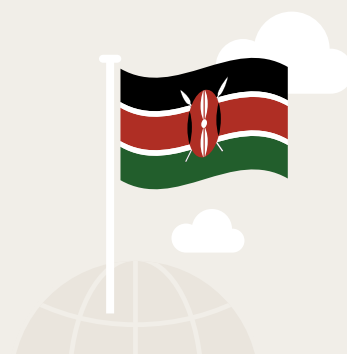


Kenya

National legal study on ageism and age discrimination

This study has been produced in connection with HelpAge International's global report, *Advancing equality for older people* →



Under international human rights law, States agree to combat discrimination and make progress towards equality. This requires the adoption of comprehensive anti-discrimination legislation, which prohibits all forms of discrimination in all areas of life on an open-ended and extensive list of grounds, including age.¹ The law should establish the framework for promoting equality for older people, and put in place the necessary enforcement and implementation mechanisms needed to ensure access to justice and remedy for victims.

The Kenyan legislative framework falls below these standards in several respects.

Equality and non-discrimination obligations

Treaty ratification	Ratified	Individual complaints
ICCPR	✓	✗
ICESCR	✓	✗
ICERD	✓	✗
CEDAW	✓	✗
CRPD	✓	✗
CRC	✓	✗
CAT	✓	✗
ICMW	✗	✗
CPED	✗	✗

Kenya has accepted non-discrimination obligations through the ratification of international human rights treaties. The State is party to the International Covenant on Civil and Political Rights (ICCPR), which contains a free-standing right to non-discrimination, and prohibits discrimination in respect of all Covenant rights.²

Kenya is also a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as each of the ground-specific treaties: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). Kenya does not permit individuals to bring complaints directly to any of the UN treaty bodies after exhausting domestic remedies. The State is a party to relevant regional human rights instruments, including the African Charter on Human and Peoples' Rights, which prohibits discrimination on an open-ended list of grounds. In February 2022, it was announced that Kenya had ratified the Protocol to the Charter on the Rights of Older Persons in Africa. However, at the time of writing, the Protocol has yet to enter into force.

The prohibition of age discrimination

Personal scope	
Has the State adopted comprehensive legislation?	✗
Has the State adopted age-specific equality legislation?	✗
Does the law expressly prohibit age discrimination?	✓

Kenya has not adopted a comprehensive anti-discrimination law or age-specific equality legislation. Whilst a bill on the Care and Protection of Older Members of Society has been drafted, which declares the equality of older people, and permits the adoption of positive action measures for members of this group, at the time of writing the bill has yet to be adopted.³



EQUAL RIGHTS TRUST

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In the absence of comprehensive legislation, protections against discrimination are fragmented across different laws and policies which vary in their **personal** and **material scope**. Kenya has adopted specific equality legislation relating to the rights of people with disabilities, and ethnic minorities.⁴ Singular non-discrimination provisions have also been adopted that apply in particular fields of life.⁵ Principal amongst these is the Employment Act of 2007, which, at Section 5(3)(a), prohibits discrimination in both public and private sector employment. Age is not expressly listed as a protected characteristic under this provision, although national courts have held that age discrimination is prohibited under the act.⁶

The main equality and non-discrimination guarantees stem from Article 27 of the 2010 Kenyan Constitution. Article 27(1) establishes the right of “every person” to equality before the law and equal protection of the law. The right to equality includes “the full and equal enjoyment of all rights and fundamental freedoms”.⁷ Article 27(4) of the Constitution expressly prohibits the State from discriminating against individuals on the basis of their age, amongst other grounds. Non-state actors must also refrain from discrimination on this ground, by virtue of Article 27(5). In addition to these guarantees, Article 57 of the Constitution requires the State to adopt specific measures to ensure to older people the right to “fully participate in the affairs of the society; to pursue their personal development; to live in dignity and respect and be free from abuse; and to receive reasonable care and assistance”.

Personal scope	
Is multiple discrimination prohibited?	?
Is discrimination based on association prohibited?	?
Is discrimination based on perception prohibited?	?

With one small exception, none of the laws outlined above provide express protection against **multiple or intersectional discrimination** occurring on the basis of age or any other grounds. Section 2 of the Persons with Disabilities Act defines the term ‘discriminate’ to include differential treatment based ‘solely or mainly’ on the ground of disability. Although age is not listed as a potential source of differential treatment, multiple discrimination based on the grounds of age and disability could – in principle – be covered by this provision.

However, disability must be the ‘main’ cause of disadvantage, limiting the scope of protection. Amendments have been proposed to the Persons with Disabilities Act that would expressly recognise the rights of all persons with disabilities “to effective legal protection against discrimination on all grounds”.⁸ However, at the time of writing, these amendments are yet to be adopted. Kenyan law does not specify whether differential treatment based on the **association** of a person with a group sharing a protected characteristic, or a **perception** (whether accurate or not) that a person belongs to such a group, falls within the ban on discrimination. The **personal scope** of the law is therefore unclear.

Prohibited conduct	
Direct discrimination	✓
Indirect discrimination	✓
Harassment	?
Denial of reasonable accommodation	?

The Constitution expressly prohibits **direct** and **indirect discrimination** by State and non-State actors.⁹ However, other forms of conduct are not listed, resulting in uncertainty in the coverage of the law. Like the Constitution, Section 5(3) of the Employment Act of 2007 prohibits both direct and indirect discrimination. The **harassment** of an employee is also prohibited. Whilst this term is not defined, Section 6 of the act defines sexual harassment as a separate form of harm. Consequently, it may be inferred that the reference to ‘harassment’ under Section 5(3) refers to ground-based harassment. A definition of harassment is included in the National Cohesion and Integration Act of 2008 as “unwanted conduct which has the purpose or effect of violating [a] person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment”.¹⁰ This definition is consistent with international law and best practice.¹¹ However, the act does not expressly refer to older people, and the ban on harassment only covers the ground of ethnicity. Nonetheless, this definition may offer interpretive guidance to national courts in their application of Section 5(3) of the Employment Act.

The Constitution does not expressly recognise **denial of reasonable accommodation** as a form of discrimination. However, in recent cases, Kenyan courts have noted that Article 27 may include a duty to accommodate.¹² This duty is made explicit under the Persons with Disabilities Act, which obliges certain duty-bearers, including employers and educators, to make reasonable accommodations to persons with disabilities.¹³ However, judicial understanding of the concept is still at an emerging stage in development in Kenyan jurisprudence, and to date, it has not been applied to the ground of age.

Article 27 of the Constitution of Kenya does not set out specific rules relating to **justifications** and **exceptions**, although it does require the State to adopt particular measures designed to advance equality for certain marginalised groups, which may require preferential treatment. These measures are discussed under the heading of positive action, below. The right to equality is listed as a fundamental right, and Article 24(1) of the Constitution provides that such rights “shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. In determining whether a limitation is reasonable, enforcement bodies should have regard to the “nature of the right”, the “importance of the purpose of the limitation”, the “nature and extent of the limitation”, and the availability of any “less restrictive means” to achieve the stated goal. These requirements reflect different aspects of the justification test established under international law, and in some cases national courts have evaluated discrimination claims by reference to the legitimate aims and proportionality of adopted policies.¹⁴

The Employment Act of 2007 sets out specific exceptions to the prohibition of discrimination. Section 5(4) provides that it shall not be considered discrimination to “distinguish, exclude or prefer any person based on an inherent requirement of a job”; to “employ a citizen in accordance with the national employment policy”; or to “restrict access to limited categories of employment where it is necessary in the interest of State security”.¹⁵ These provisions are drafted broadly, and no criteria are specified for evaluating the legitimacy of measures adopted. This creates a risk that ageist assumptions could be used to justify differential treatment in cases

concerning older people, contrary to the requirements of international law and best practice. It is important, therefore, that Section 5(4) is interpreted narrowly, in view of Kenya’s broader human rights obligations. In particular, the UN treaty bodies have stressed that stereotypes cannot be used to justify an otherwise discriminatory policy or practice.¹⁶

Equality duties and other equality measures

Alongside eliminating discrimination, States are required to advance equality for members of discriminated groups, including older people. This, in turn, requires the adoption and effective implementation of a comprehensive package of proactive and targeted equality measures which seek to identify and address structural barriers to equal participation. To meet their non-discrimination and equality obligations under international law, many states have enacted equality duties that require public authorities and other duty-bearers such as employers and service providers to assess the impact of their policies and mainstream the rights of discriminated groups in their work.

The adoption of **positive action** is expressly required by the Constitution of Kenya. Under Article 27(6) “the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantages suffered by individuals or groups because of past discrimination”. Article 27(7) further provides that any measures adopted pursuant to this provision “shall adequately provide for any benefits to be based on genuine need”. The framing of these provisions – as a mandatory obligation – is positive. However, the duty only applies to the State, and the provision is unqualified. Under international human rights law, positive action measures should be discontinued once the purposes of equality have been achieved.¹⁷ Due to systemic ageism, older people have historically experienced disadvantage in Kenya. However, it is important that this provision is not interpreted as a requirement to demonstrate individual harm. Whilst positive action measures have a clear remedial role, such measures must also aim to “accelerat[e] *de facto* equality” for groups.¹⁸ This position is made clearer under the Employment Act, which permits (but does not expressly require) the adoption of positive action provided that measures are “consistent with the promotion of equality or the elimination of discrimination in the workplace”.¹⁹ Like the Constitution, however, this provision is also unqualified.

Section 5(1) of the Employment Act requires certain listed public bodies to promote equality of opportunity and eliminate discrimination in employment. A similar obligation is imposed on employers under Section 5(2). The act does not, however, detail how these provisions are to be given effect, and Kenyan legislation as a whole does not impose a specific legal obligation on duty-bearers to adopt **equality policies and strategies** relating to older people, or to mainstream their rights. Similarly, the law does not require the adoption of **equality impact assessment** to identify and mitigate the impacts of (age) discriminatory laws and policies before they are adopted.

Enforcement and implementation

To ensure access to justice for victims of discrimination, a wide range of measures are required. This includes the establishment and adequate resourcing of institutions empowered to enforce the legal framework; the amelioration of national rules governing evidence and proof in discrimination cases; and the provision of legal aid and assistance, alongside procedural accommodation and accessibility measures, to remove financial and physical justice barriers. While States may adopt slightly different approaches to the enforcement and implementation of equality law, in all cases people who have been subjected to discrimination must be ensured the right to seek legal redress and an effective remedy.

Non-discrimination provisions in Kenyan legislation may be enforced via different avenues, depending on the nature of the violation. Article 22 of the Constitution provides that “every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed or is threatened”. This would include violations of the rights to equality and non-discrimination under Article 27. A range of groups, including persons acting in the public interest, and associations “acting in the interest of one or more of its members” have standing to institute court proceedings.²⁰ The remedial powers of the court are listed under Article 23(3). In addition to awarding compensation, the court is empowered to issue injunctions, order judicial review, and declare the invalidity of discriminatory legislation. A separate procedure is established for violations of the Employment Act. Remedies may differ depending on the nature of the violation.²¹ Under Section 88, a person “who commits an offence under [the] act or contravenes or fails to comply with any of the provisions of [the] act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both”.

This Section may apply to cases of discrimination brought under Section 5.²² The use of criminal sanctions in this area is problematic. In particular, Section 5(7) of the act places the burden of proving that discrimination did not take place upon the employer. Whilst a shift in the **burden of proof** is necessary and appropriate in civil proceedings, in criminal cases, it may conflict with the presumption of innocence.²³

Consistent with international law and best practice the State has established an independent **equality body**: the National Gender and Equality Commission of Kenya. Despite its name, the commission has a multi-ground mandate. The functions of the commission are set out under national legislation.²⁴ These include broad equality promotion and prevention responsibilities. The commission is also empowered to receive individual complaints. Whilst the commission has wide investigatory powers, which include *inter alia* the ability to issue summonses and compel the production of documents, it may only issue non-binding recommendations. If, following mediation, a recommendation is not followed, the commission may submit a report to Parliament.²⁵

Gaps and opportunities

Through the adoption of a new Constitution in 2010, Kenya has placed the rights to equality and non-discrimination at the heart of its legal framework. Through a combination of constitutional equality guarantees and non-discrimination provisions in other legal fields, older people have different routes to enforce their rights, and in practice, age discrimination claims, such as those challenging “early retirement and age limits in job vacancies are common”.²⁶ However, there remain a number of weaknesses in the national legal infrastructure that undermine these protections in practice. Age is not listed as a protected characteristic under national employment law, forms of discrimination are not defined uniformly across different pieces of legislation, and there is no clear and explicit protection against intersectional discrimination or discrimination based on association or perception. Whilst the State is required to adopt positive action measures under the Constitution, this obligation does not apply to private duty bearers. Moreover, beyond some broad provisions of the Employment Act, the national legal framework does not establish specific equality duties or require equality impact assessment.

To address these gaps comprehensive anti-discrimination legislation is required. In its recent interactions with UN treaty bodies, the Government of Kenya has spotlighted plans for the development of a draft comprehensive anti-discrimination law.²⁷ However, in its most recent reports, the State has failed to elaborate on these plans, and has instead insisted upon the adequacy of its current legal framework.²⁸ This study indicates that there remain significant gaps in this framework.²⁹

To meet its international law obligations, and to respond to the clear recommendations of human rights bodies in this area,³⁰ the State should reaffirm its commitment to legal reform and expedite the adoption of comprehensive legislation, which should explicitly prohibit age discrimination and establish clear mechanisms for the advancement of equality for older people.

Endnotes

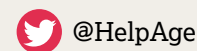
1. For a discussion of the human rights framework on age discrimination see HelpAge International, *Advancing equality for older people*, 2022, available at: www.helpage.org/AgeEquality
2. International Covenant on Civil and Political Rights, Articles 26 and 2(1).
3. The Care and Protection of Older Members of Society Bill, 2020, Section 7, available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/TheCareandProtectionofOlder_MembersofSocietyBill_2020.pdf
4. Persons with Disabilities Act, 2003; National Cohesion and Integration Act, 2008.
5. For further discussion of some of these provisions see Equal Rights Trust, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 2012, Section 3.2.3. It should be noted that some amendments may have been made since the time the report was published. However, many of these provisions remain unchanged. The report is available at: www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf
6. For further discussion on this point, see Age Discrimination Info, *Kenya*, 2019, available at: www.agediscrimination.info/international-age-discrimination/kenya
7. Constitution of Kenya, Article 27(2).
8. The Persons with Disabilities (Amendment) Bill, 2020, Section 12(a), available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/ThePersonswithDisabilities_Amendment_Bill_2020.pdf
9. Constitution of Kenya, Articles 27(4) and (5).
10. National Cohesion and Integration Act, 2008, Section 6(1).
11. See, for instance, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(d).
12. See, for example, in respect of religious accommodations, Court of Appeal at Nyeri, *Fugicha v. Methodist Church in Kenya and Others*, Civil Appeal No. 22 of 2015, 2016. In 2019 this decision was set aside by the Supreme Court on technical grounds.
13. Persons with Disabilities Act, Sections 9(2), 15(2) (c), 15(5).
14. See, for instance, the *Fugicha* case cited above.
15. Additionally, as discussed further below, Section 5(4)(a) permits the adoption of positive action measures.
16. See Note 1.
17. See, for example, Convention on the Elimination of All Forms of Discrimination against Women, Article 4(1).
18. *Ibid.*
19. Employment Act, 2007, Section 5(4)(a).
20. Constitution of Kenya, Article 22(2).
21. See further discussion in Age Discrimination Info, *Kenya*, 2019, available at: www.agediscrimination.info/international-age-discrimination/kenya
22. *Ibid.*
23. See further discussion on this point in the Equal Rights Trust, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 2012, pp.231–232, available at: www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf
24. National Gender and Equality Commission Act, 2011, Section 8.
25. *Ibid.*, Sections 27, 28, 29, 41, and 42.
26. Age Discrimination Info, *Kenya*, 2019, available at: www.agediscrimination.info/international-age-discrimination/kenya
27. See Office of the United Nations High Commissioner for Human Rights, 'Committee on the Elimination of Discrimination against Women Considers the Report of Kenya', 2 November 2017.
28. See, for instance, Kenya, Report to the African Commission on Human and Peoples' Rights, 2021, para. 21; Human Rights Committee, Kenya: Reply to List of Issues, UN Doc. CCPR/C/KEN/RQ/4, 2021, para. 24.
29. Equal Rights Trust, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 2012, available at: www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf
30. African Commission on Human and Peoples' Rights, Concluding Observations: Kenya, 2016, para. 55(ii); Human Rights Committee, Concluding Observations: Kenya, UN Doc. CCPR/C/KEN/CO/4, 2021, Paras. 10–11.

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