

# KATIBA DAY

A Celebration of Constitutional Progress and Promise



## What is measured can be improved

At fourteen years, the Constitution of Kenya, 2010 resembles an adolescent entering a critical phase of growth. Having survived its first decade, it has weathered challenges, adapted, and evolved, much like a young adult finding their footing. This Constitution, a symbol of hope and democratic governance, has been nurtured and shaped by the entire nation. As it stands on the threshold of maturity, it begins to form its own identity, embodying the values and aspirations of the Kenyan people. However, like any growing entity, the Constitution requires a delicate balance between guidance and freedom to fully realize its potential.

## Significance of the Kenyan constitution and progress since 2010

In the two decades leading up to the promulgation of the Constitution of Kenya, 2010, the people of Kenya had yearned for a new Constitution which would establish a free and democratic system of government that ensures human rights and the provision of basic needs for all Kenyans. In this same period, Kenya suffered high maternal mortality rates amidst public health and human rights concerns around the protection of women's health

**Having survived its first decade, the Constitution of Kenya, 2010 has weathered challenges, adapted, and evolved, much like a young adult finding their footing. Like any growing entity, the Constitution requires a delicate balance between guidance and freedom to fully realize its potential.**

and lives. These debates were recognised in the Constitution making process and the 67% of voters who accepted the draft Constitution in the National referendum on 4 August 2010 are testament of the need to affirm women and girls' right to life and health including reproductive health.

Articles 26(4) and 43, in particular, have guided policy-making and evidence based advocacy, especially in the areas of health and reproductive rights. The judiciary, as envisioned in Article 23, has played a crucial role in upholding these rights, most notably in the High Court's ruling on Petition E009 of 2020—PAK and Salim Mohammed v Attorney General & Others—which underscored the necessity of aligning the Penal Code with constitutional standards.

The Fifth Schedule of the Constitution allowed Parliament five years to ensure that they pass legislation to breathe life into the provisions of Article 43. The Health Act, 2017 tarried but it was passed into law to establish a unified health system, coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.

The national principles and values in Article 10 have gone a long way in allowing the people's input during the policy making function of the Ministry of Health. In Nairobi High Court Petition No. 266 of 2015 FIDA Kenya & 3 Others v Attorney General & 2 Others, a five judge bench concluded that the withdrawal of the 2012 Standards and Guidelines and the Training Curriculum was arbitrary because they were the result of a public participation process required under the Constitution and therefore their withdrawal should have followed the same process.

## **Vision for the future**

Looking ahead, the full realization of reproductive health rights remains contingent on further legal reforms. The fear of criminal prosecution among health care providers who offer abortion services remains a persistent threat to the

actualisation of the highest standard of health including reproductive health. Lack of political goodwill to harmonize existing provisions of the Penal Code with Article 26(4) is a thorn in the flesh of women and girls in Kenya and is a barrier to sustainable development. As proponents for change, KELIN continues to push for the repealing of sections 158-160, 228 and 240 of the Penal code.

Moreover, schedule Four of the Constitution of Kenya, 2010 assigns the role of promoting primary health care to County Governments. Family Planning services fall within the scope of primary health care and we have seen a pattern in county governments shunning their role by failing to financially plan for the delivery of services. While civil society has stepped in to fill gaps, there is an urgent need for both national and county governments to prioritize funding for these essential services. Article 43(1)(a) should guide fiscal planning to ensure sustainable healthcare delivery as Kenya transitions to a middle-income country.

Linda Mama Program was a successful program based on political goodwill and its contribution to maternal health cannot be understated. In the spirit of Article 43(3), there is a need to anchor successful programs like Linda Mama in statute, ensuring their continuity beyond the whims of changing political landscapes.

## **Conclusion**

As we commemorate Katiba Day, we must remember the collective yearning for a better Kenya that led to the adoption of the Constitution in 2010. It is not merely a document but a living testament to our aspirations for self-governance and justice. We call upon the people of Kenya to protect the gains we have made and to jealously guard the feeling they had when they passed it. Let us shun any discussions around amending the Constitution of Kenya, 2010 and instead call for internal mechanisms for enforcement which promote constitutionality. The future of our nation depends on our unwavering commitment to the Constitution and the principles it enshrines.

### **NAIROBI OFFICE**

Kuwindia Lane, Off Lang'ata Road, Karen C  
P O Box 112 - 00202, KNH Nairobi  
Tel: +254 020 2515790  
Mobile: +254 710 261 408 / +254 788 220 300  
Fax: 020 386 1390

---

### **KISUMU OFFICE**

Nyalenda Railways Estate, Block 9/220  
Off Nairobi Road Opposite YMCA  
P.O Box 7708 - 40100, Kisumu - Kenya  
Tel: +254 057 204 1001/+254 020 251 5790  
Cell: +254 716 978 740/+254 710 261 408