

THE LINK BETWEEN THE RIGHT TO LIVE INDEPENDENTLY AND TO BE INCLUDED IN THE COMMUNITY FOR PERSONS WITH PSYCHOSOCIAL DISABILITY, AND THE RIGHT TO WORK AND EMPLOYMENT: A CRITICAL ANALYSIS OF KENYAN LAW

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Summary

The right to live independently and to be included in the community is especially important for persons with psychosocial disabilities as they often find themselves isolated from the community. This paper will delve into what the right to live independently in the community means for persons with psychosocial disabilities. Specifically, it will discuss the link between the right to work and employment, and the right to live independently and in the community. In fact, it will make the argument that if the Kenyan legal framework does not adequately protect the right of persons with psychosocial disabilities to work and employment, then it has failed to protect the right of persons with disability to live independently and to be included in the community. In order to make a determination, this paper will engage in a critical analysis of the Kenyan legal framework on the right to work.

1 Introduction

The history of persons with disability across the world has been one of segregation, isolation and exclusion from full participation in society.¹ They have been locked in institutions or in their homes, banned by laws or

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1 M Berghs et al 'Do disabled people need a stronger social model: A social model of human rights?' (2019) 34 *Disability & Society* 1034; CRPD Committee General Comment 5: Article 19: Living independently and being included in the community (2017) UN Doc CRPD/C/GC/5 dated 27 October 2017 para 1.

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culture from going out, and routinely denied full citizenship.² Basically, persons with disability are denied from taking part in community life.³

The effects of institutionalisation and exclusion have been devastating, not just on persons with disability, but also to their families and communities.⁴ Persons with disability have not only become increasingly invisible to society,⁵ but social exclusion perpetuates dependency and thus interference with individual freedoms.⁶ This has resulted in persons with disability being denied their personal and individual choice and control across all areas of their lives. In fact, many have been presumed to be unable to live independently in their self-chosen communities.⁷

Worth noting, is that psychosocial disabilities are regarded as one of the most stigmatised of all disabilities,⁸ and thus the segregation and isolation they experience is magnified.⁹ This paper will use the term psychosocial disabilities to refer to both common and severe mental illness.¹⁰ In fact, persons with psychosocial disabilities are amongst the

- 2 L Mladenova 'The right to live independently and be included in the community: Addressing barriers to independent living across the globe' European Network on Independent Living (2017) http://enil.eu/wp-content/uploads/2017/06/The-right-to-live-independently_FINAL.pdf (accessed 10 March 2020); E Kamundia 'Choice, support and inclusion: Implementing article 19 of the Convention on the Rights of Persons with Disabilities in Kenya' (2013) 1 *African Disability Rights Yearbook* 54.
- 3 Mladenova (n 2) 8; E Kamundia (n 2) 54.
- 4 P Gooding 'The right to independent living and being included in the community: Lessons from the United Nations' (2018) 24 *International Journal of Mental Health and Capacity* 32; Kamundia (n 2).
- 5 As above.
- 6 CRPD Committee (n 1) para 5.
- 7 CRPD Committee (n 1) para 1.
- 8 DJ Viviers 'Mental health and the world of work: A comparative analysis of the legal frameworks governing categories of mental health conditions' PhD thesis, University of the Free State, 2016 at 22.
- 9 Viviers (n 8); M Swanepoel 'Human rights that influence the mentally ill patient in South African medical law: A discussion of sections 9; 27; 30 and 31 of the Constitution' (2011) 14 *Potchefstroom Electronic Law Journal* 126.
- 10 See W Holness 'The invisible employee: Reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 510, provides that: the CRPD's reference to 'mental' impairment in art 1, includes persons with psychosocial disabilities. The preferred terminology is 'persons with psychosocial disabilities' instead of persons with mental disability. This is in line with the social model of disability and the recognition that disability is an evolving concept (Preamble para (e) of the CRPD). Psychosocial disabilities include mood disorders (such as depression and bipolar disorder), anxiety disorders and psychotic disorders (such as schizophrenia and some forms of bipolar disorder); K Vornholt et al 'Disability and employment – Overview and highlights' (2018) 27 *European Journal of Work and Organizational Psychology* 40 at 41 defines psychosocial disabilities to include both common mental disorders, which include adjustment, mood, and anxiety disorders, and severe mental disorders such as schizophrenia or bipolar disorders; C Harvey et al 'People living with psychosocial disability: Rehabilitation and recovery-informed service provision within the second Australian national survey of psychosis' (2016) 50 *Australian & New Zealand Journal of Psychiatry* 534 at 535 points out that the term psychosocial disability is also preferred over psychiatric disability because it emphasises the social consequences of disability, while psychiatric disability focusses on impairment.

most disadvantaged within the disability movement.¹¹ They experience severe social challenges and continue to be subjected to human rights violations worldwide.¹² Their rights to participate and contribute meaningfully in political, legal, social, clinical and personal decisions which impact their own lives have been violated.¹³

The experiences of discrimination, mistreatment, intolerance and exclusion of persons with psychosocial disability are disturbing.¹⁴ This has been facilitated by prejudicial and misguided beliefs that persons with psychosocial disability, unlike say physical disabilities, lack the capacity to make rational and informed decisions.¹⁵ Further, because people with psychosocial disabilities do not have access to the basic mental healthcare, support and social services that they may require, they eventually become isolated from the community.¹⁶ Accordingly, this isolation and segregation is not just experienced within the community, but even outside and touches every area of the lives of person with psychosocial disabilities, from their right to education, to the right to equal recognition before the law, and even the right to work and employment, just to name a few. For example, persons with psychosocial disabilities experience high rates of unemployment.¹⁷ Persons with psychosocial disabilities continue to experience challenges not just in accessing, but also in maintaining employment.¹⁸ This is particularly alarming because of the high prevalence of psychosocial disabilities worldwide.¹⁹ Yet, the right to work and employment not only reduces poverty, but enables people to become independent, self-sustaining, and to be able to participate equally in society.²⁰ This is the reason that article 19 is so important.²¹ In fact, it was the resistance to this type of harm caused by isolation and segregation which led to the development of the right of all persons with disabilities to

11 K Wheat et al 'Mental illness and the workplace: conceal or reveal?' (2010) 103 *Journal of the Royal Society of medicine* 83.

12 SJ Hoffman, L Sriharan & A Tejpar 'Is the UN Convention on the Rights of Persons with Disabilities impacting mental health laws and policies in high-income countries? A case study of implementation in Canada' (2016) 16 *BMC International Health and Human Rights* 2.

13 S Kleintjes, C Lund & L Swartz 'Barriers to the participation of people with psychosocial disability in mental health policy development in South Africa: A qualitative study of perspectives of policy makers, professionals, religious leaders and academics' (2013) 13 *BMC International Health and Human Rights* 1.

14 Hoffman, Sriharan & Tejpar (n 12).

15 Kleintjes, Lund & Swartz (n 13).

16 As above.

17 DR Becker et al 'Job terminations among persons with severe mental illness participating in supported employment' (1998) 34 *Community Mental Health Journal* 71 at 72.

18 ID Ebuanyi et al 'Employability of persons with mental disability: Understanding lived experiences in Kenya' (2019) 10 *Frontiers in psychiatry* 1 at 10.

19 As above.

20 Judge DL Bazelon (Centre for Mental Health Law) 'Getting to work: Promoting employment of people with mental illness' (September 2014) <http://www.bazelon.org/wp-content/uploads/2017/01/Getting-to-Work.pdf> (accessed 21 March 2020) 3.

21 Mladenova (n 2) 8.

live in the community, with choices equal to others in article 19 of the Convention on the Rights of Persons with Disabilities (CRPD).²²

Currently, there is no accurate data and information on the prevalence of psychosocial disabilities in Kenya.²³ What is available is the 2019 Kenyan Census which adopted the Washington Group short set of questions on disability in order to collect data on the prevalence of disability in Kenya.²⁴ Nonetheless, one limitation of the short set of questions is that they fail to capture psychosocial disabilities as a disability category. As a result, it is difficult to tell the specific numbers of persons with psychosocial disabilities in Kenya from the data collected. The WHO provides some incite, it provides that mental, neurological and substance use disorders are common and affect more than 25 per cent of all people at some point during their lifetime.²⁵ Furthermore, few studies currently exist that explore the employment of persons with psychosocial disabilities in Kenya.²⁶ It is for this reason that this paper will analyse the legal framework in Kenya that protects the right to work and employment²⁷ and investigate its link to the right to living independently and being included in the community. It will firstly discuss the state of persons with psychosocial disabilities in Kenya. Then, it will delve into the meaning of independent living and what constitutes living in the community as provided by the CRPD, and further, look at how it applies to persons with psychosocial disabilities. Additionally, it will investigate how the right to live independently and, in the community, article 19 of the CRPD, and the right to work and employment, article 27 of the CRPD, are connected. Lastly, it will engage in a critical review of Kenyan legislation that regulates the right to work and employment for persons with psychosocial disabilities and identify whether it is in compliance with article 27. This will be done in order to identify whether the Kenyan legal framework is in compliance with article 19. Specifically, the argument the paper makes is that in failing to adequately protect the right to work and employment for persons with psychosocial disabilities, Kenya has failed to enable persons

22 Gooding (n 4) 32.

23 Ebuanyi et al (n 18) 2.

24 Devinit.org 'Status of disability in Kenya: Statistics from the 2019 census' (6 May 2020) <https://devinit.org/resources/status-disability-kenya-statistics-2019-census/#download> (accessed 3 October 2020).

25 Fact Sheet: The World Health Report 'Mental and neurological disorders' (2001) https://www.who.int/whr/2001/media_centre/en/whr01_fact_sheet1_en.pdf?ua=1 (accessed 3 October 2020) in The Kenya Mental Health Policy 2015-2030 (August 2015) <http://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf> (accessed 3 October 2020).

26 As above.

27 Kenya is a signatory of African Charter on Human and Peoples' Rights and as a result domesticated article 15 on the right to work and employment in the Employment Act which defines the fundamental rights of employees. See African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' <https://www.achpr.org/ratificationtable?id=49> (accessed 3 October 2020)

with psychosocial disabilities to live independently and to be included in the community as provided in article 19.

2 Persons with psychosocial disability and employment in Kenya

Persons with psychosocial disabilities are only often institutionalised against their will,²⁸ but they face the greatest threat of institutionalisation in Kenya²⁹

It is important to note that there are different types of institutions, they vary in size, name and setup the world over.³⁰ The defining elements of institutionalisation include:

[O]bligatory sharing of assistance with others and no or limited influence over by whom one has to accept assistance, isolation and segregation from independent life within the community, lack of control over day-to-day decisions, lack of choice over whom to live with, rigidity of routine irrespective of personal will and preferences, identical activities in the same place for a group of persons under a certain authority, a paternalistic approach in service provision, supervision of living arrangements and usually also a disproportion in the number of persons with disabilities living in the same environment³¹

Institutionalisation is basically a place where people who have been labelled as persons with disabilities are isolated and segregated from life in the community.³² Notably, the institutionalisation and exclusion of persons with disabilities has been shown to cause immense harm to individuals, families and communities.³³ For example, apart from preventing persons with psychosocial disabilities from full participation in society, institutionalisation also increases the risk of exploitation, violence, neglect and abuse.³⁴ In Kenya, Mathare Hospital, the biggest psychiatric

28 Kamundia (n 2) 55.

29 Kenya National Commission on Human Rights 'Silenced minds: The systematic neglect of the mental health system in Kenya: A human rights audit of the mental health system in Kenya' (November 2011) http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf (accessed 20 March 2020) 38; Kamundia (n 2).

30 CRPD Committee (n 1) para 16.

31 As above.

32 Kamundia (n 2) 55.

33 Gooding (n 4) 32.

34 Council of Europe Commissioner for Human Rights 'Issue paper: The right of people with disabilities to live independently and be included in the community' (2011) <https://rm.coe.int/the-right-of-people-with-disabilities-to-live-independently-and-be-inc/16806da8a9> (accessed 10 March 2020) 12; Kamundia (n 2) 55.

hospital, and where persons with psychosocial disabilities are sometimes institutionalised, has often been accused of neglect and abuse.³⁵

Additionally, apart from institutionalisation, the rights of persons with psychosocial disability can also be infringed within the community, and specifically by family members.³⁶ In Kenya this occurs where persons with psychosocial disabilities are isolated by their family members within the family home.³⁷ This is often perpetuated by the prevalence of prejudice and stigma, lack of knowledge or understanding of psychosocial disabilities, and further, the state's failure to provide individualised support services.³⁸ As a result, the majority of persons with psychosocial disabilities, although they may not be institutionalised, continue to live isolated lives within their communities.

As a consequence, the isolation and segregation experienced by persons with psychosocial disabilities within the community is reflected in the rate of employment of persons with psychosocial disabilities. According to an International Labour Organisation report, disabled people in Kenya live in poverty, have limited opportunities for accessing everything from education, to employment opportunities.³⁹ Nonetheless, few studies currently exist that explore the employment of persons with psychosocial disabilities in Kenya.⁴⁰ What is available does not provide an accurate picture. A report by the Kenyan National Human Rights Commission states that only 3 per cent of persons with disabilities were employed by the government instead of the stipulated 5 per cent.⁴¹ Another report by the UN Committee on the Rights of Persons with Disabilities, provides that the employment rate amongst persons with disabilities is about 1 per cent.⁴² Both reports highlight the fact that employment of persons with disability is particularly low in Kenya. Further, that within the general low rate of employment of persons with disability, the rate of employment for persons of psychosocial disabilities

- 35 V Okeyo 'Report reveals huge toll of neglect at Mathari Hospital' *Nairobi News* 12 December 2018; D McKenzie 'Rights groups accuse Kenya of patient abuse' 3 March 2011 <http://edition.cnn.com/2011/WORLD/africa/03/02/kenya.health/index.html> (accessed 5 March 2020), D McKenzie, 'Kenya's mentally ill locked up and forgotten' 25 February 2011 <http://edition.cnn.com/2011/WORLD/africa/02/25/kenya.forgotten.health/index.html> (accessed 5 March 2020).
- 36 Kamundia (n 2) 71; Council of Europe Commissioner for Human Rights (n 34) 39.
- 37 Kamundia (n 2) 71.
- 38 Kamundia (n 20) 71; Council of Europe Commissioner for Human Rights (n 34) 12 and 39.
- 39 ILO 'Inclusion of people with disabilities in Kenya' (2009) https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_115097.pdf (accessed 6 July 2020).
- 40 As above.
- 41 Kenyan National Human Rights Commission 'Compendium on submissions to CRPD' (2016) http://rodra.co.za/images/countries/kenya/concluding_observations/KNCHR%20Compendium%20CRPD%20REPORT%20A4.pdf (accessed 14 October 2020).
- 42 Concluding Observations in relation to the initial report of Kenya, CRPD (4 September 2015) UN Doc CRPD/C/KEN/CO/1 (2015) <https://www.refworld.org/docid/55eed6bc3.html> (accessed 3 October 2020).

is often lower not just in Kenya, but globally.⁴³ This is because employers often prefer employing persons with physical disabilities over persons with psychosocial disabilities when it comes to meeting employment equity targets.⁴⁴ In fact a recent study done in Kenya found that mental illness was the highest self-reported barrier to employment opportunities.⁴⁵

Furthermore, persons with psychosocial disabilities do not only struggle to access employment, but to maintain said employment.⁴⁶ This is driven by misconceptions about the capacity of persons with psychosocial disabilities to make rational and informed decisions,⁴⁷ which has further led to misguided assumptions about the abilities and performance of persons with psychosocial disabilities in work or employment.⁴⁸ So much so, that 'studies suggest a two-way relationship between psychosocial disabilities and poverty and show how they reinforce each other'.⁴⁹ Yet, employment for persons with psychosocial disabilities not only plays a critical role in promoting recovery,⁵⁰ but promotes social acceptance and integration into the community, and gives individuals a sense of purpose, self-esteem, and self-worth.⁵¹ In addition, work also reduces poverty and dependence, enabling people to become independent and self-sustaining, and as a result to have more choices and control over their lives, and to live independently.⁵² Indeed, the Kenyan Labour Court in the case of *Patrick Njuguna Kariuki v Del Monte (K) Limited*,⁵³ held that every moment of time that an employee works inherently generates satisfaction and the employee's self-esteem which is a necessary component to the employee's human dignity beyond mere pay for the employee's work.

43 ID Ebuenyi et al 'Expectations management: Employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' (2020) 42 *Disability and Rehabilitation* 1687; Ebuenyi et al (n 18) 2.

44 Holness (n 10) 511.

45 Ebuenyi (n 18) 10.

46 Becker et al (n 17); ASM Chan, HWH Tsang & SMY Li 'Case report of integrated supported employment for a person with severe mental illness' (2009) 63 *The American Journal of Occupational Therapy* 238.

47 Kleintjes, Lund & Swartz (n 13).

48 Holness (n 10) 510 and 511.

49 Ebuenyi et al (n 45) 10.

50 Judge Bazelon (n 20) 3; R King et al 'Enhancing employment services for people with severe mental illness: The challenge of the Australian service environment' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 471 at 472.

51 As above.

52 As above.

53 [2012] eKLR, Cause 953 of 2011.

2.1 Article 19 of the CRPD

The CRPD was adopted in 2006⁵⁴ and came into force on 3 May 2008.⁵⁵ It was the first UN convention of this millennium⁵⁶ and Kenya ratified the CRPD on 19 May 2008.⁵⁷ By virtue of article 2(6) of the Constitution,⁵⁸ the CRPD forms part of the laws of Kenya.⁵⁹ The Constitution states that: 'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.⁶⁰ Undoubtedly, the Convention represents a paradigm shift in the way disability is viewed as it adopts the social model of disability.⁶¹ It highlights the role of attitudinal, societal and environmental barriers in hindering disabled persons' full and effective participation in society on an equal basis with others.⁶² Prior to the CRPD the existing UN human rights treaties proved to be insufficient in challenging national laws that excluded the rights of persons with disabilities.⁶³ Nevertheless, the purpose of the CRPD was not to create new rights, but to bring clarity on how the existing human rights law relates specifically to persons with disabilities.⁶⁴

Furthermore, prior to the CRPD, no other human rights instrument contained explicit rights for persons with disability to live independently and in the community as equal citizens.⁶⁵ The CRPD is the first legally binding human rights treaty to recognise the right of persons with disability to live independently and be included in the community as equal citizens in article 19.⁶⁶ However, it is not a new right.⁶⁷ Indeed, the right stems

54 United Nations Department of Economic and Social Affairs Disability 'Convention on the Rights of Persons with Disabilities (CRPD)' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 15 October).

55 As above.

56 United Nations Department of Economic and Social Affairs Disability (n 54).

57 Office of the High Commissioner for Human Rights 'Ratification status for Kenya' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=en (accessed 28 March 2020).

58 Kenyan Constitution, 2010.

59 Mental Disability Advocacy Centre 'The right to legal capacity in Kenya' (March 2014) mdac.info/sites/mdac.info/files/mdac_kenya_legal_capacity_2apr2014.pdf (accessed 20 March 2019) 15.

60 Art 2(6) of the Constitution.

61 Kamundia (n 2 above) 50; Mladenova (n 2 above) 8.

62 As above.

63 C O'Mahony 'Legal capacity and detention: Implications of the UN Disability Convention for the inspection standards of human rights monitoring bodies' (2012) 16 *The International Journal of Human Rights* 883 at 885.

64 O'Mahony (n 63); and T Degener 'Disability in a human rights context' (2016) 5 *Laws* 35.

65 Mladenova (n 2) 7 and 8; I Bulić & C Parker (eds) 'Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities' *The European Coalition for Community Living* (2009) <http://community-living.info/wp-content/uploads/2014/02/ECCL-Focus-Report-2009-final-WEB.pdf> (accessed 10 March 2020) 3.

66 Mladenova (n 2) 7; I Bulić & C Parker (n 65) 3.

67 The European Network on Independent Living (ENIL) 'ENIL's contribution to the consultation on the draft Council of Europe Disability Strategy 2017-2023' (23 May 2016) http://enil.eu/wp-content/uploads/2016/05/ENILSubmissionCoE_230516.pdf (accessed 9 March) 5.

from human rights standards within the United Nations system.⁶⁸ Particularly, the overarching objective of article 19 of the CRPD is full inclusion and participation in society for persons with disability.⁶⁹ Its three key elements are: choice;⁷⁰ support services;⁷¹ and community services.⁷²

It has especially been argued that the purpose of the right is to neutralise the devastating effects of isolation and loss of control over one's life as a result of a society that is not accessible to persons with disability;⁷³ a society that has been rendered inaccessible because of barriers (attitudinal and environmental) to community services, and further no support services designed specifically for persons with disability.⁷⁴ The solution is therefore in removing the barriers in the society, and also providing access to support services to facilitate independence and participation in the community.⁷⁵

Living independently for persons with disabilities is defined as: '[being] provided with all necessary means enabling them to exercise choice and control over their lives and make all decisions concerning their lives ...'⁷⁶ It is all about persons with disability demanding the same choices and control in their every-day lives as non-disabled persons have.⁷⁷ Independent living stresses the importance of personal autonomy and self-determination as fundamental to independent living.⁷⁸ In addition, it does not mean that persons with disability have to be independent in the sense of living a highly individual and self-sufficient life; or that that persons with

68 Council of Europe Commissioner for Human Rights (n 34) 9; art 19 has its roots in civil and political as well as economic, social and cultural rights: The right to liberty of movement and freedom to choose one's residence (art 12 of the International Covenant on Civil and Political Rights); and the right to an adequate standard of living, including adequate clothing, food and housing (art 11 of the International Covenant on Economic, Social and Cultural Rights) and to basic communication rights form the basis for the right to live independently and be included in the community. Liberty of movement, an adequate standard of living as well as the ability to understand and have one's preferences, choices and decisions understood, form indispensable conditions for human dignity and the free development of a person, see CRPD Committee (n 1) para 8.

69 Council of Europe Commissioner for Human Rights (n 34) 5.

70 Art 19(a) CRPD.

71 Art 19(b) CRPD.

72 Art 19(c) CRPD.

73 Council of Europe Commissioner for Human Rights (n 34) 11.

74 As above.

75 As above.

76 CRPD Committee (n 1 above) para 16.

77 R Townsley et al 'The Implementation of Policies Supporting Independent Living for Disabled People in Europe: Synthesis Report' (November 2009, amended January 2010) https://www.academia.edu/24375031/The_Implementation_of_Policies_Supporting_Independent_Living_for_Disabled_People_in_Europe_Synthesis_Report (accessed 2 March 2020) 8. White Paper on the Rights of Persons with Disabilities (Approved by Cabinet on 9 December 2015) [https://www.gov.za/sites/default/files/gcis_document/201603/39792gon230.pdf\(70\)](https://www.gov.za/sites/default/files/gcis_document/201603/39792gon230.pdf(70)) (accessed 2 March 2020).

78 CRPD Committee (n 1) para 16(a).

disability should be allowed to live alone or have the ability to carry out daily activities.⁷⁹

In addition, living independently does not mean living at a distance from other people.⁸⁰ In fact, living independently varies depending on individual situation. For some people, it may mean moving away from their family, while for others it means living with their family.⁸¹ What is significant is that the disabled person should have the choice to decide where to stay.⁸² Additionally, living independently does not mean living without support from the state. Indeed, it means that persons with disability should have access to adequate state support to enable inclusion.⁸³ However, choice and control over the support is an essential pre-condition for independent living.⁸⁴ In short, independent living for persons with psychosocial disabilities means having choice and control over their decisions, and having access to support services (including personal assistance) offered by the state.⁸⁵

Then, the right to be included in the community means that persons with disability are able to live in their local communities as equal citizens, with the support that they need to participate in every-day life including everything from cultural life in the community, public meetings, sports events, cultural and religious festivals and any other activity in which the person with disability wishes to participate.⁸⁶ It is basically being fully included and participating in all spheres of social life,⁸⁷ namely where persons with disabilities are not only able to live in the community, but are also given the opportunity to participate and contribute.

A key precondition for the right to live independently and be included in the community is the availability of mainstream services and facilities and support to access these services and facilities.⁸⁸ Significantly, for many persons with psychosocial disabilities it is not enough to provide mainstream services and facilities alone,⁸⁹ access to a range of individualised support services is an important precondition to enable them to live independently and within the community.⁹⁰ In fact, the right

79 CRPD Committee (n 1) para 16(a); Council of Europe Commissioner for Human Rights (n 34) 16.

80 Townsley et al (n 77) 8; Council of Europe Commissioner for Human Rights (n 34) 16; Mladenova (n 2) 9.

81 Mladenova (n 2) 9.

82 As above.

83 As above.

84 As above.

85 Townsley et al (n 77) 8.

86 CRPD Committee (n 1) para 16(b).

87 As above.

88 CRPD Committee (n 1) para 19 (b); Mladenova (n 2) 9.

89 Including housing, transport, education, employment and training, recreational activities and all other facilities and services offered to the public, including social media, CRPD Committee (n 1) para 28.

90 CRPD Committee (n 1) para 28.

to live independently and be included in the community may be compromised where support services are not provided.⁹¹ Notably, support services are of two types: community support services⁹² and individualised support systems.⁹³ Furthermore, in the spirit of article 19 even where support services are provided, persons with disability should still retain choice and control.⁹⁴ This is to ensure that persons with disability despite requiring support still maintain the same choice, control and freedom as any other citizen.⁹⁵ Hence, article 19 is violated when the support services required by persons with disability are not provided or if when provided, are done in a manner that takes away control and choice from persons with psychosocial disabilities.⁹⁶ Lastly, It is also important to note that, support services should not only be limited to services inside the home, but should be extended to other areas of a person's life including everything from education to employment.⁹⁷

2.2 The link between the right to work and the right to live independently and be included in the community

Article 19 unlike the other articles found in the CRPD plays a distinct role of being one of the widest ranging and most intersectional articles.⁹⁸ It is in fact a great example of the interdependence and indivisibility of all human rights.⁹⁹ This is because it is interrelated with the enjoyment of other human rights provided for in the CRPD¹⁰⁰ and, as a result, is considered as integral and central for the implementation of the Convention across all articles.¹⁰¹ It is interrelated to both civil and political

91 Council of Europe Commissioner for Human Rights (n 34) 18.

92 C Brennan et al 'How can states ensure access to personal assistance when service delivery is decentralised? A multi-level analysis of Iceland, Norway and Sweden' (2017) 19 *Scandinavian Journal of Disability Research* 334; CRPD Committee (n 1) para 28 and 19(b) provides that: Community support services' are services, based in the community, that support 'living and inclusion in the community' and 'prevent isolation and segregation from the community'. However, this term is commonly used incorrectly to refer to services that are physically located in the community, but are not necessarily inclusive; for example, group homes, sheltered workshops and day-care centres. Often, such services perpetuate segregation and exclusion from the community, because they maintain a parallel system for disabled people, away from the mainstream.

93 CRPD Committee (n 1) para 19(b) states that: 'Individualised support services may vary in name, type or kind according to the cultural, economic and geographic specifics of the State party, all support services must be designed to be supporting living included within the community preventing isolation and segregation from others within the community and must in actuality be suitable to this purpose. It is important that the aim of these support services is the realisation of full inclusion within the community'. See more General Comment No 5 para 28, 29 and 30; and Brennan et al (n 94) 334.

94 CRPD Committee (n 1) para 31.

95 As above.

96 Council of Europe Commissioner for Human Rights (n 34) 5.

97 CRPD Committee (n 1) para 28.

98 CRPD Committee (n 1) para 69; European Coalition for Community Living 'Focus on article 19 of the UN Convention on the Rights of Persons with Disabilities' Focus Report (2009) <http://community-living.info/wp-content/uploads/2014/02/ECCL-Focus-Report-2009-final-WEB.pdf> (accessed 30 March 2020) 7.

99 CRPD Committee (n 1) para 28.

100 As above.

as well as economic, social and cultural rights.¹⁰² These rights include: consultations with and active involvement of persons with disabilities (article 4(3)); non-discrimination (article 5); awareness-raising (article 8); accessibility (article 9); equal recognition before the law (article 12); access to justice (article 13); inclusive education (article 24); health (article 25); habilitation and rehabilitation (article 26); adequate standard of living and social protection (article 28); participation in political and public life (article 29); participation in cultural life, recreation, leisure and sport (article 30); statistics and data collection (article 31); international cooperation (article 32); freedom of expression and opinion (article 21); and access to information, and right to work and employment (article 27).¹⁰³ Indeed, the right to live independently and be included in the community can only be realised if all economic, civil, social and cultural rights enshrined in this norm are fulfilled¹⁰⁴. Therefore, article 19 cannot be fully implemented without implementing other rights¹⁰⁵, and vice versa. For example, the right to work and employment is a key right when it comes to implementing article 19. It not only empowers persons with psychosocial disabilities economically, but it enables them to become independent and to participate in the community. The result is that persons with psychosocial disabilities have more choices and control over their lives as is required by article¹⁰⁶ 19. Thus, addressing, to some extent the fulfilment of other rights, in this case the right to work and employment for persons with psychosocial disabilities as provided in article 27 of the CRPD, is not a diversion but in actual fact addressing article¹⁰⁷ 19.

Therefore, in determining whether Kenya has facilitated or failed to enable persons with psychosocial disabilities to live independently and in the community, it is justified to identify whether the state's legal framework has sufficiently protected and facilitated the right of work and employment for persons with psychosocial disabilities.

2.3 The overview of the right to work and employment (article 27 of the CRPD)

Article 27 of the CRPD constitutes one of the most detailed provisions of the Convention, establishing the legal framework for state obligations in relation to work and employment of persons with disabilities.¹⁰⁸ It states that the right for persons with disabilities, in this case persons with

101 CRPD Committee (n 1) para 6.

102 CRPD Committee (n 1) para 7.

103 CRPD Committee (n 1) para 70-97.

104 CRPD Committee (n 1) para 7; Kamundia (n 2) 57.

105 Kamundia (n 2) 68.

106 Kamundia (n 2) 68 Judge Bazelon (n 20).

107 Kamundia (n 2) 68.

108 M Fasciglione 'Article 27 of the CRPD and the right of inclusive employment of people with autism' in VD Fina & R Cera (eds) *Protecting the rights of people with autism in the fields of education and employment* (2015) 146.

psychosocial disabilities, includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.¹⁰⁹ State parties are obligated to safeguard and promote the realisation of the right to work for both those who have a disability when employed, and those who may acquire a disability during the course of employment.¹¹⁰ Admittedly, given the fluctuating, chronic and unpredictable nature of psychosocial disabilities,¹¹¹ this is particularly of relevance to persons with psychosocial disabilities.

Then it sets out a non-exhaustive list of appropriate steps for state parties to take, in order to safeguard and protect the right to work and employment including through legislation, to safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment.¹¹² Importantly, it covers all stages of employment, from recruitment all the way to career advancement and even the creation of safe and healthy working conditions.¹¹³

Further, article 27 places a strong focus on the duty of states parties to prohibit discrimination on the basis of disability¹¹⁴ and also the definition of discrimination¹¹⁵ found within the CRPD makes it an act of discrimination for an employer to refuse to reasonably accommodate an employee with a disability.¹¹⁶ Furthermore, it goes on to widen the scope of the obligation requiring employers to reasonably accommodate persons with disability as more than an anti-discrimination obligation as provided in article 27(1)(a), article 27(1)(i) proceeds to also provide it as a general obligation for employers. Notwithstanding, an employee is only obligated to reasonably accommodate an employee as long as it does not impose a disproportionate or undue burden.¹¹⁷ Additionally, article 27(1)(b) obligates employers to protect the rights of persons with psychosocial disabilities on an equal basis with others, especially as regards 'just and favourable working conditions, including equal opportunities and equal remuneration for work of equal value, safe and healthy working

109 As above.

110 Art 27(1) CRPD

111 L Waddington & M Bell 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' (2016) <https://pdfs.semanticscholar.org/709c/e191dc4236d6dad49894aded969dcf0f50cf.pdf> (accessed 18 March 2020) 7 and 8; M Modini et al 'Supported employment for people with severe mental illness: Systematic review and meta-analysis of the international evidence' (2016) 209 *The British Journal of Psychiatry* 14.

112 Fasciglione (n 108) 146.

113 Art 27(1)(a) CRPD

114 MV Liisberg 'Flexicurity and employment of persons with disability in Europe in a contemporary disability human rights perspective' (2015) 4 *European Yearbook of Disability Law* 145 at 152; art 27(1)(a).

115 Art 2 CRPD.

116 As above.

117 Art 3 CRPD

conditions, including protection from harassment and the redress of grievances'.¹¹⁸

Moreover, in order to help enforce equality and anti-discrimination employees with disability need to be allowed to exercise their labour and trade union rights on an equal basis with others, which is protected under article 27(1)(c). Furthermore, state parties are obligated to promote the work experience of persons with disability in the open labour market.¹¹⁹ Additionally, because the CRPD recognises that employment alone is not the only source of work, it further obligates states in article 27(1)(f) to promote opportunities for self-employment, entrepreneurship and the development of cooperatives and starting one's own business. Furthermore, article 27(1)(g) and (h) obligates states parties to not only employ persons with disabilities in the public sector, but to also promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures. Additionally, article 27(2) prohibits slavery, servitude and forced or compulsory labour for persons with disability.¹²⁰

In addition, in order to comply with the requirements in article 27 in a manner that facilitates the compliance with the overarching article 19, state parties are required to do more than just protect the right to work and employment. State parties are required to go a step further and also ensure that they provide employment support services. Persons with psychosocial disabilities need support services in order to access meaningful work, and further to maintain work as they particularly struggle in this area.¹²¹ Studies have consistently found that persons with psychosocial disabilities are capable of working if they are connected with appropriate jobs and receive appropriate support.¹²² In line with this, the CRPD requires states parties take action to ensure that persons with disability, in this case

118 Liisberg (n 114) 150.

119 Art 27(1)(j).

120 Kamundia (n 2) 65.

121 Mental Health Europe 'Toolkit on article 27 of the UN CRPD' (2017) <https://mhe-sme.org/wp-content/uploads/2017/09/Toolkit-on-article-27-of-the-UNCRPD.pdf>9 (accessed 30 March) 3. These work places provided protected environments for people with psychosocial disabilities based on the idea that people could not cope in working environments in the open labour market. These settings were segregated and often provided poor quality and repetitive work.

122 Judge Bazelon (n 20); European Union Agency for Fundamental Rights Choice and Control 'The right to independent living experiences of persons with intellectual disabilities and persons with mental health problems in nine EU Member States' (2012) <https://fra.europa.eu/en/publication/2012/choice-and-control-right-independent-living>, https://fra.europa.eu/sites/default/files/fra_uploads/2129-FRA-2012-choice-and-control_EN.pdf (accessed 30 March); J Rice & R Traustadottir 'ANED country report on the implementation of policies supporting independent living for disabled people: Iceland' (2009) https://www.researchgate.net/publication/304494770_ANED_country_report_on_the_implementation_of_policies_supporting_independent_living_for_disabled_people_Iceland/link/5771326c08ae0b3a3b7d4eeb/download (accessed 17 March) 6.

psychosocial disabilities, receive the support that they need to participate in society as equal citizens.¹²³ Thus, support services must be available, accessible to all and provided on the basis of equal opportunity, free and informed consent and allowing disabled people flexibility in their daily life.¹²⁴ Apart from article 19(b) of the CRPD, this can be read into 27(1)(d), 27(1)(e) and 27(1)(k). This is where state parties are obligated to provide general, technical and vocational guidance programmes, placement services and vocational and continuing training.¹²⁵ This goes hand in hand with article 27(1)(e), which provides that states parties should 'promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities'.¹²⁶ Then beyond training and placement services, states parties are obligated to 'promote ... career advancement for persons with disabilities in the labour market, as well as assistance in ... maintaining and returning to employment'.¹²⁷ Additionally, according to the General Comment 5, the 'existence of individualised support services, including personal assistance, often is a precondition for effective enjoyment of the right to work and employment'.¹²⁸ Supported employment is a direct service with specialised assistance in choosing, acquiring and maintaining competitive employment.¹²⁹ It includes job placement, training before and on the job counselling services, to a personal job coach, provision of an employment specialist,¹³⁰ rapid job search, integration of rehabilitation and mental health services, job development, benefits counselling, and individualised follow-along supports that are necessary to sustain employment.¹³¹ Case studies done across the world including the UK, USA, Netherlands and most recently in India,¹³² have shown that when it comes to accessing and maintenance of competitive employment, supported employment is most effective for producing positive employment outcomes for persons with psychosocial disabilities.¹³³

As a result, failure to provide employment support services as a precondition, is akin to preventing persons with psychosocial disabilities from accessing and maintaining employment.¹³⁴

123 ENIL (n 67) 5 and 6.

124 ENIL (n 67) 6.

125 Art 27(i)(d) CRPD.

126 Art 27(i)(k) CRPD.

127 Art 27(1)(e) CRPD.

128 CRPD Committee (n 1) para 91.

129 T Marshall et al 'Supported employment: Assessing the evidence' (2014) 65 *Psychiatric Services* 16 at 17.

130 Ebuenyi et al (n 18).

131 Marshall (n 129).

132 A Jagannathan et al 'Supported employment programme for persons with severe mental disorders in India: A feasibility study' (2020) 66 *International Journal of Social Psychiatry* 607.

133 Modini et al (n 111); Engelbrecht et al 'Supported employment for people with mental disabilities in South Africa: Cost calculation of service utilisation' (2017) 47 *South African Journal of Occupational Therapy* 11; Ebuenyi et al (n 18).

134 ENIL (n 67) 6.

In summary, from all the above it is clear that state parties are obligated to do more than simply provide for access to work and employment, they are obligated to ensure that persons with psychosocial disabilities are also able to maintain said work or employment.

3 Obligations of states parties under article 27

Kenya having ratified the CRPD,¹³⁵ is obligated to adopt all appropriate legislative, administrative and other measures for the implementation of the right to work and employment in order to enable persons with psychosocial disabilities to live independently and be included in the community.¹³⁶ Further, to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities with regard to article 27 in conjunction with or under the umbrella of article 19 of the CRPD.¹³⁷ However, because the right to work and employment is an economic, social and cultural right, it requires progressive realisation and not immediate realisation.¹³⁸ Nonetheless, it still demands

immediate obligation to design and decide upon concrete strategies, plan of actions and allocate resources to develop support services as well as making existing as well as new general services inclusive for persons with disabilities.¹³⁹

4 Kenyan national legal framework

4.1 The Constitution (2010)

The right to live independently and be included in the community, article 19 of the CRPD, is not provided for directly under the Kenyan legal framework, but indirectly through the collective provision of other rights.¹⁴⁰ This is first highlighted in the Kenyan Constitution, which does not specifically provide for the right. Nevertheless, article 19 is echoed in a variety of both political and social and economic rights which are found in the Constitution. They include: the right to human dignity;¹⁴¹ freedom and

135 Office of the High Commissioner for Human Rights 'Ratification status for Kenya' http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&ang=en (accessed 28 March 2020).

136 Art CRPD 4(1)(a), 27.

137 Art 4(1)(b) CRPD; M. Fasciglione (n 108) 147.

138 As above.

139 CRPD Committee (n 1) para 39.

140 CRPD Committee (n 1) para 70-97; Kamundia (n 20) 64.

141 Art 28.

security of the person;¹⁴² freedom of movement and nationality;¹⁴³ equality and freedom from discrimination;¹⁴⁴ freedom of expression;¹⁴⁵ and education.¹⁴⁶ Nonetheless, this paper will only be focusing on the right to work and employment for persons with psychosocial disabilities.

Firstly, it is important to note that the new Kenyan Constitution defines disability to include persons with psychosocial disabilities and thus its provisions apply to them.¹⁴⁷ The 2010 Constitution furthermore, unlike the previous Constitution,¹⁴⁸ defines disability in art 260 as:

includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.

Notwithstanding, although it can be argued that the wording 'includes' recognises that disability is an evolving concept and further its recognition of perceived disabilities is similar to the CRPD,¹⁴⁹ it still adopts a medical approach when defining disability. This is because its focus is on the negative impact of impairments, and it fails to recognise that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹⁵⁰ This is in contrast to the CRPD.

Then, the Constitution goes on to protect persons with disability from discrimination in both the public and private sphere.¹⁵¹ This is in compliance with article 27 of the CRPD. However, although article 27 of the Constitution prohibits direct and indirect discrimination against person with a disability, it does not include denial of reasonable accommodation and harassment as a form of discrimination in a manner that complies with article 27 of the CRPD. Further, there is no provision that deals with reasonable accommodation as a general obligation or as an anti-discrimination obligation as provided by the CRPD.

Additionally, article 56(c) obligates states parties to put in place affirmative action programmes designed to ensure that minorities and marginalised groups, which includes person with disability,¹⁵² are

142 Art 29.

143 Art 18.

144 Art 27.

145 Art 33.

146 Art 43(1)(f).

147 Art 260.

148 The Kenyan Constitution, 1963.

149 CRPD Committee, General Comment 6: Equality and non-discrimination (2018) UN Doc CRPD/C/GC/5 dated 9 March 2018 para 73(b).

150 Mental Disability Advocacy Centre (n 59) 15.

151 Art 27.

152 Art 260.

provided with special opportunities for access to employment. This is in compliance with article 27 of the CRPD.

Also, in line with article 27, the Constitution protects the labour and trade union rights of persons with psychosocial disabilities in article 41. It provides that every worker's right to fair labour practices includes the right to: fair remuneration; reasonable working conditions; to form, join or participate in the activities and programmes of a trade union; and to go on strike.¹⁵³ Slavery and servitude, and forced labour are also prohibited in article 30. In addition, the Constitution requires the representation of persons with disability in the National Assembly and the Senate. It provides that states should progressively ensure that at least five per cent of the members of the public in elective and appointive bodies are persons with disabilities.¹⁵⁴ Additionally, requiring parliament to enact legislation to promote the representation of persons with disability in parliament.¹⁵⁵

4.2 Persons with Disabilities Act

The Persons with Disabilities Act (PWA) was enacted in 2003 before the CRPD came into force. Prior to it, Kenya's legal system made little specific provision for persons with disabilities.¹⁵⁶ The aim of the Act is to provide for the rights and rehabilitation of persons with disability, to achieve equalisation of opportunities for them, and to establish the National Council for Persons with Disabilities.¹⁵⁷

Firstly, similar to the Constitution, the Act's definition of disability includes persons with psychosocial disabilities. Notably though, here again and similar to the Constitution, the definition¹⁵⁸ reflects the medical model of disability which is in contradiction with the social understanding of disability that is adopted by the CRPD.

Here again, the Act does not directly provide for the right to live independently and to be included in the community, nevertheless, the right can be read into the functions of the National Council of Persons with Disabilities (NCPD) formed in section 3 of the Act. The NCPD is charged with formulating and developing measures and policies designed to 'encourage and secure the rehabilitation of persons with disabilities within their own communities and social environment';¹⁵⁹ and to 'co-ordinate services provided in Kenya for the welfare and rehabilitation of persons with disabilities and to implement programmes for vocational guidance

153 Section 41(2).

154 Art 54(2).

155 Art 100(b).

156 As above.

157 Persons with Disabilities Act 14 of 2003 (CAP 133).

158 Sec 2.

159 Sec 7(1)(b)(vi).

and counselling'.¹⁶⁰ Also it is charged with formulating and developing measures and policies designed to 'achieve equal opportunities for persons with disabilities by ensuring to the maximum extent possible that they ... are afforded full access to community and social services'.¹⁶¹ Despite this it is important to note that the use of the words 'to the maximum extent possible' somewhat reduces the strength and possible impact of this the provision.¹⁶²

When it comes to the right to work and employment, the right of persons with psychosocial disabilities is protected from section 12 all the way to 16 of the Act. It provides that persons with disability – this is inclusive of persons with psychosocial disabilities – should not be denied access to opportunities for suitable employment. That a person with disability who is a qualified employee should be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees.¹⁶³ Additionally, the Act provides tax incentives for employers who hire persons with disability.¹⁶⁴ Kenyan employees who hire persons with disabilities are entitled to incentives in form of tax exemption to promote the employment of persons with disabilities in the private sector. This in line with article 27(h).¹⁶⁵ Then section 13 requires the NCPD to endeavour to secure the reservation of five per cent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities. Also, section 14 provides for the right to apprenticeship opportunities for persons with disabilities.

Moreover, the Act goes on to prohibit discrimination of persons with psychosocial disabilities in the workplace.¹⁶⁶ It prohibits both public and private employers from discriminating in all areas of employment including: advertisements, recruitment, the creation, classification or abolition of posts; the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; and the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment.¹⁶⁷ This is in line with article 27 of the CRPD. Furthermore, the Act prohibits discrimination of persons with disability in the workplace, and takes it a step further to describe the term

160 Sec 7(1)(b)(viii).

161 Sec 7(1)(b)(i).

162 Kamundia (n 2) 65.

163 Sec 12(1) and (2).

164 Sec 12(3) and 16.

165 Sec 12 provides that: '1) No person shall deny a person with a disability access to opportunities for suitable employment. 2) A qualified employee with a disability shall be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees. (3) An employee with a disability shall be entitled to exemption from tax on all income accruing from his employment.'

166 Sec (15).

167 Sec 15(1).

'discriminate'.¹⁶⁸ Nevertheless, discrimination is only defined in terms of direct discrimination and it does not refer to indirect discrimination either explicitly or within the scope of the definition, which is limiting and contradictory to the CRPD. Further, it does not acknowledge denial of reasonable accommodation and harassment as a form of discrimination as is provided under the CRPD.¹⁶⁹

Further, although the Act does not directly refer to reasonable accommodation or even define it, it is echoed in Act where it provides in section 15(5) that: 'An employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities'.¹⁷⁰ Also, the Act does not define reasonable accommodation as a form of discrimination. Nevertheless, in line with the CRPD, the position taken by the Labour and Employment Court in Kenya, is that denying employees with disability reasonable accommodation amounts to discrimination, and the violation of the right to dignity. This was the position taken in *Juliet Mwangeli Muema v Smollan Kenya Limited*,¹⁷¹ and *Antony Kipkorir Sang v Attorney General*.¹⁷²

The Act, further, establishes the National Development Fund for Persons with Disabilities, a permanent fund that provide monetary assistance to organisations and persons with disability for the first time in the history of Kenya.¹⁷³ Nonetheless, the Act is a bit silent about support services in general. It is only mentioned as one of the possible uses of the National Development Fund amongst other uses. Furthermore, the decision of whether to use the fund for support services is left at the discretion of the board of trustees. In fact, the section states that 'the board of trustees may contribute part of the funds ... to provide or contribute to the cost of assistive devices and services'.¹⁷⁴ The use of the word 'may' weakens the provision and leaves persons with psychosocial disabilities in a difficult position. This is because for persons with psychosocial disabilities to be able to live independently and be included in the community, support services are key.¹⁷⁵ It is not enough to provide for the various political and economic and social rights under the umbrella of article 19, in this case the right to work and employment, but then fail to provide for employment support services. For persons with psychosocial disability, especially those with severe psychosocial conditions, support services are crucial in order to enable them to not only access, but maintain

168 Sec 2: to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability.

169 Art 2 CRPD.

170 Sec15(5).

171 [2019] eKLR Cause 104 of 2017, para 1, 4, 5, 7(3).

172 [2014] eKLR, Cause 2408 of 2012, para 57.

173 Sec 32.

174 Sec 33(2)(d).

175 Judge Bazelon (n 20) 2; Marshall et al(n 131).

employment.¹⁷⁶ As a result, of lack of clarity on the necessity of support services, in section 32 and 33 above, the amount set aside in the disability fund for persons with disability in Kenya is very little. The amount is about 19 dollars (Ksh 2000) and is only given every two months.¹⁷⁷ Further, the requirement that the fund ‘targets adults and children with severe disabilities, who require full time support of a caregiver’,¹⁷⁸ seems to imply that the fund is only for persons with disability who are not in a position to work. Indeed, there is no funding that specifically provides support services to support employment of persons with disability. In addition, the job placement platform,¹⁷⁹ where persons with disability are required to register, does not provide adequate information or data on the number of persons with disability who have been assisted to access and maintain employment or which specific employment services it provides.¹⁸⁰

Lastly, going through the Act, it seems to focus heavily on person with physical disabilities. Example, section 21 which deals with accessibility and mobility only focuses on needs of persons with physical disabilities. However, the Act is currently under review,¹⁸¹ and clearly it is necessary in order to take into account the provisions of the CRPD.

4.3 The Employment Act

The purpose of the Employment Act, 2007 is to define the fundamental rights of employees and it provides basic conditions of employment for employees. It governs all forms of employment and provides for the protection of persons with disabilities from discrimination within employment.¹⁸² Here again, although disability is defined to include persons with psychosocial disability, the definition provided in section 2 adopts the medical model of disability. Also similar to the Constitution, persons with psychosocial disabilities¹⁸³ are protected from direct and indirect discrimination in employment.¹⁸⁴ It prohibits discrimination in both public and private sectors of employment.¹⁸⁵ Furthermore, discrimination is prohibited in respect of recruitment, training, promotion,

176 As above.

177 National Safety Net Programme – Cash Transfer for Persons with Severe Disabilities (PWSD-CT) <http://www.socialprotection.or.ke/national-safety-net-program/cash-transfer-for-persons-with-severe-disabilities-pwsd-ct> (accessed 20 March 2020).

178 As above.

179 See National Council for Persons with Disabilities <http://placement.ncpwd.go.ke/public/> (accessed 24 March 2020).

180 As above.

181 Kenyan Human Rights Commission ‘Towards equality and anti-discrimination: An overview of international and domestic law on anti-discrimination in Kenya’ (25 January 2015) <http://www.khrc.or.ke/publications/64-an-overview-of-international-and-domestic-law-on-discrimination-in-kenya-1/file.html> (accessed 23 March 2020) 6-8.

182 The Employment Act Cap 226, 11 of 2007.

183 Sec 2.

184 Sec 5(3).

185 Sec 3.

terms and conditions of employment, termination of employment or other matters arising out of the employment, which is in compliance with article 27.¹⁸⁶ Thus, the scope of protection extends to employees and prospective employees.¹⁸⁷ Nonetheless, here again, the Act does not define direct or indirect discrimination, and also fails to acknowledge denial of reasonable accommodation and harassment as a form of discrimination as is provided under the CRPD.¹⁸⁸

Additionally, the Act goes on to provide that employers should pay all their employees equal remuneration for work of equal value.¹⁸⁹ Moreover, the Act makes the dismissal unfair if the termination or discipline of an employee is based on disability.¹⁹⁰ These two provisions are in compliance with article 27 of the CRPD. Nevertheless, here again the Act does not provide for employment support services.

As has already been highlighted, available data suggests that the current rate of employment for persons with disabilities in general, is low.¹⁹¹ Further, as has also been emphasised, support services are a necessary precondition for employee's with psychosocial conditions to access and maintain employment.¹⁹² The review of the law above exposes its failure to adequately provide for employment support services not just for persons with psychosocial conditions specifically, but for persons with disability in general. Therefore, if persons with psychosocial conditions are denied employment support services and as a result are unable to access and maintain employment, their right to work and employment will be infringed, and in turn their right to live independently and in the community.¹⁹³

5 Conclusion

The analysis of the Kenyan legal framework highlights the fact that although Kenyan law still has a long way to go in order to adequately protect the right to work and employment for persons with psychosocial disabilities, it has made great strides. It is important to acknowledge, that the laws have attempted to capture the spirit of article 27 of the CRPD in many instances, for example by including disability as a ground for discrimination in the Constitution for the first time in Kenya and other relevant legislation; providing for labour and trade union rights;

186 Sec 5(3)(b).

187 Kenya Human Rights Commission (n 181) 8-11.

188 CRPD art 2.

189 Sec 5(5).

190 46(g).

191 Kenyan National Human Rights Commission (n 41); UN Committee on the Rights of Persons with Disabilities (n 42).

192 Council of Europe Commissioner for Human Rights (n 34) 18; Jagannathan et al (n 132)1; CRPD Committee (n 1) para 19(b); Mladenova (n 2) 9.

193 Kamundia (n 2) 68; Judge Bazelon (n 20 above)

prohibiting slavery and servitude and forced labour; providing for protection against discrimination in all areas of employment; and providing for positive measures and incentives for employers in order to motivate the employment of persons with disability. Nevertheless, the Constitution and all the laws reviewed above still adopt a medical model when it comes to defining disability which goes against the spirit of the CRPD. Further, a review of the law has highlighted a lacuna in the provision of supported employment, yet as highlighted above support services are a key precondition for persons with psychosocial conditions when it comes to access and maintenance of employment.¹⁹⁴ Therefore, there is a need to amend the law to include provisions of supported employment. Without employment supports services, persons with psychosocial disabilities may still find themselves isolated and excluded from the workplace and further in the community. In conclusion, as the Kenyan legal framework currently stands, it has failed to adequately enable persons with psychosocial disabilities to live independently and in the community.

¹⁹⁴ Council of Europe Commissioner for Human Rights (n 34) 18; Jagannathan et al (n 132) 1; Modini et al (n 111)14; Engelbrecht et al (n 133) 11; Ebuenyi et al (18) 2.