

LONDA



2021



Kenya Digital Rights and Inclusion Report

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KENYA DIGITAL RIGHTS AND INCLUSION 2021 REPORT

A PARADIGM INITIATIVE PUBLICATION

Published by Paradigm Initiative

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www.paradigmhq.org

Published in May 2022

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Cover Page design by Kenneth Oyeniyi

Design & Layout by Luce Concepts

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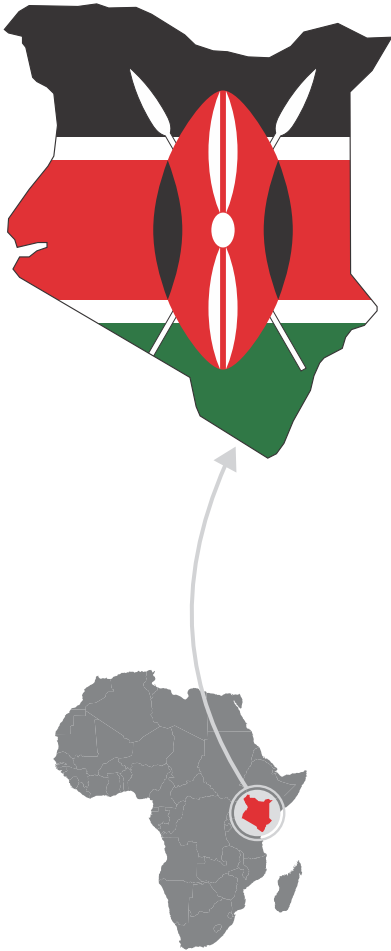
EXECUTIVE SUMMARY

In 2021, Kenya witnessed a number of developments in the country's digital rights ecosystem. Despite the challenges presented by the COVID-19 pandemic, the Ministry of Information, Communications and Technology (ICT) Innovation and Youth Affairs (MoICT) led efforts to create a rights-respecting and liberal internet-policy environment.

The report gives an overview of digital rights in Kenya and the intersection between data protection and humanitarian action, digital rights and digital inclusion, data protection and privacy and the threats by public authorities on freedom of expression online.

The report also takes a look at the application of cybercrime laws by the law enforcement and other agencies in Kenya.





INTRODUCTION

DIGITAL RIGHTS AND INCLUSION IN KENYA

Kenya is currently one of the most technologically advanced and rapidly growing Information and Communication Technology (ICT) markets in Sub-Saharan Africa.¹ ICT is identified as an enabler for social economic transformation and the attainment of the aspirations of Kenya's Vision 2030. The country is home to some of the key players in the industry, including Google, Meta, Oracle, IBM and Microsoft, among others.² Notably, Kenya's MPESA is a world recognized mobile banking service that has catapulted the country into greater heights in the field of Mobile Banking.



USD \$210M

**ALLOCATED TO THE MINISTRY
OF ICT INNOVATION AND
YOUTH AFFAIRS**

A number of laws and policies including the Film Bill 2021 were proposed for enactment during the period under review. The Government of Kenya's commitment to supporting ICT development is evident from the promising policy direction the country is currently taking through the ongoing actualization of the country's ICT aspirations through sufficient budgetary allocations. A case in point is the Financial Year 2021/2022 period during which the government allocated USD\$210 million to the Ministry of ICT Innovation and Youth Affairs.

1. Kyem, Peter A. Kwaku. "Is ICT the panacea to sub-Saharan Africa's development problems? Rethinking Africa's contentious engagement with the global information society." *Progress in Development Studies* 12.2-3 (2012): 231-244.
2. Schachter, Kara. "The Digitalization of Development: Understanding the Role of Technology and Innovation in Development through a Case Study of Kenya and M-Pesa." (2019).



A deliberate, continued push by the government of Kenya to lead by example, by providing more of its services online through the e-citizen service portal (ecitizen.go.ke), has contributed to demand-driven growth of the ICT sector. Following the government's directives that employers allow non-essential workers to work from home, citizens spent more time online during the period under review. As work-related and other engagements shifted online as a result of the government-backed work from home policy, a number of impediments to full enjoyment of digital rights by the majority of Kenyans were noted.

COMPLIANCE WITH REGIONAL AND INTERNATIONAL FRAMEWORKS



Article 19 of the Universal Declaration of Human Rights, which provides that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” guarantees, among others, the freedom of expression and association.³

Kenya has ratified the African Charter on Human and Peoples Rights, considered the general human rights instrument on the continent.

March 2021 is viewed as an important moment for the rights of children online because even though it is often denied the attention it deserves, the United Nations (UN) Committee on the Rights of the Child launched a guiding document on children's rights in relation to the digital environment. The document complements the existing UN Convention on the Rights of the Child.

The African Declaration on Internet Rights and Freedoms was developed to “promote human rights standards and principles of openness in internet policy formulation and implementation” in African countries, including Kenya. The African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention) was drafted in 2011 but adopted in June 2014 to “establish a credible framework for cybersecurity in Africa through organization of electronic transactions, protection of personal data, promotion of cyber security, e-governance and combating cybercrime.”⁴ Further, the European Union's General Data Protection Regulations (GDPR) provide, what could be termed as, international best practices in data governance. While not Kenya-specific, the regulations are progressive and are informative.

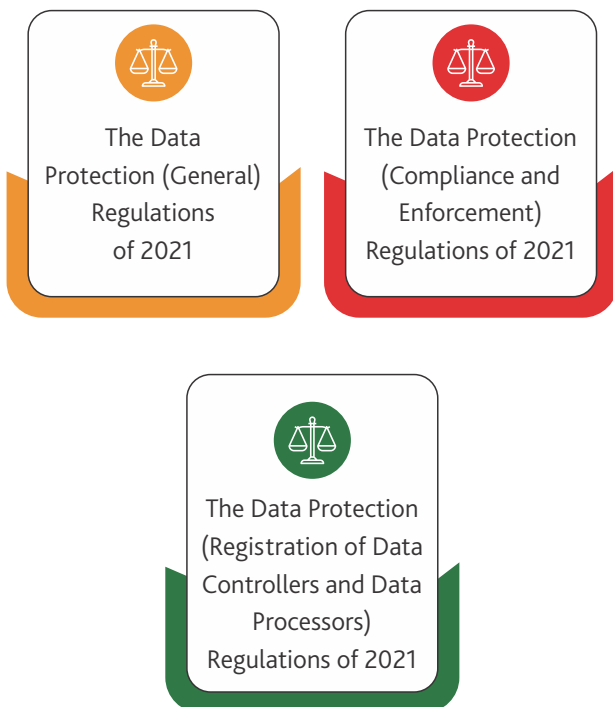
3. Africa Charter on Human and Peoples Rights https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed on 24 January 2022)

4. See The NATO Cooperative Cyber Defence Centre of Excellence (CCDCOE) available at <https://ccdcoe.org/organisations/au/> (Accessed on 15 March 2022).

Anecdotally, Kenya's compliance with regional and international frameworks can be deciphered from the fact that it has taken deliberate steps to ensure that the country operates within the confines of international standards and human rights obligations to protect the right to privacy and other digital rights that were threatened online before.

The country continues to improve its legal, policy and institutional framework to, among others, attune it to regional and international frameworks. For instance, the National Communications Secretariat, the policy advisory arm of the Ministry, announced in April 2021, that the Ministry of ICT, Innovation and Youth Affairs had launched a public consultation on draft data protection regulations.

In particular, the Ministry highlighted that it is seeking feedback from members of the public on the following three sets of regulations:⁵



IMPACT OF COVID-19 REGULATIONS ON DIGITAL RIGHTS AND INCLUSION

As a result of the COVID-19 pandemic, there was a noted increase in the number of internet users and internet usage. In June 2021, the Communications Authority of Kenya reported that leading telecom company, Safaricom PLC, had the highest internet users.⁶

The report notes that this increase was occasioned by the work from home government policy. The onset of the pandemic also saw the introduction of the digital services tax. Further, the government increased surveillance of COVID-19 patients in 2020 at the beginning of the government-imposed lockdowns.⁷

However, due to an outcry on the manner in which the surveillance was being carried out, the government appeared to have gone slow on the intrusive surveillance.

FREEDOM OF EXPRESSION ONLINE IN 2021

Kenya is largely a rights-respecting jurisdiction as a result of the developments that have been made in the country's judicial system.

Freedom of expression online is often guaranteed but in 2021 there were a few instances of threats to freedom of expression online. For instance, the government sanctioned the arrest and prosecution of activist Mutemi wa Kiama for publishing what the government considered offensive graphics. The activist was subsequently prosecuted in a case that attracted international condemnation. The case has since been dismissed.⁸

5. Data Protection General Regulations <https://www.odpc.go.ke/resources/data-protection-general-regulations-2021/> 2 (Accessed on 15 January 2022)

6. See Communication Authority's Sector Statistics Report available at <https://www.ca.ke/wp-content/uploads/2021/09/Sector-Statistics-Report-Q4-2020-2021.pdf> (Accessed on 19 January 2022).

7. Barasa, Edwine, et al. "Indirect health effects of the COVID-19 pandemic in Kenya: a mixed methods assessment." *BMC Health Services Research* 21.1 (2021): 1-16.

8. Carolyne Kubwa, "Activist Kiama released over lack of sufficient evidence," *The Star*, April 21, 2021, Available at <https://www.the-star.co.ke/news/2021-04-20-activist-kiama-released-over-lack-of-sufficient-evidence/> (Accessed on 15 March 2022).

PRIVACY, DIGITAL IDS AND SURVEILLANCE

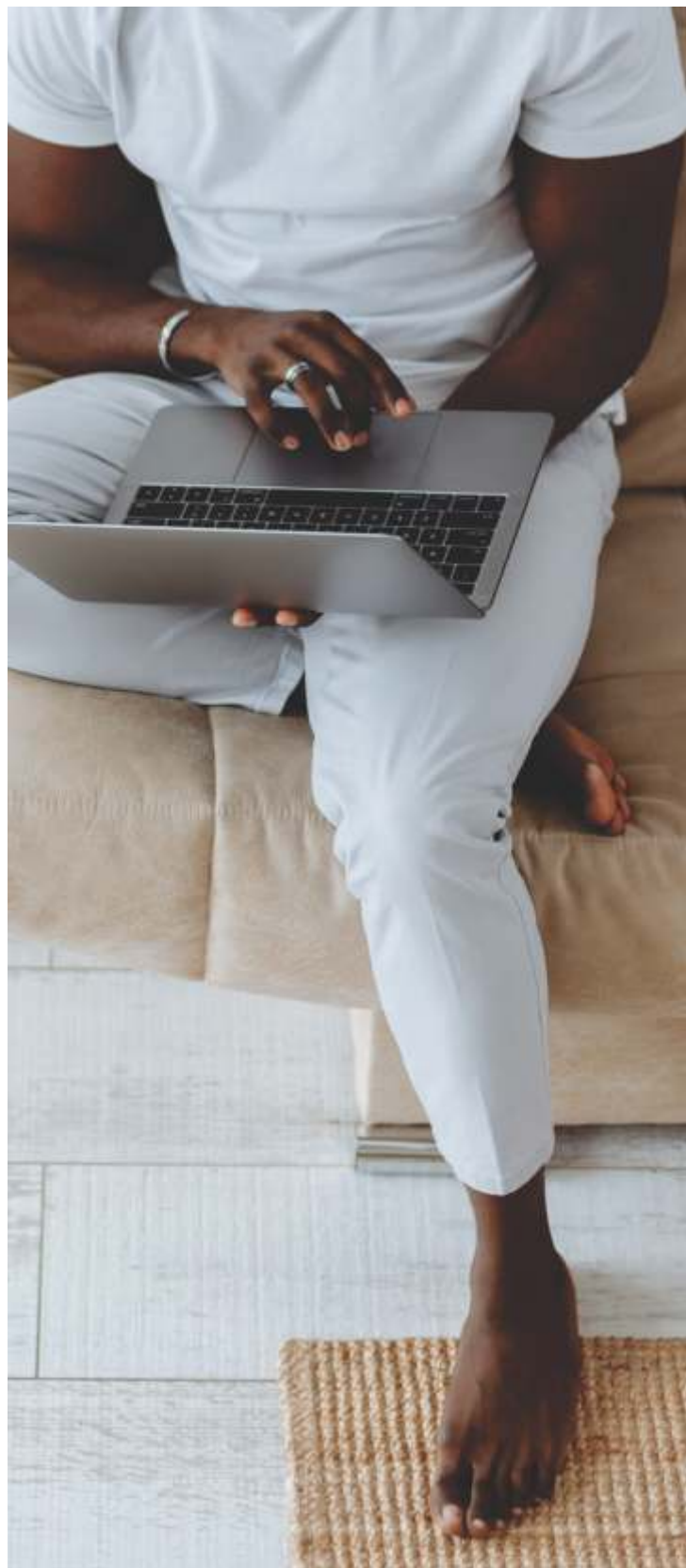
Due to its failure to comply with the express provisions of the Data Protection Act of 2019 (the DPA), the High Court of Kenya annulled the decision to roll out Huduma Cards in October 2021. The Huduma Cards are issued to Kenyan citizens for identification purposes and are set to replace the National Identity Cards that are currently in use. Contrary to the Act, the government kick-started the process of collecting personal data from Kenyans without putting measures in place to ensure that the data would be protected under the National Integrated Identity Management System (NIIMS).⁹ The court proceeded to issue an order of mandamus which sought to compel the Government of Kenya to first complete a data protection impact assessment before rolling out the Huduma cards as it had intended.

ACCESS TO INFORMATION

Pursuant to Kenya's Access to Information Act of 2016, the right to access to information held by public authorities is codified in statute. As empowered by the Act, the Cabinet Secretary for Information, Communications and Technology (ICT) Innovation and Youth Affairs in liaison with the Commission on Administrative Justice (CAJ) published the Access to Information Regulations, 2021 for comments by members of the public.¹⁰ This was a great milestone as far as access to information in Kenya is concerned.

INTERNET DISRUPTIONS

There were no major government internet disruptions in Kenya in 2021 except for interruptions occasioned by routine maintenance of their respective systems by the respective telecom companies. Internet disruptions were also occasioned by the frequent power outages by the Kenya Power and Lighting Company (KPLC).



9. Bajpai, Nirupam, and John Biberman. "Digital Identification and ICT-Driven Development in Africa." (2021). See also Mosero, Rose. "Analysing the impact of Digital ID frameworks on Marginalised Groups in Sub-Saharan Africa." Available at SSRN 3797506 (2021).

10. See Highlights of the Access to Information Regulations <https://vellum.co.ke/highlights-of-the-access-to-information-regulations-2021/> (Accessed on 16 January 2022).

See also a commentary by Article 19 Eastern Africa on <https://www.article19.org/resources/kenya-access-to-information-regulations/> (Accessed on 20 January 2022).

HATE SPEECH, MISINFORMATION AND CRIMINAL DEFAMATION LAWS

As it usually goes during a campaign season, Kenya is currently marred with rampant cases of politicians engaging in hate speech and misinformation, specifically the spread of fake news. No major hate speech, misinformation and criminal defamation legislative proposals were made during this period.

DIGITAL EXCLUSION IN AFRICA AND ITS IMPACT ON HUMAN RIGHTS

Digital exclusion is still a matter of concern in Kenya's ICT development. Some parts of the country still have either weak 2G connectivity or no mobile network coverage especially in North-Eastern and North-Western regions. The fact that some parts of the country are digitally excluded means that they are not able to take advantage of the internet revolution. As the rest of the country grapples with 4G and 5G, it is unfortunate that some parts of the country have been left out.

DIGITAL INFRASTRUCTURE AND PRIORITIZATION OF ICT

Pursuant to the Constitution, broadcasting, postal and telecommunications services are the mandate of the national government as opposed to the county governments. In order to achieve its ICT aspirations as stated in its ICT Policy, the Government of Kenya has invested in a National Optic Fibre Backbone Infrastructure (NOFBI).¹¹ Further, the national government through the Ministry of ICT continues to encourage counties to provide ICT infrastructure and skills development to enable them to benefit from the immense potential and opportunities presented by the national ICT policy.



ARTIFICIAL INTELLIGENCE NATIONAL STRATEGY

Kenya currently does not have an Artificial Intelligence (AI) national strategy. However, a number of AI initiatives are being implemented by non-state actors. In partnership with Global Partners Digital, Paradigm Initiative implemented an AI project in Kenya that resulted in a compilation of an AI Stakeholders Map, an AI Factsheet and an Artificial Intelligence in Kenya Policy Brief.¹²

GENDER AND ICT

Women involvement in ICT in Kenya is critical as women continue to take up necessary space in the ICT sector. There is a growing importance of inter-agency collaboration and coordination to achieve digital rights for women at the national level. Despite these strides, there is an urgent need for an accountability framework that promotes improved planning, coordination, programming and results for gender equality and women's empowerment at the country level especially in relation to digital rights.

By focusing on gender mainstreaming processes at the country level, the government can work to achieve its aspirations in gaining gender parity in the ICT sector. For now, a lot remains to be done.

11. Makini FM, Mose LO, Kamau G, Mulinge W, Salasya B, Akuku B, Makelo M. The Status of ICT Infrastructure, Innovative Environment and ICT4AG Services in Agriculture. Food and Nutrition in Kenya. 2020;5(11):75.

12. The documents are available through this link

<https://drive.google.com/drive/folders/1WEV4zcO9PsprH34GXHy7U50gVBJAxePm?usp=sharing> (Last accessed on 18 February 2022).

AN ANALYSIS OF THE COUNTRY'S PERFORMANCE FROM THE PREVIOUS YEAR

As opposed to 2020 when the government was grappling with containing the COVID-19 situation in the country and in the process, violating human rights, 2021 witnessed positive developments in the ICT sector. There is a notable difference from 2020 in terms of the general improvement of the digital landscape, regulatory framework, the institutional arrangement as well as the clarity of what the future looks like for ICT in Kenya. The government appears to be better at managing the COVID-19 pandemic compared to the chaos in 2020 of intrusive government surveillance put down to the containment of the spread of the pandemic.

Following the government's move to slash domestic mobile termination rates (MTRs) and fixed termination rates (FTRs), the mobile operators opposed this move. The implication of this was that mobile operators would still charge as they deemed fit hence negatively impacting on the general public access of digital services. The cost of access to the Internet is a key determinant of digital inclusion and digital rights.

ICT has undoubtedly contributed to Kenya's socio-economic development, improvement of the Gross Domestic Product (GDP), quality of life of the citizens and literacy levels. Section 4 of the Computer Misuse and Cybercrimes Act 2018, establishes the National Computer and Cybercrimes Coordination Committee (NC4) composed of representatives from various government agencies.

The Committee is charged with the responsibility of overseeing the security related aspects of the Kenyan cyberspace. Kenya launched the National Computer and Cyber Crimes Co-ordination Committee (NCCCC) to combat the rising cyber-related crimes which has bedeviled Kenya and other countries globally. It is hoped that the operationalization of the Committee will contribute to the early detection, prevention and penalization of cyber crimes.



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CONCLUSION AND RECOMMENDATIONS

This report has highlighted the challenges that have been witnessed in the digital landscape in Kenya. It urges that the recommendations which have been advanced in this report are put into due consideration for the betterment of the Kenyan populace. The following recommendations are advanced:

- There is a need for the government to put in place policy measures which ensure that the infrastructural development that is being witnessed in the major cities in the country is cascaded down to other parts of rural Kenya that have not benefited from the digital inclusion programmes.
- There is a need for all stakeholders-public authorities, the private sector and the general population in Kenya to lead efforts to reduce the spread of hate speech and misinformation online. This is critical especially during this period when the country is in an electioneering period.
- The Government of Kenya must adopt a multi-stakeholder approach in gearing towards an ICT-centered economy as envisioned in the country's development blueprint that seeks to transform Kenya into a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment.
- There is a need for the national government to spur ICT development at the local county level by initiating programmes in partnership with the county governments.
- There is a need for promotion and encouragement of self-regulation and strengthening of professional bodies to support the government to ensure adherence to certain guidelines and ethics.
- The Government of Kenya needs to assess the gender perspectives in regards to ICT in the country and to remove bottlenecks that hinder women's involvement in ICT.

Londa 2021 expands on last year's report with findings from 22 countries, examining themes of privacy, freedom of expression, access to information, segmentation and exclusion, digital transformation, affordability, gender and others within existing legislative frameworks, and against the backdrop of a widening digital divide. This edition captures the gaps and proffers recommendations to achieve a digitally inclusive and rights - respecting Africa.



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