

The Vices of Discrimination

The Impacts of Vetting and Delays in the Issuance of ID cards in Kenya

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Introduction

The Unfulfilled Dream: The Story of Mohammed Abdullahi

Mohammed Abdullahi, a Kenyan who is a caterer by profession, started applying for a national identity card (ID) in early 2016 at the age of 22 years. As of this writing, he is 24 years old and still waiting for his ID. He applied for an ID to get a job as everywhere he went to ask for a job he was requested to produce his national identity card. When it dawned on him that he could not get employed without an ID, like any ordinary Kenyan he went to the registration office to seek this vital document that determined his employment opportunities. He only had a clinic card from when he was a child. He never had a birth certificate and was requested to go to his former school and collect his school leaving certificate to use as a supporting document to prove his age. With these documents, he was booked for vetting and within a week he appeared before the vetting committee. Afterwards he received a waiting card and instructions to come and collect his ID after three months.

After 3 months Mohammed went back to collect his ID, but he found out that his application was rejected and he was requested to bring his birth certificate. He went to Huduma center and he was directed to go to the hospital where he was born to get a copy of his birth notification slip, which would help him to get a birth certificate. When he went to Woodley Hospital in Nairobi where he was born, the hospital staff wanted a letter stating that he was born there, yet his mother is now out of the country. He gave up, went home and stayed for almost a month at home just thinking on what he could do.

When he went back to the chief, he was informed that the office there could not help him and that he should just go back to the hospital and come with the birth notification or hospital attendance register. He told his father, who accompanied him to the hospital to get a copy of the hospital records. Then he heard about paralegals working in his community. He sought assistance and her Makkah, a paralegals at Nubian Rights Forum. He and Makkah reviewed his supporting documents and then they went together to apply for a birth certificate at Huduma Center. After getting the birth certificate, Mohammed and Makkah continued with his ID application. After going through the second vetting, his father had to appear in person to put his thumbprint on Mohammed's application. Finally, Mohammed submitted his forms and was told to return in January 2017.

Yet Mohammed's troubles continued. When he went back to collect the ID in January he was told that his ID was not issued. He went to the registrar's office several times in a span of two weeks and then the registrar advised him to go to Huduma center to get the status of his application. He was told that his application was rejected again because his fathers' fingerprints were wrong and that he was not his father. His application was denied and he was advised to go for a DNA test to prove parentage. Up to now he is stranded as the test is very expensive. He does not have a job and he needs an ID to further his career as a caterer.

Citizenship in Kenya, Law and Practice

This policy brief aims to highlight the plight of Kenyans like Mohammed Abdullahi who go through difficulties in getting identity cards based on their ethnicity. It shall shed light on how the inordinate delays and additional processes that are discretionary and discriminatory in nature delay the issuance of an identity card for applicants like Mohammed.

In the history of documentation in the country, documents were used for oppression and marginalization of the Africans limiting their rights and freedoms and restricting them to specific areas. When one lacked documentation it was not possible to access any service. During the colonial era the Asians and European protectorates enjoyed more privileges in acquiring documents like passports and birth certificates. The current state has borrowed this practice by favoring the “42 tribes” whereas the “others” face grave challenges in applying for these crucial documents 53 years after independence. Specific minority communities like the Nubian community and the Muslim community at large face difficulties in applying for documents such as ID cards and are subjected to discriminatory process called vetting and prolonged wait times. Vetting is a process where one has to appear before registration and security agents that include the Criminal Investigation Department (CID), the Intelligence service, the chief, the Deputy County Commissioner, the registrar, who is the secretary of the committee, and two appointed community elders. This process does not constitute a formal step in the application process and was introduced to identify Kenyans from non-Kenyans in the border areas in the 1990s. In 2014 the government pushed through the Security Laws (Amendment) Act, 2014, after the Westgate Mall attack. The Security Laws (Amendment) Act added a section to the Registration of Persons Act (Cap. 107) that the “Director may establish identification committees or appoint persons as identification agents to assist in the authentication of information furnished by a parent or guardian.” The Election Laws (Amendment) Act, 2016, similarly added a provision to the Registration of Persons Act stating the Minister may make rules “providing simple guidelines for the vetting of applicants prior to the issuance or replacement of an identity card.” These amendments potentially provide a vague basis for vetting in the name of national security.

A study by the Kenya National Commission on Human Rights in 2007 found that there is a strong institutionalized link between citizenship and ethnicity in the issuance of identity cards. It further cites the registration system applied different and stricter rules with respect to Nubians, Kenyan Somalis and Kenyan Arabs as opposed to other Kenyan ethnic groups. The report states that: “This approach offends the tenets of equal treatment and has no place in a pluralistic and democratic society. Denying specific ethnic groups Identity Cards is not only discriminatory; it also enhances opportunities for rent seeking and further marginalizes these communities. The numerous cases of corruption and extortion reported by the citizens against public officers in remote districts were adequate proof.”¹

¹ See: *An Identity Crisis? A Study on the Issuance of National Identity Cards In Kenya* by Kenya National Commission on Human Rights 2007

For applicants like Mohammed Abdullahi, the promulgation of the Constitution of Kenya 2010 was a sign of hope as it brought the spirit of equality and non-discrimination. The drafters of the Constitution of Kenya 2010 had intended that the enactment of the Constitution shall solve all the problems in nationality in the country through including an entire Chapter 3 on citizenship and outlining the entitlements of a citizen, including equal access to all documents of registration and identification.

According to the performance contract between the Office of the President and the Ministry of Interior in 2014, the government shall ensure efficient and effective services are delivered to Kenyans in line with the provisions of the Constitution with a human rights approach to service. This principle is protected by the Constitution under the bill of rights Article 27(4):² “The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.”

A national identity card (ID) is a vital document in terms of access to basic rights and services. Lacking an ID can limit the level of education and it can also subject an individual or an entire family to the vicious cycle of poverty. In Kenya, the ID is needed for freedom of movement and without this document, an individual is disenfranchised. The Constitution of Kenya 2010 Chapter 3 Article 12 states that:

- (1) Every citizen is entitled to—
 - (a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and
 - (b) a Kenyan passport and any document of registration or identification issued by the State to citizens.

The Constitution changes the narrative from that of the past regime where the citizen held the ID in trust of the state to the ID now being a right of a citizen. Such documents should be accessible by all citizens irrespective of their race or tribe. In 2011, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) made a ruling on the discrimination against the Nubian child. The Committee found Kenya in violation of the African Children’s Charter and strongly advised the Kenyan government to scrap the discriminatory vetting process and the denials of ID documents to the Nubian child.

² Performance contract between H.E the President and the Cabinet Secretary Ministry of Interior and Coordination of National Government
<http://www.knchr.org/Portals/0/EcosocReports/KNCHR Final IDs Report.pdf>
<http://eurocom.co.ke/devolution/wp-content/uploads/2014/08/Ministry-of-Interior-and-National-Coordination.pdf>

The Committee also advised Kenya to implement its birth registration system in a non-discriminatory manner, including ensuring children of Nubian descent are registered immediately after birth.³ This *Nubian Minors'* decision led to the initiation of a citizenship paralegal program in Kenya that would help the Nubian community in applying for documents while at the same time track the challenges of the community in accessing these vital documents. In the 2015 *Ali vs Kenya* ruling before the African Commission on Human and Peoples Rights, the Commission found credible evidence that the state had failed to put in place fair processes, devoid of discrimination and arbitrariness for the acquisition of identity documents, and the Commission considered that Kenya had failed to recognize the legal status of Nubians, in violation of Article 5 of the Charter that states that:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The African Commission on Human and Peoples Rights recommended that, the state establishes objective, transparent and non-discriminatory criteria and procedures for determining Kenyan Citizenship.⁴

This policy brief is informed by the work of the Nubian Rights Forum paralegal work in Kibera from 2013 till date. This brief will mainly focus on the current state of unjust delays in the issuance of ID cards.

A Legal Empowerment Approach. Community Paralegals and Citizenship Rights.

In 2012, the Nubian Rights Forum, Namati and Open Society Justice Initiative designed a paralegal project in Kibera⁵ one of the largest slums in Africa and the largest Nubian settlement in Kenya. The paralegal project trained a group of community-based paralegals who hail from the Nubian community and have a passion of serving their community.

³ See *Decision on the communication submitted by The Institute on Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the government of Kenya* <https://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf>

⁴ See *Communication 317 / 2006 – The Nubian Community in Kenya vs The Republic of Kenya* http://www.achpr.org/files/sessions/17th-oo/comunications/317.06/communication_317.06_eng.pdf

⁵ The Nubians were brought to Kenya by the British to fight under the King's African Rifles (KAR) to help expand and protect the British empire and participated in both World War I and World War II. They were settled in different parts of the country like in Nakuru, Naivasha, Mazaras, and Kisii, while Kibra was the largest settlement given to them by the British in early 1917.

These paralegals empower the community on the Nubian Minors' decision, the Constitution of Kenya, Kenya's domestic laws on nationality, and the application processes for various identity documents like IDs, passports, birth certificates, and death certificates. The paralegals conduct daily door to door outreach, use a local community radio (Pamoja FM) and even mosques to search for under-documented persons in order to empower them on their right to nationality and the process of applying for the essential identification card. Paralegals then help their clients gather all the required supporting documents and escort the applicant to the registration office. This relationship is nurtured up to the day of issuance or rejection of the application. The paralegals also document each and every step of the application process a client goes through to obtain identity documents. The paralegals collect real time data and upload it on a cloud-based database for program and policy use. The database captures the application from the first visit to the government office, the documents requested of the applicant, questions asked, as well as populating the time taken to obtain a document based on the dates of application and dates of issue. The paralegals also track the costs of application for a document.

Till date, the paralegals have handled over 3,100 cases of which 1,500 are ID card cases. The paralegal project has now expanded to support partners in two other regions in the country, these are the Coast and North Eastern Kenya. The expansion was informed by the demand from the ground by other communities facing challenges similar to the Nubians and local organizations with the desire to understand the nature of the application processes across Kenya to enrich the discourse of nationality and documentation in the country. With this data drawn from the experience thousands of ID applicants, this report aims at illustrating the challenges of the delays in issuing the ID cards.

For the purpose of this brief, we shall be limited to data relating to the time taken to get documents and how additional processes that are discriminatory in nature add further delays in obtaining an ID card.

How Discriminatory Vetting Delays Access to Document Impinges on the Right to Documentation

Over the past five years, even with the assistance of a paralegal, the average time taken between a Nubian client's first visit to government offices and their vetting date is 37 days. The first visit to the government office could be going to the registrar to attempt to apply or to gather information on the requirements. In addition, the application for an ID card for a Nubian is limited to either Tuesday or Thursday when the Nubian vetting elders sit in the morning outside the registration office to vet the Nubian applicants. The elders then fill an affidavit for the applicant stating that they know the applicant and the grandparents of the applicant.

After the elders vetting, the elders book the applicant for a national vetting that is comprised of the intelligence service, the Criminal Investigation Department, the Civil Registry, the chief, the Deputy County Commissioner and the registrar.

During the vetting committee meeting, applicants provide their documents and must answer a variety of questions from the committee – some irrelevant to citizenship or documentation. Some applicants are lucky enough to pass vetting the first time they appear before the committee; others are asked to return over and over with additional documents or information, further delaying their acquisition of ID.

Even for applicants who pass the vetting process, another wait is required before they can formally apply for the ID with the registrar. The time taken between vetting and submitting the formal application to the registrar can range from one to three weeks. In total, across both normal and late applications, clients spend an average of 58 days working on their application before they are able to submit to the registrar – which for other Kenyans is where they start the process on day one.

The chart below shows more info on how the vetting delays an applicant ⁶

	NUBIAN APPLICANTS, 2013 - 2014		NUBIAN APPLICANTS, 2015 - 2017	
Days Between:	Normal Applications (at 18)	Late Applications (over 18 & 9 Months)	Normal Applications (at 18)	Late Applications (over 18 & 9 Months)
First Visit to a Government Office and Vetting	30	21	73	77
Vetting and Application Submission	11	21	9	32

The delays caused by the vetting process have worsened over the period of the past five years. For ID card cases that were started in 2013 and 2014, the average number of days between the first visit to the government office and vetting was 21 days for late applications and 30 days for normal application (at the age of 18). But for cases started in 2015 and 2016, the average time between the first visit and vetting has increased to 73 days for normal applications or 77 days for late applications – a significant increase in the amount of time people must wait to move forward. Currently when people in the Nubian community are booked for vetting they are given a vetting date approximately three months later, leading to a long waiting period just to move to the next step in the process. When a client has missed a vetting date or has been asked to produce additional documents, they may have to wait a further three months to re-appear before the committee.

⁶ This data is based on an analysis of 1,222 ID card cases handled by Nubian Rights Forum paralegals working in Kibera.

How vetting delays access to documentation and leads to loss of opportunities

Sarah Badru, a client of NRF, had just turned 18 a few months before the end of 2015. She decided to apply for the ID in January 2016 in order to access a passport and a scholarship to study abroad, which she earned based on excellent performance during her secondary schooling. But the process was not easy since she had to prepare documents such as her parents' and grandparents' birth certificates. Luckily she had all the documents ready and was able to start the process. Although the elders reviewed her documents and scheduled her for vetting, the vetting date she was assigned was in April 2016 – more than three months later. After waiting, Sarah proceeded for vetting in April 2016. Once vetting was over and done with she finally made a formal application for the ID card at the registrar's office. She was given a waiting card as a receipt to hold while her ID was being processed. However, because of the time she had to wait for vetting, she lost her opportunity to access the scholarship.

In the above case study, it is clear that her application was delayed by three months just waiting for her vetting and thus increasing on the wait time it takes to get an ID card. A “typical” Kenya can walk into the registrar's office on any day of the week with a copy of either one of the parent's identity card and either the school leaving certificate or a birth certificate or even a baptismal card. On the same day the applicant fills the application forms and gets to go home with the waiting card without going for any vetting.

The differential treatment in the acquisition of an ID in terms of additional steps and processes is unconstitutional and discriminative in nature and delays the time taken to obtain ID cards. This is a discriminative process that was initially began to track border communities that are in Kenya and on the other side of the border and now has been extended to other communities that are far from the border. For example, the Nubian community resides in the Kibera area of Nairobi, miles away from the border. This practice has now lost the initial value and is now being used as a tool of marginalization. Vetting can even radicalize the youth who are subjected to marginalization at an early stage of life and can develop resistance towards the state. A recent report by the Kenya National Commission on Human Rights states that:

According to the Kenya National Commission on Human Rights report, vetting is without any legitimate basis has created room for abuse. Lack of uniform guidelines and approved methods of identification gives the elders even greater powers, which may lead to discrimination since their judgement is not immune from their pre-conceptions, stereotypes and tribal affiliations. The vetting process therefore risks becoming a subjective assessment and not an objective process of identifying who is Kenyan and who is not.⁷

How Discrimination Causes Further Delays in the Processing of Applications

Delays in the issuance of ID cards continue after the submission of application forms into the period of processing by the National Registration Bureau (NRB).

The chart below shows days between application and receiving document

	NUBIAN APPLICANTS, 2013 - 2014		NUBIAN APPLICANTS, 2015 - 2017	
	Normal Applications (at 18)	Late Applications (over 18 & 9 Months)	Normal Applications (at 18)	Late Applications (over 18 & 9 Months)
Application Submission and ID Card Issuance	95	91	135	145

Based on the cases handled by the NRF paralegals, the average time it takes from the time of application to the issuance varies from 95 days to 145 days. This period excludes the time the client has to wait for the vetting but reflects only the time after submission of the ID card application to the time when the applicant receives the ID card in hand. This amount of time is contrary to the Registration of Persons Act (Cap. 107) that clearly states a document should be issued within 30 days from the date of application. Many communities in Kenya do receive ID cards in just 3 weeks after application. This difference implies that there may be additional scrutiny for the forms for particular individuals in the name of national security. In the processing time as well as the vetting delays, the severity of the delay has increased in the past five years – leading to most applicants now waiting over 4 months for their application to be processed, thus leading to missed opportunities like that of Sarah Badru above.

⁷ See: *An Identity Crisis? A Study on the Issuance of National Identity Cards in Kenya* by Kenya National Commission on Human Rights 2007 [http://www.knchr.org/Portals/0/EcosocReports/KNCHR Final IDs Report.pdf](http://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf). See also: *A Country Under Siege: The State of Security in Kenya an Occasional Report (2010 – 2014)*, Kenya National Commission on Human Rights, 2014

In some instances the NRF team had to intervene for some clients to be issued with identity cards after waiting for over one year. These include:

1. Mohamed Mzee Kaka who applied on 14/10/2013
2. Abdul Karim Babu Sebi who applied on 16/6/2014
3. Kadija Osman Ali who applied on 27/1/2016
4. Abdul Karim Babu Sebi who applied on 16/6/2014
5. Asha Rashid Ismael who applied on 08/10/2015

All the above are just among the few that got their identity cards issued after the Nubian Rights Forum held a press conference to speak against the delays in getting an identity cards and threatening to boycott the August 2017 general elections.⁸

It is against the interest of the state to discriminate its own citizens and subject them to differential treatment and unnecessary delays as these youths might get involved in criminal activities since they cannot access jobs due to lack of documentation. The government should have uniform practice in terms of issuance of ID cards and if there should be any scrutiny of the application, such scrutiny should be standardized and regularized for all applications with limited discretion of the registrars.

How this Discriminatory System Affects People's Lives

An identity card is a right of every Kenyan and is a gate pass to accessing basic rights, services, and even access to employment. As seen in the first case study of Mohammed, he could not be able to practice his career as a caterer as he does not have an identity card. This lack of documentation locked him from advancing himself financially and subjecting him to the risk of poverty and dependence to his next of kin.

In the case of Sarah Badru, she had received a scholarship to study abroad from the Muslim Supreme Council after excelling in her secondary education. She needed a passport and had already reached 18 years of age and needed an identity card to apply for a passport. Her application for a passport was determined by her ID application and this delay made her lose her scholarship, she was not able to join the university.

In general, the ID card is:

- Needed to register for university education
- Needed to support passport application
- Needed to procure land, and assets such as cars
- Needed to apply for tax pin number and to pay taxes
- Needed to get a job
- Needed to register a SIM card and a television set top box
- Needed to access any government building

⁸ Nubians in Kibera threaten poll boycott over IDs delay <http://www.capitalfm.co.ke/news/2017/01/nubians-kibera-threaten-poll-boycott-ids-delay>

Therefore, when one's application is delayed it means that the state is locking out individuals from making good use of their productive stage in life and from the two case studies it is evident that it exposes them to risks of poverty and dependence on others for financial support.

This discrimination has rendered the community at risk of xenophobic attacks as experienced in Kibera in 2001 between the Luos and the Nubians. By officials treating a particular community differently, the rest of the nation also treats them differently especially when the treatment is in the excuse of security. In 2015 the backlash in Eastleigh can be a good learning point after the rest of the communities started attacking the Muslims in the area calling them terrorists. The differential treatment by the state exposes individuals and communities at risk of xenophobic attacks and can lead to clashes just like the Post-election violence in Kenya during 2007 and 2008.

This treatment also undermines the spirit of the Constitution and equality. In other countries like Uganda they have listed the tribes under the Third Schedule Article 10(a). The list of 56 indigenous community dates back to 1st February 1926. This does not imply that it is the best practice but it is a rather transparent way of admitting that the nationality is limited to a certain group of ethnic persons from a list that is over 90 years old. In Kenya we claim to have 42 tribes with a constant political 43 that is ceremonial in nature. The list of the 42 tribes is a virtual list, unlike the Ugandan list that is in the national constitution. In 2003 during the drafting of the proposed new constitution, Kenya also wanted to copy Uganda and compile a list of ethnic tribes; delegates at the National Constitutional Conference were asked to compile a list of Kenya's ethnic communities (with a view to including the list as an appendix to the new constitution). Additions resulted in the number of "indigenous African" communities increasing to 94 within a couple of weeks. Given this rapid proliferation, organizers scrapped the idea of a list for fear that it would not be conclusive and would cause grave offence to any missing community.⁹

Yet even today, the discriminatory process of vetting is a dangerous element as it makes the youth feel as outcasts and thus potentially easily manipulated by gangs and other violent extremists. Instead, Kenya should embrace the diversity of its citizens – adopting a view of Kenyan citizenship that is not limited by one's tribe.

⁹ See, Gabrielle Lynch, *Kenya has more than 42 tribes, so why is this still the magic number?* <http://mobile.nation.co.ke/blogs/Kenya-has-more-than-42-tribes/1949942-2450876-format-xhtml-j6rtv5/index.html>

Conclusion and Solutions

As cited in the Nubian Minors' decision, vetting violates the African Children's Charter and further undermines the spirit of The Constitution of Kenya, especially the right to dignity as protected by Article 28, and the right to equality and freedom from discrimination under Article 27. As seen above, vetting also causes delays in the ID application process – even forcing certain applicants, like those of the Nubian community and other Muslim groups – to wait up to 4 months before they can submit their application to the registrar. In addition, the issuance of the ID also takes longer for some groups, who may miss out on important life opportunities while waiting for their documentation.

It is against the interest of the state to subject citizens to differential treatment as the citizens may feel as outcasts and can easily fall prey to rebellious groups and even to terrorist recruitment cells. The state also violates many other rights of its citizens, who without documentation may not be able to access education, health facilities, employment, financial services, and many other entitlements owed to them by the state.

Subjecting particular communities to differential treatment in the acquisition of such documents is unconstitutional and against the principles of equality and non-discrimination and further undermines one's dignity. We believe in the importance of securing the nation but it should not be used in the pretext of victimizing minority groups and if vetting should continue, we propose it should be universal and non-discriminatory. Vetting should be regulated in terms of wait time and no one should wait for more than one month to obtain an ID card as it will restrict access to basic services and financial empowerment.

Recommendations for Kenya

We recommend that the state should:

1. Implement the *Nubian Minors'* decision of the African Committee of Experts on the Rights and Welfare of the Child as well as the *Ali vs Kenya* decision from the African Commission on Human and Peoples Rights, which recommends that:

The state establishes objective, transparent and non-discriminatory criteria and procedures for determining Kenyan Citizenship

2. The State should eliminate vetting in totality or nationalize the process as the process is discriminatory and unconstitutional
3. The state should implement section 9(1) of the Registration of Persons Act (Cap. 107) that states:

Registration officer to issue identity cards

(1) Upon the registration of a person under this Act, the registration officer shall within a period of thirty days from the date of registration issue an identity card in the prescribed form to that person.

The 30 day timeline should be observed to the letter with exception of areas where transportation is a challenge while at the same time it should be at a reasonable timeline that does not impinge the right to documentation.

4. The state should have a regularized and equal process of application of IDs, not limiting particular communities to applying on certain days while others could apply on any day.
5. The state should regularize the requirements for an application of an ID to limit the discretion of a registrar as discretion creates room for discrimination and evidence has proved that it has been abused to marginalize particular individuals and communities.
6. The state should establish clear service charters, publicize the terms within, and ensure the issuance of documentation meets the service charter commitments.
7. The Kenyan government should not discriminate on any particular community based on religion, ethnicity or sex as it violates the Constitution Article 27.