

LONDA

KENYA DIGITAL RIGHTS AND INCLUSION

A PARADIGM INITIATIVE PUBLICATION



2020 REPORT

www.paradigmhq.org



     @ParadigmHQ

LONDA

KENYA DIGITAL RIGHTS AND INCLUSION 2020 REPORT

A PARADIGM INITIATIVE PUBLICATION

Published by Paradigm Initiative

374 Borno Way, Yaba, Lagos, Nigeria

Email: media@paradigmhq.org

www.paradigmhq.org

Published in April 2021

Report written by Ekai Nabenyio

Editorial Team: 'Gbenga Sesan, Kathleen Ndongmo, Koliwe Majama, Margaret Nyambura Ndung'u,

Mawaki Chango, Nnenna Paul-Ugochukwu and Thobekile Matimbe.

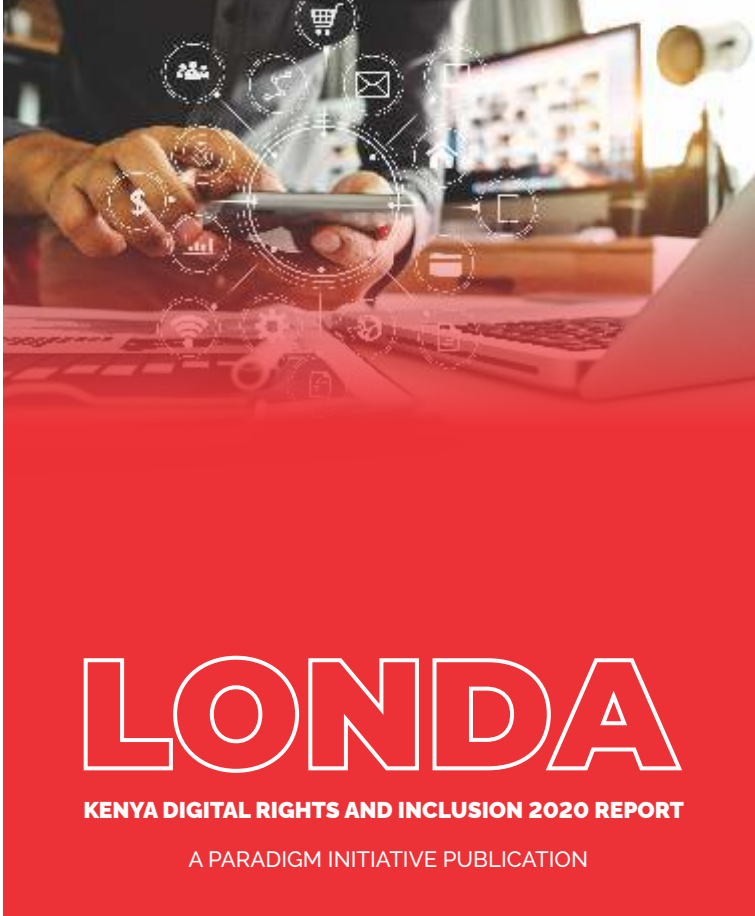
Design & Layout by Luce Concepts

This publication may be reproduced for non-commercial use in any form provided due credit is given to the publishers, and the work is presented without any distortion.

Copyright © 2021 Paradigm Initiative



Creative Commons Attribution 4.0 International (CC BY 4.0)



LONDA

KENYA DIGITAL RIGHTS AND INCLUSION 2020 REPORT

A PARADIGM INITIATIVE PUBLICATION

Civil society organizations continue to work to advance digital rights and inclusion in Africa, ensuring best practices are adopted into policy and legislation. This report analyses the state of digital rights and inclusion in Kenya, examining violations and gaps, investigating the use and application of policy and legislation, highlighting milestones and proffering recommendations for the digital landscape in Kenya. This edition captures among other issues, the digital divide worsened by the COVID-19 pandemic and unearths infractions on different thematic areas such as privacy, access to information, and freedom of expression with the legislative and policy background well enunciated.

CONTENTS

INTRODUCTION	1
IMPACT OF COVID-19 ON DIGITAL RIGHTS AND INCLUSION	1
PRIVACY, DIGITAL IDS AND SURVEILLANCE	2
HATE SPEECH, MISINFORMATION AND CRIMINAL DEFAMATION LAWS	3
DIGITAL EXCLUSION	4
CONCLUSION AND RECOMMENDATIONS	4
CASE STUDIES	5





Kenya is an Information and Communication Technology hub, informally known as the 'Silicon Savannah' for its innovations in technology. That does not, however, mean that Kenya is not immune to the digital divide.

INTRODUCTION

DIGITAL RIGHTS AND INCLUSION IN KENYA

The cost of internet access is one of the most expensive in the region which has led to the digital exclusion of mostly youth and women. This has consequently led to violations of human rights such as the right to access to information. The country is home to hundreds of technology companies and ICT start-ups. The state of the digital spectrum in Kenya is in focus in this segment of the report. The data in this section was obtained through a review of the various reports of the ICT authorities in the country, individual company reports as well as credible media reports.

IMPACT OF COVID-19 ON DIGITAL RIGHTS AND INCLUSION


The COVID-19 pandemic has brought to the fore the inequalities in access to the internet and digital technologies in Kenya. The untimely pandemic has also been a timely reminder of the stark inequalities in internet access and digital technologies among young people in Kenya. The enjoyment of freedom of expression online in 2020 in the country was characterized by a surge in the numbers of internet users due to the fact that the government did not restrict access.



Freedom
of Expression online

As of 2020, Kenya had an internet penetration of approximately 87%. This high rate is mainly because Kenya is home to M-PESA, which is a mobile wallet provider and the secure payment system encourages internet access.¹ According to the Communication Authority of Kenya, internet subscriptions in Kenya rose about 5.1% between April and June 2020 as demand for the service surged amid stay-at-home measures imposed by the government as a result of the COVID-19 pandemic. Subscriptions increased to 40.9 million in June 2020, up from 38.9 million in the period ending March 2020. The Communication Authority of Kenya attributed the rise to increased demand for access to information online, coupled with transfer of more services to the digital space during the pandemic period.²

Additionally, the country has a largely independent judicial system and has developed jurisprudence in the area of digital rights. Courts of law have issued progressive and liberal judicial pronouncements geared towards ensuring that the digital rights of the country's citizens are respected, their privacy is guaranteed and that the citizens are able to access courts for redress in case of an alleged violation, pursuant to the country's Bill of Rights. Additionally, Kenya has a robust Bill of Rights and Article 35 specifically provides for access to information. The Access to Information Act, 2016 seeks to operationalize this Constitutional provision. Further, the Data Protection Act seeks to offer data protection. Despite the challenges presented by the COVID-19 pandemic that re-directed the country's attention, Kenya made some positive strides in digital rights and digital inclusion in the year 2020. Some key developments included the following:



PRIVACY, DIGITAL IDS AND SURVEILLANCE

- Appointment of a Data Commissioner**

Pursuant to the Data Protection Act No. 24 of 2019, President Uhuru Kenyatta nominated Immaculate Kassait as Kenya's Data Commissioner.³ The Commissioner is expected to put in place structures and systems for the protection of personal citizen's data as per the directions given by the High Court in the Huduma Number case. The Huduma number that was rolled out beginning December 2020 presented challenges relating to data protection and privacy. The Data Commissioner will be responsible for establishing and maintaining a register of data controllers and data processors; exercising oversight on data processing operations and receiving and investigating any complaint by any person on infringements of the rights under the Act. The Act, for instance, requires that personal data can only be "collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes."⁴

1. See Share of internet users in Africa as of March 2020, by country, <https://www.statista.com/statistics/1124283/internet-penetration-in-africa-by-country/>
 2. Fourth Quarter Sector Statistics Report for the Financial Year 2019/20 (April-June 2020), <https://ca.go.ke/wp-content/uploads/2020/10/Sector-Statistics-Report-Q4-2019-2020.pdf>

3. Immaculate Kassait sworn in as Data Commissioner, <https://www.kbc.co.ke/immaculate-kassait-sworn-in-as-data-commissioner/>

4. Data Protection Act, 2019 Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct_No24of2019.pdf

■ Huduma Number/ National Integrated Identity Management System (NIIMS) Case

The government of Kenya introduced a national database: the National Integrated Identity Management System. The Huduma Number proposals were challenged in the High Court of Kenya by human rights organizations due to, among others, a need for public participation and an argument that the proposals sought to disenfranchise already marginalized groups in Kenya such as stateless persons. One more controversial aspect of this government project was the fact that the registration for the Huduma Number was a prerequisite to the provision of government services such as healthcare. The High Court subsequently determined that the government move was constitutional as long as that information was properly protected. The court also observed that any collection of DNA and the recording of a person's precise location was intrusive and unconstitutional as it was a breach of their privacy.⁵

The petitioners disagreed with particular sections of the High Court's judgment on this matter and they filed an appeal at the Court of Appeal. This appeal is yet to be heard and conclusively determined.

Notably, the Huduma Bill does not have sufficient provisions on data protection measures. The introduction of a centralized population register with the sharing of data across a range of functional government and/or private databases and users for a wide range of services and transactions presents a risk to privacy that is categorically different from the prevailing situation where the data is stored in separate databases. The Bill proposes various penal measures for non-compliance with various provisions of the Bill.⁶ The hope is that the Huduma number will be implemented in strict compliance with the decision of the High Court in the case so as to protect citizen's personal data.

HATE SPEECH, MISINFORMATION AND CRIMINAL DEFAMATION LAWS

The Computer Misuse and Cybercrimes Act⁷

In July 2019 the Senate moved to the High Court to challenge the constitutionality of 24 laws that were passed by the National Assembly without the involvement of the Senate, one of the chambers of Parliament. Kenya is a bicameral legislature with a two-chamber Parliament. After hearing and determining the petition, the High Court of Kenya voided a number of bills that were passed by the National Assembly that did not involve the Senate. The laws that were nullified included the Computer Misuse and Cybercrimes Act, Kenya's principal ICT legislation. The High Court suspended their ruling for nine months to grant parliament adequate time to right the wrongs as pointed out by the court. The National Assembly has threatened to file an appeal against this judgment. The implication of the decision of the High Court is that the laws will cease to be in application at the lapse of the nine months, in compliance with the court order.

5. Huduma Namba: Kenya court halts biometric ID over data fears: <https://www.bbc.com/news/world-africa-51324954>

6. Seven Things You Should Know About Huduma Number, <https://icj-kenya.org/news/latest-news/271-seven-things-you-should-know-about-huduma-namba>

7. High Court nullifies 23 laws passed without Senate's approval, <https://www.businessdailyafrica.com/bd/news/high-court-nullifies-24-laws-senate-s-approval-2725652>



“

Kenya made some positive strides in digital rights and digital inclusion in the year 2020.

DIGITAL EXCLUSION

■ Gender and ICT

Many women in Kenya do not have access to mobile phones and some possess only a SIM card which means that they rely on friends and neighbours to access telephony services. It is important to understand the challenges that women face in accessing digital resources. Three main challenges that are often identified include

affordability, relevance and lack of digital skills amongst members of particular genders. The country's digital infrastructure is less robust and there is a rural-urban divide as well as gender digital exclusion in parts of the country especially in the North.

CONCLUSION AND RECOMMENDATIONS

- Government should seek to address the digital inclusion inequalities during and after the COVID-19 pandemic.
- Government ought to address the gender inequality gap to ensure that both men and women as well as young people have unrestricted access to the internet.
- Government must ensure that the planned Huduma number roll-out does not infringe on human rights and its implementation is as per the court decision in the Huduma number case.





Case Study: The threat to data privacy in Kenya in the time of COVID-19

Compiled by Ekai Nabenyio

Even though the COVID-19 pandemic is global, the development and implementation of contact tracing has taken place only on national levels. At the onset of the COVID-19 pandemic, different methods were used by the Kenyan government to contain the spread of the pandemic. This included a mandatory quarantine order for all persons travelling into Kenya. Chali Baluu (name changed), a Kenyan citizen, reported human rights violations to the Kenya Human Rights Commission, complaining that his communication devices, specifically his mobile phones, were being monitored by government authorities. Numerous incidents were also reported on the State's tapping of phones and eavesdropping on private communications. Additionally, as a COVID-19 patient, Chali Balu indicated to the Kenya Human Rights Commission (KHRC) that while placed under mandatory quarantine at Jomo Kenyatta International Airport in Nairobi, in compliance with the government directive, they were placed under 24/7 surveillance.

The challenge faced by the KHRC in monitoring the veracity or otherwise of these violations included the fact that it was not easy to prove monitoring of communication devices despite the seriousness of the allegations made. Individuals reported incidents to the KHRC in which they were placed under mandatory quarantine for periods more than the stated 14 days. This meant more surveillance for longer or indefinite periods. Further, the fact that staff of KHRC worked virtually meant that they received and handled these reports of violations virtually. This affected the credibility that is easier to prove during face to face communication. It also means that some cases of those less tech-savvy victims that would have otherwise paid a visit to the offices of the Commission may have gone unreported. Journalists that attempted to relay the information on COVID-19 human rights violations to the general public were often arrested as surveillance was extended to media houses, and vandalism was reported. The Media Council of Kenya did raise a complaint against this violation which essentially violated the right to access information guaranteed under the Constitution of Kenya, 2010. Article 35 (1) of the Constitution of Kenya states as follows:



Every citizen has the right of access to--

- (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicize any important information affecting the nation.

Regional and international human rights instruments such as The Declaration of Principles of Freedom of Expression and Access to Information in Africa demand that for any restriction on access to information held by public authorities to be allowed by law, it must have a legitimate aim, be necessary, proportionate to the aim of safeguarding public health, and must also be restricted to only the existence of the crisis. This means that any limitations of human rights should be justified. Information accessibility is a key component of the right to health and countries such as Kenya are urged to comply. When officials do not publish health information proactively, populations suffer adverse health impacts and cannot fully enjoy their right to health as guaranteed. Kenya needs to be open and transparent, responsive and accountable to the citizens in the fight against COVID-19.

The reduction in the public's right to know about the activities of their governments is counter-productive to the effort in combating the COVID-19 outbreak. The right to information is crucial for ensuring public awareness and trust, fighting misinformation, ensuring accountability as well as developing and monitoring implementation of public policies aimed at solving the crisis. It is crucial that the right to information is maintained during the emergency as much as possible.



Case Study: Safe-guarding Kenyans' data amidst a pandemic

Compiled by Ekai Nabenyio

Contact tracing, as a public health management process of identifying persons (including healthcare workers) who have had contact with individuals with probable or confirmed COVID-19 infection, has been applied in Kenya, as in other countries. Contact tracing is meant to identify potential secondary cases that may arise from a primary COVID-19 case. This intervention has helped avoid further onward transmission by victims. The implementation of contact tracing in Kenya by the Ministry of Health, in coordination with law enforcement, has not been without controversy and has raised various human rights concerns. Important considerations include the effectiveness of contact tracing and the concomitant impact on privacy and human rights. The shortcomings of contact tracing go beyond privacy considerations and potentially infringe on other human rights. While the various accounts as narrated by the respondents are true, the names that have been used in this case study have been deliberately modified to hide the true identity of the respondents.

A journalist at The Standard Media Group received reports from Wanjiru Kemboi whose phone calls and other communications were believed to be intercepted by government surveillance agencies. It was also apparent that the affected individuals did not understand their digital rights. Wanjiru who had been subjected to the 14-day mandatory quarantine period contacted the journalist as she had a strong suspicion that her mobile phones were tapped, although she seemed to not be concerned about it. Wanjiru had an experience in which a National Intelligence Service official contacted her, as a patient that was supposed to be on self-quarantine, warning Wanjiru against going to the market and mingling with others on a day when she actually attempted to go to the market. Wanjiru Kemboi complied with the order and retreated back to quarantine. This was a clear testament that the patient was being monitored by the National Intelligence Service in liaison with the Health Surveillance agencies. This meant that the COVID-19 patient lived in constant fear while in private confinement and did not have an assurance about the protection of their privacy. It was also not clear what the extent of the penetration of the surveillance by the National Intelligence Service, and the Health Surveillance, was.



This clearly violated the individual's right to privacy, even in the face of the COVID-19 pandemic, as guaranteed in the Bill of Rights of the Constitution of Kenya, 2010. This revelation raises questions as to how the COVID-19 patient's data is used and how long it should be stored on national security databases. The concern here is the possibility of surveillance by the State, particularly should data use and storage not be legally safeguarded. Individuals' right to privacy can be affected by digital data collection and processing. In developing solutions to address crises, State institutions and regulators should do their utmost to balance the right to privacy and the right to information when there is a potential conflict between them. Numerous other cases were reported, especially after the journalist penned an article to report cases of increased tapping of phone calls by State agencies.

In conclusion, injurious contact tracing that violates human rights breeds suspicions between the State and the citizenry. To right the wrongs that have characterized contact tracing in Kenya, it is recommended that there is an urgent need for Health Surveillance authorities and officers of the National Intelligence Service to comply with the provisions of the Data Protection Act, 2019, as far as the protection of citizen's private data is concerned. The State should take appropriate measures to safeguard data and to regulate who has access to the same.

The Government of Kenya introduced the mSafiri App, a brain-child of a collaboration between Kenya's Ministry of Health and the Ministry of Transport, in containing the spread of the virus. The app was designed to provide critical data that would help trace back the movements of infected or suspected COVID-19 cases. This Digital Health Surveillance tool necessitated the need for the government to be transparent on how the data collected was used but the lack of guiding principles, as far as contact tracing is concerned, was a point of concern raised. There were concerns by particular patients that the Government of Kenya was not able to manage these technologies and therefore contracted third parties-technology companies. As a result, this has presented an opportunity for abuse of health surveillance data as there are no known Data Sharing Agreements with such third parties. This is critical as it is feared that intra-government use of data in Kenya may be mostly utilised for security reasons; there is a need to safeguard against this.

LONDA

KENYA DIGITAL RIGHTS AND INCLUSION 2020 REPORT

A PARADIGM INITIATIVE PUBLICATION



Paradigm Initiative

374 Borno Way, Yaba, Lagos, Nigeria

Email: media@paradigmhq.org

www.paradigmhq.org

     @ParadigmHQ