

Chapter 3

The Role of the Judiciary in Addressing VAW

3.1 Introduction

It is the judiciary that is responsible for establishing domestic violence as an unacceptable social behaviour, and not the victim of the crime; thus the burden of enforcement should fall entirely upon responsible institutions and not individual members of society.¹

If the judiciary is to improve judicial practice, it is crucial for judicial officers to evaluate and understand VAW as a gendered crime. Overall, judicial intervention should at all times be seen to: express society's condemnation of VAW; hold perpetrators accountable; ensure the safety of the victim/survivor, witnesses and the general public; deter future offenders; reduce the incidence of recidivism and repeat offending; and increase public awareness of the dangers and costs of VAW to society and the available avenues for redress. The court plays a critical role as preventer, adjudicator, educator and enforcer of rights. There are challenges and weaknesses, but it is possible to mitigate against the challenges and reduce the phenomenon of VAW.

3.2 Direct judicial intervention in addressing VAW

3.2.1 Judicial leadership in administration of justice

The judiciary takes the lead in the development and implementation of formal legal responses to discriminatory and criminal activities, including VAW in both judicial and non-judicial capacities. As the principal administrator of justice in any given state, the judiciary is uniquely positioned to take leadership and act as the mobilising power towards addressing VAW and encouraging other stakeholders – such as civil society, the public prosecutor and the police – to play their part.

3.2.2 Judicial interpretation of laws

The judiciary interprets the national constitution and defines the obligations of the state in relation to fundamental rights and freedoms, in order to hold the state and all perpetrators of violence accountable whenever these obligations are breached. In the course of interpretation of existing laws, the judiciary also performs the role of lawmaker by legislating from the bench. In the process of addressing ambiguity and conflicts existing between legislative

provisions, 'judge-made' laws are developed and these are further propagated through the doctrine of *stare decisis* as precedents are handed down to lower courts.

3.2.3 Guardianship of rights

The courts are the guardians of the constitution and regulate the actions of all entities that have power under the law. They are therefore seen as protectors and defenders of the fundamental individual rights and liberties of victims and witnesses, of perpetrators and of members of the general public. Judicial officers ensure the authoritative adjudication of controversies over the application of laws in specific situations; make law and public policy, especially when they exercise their power of judicial review to declare laws, government actions or omissions as unconstitutional; act as administrators for out-of-court settlements; and ensure enforcement of decisions. Judicial officers are barometers of a society's conscience and must be seen to take restorative steps with impartiality and professionalism to address VAW by establishing and enforcing social and behavioural norms in line with the principles of the rule of law, as embodied in the law applicable and the practice before adjudicating institutions, and educating within and outside the court system.

The judiciary has the obligation of ensuring that victims of violence access justice without discrimination and that they receive equal protection of the law. Failure to hold perpetrators accountable makes victims lose confidence in the institution of the judiciary and in the ability of the state to protect them from violence. Such failure can have the negative effect of victims refraining from engaging the judicial system altogether. Therefore, the court must ensure that VAW and other human rights violations are redressed wherever they are brought to the attention of the court. This will enhance confidence in the workings of the justice system and victims will be willing to engage the justice system as a result.

Each of the East African Commonwealth member countries is a state party to international and regional human rights instruments that embrace gender equality and protection of women from violence through the 'due diligence standard'. Such ratification confirms their willingness to be bound by and to apply international human rights standards contained in those conventions. It also confirms their willingness to incorporate the provisions of these instruments in their domestic legislations, so as to protect women and girls from violence and to provide them with effective remedies.

In discharging their duty to enhance access to justice for women and child victims of violence, courts will find guidance in international human rights law and standards contained in these instruments. These instruments and

standards provide important guidance in cases concerning fundamental human rights and freedoms.² However, while it is desirable for the norms contained in these instruments to be recognised and applied by national courts, this process must take into account the constitutional provisions, local laws, traditions, circumstances and needs in any particular country.³

3.3 Addressing VAW – The judicial process

3.3.1 Pre-trial challenges

Judicial officers should be aware that, even before the commencement of a case, victims face various challenges – making successful prosecution and access to justice difficult to achieve. Such obstacles may range from discriminatory norms and practices within the justice sector and the society as a whole, a hostile and insensitive judiciary, gender stereotypes and bias on the part of some officials in the justice system, gender stereotypes in the law and a callous approach in understanding what constitutes VAW.

Lack of and poor quality of support services

There is lack of knowledge regarding the existence of and how to access services needed by victims/survivors of VAW. This is coupled with the fact that the legal and other support services required are not found in one central place and such structural challenges contribute to a high incidence of abandonment of cases by the victims of violence. Such obstacles include lack of shelter and other support services to help victims navigate the judicial process. The trauma experienced by the victims of VAW leaves them intimidated and vulnerable and, in the absence of such support services to prepare them for court appearance, it becomes extremely difficult for them to engage with the justice system. Even in those instances where a report of violence has been made to the police, the absence of specialised and friendly police units to investigate and attend to victims in a gender-sensitive manner, the distance which victims have to travel in order to access medical and other services, together with lack of sensitivity on the part of medical personnel examining victims of SGBV, all contribute to secondary victimisation. Consequently, victims – fearing further victimisation – may fail to turn up in court altogether.

Quality of investigations

The prosecution of cases of VAW, particularly domestic and sexual violence, face a multitude of other challenges. These include refusal by the police to investigate complaints and poor investigations arising from ignorance by the police of what constitutes a sexual assault or GBV. Knowledge of the law is important for investigators because, prior to commencing investigation,

they are required to establish if the act complained of amounts to a criminal offence. Furthermore, they may be influenced by traditional interpretations of what might be perceived to be acts that occur naturally within intimate or social interactions. The denial of justice arising out of the police's negative attitude and/or lack of professionalism in handling cases of VAW is clearly demonstrated in the case of *CK (A Child) and 11 Ors v The Commissioner of Police and 2 Ors*,⁴ reproduced in chapter 14 of this bench book.

Existence of gender stereotypes

The assumption of gender stereotypes on the part of the police is an impediment to effective investigation of cases of GBV/VAW. Some cases involving child victims of sexual violence may fail to reach the courts, because guardians of such children might agree to an out-of-court settlement; once they receive money from perpetrators, they do not pursue the matter any further. If the matter is already before court, they end up dropping charges or refusing to turn up in court to testify. In the event that they turn up for the trial, they could end up becoming hostile witnesses, not useful for the prosecution. The fear of stigma attached to victims of sexual assault also contributes to the unwillingness of victims to subject themselves to the judicial process, due to the public nature of the process.

Ignorance

Similarly, ignorance of the law and of what constitutes rape or sexual assault under the laws of the land is another obstacle. Due to such ignorance, victims can easily be convinced to withdraw charges or change their statements, rendering the case weak and successful prosecution difficult.

Reliance on traditional justice mechanisms

Some traditional justice mechanisms, premised in cultural norms, permit subsequent marriage between a victim and offender in sexual offences or the payment of material compensation as an acceptable form of resolving such matters. Such mechanisms also encourage the discriminatory allocation of matrimonial property in cases of dissolution of marriage or intestacy. These practices are counterproductive and do not send the right signal – i.e. that there is no place for customs which are inconsistent with fundamental rights and freedoms, human dignity and democracy.

Societal pressures

For some domestic violence victims, family members can prevail upon them not to expose private matters concerning the family to the general public, as domestic violence is considered a family affair in which the police and the government have no place. Intimidation by family members, should

the perpetrator be sent to prison, also contributes to withdrawal of cases of domestic/GBV violence.

Impact of costs

Lack of economic empowerment on the part of victims of domestic violence could also contribute to reluctance by women victims to testify in criminal cases against perpetrators. Where the perpetrator of violence is the husband and sole breadwinner for the family, the woman will more often than not abandon the case for fear of losing support should the perpetrator of violence be sent to prison. Domestic violence victims residing under the same roof with the perpetrator of violence will not be ready to testify against him for fear of being thrown out of the house and being rendered homeless.

All the above factors discourage victims of violence from engaging the justice process and impede their access to justice, such that on the date the case is scheduled for hearing, the court could find itself with no victim and witnesses to testify.

3.2.2 Challenges arising during the trial

Inadequate awareness

Other factors which contribute to attrition in cases of VAW and which do arise during the trial include inadequate gender-sensitive and women's rights training for judicial and other actors in the justice system. This makes it difficult for the court to handle cases with a gender-sensitive understanding, and can lead to a miscarriage of justice. The absence of a comprehensive legislation on VAW and, where such legislation exists, lack of awareness and sensitivity on the part of judicial officers in applying it to enhance access to justice and promote protection, denies women victims equal protection of the law. The absence of specialised courts where survivors of violence can narrate their experiences in camera also undermines successful prosecution and access to justice, even during the hearing of divorce and other civil cases involving the family.

Implementation of any legislation on VAW must be preceded by training of all those involved in its administration and implementation. Such training is an important intervention, whose outcome is to create awareness of the provisions of the new law and how those provisions should be applied to protect women from violence. It is important that such training takes place before the commencement date of the new legislation. In the absence of such training, implementation can be a challenge and victims may end up not receiving protection. This was the case when the Kenya Sexual Offences Act (SOA) came into force without prior training of all those involved in its implementation.

The SOA had:

*new concepts; new and expanded definitions; new offences and new procedures all of which challenged the traditional role of a judicial officer from being a mere impartial arbiter or umpire and added thereon, the role of counsellor, friend, social worker, psychologist and a human rights activist for both the survivor and the offender without discrimination and/or distinction.*⁵

Lack of awareness of the provisions of the new law made the transition from the Penal Code, under which sexual offences were previously prosecuted, to the newly enacted SOA highly challenging. Police officers and magistrates, who are the persons charged with the implementation of the SOA, did not receive any form of training on the Act prior to its coming into force and most of them did not have copies of the new legislation. The effect of this omission was that magistrates whose duty it was to try SGBV cases in the first instance would invoke certain provisions of the SOA to pass sentence in cases where the charge had been laid under the Penal Code, which cases were pending at the date of commencement of the SOA. This was despite the existence of a clear provision in Part 3 of the First Schedule to the SOA to the effect that all cases pending at the commencement of the SOA, having been brought under the old law, were to be concluded under that old law (the Penal Code). In most cases, where appeals were preferred, the superior court allowed such appeals and either discharged the accused persons or ordered a retrial.⁶

The police also had difficulty in deciding whether to bring charges under the Penal Code or the new law. This was particularly the case for those matters that were under investigation when the SOA came into force.

In order to address the crisis manifested during the transition period from the Penal Code to the SOA, a draft reference manual on the SOA was designed specifically for prosecutors. In the speech at the launch of the manual, the Attorney-General was reported as having said thus:

*We realized that for the Sexual Offences Act to be embraced in our courts of law, it was key for the law enforcers who are obliged to draft charges for the reported offences in police stations to be well equipped with the contents of the Sexual Offences Act vis-à-vis the Penal Code.*⁷

The manual is used as a point of reference by prosecutors and investigators of cases of SGBV, and has been incorporated into the training syllabi of the police service countrywide.⁸ The training of police officers and prosecutors on SGBV is an intervention that is aimed at enhancing prosecution of cases of SGBV and bringing perpetrators to account for their actions. To complement training efforts, the Kenya Women Judges Association (KWJA) developed a training manual on the SOA which is used in training judicial

officers.⁹ The case of *Dalmar Musa Ali v Republic*¹⁰ and that of *Kamaro Wanyigi v Republic*¹¹ demonstrate some of the challenges encountered by the judiciary in implementing the new law, due to failure to conduct prior training and create awareness of the provisions of the new law.

Lack of guidelines and rules to implement legislation

Another challenge that may be encountered in implementation of newly enacted legislation is the absence of guidelines and court rules for successful implementation of the new laws. An example of such a scenario arose in Kenya following the enactment of the SOA. The SOA came into force in the year 2006, with no regulations, no guidelines and no rules of court to guide implementation. A task force on sexual violence was set up with the mandate to draft regulations, but it was not until 2008 that two sets of implementing regulations were gazetted.¹² Medical treatment regulations, which were also important, were not gazetted until 2012. Another major challenge that the courts faced and which made implementation of the SOA extremely difficult, was the absence of Sexual Offences Rules to guide the court in sexual offence cases. It was not until 2014 that the Sexual Offences Rules of Court were published.¹³

Existence of gender stereotypes

The presence of gender stereotypes in laws and practice is also a challenge that arises during the hearing of cases of SGBV, as these prevent the enjoyment of equal protection of the law.¹⁴

Box 3.1 Case law to demonstrate challenges encountered

Dalmar Musa Ali v Republic Criminal Appeal No. 58 of 2007 High Court of Kenya at Nairobi

The accused was charged with the offence of abduction contrary to section 142 of the Penal Code. The offence was alleged to have been committed on 16 June and 2 July 2006. The Sexual Offences Act (SOA) came into force on 21 July 2006. At the time of rendering judgement, the trial magistrate invoked the Sexual Offences Act, which was newly enacted. He modified the charge and proceeded to sentence the accused person under section 8(3) of the SOA. On appeal, the High Court quashed the conviction and sentence because the accused person had been denied his constitutional right to answer to the charge of defilement, which had been included arbitrarily by the magistrate at the time of the judgement.

Kamaro Wanyigi v Republic [2008] eKLR, Kenya

The accused, a 67-year-old man, was charged under the Penal Code with the offence of rape committed against the survivor on diverse dates in August 2005. On 27 September 2006, the accused was convicted as charged and sentenced under section 8(4) of the Sexual Offences Act to 20 years' imprisonment.

On appeal against sentence, the High Court held that the invocation of the SOA by the trial magistrate was unlawful since the accused person had been charged under the Penal Code. He therefore ought to have been sentenced under the same Act. The High Court allowed the appeal and discharged the accused person on this ground.

Limitations imposed by the rules of evidence

The requirement for corroboration of the evidence of a victim in sexual offence cases and in cases involving a young child, along with the further requirement that the court warns itself of the danger of relying on uncorroborated evidence of a victim of a sexual offence, are issues which arise during the trial and which have the negative effect of preventing the enjoyment of equal protection of the law. The requirement for corroboration discriminates against women victims in rape cases, because such corroboration is not required of the evidence of women victims of other crimes. The general rule in English common law in both civil and criminal cases is that any judgement or conviction may be based on the uncorroborated evidence of a single witness, or on uncorroborated evidence of any other kind. The two main categories of case where corroboration or care warnings still apply in analogous cases – where the law requires corroboration in the sense of either evidence from an independent source or an alternative type of evidence from the same source – are: identification cases; inferences drawn from the defendant's silence; and confession by a person with a mental disability and cases in which the discretionary care warning applies (evidence from potentially 'unreliable witnesses', which category includes: an accomplice giving evidence for the prosecution; complainants in sexual cases; children; and prosecution evidence given by an inmate of a secure mental institution).

3.3.3 Challenges arising after the trial

Review and enforcement of orders

At the end of the trial, judicial officers make orders within the ambit of applicable laws, which orders must be successfully executed in line with the principle that a court will not make an order if compliance is impossible. However, the reality on the ground may differ. For example, abusers sometimes ignore the terms of injunctions and continue to behave abusively. It is also not uncommon for victims to breach the conditions of the order – e.g. by speaking to the abuser when he has been ordered not to contact the victim. This is due to the complexity of abuse in intimate relationships.

Media wars and personal safety

Judicial officers are also members of their respective societies and are therefore impacted upon by the media and sometimes caught up in a backlash from the public and, at times, politicians. In some cases, the personal safety of the judicial officer is at risk. According to information obtained by *The Guardian*, in the United Kingdom, judges dealing with sensitive issues – including child custody in the family courts – have fallen victim of attacks through: hate mail sent to their homes, private email addresses and social media pages, such as

Facebook; threatening correspondence related to hearings they have presided over; physical attacks; and attempted assaults in court buildings. The presence of a robust security and safety system to protect court users and the judiciary, provided by Her Majesty's Courts and Tribunals Service, did not stop 26 incidents recorded in 2012. Yet more attacks are not recorded officially for fear of increasing the threats.¹⁵

3.3.4 General challenges encountered by judicial officers

Lack of a socioculturally sensitive approach

There is limited awareness, on the part of some judicial officers, of the context and an understanding of the shame associated with being a victim of sexual violence.

It is important for judicial officers to understand how, in making a liberal and gender-sensitive interpretation of the law, their decisions can enhance women's enjoyment of the right to equality before the law with men and hold perpetrators accountable for their actions. Failure to appreciate societal norms, as exhibited by the court in *Uganda v Apai Stephen*¹⁶ whose facts appear in Box 3.2, is an obstacle to women's access to justice.

Whereas the trial court may have been right in finding that the victim had not clearly stated what the accused person did to her and in finding that the prosecution case had not been proved to the required standard, the language used by the judge was culturally insensitive and exhibited lack of appreciation of the woman's lived realities. In many Ugandan societies, explicit discussion

Box 3.2 Uganda V Apai Stephen

During the court hearing of the case, the rape victim made a statement that, 'she was made the accused's wife'. What the victim meant by this was that the accused person had sexual intercourse with her. The judge described the statement as useless and acquitted the accused for lack of compelling evidence.

Part of the Judgement read that:

In this case, apart from the vague and meaningless statement uttered by PW1 (the Complainant) to the effect that the accused made her his wife at the material time and that he worked on her etc., there is nothing on record to show or throw light on what actually took place ...

Before I take leave of this matter, may I also point out that the complainant (PW1) has only herself to blame for the fact that this case collapsed. Indeed, the learned Resident Senior State Attorney endeavoured to guide her in her evidence for more than one and half hours, but she stubbornly refused to say exactly what took place inside the accused's hut on the day in issue. She was very satisfied with leaving the court with the useless statements above. By her looks, PW1 was probably a grandmother. Children under the age of 18 years have on countless number of times before, given valuable evidence to this Honourable Court on matters such as these. The Court therefore expected PW1 to perform a lot better than she did.

of sexual matters in public is taboo and to interpret the woman's failure to express herself in the circumstances of the case as stubborn refusal to co-operate with the court was insensitive and could easily discourage victims from attending court to testify. An insensitive judiciary can be an obstacle to the realisation, by women victims of violence, of the right to equal protection of the law.

Lack of a gender-sensitive approach

A gender-sensitive approach by the court during the hearing of cases of SGBV is important. It is also important for the court to adopt a liberal interpretation of the law. That way, the court will be able to give 'violence' the broadest definition, which encompasses both physical and psychological harm. The Kenyan case of *Omambia v Republic*¹⁷ demonstrates how some courts give narrow and gender insensitive interpretation of what acts constitute 'sexual assault,' trivialising sexual assault complaints and dismissing them as not warranting court intervention.

The narrow/restrictive and gender-insensitive interpretation of sexual assault adopted in the two cases in Box 3.3 legitimises and trivialises the

Box 3.3 Omambia V Republic

The brief facts of this case were that the appellant was charged with the offence of indecent assault of a female. He was convicted and sentenced by the Magistrates Court. He appealed to the High Court. In allowing the appeal, the High Court gave a very narrow interpretation of what acts amounted to an 'indecent assault', stating that:

These particulars that the appellant touched the private parts of the complainant mean and can mean nothing else, than that the appellant touched, with his hand, 'the private parts of the complainant' which to give the well-known and ordinary meaning of the phrase, means, the genitalia of the complainant and no other parts of her body...

In the view of the High Court, the appellant had not touched the complainant's 'private parts', but 'had merely touched the bottom' of the complainant and 'put his hand under her blouse'. The court held that in those circumstances, the actions of the appellant did not constitute an indecent assault. The court went ahead to define 'indecent assault' so narrowly to mean: 'touching the genitalia of the complainant and no other parts of her body'. The perpetrator was set free on appeal.

The Tanzania case of *R v Haruna s/o Ibrahim*, though a very old one, is used here to further demonstrate how – through a gender-insensitive approach, understanding and narrow interpretation of the law and evidence – the judiciary can be a real impediment in the pursuit for justice by women victims of violence. The accused person in this case was convicted by the Magistrates Court in Tanzania of attempted rape. The accused had dragged the complainant to a ditch, placed his hand over her mouth, pulled down her clothes while lying on top of her. On noticing a passer-by, he fled. There was no evidence that, at the time of fleeing, he had undressed himself. The High Court held that in view of the fact that the accused had not undressed, the offence of attempted rape had not been proved and a conviction for preparation to commit a felony was substituted.

psychological impact of unwanted sexual contact and negates a woman's right to bodily integrity. In so doing, the court fails in its duty to enhance women victims' access to justice, leaving women victims without protection from activities that amount to violence against them.

3.3.5 Other challenges

Judicial officers and the courts as a whole are not isolated from the challenges that plague the judiciary, such as funding constraints that limit the provision of victim-friendly facilities, absence of support structures to guarantee protection of victims after the trial and rehabilitation of the offenders, and other capacity challenges.

3.4 Judicial guidelines in dealing with matters involving VAW

In order to encourage systematic review and analysis of matters concerning VAW, guidelines have been prepared. It is anticipated that a checklist will be developed to give an easy-to-use snapshot of the guidelines. The guidelines follow the logical sequence of a matter or case introduced for judicial intervention, and seek to aid a judicial officer in addressing cases of VAW from different perspectives. The guidelines further seek to assist judicial officers to address themselves to all the relevant law applicable to a situation, including regional and international legal instruments and other factors relevant to the matter in a consistent manner.

3.4.1 General principles

In addition to the professional and official undertakings, it is highly recommended that, within practical possibility and the ambit of the law applicable, judicial officers are encouraged to ensure that at all stages of court proceedings, the following rights and guarantees, as per the victim, are not undermined. Namely the right to:

- (a) be treated with respect and dignity;
- (b) be protected from re-victimisation due to further violence;
- (c) receive all information about their rights (delivery of the judgement and damage compensation, i.e. filing a property claim);
- (d) have the identity of the victim protected from the media, in accordance with relevant legislation and practice;
- (e) non-exposure to prejudices based on gender, race, ethnicity, age, appearance, physical and intellectual abilities or other personal features;

- (f) be asked only those questions relevant for the court proceeding;
- (g) have all required steps taken to eliminate fear of future assaults;
- (h) protection and safety;
- (i) be informed, at least in cases when victims and their families may be in danger, about the perpetrator's escape from prison/custody or temporary or permanent release;
- (j) have special protective measures provided as a vulnerable witness in court proceedings, including video-link hearings so that the victim may avoid being questioned in the same room with the perpetrator, and the use of a psychologist or other expert to assist the victim during testimony; and
- (k) adequate support services, depending on the court's organisational capacities, so that the victim's rights and interests are properly presented and taken into consideration.

3.4.2 Preparation for the hearing

In the course of preparing for the hearing, a judicial officer is encouraged to pay attention to the social context – the form, prevalence, impact, indicators and manifestations of VAW – and be aware of unconscious prejudice on his or her part that may impact on evaluation of evidence and decision-making.

Following this, the judicial officer is expected to take the actions enumerated below in preparation for a hearing in a case of VAW.

Review the case file to flag vulnerability of victim or witnesses

- (a) Review the case file to establish the facts, taking note of the relationship between the victim and the perpetrator, the location (within or outside the home) in which the offence was committed, characteristics peculiar to the victim – for example, vulnerability of the victim on the basis of age, infirmity, racial or ethnic minority, his or her being a refugee, returnee or internally displaced person. This assists in early identification of vulnerable witnesses, who may require special measures of protection during the course of proceedings.
- (b) Familiarise or reacquaint him- or herself with the relevant applicable law, including regional and international legal instruments that may have been domesticated by the state.
- (c) If the facts could support charges for other offences – for example, assault occasioning actual bodily harm, common assault and

attempted murder or doing grievous bodily harm – these can be discussed with the prosecution for purposes of ensuring that all grounds are covered. Some VAW cases may appear under every other category of violent offences, such as criminal damage; arson/arson with intent to endanger life; harassment; kidnapping; burglary with intent; or firearms offences arising in a domestic violence scenario.

- (d) Develop special measures of protection, including providing a victim-friendly atmosphere and securing the physical environment in which the hearing will take place.
- (e) Establish a system to prioritise and fast-track cases of VAW, so as to promote victim safety and minimise delay.
- (f) Encourage the victim to utilise a dependable social support system such as family members, friends, etc. Where the victim lacks such support, it would be prudent of the judicial officer to inform the victim of any other organisations that address such matters – for example, civil society organisations. For consistency, the judicial officer is encouraged to make arrangements for the development of a register of organisations available to provide such support when required. This necessitates getting information from community-based programmes and government agencies interacting with the case participants and sharing that information, where appropriate. Invite *amicus curiae* – e.g. relevant NGOs that can provide psychosocial support, legal aid, etc. for assistance to the court intervention.
- (g) A pre-trial familiarisation visit to the courtroom, including the layout of the courthouse, may be arranged where possible in order to build confidence and reassure the victim about the trial process.

Put in place special measures

- (a) The judicial officers may give further protection by prohibiting the publication of the identity of the complainant or of the complainant's family to secure the victim's privacy.
- (b) Provide a secure waiting area for victims, witnesses and accused persons.
- (c) Establish security and safety protocols that include:
 - (i) separate entrances and waiting rooms for victims and defendants;
 - (ii) security screening before entering the courtroom;
 - (iii) the physical presence of security officers;

- (iv) rules requiring that the defendant wait 30 minutes after the victim leaves before departing;
 - (v) providing a security escort for the victim to her mode of transportation;
 - (vi) conducting mandatory bag searches;
 - (vii) providing metal detectors and surveillance cameras; and
 - (viii) providing court security officers who have the ability to restrain and remove people from the building should there be a need and powers to protect all those in the court building.
- (d) The physical environment within the courtroom should be secured in such manner as to ensure that the witness box is not in close proximity to the dock. Witnesses should be brought into the witness box via a route that does not involve passing right in front of the dock. Ideally, the witness or victim should have their back turned to the accused when asked to turn to face the bench.

Interim protection orders

- (a) The judicial officer may be required to consider an application for an interim protection order without any requirement that the victim institute other legal proceedings, such as criminal or divorce proceedings, against the perpetrator.
- (b) Applications may be submitted anytime, even after normal working hours.
- (c) In addition to an order granting a victim exclusive occupation of a shared residence or premises, a protection order may prohibit the perpetrator from doing any or more of the following:
 - (i) physically or sexually abuse or threaten to abuse the protected person;
 - (ii) damage or threaten to damage any property of the protected person;
 - (iii) engage or threaten to engage in behaviour including intimidation or harassment that amounts to psychological abuse of the protected person;
 - (iv) encourage any person to engage in behaviour against the protected person where, if that behaviour was by the perpetrator, it would be prohibited by the order;
 - (v) engage or threaten to engage in intimidation, harassment or stalking, which amounts to emotional, verbal or psychological abuse of the protected person;

- (vi) engage or threaten to engage in economic abuse of the protected person; and/or
- (vii) engage or threaten to engage in cultural or customary rites or practices that abuse the protected person.

3.4.3 The trial

In the course of the trial, the judicial officer is encouraged to take other measures that will protect victims and witnesses of violence and help enhance victims' access to justice and maintain a victim-friendly atmosphere.

Informing victim of rights

Some legislative provisions expressly place on the courts the obligation to inform victims of their rights. The Protection against Domestic Violence Act, 2015 (Kenya) provides for the issuance of protection orders as a remedy for victims of domestic violence and some victims of domestic violence may, without lawyers, approach the court for such orders. The court should take note of section 24 of the Act, which addresses the challenges that such applicants are likely to face while acting in person. The section provides that, where an application for a protection order is made, the court is required to inform all such applicants who appear without lawyers, of:

- (a) All the reliefs available under the law.
- (b) The effect of any order which may be granted and the means provided under the law for enforcement of that order.
- (c) The right to lodge a criminal complaint against the respondent if a criminal offence has been committed by the respondent.
- (d) The right to claim compensation for any loss suffered or injury caused by an act of domestic violence. The court hearing a claim for compensation is empowered to award such damages as it deems just and reasonable, taking into account the pain and suffering of the victim, nature and extent of physical and mental injury suffered, cost of medical treatment, loss of earnings, and the value of property taken or destroyed, among other considerations.

The balancing act required in handling bail applications

Bail is probably one of the most difficult procedural areas of VAW cases, especially in domestic violence cases, as the victim and witnesses are most vulnerable at this stage of the proceedings. There may be numerous opportunities for witness intimidation and/or opportunities to persuade a victim to withdraw charges.

A judicial officer, while bearing in mind the general rule that a defendant is entitled to unconditional bail,¹⁸ is encouraged to closely examine the unique

circumstances of cases of VAW and make a decision for example to impose conditions upon the bail or remand the accused in custody.

In Uganda, the leading case on bail pending appeal is *Arvind Patel v Uganda*.¹⁹ The Supreme Court in this case made a distinction between bail pending trial and bail after conviction. It was held that an applicant for bail pending appeal bears the burden of proving that there are exceptional reasons and/ or circumstances to warrant his or her release on bail. Case law also established that whereas factors like the character of the applicant and the fact that he is a first offender may be taken into account, such cannot be said to be exceptional reasons for release of a convict on bail pending appeal (see also *Singh Lamba v R [1958] EA 337*). The court in the Arvind Patel case also *inter alia* held that one of the considerations that must guide the court is whether the offence the applicant is accused of involved personal violence.

The judicial officer is encouraged to pay keen attention to the prosecution's version of events and the most frequent objections to unconditional bail raised by the prosecution counsel, i.e. that the accused: will fail to surrender to bail; will commit offences while on bail; will interfere with witnesses or obstruct the course of justice; or has to be protected from an angry public.

The judicial officer is encouraged in an inquisitorial manner to take into consideration the following before making a decision on the bail application:

- (a) adequate protection of the victim and any children;
- (b) emotional and family ties;
- (c) the consequences of moving the accused out of shared accommodation;
- (d) collection of belongings;
- (e) issues relating to the accused getting to work;
- (f) contact with the children during the remand period; and
- (g) existence of other civil court orders which already protect the victim and/or any children, e.g. non-molestation orders or occupation orders or any other court injunctions.

The judicial officer is encouraged to ask questions to probe and reveal further information behind what has been stated before the court, to determine:

- (a) whether children were witnesses to the alleged incident;
- (b) any previous history of complaints of domestic violence or of other offending behaviour within a domestic scenario, e.g. criminal damage/theft (whether convicted or not);
- (c) previous convictions, and enquire whether any were committed within the domestic or any other environment;

- (d) what, if any, civil orders have been made between the parents or are in existence relating to the children;
- (e) if there are any applications for and orders relating to contact with children and non-molestation orders; and
- (f) if the victim has any concerns or fears for their safety.

In cases where the judicial officer grants conditional bail, conditions must be spelled out clearly to the accused – for example, a ‘no contact condition’ means no contact face to face, through family members, through the intervention of any other person or via text/mobile phone call/fax/letter from the accused or any of the persons specified above.

The court is encouraged to ensure that the victim and witnesses are immediately informed of the outcome of the bail hearing, so that they will know that the court has their best interests in mind and also for them to know what the defendant is permitted to do and prohibited from doing, during the remand period. This is an important factor in encouraging the victim and witnesses to stick with the prosecution process.

Procedures for victim/vulnerable witness protection²⁰

Declaring a witness vulnerable²¹

Vulnerability of some victims and witnesses may arise in circumstances which occasion particular difficulties in attending court and giving evidence – due to age, personal circumstances and fear of intimidation, or because of their particular needs on the following bases:

- (a) the victim of the offence;
- (b) age, including all child witnesses;
- (c) any witness whose quality of evidence is likely to be diminished because they are suffering from a psychological or mental disorder (as defined by law);
- (d) significant impairment of intelligence and social functioning (including learning disability);
- (e) cultural differences;
- (f) physical disability or disorder;
- (g) the possibility of intimidation;
- (h) the relationship of a witness to any party to the proceedings;
- (i) fear, trauma, or distress in relation to testifying in the case;
- (j) the nature of the subject matter and the evidence to be given; and/or
- (k) on account of any other factor which the court considers relevant.

Special measures for vulnerable witnesses

If the law applicable does not provide special measures automatically, it is important for the judicial officer to establish how an application requesting special measures can be entertained. The court may have discretion, with justification, not to give directions for protection, if doing so will defeat the course of justice.

Directions/orders for protection

Judicial officers can consider special measures²² to assist ‘vulnerable and intimidated’ witnesses to give their best evidence in court, namely:

- (a) giving evidence behind a screen positioned around the witness box;
- (b) giving evidence by a live video link from a room outside the courtroom;
- (c) giving evidence in private by clearing the courtroom of members of the public;
- (d) removal of wigs and gowns by judges and lawyers;
- (e) use of video-recorded interviews as evidence in chief;
- (f) examination of the witness through a registered intermediary; and
- (g) provision of aids to communicate, such as through a computer, mannequins for cases of sexual violence to protect the victim or witness from emotional harm and embarrassment, or other device to communicate when giving evidence.

The court is encouraged to notify a vulnerable witness of protective measures and seek the vulnerable witness’s input before making an order, taking into account the age and maturity of such a witness.

The court may appoint an intermediary unless the interests of justice justify the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.²³

The court may, with reason, vary the protection order.

Examination of vulnerable witnesses

The judicial officer is encouraged to ease the process of examining vulnerable witnesses by exploring ways within the ambit of the applicable law to do so.

To this end, the court may at its discretion:

- (a) admit in evidence, a recorded statement of a vulnerable witness as the evidence in chief or as part of the evidence in chief of that witness;
- (b) hold a special session within the precincts of the court building, for purposes of examining in full or in part, the vulnerable

witness for the purpose of making an audio visual recording of the examination in full or in part, of a vulnerable witness at a special sitting of the court held to examine the vulnerable witness;

- (c) make arrangements for the proceedings to be transmitted so that the accused person can hear and observe the examination of the vulnerable witness, but all the time enabling the accused person to communicate with the court during the examination of the vulnerable witness;
- (d) permit a vulnerable witness to be present in the courtroom when an audio visual recording of the examination of the witness made at a special sitting of the court to record the testimony, is played back in court; and/or
- (e) permit a victim's family member, friend or a social worker, or other mental health professional to act as a victim advocate by being present in the courtroom with the victim and addressing the court on behalf of the victim, most especially where detailed explanations or illustrations are required.

Cross-examination

A judicial officer is encouraged to manage the process of cross-examination in such a way as to ensure that the quality of the evidence on cross-examination is not diminished because of:

- (a) the views of the witness;
- (b) the nature of the questions;
- (c) the behaviour of the accused/defendant during the proceedings generally and towards the witness; and
- (d) the nature of any relationship between the witness and the accused/defendant.

In some jurisdictions, the law prohibits the cross-examination by the accused/defendant in person of the complainant to a sexual offence; or of a 'protected witness' (under 17 years old) in sexual cases; and in the case of an under 17-year-old where the offence involves an assault on or injury to any person and if deemed necessary, cross-examination is done through the defence counsel.

Adjournments

Subject to the procedural rules applicable, the judicial officer is encouraged to limit adjournments in cases of VAW. Cases should proceed as scheduled and be concluded in a reasonable time, as matters of VAW are emotionally draining and need to be resolved in a timely manner.

Protect the victim's privacy by holding proceedings in camera

A judicial officer is encouraged to limit occurrences of secondary victimisation by permitting the proceedings to be held in camera (see below). Women and child victims of violence, particularly sexual assault and domestic violence, may fail to engage with the justice system because of the fear of appearing in open court to narrate their experience in full view of the members of public who may be present in the courtroom. The evidence which victims are asked to relate during the trial can be both embarrassing and emotional. Coupled with the feeling of shame, fear of persecution by the criminal justice system and the unfamiliar and uncomfortable experience of being in the courtroom can all act as a barrier to access to justice.

In these circumstances, the right to equal access to justice could quite easily be sacrificed to the adversarial court process, unless supportive measures are adopted by the court to protect victims and enhance their ability to access justice. One such intervention is the designation of specialised gender-responsive courts, including mobile Domestic Violence and Family Courts. Apart from improving efficiency and case outcomes and minimising re-victimisation, these courts ensure victim protection and safety. Such courts provide privacy and a conducive atmosphere within which cases of SGBV and other forms of violence can be heard. For effective operation, it is critical that the personnel working in the specialised courts receive appropriate human rights and gender-sensitive training to sensitise them on gender- and child-related issues and to build their capacity regarding violence against women.²⁴

Where specialised courts have not been established by legislation, the judicial officer can, through judicial creativity, declare in camera proceedings of the existing courts.

In Camera proceedings ensure privacy and a friendly environment, within which survivors of violence will feel comfortable to narrate their experiences. However, in their judgements, judicial officers ought to bring to the attention of their respective governments the fact that establishment of specialised violence courts is an international law obligation on the part of the state and that the absence of such courts is a breach of that obligation. This is an intervention that enhances women victims' access to justice²⁵ and is necessary for the promotion of equality and gender justice.²⁶ The courts in Kenya can apply Rule 2 of the Sexual Offences Rules of Court, 2014²⁷ to declare in camera proceedings to provide privacy in sexual offence cases (see Box 3.4).

In the case of Tanzania, section 186(3) of the Tanzania Criminal Procedure Act (CPA)²⁸ in mandatory terms provides for in camera sessions in all trials involving sexual offences. This is an important intervention that enhances victims' access to justice by ensuring an atmosphere of privacy that protects victims of violence from secondary victimisation (see Box 3.5).

Box 3.4 Rule 2 of the Sexual Offences Rules of Court, 2014 [Kenya]

Rule 2 empowers the court to make any order or give any directions for the efficient disposal of cases in order to protect the privacy of victims, children accused of an offence under the Sexual Offences Act and to ensure that victims and vulnerable witnesses are treated in a manner that recognises their vulnerability. Such order or directions may limit access to the press and the media or any other person to the courtroom or the court proceedings during the trial or any part of the trial for the purpose of protecting the privacy of victims, vulnerable witnesses and children accused of committing offences under the Act. In the absence specialised violence courts, judicial officers should take advantage of this Rule to declare in camera proceedings.

Box 3.5 Section 186(3) – Tanzania Criminal Procedure Act

Section 186 (3) provides that:

Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among the members of the legal or medical professions.

Although failure to comply with this provision has been a ground of appeal, as was the case in *Laureano Mseya v Republic*,²⁹ courts have relied on section 388 of the CPA to dismiss such appeals. The section provides that: 'no finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial or other proceedings were conducted in a wrong area unless it appears that such error has occasioned a failure of justice'.

Privacy can further be promoted by underpinning confidentiality by all involved in the matter, including court staff, the prosecution and defence teams, and by redacting the name of the victim in the record of court proceedings.

The rules of evidence

Existing rules of evidence regulating the conduct of criminal trials concerning gendered violence have been subject to vocal and persistent criticism in many jurisdictions for their perpetuation of unstated social understandings regarding female and male sexuality.³⁰ The judicial officer is faced with the task of ensuring that the courtroom experience is fair to the victims of sexual violence, while at the same time protecting the due process rights of any accused charged with offences of VAW.

The requirement for corroboration

The judicial officer is encouraged to look for creative ways of dealing with evidence that requires corroboration. The mandatory requirement for

corroboration of evidence of a child witness and that of a victim in sexual offences is discriminatory, fetters judicial discretion in that the court must look for corroboration even if the judicial officer strongly believes the child's evidence to be truthful, and defeats the successful prosecution of cases of VAW. The testimony of children (those below 12 years of age) in the current situation and under section 101(3) of the Magistrates Court Act (MCA) (Uganda) provides that, where in any proceedings a young child is called upon as a witness and does not, in the opinion of the court, understand the nature of an oath, the child's evidence may be received, though not given upon oath if, in the opinion of the court, the child is possessed of sufficient intelligence.

Judicial officers may be guided by the English case of *R v Makanjuola*,³¹ in which the effect of s.32 of the Criminal Justice and Public Order Act 1994 (UK) was assessed. The Court of Appeal declared that any attempt to re-impose the 'straightjacket' of the old common law rules was to be deprecated. The Court of Appeal summarised its conclusions:

S. 32 abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complaint of a sexual offence, simply because a witness falls into one of those categories; It is a matter for the judge's discretion, what, if any, warning is appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case; In some cases it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness; If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel, in the jury's absence, before final speeches; where the judge does decide to give some warning in respect of a witness, it would be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it, rather than as a set-piece legal direction; Where some warning is required, it is for the judge to decide the strength and terms of the warning.

Lord Taylor LCJ said:

(1) it was a matter for the trial judge's discretion whether or not to give a warning to the jury in respect of the unsupported evidence of a complainant in a sexual case. The nature of the warning and whether or not to give it would depend upon the circumstances of the case, the issues raised and the content and quality of the witness's evidence. (2) There would need to be an evidential basis for suggesting that the evidence of the witness was unreliable, which did not include mere suggestions by cross-examining counsel. (3) If the question arose whether a special warning should be given, it was desirable that the question be resolved by discussion with counsel

in the jury's absence before final speeches. ... (5) Where some warning is required, it will be for the judge to decide the strength and terms of the warning; it does not have to be invested with the whole florid regime of the old corroboration rules. (6) The court will only interfere with the judge's exercise of his discretion if it is unreasonable in the Wednesbury sense.

As to retrospectivity:

the general rule against the retrospective operation of statutes does not apply to procedural provisions ... Indeed the general presumption is that a statutory change in procedure applies to pending as well as future proceedings.³²

Prohibiting evidence of victim's previous sexual behaviour

A judicial officer is encouraged not to entertain evidence of the victim's sexual history by allowing questions regarding such sexual conduct to be put to the victim, any other witness or the accused person unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to ask such questions. The law in some jurisdictions prohibits the adducing of evidence relating to the victim's character or previous sexual history.³³ This provision seeks to protect victims of sexual violence, because such evidence and questions are aimed at portraying victims of rape as liars and as persons of 'loose morals' and who must have consented to sex. Where no leave of court has been granted, it is the duty of the court to intervene and save the victim from harassing cross-examination by the defence in an attempt to bring out evidence of the character and past sexual history of the victim. The effect of such harassing cross-examination, if permitted, is to subject the victim to further victimisation.

Dealing with medical and forensic evidence

In cases of VAW, especially in cases of sexual violence where the evidence is likely to be circumstantial, medical and forensic evidence is crucial for effective case building and prosecution by linking a perpetrator to a particular crime scene or victim.

Key forms of such evidence include:

- (a) DNA test results, hair sample analysis, blood-type test results and bite mark evidence;
- (b) fingerprints, saliva, blood and semen, tissue under fingernails, unique ligatures, hairs and fibres;
- (c) signs of injuries (e.g. cuts, scrapes, bruises, fractures, choking, pulled-out hair) that can be photographed or attested to by an examining physician or medical clinician;

- (d) paper documentation such as diaries, letters, notes, either from the suspect or written by the victim, and detailing past acts of abuse and violence;
- (e) weapons;
- (f) broken household items, indicating a violent incident;
- (g) observations of neighbours, friends and family;
- (h) statements from service providers involved in past incidents of violence;
- (i) prior police incident reports;
- (j) medical files detailing past injuries (used only with the permission of the victim);
- (k) evidence of court orders, including bail restrictions or restraining orders;
- (l) evidence of alcohol and/or drug abuse by the offender;
- (m) criminal record/history of the alleged offender and all related suspects; and
- (n) computer, internet/ email, text messages and other forms of electronic evidence (voicemails, answering machine tapes, and emergency number police tapes).

Expert testimony might be needed to explain the scientific methods that were used to collect this forensic evidence. Expert testimony could also be used to qualify the facts of a case. For example, physicians or other medical personnel could describe the type and sexual nature of the injuries that the victim suffered.

The judicial officer should ensure that such evidence is handled in such a manner as not to pervert the course of justice. Arrangements should be made to acquire originals or clear copies of the documents and other items within the ambit of the law. If the evidence is incontrovertible, arrangements can be made for the contents of the evidence to be admitted.

Prohibiting evidence of character

In some circumstances in cases of VAW, there is invariably a history of domestic abuse. There may have been previous complaints to the police; successful or unsuccessful prosecutions; or prosecutions initiated, but later withdrawn. In such situations, the issue of bad character – whether of the defendant or the alleged victim – may be raised in a VAW trial.³⁴ Bad character may be raised through evidence of or a disposition towards misconduct on the part of the accused, victim or a witness, other than evidence which has to do with the alleged facts of the offence with which the defendant is charged or is evidence of misconduct in connection with the investigation or prosecution

of that particular offence. The judicial officer needs to make a decision to determine the relevance and admissibility of such evidence.

General good practice in relation to victims and witnesses

1. A judicial officer is encouraged to advise the victim of the available remedies, such as claiming damages, restoration of damaged property, etc., as per the law applicable as well as any other resources that may be available in the non-governmental sector.
2. The judicial officer should allow the victim to tell her story in detail and give her the opportunity to present testimony on her perceived fear of retribution. The victim may be reluctant to testify, so the court should encourage her to do so and reassure her that her fear of future harm will be addressed.
3. In addition, a court should strive to keep victims informed about all aspects of the case, such as: the status of the case; the terms of the order of protection; and if the abuser has been released on bail, among others. This helps to make sure the victim's opinion and concerns are heard.
4. The judicial officer should remain impartial and give even-handed treatment in the courtroom. This may be by promoting access to counsel for all parties in the case in question.
5. Judicial demeanour is critical in cases of VAW. Best practice reveals that conditions that make a courtroom comfortable for victims and fair to perpetrators, by demonstrating impartiality and courtesy to all parties, are beneficial in the prosecution of cases. The judicial officer should win the trust of all parties.
6. The judicial officer should at all stages ask the victim to assess the present risk she believes the defendant poses to her, her family and the community.
7. The court should encourage use of victim impact statements (i.e., written or oral statements made by the victim concerning the physical, emotional or financial impact of the crime on the victim and her or his family) and statements of risk assessment, and should solicit the victim's recommendations for release conditions.
8. The judicial officer should not allow a defence of subsequent marriage or mutual settlement of the victim in a rape or defilement case.

3.4.4 Judgement and sentencing

The court should ensure that its intervention to address VAW is clear and consistent and has a preventive effect. Lenient or suspended sentences

undermine the authority of the court and send a message that VAW is a tolerated and socially acceptable behaviour.

What to consider when evaluating a case of VAW for sentencing

Aggravating factors

While considering cases of VAW, the judicial officer is encouraged to address him- or herself to, among others, the aggravating factors, i.e. any facts or circumstances that increase the severity or culpability of the acts of VAW, including public behaviour degrading or humiliating for the victim, witnesses and law enforcement officers and the perpetrator's criminal history, etc. Aggravating factors for VAW include recidivism, lack of remorse, the amount of harm to the victim and committing the crime in front of a child, among many others.

1. The scope and types of violence considered aggravating include:
 - (k) evidence of strangulation;
 - (l) threats with/use of weapons or dangerous tools, including the head and feet;
 - (m) sexual assault, rape or attempted rape within the context of VAW;
 - (n) stalking to cause fear and/or trauma (i.e. pose a threat to a person's psychological integrity and jeopardise the victim's sense of safety);
 - (o) extreme domination, which includes the perpetrator's constant control over the victim's behaviour with an exclusive goal to dominate the victim, who is always in a subordinate position with respect to the perpetrator;
 - (p) obsessive behaviour or obsessive jealousy; isolating the victim from family and friends to limit their support system (among other things, not allowing the victim to use a cell phone, home telephone or internet, checking the victim's cell phone and e-mail, censoring and checking the victim's mail, setting the time when the victim must be home from work, prohibiting the victim from contacting family, humiliating the victim at family events, etc.);
 - (q) vulnerability of victims (whether disabled, refugees, internally displaced persons (IDPs), returnees, age, illiteracy, etc.);
 - (r) involvement of child victims;
 - (s) potential consequences for children who have witnessed or been exposed to VAW;
 - (t) where the victim has left home in cases of domestic violence or placement of a victim in a safe house or in a place of hiding

- may be significant as potential evidence of abuse and signifies the possible need for a more severe criminal sanction;
- (u) group attack;
 - (v) planned attack, such as pre-meditation;
 - (w) sustained attack; and
 - (x) kicking / beating a victim who is on the ground.
2. Recidivism (repeated offence): If the perpetrator of VAW is a repeat offender, it is clear that previous sanctions imposed through the criminal justice system and allied institutions have not been successful and the court needs to explore ways of deterring the perpetrator from causing more harm.
 3. Duration of VAW over a long period of time (factual recidivism): This has to be established from the facts on how long the acts constituting the offence have taken place, which aim at countering the common defence that an incident of domestic violence is an isolated instance that does not constitute ongoing violence and abuse.
 4. The possible existence of psychological consequences for the victim during the entire duration of VAW, especially in cases of domestic violence: The court can request assistance from independent experts to assess and establish the consequences of long-term abuse on the victim. In *Uganda v NA*, in which the accused was convicted for murder at her own plea of guilt, the court sentenced 'the convict' to the rising of the court, taking cognisance of the fact that the convict had been the victim in the circumstances. The court reasoned that the deceased (the convict's father) had a moral obligation to protect the convict, but had turned perpetrator by subjecting her to repeated, incestuous sexual assault. The convict was to carry psychological scars for life. In *Uganda v Rwishosha*, the court sentenced the convict to imprisonment for life (without remission) for the incestuous sexual assault, which resulted in the victim (the convict's daughter) conceiving and giving birth to a child. The court noted that the convict's actions had left permanent psychological scars on the victim, including the birth of an incestuous child who bore a close resemblance to the convict. In the court's opinion, the convict had committed an abomination not only against any known culture, religion and custom, but had also violated the victim's human rights – including her dignity and personal integrity.

Perpetration of VAW under the influence of alcohol or drugs

It is a widely held view that court should be encouraged to recognise that in many cases of VAW, especially in cases of domestic violence, the perpetrator

Box 3.6 The defence of intoxication

David Munga Maina v Republic

The accused person in this case was convicted of the murder of his second wife and sentenced to death by the High Court. The accused beat up the deceased using the wooden handle of a jembe (hoe), inflicting fatal injuries. Prior to the incident, the accused had been drinking alcohol. The High Court found that the accused had the necessary *mens rea* to cause the death of the deceased and that, although he had drunk alcohol between 2 and 5pm when he left the bar and went home, the drinking was by choice and therefore voluntary.

The Court of Appeal was of a different view and reversed this decision on the ground that the accused person's drunkenness negated the intent to kill and a conviction for manslaughter was substituted. The Court of Appeal completely disregarded the fact that the drinking was by choice and therefore voluntary.

will consciously and/or intentionally place himself under the influence of alcohol or drugs in order to eliminate inhibitions and, in doing so, is more easily able to perpetrate violence against a family member.

According to relevant criminal codes, the legal qualification of self-induced mental incapacity does not constitute grounds for a more lenient sanction. The court should be wary of people who commit sexual offences while under the influence of alcohol, and who may want to use this as a defence to escape criminal responsibility or deterrent sentences. The influence of alcohol *per se* does not take away the criminal responsibility of a person who perpetrates VAW while voluntarily under the influence of alcohol, drugs or other substances.³⁵ However, as was held in *David Munga Maina v Republic*,³⁶ if violence results in death, intoxication can affect the ability of the perpetrator to form an intention to kill or to know that his actions will result in the death of the victim (see Box 3.6).

Accused's criminal history

It is recommended that previous court decisions and the previous criminal record of the perpetrator in violence cases be considered aggravating.

Deliberate delay of criminal proceedings by the accused

Attempts by the accused to delay or frustrate the conduct of proceedings – for example, by claiming procedural incapacity to attend the trial, and the court then determines that the accused is capable of attending the trial – should be considered an aggravating factor.

Accused's position of social power or authority

The court should take note when perpetrators use or attempt to use their position of social power or authority to establish power and control over

the victim, commit violence against the victim or otherwise coerce, abuse or threaten the victim or abuse their position to influence the actions of the police or court officials or demand special treatment by the court.

Furthermore, the existence of a fiduciary relationship between the offender and the victim, especially in sexual assault cases such as defilement, should also be taken as an aggravating factor.

Mitigating factors

Judicial officers may consider the following to be mitigating factors:

1. The accused's family status

The judicial officer should not assume that marital status or parenting is indicative of the accused's moral character. The accused's family status is not considered a mitigating factor, with perhaps one exception, in cases where the accused is a parent of a juvenile child or children and the only person responsible for supporting the family, provided that the incident of violence before court was an isolated incident of violence.

2. Significantly decreased mental capacity

The court may consider significantly decreased mental capacity as a mitigating factor only in exceptional cases, as outlined by the law in instances where the VAW was perpetrated with significantly decreased mental capacity due to temporary or permanent mental illness, temporary insanity or mental retardation. Such states constitute legal grounds for a more lenient sanction at the judicial officer's discretion, in light of the circumstances and evidence at hand.

3. The family's economic status and/or the accused's role as breadwinner

Best practice discourages courts from automatically valuing a family's poor economic and social status or the perpetrator's role as the primary breadwinner as a mitigating factor. Judicial officers must realise the possibility that a perpetrator's role as breadwinner may be a catalyst to continue the violence, especially in a domestic setting, because in that way the perpetrator exercises power over the victim, who is in most cases economically dependent upon the accused.

4. Accused's 'good behaviour' before the court

It is expected that a defendant will exhibit good behaviour before the court and therefore this should not in itself be considered a mitigating factor in sentencing. To arrive at a more objective conclusion, the court is encouraged to observe the mannerisms, demeanour and reactions of the victim, perpetrator and witnesses in the courtroom.

5. Remorse

Remorse represents the defendant's attitude towards the perpetrated offence. The accused's remorse should not automatically be considered a mitigating factor. In some instances, the act of remorse may be a dishonest gesture by the accused. Even when the defendant is remorseful, other factors must be considered – for example:

- (a) Whether there is a history of violence (i.e. previous domestic violence/abuse that occurred before the subject). This includes whether the domestic violence is ongoing, the perpetrator's attitude towards the act of violence after the incident and his psychological attitude towards the consequences of the offence or demeanour before the court.
- (b) If the accused appears before the court for VAW for the first time and there is no other indication of ongoing or continuous abuse. In any case, when determining the sanction, the court is encouraged to place emphasis on the act of perpetration and all the circumstances of the case, rather than the fact that the defendant expressed remorse. Courts are encouraged to exercise increased caution and critical analysis when valuing the perpetrator's remorse, given the possibility that the accused is intentionally deceiving the court and the difficulty of establishing whether the expressed remorse for the violence is honest.

Victim's attitude

In cases of VAW, as a general rule, the court should not consider the attitude of the victim when determining an appropriate sanction.

Best practice shows that courts are obliged to follow a general principle to impose a sanction proportional to the gravity of the offence and in accordance with general sentencing rules. The wishes of the victim may interfere with the application of a criminal sanction, yet it is important for victims not to feel responsible for the imposed sanction. Through coercion or fear of retribution, the victim may seek to influence the court's decision and plead for a more lenient sanction. Or they may plead for the case to be dismissed, and yet the attitude of the victim may not reflect the reality of the circumstances.

Specific actions – Judgement and sentencing

A judicial officer is encouraged to:

1. Write an opinion with explanations for the decision. It is prudent, where practically possible, to allude to best practice in other

- jurisdictions in meeting state international law obligations and adopting best practice, including reference to international standards to address decision-making and assessment and be guided by national, regional and international standards for judicial consistency.
2. Have a firm basis on which to hold the state accountable. The judicial officer is encouraged to familiarise herself/himself with the contents of state reports and national performance reports of international bodies, as well as jurisprudence of international courts such as the ground-breaking jurisprudence of the International Criminal Tribunal of Rwanda on rape as a tool of war – and thus a war crime – and the *case of Thomas Lubanga Dyilo*³⁷ before the International Criminal Court on the use of child soldiers as sex slaves.
 3. Use an alias or other accepted form of anonymisation to protect the identity of the victim in the judgement.
 4. Offer the perpetrator information on any rehabilitation programmes that are available, so as to achieve correction as well as punishment of offenders.
 5. Give the victim restitution when possible within the ambit of the law.
 6. Impose harsh penalties on repeat offenders to deter others and discourage repeat offenders, commensurate to the harm caused, to the extent possible.
 7. Impose stringent sentences where appropriate (e.g. where there is prior history of VAW, history of threats to others, viciousness and callousness, or in the case of a particularly vulnerable victim).
 8. Make orders that can protect the victim, witnesses and society at large, such as orders on physical distancing, non-approach, exclusion; safety of children, child contact; access to weapons/firearms; or mandatory or voluntary counselling.

Judicial supervisory considerations

The judicial officer is encouraged to:

- (a) Maintain a record of cases of VAW.
- (b) Create awareness for all court personnel, inclusive of the court staff who interact with the victim and the perpetrator, of the guidelines or any standard operating procedures that may have been developed and tell them to help minimise the trauma that victims may face in court facilities.
- (c) Ensure that the guidelines and the checklist are distributed to all court staff, and oversee court compliance with them.

- (d) Assess whether court responses meet the goals of victim safety and offender accountability after a determined period of use of the guidelines and the checklist. If such goals are not fully met, suggest means for achievement of these goals.
- (e) Determine the need for additional training and awareness raising for court staff on an ongoing basis.

Judicial outreach of the community

The judicial officer is encouraged to:

- (a) Contribute to civil society and community meetings to advise women and the community in general on VAW, human rights, the court process and punitive measures against offenders.
- (b) Promote community education, judicial involvement in it, and a 'zero tolerance' policy for violence against women.
- (c) Advise on legal aid/pro bono and other support services options.

3.5 Addressing challenges

Due to the sensitive nature of VAW cases, and with the background of the challenges discussed above, a special approach is sometimes required. It might be necessary for the court to consider precautions to protect the physical and emotional safety of a witness or victim of violence, so that the victim is able to access justice on a basis of equality. Some of these challenges can be addressed by the judiciary or the particular judicial officer hearing any particular case to hold perpetrators accountable, while others can be addressed through legislative and policy interventions.

3.5.1 Pre-trial

The court should develop networks and co-ordinate as much as possible with the police and key stakeholders in advance to develop a strategy beforehand as to how to handle cases of VAW. Recommended mechanisms are such as those put in place by the JLOS Chain Linked Committees operational in Uganda, which ensure that there is a co-ordinated approach to the delivery of justice by all relevant actors.³⁸

3.5.2 During trial

Addressing gender stereotypes

The courts must be wary of the gender stereotypes and customs that trigger events that spark off incidents of VAW. Examples of such customs, which

Box 3.7 Rono v Rono

This case involved the inheritance of the deceased's 192 acres of land by his two wives and male and female children. The High Court considered the customary law applicable to the deceased, wherein succession was patrilineal and prohibited daughters from inheriting their fathers' land, and the statutory law of succession, which provides for distribution to all dependents. The learned judge awarded the daughters a lesser share of the land compared to that of their brothers. The reason for so doing was the gender stereotype that the daughters were expected to get married, leave the clan and inherit from their husbands. Fortunately, this decision was set-aside on appeal because it discriminated against the daughters of the deceased person. The Court of Appeal awarded all the children of the deceased an equal share, irrespective of their gender.

Faced with an almost similar situation, the court *In the Matter of the estate of Lerionka Ole Ntutu*⁴⁰ held that a customary law which denies daughters the right to inherit their father's land was repugnant to justice and morality, as it discriminated against the daughters of the deceased and could not apply to the estate of the deceased in this case. The court held that both the daughters and sons of the deceased were equally entitled to inherit the land of their deceased father.

in some locations are deeply rooted, include the custom that prohibits daughters – irrespective of their marital status – from inheriting their fathers' property, particularly land. Unfortunately, this and other gender stereotypes sometimes find their way into the courtroom and deny women equality before the law and equal protection of the law.

Women seeking to inherit their fathers' land are sometimes subjected to discrimination and unequal treatment and protection of the law of inheritance. Such unequal treatment was demonstrated in the Kenyan case of *Rono v Rono* (see Box 3.7).³⁹

Ensuring state compliance with the due diligence principle to investigate VAW

Justice ought to be delivered equally to all individuals, irrespective of their gender, race or financial status. Freedom and security of the person is a fundamental right to which both men and women are entitled and the state has a duty to ensure that this right is enjoyed on a basis of equality. The due diligence principle goes hand in hand with the principle of non-discrimination. Governments are under the obligation to act on and investigate cases of violence against women in the same manner as any other cases involving other crimes. It is the duty of the judiciary to ensure that the government applies the same level of commitment in relation to investigating, punishing and providing remedies for acts of VAW as it does with other crimes. The obligation of the state and its agents and institutions to act with due diligence to investigate acts of violence includes the obligation to do so without discrimination, and the judiciary must ensure that this obligation is discharged. Judicial officers should highlight these deficiencies

Box 3.8 Ensuring compliance with the due diligence obligation to investigate CK (A child) and 11 others v COP & 2 others

The petition was filed against the Kenyan government by 11 girls aged between 5 and 15 years of age, through Ripples International, an organisation that had sheltered 160 girls in the Meru community who were victims of sexual abuse. The petitioners had experienced sexual abuse at the hands of family members, caregivers, neighbours, employers and, in the case of one girl, a police officer. As a result of the abuse, some girls became pregnant; some contracted sexually transmitted diseases, while others sustained physical injuries that required surgery.

Although each of the victims had reported or attempted to report the defilement to the police, the response of the police was inadequate and ranged from failure to record the complaints in the Police Occurrence Book, demanding money to fuel police vehicles, interviewing the victims in a humiliating manner, and failure to arrest the perpetrators and to interview witnesses. The alleged perpetrators, who were well known, continued to roam free and to threaten the victims and their families.

The main issue for determination was whether failure by the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence was a violation of their fundamental rights and freedoms under Articles 21(1),⁴² (3),⁴³ 27–29,⁴⁴ 48,⁴⁵ 50(1)⁴⁶ and 53(1)(d)⁴⁷ of the constitution⁴⁸ and international and regional human rights treaties.

Allowing the petition, the High Court found the government culpable for systemic violence and held that while the perpetrators were directly responsible for many of the harms suffered by the girls, the respondents could not escape responsibility as their failure to ensure effective investigation and prosecution of perpetrators had created a climate of impunity in which the perpetrators knew that they could defile innocent children without fear of apprehension and prosecution.

The court declared that the fundamental rights of the petitioners enshrined in the cited articles of the constitution and under the international and regional human rights instruments and national laws, including the right to access justice on a basis of equality, had been violated following failure by the police to enforce Kenyan laws, including the Sexual Offences Act. Finally, the court issued an order directing the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence.

as they enter judgement. This was demonstrated in the celebrated case of *CK (A child) and 11 others v Commissioner of Police (COP) and 2 others*,⁴¹ a summary of which appears in Box 3.8.

Ensuring discharge of obligation to prevent VAW

Although the case of *Suzette Irene Nelson v Minister of Safety and Security and Another*⁴⁹ is not a judgement emanating from the East African region, it is good practice that should be emulated by judicial officers in East Africa. In cases where the state fails to act with due diligence to prevent violence, the court must hold the state accountable – as was held in the *Suzette Irene Nelson case*.

In this case, the plaintiff's husband was a licensed firearm holder. He threatened to shoot the plaintiff with his firearm and she petitioned to court seeking a protection order. The protection order was granted, but the government took no steps to withdraw the firearm and subsequently he shot

and injured the plaintiff. The court found that by failing to take steps to have the perpetrator declared unfit to hold a firearm, the police failed to act with due diligence to prevent and protect the applicant from violence. Finally, the court held that the state was liable to compensate the plaintiff, because it was the constitutional duty of the state to give its citizens protection from all forms of violence and by failing to take steps to withdraw the firearm, the state breached the due diligence obligation to protect Irene Nelson from violence. The court ordered the first defendant (the state) to pay to the plaintiff such damages as she was able to prove.

Applying judicial creativity to promote access to justice

The national constitution of any country is a powerful tool, which judicial officers can and are strongly encouraged to interpret in a creative manner to pronounce progressive decisions in cases of domestic and other forms of violence against women. Where there is no legislation providing for the grant of a particular order sought by a victim of violence, the court can, through judicial activism and creativity, apply the constitution and grant orders that will protect women and girls from violence. The court in Vanuatu demonstrated such creativity in interpreting the national constitution in the case of *Taleo v Taleo*.⁵⁰ Although this case does not emanate from the judiciary in East Africa, it demonstrates good practice that should be emulated by the courts in East Africa (see Box 3.9).

Ensuring discharge of obligation to punish violence through deterrent sentences

The obligation of the state to act with due diligence and punish acts of domestic and all the other forms of VAW includes legislating for sanctions that ensure perpetrators of such violence are sentenced in a manner commensurate with the severity of the offence committed. It also requires ensuring that victims receive compensation for the harm suffered and that the right to seek compensation from the offender or from the state is guaranteed and, where appropriate, measures are taken to reintegrate the

Box 3.9 Judicial creativity – A tool to address VAW

In *Taleo v Taleo*, the applicant applied for an order to restrain the respondent from assaulting her on his return, and from approaching or contacting her at her parent's home. In the absence of a written law giving the court jurisdiction, the court relied on S. 47 of the Constitution of Vanuatu, which creates a duty for the courts to act fairly and, where there is no legislation, to determine matters according to substantial justice. The court granted the protection order sought, because it served the ends of justice. Also see *Uganda v Peter Matovu*,⁵¹ in which the court relied on a constitutional provision to override a statutory rule of evidence.

perpetrator into the community.⁵² The **Victim Protection Act of Kenya** addresses the issue of reparation, restitution and compensation.

One of the strengths of the Kenya SOA is the mandatory minimum sentences that it has prescribed upon conviction for a sexual offence. Unlike previously, when the court had discretion in sentencing under the Penal Code, judicial officers must keep within the minimum limits set by the SOA. Both the **Tanzania Penal Code** as amended by the **Sexual Offences (Special Provisions) Act** and the **Uganda Sexual Offences Act** provide deterrent mandatory minimum sentences in sexual offences.

The benefit of minimum sentencing legislation is to ensure that consistency is maintained in sentencing and that the sentence in each case is commensurate with the gravity of the offence committed. In rape cases, for example, the sentence prescribed in section 3(3) of the Kenya **Sexual Offences Act** is ‘not less than ten (10) years but this may be enhanced to imprisonment for life.’ Attempted rape⁵³ carries a penalty of not less than five years imprisonment, but which may also be enhanced to imprisonment for life. In cases of defilement, the sentence varies depending on the age of the child victim. If the victim is between the ages of 12 and 15 years, imprisonment for a term of not less than 20 years is prescribed.⁵⁴ If the child victim is aged 11 years or less, a mandatory sentence of imprisonment for life is prescribed.⁵⁵ Where the child is aged between 16 and 18 years, the sentence upon conviction is imprisonment for a term of not less than 15 years.⁵⁶

The **Tanzania Penal Code**, as amended by the **SOSPA, 1998** also provides statutory sentences that must be applied upon conviction. Judicial officers should be able to pronounce these sentences as a warning to future offenders.

The law on Prevention of GBV in Rwanda prescribes highly deterrent sentences, especially when taking into account aggravating factors such as infecting someone with a terminal illness, causing death or disability, or abuse of trust or authority.

Using the constitution and human rights Instruments to address gender stereotypes in law, practice and procedure

Gender stereotypes in the law, in practice and on the part of judicial officers, together with the procedures applicable to cases of sexual violence, make it difficult for victims of violence to access justice and protection. Courts should be wary of the rules of evidence, which require corroboration in sexual offence cases. Such rules of practice discriminate against women and child victims of sexual violence.

The further requirement that the court warns itself of the danger of convicting an accused person on the uncorroborated evidence of a victim of sexual violence portrays women/girls as liars who should not be believed

Box 3.10 Gender stereotypes in law and in practice deny women victims equal protection

R v Rashidi Mohamed [1968] HCD 269

The accused person was convicted by the subordinate court of the offence of having committed an unnatural offence c/s 154(1) of the Tanzania Penal Code. The only evidence was that of the complainant, an elderly woman. On appeal, the conviction was set aside and the accused person set free.

The court held that as a general rule, corroboration of the evidence of a victim of a sexual offence was a requirement; however, in the absence of such corroboration, it was possible to convict if the trial magistrate warned him- or herself of the danger of convicting in the absence of corroboration. As there was no such warning, the conviction was quashed. This was in total disregard of the section 143 of the Evidence Act, 1967, as amended by the Act No. 19 of 1980, which provides that no particular number of witnesses is required to **prove any fact**.

Maina v Republic [1970] EA 370

In the above appeal, which arose from a conviction for a sexual offence, the Court of Appeal, Kenya – at that time supporting the requirement for corroboration of the evidence of women and girl victims of sexual violence – allowed the appeal and issued a warning containing the following words indicative of a gender stereotype:

.....it has been said again and again that in cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women do tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence, the magistrate must warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning he comes to the conclusion that in the particular case, the woman or girl, without any real doubt is speaking the truth, then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in this case....

in the absence of independent evidence to corroborate their claims in sexual offences. Since the same caution is not required of the evidence of women and girls in cases involving other criminal offences, it is implied that the credibility of a complainant in a sexual offence case is given different treatment from that of women complainants in any other criminal cases – thereby subjecting women victims of sexual violence to discrimination. It denies them application and protection of the law on a basis of equality of all persons before the law (see Box 3.10).

Unfortunately, the gender stereotype within the warning by the Court of Appeal in *Maina v Republic* remained on record from 1970 when it was issued, and was an authority binding on the lower courts, which continued applying it until 2003 when it was overruled by the same Court of Appeal in *Mukungu v Republic*.⁵⁷ In this case, the court held that all previous decisions which held that corroboration was essential in sexual offences before conviction were no longer good law in Kenya, as they conflicted with Article 82 of the constitution.⁵⁸

Three years later, in *Uganda v Peter Matovu* (ibid.), the court declined to apply the said common law rule that required that it warn itself of the danger of convicting on the uncorroborated evidence of a victim of a sexual assault. The court relied on the Constitution of Uganda and on human rights instruments to which Uganda is a state party, and held that the rule discriminated against women victims of sexual offences and was therefore unconstitutional. These two decisions constitute good practice on the part of the courts, which are required to interpret and apply all laws and procedures in line with the provisions of the national constitution and to interpret national constitutions in the context of human rights instruments to which the government is a state party.

Women are entitled to equal status in marriage, during its existence and at its dissolution. This includes, among others, the right to equality in the ownership of property during the existence of the marriage and at its dissolution. However, violence creates inequalities in marriage and this negatively affects the property rights of women. The courts must ensure that women enjoy this right during the marriage and at the end of such marriage. Upon dissolution of marriage, which more often than not is as a result of violence, the right to equality with regard to distribution of property acquired during the existence of marriage frequently arises – when the court is called upon to adjudicate on the property rights of the parties.

In *Kivuitu v Kivuitu*,⁵⁹ the dispute was over a house purchased during the subsistence of a marriage, which came to an end through a divorce order. The court awarded a 50 per cent share in the disputed property. Though *obiter*, the court, Omolo Ag JA (as he then was) in the lead judgement, recognised that the wife's contribution to the acquisition of family property can be direct (financial) or indirect by way of her services towards the welfare of the family. The principle of equality contained in this decision, which was made at a time when Kenya had no constitutional provisions on equality in marriage and had not enacted legislation on matrimonial property, is the foundation of similar decisions in subsequent cases. This principle has since found its way into Article 45(3) of the Constitution of Kenya, 2010, while the recognition of the wife's direct and indirect contribution has found its way into Kenya's matrimonial property legislation.

Box 3.11 The right to matrimonial property

Tanzania

The Marriage Act of Tanzania,⁶⁰ section 56, empowers every married woman to acquire, own and dispose of property. Section 57 of the act provides that the wives of a polygamous man have equal rights and status.

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Section 59 protects the matrimonial home and provides that: where any estate or interest in the matrimonial home is owned by one spouse, it shall not be alienated by way of sale, mortgage, lease or in any other way, except with the consent of the other spouse. The other spouse is deemed to have an interest in the matrimonial home which is capable of protection by caution, caveat or otherwise under the law relating to registration of Title.

Under the act, there is a rebuttable presumption that any property acquired by one spouse during the subsistence of a marriage, belongs absolutely to that spouse to the exclusion of the other spouse. If the property is acquired and registered in the joint names of both spouses, there is a rebuttable presumption that the beneficial interests therein are equal (section 60). If either spouse gives any property to the other spouse by way of gift, section 61 provides that there is a rebuttable presumption that the property belongs to the recipient absolutely.

Ownership and division of matrimonial property between spouses⁶¹

Upon separation or dissolution of marriage, the court is empowered under section 114 of the Marriage Act to order division, between the spouses, of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. In exercising this power, the court is required to take into account, among others: the custom of the community to which the parties belong and the extent of monetary or work contributions made by each party towards the acquisition of the property. According to section 114(3), '*assets acquired during marriage*' include assets owned by one party before marriage and which have been substantially improved, during marriage, by the other party or by their joint effort.

Kenya

The Constitution of Kenya, Article 45(3), entitles spouses to equal rights at the time of marriage, during marriage and at its dissolution. The recently enacted Matrimonial Property Act (MPA), 2013,⁶² recognises the equal status of spouses and in section 4 provides that a married woman has the same rights as a married man to, among others, acquire, administer, hold, control, use and dispose of property, whether movable or immovable. Section 6 defines matrimonial property to comprise the matrimonial home(s), household goods and effects in the matrimonial home(s), or any other moveable or immovable property jointly owned or acquired by the parties during the subsistence of the marriage. According to section 7, ownership of matrimonial property vests in the spouses according to the contribution of either spouse to its acquisition and upon dissolution of the marriage, the property shall be divided between the spouses. However, the parties to an intended marriage are entitled to enter into an agreement before the marriage to determine their property rights.⁶³

If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, according to section 8, the matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only if the property was acquired before the man married another wife. If the property was acquired by the man after he married another wife, the property shall be regarded as owned by the man and both wives, taking into account any contributions made by the man and each of the wives. However, if the parties have agreed that the wife shall have her matrimonial property with the husband separate from that of the other wives, any such wife will own her matrimonial property equally with the husband without the participation of the other wife or wives.

Acquisition of interest in property by contribution⁶⁴

Where one spouse acquires property before or during the marriage and that property does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made. Section 2 of the act defines 'contribution' to mean monetary and non-monetary contribution and includes: domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

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Provisions protecting interest in matrimonial property⁶⁵

During the subsistence of a monogamous marriage, an interest in matrimonial property shall not be alienated in any form whether by way of sale, mortgage, lease, gift or otherwise except with the consent of both spouses. A spouse is entitled to the matrimonial home and shall not during the subsistence of the marriage be evicted there from by or at the instance of the other spouse, except by an order of the court. A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution under the laws relating to registration of Title to land or Deeds.

Presumptions as to property acquired during marriage⁶⁶

Where matrimonial property is acquired by a spouse during marriage, there is a rebuttable presumption that the property is held in trust for the other spouse, and if the property is acquired in the names of the spouses jointly, there is a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

Gifts between spouses⁶⁷

When, during the subsistence of the marriage, a spouse gives any property to the other spouse as a gift, there is a rebuttable presumption that the property there after belongs to the recipient.

Lobbying the repeal of stereotypes and discriminatory provisions in the law

Where stereotypes and discriminatory provisions exist in national laws, the court is in a powerful position to lobby the repeal of such provisions. It has a duty to bring these to the attention of the executive arm of government and to recommend a repeal of such provisions. Such recommendations can be made in the judgements that the courts make in cases of VAW and by causing such judgements to be served upon the Attorney-General and Law Reform Commission, where these exist. Recommendations for repeal of such laws can also be made at judicial officers' seminars, annual conferences and workshops, at the opening of the new law year, in statements to parliament during the budget-making process, and at other awareness-raising fora and passed on to the government for action.

Prior to the amendment of the Tanzania Evidence Act in 1980, no conviction could proceed from the uncorroborated evidence of a young child. The evidence of an adult only could provide such corroboration: the evidence of another young child could not provide such corroboration, because it too required corroboration.⁶⁸ However, following the amendment, the current position in Tanzania is that courts may convict an accused person on the uncorroborated evidence of a young child, and the evidence of such a child may now be corroborated by the evidence of another child 'of tender years'. The amendment removed the discriminatory provision.⁶⁹ However, this is the case only if the child of tender years is able to give evidence on oath in cases where the court finds that such a child possesses sufficient intelligence and has understood the duty to tell the truth.

In Kenya, under the Evidence Act as amended,⁷⁰ section 124, the evidence of a child victim of a criminal offence cannot form the basis of a conviction unless it is corroborated by other material evidence implicating the accused person. However, if the criminal case involves a sexual offence, and the only evidence is that of the alleged child victim of the offence, the court is mandated to receive the evidence of the child victim and proceed to convict the accused person if it is satisfied that the alleged child victim is telling the truth. The court is required to record the reasons why it is so satisfied. By removing the discriminatory mandatory warning before convicting in sexual offence cases, the amendment to this section enhances access to justice and gives child victims more protection.

However, from the first part of section 124, it is clear that discrimination against child victims of other offences still exists, because the evidence of such child victims of other offences requires corroboration by other material evidence implicating the accused person.

Identifying victims of VAW, including battered woman syndrome

Women victims of violence, suffering from the 'battered woman syndrome',⁷¹ may find themselves before courts of law as accused persons having killed or inflicted injuries on those who perpetrate violence against them. Claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome, should be taken into account during investigations, prosecutions and sentencing against them.⁷²

Dissolution of marriage as a protection measure

In most divorce proceedings, courts often find themselves dealing with allegations of domestic violence as a ground for seeking dissolution of the marriage. Legislation on VAW promises more protection for women when it provides for dissolution of marriage on account of cruelty.

In most Commonwealth member countries, including Kenya, Uganda, Rwanda and Tanzania, the marriage laws identify cruelty as a ground upon which the court can dissolve a marriage to protect women victims from further violence. However, in assessing the various acts of cruelty complained of, the court should be vigilant in order to give 'cruelty' a liberal and gender-sensitive interpretation in order to protect women from violence.

In *Meme v Meme*,⁷³ the late Chesoni J (as he then was) confirmed the definition laid down in *Russell v Russell*⁷⁴ and adopted in *Horton v Horton* {1940} page 187, by stating that:

Cruelty as a matrimonial offence upon which a petition for dissolution of a marriage may be grounded, is defined as, a wilful and justifiable conduct

of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such danger.

In granting the dissolution of marriage on ground of cruelty, the High Court in the Malawi case of *Vaux v Vaux*⁷⁵ noted that the types of mistreatment the petitioner suffered at the hands of her husband caused her serious psychological suffering and, since it denied the petitioner equality in the marriage, it constituted GBV as defined by the *United Nations Declaration of the Elimination of Violence against Women*. The court further held that the cruelty that she was subjected to amounted to a violation of her fundamental human rights, as well as those of the only child of the marriage.

Applying the constitution and treaty law to strike out discriminatory laws

In order to enhance access to justice for women and child victims of violence, judicial officers are encouraged to interpret national constitutions and laws in the context of the provisions of international and regional treaties to which the country is a state party. The courts should be vigilant and ought to enhance victims' access to justice by declaring such laws discriminatory and not applicable in the courts in East Africa. This is because the East African countries are states parties to CEDAW, which condemns discrimination, and the national constitutions of these countries also proscribe discrimination.

The approach taken by the learned judge in *Uganda v Peter Matovu*⁷⁶ is to be emulated. In this case, the learned judge declined to apply the common law rule that where a victim alleges that the accused committed a sexual offence against her, the court must warn itself that it is dangerous to act upon the uncorroborated evidence of the victim and, before so acting, to satisfy itself that the victim is a truthful witness. He explained that the rule discriminated against women, who were the most frequent victims of sexual offences. The judge found that it was therefore inconsistent with the Constitution of Uganda and international law obligations, particularly CEDAW Article 1.

He noted that under Article 2 of the constitution, which proclaims equality for all persons under the law, equal protection of the law and protection against discrimination on ground of sex, Uganda had '*enacted the heart of the above international instruments*'.

3.5.3 After trial

Where a community partnership already exists, the judicial officer is encouraged to conduct an after-action review with stakeholders, including court staff, partners in the justice sector and non-governmental organisations, to establish lessons learned and map out the best way forward. In cases where there is no co-ordinated response, the judicial officer is encouraged to use the convening and mobilising power of the court to develop such mechanisms.

Engaging with informal dispute resolution institutions

Outside the courtroom, judicial officers command power and respect in the community and have a role to play in preventing VAW and enhancing gender equality and access to justice. Many women, particularly those in the rural areas, find the courts inaccessible due to, among others, the financial cost, the complexity of procedures involved and the time taken to resolve disputes in the formal legal system. Their lives are governed by informal norms, practices and institutions that apply customary laws to resolve all manner of disputes – including land disputes, ownership and inheritance of property, including land, and issues of VAW. Some women prefer dealing with these informal institutions, which they consider to be more efficient because they resolve disputes expeditiously and are less expensive compared to the formal justice system which can take years to resolve any given dispute.

Customs, traditions and culture, meanwhile, are often used to justify VAW – relegating women to subordinate positions where they endure discrimination. Some customs and culture are causal factors for VAW. These include beliefs in harmful traditional practices like FGM, forced marriage and child marriage, among other harmful practices.

One way of preventing VAW and enhancing gender equality is for judicial officers to work towards reconciling culture and customary norms with statutory laws. In order to achieve this, it is important for the judiciary to engage with informal institutions as part of the process of implementing laws that prevent/protect women from harmful traditional cultural practices in order to enhance access to justice. Working with informal institutions and sensitising them on women's rights and the consequences of VAW are crucial in addressing VAW.

Box 3.12 Reconciling customary norms with statutory laws

Colloquium on Gender, Culture and the Law, with Chiefs and Land Disputes Tribunals

In 2009, the Commonwealth Secretariat, together with the KWJA, organised the *Gender, Culture and the Law, with Chiefs and Land Disputes Tribunals* colloquium. The colloquium brought together local chiefs, magistrates, district administrators and members of Land Disputes Tribunals in the Rift Valley province of Kenya. Here they received training in gender, human and women's rights, and the Land Disputes Tribunals Act – in order to enhance their capacity to apply the Land Disputes Tribunal law in a gender-sensitive manner to resolve land disputes in which women were parties.

Although their decisions have no force of law, local chiefs were included in this colloquium because of their informal role in resolving land and other disputes.

Subsequently, the Secretariat organised a meeting in London, the outcome of which was separate handbooks on the land rights of women in Sierra Leone, Kenya, Nigeria and Cameroon. Since land can be a source of conflict and violence against women, particularly in matters of succession, these handbooks are yet another step in strengthening women's access to justice.

Campaigns and advocacy to create awareness of VAW

Many women are ignorant of their rights and this is an impediment to realisation of those rights. Women can only arise to claim their rights if they are aware of those rights and the remedies available. It is important that women and the public in general be sensitised on women's rights and VAW and encouraged to report cases of such violence whenever it occurs. The role of judicial officers to address VAW is not confined to the courtroom. They can also take part in creating awareness of the adverse effects of violence and in sensitising women, and the community in general, on women's rights and the consequences of violence for the lives of women and children.

They can also create awareness of the existence of laws to address such violence. Such initiatives are instrumental in enhancing women's awareness of their rights and the available remedies and services. When the Uganda Domestic Violence Law was enacted, the National Association of Uganda Women Judges (NAWJU) prepared a booklet on domestic violence and travelled the country sensitising women about the new law, their rights and the remedies available under the law. The booklet, which was translated into the local languages, was widely distributed as a tool to address VAW and to inform women of their rights. In partnership with the International Association of Women Judges (IAWJ), NAWJU developed a training curriculum to sensitise judicial officers on the connection between GBV and HIV/AIDS.

During the implementation of the Jurisprudence on the Ground (JOG) project, the Tanzania Women Judges Association (TAWJA) worked with the Society of Women Against AIDS-Tanzania (SWAA-T) key workers and designed brochures on various topics connected with VAW – namely, domestic violence, marriage and divorce, custody of children, distribution of matrimonial property upon dissolution of marriage, simple litigation, inheritance upon the death of a spouse, will writing and sexual harassment. These brochures have been used to educate women and other members of the community on how to access the courts of law, particularly in cases involving the above-mentioned issues, as well as on discrimination and violation of human rights by relatives or other persons in authority. Like the Jurisprudence of Equality Training Program (JEP) (see below), JOG has had a significant impact on women's rights in Tanzania.

The media as a tool to address VAW

The media is a powerful campaign tool for public education via newspapers, radio, television and other multimedia information and communication systems with the capacity to provide coverage countrywide and worldwide. The media should not therefore be left out of the campaign and awareness-creating strategy. Judicial officers can work with the media by providing

training on women's rights, VAW and the root causes of such violence, as well as generating awareness on ethical reporting, and the need to protect the privacy of victims and witnesses and to safeguard against secondary victimisation.

Such training should target journalists and other media personnel who report cases of VAW, which is critical as it may enhance the quality of reporting, contribute to increased awareness and understanding of the consequences of violence against women, and influence societal attitudes. The initiative taken by the TAWJA is a good example of what judicial officers can do outside the courtroom to address violence against women.

For example, according to the TAWJA Sextortion Tool Kit (see Box 3.13), the Tanzania Women Media Association designed a television advertisement warning about sextortion (abuse of power by sexual exploitation). The advertisement depicted a schoolgirl dressed in a school uniform being seduced by an amorous man. She rejects the sexual overtures, saying '*sidanganyiki*', which means, 'I cannot be deceived' and the embarrassed man shamefully walks away. The media in Tanzania has continued to sensitise people on sextortion by reporting sexual offence cases.

Additionally, the media can be used to expose occurrences of VAW by bringing to the attention of the authorities cases of domestic violence that were previously considered to be a private matter. Media reports cover incidents in the workplace, schools and institutions, as well as carrying reports on government and public policy that may have an impact on VAW.

Capacity building of other persons who respond to VAW

Enacting laws and prescribing penalties is not all that is required to address GBV and VAW. All those who respond to violence require the capacity to respond to such violence in a gender-sensitive manner. They must have sufficient knowledge of the laws and their duties under those laws in order to implement and enforce them effectively.

As part of discharging the state's obligation to address violence, the judiciary must ensure that these other officers receive sufficient training on the content of the laws that they implement.

Apart from judicial officers, police officers, prosecutors, lawyers and medical personnel are some of the other people who come into contact with witnesses, perpetrators and victims of violence against women at various stages of a case. These officers are in positions of authority and it is important that those appearing before them are comfortable in their presence. Such an environment can only be created by the officers through sensitisation and training. Gender-sensitivity training – particularly in the area of women's rights and, specifically, gender-based and other forms of VAW – is a critical

intervention in addressing VAW. Such training should target all stakeholders, including the police, prosecutors, investigators, medical personnel, children's officers, policy-makers and the entire criminal justice system to create in them an understanding that violence against women is a human rights issue.

Training in VAW and in the performance of their duties is also critical for non-technical officers such as receptionists, court clerks, office attendants, secretaries and registry staff. All technical and non-technical officers in the justice system come into contact with witnesses and victims of VAW and have a role to play in ensuring access to justice by victims of violence. Such training will enhance their capacity to deal with victims and witnesses with a gender-sensitive understanding, remove gender biases and stereotypes, and will influence the ability of women to access justice on a basis of equality.

Toolkits to address VAW

The development of the TAWJA Sextortion Tool Kit (Box 3.13) is good practice worth emulating, as it builds the capacity of the various actors who respond to sextortion offences. It is a valuable tool in addressing VAW and contains resource materials on the role of different stakeholders – the judiciary, police, prosecutors, medical practitioners and the media – in combating sextortion; how sextortion fits in the broader context of sexual abuse; the legal framework for prosecution of sextortion in the criminal justice system; the legal framework for bringing sextortion cases in the civil justice system; challenges encountered during investigation and prosecution

Box 3.13 The TAWJA Sextortion Tool Kit to address sexual exploitation

Sextortion under the laws of Tanzania is the abuse of a position of power or authority for sexual exploitation. Such abuse can take many forms, but it will always involve someone in a vulnerable position who needs something that the person in authority has the power to grant or to withhold. When the person in authority demands a sexual favour in return, this is sextortion. Between 2009 and 2011, the TAWJA ran a programme referred to as '*Stopping the abuse of power for purposes of sexual exploitation: Naming, Shaming and Ending Sextortion*'. The programme was a project of the International Association of Women Judges (IAWJ) and was administered in collaboration with the IAWJ. Under the sextortion programme, TAWJA conducted seminars for judicial and non-judicial personnel in the judiciary and the police. This was aimed at building the capacity of the various actors who respond to offences of sexual exploitation by persons in positions of authority in Tanzania.

The association designed brochures on sextortion, which were disseminated throughout the country. The output of this programme is the *Sextortion Tool Kit*, which is designed to: address a wide range of circumstances under which vulnerable women and children suffer molestation, harassment, exploitation and humiliation through abuse of authority; provide a resource for law enforcers, stakeholders and the public; raise awareness and generate interest in eradicating the practice of sextortion in private and public institutions; help to reduce sexual abuse, harassment and exploitation by fostering greater awareness, consciousness and good ethical behaviour in private and public institutions; and underscore human dignity and respect in private and public institutions, in the family and across Tanzania as a whole.

of sexual offences such as sextortion; and the relationship between sextortion and public service ethics.

Improving access to justice

Access to justice does not depend only on the way proceedings are conducted and how the law is interpreted and applied. For victims of violence, access to justice will also depend upon the availability and accessibility of the courts, as well as their affordability. These are key factors that determine if victims of violence will engage with the judicial system and seek protection. The location of the court, high levels of illiteracy, high court fees, ignorance of the law and complex court procedures all impede victim's access to justice. The institution of the judiciary has a duty to address all the challenges discussed herein, so that victims can access justice on a basis of equality with perpetrators. Article 48 of the Constitution of Kenya, which addresses access to justice, creates an obligation on the part of the government to ensure access to justice for all persons, and if any fee is required, such fee shall be reasonable such that it shall not impede justice. The judiciary in Kenya has, through the Judiciary Transformation Framework (JTF),⁷⁷ tried to address the accessibility of the courts (see Box 3.14).

Judicial training in human rights and violence against women

The administration of justice for victims will be strengthened if judicial officers have knowledge of human rights law and standards contained in

Box 3.14 The Judiciary Transformation Framework (JTF) – Kenya

The Judiciary Transformation Framework adopts various strategies to make the courts accessible by all, including women victims of violence. The objective of Pillar 1 of the JTF⁷⁸ is 'to provide equitable access to justice for all', by improving physical access to the courts and reducing distance. This is to be achieved through the construction of new courts, provision of mobile courts, ensuring that all courts are accessible to all users, including people with disabilities, and the use of ICT tools to provide access without requiring the physical presence of litigants.

The establishment of special courts for children and other marginalised and vulnerable groups, simplifying court procedures and reducing costs are also aimed at improving functional access to courts and court services. Another initiative includes the establishment of customer care desks at every court station. These provide customer care services to litigants, and are equipped with information on organisations that provide legal aid and assistance. Judicial collaboration with other justice sectors is aimed at increasing access to legal aid/assistance and this should enhance access to justice by victims who require legal aid.

Individuals who benefit from such initiatives include women victims of gender-based violence who have no legal representation and who find it difficult to access the courts due to the language of the court and/or complex court procedures. Such procedures may in particular relate to divorce, maintenance, matrimonial property, succession and custody of children – all of which might arise from VAW. Efforts being made to help women victims of violence participate more effectively in the court process include translating court procedures into the national languages (English and Kiswahili).

international and regional instruments as well as national constitutions and laws. All participants who may be involved in a domestic violence case – including judges, bail commissioners, clerks, court reporters, advocates, prosecutors, defence attorneys, probation officers, law enforcement, child welfare workers and guardians *ad litem* – must be educated on the dynamics of abuse and effective interventions in order to improve their operations and response. These partners in a domestic violence court must also be educated about one another's roles and responsibilities, in order to work together effectively on these cases.

The application of the standards set in these human rights instruments offers women protection from violence. However, judicial officers cannot be expected to apply international human rights law and standards if they do not know the provisions of the various conventions and other instruments to which their respective countries are state party.

It is important to equip judicial officers with knowledge of the various regional and international human rights instruments that have been signed and ratified by their respective countries, particularly those that concern women and which establish an obligation on states parties to act with due diligence to protect women from violence. Capacity-building training for judicial officers in the areas of human/women's rights and gender-based violence will enhance their understanding of the issues. Such training serves to enhance their understanding and interpretation of the various conduct and acts that constitute domestic and other forms of violence against women.

Jurisprudence of Equality Training Program (JEP)

In the year 2000, the International Association of Women Judges (IAWJ) recognised the importance of capacity-building training for judges and introduced the Jurisprudence of Equality Training Program (JEP) in the East and Southern Africa jurisdictions. JEP is a three-year judicial innovative training programme addressing women's human rights. It was developed by the IAWJ in partnership with the then International Women Judges Foundation, together with some judiciaries in Africa.

The objective of the JEP is to train judges and allied professionals on the application of international and regional human rights conventions to cases arising in national courts and which involve discrimination or violence against women. The training also aims at enhancing the capacity of trainees to identify the various forms of violence perpetrated against women. JEP training workshops and seminars bring judges and magistrates together to focus on the concrete meaning of the abstract guarantees of 'equal protection' and 'non-discrimination.' The skills acquired during the training enable judicial officers to decide cases related to VAW, in accordance with the principles of equality and non-discrimination enshrined in CEDAW and other international and

regional human rights instruments and national constitutions and legislation. During JEP seminars, judicial officers are introduced to international human rights law, CEDAW and other conventions on women's rights, with the objective of equipping them with knowledge and skills required to apply human rights law and norms to resolve cases involving VAW and discrimination. Through case studies, problem-solving exercises and other adult learning techniques, participants have the opportunity to share insights with colleagues and deepen their understanding of international law as applied to national contexts.

The training, which is also aimed at removing gender stereotypes and patriarchal mindsets on the part of the judiciary, has produced a core group of judges and magistrates who are well versed in human rights law, with the experience of applying regional and international instruments in domestic courts.⁷⁹ It has greatly enhanced the capacity of judges and magistrates to address violence against women. Many JEP-trained judges and magistrates in the region credit the programme with alerting them to the nature and scope of: gender discrimination, domestic and other forms of violence against women, hidden biases (their own and others') and stereotypes that sustain these biases (see Box 3.15).

Box 3.15 JEP Training in East Africa

JEP training in Tanzania

JEP training has become an official part of the Judicial Training Institute in Tanzania.⁸⁰ It is one of the ways the judiciary is addressing violence against women in the country. The training was introduced in Eastern (Kenya, Uganda, Tanzania) and Southern Africa in the year 2000 through a Training of Trainers Workshop at Entebbe in Uganda, where judges and magistrates from the region were trained with a view to going back to their respective countries to train their peers. Tanzania conducted JEP training for judges and magistrates between 2001 and 2003 in Dar es Salaam, Moshi, Arusha and Mwanza.

At the end of the three-year JEP period and in support of continued legal education for judicial officers, the judiciary in Tanzania funded the JEP training – with an HIV/AIDS component added thereto – from 2004 to 2006. More JEP seminars were conducted in Dar es Salaam, Mwanza and Dodoma, and at the Institute of Judicial Administration, Lushoto in Tanga for more than 400 second-year diploma students, the majority of whom were prospective primary court magistrates.

In 2007–09, the United Nations Democracy Fund (UNDF) provided funding for the Tanzania Women Judges Association (TAWJA), which made it possible for the JEP training to be extended. Upon extension, the project adopted the name Jurisprudence on the Ground (JOG) which, like JEP, was jointly executed by IAWJ, the TAWJA and a community-based organisation known as the Society of Women Against AIDS in Africa (SWAA-T). As a result, TAWJA held JOG seminars for judges and magistrates in Dar es Salaam, Mwanza, Dodoma, Songea, Arusha and Kigoma. The JOG Kigoma seminar for judges and magistrates from the Bukoba, Mwanza, Shinyanga, Rukwa and Tabora zones was funded by UN-Women, Tanzania. The officers were sensitised on human right violations in the areas affected by the influx of refugees during the genocide massacres in bordering Rwanda and Burundi, and to a lesser extent, refugees from the Democratic Republic of Congo.

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JEP training in Kenya

The Kenya Women Judges Association (KWJA), in partnership with the IAWJ, took part in the Training of Trainers Workshop at Entebbe in the year 2000 and – like Tanzania – embraced JEP as one of its projects with effect from 2001, which was the first project year.

Two JEP seminars were conducted in the year 2001 in Nyeri and Mombasa, and judges and magistrates were introduced to international human rights law and norms on women's rights, as contained in the various international human rights instruments. At the end of the three-year JEP project in Kenya, the KWJA received a grant from the Commonwealth Secretariat, which made it possible for the association to develop a comprehensive training curriculum on the 'Jurisprudence of Equality'. The training curriculum is the final output of the JEP project. It forms the basis of training of judicial officers by the KWJA and it is a tool addressing VAW.

The judiciary has benefited greatly from the JEP training. This is demonstrated by the way courts continue to adopt a gender-sensitive approach and to apply human rights law in cases of VAW and women's rights in general. JEP training has been incorporated into other trainings in Kenya, while KWJA is advocating for the adoption of the JEP Training Curriculum into the syllabus of the Judicial Training Institute.

JEP training in Uganda

The Uganda Association of Women Judges (NAWJ(U)) implemented JEP from the year 2001, and trained more than 200 judicial officers on the use of international instruments when deciding cases involving discrimination or violence against women. Judicial officers who have attended the training have observed that it has improved their ability to detect gender bias and deliver gender-sensitive judgements.⁸¹ JEP training has also been incorporated into other trainings in Uganda.

Sensitisation and awareness raising

Judiciaries across the region continue to address VAW through training, seminars and workshops, which serve to enhance their understanding of the adverse effects of VAW and help them to come up with strategies to address such violence. In December 2014, the judiciary in Uganda held an international colloquium on 'Sexual and Gender-based Violence in Uganda'. The objective of the colloquium was to provide judges with a platform to reflect on the practice relating to sexual gender-based violence (SGBV). The reflections covered contributing factors and the impact of SGBV, the Uganda context, different dimensions of SGBV, comparative jurisprudence from the East African region and court practices.

The colloquium discussed various topics including; understanding sexual gender-based violence (SGBV), its causes, social cultural practices and beliefs; the psychosocial impact of SGBV; SGBV transitional justice; SGBV cases and statistics in Uganda; the policy dimensions to SGBV; structures for addressing SGBV; and legal aid issues.

Such trainings are important for judicial officers, because through discussions and sharing of information, they enhance their understanding of VAW and how to address it in the courtroom.

Box 3.16 KWJA's Bench Book on Family Law

The procedure of filing succession cases in the Family Court under the Law of Succession Act of Kenya is highly technical. Due to legal illiteracy, most litigants, particularly women, are unable to fill out the numerous forms that are prescribed under the act.⁸²

Assistance is normally provided by registry staff, who help in filling out the forms. To enhance access to justice, the Kenya Women Judges Association (KWJA) has produced a very simple *Bench Book on Family Law*, which has simplified the procedure. The Bench Book provides a checklist of the requirements and identifies the forms required at different stages of a case involving succession/inheritance of property of a deceased person.

It also gives a simplified checklist of the numerous jurisdictions conferred by law to various courts under the many marriage laws that existed at the time when the *Bench Book* was produced. It also summarises, in very simple language, the procedure and requirements in adoption matters under the Children Act, 2001. These efforts go a long way in strengthening the administration of justice and enhancing women's access to justice.

During the colloquium, a *Judicial Training Manual on Sexual and Gender-based Violence*, developed by FIDA Uganda (the Uganda Association of Women Lawyers) and the Uganda Judicial Studies Institute in 2011, was launched. The training manual is an important tool that will help the judiciary to enhance access to justice by women victims of VAW in Uganda.

Addressing the language barrier and complex procedures

One way of enhancing access to justice is to address the challenge of language and complex procedures. This can be achieved through the development of more guidelines and bench books to simplify the law, procedures and legal language. Such manuals and bench books can also inform judicial officers, women and the entire community of women's rights and how to claim them through the judicial process (see Box 3.16).

Notes

- 1 Geneva Centre for the Democratic Control of Armed Forces.
- 2 Bangalore Principles on the Domestic Application of International Human Rights Norms, 26 February 1988, 14 *Commonwealth Law Bulletin*, 1196 (1988), Principle No. 2.
- 3 Ibid, Principle No. 6.
- 4 Petition No. 8 of 2012 High Court of Kenya.
- 5 Kenya Women Judges Association (2008), *Training Manual*, Foreword by Lady Justice Roselyne Nambuye.
- 6 Agency For Cooperation and Research in Development (ACORD) (2009), *Kenya, An Audit of Legal Practice on Sexual Violence*, ACORD.
- 7 Mutua, M (2007), 'Sexual Offences Guide Launched', *EA Standard Newspaper*, 20 December 2007.
- 8 ACORD (2009).
- 9 KWJA (2008).

- 10 {2008} eKLR, available at: <http://www.kenyalaw.org>.
- 11 Ibid.
- 12 Sexual Offences Regulations 2008; Sexual Offences (Dangerous Offenders [DNA Data Bank]) Regulations 2008; and the Sexual Offences (Medical Treatment) Regulations 2012 (Republic of Kenya 2008a, 2008b, 2012).
- 13 Sexual Offences Rules of Court 2014 (Republic of Kenya 2014).
- 14 This challenge is covered in detail under the discussion of the general challenges below.
- 15 <http://www.theguardian.com/law/2013/feb/27/judges-threatened-abused-family-courts>
- 16 *Uganda v Apai Stephen*, Criminal Session Case No. 23 of 1994 (unreported).
- 17 Criminal Appeal No. 47 of 1995 (unreported).
- 18 Constitution of Uganda, Art. 23 (6).
- 19 Supreme Court Criminal Application No.1 of 2003.
- 20 The Kenya SOA provides the procedure relating to the conduct of proceedings in cases of sexual violence. These provisions, together with the Sexual Offences (Rules of Court), 2014, are aimed at enhancing the ability of victims of sexual violence and vulnerable witnesses to access justice.
- 21 The Kenya SOA S. 31(2)-The court may on its own initiative or acting on the application of the prosecutor or any witness other than the accused or those witnesses mentioned in s. 31(1).
- 22 See also the Youth Justice and Criminal Evidence Act 1999, United Kingdom.
- 23 Section 31(5), Sexual Offences Act, Kenya, Regulation 7, but warns itself on corroboration requirements. However, section 31(10) prohibits the court from convicting an accused person on the uncorroborated evidence of an intermediary; directs that the proceedings shall not take place in open court; (camera proceedings); prohibits the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or any other measure which the court deems just and appropriate depending on the circumstances of each individual case; any views expressed by a knowledgeable who is acquainted with or has dealt with the witness; the need to protect the dignity and safety of the witness and to protect the witness from trauma; and whether the protective measures are likely to prevent the evidence being given by the witness from being effectively tested by a party to the proceedings – section 31(8).
- 24 (2008), *Report of the 'Partners for gender justice' Conference*, 19–21 November 2008, Accra, Ghana, page 13.
- 25 United Nations Department for Economic and Social Affairs (UNDESA) (2010), *Handbook For Legislation on Violence Against Women*, UNDESA, Division for the Advancement of Women, Part IV, 16(c).
- 26 *Report of the 'Partners for Gender Justice' Conference*, page 13.
- 27 Sexual Offences Rules of Court, 2014, LN 101/2014, made under the Sexual Offences Act (Republic of Kenya 2014).
- 28 The Civil Procedure Act, Chapter 21, Laws of Kenya, available at: <http://www.kenyalaw.org>.
- 29 Criminal Appeal No. 430/2007 (unreported).
- 30 See Susan Estrich, 'Rape', 95 Yale LJ 1087 (1986) (arguing that the law on rape has not only reflected 'the restrictive and sexist views of our society; it has legitimized and contributed to them'). See also: Susan Brownmiller, 'Against Our Will: Men, Women and Rape', 347 (1975) (recognizing the persistent view in the law that the woman who fails to immediately come forth publicly is suspicious); Susan SM Edwards, 'Female Sexuality and the Law' 49 (CM Campbell and Paul Wiles (eds.) 1981) (arguing that the law of evidence and procedure in relation to rape trials continues to presume the female provoked the assault); Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', 96 Harv. L Rev. 1497 (1983) (positing that the legal reforms regarding female victimisation and aiming to improve the status of women fail because such reforms merely perpetuate domination and hierarchy under the persistence of the male/female dichotomy).
- 31 *Regina v Makanjuola* (1995) 2 Cr App R 469, [1995] 1 WLR 1348, [1995] 3 All ER 730.

- 32 Ibid.
- 33 34 of the Sexual Offences Act [Kenya].
- 34 The UK Criminal Justice Act 2003 introduced a statutory scheme relating to the admissibility of evidence of bad character, and all previous common law rules have been abolished.
- 35 UNDESA (2010), Part III, section 15(f); see also UN General Assembly, *Updated Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice*, A/RES/65/228, Guiding Principles, Part III, section 15(f).
- 36 *David Munga Maina v Republic*, {2006} eKLR.
- 37 ICC-01/04-01/06.
- 38 JLOS.
- 39 In the Court of Appeal of Kenya, Civil Appeal No. 66 of 2002, available at: www.kenyalaw.org.
- 40 High Court of Kenya at Nairobi, HC Succession Case No. 1263 of 2000, available at: www.kenyalaw.org.
- 41 *CK (A child) through Ripples International as her Guardian and Next Friend & 11 others versus The Commissioner of Police/Inspector General of the National Police Service & 2 others*, High Court at Meru, Petition No. 8 of 2012, 2012 eKLR, available at: www.kenyalaw.org.
- 42 The fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
- 43 The duty of all state organs and all public officers to address the needs of vulnerable groups within society, including women and children.
- 44 The right to equality and freedom from discrimination, the right to human dignity and the right to freedom and security of the person.
- 45 The right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 46 The right to have a dispute that can be resolved by application of law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.
- 47 The right of every child to be protected from abuse, neglect, harmful cultural practices and all forms of violence.
- 48 The Constitution of Kenya (2010), Kenya Gazette Supplement No. 55 of 27 August, 2010, available at: <http://www.kenyalaw.org>.
- 49 In the High Court of South Africa, Case No. 1326/2004.
- 50 *Taleo v Taleo*, Civil Appeal No. 83 of 1996, unreported, SRM Court, Vanuatu.
- 51 In the High Court of Uganda at Kampala, Cr. Session Case No. 146 of 2001.
- 52 UNDESA (2010), Part V, pages 12–13.
- 53 Sexual Offences Act, Cap 62A, Laws of Kenya, Section 4.
- 54 Ibid, Section 8(3).
- 55 Ibid, Section 8(1).
- 56 Ibid, Section 8(4).
- 57 (2003) AHRLR 175, 30 January 2003 (Ke CA 2003).
- 58 Article 82 of the former constitution. Article 82 provided that: ‘no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority’.
- 59 *Kivuitu v Kivuitu*, Civil Appeal No. 26 of 1985, reported in (1991)2 KAR 241.
- 60 The Marriage Act, No. 5 of 1971, Tanzania.
- 61 Ibid, section 114.
- 62 Matrimonial Property Act, 2013, (Act No. 49 of 2013), Date of Commencement 16 January 2014.
- 63 Ibid, section 6(3).
- 64 Ibid, section 9.
- 65 Ibid, section 12.

- 66 The Matrimonial Property Act, Act No. 14 of 2013, section 14.
- 67 Ibid, section 15.
- 68 Law Reform Commission Tanzania (1998), 'Criminal Law as a Vehicle for the Protection of the Right to Personal integrity, Dignity and Liberty of Women', Discussion Paper presented at the 48th Meeting of Tanzania Law Reform Commission, page 51.
- 69 Ibid.
- 70 Republic of Kenya (2006), Evidence Act, Chapter 80, Laws of Kenya, as amended by Act No. 5 of 2003 and Act No. 6 of 2006.
- 71 'Battered woman syndrome' is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or accept offers of support.
- 72 See *Anieta Natasha Ferreira & Others v State and Uganda v N A*, reproduced in Box 1 at pages 28 and 31.
- 73 *Meme v Meme* Divorce Cause No. 52 of 2005/[1976-80] KLR 17.
- 74 {1895} page 315.
- 75 MWHC 127-HC of Malawi (Lilongwe District Registry).
- 76 Ibid, at page 106.
- 77 Judiciary Transformation Framework, 2012–2016
- 78 Ibid; Results-based matrix, Pillar 1, People/User-Focused Delivery of Justice, pages 22–24.
- 79 The International Association of Women Judges (IAWJ) Case summaries on selected by JEP participants, available at: <http://www.iawj.org/jep/jep.asp>
- 80 (2008), Report of the 'Partners for gender justice' Conference, 19–21 November 2008, Accra, Ghana.
- 81 Wolayo, H (2007), *The Role of Judges' Associations: A perspective from Uganda*, November 2007.
- 82 The Republic of Kenya, The Law of Succession Act, Chapter 160, Laws of Kenya, available at <http://www.kenyalaw.org>.