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ARTICLE

Protection of the Rights of Minorities within the African Human Rights System: The Dilemma of the Kenyan Nubian Community

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Abstract

Nubians are an ethnic minority group in Kenya consisting of over 100,000 people living in the 2.5 square-kilometers Kibera slum in Nairobi. Originally from Sudan, the community was forcefully conscripted into the British army by the British Colonialists in the early 1900s but were not repatriated at the end of the war. A century and several generations later, Nubians are yet to be recognized as Kenyans and are subjected to many restrictions of their right to national identity including enduring a complex and humiliating vetting processes. Consequently, many Nubians have been deprived of national identity and essential services. The community initiated legal action against the Government of Kenya (GOK) on several occasions in domestic courts; but despite receiving favorable rulings, the GOK failed to implement the decisions. The community therefore approached the African Committee and African Commission respectively in the Nubian Community in Kenya v The Republic of Kenya and IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya. The cases subjected the African Charter's effectiveness as a normative human rights framework to the test. It is against this backdrop that this article evaluates the extent to which the African Human Rights mechanisms have advanced minorities rights. It explores whether African mechanisms can be perceived to have a meaningful contribution to the protection of minority rights, particularly considering State Parties' persistent trend of noncompliance with decisions. Arguing that noncompliance with decisions is not necessarily an indictment of the African Union mechanisms, it offers among other recommendations the strengthening of implementation mechanisms of AU both domestically and regionally.

Keywords: Protection; rights; minorities; African system; Kenya, Nubian Community.

1.1. Introduction and Background

Minority rights are one of the most critical and pressing issues in contemporary human rights dis-

courses globally due to their persistent violation (Macklem, 2008, p. 531). Accordingly, it is crucial to clearly define minorities in the human rights context. The term 'minorities' connotes a distinct group of people that are fewer than the rest of the population, who share a common identity and rights such as ethnicity, religion, language, or culture (UNHCR, 2004). As minorities often have a sense of belonging to a certain group and hold a non-dominant position in a given state, they are exposed to discrimination based on these characteristics (Makoloo, 2005, p.7).

Virtually all countries have a minority population (United Nations, no date). Very often, minorities, including indigenous people are disadvantaged by virtue of their numbers, causing them to be further marginalized in the socio-economic, political, and even cultural spheres (UNHCR, 2004). Marginalization exposes minorities to human rights violations that sometimes can take extreme forms including but not limited to genocide (Becker, et al, 2022).

As human rights are indivisible and universal in principle, minorities are entitled all human rights. Special rights of minorities include non-discrimination, protection of identity, effective participation and enjoyment of their culture among others (United Nations, 1948, Art. 27). These rights are articulated in national, regional and international human rights instruments. Foundations for the protection of minority rights was established by the League of Nations' recognition of racial, religious and linguistic minorities (Scheu, 2020, p. 360). This legacy was carried forward by the United Nations (UN). The UN's agenda is to promote human rights, peace, and security globally, part of which is protection minorities' rights (United Nations, 1945, Preamble).

Under the auspices of the UN, the International Convention on Civil Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) encapsulates minority rights including freedom to practice their culture and religion among other rights (United Nations, 1948, Art. 27). The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic minorities is the magna carta for the promotion and protection of minority rights globally (UN, General Assembly, 1992). Though non-binding, it creates a clear framework for minority rights and offers a detailed guidance on their interpretation (Commission on Human Rights, 2005). The Declaration emphasizes the value in the promotion and realization of the rights of minorities as integral to societal development and draws connection between the promotion and protection of minority rights, rule of law and cooperation among states (UN, General Assembly, 1992). The Declaration further obligates State Parties to protect minorities and to take the necessary steps including but not limited to legislative measures to promote their rights (UN General Assembly, 1992).

Notwithstanding the existence of clear legal and normative frameworks for the protection of minorities worldwide, the practical aspects of their implementation has remained contentious for decades (Parliamentary Assembly of the Council of Europe, 2020). Kugelmann argues that for centuries, the protection of minorities has posed significant challenges for domestic and international legal systems globally (Kugelmann, 2007). Alluding to this, Pentassuglia observed that although violation of minority rights is an old problem, it remains one of the most delicate challenges in the international human rights space in contemporary times, even as disputes surrounding the enforcement of minority rights have regularly been brought before international forums (Pentasuglia, 2002). Although the debate on the content of minority rights has generally presented challenges to their promotion and protection, it has no doubt contributed to advancement of jurisprudence in this area (Lamarr, 2018, p. 44).

Regional mechanisms- the Americas, Asia, Pacific and Africa, have adopted the agenda of protection of human rights from the universal mechanisms. This article examines the ongoing debates on the efficacy of protection of minority rights in Africa by assessing the role of the African human rights mechanisms in advancing the rights of minority groups, with a particular focus on the Nubian community.

This article opens with background information on Kenya and the Nubian community, outlining the historical context and legal dispute central to this argument. It then provides an analysis of the decisions and their impact. A major contention is that the AU mechanisms play a pivotal role in advancing human rights on the continent by holding states accountable to their commitment to the African Charter, notwithstanding the challenge of noncompliance. The article concludes with a reflection on the broader implications of the findings.

1.2. The Nubians of Kenya

Kenya is a culturally diverse society that comprises many ethnic, linguistic, and religious groups, with 44 officially recognized tribes (Kabiri, 2014, p. 514). The majority communities in the country include the Kikuyus, Luhyas, Luos, Kambas and Kisiis. The remaining tribes are, therefore, technically minorities, with some of them considered as indigenous while others are not (Balaton-Chrimes, 2021). The Nubian community is one of the non-indigenous ethnic minority groups in the country besides the Makondes and the Shonas and Indians (Center for Minority Rights Development, 2010). This description of the Nubians aligns with the guidelines set out in the ICCPR (ICCPR, 1966, Art. 27) and the UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (United Nations, 1992), and the Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (United Nations, 1992).

Non-indigenous minorities typically came to Kenya as army personnel of the British or as missionaries. The Nubians were military slaves (Johnson, 2009, p. 112). The Nubian soldiers asked to be repatriated back to Sudan at the end of the first World War, but the British government declined to grant this request and instead, allocated them a piece of land at Kibera, without providing them with title documents (Makoloo, 2005, p.14).

It has been claimed that the land allocation to the Nubians derived from archaic military slavery principles and was presented in terms of a reciprocal loyalty between the Sudanese and the British, rather than the specific legal jurisdiction of the Kenya Colonial government (Parsons, 1997, p. 87). Some have argued that the Nubians ownership over Kibera was based on the grant from the British Empire in lieu of pension. Regardless, it appears that the unique position that the Nubians held within the British empire, and which continued well into, and modern Kenya is the basis of their deprivation of nationality and attendant rights in Kenya today (Johson, 2009, p. 113).

Notably, the Nubians were not the only group of immigrants conscripted for the British army military expeditions in late 19th Century. Indians were also involved. However, while most of the Indian community was granted British citizenship, the Nubians did not receive the same privileges. After being demobilized, they were left without compensation or any benefits (Parson, 1997, p. 90). Furthermore, Kenya's first post-independence government continued to isolate Nubians, leaving them in obscurity and successive governments continued to treat Nubians as 'aliens' despite them being qualified for Kenyan citizenship under the independence Constitution of Kenya (Kohn, 2010).

Over a century later, Nubians still endure a complex vetting process having to produce their grandparents' identity cards, swear affidavits, pay 'administrative' costs and being scrutinized by a special committee when applying for identification documents (Durojaye and Foley, 2012, p. 569). Non-recognition as citizens has denied the Nubians the right to nationality and by extension Kenyan passports, National Identity Cards, and derivative benefits. Having lived in Kenya for over a century by now, and with all their living descendant having been born and raised in Kenya, one would assume that Nubians' claim for Kenyan citizenship ought to be easier with each new generation. To the contrary, it got even more complicated (Venkov, 2021). This is a sharp contrast with most Indians and their descendants who can do business, run their schools, and who generally live a life of privilege compared to other Kenyans (Aiyar, 2015). This is while acknowledging that there is a very small number of Indians who are also stateless in Kenya (Ghai and Ghai, 1970, p.44). GOK's

arguably deliberate discriminatory acts effectively disenfranchised and excluded Nubians from political participation and social development causing them to live in abject poverty (Kohn, 2010).

Notably, the GOK officially recognized the Makonde (Chanji, 2017), and the Indian community as the 44th tribes of Kenya in 2017 and 2020 respectively (Ombuor, 2017). In 2021, the Kenyan Parliament heard the Nubian Petition and recommended among others, that the tribe be officially listed as one of the tribes in Kenya and for the GOK to ensure that it put in place measures to ensure that the vetting process prior to issuance of identity cards is transparent and non-discriminatory (National Assembly, 2021, p. 114). Given the circumstances, it is no surprise that recent studies on identity rights, citizenship, statelessness, marginalisation, and integration of minorities in Kenya have featured the Nubian community in one form or the other (Makoloo, 2005). The community has endured gross human rights violations (Adam, 2009). And notwithstanding their century-long presence in Nairobi – the hub for media, research and other academic institutions, their marginalization was largely not featured before the AU mechanisms (Fokala, 2021).

Nationality is the birthplace of an individual and the link through which one obtains membership to a community (Edwards and van Waas, 2014, p.6). Nationality births reciprocal privileges and obligations between a person and their state, hence its description as the foundation of modern minority rights (van Waas and Recalde Vela, 2023). Closely related to nationality is citizenship, also known as the legal status, conferred to an individual by a state upon satisfying certain legal requirements (Piattoeva, 2016, p. 1). Although international law treats both terms as synonymous, nationality is concerned with rights and duties of an individual under international law, while citizenship pertains to the relationship between an individual, the state and the relevant rights (Foster and Lambert, 2019). Acquisition of nationality is either by birth, descent, adoption, marriage or by habitual residence (Manby, 2015). Be that as it may, not being a national of any state is considered 'stateless' (Ibid). Statelessness can result from a myriad of factors including but not limited to discrimination on several basis including ethnicity (Ibid). From the two Nubian disputes at the centre of this discourse, statelessness affects adults and children alike. The section below unpacks the said disputes before the Commission and the Committee, collectively referred to as the 'mechanisms' in this article.

1.3. The Disputes

In the *Nubian Community in Kenya v the Republic of Kenya* (317/2006), the Nubian community approached the African Commission on Human and People's Rights in 2006 alleging violations of their rights in the African Charter (African Charter on Human and Peoples' Rights, Articles 1, 2, 3, 5, 12(1) and (2), 13, 14, 15, 17(1), 18, 19, 22, 24). They claimed that the acts and or omissions of the GOK were rendering it 'stateless,' as without national identity cards, the community lacked national affiliation besides being technically locked out of essential social services like education and health. The community further claimed it had been locked out of participating in Kenya's civil, political, economic and cultural life contrary to the Constitution of Kenya and international laws, and were therefore de facto stateless (*The Nubian Community in Kenya v. The Republic of Kenya*, para. 22). Additionally, the community claimed that not only was it landless, but its members had also been arbitrarily displaced from their dwelling places, uncompensated, and continued to be threatened with further displacements (para. 34). As a result of all these, the Nubians live in extreme penury.

The Nubians further alleged discrimination based on their religion and ethnicity (para. 2). To exemplify their unique experience, it was the community's case that only two other minority immigrant communities; the Kenyan Somalis and Kenyan Arabs were subjected to vetting before the issuance of ID cards because the two were border communities as contrasted with Nubians (para. 35). The Nubians found no justifiable basis for their treatment and argued that due to the State's systematically singling them out for differential treatment, the other communities in Kenya had developed discriminatory attitudes towards them (para. 36).

The community therefore sought to hold the GOK accountable for breaching its commitment to the African Charter by discriminating on the Nubians and failing to address challenges that hinder them from realizing their potential (Constitution of Kenya, 2010, Art. 27). According to Samantha, contrary to what has been put out there by many equality scholars, what Nubians want is not special status but equal treatment as other Kenyans (Balaton-Chrimes, 2021). This position is consistent with their claim for recognition, inclusion and non-discrimination as already described above.

In 2011, the Commission found the GOK to have contravened the Charter by discriminating against the Nubians particularly by requiring them to go through a complex, ambiguous and humiliating vetting process as a precondition to being recognized as Kenyans (*Nubian Community in Kenya v the Republic of Kenya*, para. 35). The Commission also found that the marginalization of Nubians and arbitrary deprivation of nationality was tantamount to degrading treatment contrary to Article 5 of the African Charter (para. 40). It further observed that on account of the said discrimination, the citizenship status of the Nubian community and their descendants remained uncertain, culminating in cruel and degrading treatment contrary to the African Charter and well-established international law (para. 35). The Commission highlighted GOK's total disregard of the fact that the Nubians have lived in Kenya for over a century, generation after generation, pointing out that Kenya was Nubians sole country of habitual residence, with which the community had developed deep roots (Balaton-Chrimes, 2013). And Shack agrees with the Commission, adding that Nubians having left Sudan over a hundred years ago had long lost all ties with Sudan, and Kenya was the only 'home' they knew (Shack and Skinner, 1979).

Further, it was the Commission's position that the deprivation of national identification documents, technically rendered the Nubians stateless contrary to Article 15 of the Universal Declaration on Human Rights and other relevant laws. Additionally, it found the GOK to have contravened Nubians' right to property by denying them security of tenure over their ancestral homeland - Kibera, despite having lived there for over a century (para 65).

Flowing from the Commission's declaration that the GOK infringed the rights of the Nubians, it required the GOK to, among other things; put in place not only an objective but also a transparent and non-discriminatory procedures around citizenship in Kenya; and to give Nubians security of tenure over Kibera land (African Charter on Human and Peoples' Rights, 1981, arts. 1–3, 5, 12–18). The GOK was required to notify the Commission on the steps it was going to take to comply with the Commission's decision within 180 days (para 171 (iii)).

Equally important is the case filed before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in 2009 by the Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (OSJI). The ACERWC is a technical body comprising of legal professionals with expertise in children's rights, tasked with developing principles and rules for the protection and promotion of the rights and welfare of Children in Africa (Art 42). The motivation behind the case was the perceived violation of the rights of the Nubian children (Durojaye and Foley, 2012, p. 579). *OSJI (on behalf of children of Nubian descent in Kenya) v Kenya* claimed that the British colonialists allocated the Kibera settlement to the Nubians but did not grant them citizenship, leading to the GOK treating Nubians as 'aliens' for lack of ancestral land in Kenya (Decision No. 002/Com/002/2009). They contended that the GOK's refusal to recognize the Nubians claim to land was linked to refusal to grant Nubians citizenship (para 34).

Stemming from non-recognition as citizens, descendants of Kenyan Nubians claimed that they could not register their children at birth because they did not have valid identity documents themselves. Additionally, they challenged the fact that birth registration certificates in Kenya are not proof of citizenship, which essentially puts the children in an uncertain position contrary to Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) (*Children of Nubian Descent in*

Kenya v Kenya, para. 35). Article 6 guarantees every child the right to a name and nationality, specifically the right to registration at birth and to acquire nationality of their country of birth.

It might be worth noting that this was the first time the Committee found the GOK to be in violation of several provisions of the ACRWC including children's right to registration at birth and the right to nationality contrary to Article 6(2) and (3). The GOK was found in breach of the duty of AU State Parties to recognize children's right to acquire the nationality of their country of birth if at the time of such child's birth, such child has not been granted nationality by any other state in line with article 6(4). Additionally, the Commission found the GOK to have contravened Nubian children's right to enjoy all other rights and freedoms enunciated in the African Charter regardless of their legal parent or guardian's race, ethnicity, color, sex, language religion, political or another opinion, national and social origin fortune, birth or any other status (African Charter on Human and Peoples' Rights, Art. 3).

There were several other findings but for purposes of this discourse, the focus is restricted to the right to identity and citizenship. The GOK was found to have contravened multiple provisions of the African Charter on the Rights and Welfare of the Child including Articles 3, Article 6(2), 6(3), 6(4), Article 14(2) (b), (c) and (g); and Article 11(3). Accordingly in 2011, the Committee advised the GOK to ensure that children of Nubian descent that were otherwise stateless were registered as Kenyans at birth, and issued with proof of their nationality (Children of Nubian descent in Kenya v Kenya, 2011, para. 69(1)).

The GOK was further advised to prioritize granting already existing children of Nubian descent who do not yet have Kenyan citizenship the benefit of the new measures as a matter of priority. This is in addition to GOK implementing its birth registration systems in a fair and non-discriminatory manner to ensure that all children are registered at birth (*Children of Nubian descent in Kenya v Kenya*, 2011, para. 69(3)). Furthermore, the Committee recommended that the GOK works with the Nubian community to adopt measures to ensure the fulfilment of their right to the highest attainable standard of health and the right to education (*Children of Nubian descent in Kenya v Kenya*, 2011, para. 69(4)). Finally, the Committee required GOK to report to it regarding the steps it was going to take to implement the decision it had rendered (Children of Nubian descent in Kenya v Kenya, 2011, para. 69(5)).

In reaching its verdict, the Committee noted that Kenya was a progressive state in child rights, being among the earliest to ratify the ACRWC but noted that the violation of the rights of Children of Nubi descent had persisted for over a century, resulting to multi-generational prejudice thereby having a deep and wide impact on the Nubians including systemic under-development. The Committee therefore recommended that the GOK formulates actions which address the long-term effects thereof (*Children of Nubian descent in Kenya v Kenya*, para. 84). It is important to state that these decisions were not challenged by the GOK. In any case, the GOK started engagements in the form of dialogues and with the NGOs that had assisted the Nubians to present their case, the Nubians and other stakeholders to assess and strategize on how best to implement the said decisions (IHRDA, 2022). This article adopts the position that these actions indicate acquiescence with the mechanisms' directives.

During the follow-up mission 3 years post-decision, it was established that contrary to the Committee's holding that 'vetting' during issuance of identification documents was dehumanizing, discriminatory, and a contravention of the African Children's Rights Charter, the authorities in Kenya continued to place the burden of proof of entitlement to citizenship on Nubi applicants. For instance, to acquire identification documents, Nubians were required to produce 'additional documents (Open Society Foundations and Namati, 2014). This was a continuation of the colonial government policy.

The NGOs accordingly recommended to the ACERWC to urge the GOK to adopt the National Registration and Identification Act in consonance with the letter and spirit of the Nubian minor's deci-

sion (Open Society Foundations and Namati, 2014). The NGOs further recommended that the GOK passes the National Registration and Identification Bill as part of addressing the Committee's recommendations. They further urged the government to ensure meaningful engagement of relevant stakeholders in developing and implementing the said legislation and to submit progress reports to the Committee (Open Society Foundations and Namati, 2014). The government indicated that it would take the requisite steps to comply with the Committees recommendations (Songa, 2021).

1.4. Analysis of the Rulings

The African Commission on Human and People's Rights is a quasi-legislative entity established to promote and protect human rights alongside the interpretation of the African Charter (African Charter on Human and Peoples' Rights, Art 45). It achieves this objective by putting in place principles, rules and procedure for addressing human rights disputes (African Charter on Human and Peoples' Rights, art 45(1)(a)). This section analyses the decisions of the Nubian cases in the context of other similar rulings by the AU mechanisms and the corresponding responses from the GOK.

1.4.1. AU Mechanisms' Progressive Approaches

This article takes the view that in delivering the two resounding judgments in favor of the Nubi's and by extension all other minorities facing discrimination in Africa, indeed the Commission and ACERWC have greatly advanced protection of human rights in Africa. The two cases paint the picture of a community forcefully relocated from their native country by the British colonialists to be used for labour and thereafter left to their own devices. The cases revolve around alleged breaches of a myriad of rights including nationality, non-discrimination, property, education, and health among others.

The common denominator in both cases is recognition and respect for the rights of the Nubians; particularly the right to nationality and non-discrimination; with the case before the Commission addressing the dispute from the context of the general Nubi population while the case before the ACERWC, from child rights lens. These decisions were lauded as progressive for three reasons: First although the African Charter does not have a specific provision on the right to nationality to support the claim by the Nubi's, the Committee took the approach that the denial of the right to identification documents, land and nationality was tantamount to discrimination (Durojaye and Foley, 2012, p. 579).

Second, the case filed by Nubian children brought a fresh perspective to the 'best interest of the child principle.' Prior to this decision, the understanding of the 'best interest of the child principle was plain, i.e. that in all matters pertaining to the children, their best interest must be upheld (African Charter on the Rights and Welfare of the Child, art. 4). For instance if there was a dispute about paternity or custody of a child, best interest implied whichever of the two parents involved, gender notwithstanding, would be given custody (African Committee of Experts on the Rights and Welfare of the Child, 2011, para. 69). The Committee noted that the Nubian children had filed a similar complaint before Kenyan courts 6 years prior to bringing the matter before it, and that five judges had attempted to hear the matter but still, no decision had been made. The Committee therefore took on purposive and progressive attitude, that the matter had been pending for unnecessarily long time, particularly because a year in the life of a child is a long time.

The Committee therefore leveraged on Article 4 of the African Children's Charter on 'best interest of the child' to dispense with the jurisdictional requirement of exhaustion of local remedies leading to the position that local remedies were unduly prolonged and therefore ineffective (African Committee of Experts on the Rights and Welfare of the Child, 2011, para. 69). Ultimately, on the substance of the dispute, the Committee also found that violation of the rights of Nubians amounted to violation of the rights of their children. This was a welcome development. Although critics argued that while

the Committee made progress in this regard, it failed to take a gender-sensitive approach to pay greater attention to the gravity of violation of rights of female children, this ruling was progressive nevertheless (Durojaye and Foley, 2012, p. 580).

The Nubians' attempt to make Kenya their home has been obstructed by GOK's policies that treat them as aliens undeserving of a national identity and connected rights. Oppressed and suppressed, the community and its descendants earlier approached domestic courts in vain before resorting to the regional dispute resolution mechanisms (Fokala, 2021). It is noteworthy that although the African Charter does not expressly articulate the right to nationality, the Commission interpreted the provisions on equality and non-discrimination to find the GOK in breach of the Nubian's right to nationality (Ndeunyema, 2018). This was buttressed by the Additional Protocol to the African Charter which articulates everyone's right to nationality and the fact that no person can be arbitrarily deprived of their nationality. The Protocol also regards 'best interest of the child' as the key consideration in determining disputes involving children, and in this incidence, the right to nationality, clearly indicative of progressive thinking by the judges.

Other progressive approaches employed by the Committee and the Commission in tackling these disputes include the adoption of Resolutions, General Comments, Advisory Opinions, Model Laws, on-site visits, Special Rapporteurs and Technical Working Groups among others (Working Group on Indigenous Populations and Communities, 2022). The progressive approach of the mechanisms is commendable.

1.4.2. Non-compliance by State Parties

The African mechanisms having taken judicial notice of the plight of the Nubians as encapsulated in the two cases. However, almost 15 years later, the GOK has not yet fully complied with the recommendations (IHRDA, 2022). In these circumstances it is a fair comment that obtaining a positive decision does not automatically translate to improved human rights conditions for the Nubians; the realization of the benefits of the judgement through implementation of a decision is a different matter altogether.

This phenomenon of non-compliance with the decisions of the African Commission is not unique to Kenya or to the case of the Nubians, as several AU State Parties do not always comply with decisions (Nxumalo, 2022). Notably though, the failure to adhere to recommendations and decisions not only undermines the authority of the Committee and Commission but also leaves those affected by the dispute in despair (Liwanga, 2015). For instance, in *The African Commission on Human and People's Rights v The Republic of Kenya* (Application 06/2012), the Court found the GOK to be in breach of the Ogiek community's rights. It therefore ordered GOK to compensate the Ogieks for the material and moral prejudice they suffered, and in addition, to take all necessary measures to issue the Ogieks land, security of tenure over the same and send a progress report to the court within 6 months from the date of the judgement (Para. 227). It took close to a decade for the fruits of this decision to be realized (Amnesty International, 2023).

The despair took different dimensions: social despair for evident in the community's feeling that despite a ruling in their favor, their dignity and identity continued to be denied; legally, it deepened the feeling of legal invisibility and exclusion, crystalizing a sense of legal abandonment. Generally, it reinforced the narrative of neglect and exclusion that started with the British colonial powers, further eroding trust that Nubians had in the law (Open Society Justice Initiative, 2017). The same held true for the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* (276/2003) based on the report that non-implementation of its recommendations has negatively impacted the community's livelihoods (Centre for minority Rights, 2022). There are several similar examples of GOK's non-compliance with the decisions, one of which is *Nubian Rights Forum 2 Ors. Vs. Attorney General 6 Others*, Petition 56, 58 and 59 of

2019 (Consolidated). This article postulates that as the claims by the Nubians are deeply rooted in the history of Kenya and the rights violated intertwined, any half-hearted attempts at compliance remains superficial, and unlikely to benefit the community. In essence, no meaningful change can be realized unless there is full compliance with the decisions of the AU mechanisms.

1.4.3. Influences and Impediments to Compliance

Compliance or otherwise of State Parties with decisions or recommendations is not by happenstance, rather, various dynamics operate to promote or impede compliance. In monitoring compliance, the mechanisms are guided by special rules and procedures. For instance, Rule 112 and 125 of the Rules of Procedures of the African Commission on Human and People's Rights requires State Parties to update the Commission in writing within 180 days of being informed of the decision of measures taken to comply. This was not any different in the Nubians' case. Except that there is no information as to whether Kenya submitted any reports. In any case, in July 2022, the IHRDA conducted a public dialogue with key stakeholders of the Nubians' cases regarding the implementation of the decisions of the Nubian cases. It found that most of the recommendations were yet to be implemented (IHRDA, 2022).

Rule 125(3) and (4) directs State Parties to submit further information on the measures they have taken in response to the Commission's decision. Although there is no evidence that reminders were sent to the GOK regarding the Nubian cases, Rule 125 (4) provides that State Parties who do not submit their reports in time may be reminded to comply. Notably, the follow-up mechanisms in the ACERWC's implementation Guidelines are not that different from those of the Commission (African Committee of Experts on the Rights and Welfare of the child, 2014). Under exceptional circumstances of a State Party's refusal to comply with recommendations, the ACERWC may refer cases to the Assembly of State Parties for intervention (ACERWC Guidelines, RuleXXII (5)). The Assembly of State Parties mainly employs political pressure and diplomacy – including naming and shaming and in extreme cases, sanctions and suspensions to secure compliance (Amani Africa, 2022).

In specific refence to GOK, political pressure and diplomacy including advocacy by NGOs, media coverage, pressure from other AU commission, AU peers and right-thinking Kenyans were instrumental in securing compliance with the Endorois decision (IHRDA, 2022). Confirmation that the AU mechanisms have elaborate procedures for ensuring compliance prompts consideration of the obstacles to effective implementation.

Murray et al explain the complexity around what determines whether a State Party might honour a decision or judgment or otherwise. He cites the political context in which a State Party is operating; such as transition of governments, sensitiveness of the subject matter in the light of the current affairs/developments in a particular state jurisdiction at the specific moment; the nature of the remedies/recommendations required to be complied with; and the practical feasibility of realizing the set recommendations (Murray *et al*, 2017, p.16). Therefore, where a State Party has just undergone political transition, the new government may be willing to comply, and to the converse, a new government with a different ideology may be opposed to gains already made by the preceding government. Moreover, there's tendency of authoritarian governments failing to uphold values such as equality compared to democratic and progressive states. Furthermore, where compliance is resource intensive, States may not be keen to comply due to financial limitations, just as where a State Party is having political instability, compliance with decisions may not be a priority as compared to stable environments. All these factors (discussed more in the next section) have been at play in Kenya since 2011.

Murray et al add that additional factors that may impede compliance include the specificity of the recommendations made, and the level of clarity provided to the duty bearer State Party on what is required of it to implement the decision, as contrasted with where the duty bearer State is given the

discretion to decide on how best to implement the recommendation within its capacity and context (Murray *et al*, 2017, p.177). Although in the two Nubian cases, the AU mechanisms were prescriptive on how GOK was expected to comply, full compliance is yet to be achieved.

1.5. Challenges Kenya Faces in Implementing Decisions of the AU Mechanisms

Kenya, like many other AU State Parties grapples with complying with decisions and recommendations of the AU mechanisms; the uptake of decisions and recommendations and other modes of enforcement of rights such as letters of urgent appeals has been dismal and rather disappointing (Liwanga, 2015). In addition to those cited in section 1.4.1 above, low levels of compliance by State Parties continue to negatively impact decisions churned out.

The decision on the Nubian cases was not any different; notwithstanding the efforts to following up on implementation, as of 2022, the GOK had not fully complied as confirmed by IHRDA during its follow-up mission to Kenya. IHRDA stated that although the GOK had taken significant steps towards implementation, it had a long way to go (IHRDA, 2022). This observation is justified considering that as of June 2025, the GOK has not put in place an objective, transparent or non-discriminatory guidelines and processes for determining Kenyan citizenship. Additionally, the GOK has also not granted the Nubians security of tenure over the whole of Kibera (Makoloo, 2005). Out of 700 acres claimed, title was granted for only 288 acres in 2017 (Open Society Justice Initiative, 2017). Notably, in 2024, the land court issued an interim injunction against implementation of the '2013 Amended Trust Deed' barring any further transfer of management in Kibera land, effectively preserving the rights of the Nubians over Kibera (Nubian Rights Forum v Registered Trustees of Kibra Nubian Community Land Trust 4 others [2024] KEELC 5325 (KLR)). Although these show elements of compliance, there is a long way to go. This begs the question as to what the challenges may be. This article argues that challenges that impede the implementation of the decisions are diverse, complex, intertwined and multifaceted, ranging from legal, political, institutional, and socio-economic as outlined below.

From the political lens, even before Kenya's independence, the colonial government ignored the rights and interests of the Nubians. This is evident from the denial of their right to be repatriated back to Sudan after being used in the military (Makoloo, 2005). In contrast, Indians who were brought to Kenya in similar circumstances received more favorable treatment; most were repatriated and most of those left in Kenya were well settled in the suburbs of Nairobi, issued with proper documentation, allowed to run their businesses, practice their culture and special education system. In any case, the Indians got British citizenship. When Kenya got its independence in 1963, successive governments maintained this trend, leading to the marginalization of the Nubians to date (Makoloo, 2005, p.4). This points to systemic discrimination. With passage of time, the systemic discrimination of the Nubians has birthed multiple violations.

It might be that past governments have not been able to confront or resolve this issue due to lack of appreciation of the relevant history. This failure to understand the dispute in depth to comprehend the nature of injustice possibly further entrenches the impression that the dispute is either too complicated to resolve or not important enough to warrant government's intervention. On the other hand, the political class could argue that disturbing the existing status quo (majority of Kenyans being well settled) is easier. After all, in terms of numbers, the Nubians are insignificant politically and therefore not worth the political risk. And it might be the attitude that if they (government of the day) did not cause the problem, they did not have to deal with it, or that if other governments ignored the issue, they need to do the heavy lifting to resolve it. This is particularly so because the Nubians' claim has to do with land rights and citizenship, which are particularly sensitive issues in Kenya (Kameri-Mbote, 2009, p. 4).

This article takes the view that fully complying with the AU decision would mean GOK acknowl-

edging the wrongs committed, the possibility of redistribution of resources, which in effect would disturb the existing status quo or negatively impact political interests – particularly as Nubians' Kibera is in the opposition stronghold. Disturbing the status quo might make the government of the day unpopular which would impact on election. For these reasons, every successive government is seen to pass the buck to the next. Still on political nuances or undertones of Nubian's claim, in Kenya, tribe is a very important element of the identity. One is not only a Kenya, but more importantly a member of a particular tribe. This has a broader impact in terms of regional identities, power distribution, and even national unity. It is in this context that past governments may have hesitated to fully implement decisions that might stir tensions in a country with such a diverse tribes and interests.

Additionally, it is argued that the Nubians' claim cannot be looked at in isolation but in the broader context of how GOK has handled other claims of historical injustices. The GOK is among states that have been reluctant to confront and address historical injustices for various reasons. In effect the GOK adopted the pattern of passing the buck to successive governments (Kenya Land Alliance and Kenya Human Rights Commission, 2014). This modus operandi makes issues even more complex as years go by, naturally making them even more difficult to resolve.

The plight of the Nubians has received minimal attention at the national level despite their location in the heart of the capital city of Nairobi where many of Kenya's major media outlets, universities and other research institutions are based. This contrasts with other marginalised communities that are in far-flung areas of the republic like Turkana and West-Pokot but whose circumstances are well appreciated by most Kenyans. This exemplifies the successful marginalization of the Nubians, leading to the public lacking interest in the issue as compared to the Ogieks and other minority groups that the media has highlighted. With low public awareness, there is less public pressure on the government to act.

Further, implementing the decisions on Nubian cases requires significant resources for reparations, granting land rights, and putting in place mechanism around regularizing their citizenship rights and for social services – particularly education and health. A developing country with competing development priorities such as security, infrastructure among others, gaps in finances can impede GOK's capacity to fully comply, assuming all other factors constant. On the flipside, notwithstanding that the AU mechanisms have elaborate rules for following-up compliance, financial constraints impede follow-ups, thereby impacting how States – Kenya included, follow through their commitment to comply (IHRDA, 2022). An example is where IHRDA and other Stakeholders in the Nubian cases conducted a country visit and stakeholder engagement 3 years post decision to strategize with the GOK on the best to approach the implementation (IHRDA, 2022). This paper takes the view that Committee and Commissions involvement in follow-up missions could yield better results, but for limited finances.

That the AU mechanism decisions are 'merely persuasive' as opposed to binding on State Parties. This creates a problem with respect to compliance. The chronic lack of cooperation or goodwill of State Parties symptomized by their indifference and sometimes open hostility to the AU mechanisms cannot be overemphasized. This is apparent by failures to meet their treaty reporting obligations; as of 2022, just 6 of 55 state Parties were compliant with their reports (Amnesty International, 2021). Additionally, some State Parties threaten to withdraw from the Charter whenever the mechanisms take a stand that they do not agree with. These factors have been a great setback to an otherwise progressive entity (Amnesty International, 2021).

Considering the above therefore, non-compliance by the GOK with the AU decisions in Nubian cases is not necessarily an indictment on the African human rights system or a case of impunity, but a consequence of complex and overlapping challenges. This calls for a multifaceted approach by all

key players: the media to keep this discourse in the public domain, academic, legal and research institutions to research and advise policy makers and the GOK, civil society groups to build capacity of the people to make demands of the GOK and to put pressure on GOK even as the AU mechanisms continue to engage with the GOK on the best approach to full compliance.

1.6. Impact of the Decisions on Nubian Cases

Globally, states tend to marginalise their minorities, leaving such communities with no choice but to seek legal remedies domestically and sometimes internationally (Singh, 2022, p. 4). It is also all too common that the said minority groups more often are limited in resources in comparison to the state, which aggravate and further complicates their struggles (Kohn, 2010). The situation was not any different for all the minority groups already cited earlier in this article. The ACERWC and ACHPR have undoubtedly made enormous contribution to the protection of human rights and development of human rights standards on the continent through exposure of violations including those concerning and emanating from state authoritarianism. The following are the highlights of the impact:

Firstly, awareness creation; Although it is agreed that the issues of minority rights is nothing new, it is not until the African Commission pronounced itself on it, that flood gates of litigation in Africa opened. For instance, after the GOK was successfully sued by the Endorois, subsequent cases were filed by the Ogieks, and now the Nubians. It appears that the success of the Endorois case gave impetus to other marginalized minorities to organize themselves and demand their rights on the continental platform (Claridge, 2018, p. 1). Additionally, with the help of NGOs and national human rights organizations, minorities have been sensitized on their rights. Such sensitization has built a force leading other smaller minority groups in Kenya demand recognition by the government (Venkov 2021).

The ripple effect of such is the GOK's recognition of the Pemba community in 2023 (Government of Kenya, 2023). The Pembas have resided in Kilifi County for over a hundred years, in which they have experienced untold suffering because of being denied identification documents (National Assembly, 2021, p. 180). Recognition of Pembas was a celebrated milestone that even the ACHPR took judicial notice of and consequently congratulated and encouraged the GOK to extend the same recognition to other stateless communities in Kenya such as the Galjael community (African Commission on Human and Peoples' Rights, 2022). Prior to this, GOK had also recognized the Makonde and Shona community as well as the Indian community in Kenya (Voice of Africa, 2017). As a result of sustained public awareness efforts, in 2017 the Ndorobos sued the government of Kenya for illegal evictions, even though their claim was dismissed in 2022 (*Chongeiywo others v Attorney General others, Environment Land*, Petition No. 1 of 2017). These are indeed impressive achievements attributable to the very first successful claim (Songa, 2021).

Secondly, consistency of the rulings affirms the position that the AU mechanisms have taken regarding minority groups in relation to non-discrimination and nationality; that States should resist and desist discrimination tactics that render minority groups in their territories stateless as has been the experience of the Nubians highlighted in the previous sections. The holding that the GOK had violated the rights of the Nubians through systemic discrimination aligns with the position taken in the Endorois case in 2003. The Endorois, an indigenous community of approximately 60,000 people at the time of filing of the complaint were displaced from their ancestral land by the GOK without the requisite compensation (Endorois Case, para. 2). That the Commission ruled in favour of the Endorois community in 2009, recognizing the community's land ownership rights and accordingly recommending the restoration of their ancestral land is indicative of consistency in approach (Para 297, 298).

Stemming from the consistency of the rulings, it is apparent that the Committee and the Commission

have developed an African approach to minority rights. Besides recognizing and distinguishing indigenous from non-indigenous minority groups, the mechanisms have taken note of the contextual nuances of the Nubian people and accorded them the necessary protection even though they do not tick the indigeneity box. This is in contrast with the Endorois, the Ogieks and the Ndorobos. This uniqueness adds to the African jurisprudence on minorities, as there are millions of populations facing the same challenges across the continent.

Further, the Committee declared that the GOK by discriminating on the Nubians, denying them nationality and identification documents for over a century, locking them from basic social amenities and services including health and education – had fundamentally violated the rights of Nubian children and their future generations. This finding is landmark as for the first time, attention was paid to the impact of long-term discrimination on a people and their descendants. Additionally, by adopting General Comment No. 2 in 2014 articulating the right to nationality at birth, state obligation to ensure the registration of all children, avoid discriminatory laws, avoid arbitrary denial or withdrawal of nationality among others, the Committee embraced the internationally accepted principle that statelessness should be avoided. This is important as it fortifies African human rights regimes and by extension advancing African jurisprudence on the rights of children of minorities.

Furthermore, state sponsored transgression of individuals' right to nationality remains a widespread problem across many states and affecting millions of people on the continent (UNHCR, 2024). Coming at a time when the number of persons who belong to minority groups who are either internally displaced, rendered stateless, or discriminated in whatever shape or form by the policies of the state they live in is steadily growing, the impact of these rulings cannot be gainsaid (Lamarr, 2018). As statelessness is a global phenomenon; several African countries have been highlighted to have many of their populations at risk. These include Ivory Coast, the Democratic, Eritrea, Ethiopia, Madagascar, South Africa, Sudan, Zimbabwe and Kenya (Manby, 2015). The 'creativity' and consistency in the decisions already given, serve to put State Parties on notice that minorities must be recognized and protected and can no longer be routinely marginalized. The relevant governments should therefore draw inspiration from these rulings and take the necessary action to protect the rights of their minorities.

Finally, among the recommendations of the Committee to the GOK was to take the necessary measures to ensure that the stateless Nubian children acquire Kenyan citizenship at birth and proof of the same. Accordingly, Kenya was urged to enact a National Registration and Identification Act that would reflect the letter and spirit of the Nubian Minors decision even though this is yet to be complied with.

1.7. Appropriate Approach by Kenya

At the macro level, the most important step the GOK can take to alleviate the suffering of the Nubians is to urgently fully comply with the recommendations given in the two cases. In the broader sense, the GOK should evaluate and make right its commitment to the Charter by fulfilling all their obligation pertaining to the Charter including paying their dues to support activities of the AU Mechanisms, since financial constraints are among the factors hindering the mechanisms' ability to do follow-ups.

While by law, enforcement of the Court's decisions in Kenya is left to political bodies, this mechanism should not be used in a manner that defeats its purpose. If they must, political muscles be flexed only to make the landscape conducive for the enforcement of judgments by enacting laws that facilitate the enforcement of the Commission/Committee's decisions at national level.

Furthermore, a mechanism for dialogue should be established to identify and canvass issues that arise in the interactions between the GOK and the Court, Commission, and Committee. With human

rights becoming more complex and abuses bearing even greater implications, it is more important than ever to support institutions that promote the African human rights agenda. Dialogue can be instrumental in building trust and consensus between the AU and State Parties, creating a good platform for stakeholder engagement. By discussing matters of mutual interest, State Parties and the Mechanisms can develop region-specific solutions for various issues. This can be contrasted with the current position characterized by indifference or impunity and open hostility of State Parties towards the AU mechanisms.

Finally, employing a multifaceted approach: Not all disputes can be resolved legally, or legally alone. Sometimes it takes a multi-dimensional approach. For instance, in the matter of the Nubians, despite two international decisions in their favour, the State is unyielding. It might be that the Nubian dispute has a political undertone, in which case, in addition to legal processes, it might be helpful if Civil Society Organizations could continue to lobby the State to do the needful. This could also help build the capacity of the rest of Kenyans to bring them to a place where they empathize and push for the realization of the rights of Nubians, even as scholars research and recommend to the State how best to actualize the decisions. The concerted effort could be the game changer.

1.8. Conclusion

The level of protection of human and people's right on the continent could not have been achieved but for the intervention of the human rights mechanisms. Indeed, the institutions have been progressive in interpreting the law relative to human rights disputes broadly and specifically minority right disputes as exemplified by the many 'landmark' decisions that have been passed (Ssenyonjo, 2011). These decisions can greatly advance human rights in Africa. By declaring Nubians citizens of Kenya and tasking the GOK to do the needful to regularize their status, the Commission and the Committee have solved a long-standing dispute, whose full implementation will promote peace and security, foster economic development besides influence governance in Kenya. Additionally, as this is not only a Kenyan phenomenon, other State Parties can take a lesson from these monumental decisions and align their practices accordingly.

That said, noncompliance with decisions continues to gravely undermine the AU mechanisms' effectiveness. This not only reflects poorly on State Parties' commitment to justice and equality, undermines and development of jurisprudence, but also leaves victims/survivors of violations without recourse where domestic legal systems are dysfunctional. That GOK has not yet complied with recommendations of Nubian cases is not a reflection of the AU mechanism's incapacity to uphold human rights, rather, it should be seen as a reflection of lack of genuine commitment by state parties to upholding human rights. It underscores the fact that for the desired change to be achieved, sound rulings must be met with commitment and capacity of State Parities to implement.

Overall, the AU human rights mechanisms hold a great promise in promoting, protecting and developing African jurisprudence on human rights and ensuring peace and justice on the continent. More specifically, the ACERWC and the AU Commission have lived up to their promises despite the political undercurrents symptomized by resistance or non-compliance with its decisions. With the right support from State Parties, the AU mechanisms can revolutionize the human rights landscape in Africa.

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