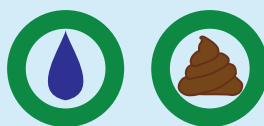


# KENYA



*One of the strongest commitments that can be made to the human right to water and the human right to sanitation is its clear, unequivocal articulation in a country's core laws. This fact sheet examines whether the country's core laws establish a human right to water and a human right to sanitation. We explore whether a right is explicitly stated in those core laws and whether the scope and parameters of right are described in the laws. Articulating a clear obligation is the starting point for implementing the human rights to water and sanitation at the country level.*

**Modest improvements in access to drinking water and sanitation have been achieved since 2000, but much more is needed to achieve universal access by 2030.** Kenya, located in East Africa, borders the Indian Ocean with a total area of more than 580,000 square kilometers and a population of approximately 53 million people. The median age is 20 years. The greatest areas of population density are located in the west along the shore of Lake Victoria, in the southeast along the coast of the Indian Ocean, and in the capital of Nairobi.

Kenya's population has grown steadily since 2000. Rural populations have grown from 25.2 million people in 2000 to 36.5 million people in 2017. Urban populations have grown from 6.3 million people to 13.2 million people during the same time frame. During the same period, access to at least basic sanitation declined in rural and urban communities. Access to safely managed drinking water remains out of reach for many where no rural population has access to safely managed drinking water and where urban communities actually saw a decline in access to safely managed drinking water between 2000 and 2017.

As of 2017, the most recent year of JMP data, 13.4 percent of rural households continue to practice open defecation. In raw numbers, this represents only a decrease of 410,120 people practicing open defecation between 2000 and 2017. Comparatively, only 1.9 percent of urban households practice open defecation. At the same time, the number of households with access to at least basic sanitation services has risen from approximately 10.6 million people to 14.4 million people. However, the percentage of the population with access to at least basic sanitation declined in both rural and urban households from 68.8 percent to 61.7. Therefore, the efforts to expand access to at least basic sanitation could not keep pace with the growth in population.

With respect to drinking water, in 2017, 39.6 percent of rural households continued to consume drinking water from unimproved sources or directly from surface waters such as lakes and rivers. Comparatively, 11 percent of urban households consumed drinking water from unimproved sources or directly from surface waters. Between 2000 and 2017, the consumption of drinking water from unimproved sources and directly from surface waters decreased by 16.1

percent for the rural population whereas areas consumption from these sources actually increased by 2.8 percent for the urban population. There was a 12.1 percent decrease in the percentage of the urban population with access to safely managed drinking water and an increase of 2.7 million people with access to safely managed drinking water. Comparatively, no percentage of the rural population has been recorded having access to safely managed drinking water. Between 2000 and 2017, there was a 12.4 percent increase in rural population access to at least basic drinking water services. In raw numbers, 8.7 million more rural people had access to at least basic drinking water in 2017 compared to in 2000. However, many of these numbers show that the increases in access to better quality drinking water services are not keeping pace with the growth in population.

In the 2019 WHO GLAAS Report, Kenya accurately reported that both a right to water and a right to sanitation are contained in its Constitution.

**The (human) rights to water and sanitation have been established in Kenyan law.** Kenyan law establishes a right to water and to sanitation. The Constitution of Kenya states that every person has the right to “accessible and adequate housing, and to reasonable standards of sanitation” and to “clean and safe water in adequate quantities”. Article 43(1)(b), (d). The Constitution also places a heightened responsibility on the State to create equitable access to water services. The Constitution requires the State to put in place affirmative action programs to ensure that minorities and marginalized groups have reasonable access to water, health services and infrastructure. Article 56. Reasonable access is not defined or described. These rights to clean and safe water in adequate quantities and to reasonable standards of sanitation are reiterated in Article 63 of the Water Act, 2016. Under the Water Act, sanitation is defined as the “provision of on-site sanitation services including latrines, septic tanks and conservancies including the associated exhauster services.” Article 2. Sewerage services - or the infrastruc-

ture responsible for transporting and treating wastewater - is defined separately from sanitation. Therefore, under the Water Act the right to sanitation is likely not to extend to wastewater collection and treatment services or other off-site human waste services. Furthermore, if the definition of sanitation presented in the Water Act represents the common understanding of sanitation, it is unclear whether the right to sanitation under the Constitution would extend to wastewater collection and treatment services. Therefore, the right to sanitation may only extend to a right to onsite sanitation services.

Kenyan law also recognizes the right to a clean and healthy environment. The Constitution creates a right to a clean and healthy environment which is defined as the right to have the “environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69” as well as the right to “have obligations relating to the environment fulfilled under Article 70.” Article 42. The Environmental Management and Coordination Act reiterates the entitlement to a clean and healthy environment. Article 3(1). The Act defines the right as including “access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.” Article 3(2). The Act creates an obligation on all persons to cooperate with the State to protect and conserve the environment. Article 3(2A). To ensure the realization of this right, the Act creates a cause of action whereby any person, whether or not the act or omission causes or is likely to cause personal harm to the person, can apply to the Environment and Land Court for redress. Article 3(3). In exercising its authority, the Court is to be guided by several principles of sustainable development, including the principles of intergenerational and intragenerational equity. Article 3(5). Such a right to a clean and healthy environment supports the right to water by providing a right to access public water resources for health purposes, which would include accessing water from public waterbodies for drinking water, hygiene, and other domestic needs. This right may

also be seen to create an obligation on persons to manage their fecal waste in such a way that does not contaminate the environment given that every person is required to protect the environment. However, this understanding of the Act does not create a right to sanitation, but rather an obligation on every person to prevent the release of their fecal waste into the environment. While the Public Health Act does not speak to a right to water or sanitation, the Act creates a duty on local authorities to protect water supplies. The Act requires local authorities to take “reasonably practicable measures” to prevent “any pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes (whether such supply is derived from sources within or beyond its district)” and to purify “any such supply which has become so polluted, and to take measures (including, if necessary, proceedings at law) against any person so polluting any such supply or polluting any stream so as to be a nuisance or a danger to health.” While the term “water supplies” is not defined, if the term includes those waterbodies which serve as a source of drinking water - either directly (and untreated) or indirectly (as source waters for drinking water suppliers), then the local authorities are being required to ensure that the water quality of waterbodies which serve as a source of drinking water is kept at a water quality safe to consume for drinking. This is particularly critical where the population gets their drinking water directly from rivers. It is also

important where rivers are source waters for drinking water and treatment would be progressively more expensive the more pollution there is in the source water because these expenses are passed along to the ratepayers. Greater protection of source waters supports the actualization of any right to water and requires that pollution from untreated fecal waste be eliminated.

### References

1. Constitution of Kenya, 2010.
2. The Water Act, No. 43 of 2016.
3. The Environmental Management and Coordination Act, No. 8 of 1999.
4. The Public Health Act 2012, Rev. 2017.
5. Central Intelligence Agency (CIA), The World Factbook, Kenya.
6. World Health Organization, Joint Monitoring Program (JMP) Global Database available at <http://www.washdata.org>.