limited in so far and guaranteeing minorities and stateless person full enjoyment of their rights.

APPENDICES

APPENDIX I

Key Informant Guide for Makonde Group Leaders

Instructions

All the information you give me will be treated as completely confidential and it will not be possible for anyone to identify the information you give me in my project.

Note: The questions below will be used as a guide during the interviews regarding the subject in question. The answers provided by the respondents are not restricted to the questions asked.

The respondents will be allowed to provide broad answers into the subject.

Questions

1. Tell me about the Makonde community (e.g. description of the Makonde community history)
2. From your knowledge and experience in the community, what are some of the challenges that Makonde community have faced in Kenya (Political challenges, Social challenges, Economic challenges)
3. What special challenges have the Makonde faced regarding acquiring citizenship in Kenya. (e.g. Challenges from the National Government, Local/county government, public officials, the public)
4. In your opinion, how has the Kenyan government fared in addressing the rights of minorities such as the Makonde (e.g. Jomo Kenyatta Government, Moi Government, Kibaki Government, and Uhuru Kenyatta Government?)
5. Based on your knowledge and experience in the community, what can you say about the rights that Makonde have enjoyed before issuance of IDs (e.g. rights to education, right to health, right to own property)

6. What can you say about the rights that Makonde enjoy in comparison to the local citizens ever since they received citizenship.
7. Kindly explain the process that led to Makonde community been granted citizenship by the head of state last year.
8. Are there any challenges that have limited the Makonde from fully enjoying their citizenship rights after acquiring national IDs?
9. Do you have any concerns that you need to highlight on the plight of Makonde community members?

APPENDIX II

Key Informant Guide for UNHCR and KHRC Official

Instructions

All the information you give me will be treated as completely confidential and it will not be possible for anyone to identify the information you give me in my project.

Note: The questions below will be used as a guide during the interviews regarding the subject in question. The answers provided by the respondents are not restricted to the questions asked.

The respondents will be allowed to provide broad answers into the subject.

Questions

1. Describe some of the stateless groups that exist in Kenya?
3. Based on your knowledge, how far has Kenyan government gone regarding implementation of minority rights in Kenya?
4. What are some of the challenges faced in implementation of minority rights in Kenya?
5. What are some of the national laws that touch on Stateless persons in Kenya?
6. Have any of the initiatives that you have mentioned been taken by the Government of Kenya? Please explain.
7. Kindly explain the process that led to Makonde community been granted citizenship by the head of state last year (what role was played by non-state actors)
8. in your opinion, has the granting of citizenship to Makonde community resulted in the community members fully enjoying their rights. Please explain
9. What are some of the possible barriers that limit the Makonde group from enjoying their rights fully as citizens?
10. Are there any suggestion that you could make towards improving the implementation of minority rights in Kenya?
11. Is there anyone else in that I should speak with about this issue of minority rights and stateless persons in Kenya?

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