

Chapter 14

Sexual Violence and Abuse of Authority/Trust

Case 14.1 WJ and LN (Minors Suing through their Guardians, JKM and SCM) v Astariko Henry Amkoah & Others and the Cradle and 3 Others (NBI)

(HC Constitutional and Human Rights Division Petition No. 331 of 2011)

Facts

WJ aged 12 years and LN aged 13 years sued Astariko Henry Amkoah (deputy head teacher), Jamhuri Primary School, the Teachers Service Commission (TSC) and the Attorney-General (AG) over their defilement by the deputy head teacher of Jamhuri Primary School. They filed a petition at the Constitutional and Human Rights Division of the High Court through their guardians. The TSC and AG were sued in their respective representative capacity as being vicariously liable for their employee's (deputy head teacher's) act of defilement.

It was the evidence of the petitioners that in July 2010, Amkoah deceived the two victims that he was taking them for an educational trip but instead lured them to go with him to his house. He ordered LN and WJ to do house chores for him and later on defiled the girls.

The incident was reported to the area chief and later a police statement recorded at Solai Police Station, where he was charged with defilement.

Amkoah tried to settle the matter amicably through elders, but his efforts failed. The TSC took disciplinary action against him by sacking him and deregistering him from the registry of teachers.

Issue:

1. Whether sexual violence against a student amounted to a violation of the right to education and health as provided for under Article 43(1) of the constitution and Section 7 of the Children Act.
2. Whether the state and the TSC were liable for Amkoah's actions.
3. Whether a judgement in a criminal court acquitting him would bar the constitutional court in determining constitutional rights on the same facts.

Held *inter alia* that:

1. Where a teacher defiled a child, leading to emotional and psychological trauma, feelings of being an outsider in society, and as somehow to blame for the acts of the perpetrator, as detailed in the girls' counsellor's report, that amounted to violation of the right to dignity and self-worth of the victims of the abuse, which was continuous in its effect.
2. The consequences of sexual violence against minors were severe and could affect their physical and emotional well-being and also expose them to the risk of contracting sexually transmitted diseases, thus affecting their right to health. In addition, the fact that their psychological well-being was affected was a violation of their right to health, which was defined as including the highest attainable standard of physical and mental well-being.
3. Jamhuri Primary School, TSC and the state were under a duty to ensure that pupils who were in educational institutions and therefore under their care, young, immature and therefore vulnerable, were protected from harm. In particular, they were under a duty to safeguard pupils from sexual abuse by the teachers. Should they fail to do that, they would not only be liable for failing in their duty of care to the pupils, but also would be liable for the unlawful acts of the teachers found to have sexually abused the pupils.
4. Public policy considerations dictated that those in charge of educational and other institutions be held strictly liable for abuses committed by those whom they have placed in charge of vulnerable groups such as minors in educational institutions. It was not enough to prosecute those found to have breached the duty of care and to have intentionally committed criminal acts against minors, and that the institutions were under a duty to ensure that there was no room for abuse by those they had placed in charge of those vulnerable groups. Thus TSC and the state were vicariously liable for Amkoah's actions.

Order of court

On relief, damages were the only remedy that the court could offer. In respect of the liability of the TSC and the state, such damages should not only be paid by Amkoah but also by his employer, the state through the TSC, which had failed to adequately exercise its duty of care to the two girls.

The state was thus ordered to pay Shs2 million to WJ and Shs3 million to LN.

Ratio decidendi

1. Where a child is defiled by a teacher, the defilement amounts to violation of a child's right to:
 - i. dignity,
 - ii. health and education.
2. The state and employers of a primary perpetrator of sexual violence can be held vicariously liable for the illegal acts of their employee.

Contribution to jurisprudence/ point to note:

1. Criminal prosecutions result in punishment of an offender and the victim of the offence is merely a witness in the proceedings. However, a court can use its discretion to craft effective remedies which take into account the personal needs of the victims; for example, award of damages to the victim.
2. Furthermore, in using its discretion, courts must be aware that in some circumstances, primary perpetrators of sexual violence may not have the financial ability to pay the kinds of awards or damages ordered by the court; so by holding the state liable, the court ensured that the damages were to be paid by the state/ government. This would constitute an effective remedy to victims of such horrendous crimes.

Case 14.2 Prosecutor v Munyawera Moustapha

(RPAA 0069/CS)

Supreme Court of Rwanda at Kigali

Facts

The appellant was charged with the offences of defilement, attacking, persuading or deceiving children to commit themselves to prostitution or fornication and benefiting from such prostitution of children in contravention of Articles 34, 38 and 39 of Law No. 27/2001 of 28/04/2001 relating to rights and protection of the child against violence.

The appellant, who was infected with HIV/AIDS, had received two children at his home. He was fully aware the children were school dropouts. The appellant proceeded to explain to the children what sexual relations involve and added that he wanted to have sexual intercourse with one of them while the other would massage him at a rate of RWF2000 a day.

At trial, the appellant was convicted and sentenced to 30 years' imprisonment by the Second Instance Court at Gasabo for defiling the two children,

attacking, persuading and deceiving them to commit themselves to prostitution and fornication, and also benefiting from their prostitution.

The appellant lodged an appeal before the High Court. On appeal, he argued that the Court of Second Instance had disregarded the fact that Mutumba Joly, a person claiming to be a mother to one of the girls, was not her true mother and the signature on her identity card differed from that which was given during her interrogation. The appellant added that the court did not consider the contradictory statements of one of the girls, since she had denied having had sexual intercourse with him before the prosecutor and doctor. It was not until two months after her interrogation by the police that she went and stated before the prosecutor that she had indeed had sexual intercourse with him (the appellant).

The High Court found the appellant guilty of defiling only one child and sentenced him to 20 years' imprisonment and a fine of RWF200,000. He lodged a further appeal to the Supreme Court.

Issue on appeal

1. Whether there was sufficient evidence on which the High Court based its conviction of defilement.

On appeal to the Supreme Court, the appellant explained that the two girls he was convicted of defiling had gone to his home as visitors and he had received them. Further, he had taken them to a nightclub where they had desired to go and they had returned to his house in the morning where they slept and eventually left to return to their homes. The appellant added that he had given RWF10,000 to the girl he was convicted of defiling as assistance, as she was an orphan and he denied having used the money to further prostitution.

The prosecutor stated that the evidence used to convict the appellant sufficed. It consisted of statements from two girls confirming that one of them was defiled and the appellant having indeed spent four days with the children, taking them to a nightclub and also having rented a house for one of the girls who was defiled, and having offered her money for welfare.

The Supreme Court of Rwanda held that:

1. On the evidence, the appellant was undoubtedly guilty due to the fact that both girls had confirmed in interrogation by the prosecutor that the appellant had slept with one of them and defiled her. The appellant had also confirmed having spent two nights with the girls, taking them to a nightclub and giving them money, despite the fact that he knew they had dropped out of school.
2. Even though the appellant maintained his plea of not guilty, he could not provide tangible justifications for such unusual and bad

behaviour towards the two female children that he had kept in his house while he had no relationship with them, apart from saying that he was assisting orphans. The appellant had even admitted that his actions were careless and wrong and anybody with common sense would have realised the situation was strange and abnormal.

3. The contradictions of the child victims during interrogation could be explained through other ways and in any case they did not affect the fact that the appellant had defiled the victim and there was ample corroboration from other evidence.
4. The appellant could not rely on the fact that because he was infected with HIV/AIDS, in order to prove his guilt, the girl he defiled should have had the same disease. This was because he had failed to prove that a person living with HIV/AIDS who defiles another has to absolutely infect them.
5. In the absence of evidence showing that the woman who claimed to be the victim's mother had not authored the signature on the statement, this piece of evidence could not impeach other incriminating pieces of evidence.

Order of court

Munyawera was ordered to pay the court fees of RWF35,883 in a period of 8 days – failure of which, his property would be seized.

Ratio Decidendi

Where a person living with HIV/AIDS or a sexually transmitted disease (STD) defiles a girl, but it is not established that the victim has been infected with HIV or STD, this in itself does not make the perpetrator innocent of the crime.

Case 14.3 Prosecution v Kazina Lucien

(RPAA 0103/09/CS)

Supreme Court of Rwanda at Kigali

Facts

The appellant was accused of defiling a two-year-old child. The child had informed her mother on their return home that she felt pain. The child's mother discovered that the child's private parts were swollen and injured. On asking the child who had done this to her, the child had implicated the

appellant, saying that he had ‘touched her with his stick’. It was also found upon medical examination of the child that she had a sexually transmitted disease, as well as the fact that there were signs suggesting that sexual friction may have occurred.

The appellant was tried by the Muhanga Second Court of Instance and convicted for defilement. He was sentenced to life imprisonment and a fine of RWF100,000.

On appeal to the Nyanza High Court, the court found no reasons to overturn the lower court’s ruling and therefore upheld it.

On further appeal to the Supreme Court of Rwanda, the appellant argued that a two-year-old child could not leave their home unaccompanied. He also contended that a two-year-old could not talk and therefore could not explain with precision how she was defiled. Finally, the appellant also highlighted the failure to examine him and confirm whether he possessed the same sexually transmitted disease which the child victim had contracted.

The prosecutor resisted the appellant’s arguments, arguing that the claim that a two-year-old child could not leave her home unaccompanied was baseless. It was the prosecutor’s contention the two-year-old child in this case lived in the same neighbourhood as the appellant, and the appellant himself had affirmed that he was alone in the same house with the child. The prosecutor also found no merit in the appellant’s second ground of appeal, as a two-year-old child had a way of giving an account of what had happened to her and, in any case, the doctor had confirmed she was defiled. The prosecutor also discredited the appellant’s third argument that he was not examined to confirm whether he had the same disease as the child. He stated that the appellant had no proof that he had ever made a request for any such examination. Additionally, the lack of his medical examination was inconsequential, as it would not be able to challenge the facts upon which the ruling was based in the lower courts.

The Supreme Court of Rwanda held *inter alia* that:

1. The appellant’s contention that two-year-old children could not leave home unaccompanied was inconsequential, as there was a witness who confirmed that the two-year-old child had followed her back to the appellant’s home where the witness left her. This was corroborated by the fact that her mother affirmed that she had collected the child victim from the appellant’s house when returning home.
2. The fact that the appellant and the mother of the child victim were close neighbours meant that in any case the two-year-old child could still travel unaccompanied to the appellant’s home.

3. Two-year-old children were capable of communication, even if they could not form sophisticated sentences like adults. This was proved by the fact that the child managed to communicate to her mother that she was feeling pain and on asking who had inflicted the injuries on the child, the child in a rather childish manner stated that it was the appellant who had ‘touched her with his stick’. Though childish, the statement implicated the appellant.
4. In cases of defilement, a medical report was not regarded as best evidence but was only helpful in corroborating other pieces of evidence, and there was alternative medical evidence proving that the child had been defiled. This was in addition to other pieces of evidence that proved the appellant’s guilt. They included: the statement of the child as to who had defiled her, the confirmation of a witness that the child had been left at the appellant’s residence, the mother’s affirmation that she had collected the child from the appellant’s residence and the appellant’s contradiction. While the appellant denied being at his house and claimed that he had learnt of the child’s presence at his home from other children, he had earlier confirmed that the child was indeed alone with him at his house.

Ratio Decidendi

1. Although a medical report is not regarded as best evidence, it is helpful in corroborating other pieces of evidence.
2. Where a person living with HIV/AIDS or a sexually transmitted disease (STD) defiles a girl but it is not established that the victim has been infected with the HIV or STD, this in itself does not make the perpetrator innocent of the crime.

Case 14.4 CK (a Child) & 11 Others v the Commissioner of Police/Inspector General of the National Police Service, the Director of Public Prosecutions, Minister for Justice, National Cohesion & Constitutional Affairs and Kenya National Commission of Human Rights ... Amicus Curiae

(Petition 8 of 2012)

The High Court of Kenya

Facts

A group of young girls challenged the Kenya government on its inaction regarding sexual abuse of children – defilement. The action was filed in the

context of a high prevalence of sexual violence against children in Meru County and indeed in the whole country.

The petitioners were on diverse dates between the year 2008 and 2012, victims of defilement and other forms of child abuse. They made reports of the acts of defilement at various police stations within Meru County. The police failed to conduct prompt, effective and professional investigation into the complaints. For example, the police did not record the complaints in the Police Occurrence Book, did not visit the crime scenes, did not interview the witnesses or collect and preserve evidence, and did not put in motion such other processes of the law as would have brought the perpetrators of the sexual violence to account for their unlawful acts. Furthermore, police officers demanded money before they could intervene in anyway, refused to investigate the complaint, claiming that the complaint had been made late; they interrogated some of the petitioners loudly and in public in the hearing of all present at the police station, thereby subjecting the petitioner to humiliation and inhuman treatment. Further still, the police refused to arrest or interrogate some perpetrators.

The petition was based on several articles in the Constitution of Kenya, 2010, the Universal Declaration of Human Rights and the African Charter on the Rights and Welfare of the Child, Kenya's Children Act 2001(Chapter 141) of the Laws of Kenya, the Sexual Offences Act, 2006 (Act No.3 of 2006 and the Police Act (Chapter 84) of the Laws of Kenya.

Judgement

The petitioners seek the following reliefs:

1. A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first 11 petitioners' complaints of defilement violates the first 11 petitioners' fundamental rights and freedoms:
 - (a) to special protection as members of a vulnerable group;
 - (b) to equal protection and benefit of the law;
 - (c) not to be discriminated against;
 - (d) to inherent dignity and the right to have the dignity protected;
 - (e) to security of the person;
 - (f) not to be subjected to any form of violence from public or private sources or torture or cruel or degrading treatment; and
 - (g) to access to justice as respectively set out in Articles 21(1), 21(3), 27,28,29,48,50(1) and 53(1) (c) of the constitution.

2. A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first 11 petitioners' respective complaints violates the first 11 petitioners' fundamental rights and freedoms under:
 - (a) Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights;
 - (b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the Rights of the Child;
 - (c) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child; and
 - (d) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and People's Rights.
3. An order of *mandamus* directing the first respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the first to eleventh petitioners' respective complaints of defilement and other forms of sexual violence.
4. An order of *mandamus* directing the third respondent together with his agents, delegates and/or subordinates to:
 - (a) formulate the National Policy Framework envisioned by Section 46 of the Sexual Offences Act, 2006 through a consultative and participatory process, ensuring its compliance with the constitution and to disseminate, implement and widely and regularly publicise the National Policy Framework; and
 - (b) make and/or cause the National Policy Framework in (a) above to be made a mandatory component of the training curricula at all police training colleges and institutions.
5. An order of *mandamus* directing the third respondent together with his agents, delegates and/or subordinates to implement the guidelines provided in the Reference Manual on the Sexual Offences Act, 2006 for prosecutors, Sections 27–36, excepting section 34.
6. An order of *mandamus* directing the first respondent together with his agents, delegates and/or subordinates to implement Article 244 of the constitution in as far as it is relevant to the matters raised in this petition.
7. An order directing the respondents to regularly ... account to the Honourable Court, for such period as the Honourable Court may direct, on compliance and/or implementation of the orders set out in paragraphs (3) to (6) (inclusive) above.

8. The costs of and incidental to this petition.
9. Such other, further, additional, incidental and/or alternative reliefs or remedies as the Honourable Court shall deem just and expedient.

The issue for determination in this petition is whether failure on the part of the police to conduct prompt, effective, proper and professional investigation into the petitioners' complaints of defilement and other forms of sexual violence infringes on petitioners' fundamental rights and freedoms under the Constitution of Kenya, 2010?

Article 157(6), (a), (b), (c) and (II) of the Constitution of Kenya, 2010 provides:

'(6) The Director of Public Prosecutions shall exercise state powers of prosecution and may –

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.'

It is therefore clear that it is the duty of the Director of Public Prosecutions to institute and undertake criminal proceedings against any person before any court and in doing so shall have regard to the public interest, the administration of justice and the need to prevent and avoid abuse of legal process.

Under Article 244 (a)–(e) of the Constitution of Kenya, 2010, it is provided:

'244. The National Police Service shall –

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society.'

I further find that the petitioners in this petition have suffered horrible, unspeakable and immeasurable harm due to acts of defilement committed

against them. They each suffered physical harm in the form of internal and external wounds from the perpetrators' assaults and some suffered consequences of unwanted pregnancies vested on children not physically mature enough to bear children. The petitioners have suffered psychological harm from assaults made worse by the threat, fear and reality of contracting HIV/AIDS and other sexually transmitted diseases or infections.

Whereas the perpetrators are directly responsible for the harm to the petitioners, the respondents herein cannot escape blame and responsibility. The respondents' ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a 'climate of impunity' for commission of sexual offences and in particular defilement. As a result of which the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted. This to me makes the respondents responsible for physical and psychological harm inflicted by perpetrators, because of their laxity and their failure to take prompt and positive action to deter defilement.

The worst [thing] is that the petitioners visited various police stations after defilement and gave names of the perpetrators being people they knew, yet the respondents did not bother to take appropriate action. Instead the respondents showed disbelief, blamed the victims, humiliated them, yelled at and ignored them, as they put them under vigorous cross-examination and failed to take action. The respondents are in my view directly responsible for psychological harm caused by their actions and inactions. The petitioners have since become self-doubtful, self-loathing, are full of self-blame, and have low self-esteem. That has been documented among the petitioners following contact with the police.

It is as a result of the above-mentioned that the petitioners had to flee and seek protection and safety from the twelfth petitioner leading to their separation from their close family members, friends, and community and removal from their homes, schools and where close support was mostly needed. The failure to act appropriately is directly liable for the psychological damage experienced by the petitioners arising from their alienation from family, schools and their own communities.

The petitioners' counsel attached opinions of two experts on Kenyan and international police standards for establishing the standards to be applied to police treatment of defilement. The experts on Kenya policing standards concluded *inter alia* that:

In all cases investigations were inadequate in that the Police failed to visit scenes of crime to gather evidence that is vital in collaboration of a case, did not interview witnesses/victims, samples were not taken and even those

produced by victims were never forwarded to the Government analysts for examination...

The expert on international policing standards concluded *inter alia* that:

The Investigations of these eleven cases fall short of international policing standards. The very basic steps required to investigate crimes of this nature have been overlooked and ignored. There seems to be a prevailing attitude that crimes of this nature are not taken seriously. These failures are significant in that there not only is an urgent need to re-assess how these cases are investigated, but there is also an immediate need to adjust the attitude of the Police handling them ...

The respondents in this petition failed to implement the rights and fundamental freedoms as enshrined under Article 21 of the Constitution of Kenya, 2010. The respondents have failed in their fundamental duties as stated under Article 21 in failing to observe, respect, protect, promote and fulfil the petitioners' fundamental rights and freedoms, in particular the rights and freedoms relating to special protection as members of vulnerable group (Article 21(3), equality and freedom from non-discrimination (Article 27) humanity dignity (Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (Article 53(1),(d) under the Constitution of Kenya, 2010.

The petitioners referred me to the case of *Van Eader v Minister of Safety and Security (2002) Zasca 123*, in which case police allowed a dangerous criminal and serial rapist to escape from their custody. The Supreme Court of Appeal of South Africa held:

The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms ... everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources... In all the circumstances of the present case I have come to the conclusion that the Police owed the appellant a legal duty to act positively to prevent Mohammed's escape... I have reached this conclusion mainly in view of the state's Constitutional imperatives to which I have referred.

The court held that police had breached the applicant's fundamental rights and freedoms by allowing the rapist to escape from their custody.

In the instant petition, the police have allowed the dangerous criminals to remain free and/or at large. The respondents are responsible for arrest and prosecution of the criminals who sexually assaulted the petitioners and the failure of state agents to take proper and effective measures to apprehend and prosecute the said perpetrators of defilement and protect the petitioners,

being children of tender years, they are in my opinion responsible for torture, defilement and conception of young girls and more particular the petitioners herein.

In case of *Jessica Lenahan (Gonzales) et al. v United States*, Case 12.626, Report No.80/11, August 17 2011: the inter-American Commission on Human Rights considered police obligations to enforce a restraining order in circumstances where a father took his children from their mother's custody without permission and killed them. The commission found that there was 'broad International consensus' that states 'may incur ...responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women...'

The state's duty to protect is heightened in the case of vulnerable groups such as girl-children, and the state's failure to protect need not be intentional to constitute a breach of its obligation. The courts have found that the state has a clear duty to investigate crime and found the failure to do so constituted a constitutional violation of claimant's rights.

In *R V Commissioner of Police & 3 Others ex-parte Phylis Temwai Kipteyo HC. Misc. Appl. 27 Of 2008, (2011) Eklr(Bungoma)*, the court stated:

All the same, the life of the victim and the interests of the family are protected by the Constitution and the statutes. The state through the respondents herein is responsible for security of citizens in this country. It is the duty of the state to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the state to investigate the disappearance of the victim herein who was its subject and its employee.

I agree with the above-mentioned case that once a report or complaint is made, it is the duty of the police to move with speed and promptly commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally; [falling] short thereof amounts to violation of fundamental rights of the complainant.

In the instant case the police owed a Constitutional duty to protect the petitioners' rights and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in the constitution.

Further Article 27(1)–(4) of the Constitution of Kenya, 2010, it is provided:

'27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The petitioners contend that gender-based sexual violence constitutes discrimination and referred me to Article 1 of the **Convention on the Elimination of all Forms of Discrimination against Women**, which defines discrimination against women as including ‘... acts that inflict sexual harm’.

Having considered the petitioners’ petition and affidavit in support and the fact that the police did not take appropriate action to ensure justice to the petitioners, I find the police failure to conduct prompt, effective, proper, corruption-free, and professional investigation into the petitioners’ complaints of defilement and other forms of sexual violence amounts to discrimination contrary to the expressly and implied provisions of Article 27 of the Constitution of Kenya, 2010, and contrary to Article 244 of the Constitution of Kenya, 2010.

Further to the above, the police failure to effectively enforce Section 8 of the Sexual Offences Act, 2006, infringes upon the petitioners’ right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010, and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.

In the circumstances, the respondents are responsible for violation of the petitioners’ rights under Article 27 of the Constitution of Kenya, 2010. The respondents are obligated by law to protect girl-children from defilement and ensure effective investigation of defilement claims (see section 14 and 14A of the Police Act [repealed and replaced by Act No.11A of 2011], section 2, 8 and 40 of the Sexual Offences Act and Articles 157(4) and Article 244 of the Constitution of Kenya, 2010).

In the case of *MC Bulgaria (MCV Bulgaria, European Court of Human Rights 39272/98, 2003)* the European Court of Human Rights held:

The investigation of the applicant’s case, and in particular the approach taken by the investigators and the prosecutors in the case fell short of the requirements inherent in the states’ positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse... The court thus finds that in the present case there has been a violation of the respondent state’s positive obligations under both Articles 3(on torture and inhuman/degrading treatment) and 8(on protection of the law) of the Convention.

In the case of *Cas Romania* (*Cas Romania, European Court of Human Rights* 26692/05 2012), the European Court of Human Rights held that an ineffective investigation of sexual assault charges violates the Human Rights Convention. The court held as follows:

It (the investigation) should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation.

Yet in the case of *Carmichael v Minister Safety and Security and Another* (*Supra*), the court held:

The courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

In the case of *Gonzalez & Others (Cotton Field) v Mexico* (*Inter-American Court of Human Rights, judgement of November, 16, 2009*), the Inter-American Court of Human Rights held that the State of Mexico had infringed on petitioners' rights to equality and non-discrimination, in a claim relating to the discipline, torture, rape and murder of three young girls, and stated as follows:

Evidence provided to the court indicates, inter alia, that officials of the state of Chihuahua and the municipality of Juarez made light of the problem and even blamed the victims for their fate based on the way they dressed,

the place they worked, their behavior, the fact that they were out alone, or a lack of parental care.... The court therefore finds that, in the instant case, the violence against women constituted a form of discrimination, and declares the state violated the obligation not to discriminate contained in Article 1(1) of the Convention, in relation to the obligation to guarantee the rights embodied in the Articles 4(1), 5(1), 5(2) and 7(1) of the American Convention.

On sexual violence, freedom and security of a person, courts have held that the state has an obligation to protect all citizens from violence and ensure their security of person. This is enshrined in Article 29 of our Constitution.

In case of *Carmichele v Minister of Safety and Security & Another (supra)*, the court stated:

Thus one finds positive obligations on members of the Police force both in the IC and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women (and children) than freedom from the threat of sexual violence.

Article 48 and 50 of the Constitution of Kenya, 2010, obligates the state to ensure access to courts is not unreasonably or unjustifiably impeded and in particular where there is legitimate complaint, dispute or wrong that can be resolved by the courts or tribunals. Needless to say in the criminal justice system the police play a critical role, and their abdication from that role would inevitably deprive claimants' access to courts and lead to a miscarriage of justice or deny justice altogether. The centrality of police in the criminal justice system is evidenced by their functions as set out under Part III of the Police Act (now repealed), which has been re-enacted at Section 24 of the **National Police Service Act (Act No.11a of 2011)** as follows:

24. The functions of the Kenya Police Service shall be the:

Provision of assistance to the public when in need; (b) maintenance of law and order; (e) investigation of crimes; (f) collection of criminal intelligence; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged...

The police in the instant petition – by failing to conduct prompt, effective, proper, corrupt-free and professional investigations into the petitioners' complainants, and by demanding payments as preconditions for assistance, whether for fuel or P3 forms or whatever the case might have been – violated petitioners' right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair manner and in

public hearing before a court of law in accordance with Article 50(1) of the Constitution of Kenya, 2010.

Under Article 53(1), (d) and (2) of the Constitution of Kenya, 2010, it is provided as follows:

53. (1) Every child has the right–

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(2) The state shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

The above article clearly entitles petitioners to a fundamental inalienable right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour.

The article also provides that a child's best interests are of paramount importance in every matter concerning the child. The police failure to act on the petitioner's complaints of defilement violated their rights under Article 53 of the Constitution of Kenya, 2010. The constitutional requirement to protect the best interest of the child requires not only the establishment of relevant laws, but requires their proper enforcement by state agencies; and any failure to implement laws aimed at protecting children amounts to infringement and/or violation of the constitutional rights. As recognised by the UN Committee on the Rights of the Child, under Article 19, General Convention, the state is obligated to investigate and punish those responsible for committing violence against children (see *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* (2009) ZACC 8, 2009(4) SA 222(cc) 2009 (7) BCLR 637(CC) at Para 200).

Having considered the evidence in the petitioners' affidavit and the petition herein, the relevant articles in the Constitution of Kenya, 2010, the general rules of international law, treaty or convention ratified by Kenya, and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence infringes on the petitioners' fundamental rights and freedoms, under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1)(d) of the Constitution of Kenya, 2010.

Orders/declarations

In the circumstances, I find the petitioners' petition is meritorious and I proceed to grant the following orders:

1. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first 11 petitioners' complaints of defilement violates the first 11 petitioners' fundamental rights and freedoms:
 - (a) to special protection as members of a vulnerable group;
 - (b) to equal protection and benefit of the law;
 - (c) not to be discriminated against,
 - (d) to inherent dignity and the right to have the dignity protected;
 - (e) to security of the person;
 - (f) not to be subjected to any form of violence, either from public or private sources or torture or cruel or degrading treatment; and
 - (g) to access to justice as respectively set out in Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1)(c) of the Constitution of Kenya.
2. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first 11 petitioners' respective complaints violates the first 11 petitioners' fundamental rights and freedoms under:
 - (a) Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights;
 - (b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the Rights of the Child;
 - (c) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child; and
 - (d) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and People's Rights.
3. An order of *mandamus* be and is hereby made directing the first respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the first to eleventh petitioners' respective complaints of defilement and other forms of sexual violence.
4. An order of *mandamus* be and is hereby made directing the first respondent together with his agents, delegates and/or subordinates to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this petition.