

Reflections from the encampment decision in the High Court of Kenya

Anna Wirth

Civil society groups are embracing a recent victory in the High Court of Kenya as a reminder of the important role that strategic litigation can play in the enforcement and promotion of refugee rights.

On 26th July 2013, the High Court of Kenya delivered a judgment in a remarkable vindication of the rights of refugees. The Court struck down a government policy that, if implemented, would have fundamentally violated the freedoms and dignity of all refugees living in Kenya's urban areas.

The case, which was brought by Kituo Cha Sheria, a local non-governmental organisation (NGO), stands as a reminder that strategic litigation has the power to alter the legal landscape for all refugees. When executed properly, it has the potential to provide large-scale recourse for rights violations, create positive human rights jurisprudence, and send a strong message to governments and members of public that refugees are not just people with needs but people with rights to be claimed and enforced. When appeals to the legislative and executive branches of government go unacknowledged, civil society groups, such as the NGO that drove the case to victory in Kenya, are increasingly turning to strategic litigation as a means of enforcing and advancing the rights of refugees.

Urban refugees in Kenya

Although an informal encampment policy has operated in Kenya since the 1990s, approximately 150,000 refugees live in urban areas. For these urban refugees, life operates as normal – children attend school, adults work to support their families, roots are put down and lives are rebuilt. In December 2012, however, this normality came under threat.

Following a series of grenade attacks in Kenya linked to Somali non-state armed group Al Shabaab, the Department of Refugee Affairs issued a press release in December 2012 announcing its decision to stop the registration of urban refugees and to relocate them to refugee camps. On 16th January 2013, an inter-ministerial letter was circulated giving effect to the press release, instructing the first phase of the 'rounding up' of refugees to occur on 21st January. For refugees who had called the urban areas of Kenya home for years, some even for decades, the implementation of the policy would have meant another forced relocation and a dislocation from

November 2014

the communities, livelihoods and families that anchored their identity and dignity.

On 21st January, the day that the policy was scheduled to be carried out, Kituo Cha Sheria bravely challenged the government directive by filing a petition in the High Court. Soon after, seven asylum seekers and refugees residing in Nairobi filed a similar petition seeking to quash the directive. In their pleadings, each of the petitioners illustrated the ties they had made to their communities, and the ways in which an encampment directive would sever those ties, affecting virtually every aspect of their lives, including education, work, health, family, free movement, privacy and dignity.

Kituo Cha Sheria illustrated the injustice and destabilising effect that the directive would have upon the lives of individual petitioners if implemented. Kituo Cha Sheria's case and the individuals' petitions were consolidated into one case, and on 23rd January the Court issued temporary orders prohibiting the implementation of the policy pending the formal hearing of the case.

Over the course of the next six months, Kituo Cha Sheria and others from the refugee rights community joined forces to pursue and raise the visibility of the case. Refugee rights advocates around the globe, including Human Rights Watch and Asylum Access, brought the violating policy into the public eye by publicising the case in reports, newsletters and press releases. The United Nations High Commissioner for Refugees (UNHCR) also made a commendable contribution to the case by submitting a 20-page *amicus curiae* ('friend of the court') brief which clearly delineated UNHCR's concerns regarding the encampment directive, offering a solid legal explanation of Kenya's obligations under the 1951 Refugee Convention. In their coordinated effort, civil society and UNHCR sent a clear message to Kenya's government that if it were going to tolerate human rights violations, those abuses would not go unscrutinised by the global refugee rights community.

On 26th July, the Court ruled in favour of the urban refugees, quashing the government's encampment directive. In a refreshingly pro-refugee judgment, the Court held that the policy violated, amongst other things, Article 28 of the Kenyan Constitution on human dignity; Article 27 on equality and freedom from discrimination; Article 47 on right to fair administrative action; and Article 39 on freedom of movement and residence. In explaining its rationale, the Court made considerable references to the codification of these rights in international and regional human rights and refugee law.

The Court rejected the argument that national security was a justifiable rationale for the policy, stating:

"Where national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances such as the present case, a specific person's presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say that the operation is inevitable due to recent grenade attacks in the urban areas and tarring a group of persons known as refugees with a broad brush of criminality as a basis of a policy..."¹

In agreeing with arguments advanced by the petitioners, the High Court held that to allow the policy's implementation would amount to a complete upheaval of the refugees' lives, preventing any level of normality in their country of refuge.

The power of strategic litigation

The Kenyan case is a testament to the fact that civil society groups have the power to extend rule of law and make concrete and measurable changes to law and policy through judicial intervention.

By definition, strategic litigation seeks both to bring about individual justice and to alter the legal landscape in which rights exist. As is evident from this case and others, litigation can and should be accompanied

November 2014

by a broader advocacy strategy that will incorporate the involvement and collaboration of a range of stakeholders, partnerships, media campaigns and political dialogues. Importantly, this advocacy must continue well beyond a court's positive ruling; even favourable court decisions require follow-up to ensure their implementation.

In the Kenyan judgment, the Court relied heavily upon the legal analysis produced by UNHCR. The submission of *amicus curiae* briefs is only one amongst a range of ways in which UNHCR may support civil society's capacity to pursue judicial recourse; there is also scope for UNHCR to train judges and practitioners in the application of international human rights and refugee law, as well as offer case support by reviewing legal briefs, providing background information and advising on litigation techniques. In situations where UNHCR is, for diplomatic reasons, ill-placed to directly intervene in cases, it

should channel resources to strengthen the capacity of NGOs to pursue litigation.

Likewise, strategic litigation should be promoted amongst refugee rights advocates as an important tool to enforce human rights and strengthen protection at the local level. NGOs can play an important role in supporting one another in judicial intervention, through media campaigns, the sharing of information and lessons learned, as well as with legal support in the preparation of Court documents. If strategic litigation is in fact to be strategic, we must continue to build constructive partnerships that will strengthen one another's capacity to use the tool effectively

Anna Wirth anna.wirth@asylumaccess.org is
Policy Officer at Asylum Access.
www.asylumaccess.org

1. *Kituo Cha Sheria vs. Attorney General* (2013) eKLR, paragraph 87, pp38-39.