



IS ARTICLE 27 UNDER ATTACK?

KENYAN'S VIEWS ON GROWING POPULISM, SOCIAL
POLARIZATION, AND IDENTITY-BASED DISCRIMINATION

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TribelessYouth

KENYA

AMNESTY
INTERNATIONAL



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DEDICATION

We dedicate this policy brief to all children married off, for livestock in times of drought, all persons with disabilities made invisible by our prejudice, to all the widows lynched for their properties, to girls who sacrificed their innocence to survive, to persons from the LGBTIQ community who are forced to hide their identities and choices to survive in a society whose majority wishes they did not exist. May you be seen for who you are, your voices be heard, your freedoms acknowledged, your dignity restored, your rights enforced, and your identity respected.

ACKNOWLEDGEMENT

Nearly sixty years ago, Kenyan men and women of all ages, abilities, classes, and ethnicities from all parts of Kenya celebrated political independence from settler colonialism and British imperialism. On 12 December 2023, the nation marks their courage and determination to dismantle discrimination based on identity and establish equality.

All human beings are born free and fully self-expressed. The rest of our lives are dedicated to expanding this freedom. Being independently in control of our life choices and safe in our relationships with others is key. Our Constitution is built around these foundational ideas.

Article 27 upholds everyone's right to dignity, respect, and protection. Read with the rest of Chapter 4; it promises a Kenya that recognizes every person is equal before the law and has the right to equal protection and equal benefit of the law. It forbids the State from directly or indirectly discriminating against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. It further commits the state to take legislative, affirmative action programmes and policies that address past and current discrimination.

Under Article 3.1 of the Constitution, this current generation carries a responsibility to the freedom fighters of the last century to challenge prejudice, discrimination, and violence against any person. The price of our freedom today is the historical obligation we bear to disrupt the normalization of prejudice and pain in all spaces within the republic.

INTRODUCTION

Identity-based discrimination has threatened different Kenyans in different ways for over a century. The colonial government defined, controlled and then exploited Kenyans as natives through the Native Registration Ordinance of 1915. Kenyan Nubians, coastal Arabs, Kenyan Somalis, and Kenyan women, among others, have faced discrimination, statelessness and abuse because of their identity. Minorities, indigenous, marginalised and special interest groups have been more impoverished, undignified and threatened than the rest of the population.

Despite fundamental freedoms in our Constitution, Kenyan families face multiple complex challenges in 2023. Rising living costs driven by climate change, ultra-capitalism, and an overly indebted state combine to exclude millions from employment opportunities and essential services. Increasingly feeling excluded, hopeless, fearful, and restless, millions are easy prey for populist narratives against those with different beliefs (thoughts and religion), cultural identities (ethnicity, race, gender, and age) or those who make different choices (sexuality, dress and expression).

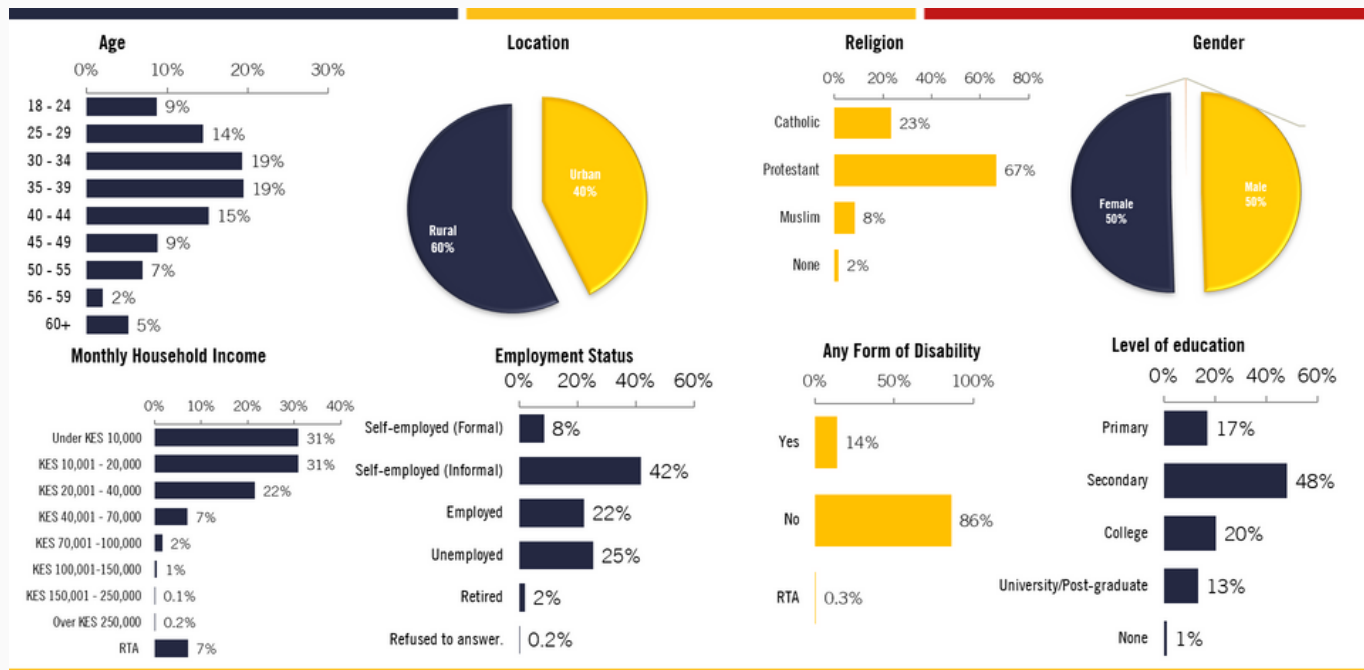
Political, social, or religious populism is both alluring and corrosive. It sets people against each other and fragments the social fabric of households, communities, and nations. It also dismantles respect for cultural diversity. With this comes the disinformation, lies and prejudice we experience daily. There is a direct link between radicalised influential Christian cults exposed by the Shakahola Massacre, rising gender-based violence, anti-refugeeism, hate crimes against LGBTIQ+ persons, the draft anti-LGBTIQ Family Protection Bill and attempts to roll back the Sexual Offences Act or the Anti-Female Genital Mutilation Act.

These trends are not isolated or disconnected. Left unchallenged, epic historical conflicts such as the German holocaust, Rwandan genocide, or the persecution of the Rohingya Muslims loom closer with each murder, cult, claw-back legal amendments, hate bill, delayed access to justice or attack on minorities. Sandwiched between intolerant and discriminatory attitudes, cancel culture and social media algorithms that accelerate violent differences, the possibility of upholding Article 10 of the Constitution narrows daily.

METHODOLOGY

Amnesty International Kenya commissioned an opinion poll to assess the level of public awareness, experience and understanding of identity-based discrimination and to generate evidence-based recommendations for legislators, policymakers, civic and business leaders, and citizens. The opinion poll was administered between 10-15 November 2023 using Computer Assisted Telephone Interviews (CATI), with a sample size of over 3,000 responses from all 47 counties.

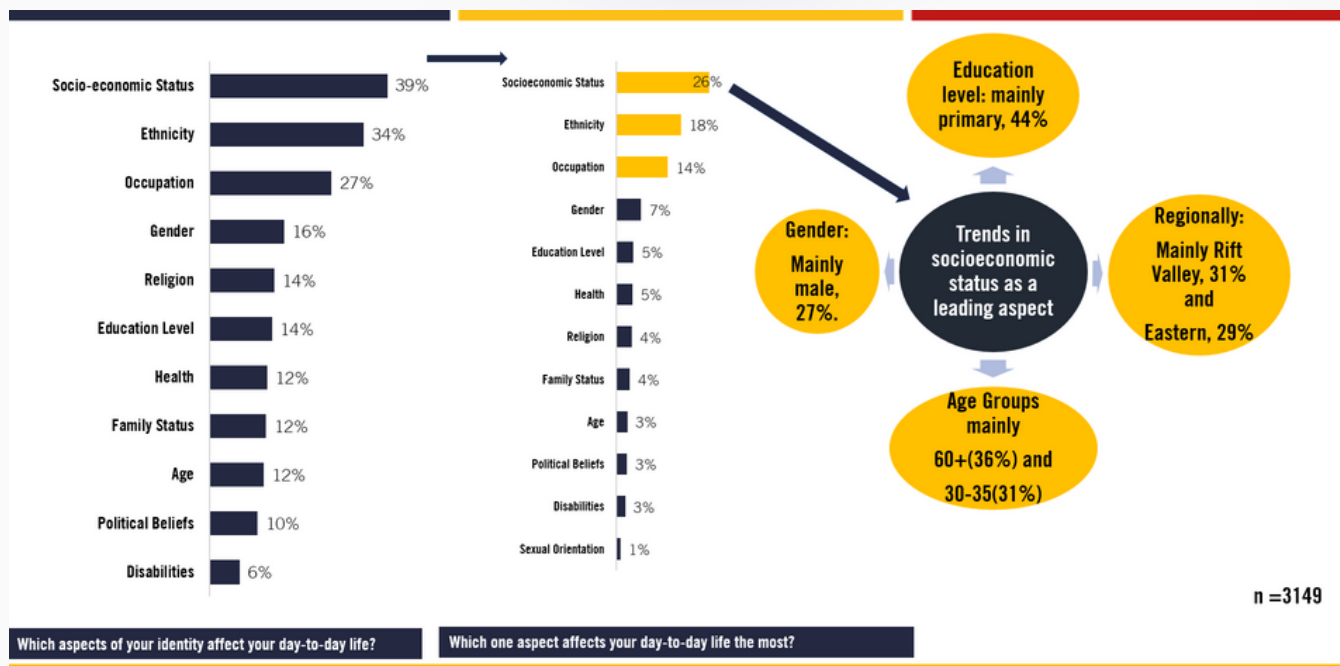
When was the survey conducted?	10 th – 14 th November 2023
How was the survey conducted?	Interviews were conducted through Computer Assisted Telephone Interviews (CATI)
Universe and Survey sample	The relevant section of the public that was targeted in the survey (i.e. the universe) was persons who were 18 years old and above at the time of the survey. The overall survey had a target survey sample size of 3000 respondents.
What was the margin of error?	±1.8 % at 95% degree of confidence.
What was the response rate?	95% response rate.
Survey Geographical Coverage	The survey covered 47 counties and all the eight regions of Kenya. To ensure the survey findings were representative of the Kenyan, 18+ years population, the distribution of the survey sample across the regions was proportionately allocated. As such, the Rift Valley region took the highest sample size, with the North Eastern Region taking the least sample.
Data Analysis	Data was processed and analysed using Statistical Package for Social Sciences SPSS version 26 statistical software due to its high accuracy and reliability.



FOUR MAJOR INSIGHTS ON THE STATE OF EQUALITY AND FREEDOM IN KENYA

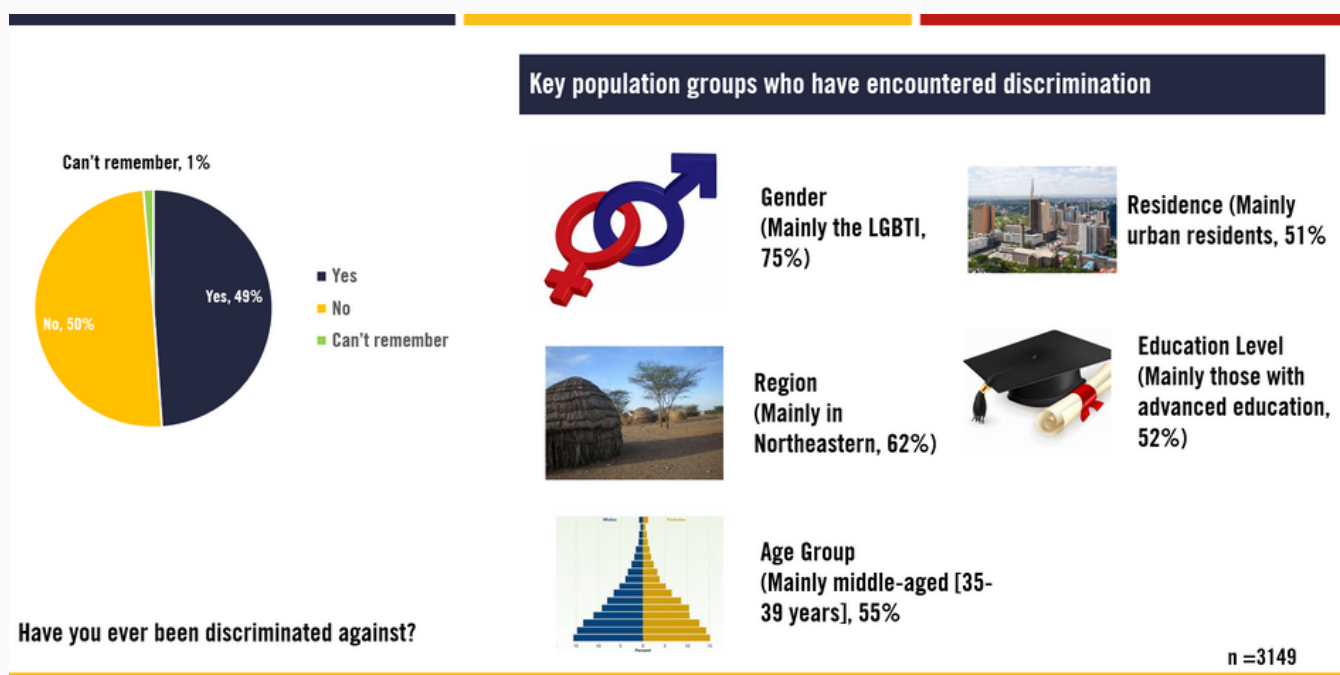
UNDERSTANDING OF IDENTITY

Most Kenyans identify themselves based on their nationality first (69%), then as African (11%), religion and gender (6%). Less than 0.3% of Kenyans have their ethnicity as their primary identity. This is an important finding in terms of national cohesion. However, 39% of Kenyans perceive that their socio-economic status affects their daily lives. 34% and 27% feel that their ethnicity or occupation is the primary driver of the opportunities, respectively. Only 16% of the population feels their gender is primary.



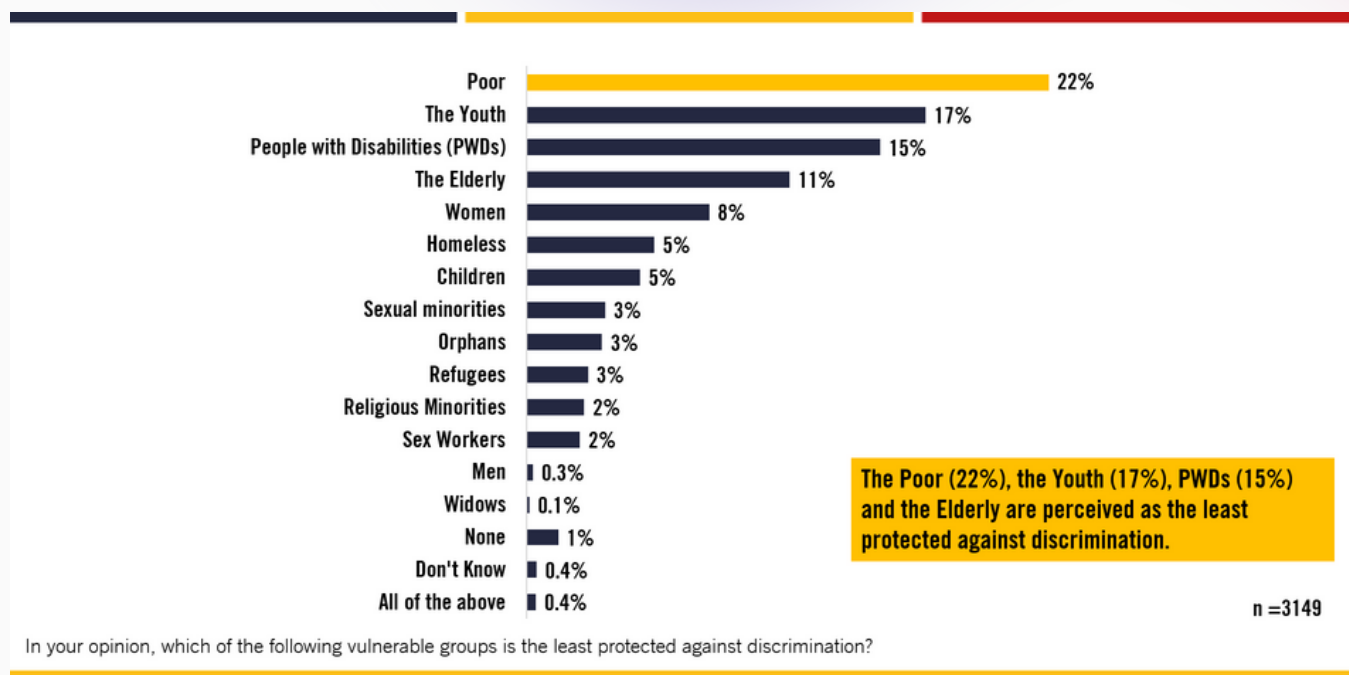
EXPERIENCE OF IDENTITY-BASED DISCRIMINATION

Nearly 1 in 2 Kenyans (49%) have directly experienced discrimination based on one or more of their identities. Those currently experiencing the worst discrimination include LGBTI persons (75%), persons from northeastern counties (62%), those between 35-39 years (55%), and urban cities and towns (51%), among others.

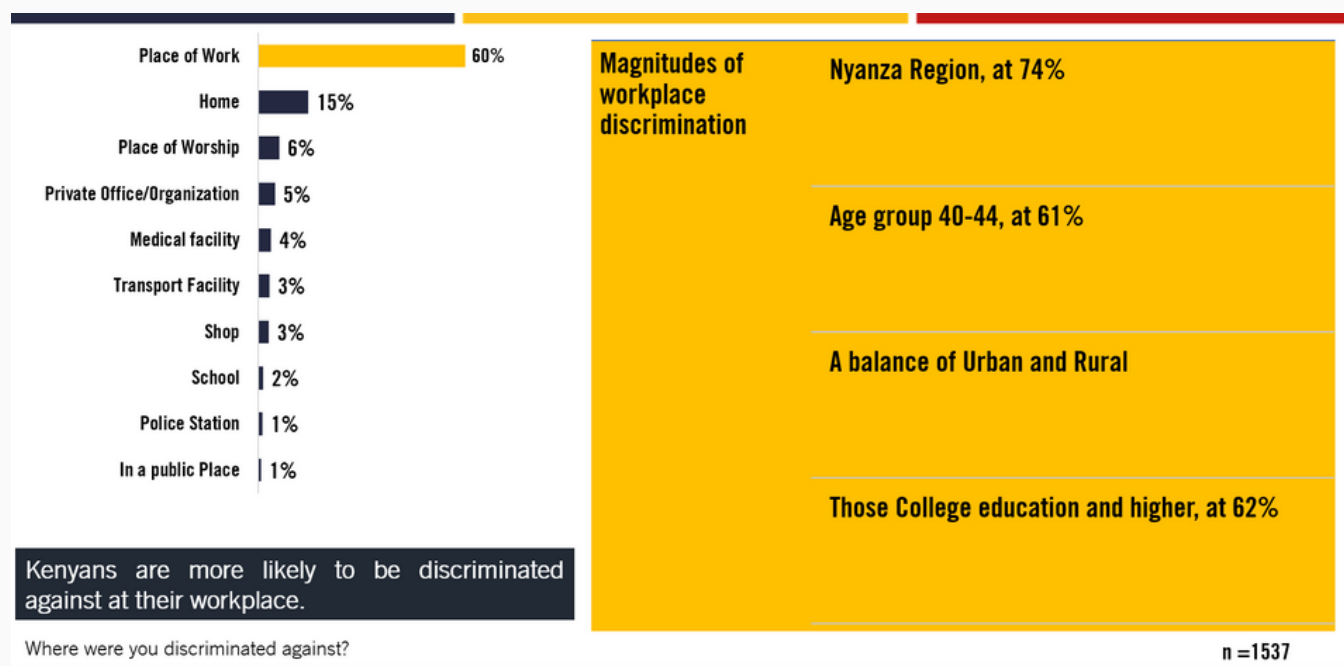


Most Kenyans know people who have been discriminated against based on their identity (54%). This awareness is highest among older adults (60%) and those with advanced levels of education (61%). Kenyans perceive the poor (22%), youth (17%), persons with disabilities (15%) and the elderly (11%) to be the least protected vulnerable groups in Kenya today. The workplace is the most unsafe space in Kenya (60%), followed by the home (15%) and places of worship (6%).

Perceptions of the least protected vulnerable groups



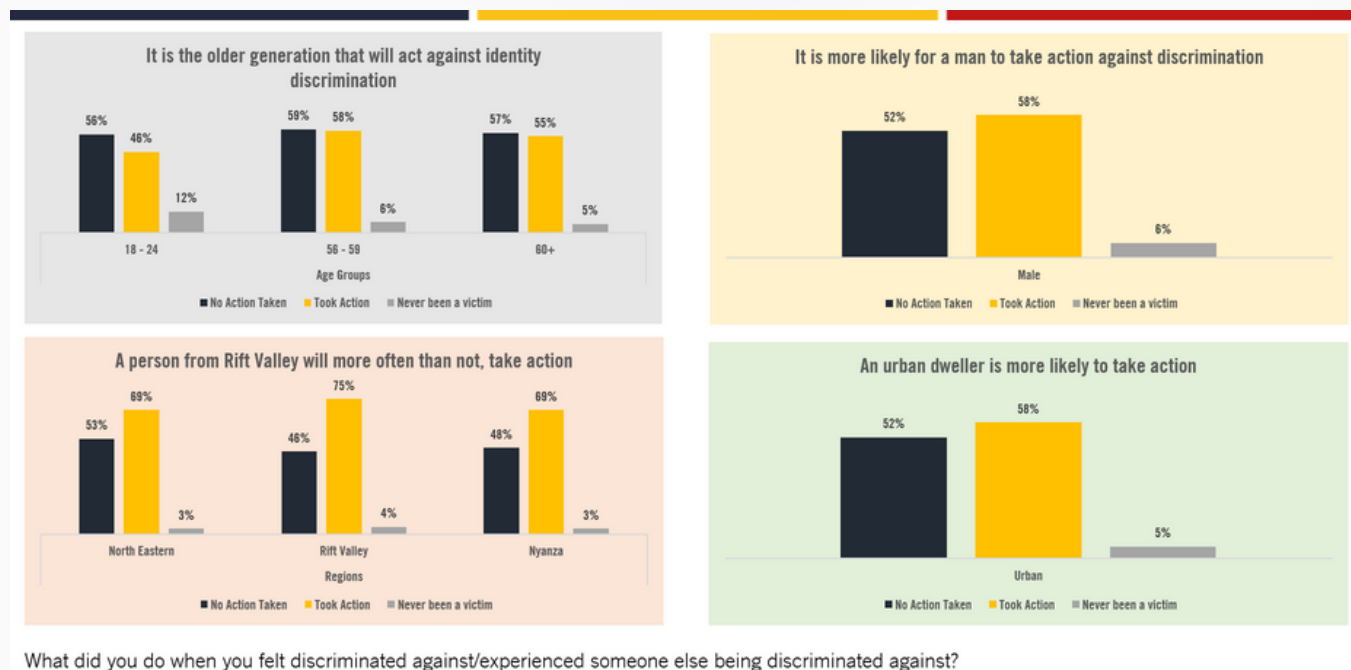
Most persons have been discriminated against at their place of work



Kenyans' awareness of various anti-discrimination laws is above average. 76% of Kenyans cite the Constitution, and over 70% are aware of the Employment Act, Kenyan National Human Rights Commission Act, Disability Act and the National Gender and Equality Commission Act.

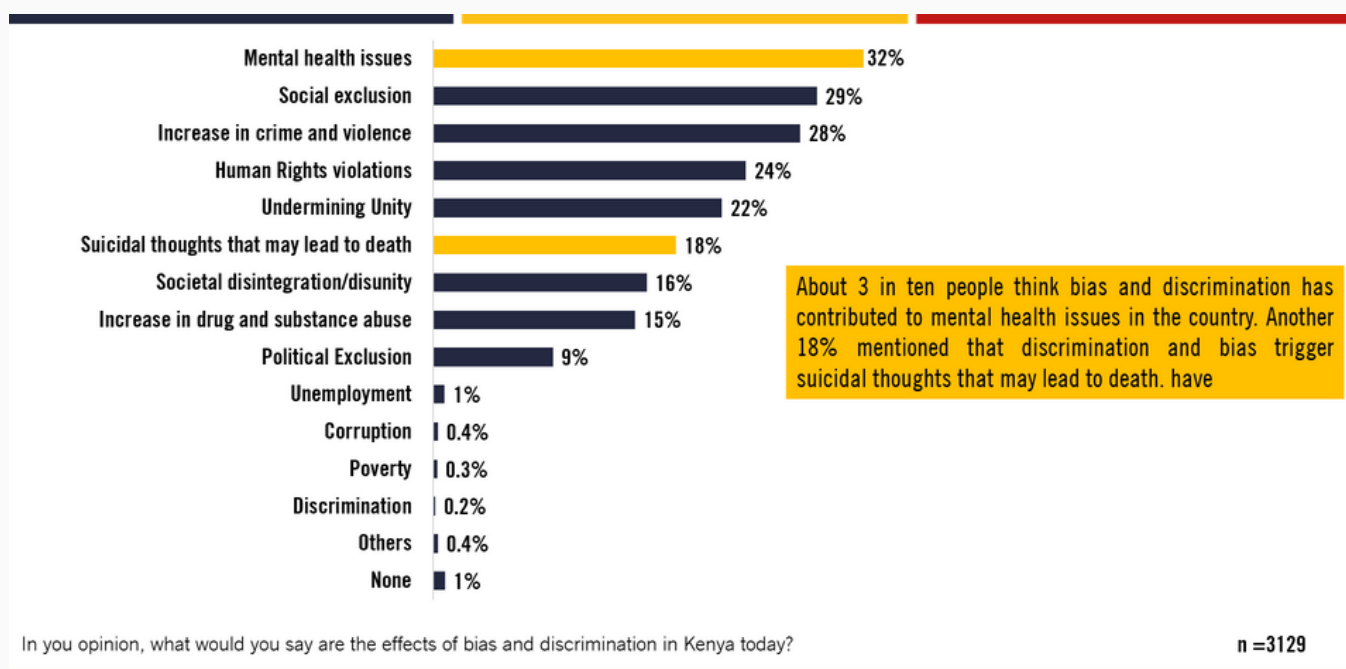
While 58% reported feeling bad or sad (24%) after being discriminated against, only 13% felt angry. 51% of Kenyans ignored discrimination against themselves and others and took no action. Only 11% of people who faced discrimination felt comfortable approaching government authorities for justice. Only 42% acted to confront their perpetrator. 22% of those who acted reported to authorities or others, 12% told a friend, 12% rescued others, and 7% sought psychosocial counselling. Older people living in urban areas, men and persons from the Rift Valley were the most likely to act.

Action or inaction upon discrimination



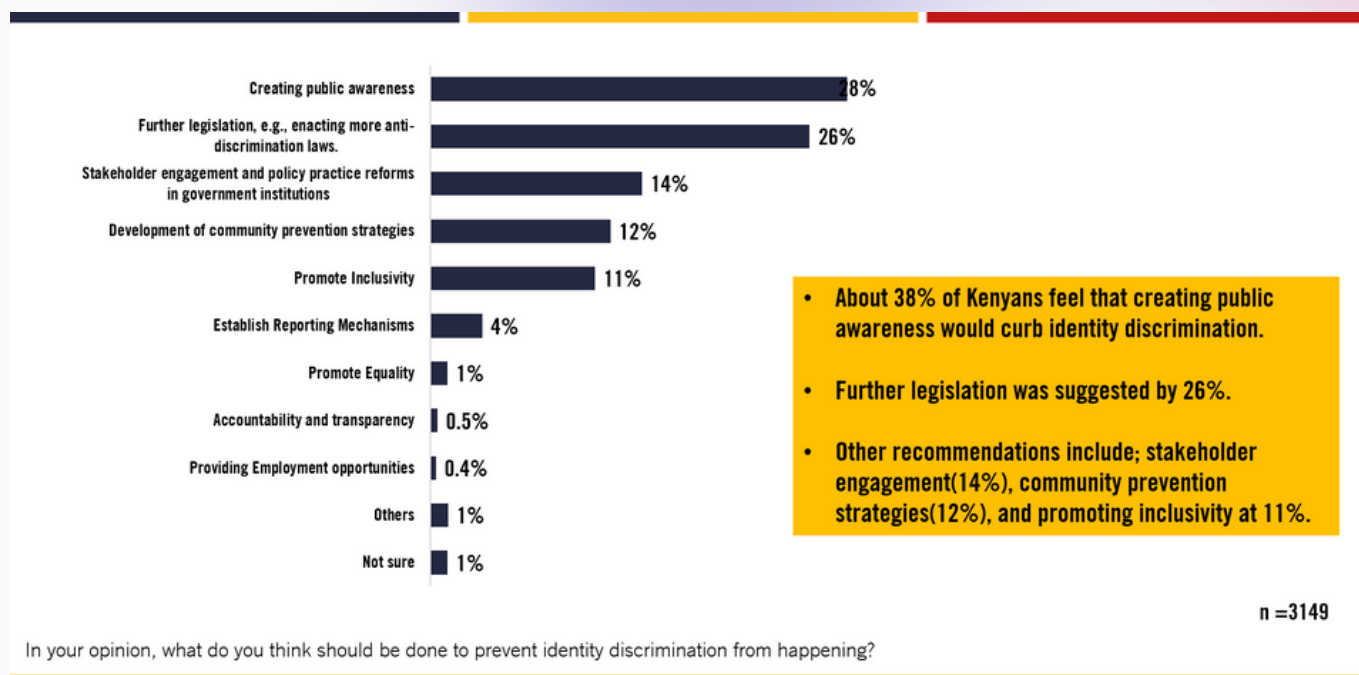
IMPACT OF PREJUDICE AND DISCRIMINATION

3 in 10 people think bias and discrimination have contributed to mental health issues in the country. Another 18% mentioned that discrimination and bias trigger suicidal thoughts that may lead to death.

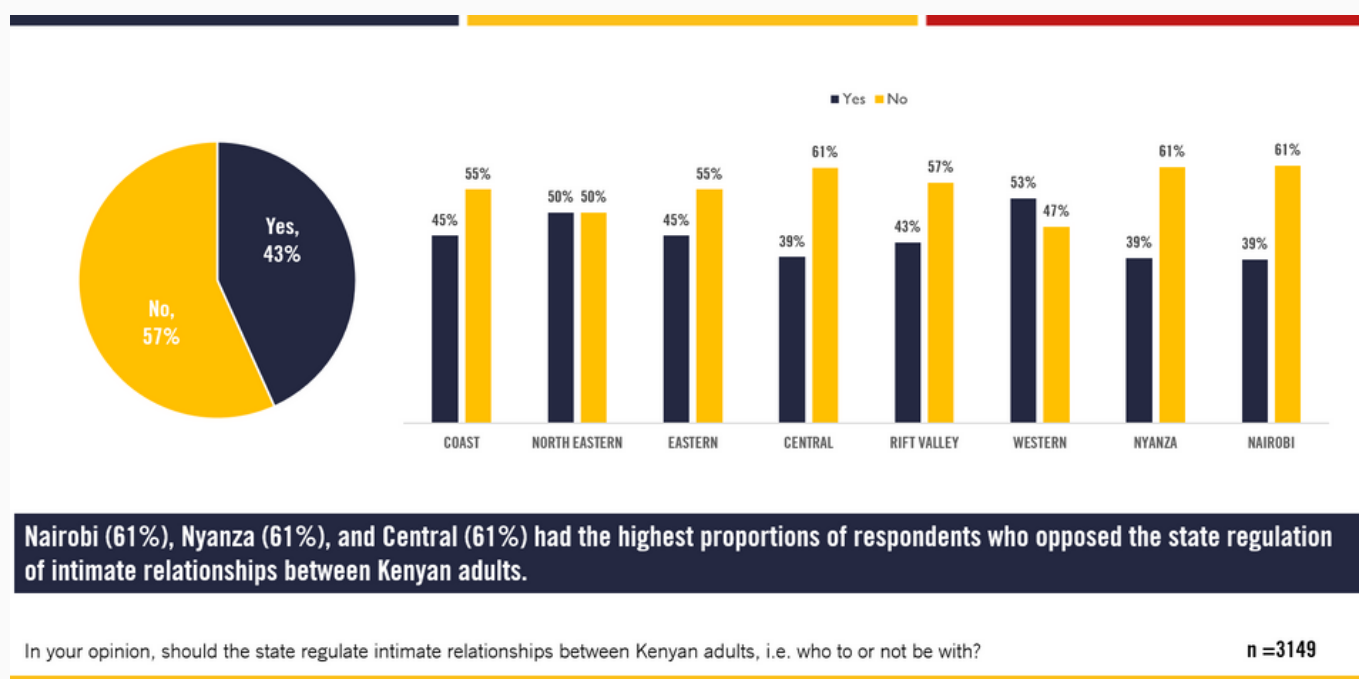


WHAT DO KENYANS WANT THE GOVERNMENT TO DO NOW?

38% of Kenyans feel that further public awareness would arrest identity-based discrimination. An additional 26% call for further legislation, stakeholder engagement (14%), community prevention strategies (12%), and promoting inclusivity (11%).



57% of Kenyans do not want the state to regulate intimate relationships between Kenyan adults. Nairobi, Nyanza, and Central residents hold this view most strongly. This view is highest among the youth (18-35), those living in urban areas with higher education levels. Those above 35 years, rural and with less education, favour "bedroom" regulations more.



FINDINGS AND RECOMMENDATIONS

The opinion poll informs the reality of the Kenyan constitutional promise of equality before the law and protection [1]. Article 27[2] calls upon the state to take legislative measures, including affirmative actions, to redress disadvantaged groups. Article 20 binds all State organs and individuals to uphold the Bill of Rights. It guarantees justice for those who feel their rights as protected in the Constitution have been violated.

Non-discrimination is a national value[3] and underpins the freedom of expression and ownership of property.[4] National government, county governments, the Kenyan National Commission on Human Rights, National Cohesion and Integration Commission and the National Gender and Equality Commission are required to promote equality, investigate and protect all complaints of human rights.[5]

This obligation is anchored in international human rights law. Kenya is bound by articles 2 (5) and (6) of the Universal Declaration of Human Rights to treat all human beings as equal in dignity and rights.[6] Under international law, the national government and 47 county governments cannot discriminate any person on the basis of race, colour, religion, gender, sex or any other basis.[7] The Kenyan government's adherence to its own Constitution and international human rights law is a critical indicator for the international community to invest, trade and diplomatically engage with Kenya.

It is time for Kenya to sign the optional protocols to the International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the United Nations Convention on the Rights of Persons with Disabilities. Signing the optional protocols would allow the committees supervising the implementation of these conventions to hear individual complaints. It is time for Kenya to make a declaration under Article 14 of The International Convention on the Elimination of Racial Discrimination. Non-ratification of these instruments is responsible for the current high levels of discrimination.

The finding that at least 60% of Kenyans experience discrimination at the workplace violates not only Kenya's constitutional provisions but also International Labour Organisation standards that require the state and non-state (employers) to ensure equal treatment of employees, including equal entitlement to benefits and pay at the workplace.[8]

While the poll suggests that gender-based discrimination may be reducing in the perceptions of Kenyans against other forms of discrimination, the finding that women are still being discriminated against violates the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).[9] Despite constitutional provisions on two-thirds gender representation, parliament and county assemblies are yet to comply. Some do not have a single representative of the youth or persons with disability. It is worth noting that 15 years after the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) committee urged the Government of Kenya to complete an audit of discriminatory laws and introduce legislation amending or repealing those discriminatory laws, this action remains incomplete.

[1] Constitution of Kenya, 2020, Article 27(1)-(5).

[2] Constitution, Article 27(6).

[3] Constitution, Article 10(2).

[4] Constitution, Article 60(1).

[5] Constitution, Article 59.

[6] Universal Declaration on Human Rights (UDHR) (1968) Article 1 & 30

[7] Universal Declaration on Human Rights (UDHR), Article 2.

[8] UDHR, article 23

[9] Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Article 3.

The absence of a National Disability Policy remains a barrier to the rights of persons with disabilities and blocks nearly one million Kenyans from enjoying the freedom and full protection of the Convention on the Rights of Persons with Disabilities (CRPD).[10]

More intentional policy focus is required to reduce the perception and reality that ethnicity disproportionately disadvantages Kenyans. The recent National Cohesion and Integration Commission report documenting a paltry compliance score of 28% and only 13 out of 47 county governments have adhered to promoting ethnic diversity must also worry both state officers and citizens.[11]

Kenyan courts have also been instrumental in interpreting the tenets of protection against discrimination based on the right to life, expression, identity, and association. The right of Africans to vote and own land in the 1950s and the right of women to work and be compensated like men in the 1970s were once controversial. It was the courts that established the rights and freedoms we currently enjoy. Today, the right of persons not to be discriminated against based on their sexual orientation or gender identity is controversial. In this and all cases of discrimination documented by Kenyans in this poll, the Kenyan courts must apply Article 27 without fear or favour.

While Kenyan laws have created the foundation for a society based on equality of opportunity and dignity for all, critical legal and policy loopholes need to be reinforced. Several statutes still contain discriminatory provisions which are subject to wide and discriminatory interpretation. They include the Penal Code (1930), Article 45 on the definition of family and the Law of Succession Act, which leaves land and other agricultural resources to the purview of Customary Law, which tends to favour boys over girls, among others.[12] The findings also inform the need to repeal aspects of the ninety-year-old Penal Code that currently regulates the bedroom activities of all Kenyans while decriminalising poverty and marginalisation.[13]

Legislators must look again at all the laws and actions taken to bring Article 27 (6) into our workplaces, homes and other spaces. The spirit of the Constitution is the protection of all from discrimination, not just some identities. Laws that contradict or conflict with this article must be repealed and replaced. Laws not being enforced must be prioritised for budgetary allocation and administrative action.

Citizens must exercise their obligation to protect others from being targeted for any aspect of their identity. Like the colonial period or Nazi Germany, it is our silence that emboldens the few to hate and hurt others. Identity-based discrimination anywhere threatens freedom and dignity everywhere.

[10] United Nations Convention on the Rights of Persons Living with Disabilities, 2008.

[11] See: <https://www.standardmedia.co.ke/national/article/2001485549/report-tribes-that-dominate-jobs-as-counties-violate-inclusivity-law>

[12] Sections 32 and 33

[13] Penal Code

FIVE RECOMMENDATIONS

This opinion poll informs the following five actions:

1. Parliament should review current gaps and harmonise all laws that seek to give full effect to the provisions of Article 27 of the Constitution.
2. Parliament should intentionally consider that human rights are indivisible across all human beings and avoid or reject legislation that seeks to criminalise any group based on their identity.
3. The National Council on Administration of Justice should review all laws and ensure they align with constitutional provisions on equality and non-discrimination.
4. Parliament should redefine and expand the functions of the National Cohesion and Integration Commission to empower it with resources to act against all forms of discrimination.
5. National and county governments must introduce workplace regulations and standards that increase workplace diversity, equity, and inclusion nationally. This should be accompanied by public participation and sensitisation, complaint hotlines, and protection measures that increase public awareness and strengthen willingness to stop discriminatory practices.

CONCLUSION

Consistent with the Constitution of Kenya (2010), Amnesty International Kenya believes in a society where all human beings are protected and empowered to claim their constitutional rights and freedoms. Over the last decade, Amnesty International Kenya has consistently protected people against state abuse or neglect and identity-based discrimination.

This opinion poll was commissioned and released to trigger a national conversation on the risks of growing populism, social polarization, and identity-based discrimination for the fundamental freedoms and equality of all Kenyans. On 10 December 2023, 206, states will celebrate 75 years since the adoption of the Universal Declaration of Human Rights. Two days later, Kenyans will celebrate our greatest victory over identity-based discrimination and colonialism. Re-dedicating our resolve to eliminate all forms of identity-based discrimination would be a befitting way to celebrate these two moments.

Extremist thoughts and attacks place innocent people at risk, dishonour our national values and threaten national co-existence. Every Kenyan silently watching the seemingly isolated attacks on women, the elderly, children, and others today must ask themselves, what if this demon does not go away? What if, emboldened, it comes for me and my family?

On 9 November 2023, President William Ruto asserted in his State of the Nation address to Parliament that “citizen freedoms and fundamental rights lie at the heart of enterprise and democracy”. Ensuring that no identity is criminalised and all are protected would be the surest way of ensuring that the freedoms and opportunities that come with enterprise, democracy and human rights are enjoyed by all.

#EqualityKE

@Amnesty International Kenya

Amnesty International Kenya commissioned this opinion poll. We acknowledge leading opinion polling agency Infotrak and Research Consulting for independently polling Kenyans on their views and thank those interviewed for their insights and our staff for interpreting, writing, and editing this report. We retain responsibility for all the conclusions reached and invite readers to draw their own conclusions. Engage us and the rest of the country on these insights and our call to action.

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