Judicial Bench Book on Violence Against Women in Commonwealth East Africa

Commonwealth Secretariat

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Contents

Foreword

The *Judicial Bench Book on Violence Against Women in Commonwealth East Africa* (Judicial Bench Book) is prepared by judges for use, primarily by judicial officers.

The role of a judicial officer in handling a case of violence against women and girls (VAWG) is to ensure a fair trial. To that end, judicial officers need to apply the law, taking cognisance of the socio-cultural and other limitations that impact on the lives of women and girls and guide the actions of perpetrators. Judicial officers need to take leadership outside the courtroom and promote change in their respective societies.

The Judicial Bench Book is the realisation of a vision that emanated from the Botswana Judicial Forum of 2013 which considered the review on the Commonwealth case law on VAW and discussed landmark judgements with a view to contributing to a strengthened jurisprudence of equality.

The Judicial Bench Book sets out the definition of VAWG in international and regional human rights instruments and national legislation. It discusses the relevant international human rights standards with respect to VAW. These standards have been developed and further advanced by international and regional institutions, global fora and the work of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences. The Judicial Bench Book discusses the obligation of the State to eliminate VAWG through the exercise of due diligence to prevent and protect women from such violence, prosecute and punish perpetrators of such violence and to provide an effective remedy for victims of such violence. it further discusses, through case law, measures to address VAWG, and the role of the judiciary in realising the obligations of the State.

The case law used in the Judicial Bench Book has enriched the final product and brought to the fore evidence of suffering that many women endure; however, through access to courts women can access justice while perpetrators are brought to account. The experience of the judiciary adds value to the contributions of new magistrates or judges on matters relating to courtroom procedure while also applying international human rights standards.

The Judicial Bench Book is a template that should be emulated in other regions of the Commonwealth, as it will have far reaching implications such as the contribution to be made by the judiciary on the sustainable economic development of a country by reducing the economic costs of VAWG.

The Judicial Bench Book is not an end in itself, and it is expected that users will make suggestions for consideration in later editions.

Rt Hon Patricia Scotland, QC
Commonwealth Secretary-General

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In the event we have omitted any individual or organisation that contributed to the project, we offer our sincere apologies and thanks.

Acronyms and Abbreviations

AU	African Union
BPfA	Beijing Declaration and Plan for Action
Cap	Chapter
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CSW	Commission on the Status of Women
DEVAW	Declaration on the Elimination of Violence Against Women
EAC	East African Community
FGM	female genital mutilation
FGM/C	female genital mutilation and cutting
GBV	gender-based violence
GBVRC	Gender-based Violence Recovery Center (Kenya)
HIV/AIDS	human immunodeficiency virus/ acquired immune deficiency syndrome
IAWJ	International Association of Women Judges
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
J	Judge of the High Court
JA	Judge of the Court of Appeal
JJA	Judges of the Court of Appeal
JEP	Jurisprudence of Equality Training Program
JTF	Judiciary Transformation Framework (Kenya)
JOG	Jurisprudence on the Ground (project)
KDHS	Kenya Demographic and Health Survey
KWJA	Kenya Women Judges Association
MWPA	Married Women's Property Act (Kenya)
NGO	non-governmental organisation

NAWJ(U)	National Association of Women Judges (Uganda)
NPA	National Plan of Action (Kenya)
OLPC	Organic Law Instituting the Penal Code
P3	Police Form 3
RE	Revised Edition
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SGBV	sexual gender-based violence
SOA	Sexual Offences Act (Kenya)
SOSPA	Sexual Offences Special Provisions Act, 1998 (Tanzania)
STD	sexually transmitted disease
TAWJA	Tanzania Women Judges Association
UDHR	Universal Declaration of Human Rights
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
VAW	violence against women
VAWG	violence against women and girls
WHO	World Health Organization

Section I

Judicial Principles on Violence Against Women

Chapter 1
Introduction

1.1 The judiciary as an actor

The judiciary plays a central role in enhancing and protecting women's rights. To the extent that the courts are the final authority in criminal and civil matters that enter the justice system, one can state that the judiciary is the main institution on which women's rights ultimately depend. The judiciary plays a critical role in the development and enforcement of formal legal responses to discriminatory and criminal activities, including violence against women (VAW). Judicial officers have a unique role in addressing violence and in crafting effective remedies for the benefit of victims. They make decisions that affect the lives of the victims, perpetrators and in the case of domestic violence, children and other family members. In the courtroom, judicial officers are charged with the task of interpreting and enforcing existing laws. They may have the ability to establish courtroom policies and procedures to enhance the safety of victims and to hold perpetrators of violence accountable.

If the judiciary is to effectively carry out its role in enhancing justice for women, judicial officers must be alive to the reality that one of the consequences of a gendered society is that different rights and privileges, duties and obligations, as well as roles and status, are attributed to women on the one hand and men on the other by virtue of their sex, and that nevertheless this categorisation is but a social construct. It is critical that a judicial officer is conscious that only a very small proportion of the differences in roles assigned to men and women can be attributed to biological or physical differences based on sex. A judicial officer must be aware that gender roles shape women's access to rights and that this therefore is a justice and rights issue.

They must also be cognisant of the reality that cultural norms and values, including those which discriminate against women, are often exemplified in the written law. In such cases, a judicial officer must take advantage of a court's judicial review role to evaluate such laws within the perspective of (universally) accepted human rights norms and values, for it is now widely accepted that judicial review transforms processes of justice, including the role of judges as agents of social change. It also is important that judicial officers themselves do not import negative cultural norms into judicial processes and in adjudication. For judicial officers to meaningfully enhance

justice for women, they must be equipped with an understanding of the concept of gender.

An understanding of social construction of men and women enables a judicial officer to integrate gender perspectives into judicial processes so that before decisions are taken, an analysis is made of their effects on women and on men respectively. Understanding gender enables a judicial officer to adopt strategies that make women's (and men's) concerns and experiences an integral dimension of the adjudication process, so that men and women benefit equally – so that inequality is not perpetuated. Judicial awareness of the differential circumstances of women and men in society and the impact of seemingly neutral decisions on either gender is a must in the fight against VAW. The bench must therefore adopt a gender analysis of all questions before court, from criminal law to family law, to taxation etc.

In interpreting the law, the court has the role of defining the obligations of the state in relation to fundamental rights and freedoms, and to hold the state and all perpetrators of violence accountable for breach of these obligations. At the same time, the court must balance the rights of victims against those of perpetrators to ensure that women victims of violence access justice, in all spheres of life, on a basis of equality with everyone, including perpetrators of such violence, and that the victims of violence are not subjected to secondary victimisation in the process of navigating the judicial process. The law is a tool for social transformation and it also sets standards. The decisions that judicial officers make and the sentences that they impose against perpetrators of VAW should send a clear message to society that VAW is unacceptable and that both the state and the perpetrator will be held accountable. Ensuring that perpetrators of VAW are held accountable and are appropriately punished will restore public confidence in the judiciary. The judiciary may also be used as a platform from which the general public can be educated on the evils of VAW.

The mid-term review of the Commonwealth Plan of Action has identified 'Violence against Women' as one of the critical areas for action. Focusing on efforts to strengthen Jurisprudence of Equality on VAW, the Commonwealth Secretariat commissioned a review of case law on VAW in Commonwealth jurisdictions. The purpose of the review is to assess the outcomes of domestic violence cases filed in national courts within the Commonwealth, with a view to analysing the gendered pattern of the judgements and subsequent implementation measures. The review identified and examined how the various judiciaries around the Commonwealth have interpreted and applied – or failed to apply – national and/or international human rights laws, to address VAW. The review also identifies the various obstacles that prevent women victims of violence from accessing justice on a basis of equality of men and women.

1.2 Purpose of the bench book

Women and child victims of violence face a multitude of obstacles in their pursuit of justice. This bench book aims at addressing the challenges encountered by women victims of violence as they navigate through the justice system. These include the absence of legislation to criminalise the various manifestations of VAW, outright bias in the courtroom, patriarchal mind-sets and gender stereotypes that find their way into the courtroom, and failure by judicial officers to apply or interpret the law in a gender-sensitive manner. Such obstacles militate against women's access to justice on the basis of equality of men and women. The bench book also discusses structural impediments which inhibit access to justice, such as the geographical location of the courts and the financial and other related implications; the financial cost of accessing justice; intricate court procedures and insensitivity on the part of the judiciary due to limited of knowledge of gender and women's rights law and standards; the fear of secondary victimisation by victims of violence; women victims' ignorance of the law and of their rights; and lack of support services to assist victims of violence to navigate the civil and criminal justice process, among other challenges. Furthermore, the bench book contains identified best practices and ground-breaking court decisions across the region which can be said to contribute towards the drive for social change. In line with the judicial practice of common law courts' discretional utilisation of decisions from other jurisdictions under the doctrine of 'persuasive authority', the regional bench book offers what a bench book limited only to cases from within a particular jurisdiction could not have offered. This is because a **'persuasive'** precedent may become binding through its adoption by a court of record in a particular jurisdiction. The bench book also points to jurisprudence being developed by international and regional tribunals. Additionally, annexes containing a paper on child, early and forced marriages (CEFM) and a list of reference materials provide judicial officers in East Africa with more literature on the subject.

The Commonwealth Judicial Bench Book is a resource that situates VAW in the four East African Commonwealth member countries (Kenya, Rwanda, Tanzania and Uganda); sets out the definition of VAW in international and regional human rights instruments and national legislation; highlights relevant international human rights standards, legal and policy instruments with respect to VAW, and provides statistics on occurrences and – where possible – costs of VAW. Lastly, the *Judicial Bench Book* discusses the obligation of the state to eliminate VAW through the exercise of due diligence to prevent and protect women from such violence, prosecute and punish perpetrators of such violence and provide an effective remedy for victims of such violence. The bench book discusses, through case law, measures to address VAW and the role of the judiciary in ensuring that the

state fulfils its obligations. Specifically, the *Judicial Bench Book* reviews the role of the judiciary in addressing VAW, identifies challenges and makes recommendations aimed at addressing the challenges which impact on the ability of the judiciary to tackle VAW.

By placing VAW within the sociocultural and legal context, it is hoped that the bench book will enhance the ability of judicial officers to handle cases of VAW, both within a human rights as well as a gender perspective. Some of the cases contained in the bench book offer examples of how particular courts have ably mainstreamed gender in judicial processes and/or applied internationally accepted human rights standards in the adjudication of matters before them. The book will thus act as a quick reference to judicial officers, in line with the foundations of the common law system – *stare decisis* and judicial precedent. On the other hand, some of the examples contained in the bench book showcase how a lack of appreciation of the lived realities of women victims of violence can lead to denial of justice. The critique of such cases offered in the book will hopefully expose the injustice arising from failure to interpret the law through a gender lens, offering lessons to judicial officers.

Chapter 2
Definitions of Violence Against Women

2.1 Introduction

This chapter of the bench book sets out the definition of violence against women (VAW) in the context of international, regional, sub-regional and national legislation. It discusses the various ways in which such violence manifests itself in the lives of women and girls and how it amounts to discrimination, denying women the right to equality in all spheres of life, including marriage; property ownership and inheritance; land rights; and education and employment. Relevant human rights standards (international, regional and sub-regional) are discussed with reference to case law, and how the judiciary can apply human rights standards to address VAW. It discusses the cost implications of violence for the judiciary and law enforcement agencies that respond to VAW.

The obligations of the state to protect women from violence through the exercise of due diligence to prevent, protect, investigate, prosecute and punish acts of VAW is also discussed in the context of international, regional and sub-regional human rights law and instruments, national constitutions and legislation, as well as case law. Measures to address and eliminate VAW are discussed in the context of national legislation, national policy instruments and country reports submitted by states to the **Convention on the Elimination of all Forms of Discrimination Against Women** (CEDAW) Committee, among other measures taken by individual states.

2.2 Definition of VAW under international law Instruments

The international law definition of VAW is contained in the **UN General Assembly Declaration on the Elimination of Violence against Women (DEVAW)**.[1] This is the first United Nations (UN) document that exclusively addresses the issue of VAW, and it provides critical leadership in the global effort to combat VAW.

The Declaration defines VAW as:

> *any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or in private life*[2]

2.2.1 Eight core incident types of VAW

For uniformity, the *Judicial Bench Book* adopts the incident types/case definitions listed below that reflect the United Nations' current recommended good practice for classifying gender-based violence (GBV) incidents. Overall, the eight core incident types of VAW[3] have been listed and defined as follows:

1. **Rape/defilement**: any form of non-consensual sexual intercourse. This can include the invasion of any part of the body with a sexual organ and/or the invasion of the genital or anal opening with any object or body part.
2. **Sexual assault**: any form of unwanted sexual contact/touching that does not result in or include penetration (i.e. attempted rape). This incident type does not include rape, where penetration has occurred.
3. **Physical assault**: physical violence that is not sexual in nature. Examples include hitting, slapping, cutting, shoving, honour crimes of a physical nature (not resulting in death), etc.
4. **Psychological abuse**: name-calling, threats of physical assault, intimidation, humiliation, forced isolation (i.e. by preventing a person from contacting their family or friends). For the purposes of the incident recorder, this category includes all sexual harassment defined as: unwanted attention, remarks, gestures or written words of a sexual and menacing nature (no physical contact).
5. **Economic abuse**: money withheld by an intimate partner or family member, household resources (to the detriment of the family's well-being), prevented by one's intimate partner from pursuing livelihood activities, a widow prevented from accessing an inheritance. This category does not include people suffering from general poverty.
6. **Forced marriage**: the marriage of individuals against their will (includes 'early marriage').
7. **Female genital mutilation/cutting**: cutting healthy genital tissue.
8. **Other GBV**: This category should be used only if any of the above types do not apply. In the context of this bench book, this category includes: domestic violence; exploitation; trafficking in women; forced prostitution; violence perpetrated or condoned by the state, wherever it occurs; sexual slavery; sexual harassment (including sextortion – demands for sex in exchange for job promotion or advancement or higher school marks or grades); trafficking for the purpose of sexual exploitation; forced exposure to pornography; forced pregnancy; forced sterilisation; forced abortion; forced marriage; virginity tests and incest.

2.2.2 The connection between VAW and discrimination

The CEDAW Committee, which monitors compliance by the various state parties to CEDAW, has made a connection between 'discrimination' as defined in Article 1 of the Convention and VAW. The Convention defines discrimination against women to mean:

> *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

Connecting VAW and discrimination, the CEDAW Committee in **General Recommendation No. 19**[4] on violence against women, has incorporated VAW in its interpretation of the CEDAW definition of 'discrimination'. The CEDAW Committee has identified GBV as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality of men and women.[5] These rights and freedoms include: the right to life;[6] the right to equality;[7] the right to liberty and security of person;[8] the right to equal protection under the law;[9] the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;[10] the right to equality in the family;[11] the right to equality in marriage, during the marriage and at its dissolution; the right to the highest standard attainable of physical and mental health;[12] the right to work and to just and favourable conditions of work;[13] among other fundamental rights and freedoms.

Consequently, in **Comment No. 6** of the General Recommendation, the CEDAW Committee has defined 'gender-based violence' (GBV) to mean, violence which is:

> *… directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.*[14]

The CEDAW Committee makes an important connection between 'discrimination' as defined in Article 1 of the Convention[15] and 'gender-based violence', and has made it clear that all forms of VAW fall within this definition. The definition of 'discrimination' contained in Article 1 of CEDAW therefore includes GBV. The CEDAW Committee elaborates on the definition of 'discrimination' by stating that:

> *Gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international*

> *law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention.*[16]

This definition brings the issue of VAW within the terms of the Convention (CEDAW) and the international legal norm of non-discrimination on the basis of sex.

The preamble to the Declaration affirms that VAW is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men. It identifies such violence as one of the crucial social mechanisms by which women are forced into a subordinate position compared with men and therefore an obstacle to the achievement of gender equality, development and peace. This constitutes a violation of the rights and fundamental freedoms of women.[17]

Some groups of women particularly vulnerable to violence include: women belonging to minority groups; indigenous women; refugee women; migrant women; women living in rural or remote communities; destitute women; women in detention institutions; female children; women with disabilities; elderly women; and women in situations of war, internal and armed conflict.

The Commission on the Status of Women (CSW) of the Economic and Social Council (ECOSOC), as the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women, has adopted the DEVAW definition of VAW and noted the economic and social harm caused by such violence.[18]

2.3 Definition of VAW under regional human rights instruments

The **Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa** has adopted the CEDAW Committee definition and defines *'Violence against Women'* to mean:

> *… all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm including the threat to take such acts or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace times and during situations of conflict or of war.*[19]

By way of comparison, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Convention of Belem do Para) or the Inter-American Convention, also adopts the CEDAW Committee definition, identifies the various places where such violence takes place and elaborates the various manifestations of such violence. It defines VAW thus:

> *Violence against women shall be understood to include physical, sexual and psychological violence: that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the work place, as well as in educational institutions, health facilities or any other place; and that is perpetrated or condoned by the state or its agents regardless of where it occurs.*[20]

2.4 Definition of VAW under national laws

Kenya, Rwanda, Tanzania and Uganda are signatories to CEDAW and various regional and international legal instruments that promote gender equality and condemn discrimination and VAW. This renders the internationally acceptable definitions of VAW applicable in these jurisdictions. While overall there is no national legislation which specifically deals with VAW comprehensively, there are various legislations that define and address the various manifestations of violence suffered by women.

2.4.1 Kenya

Statutory law in Kenya does not contain a definition of VAW. However, the **Protection Against Domestic Violence Act, 2015**[21] recently enacted by parliament, specifically addresses domestic violence. In section 3, the Act gives an elaborate definition of violence and the various acts that constitute such violence, while section 4 gives a wide range of relationships constituting a '*domestic relationship*' to which the Act applies.

Section 3 of the Protection against Domestic Violence Act defines 'violence' as:

> *An abuse that includes; child marriage, female genital mutilation (FGM), forced marriage and forced wife inheritance, interference from in laws, sexual violence within marriage, defilement, virginity testing and widow cleansing; damage to property; depriving the applicant of or hindering the applicant from access to or a reasonable share of the facilities associated with the applicant's place of residence; emotional or psychological abuse; Physical, sexual, verbal and economic abuse, intimidation, incest, harassment, stalking and emotional or psychological abuse, forcible entry into the applicant's residence where parties do not share the same residence and any other conduct against a person, where such conduct harms or is likely to cause imminent harm to the safety, health or well-being of the person.*

Section 4 provides that:

> *for purposes of the Act, a person shall be deemed to be in a domestic relationship if the person; is married or has previously been married to that other person; has been in a marriage with the other person which has been dissolved; has a child with that other person or has a close personal relationship with the person; is or has been engaged to get married to that person; is a family member of that other person or is living in the same household with that person.*

2.4.2 Rwanda

VAW is not specifically defined in any statute in Rwanda. However, **Law No. 59/2008 of 2008 on Prevention and Punishment of Gender-Based Violence** defines GBV in Article 2.1 as:

> *any act that results in a bodily, psychological, sexual and economic harm to somebody just because they are female or male, and that results in the deprivation of freedom and negative consequences, which is exercised within or outside the household.*

2.4.3 Tanzania

Statutory law in Tanzania does not contain a definition of VAW, nor that of GBV.[22] In lieu of a definition contained in a domestic law, the provisions of the international and regional human rights instruments that Tanzania has signed provide guidance on what VAW or GBV entail. The legal protection is primarily in the Penal Code, as amended by the **Sexual Offences Special Provisions Act, 1998** (SOSPA) and the **Law of Marriage Act**.

The SOSPA was enacted as an Act to amend several written laws to make provision regarding sexual and other offences and to further safeguard the personal integrity, dignity, liberty and security of women and children. However, it does not contain a definition of VAW or of domestic violence.

Box 2.1 Offences that constitute violence against women – Tanzania Penal Code

(a) Rape and attempted rape, defilement of idiots and imbeciles;
(b) Abduction of women under 16 years of age, gross indecency between persons;
(c) Sexual exploitation of children, defilement by husbands of women under the age of 15 years;
(d) Sexual harassment and grave sexual abuse, sextortion, procuring women and girls for prostitution, trafficking in persons;
(e) Indecent assault on women;
(f) Common assault and assault causing actual bodily harm.

The SOSPA criminalises various forms of GBV including rape, sexual assault and harassment, prostitution, female genital cutting and sex trafficking, while the Law of Marriage Act, section 66, prohibits a spouse from inflicting corporal punishment on the other spouse. However, the law does not define 'corporal punishment' and is also silent on economic deprivation. Cases of VAW by intimate partners are dealt with as ordinary criminal offences under the Penal Code,[23] as amended by the SOSPA.

2.4.4 Uganda

There is no definition of VAW in the law in Uganda. However, the **Domestic Violence Act, 2010** defines domestic violence. 'Domestic violence' is defined in section 2 to include economic abuse and a wide range of other behaviours. It constitutes any act or omission of a perpetrator which:

(a) harms, injures or endangers the health, safety, life, limb, or well-being, whether mental or physical, of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse;

(b) harasses, harms, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security;

(c) has the effect of threatening the victim or any person related to the victim by any conduct mentioned in paragraph (a) or (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the victim.

'Domestic relationship' is defined in section 3 to mean: 'a family relationship, a relationship similar to a family relationship, or a relationship in a domestic setting that exists or existed between a victim and a perpetrator'.

The definition of **'economic abuse'** under the Act includes:

(a) deprivation of all or any economic or financial resources to which the victim is entitled under any law or custom, whether payable under an order of a court or otherwise or which the victim requires out of necessity including, but not limited to:

  (i) household necessities for the victim and his or her children, if any;

  (ii) property, jointly or separately owned by the victim; or

  (iii) payment of rent related to the shared household and maintenance.

(b) disposal of household effects, alienation of assets whether movable or immovable, shares, securities, bonds or similar assets or property in which the victim has an interest or is entitled to use

by virtue of the domestic relationship or which may be reasonably required by the victim or his or her children or any other property jointly or separately held by the victim; and

(c) prohibiting or restricting access to resources or facilities which the victim is entitled to use or enjoy by virtue of the domestic relationship, including access to the shared household.

The **Domestic Violence Act, 2010**[24] specifically addresses domestic violence. The application of this legislation is broad and extends to a variety of family and domestic relationships, thereby promising protection for women victims of violence.

2.5 Manifestations of violence against women in East Africa

Article 2 of the *Declaration on VAW* identifies the various manifestations of VAW in three broad categories. These include, but are not limited to:

(a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation (FGM), and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; and

(c) physical, sexual and psychological violence perpetrated or condoned by the state wherever it occurs.

VAW is a cycle of abuse that manifests itself in many forms throughout women's lives (see Table 2.1) and may be perpetrated either by the family, strangers or the community. At the very beginning of her life, a girl foetus may be the target of sex-selective abortion or female infanticide in cultures where son preference is prevalent. In infancy, a girl child is not spared this violence. She may suffer malnutrition due to denied access to certain foods and often nutritious foods such as eggs, which in certain cultures should not be eaten by women. Some of the violence suffered in childhood and adolescence includes female genital mutilation (FGM) and other harmful traditional practices such as child marriages, thereby denying the girl child the right to education. At this point in their lives, girls may be subjected to sexual harassment and abuse, including defilement, incest, sexual harassment in the workplace and trafficking in persons, among other forms of violence.

Table 2.1 Summary of life phases of violence against women

Life phases	Types of violence
Pre-birth	Battering during pregnancy, denial of medical services, coerced pregnancy, rape during war, conflict or riots or caste rapes, sex-selective abortion e.g. abortion of female foetuses
Infancy	Differential access to food and medical care for girl infants (death from malnutrition), emotional and physical abuse, female infanticide and trafficking
Childhood	Child marriages, commercial sexual exploitation, differential access to food, medical care and education, female genital mutilation and other forms of harmful traditional practices, honour killings, incest, sexual abuse, human trafficking
Adolescence	Acid crimes, dating and courtship violence, female genital mutilation and other forms of harmful traditional practices, forced marriage, commercial sexual exploitation, honour killings, rape, sexual abuse in the workplace or other public places, sexual harassment, human trafficking, discrimination in ownership and inheritance of property, including land
Adult period	Abuse by strangers and intimate partners, acid crimes, dowry harassment, harassment/murders, economic violence, forced marriage, commercial sexual exploitation, rape, honour killings and other harmful traditional practices, domestic violence, including marital rape, psychological abuse, human trafficking, stalking, sexual harassment, sexual harassment in the workplace, and denial of ownership and access to property/land and inheritance rights and forced widow inheritance
Old age	Abuse of widows and elder women, denial of shelter or food, loss of economic control, widowhood rituals/forced wife inheritance, rape, forced homelessness, denial of access to land, denial of property ownership and inheritance rights, destruction of personal effects and murder
Cross-cutting ages	Emotional and physical abuse of females, female infanticide, FGM and other forms of harmful traditional practices, commercial sexual exploitation, sexual harassment and abuse, psychological abuse and honour killings

Adapted, with modification, from UN Office on Drugs and Crime (2010), *Hand Book on Effective Police Responses to Violence against Women,* Criminal Handbook Series, United Nations, New York, page 16.

In the adult phase of their lives, women and girls suffer domestic violence, including dowry harassment; sexual and economic abuse by spouses/ intimate partners and strangers; incest; and marital rape, assault and battery by spouses/ intimate partners and family members, which may end up in the death, physical or psychological maiming of the victim.

The government can perpetrate VAW through state agents in places of confinement or detention (prisons and police stations), and even in refugee

camps hosting women displaced as a result of war or internal conflict. Such violence can be physical (assaults), psychological (humiliation, verbal abuse and insults, threats of violence and injury, denial of food) or sexual (rape and threats of rape and defilement of the girl child).

Persons in positions of authority in private institutions like schools and hospitals can also perpetrate VAW. Such violence includes rape and sexual harassment, including sexual harassment in the workplace, among other places. The case of *Onesphory Materu v Republic*[25] *(Tanzania)* demonstrates how the police can subject women held in police custody to sexual violence.

The government can also perpetrate VAW through laws and policies which promote gender stereotypes, inequality and discrimination.

Such laws and policies deny women equality in many areas, including ownership and inheritance of property/land, marriage, division of matrimonial property at the end of marriage, access to justice and equal protection of the law. International trafficking and violence against migrant workers are some of the other forms of violence suffered by women, which are on the increase in the world.[26] The 2014 *Global Report on Trafficking in Persons* by the UN Office on Drugs and Crime (UNODC) shows that one in three known victims of human trafficking is a child – a 5 per cent increase compared to the 2007–2010 period; girls make up two out of every three child victims and, together with women, account for 70 per cent of overall trafficking victims worldwide.[27] A particularly vulnerable group is that of displaced women and women in armed conflict situations, who suffer sexual violence including rape.

In times of war and internal conflict in any country, women and children, especially girls, are more vulnerable than before and become easy targets for sexual and gender-based violence (SGBV). In such times, camps for refugees and internally displaced persons are established to provide refuge for the vulnerable, and to generally provide food, water, shelter and other necessities. Conditions in these settings can be extremely difficult, leaving women and children open to abuse and human rights violations. The most common abuses are rape, defilement of children and other sexual and gender-based violence perpetrated against women by men, including law enforcement agents who misuse their power and take advantage of the very people that they are supposed to protect, subjecting them to all manner of sexual violence. Some displaced male residents in the camps are also a threat to women's safety in those camps. They too perpetrate SGBV against displaced women and children by raping or coercing women and girls into providing them with 'sexual services' in exchange for their 'protection'. Apart from exposing women to HIV/AIDS and other sexually transmitted diseases, such rape could result in unwanted pregnancies and death arising from failed abortions.

In old age, women continue to suffer violence. Such violence includes: rape, forced homelessness and denial of property rights, denial of access to property, and abuse of widows by forcing them to undergo cultural widowhood rituals like forced inheritance by a male relative of a deceased husband. This exposes widows to HIV/AIDS and other sexually transmitted diseases (STDs). Killing by burning of elderly women suspected to be witches is another form of violence experienced in old age; this is prevalent in the Kisii region of Kenya and in some parts of Tanzania.

It is not possible to come up with a comprehensive list of all the manifestations of violence against women, as the list continues to grow with the emergence of new forms of violence such as stripping women naked for 'public indecency' (such as wearing trousers and short or tight dresses). New technologies also continue to generate new forms of violence, such as internet or mobile telephone stalking, among other forms of violence.

2.6 Statistics of prevalence of VAW in East Africa

Statistics collected over the years show that VAW, in the various forms in which it manifests, is prevalent in East Africa.[28]

2.6.1 Kenya

According to the Kenya Demographic and Health Survey, 2010 (KDHS), 45 per cent of women aged 15–49 years reported having experienced either physical or sexual violence, with 7 per cent having experienced sexual violence alone while 14 per cent had experienced both physical and sexual violence.[29] A similar survey carried out in the year 2014[30] found that physical violence was more prevalent than sexual violence, and women were more likely to experience physical violence committed by their spouse/intimate partner than men. The survey further found that women from the Western, Nyanza and Nairobi regions of Kenya reported higher levels of physical and sexual violence committed by a spouse/partner, as opposed to women in other regions. Approximately 50 per cent had experienced physical violence as opposed to 12 per cent in the North Eastern region. Thirty-eight per cent (38 per cent) of married women aged 15–49 reported having experienced physical violence committed by their husbands/partners, as opposed to 9 per cent of married men in the same age bracket who reported that they had experienced violence committed by their wife/partner. It also found that about 14 per cent women and 4 per cent men had reported having experienced sexual violence committed by a spouse/partner.[31]

According to the survey, FGM was almost universal in the North Eastern region of Kenya, at 98 per cent, compared with Nyanza at 32 per cent, Rift

Valley at 27 per cent, the Eastern region at 26 per cent and the Western region registering the lowest prevalence at 1 per cent. However, the survey found that the practice of FGM is on the decline in the country, because the 1998 KDHS had found that 38 per cent of women were reported to have been circumcised as opposed to 32 per cent in 2003, 27 per cent in 2008–2009 and 21 per cent in 2014.[32]

2.6.2 Rwanda

VAW and GBV are prevalent in Rwanda, as is the case in other parts of East Africa. The Rwanda Demographic and Health Survey, 2010 (RDHS) reported that two in five women (41 per cent) reported that they had suffered from physical violence at least once since they were 15 years old.[33] One in five women (22 per cent) had suffered from sexual violence sometime in the past. In all cases, the perpetrators of the violence, whether physical or sexual, were the husband or partner. A baseline study conducted by Rwanda Men's Resource Centre (RWAMREC) in 2013 revealed the following:

- women constitute the majority of victims of spousal murder (59.7 per cent), while men are the majority among spousal poisoning (81.1 per cent) and suicide (67.2 per cent);
- women and girls are six times more at risk of GBV compared with men and boys;
- sexual abuse, physical assault and economic deprivation are the most dominant forms of GBV in Rwanda;
- rape/sexual violence in general and deprivation from resources are higher in rural settings (respectively 58.2 per cent and 10.2 per cent) than in urban areas (54.7 per cent and 9 per cent respectively);
- conversely, physical assault and insults and intimidations are slightly higher in urban areas than in rural ones; in terms of place, acts of GBV among adults are at 83.2 per cent and 51 per cent for children in domestic settings;
- the level of child abuse in the street significantly increases – from 1.9 per cent among adults to 26.5 per cent among children; and
- in the majority of cases, GBV is perpetrated by intimate partners (41.4 per cent) and neighbours (21.2 per cent).[34]

2.6.3 Tanzania

Cases of VAW and girls in Tanzania are widespread. The 2010 Tanzania Demographic and Health Survey (TDHS) revealed that 45 per cent of women aged 15–49 years reported having experienced either physical or

sexual violence.[35] The survey further found that one in every two married women aged 15–49 years reported having experienced one or a combination of emotional, physical and sexual violence at the hands of their current or former husbands,[36] while four in every ten men agreed that wife beating was justified.[37] Older women in Tanzania experience witchcraft-related violence and abuse,[38] and research by the government and non-governmental organisations (NGOs) working on human rights issues found that witchcraft-related killings targeting older women were on the increase in Tanzania.[39] The killing of people with albinism and thereafter sale of their body parts is another form of violence that has emerged affecting both men and women.

Cultural practices and attitudes which condone VAW pose a challenge in preventing the abuse.[40] Girls and women in some parts of Tanzania suffer FGM, despite the prohibition of the practice by the **Sexual Offences Special Provisions Act, 1998**.[41] The Act prohibits the practice of FGM for girls under the age of 18 years. However, since it does not prohibit FGM for persons above the age of 18 years, FGM can be justified for adult women, who may be subjected to the practice in the name of tradition.

2.6.4 Uganda

In Uganda, violence against women and girls is prevalent in some areas. The Uganda Demographic and Health Survey (UDHS) of 2011 provides credible nationwide data showing that 50 per cent of women and 55 per cent of men aged 15–49 years have experienced physical violence at least once since the age of 15 years, while 27 per cent and 22 per cent respectively reported having experienced physical violence within the 12 months preceding the survey.

Concerning sexual violence, 28 per cent of women and 9 per cent of men aged 15–49 years reported having experienced sexual violence at least once in their lifetime. Overall, six out of ten married women and four out of ten married men aged 15–49 years reported having received emotional, physical or sexual violence from a spouse, while among married women and men who had experienced spousal violence (physical or sexual), 37 per cent and 26 per cent respectively had reported it to the authorities.[42] The practice of FGM is prevalent among the Pokot and Sabiny communities in Uganda.

2.7 Consequences of violence against women

The most crucial consequence of violence against women and girls (VAWG) is the denial of fundamental and human rights, as set out in international human rights instruments as well as national constitutions and legislation. The Beijing Declaration and Platform for Action adopted at the Fourth World Conference (BPfA) (1995)[43] affirmed that VAW is both an impediment to

the full enjoyment by women of their human rights and a manifestation of the historically unequal power relations between men and women. The BPfA identified the prevention and eradication of such violence as critical to the achievement of the goals of gender equality, development and peace.

VAW has a significant impact on sustainable development by imposing costs and consuming resources. Goal number five (5) of the 2030 Agenda for Sustainable Development seeks to achieve gender equality and empower all women and girls by, among other things, eliminating all forms of VAWG in the public and private spheres.

The CEDAW Committee, which monitors how various countries have implemented the Convention,[44] has contributed significantly to the recognition that VAW is a human rights violation. Since the definition of discrimination in CEDAW Article 1 includes VAW,[45] such violence is therefore a violation of the right of women to non-discrimination. It denies them equality in many spheres of life – social, economic and political. Such inequality often manifests itself in many areas, including marriage, particularly in the area of division of matrimonial property, unequal inheritance rights by women, and unequal land rights.

2.7.1 VAW and property

In matrimonial property disputes – where property acquired during the subsistence of a marriage is registered in the sole name of the husband or in the joint names of the spouses, without indicating the shareholding – women have had the uphill task of proving the basis of their claim to such property. This was in the case in Kenya with *Kivuitu v Kivuitu,*[46] where the subject property purchased during the subsistence of the marriage had been registered in the joint names of the two spouses without indicating the shareholding. The Court of Appeal of Kenya decided the case at a time when there was no legislation governing matrimonial property. The court held the view that if a husband acquires property from his salary or business and registers it in the joint names of himself and his wife, without specifying any proportions, the courts must take it that such property being a family asset is owned in equal shares. The other members of the court were in agreement, and the wife was awarded a 50 per cent share in the disputed property.

Women are denied the opportunity to inherit the property of their deceased parents. If the subject property is land, sons invoke tradition to discriminate against and disinherit their sisters, arguing that according to tradition sons inherit their fathers' land, while daughters are expected to leave the community and get married and thus inherit from their husbands. Several succession cases demonstrate this position – for example, *the estate of Lerionka Ole Ntutu*[47] and others reproduced later in this bench book,

whereby courts have had to pronounce on customary and other laws which deny daughters the right to inherit their father's land.

2.7.2 VAW and physical/bodily integrity

When violence takes the form of physical assaults, it results in injuries ranging from bruises and fractures to chronic disabilities – such as partial or total loss of hearing or vision and limbs. Some victims are subjected to burns arising from acid attacks or hot water, or may be struck using steel objects leading to death or permanent disfigurement.

Violence sometimes results in the death of victims and is therefore a violation of the victim's right to life and security of person guaranteed by the Universal Declaration of Human Rights (UDHR Art. 3), subsequent human rights treaties, as well as national constitutions and legislation. Apart from sexual violence, rape and defilement exposing victims to HIV/AIDS, such violence can lead to unwanted pregnancies and the dangerous complications arising from illegal abortions. In the case of domestic violence, women in violent relationships are less able to use contraceptives or negotiate safe sex. They therefore run a high risk of contracting sexually transmitted diseases including HIV/AIDS, which may be passed on to the unborn child.

VAW leads to far-reaching physical and psychological consequences. Although physical injury represents only a part of the negative health consequences on the women, it is among the more visible forms of violence. This form of violence also has adverse effects on the mental health of women victims.

Severely abused (battered) women are more likely to suffer stress and stress-related diseases, such as post-traumatic stress syndrome, panic attacks, depression, sleeping and eating disturbances, low self-esteem and hypertension, among other complications. Some women suffer acute depression, but are not able to escape from the violent relationship and end up committing suicide;[48] others end up killing their abusers when they can no longer withstand violence.[49] Unfortunately, women who are processed through the criminal justice system as offenders/accused persons cannot get justice because substantive and procedural criminal law is gender blind and the women are judged according to male standards and expectations. The two main defences available to perpetrators of homicides – provocation and self-defence – are based on male behavioural practices. Consequently, court decisions and pronouncements often indicate that the guardians of justice (judicial officers) have little insight into what a woman considers a serious threat to her life, nor the extent to which certain actions provoke a reasonable woman. Nevertheless, there is evidence that judicial officers the world over are progressively gaining insight into the need to mainstream gender into

judicial processes and the effect of integrating women's experiences into the adjudication process, even when women are before court as 'the perpetrators' of violent crime.

Box 2.2 Anieta Natasha Ferreira & Others V S [2004] 4 All Sa 373

Facts

The appellant, together with two others were found guilty of killing her husband – Mr Parkman – when the deceased was lying drunk on a couch. The appellant had hired two men who would kill Mr Parkman for money. The men killed Mr Parkman by strangulation using their hands while the appellant waited in another room.

The circumstances under which the appellant killed her husband were that she had continuously suffered gross mental, physical and sexual abuse during the lifetime of her relationship with her husband. Two weeks before the murder, the appellant had been assembled before 15 black labourers of the deceased and was told to remove her underwear and expose her genitals to the labourers. She refused to oblige to the instruction of her deceased husband. He shouted verbal abuse at her – '*You are so useless that not even blacks want to have sex with you*'. Following this event, her husband raped her later that evening and further threatened to hire black men to rape her if she ever tried escaping from him again.

During the trial, on behalf of the appellant, two employees from the Centre for the Study of Violence and Reconciliation in Johannesburg gave expert and factual evidence to the effect that on the facts presented to them (the experts), they considered that the first appellant's reaction to the deceased's abuse, including her decision to have him killed, fitted a well-known pattern of behaviour of abused intimate partners. In accordance with that pattern, the mind of the abused partner is eventually so overborne by maltreatment that no realistic avenue of escape suggests itself other than homicide.

The trial judge convicted the appellant on her own plea of guilty and sentenced her to life imprisonment in accordance with the Criminal Law Amendment Act, which is to the effect ***inter alia*** that a court shall sentence a person it has convicted of murder to imprisonment for life unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The trial judge found that: i) the murder was premeditated, and ii) that there were no substantial and compelling circumstances in which a lesser sentence other than life imprisonment could be imposed.

The appellant appealed to the Supreme Court of South Africa against the sentence.

Issue on appeal:

- Whether there was in existence substantial and compelling circumstances in the facts presented to court to warrant a lesser sentence than that of life imprisonment.

The Supreme Court of Appeal criticised the trial judge's interpretation of the expression 'substantial and compelling circumstances' in sentencing the appellant to life imprisonment. The court stated that the circumstances envisaged by the expression need not be exceptional, but must provide 'truly convincing reasons' or 'weighty justification' for imposing less than life imprisonment, or they must induce the conclusion that the prescribed sentence would in the particular case be unjust or disproportionate to the crime, the offender and the legitimate needs of society.

Based on the above interpretation, the Appeal Court found that on the facts that were presented before the trial judge, there existed substantial and compelling circumstances that warranted a lesser sentence than that of life imprisonment. The facts and evidence that were pivotal for the finding of the Appeal Court were that:

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- The appellant had been subjected to a grossly abusive seven-year intimate relationship by the deceased. She had no way of escape as every time she tried to escape, the deceased would trail her and bring her back to his house and punish her. The court found that the sum total of the sexual, physical and moral torture, together with the threat of exposing her genitals to labourers, had an influence on the appellant's state of mind.
- The court further found as a fact that a proper analysis and understanding of the evidence shows that what the first appellant subjectively did feel and what she experienced and eventually did conformed to a victim's behaviour in response to grave abuse to a similar pattern of abused partners.
- The court emphasised that the court ought to understand the subjective state of mind of such an abused partner.

The court held *inter alia* that:

- There are substantial and compelling circumstances which would make the prescribed sentence unjust in the case of the first appellant.

The sentence of life imprisonment was reduced to six years' imprisonment.

Ratio decidendi: A history of grave abuse by an intimate partner is a mitigating factor in arriving at an appropriate (and just) punishment for the abused partner who has killed her abuser.

Lessons learnt: The court admitted and considered the evidence of expert witnesses on the effect of abuse, in adjudicating a domestic violence case. This is a clear message that domestic violence is not an exclusively legal issue, and a harsh sentence would not serve justice.

Uganda V NA, MSK-CR-AA-132/2013, High Court of Uganda at Masaka

Facts

The accused was charged with the offence of murder contrary to s.188 of the Penal Code Act of Uganda. The 18-year-old accused person had murdered her father, who she claimed had repeatedly sexually abused her for over three years. The accused's reports of the abuse to her mother and relatives did not yield any action. Instead, the family decided to conceal the accused's continued abuse.

At trial, the accused pleaded guilty to the offence.

During sentencing, the convict – to mitigate her sentence – informed the court of her father's recurrent sexual abuse, as well as her family's concealment of her ordeal.

In sentencing the accused, the trial judge held that:

- Whereas the convict had committed an unlawful act, she had for all intents and purposes been the victim in the circumstances. Though the deceased had a moral obligation to protect the convict, he had instead continually abused her, thereby transforming from protector to perpetrator.
- The state and its agencies had equally failed in their international and constitutional obligations to protect the convict, and in those circumstances the convict was deserving of empathy and support rather than punishment as she has to carry psychological scars for life.

Contribution to jurisprudence/point to note:

- Realising that a harsh sentence would not serve justice in the case, the court exercised its discretion and gave the accused a lenient sentence because, although she was before court as a perpetrator of violence, her violent act was in reaction to the extreme abuse she suffered at the hands of the deceased.
- In arriving at an appropriate sentence, the judge placed this case within a broader context recognising that 'her violence' was not an exclusively legal issue.

Box 2.3 Uganda v Jackline Uwera Nsenga, High Court of Uganda at Kampala, Criminal Session Case No 312 Of 2013

Summary of facts

Jackline Uwera Nsenga (accused) was charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of offence were that the accused on the 10th day of January 2013, with malice aforethought, caused the death of one Nsenga Juvenal, her husband. The accused denied the charges and the prosecution called 13 witnesses in a bid to prove its case.

The evidence was as follows. On the night of 10th January 2013 at about 09.00pm, the accused returned to their residence in Bugolobi, where she parked her car outside the gate and waited. She pressed the bell and her husband, Juvenal Nsenga (hereinafter referred to as 'the deceased'), came to open the gate. It was during the process of opening the gate that the accused's car knocked it open and overran the deceased. The deceased was then dragged on the rough surface of the driveway for a distance of 10.3 metres. He sustained multiple injuries on his body. Immediately after the incident, the accused sought assistance from some people to put the deceased into the same vehicle and delivered him to Paragon Hospital in Bugolobi. About five hours later, Nsenga was pronounced dead at the said hospital. Given the marital acrimony between the deceased and accused, it was the prosecution's contention that the accused intentionally knocked down the deceased, hence the charge of murder.

In her defence, the accused presented evidence from five witnesses. The defence case was that although the accused admitted to overrunning her husband with the car she was driving, she didn't intend to kill him. It was her testimony that the car simply jerked and ended up knocking him down. The couple had been married since 1994 and blessed with two children.

Issues and resolution

The prosecution discharged, beyond reasonable doubt, the burden of proving that there was death; the death was unlawful; the death was caused with malice aforethought; and that the accused person participated in or caused the death of the deceased. Evidence of the state of the accused and deceased's marriage was adduced in proving malice aforethought.

The court declined to find that the state of their matrimonial relationship was a manifestation of the ordinary wear and tear typical in marriages. There were very grim marital problems that had gone on for over ten years, had become chronic and life-changing, leading the accused person's search for solutions including counselling with family members and prayers, among other interventions. The conduct of the accused, before, during and after knocking down Nsenga, offered corroboration to the deceased's dying declaration that the accused knocked him down with the car.

Conviction

The accused was found guilty and convicted, as charged, of the offence of murder contrary to section 188 and 189 of the Penal Code.

Sentence

The accused, seeking the lenience of court, stated that she was a first time offender, had two children and was remorseful. Before sentencing her to a period of 20 years in prison, the court noted the fact that the accused person had not enjoyed her marriage, especially in the last ten or so years. The couple had two children and the accused was the surviving parent. If the maximum penalty as prescribed in respect of the offence was to be imposed, the children would suffer even more than any of the affected persons in this whole situation. The court further noted that violence results in physical injury, psychological trauma, and at times death, as in the present case, and yet the consequences can cross generations and truly last a lifetime for the family and society at large. These components of society remain traumatised by the

(*continued*)

(*continued*)

gruesome murder, regardless of the degree of the generation of the marital relationship. The court was of the view that the accused should have sought a lawful, legally acceptable way of bringing her frustrations to an end. This was a family matter that got out of hand; the message is that violence must be stopped. Couples are strongly advised to seek guidance and help from family members, friends and relevant institutions to help resolve their differences.

Ratio decidendi

In proving malice aforethought, reliance can be placed on circumstantial evidence for a conclusion that an accused person bore an intention to kill.

Contribution to gender jurisprudence/Point to note

In sentencing the accused, the judge took into account the fact that the accused had maternal duties and that a long sentence would adversely impact on her children.

Intimate partner violence which leads a woman into killing her husband/partner is likely to result in incarceration of the woman. Where the woman is a mother of young children, this has grave consequences for the young children. To understand the impact of parental (and in this case a mother's) incarceration, one must consider the gender roles and responsibilities in a particular society and must understand the nature of family arrangements prior to incarceration. In East Africa, women are the primary caretakers of small children and, as a result, the social costs created by a woman's imprisonment, and its negative impact on the children's well-being and development are immeasurable. The children she leaves behind are often subjected to enormous suffering. Sometimes such women are forced to go to prison with their very young children; some women are imprisoned when pregnant and give birth while in prison. The psychological and physical effects on a child behind bars cannot be underestimated.[50] Therefore, in arriving at an appropriate sentence, a judicial officer may have to take such issues into consideration.

2.7.3 VAW and health

The continuation of harmful practices perpetuated by culture and tradition has serious health consequences for the sexual and reproductive health of women and girls.[51] Such practices deprive women and girls of the right to enjoy the highest standards possible of good health. Examples of such practices include FGM, sexual exploitation, abortion and compulsory sterilisation. They constitute violence that is gender specific, all suffered by women because they are women and which puts women's health and lives at risk.[52]

The complications arising from female genital mutilation range from severe psychological trauma to death due to excessive bleeding. The practice exposes women to the risk of contracting HIV/AIDS and has serious consequences

for the reproductive health of women. Child survivors of FGM become victims of early and forced child marriages and their right to life, education, the highest possible standards of good health, to choose a spouse and enter into marriage of their own free will are all violated by this kind of violence. Child marriages result in early and unwanted pregnancies, with related complications posing life-threatening risks and death of victims.

Domestic violence limits women's access to family planning, an intervention that can decrease maternal mortality, reducing women's exposure to pregnancy and pregnancy-related health risks.

VAW violates the right of women not to be subjected to torture or other cruel, inhuman or degrading treatment, which is guaranteed by the UDHR (Art. 5) and subsequent human rights conventions and has been incorporated in the bill of rights of the constitutions of many Commonwealth member countries, including Kenya, Uganda, Rwanda and Tanzania.

A report prepared by UNIFEM in 2010[53] revealed that violence limits the ability of women to protect themselves from HIV/AIDS. Furthermore, women living with HIV/AIDS are often the targets of abuse and stigma. Young women are at particularly high risk of HIV/AIDS and GBV. The report found that young women represented approximately 60 per cent of all the 5.5 million young people in the world who were living with HIV/AIDS in 2010, and that women were two to four times more likely than men to become infected with HIV during intercourse, with rape increasing this risk by limiting condom use and causing physical injuries.[54] Studies from Tanzania and Rwanda suggested that women who have experienced partner violence were more likely to contract HIV/AIDS than those who have not. Women and girls living in poor urban areas and slums are vulnerable to physical and psychological violence and are twice as likely as men to experience violence.[55]

2.7.4 VAW and equality in the workplace

VAW in the workplace manifests as sexual harassment, which is an obstacle to the realisation by women of the right to equality in employment. This is because equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.[56] The CEDAW Committee has defined 'sexual harassment' to include:

> *such unwelcome sexually determined behaviour as physical contact, and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions.*

Such actions, the Committee noted, can be humiliating and discriminatory – particularly when the victim has reasonable grounds to believe that her

Box 2.4 Vishaka & Ors v State of Rajasthan & Ors on 13 August 1997 Supreme Court of India

This petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. The immediate cause for the filing of petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. However, the petition was brought as a class action.

The petition was brought with the aim of focusing attention towards sexual harassment in the workplace and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all workplaces through judicial process, to fill the vacuum in existing legislation.

The incident reveals the hazards to which a working woman may be exposed and the levels to which sexual harassment can degenerate. In the absence of legislative measures, it is important to find an effective alternative mechanism to fulfil this felt and urgent social need.

Each such incident results in violation of the fundamental rights of 'gender equality' and the 'right of life and liberty'. It is clear violation of the rights under Articles 14, 15 and 21 of the Constitution of India. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women.

objection to sexual harassment would disadvantage her in connection with her employment, recruitment or promotion and when it creates a hostile working environment.[57]

2.7.5 VAW and equality in the family and enjoyment of family life

During the 8th session in 1989,[58] the CEDAW Committee affirmed the obligation of states parties to 'protect women from violence of any kind occurring within the family, at the work place or in any other area of social life.'[59]

The prevalence of family violence in the various forms in which it is manifested – including rape, various forms of sexual assault, mental and other forms of violence perpetuated by traditional practices, attitudes and the abrogation by men of their family responsibilities – puts women's health at risk and impairs women's ability to participate in family and public life on a basis of equality with men. These also violate women's right to equality in the family and in marriage. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such practices and prejudices are used to justify gender-based violence as a form of protection or control of women, and yet the effect of such violence on the physical and mental integrity of women is to deprive them of equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.[60]

Some traditional practices may not in and of themselves qualify to be defined as VAW. However, they perpetuate women's inferior status in the family and indirectly contribute to or result in VAW. Examples of such cultural practices are polygamy and bride price.

One of the ways in which polygamy exposes women to violence is the tension between the wives arising from, among other things, competition for often-scarce family resources. It is not unheard of for co-wives to physically fight each other and sometimes this results in the death of the antagonists. Sometimes the intra-gender tension also leads to abuse of the child of a co-wife, at times culminating in the child's death.[61]

Polygamy is legally recognised as a form of marriage in Kenya (the Marriage Act, 2014), Tanzania (the Marriage Act, 1971) and Uganda (the Customary Marriage [Registration] Act, 1973). However, in Rwanda, polygamy is prohibited.

In Article 16(c) of CEDAW state parties are obliged to ensure that men and women enjoy the same rights and responsibilities during marriage and at its dissolution. In General Recommendation No. 21, the CEDAW Committee emphasised the principle of equality in marriage and family relations as provided for in the Convention.

The Committee has declared the practice of polygamy as a custom that perpetuates discrimination against women and is a sign of unequal status in family and marriage relations. Such a marriage contravenes a woman's right to equality with men and can have serious emotional and financial consequences which violate the constitutional rights of women. Polygamy also breaches the provisions of Article 5 of the Convention, which provides that state parties shall take appropriate measures to eliminate stereotyping, prejudices and discriminatory cultural practices.

Furthermore, the CEDAW Committee, in its Joint General Recommendation/General Comment No. 31 on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices, characterised the practice of polygamy as a harmful practice, often justified by invoking sociocultural and religious customs and values. In light of this, the Committee in its general observations has called upon state parties to implement measures aimed at eliminating polygamy, as called for in the Committee's General Recommendation No.21 on equality in marriage.

It is worth noting, however, that in Kenya until 2014 – when the Marriage Act which formally recognised polygamy as a marriage was enacted – polygamy was a mere cultural practice and not a recognised form of marriage.

Similarly, the payment of bride price as a cultural practice is not prohibited in the four nation states of Kenya, Tanzania, Rwanda and Uganda, although

the CEDAW Committee has expressly categorised bride price as a harmful practice.

In reaction to state party reports on elimination of discrimination against women in Kenya, Tanzania, Rwanda and Uganda, the CEDAW Committee observed as follows:

- Kenya: **CEDAW/C/KEN/CO/6 at paragraph 22** – state party ought to address the prevalent practice of payment of bride price.
- Tanzania: **CEDAW/C/TZA/6** – the Committee is concerned about the persistent practice of bride price, which perpetuates discrimination.
- Rwanda: **CEDAW/C/RWA/CO/6** – state party should implement comprehensive measures directed to change the widely accepted attitudes and practices of women's subordination and the stereotypical roles applied to both sexes.
- Uganda: **CEDAW/C/UGA/4-7** – CEDAW Committee observed that although some efforts had been made by Uganda, it expressed concern that no steps had been taken to eliminate the practice of bride price in the country.

In general, the CEDAW Committee called upon state parties to eliminate the negative cultural value and practice of bride price.

Box 2.5

In Uganda, the customary practice of bride price was declared not unconstitutional by the Supreme Court in MIFUMI (u) Ltd & others v Attorney General & Kenneth Kakuru.[62] However, the demand for return of the bride price following divorce was declared unconstitutional by the court. We have found it pertinent to reproduce in bulk the substantial aspects of this decision below:

Facts of the case

MIFUMI, an NGO, together with 12 others, petitioned the Constitutional Court challenging the constitutionality of the custom of paying bride price as a precondition to contracting a valid customary marriage.

The petitioners *inter alia* contended that the payment of bride price by men leads them to treat their wives as mere possessions. This, they claimed, perpetuates inequality between men and women, which is prohibited by Article 21(1) and (2) of the constitution. The petitioners further contended that the demand for bride price by parents of a young woman to be married portrays her as an article in a market for sale and amounts to degrading treatment, which is prohibited by Article 24 of the constitution. They thus requested the Constitutional Court to declare the custom and practice of demanding and paying – and also of demanding a refund of the bride price at the dissolution of a customary marriage – unconstitutional.

The respondents opposed the petition. They denied that the custom and practice of paying bride price and its refund upon the dissolution of a marriage was unconstitutional. The respondents argued that the

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custom is protected by Article 37 of the constitution, which accords all Ugandans the right to enjoy and practice their culture.

The Constitutional Court, with one member of the court, Justice Twinomujuni, JA, (RIP) dissenting, dismissed the petition, holding that the marriage custom and practice of paying bride price and demanding refund of the same were not unconstitutional.

Dissatisfied with the decision, the appellants lodged an appeal to the Supreme Court. The relevant grounds for purposes of our analysis were that:

i. The learned justices of the Constitutional Court erred in law when they failed to make a declaration that the demand for and payment of bride price fetters the free consent of persons intending to marry or leave a marriage, in violation of Article 31(3) of the constitution.
ii. The learned justices of the Constitutional Court erred in law when they declined to declare the demand for a refund of bride price unconstitutional, despite their finding as a matter of fact and law, that the practice undermines the dignity of a woman contrary to Article 33(6) of the constitution and may lead to domestic violence.

The appellants requested *inter alia* for declarations that the custom and practice of demanding and paying bride price as a necessary condition for a valid customary marriage is unconstitutional and equally that the custom of demanding for a refund of bride price as a condition for the valid dissolution of customary marriage is unconstitutional.

Tumwesigye JSC, who wrote the lead judgement of the majority, was inclined to the second respondents' argument that there are many more husbands who give bride price, but who do not use it as a justification for inflicting violence and abuse on their wives. Therefore, while acknowledging that there may be some husbands who might use it as a justification to batter and abuse their wives, it is often used more as a pretext than the actual reason, this cannot constitute sufficient justification for denying the enjoyment and practice of the custom to people who cherish it as is provided for under Article 37 of the constitution. He thus held that:

> *It is my view that payment of bride price in customary marriage is overrated by the appellants as a significant factor in the promotion of inequality and violence against women. I would therefore, decline to grant the declaration prayed for by the appellants that the custom and practice of demand of bride price promotes inequality and violence in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution.*
>
> *Nevertheless, it is important that in parts of the country where men are abusing this custom which the population as a whole seem to cherish, the Government together with local governments, should pass regulations which should be strictly enforced to stop this abuse.*

As to whether bride price fetters the free consent of persons intending to marry, he held: 'The Constitutional Court did not err in holding that payment of pride price does not fetter the parties' free consent to enter into marriage'.

The court declined to grant a declaration that the custom and practice of demand for payment of bride price fetters free consent of persons intending to marry, thereby violating Article 31(3) of the constitution.

Whether the learned justices of the Constitutional Court erred in law when they held that it was not essential to declare the practice of demand for refund of bride price unconstitutional, the court held:

> *The custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2nd respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term 'bride price' is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price*

(*continued*)

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constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded.

Apart from this, the custom completely ignores the contribution of the woman to the marriage up to the time of its break down. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. I respectfully do not agree with the suggestion proposed by the 2nd respondent that when the marriage breaks down, a woman's contribution should be subjected to valuation, taking into account the length of the marriage, the number of children the woman has produced in the marriage, etc., on the basis of which the refund should be determined.

She is not property that she should be valued. It is my view that refund of bride price violates Article 31(1) which provides that 'men and women of the age of eighteen and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution'.

It is also my view that refund of bride price is unfair to the parents and relatives of the woman when they are asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund.

The effect of the woman's parents not having the property to refund may be to keep the woman in an abusive marital relationship for fear that her parents may be put into trouble owing to their inability to refund bride price or that her parents may not welcome her back home as her coming back may have deleterious economic implications for them.

Furthermore, if marriage is a union between a man and a woman, it is not right that for customary marriage to be legally recognised dissolution should depend on a third party satisfying the condition of refunding bride price failure of which the marriage remains undissolved.

It is my firm view that the custom of refund of bride price, when the marriage between a man and a woman breaks down, falls in the category that is provided under Article 32(2) of the Constitution which states: 'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any marginalized group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'.

I would, therefore, declare that the custom and practice of demand for refund of bride price after the breakdown of a customary marriage is unconstitutional as it violates Articles 31(1)(b) and 31(1). It should accordingly be prohibited under Article 32(2) of the Constitution.

On whether bride price promotes inequality in marriage, it is my finding that it does not. I would, therefore, decline to grant the declaration prayed for by the appellants that the custom of bride price promotes inequality and violence in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution. And secondly on the issue of whether bride price fetters the free consent of persons intending to marry, it is my finding that the Constitutional Court did not err in holding that payment of bride price does not fetter the parties' free consent into marriage. I would, accordingly, decline to grant a declaration that the custom of bride price fetters the free consent of persons intending to marry, thereby violating Article 31(3) of the Constitution.

In the partial dissent decision of Dr Kisaakye JSC, she agreed with the majority decision of the court, declaring the custom of refund of bride price as a condition precedent to the dissolution of a customary marriage unconstitutional. However, she also found that the payment of bride price in its self was unconstitutional.

She found the practice of demanding for any 'gifts' by the parents of the girl intending to marry and their payment, which 'gifts' in essence form the bride price and the making of the payment of these gifts a condition precedent to a valid customary marriage, unconstitutional.

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Kisaakye, JSC (supra) considered that although Article 37 of Uganda's constitution grants Ugandan citizens the right to enjoy and practice their culture, the practice of payment of bride price was not such practice envisaged to be upheld by the constitution. She held that:

> *Article 37 does not, in my view, validate all customs and cultural practices practiced by the different tribes and ethnic groups in Uganda. Rather, it is only those customs and cultural practices that meet the Constitutional test that are preserved under this Article. The net effect of the provisions cited above, in my view, is that the only customs and cultural practices that were permitted under the Constitution of Uganda to be enjoyed, practiced, professed, maintained and promoted under Article 37 are those cultural practices and customs that meet the constitutional standards laid out in the above provisions.*
>
> *This is evidenced by various provisions of the Constitution. These include Objective XXIV of State Policy, which provides as follows: 'Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life'.*
>
> *It should also be noted that Article 45 of the Constitution also provides that the rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms that are specifically mentioned in the Constitution shall not exclude those which were not specifically mentioned therein.*
>
> *Apart from Article 45 of the Constitution, it should also be remembered that Uganda is a signatory to all the major human rights Conventions which require it to put in place laws and measures that prevent discrimination and the perpetuation of inequality.*
>
> *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides but one example of such Convention imposing obligations on Uganda to take action in line with the prayers made in this Petition. Under Article 2 (f) of this Convention, Uganda as a state party condemned discrimination against women in all its forms, and agreed to: 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.*
>
> *Uganda also made specific undertakings under the CEDAW Convention to tackle discrimination occurring at the time of contracting a marriage under Article 16(1)(b), which provides as follows: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same right freely to choose a spouse and to enter into marriage only with their free and full consent'.*
>
> *Lastly, under Article 16 (1)(c) of the CEDAW Convention, Uganda is also obligated to ensure that women enjoy equal rights and responsibilities during marriage. It provides thus: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights and responsibilities during marriage and at its dissolution'.*
>
> *In my view, the learned majority justices of the Constitutional Court erred in law and fact when they failed to consider the constitutional challenges to bride price as alleged by the Petitioners vis a vis the cited constitutional provisions.*

She noted that Ugandans seeking to practice their culture would still be able to voluntarily exchange marriage gifts before, during or after the contracting of the customary marriage between the groom to be and his wife or her parents or relatives and vice versa. That such a voluntary exchange of gifts is permissible under Art. 37 and therefore not unconstitutional.

(*continued*)

(*continued*)

As to whether payment of bride price promotes inequality in marriage, she held as follows:

> *Article 31(1)(b) of the Constitution guarantees 'equal rights for men and women at and in marriage, during marriage and at its dissolution'.*
>
> *Furthermore, the payment of bride price is also inconsistent with inter alia Article 21 of the Constitution because only one party to the marriage is obligated to pay bride price. It therefore discriminates between man and woman on the grounds of sex, yet under Article 21 of the Constitution, all persons are equal before and under the law and a person shall not be discriminated against on the ground of sex, among others.*
>
> *Bride price also promotes inequality in marriage in as far as the custom only subjects men to paying bride price. This also runs contrary to clear provisions of Articles 21 and 31, which provides for men and women to have equal rights in marriage, during marriage and its dissolution; as well as Article 33 which provides for women to have full and equal dignity with men.*
>
> *In conclusion, I find, for all the reasons given in this judgement, that the majority Justices of the Constitutional Court erred in law and fact when they dismissed the petition against the payment of bride price and its refund at the contracting and dissolution of marriage respectively, as conditions precedent to the contracting of a valid customary marriage and the dissolution of customary marriage among various tribes in Uganda.*
>
> *I find that the majority Justices of the Constitutional Court also erred in law and fact when they held that bride price means the same thing for all the different cultures in Uganda and failed to find that bride price is commonly practiced in Uganda by all cultures.*
>
> *I also find that the majority Justices of the Constitutional Court erred when they found and held that they could not take judicial notice of the custom and practice of paying bride price.*
>
> *I also find that the majority Justices of the Constitutional Court erred when they failed to find that the payment and refund of bride price promotes inequality in marriages and that it is one of the causes of domestic violence in customary marriages.*
>
> *Lastly, I also find that the majority Justices of the Constitutional Court erred when they declined to issue the declaration on the undesirable effects of bride price on the basis that these could be remedied by other laws and means other than declarations.*
>
> *I would accordingly allow this appeal and make the following declarations:*
>
> (a) *The voluntary exchange of gifts at marriage or during marriage between the groom to be and his wife to be and/or her parents and relatives and vice versa is not unconstitutional.*
>
> (b) *That the custom and practice of demand of bride price by a woman's parents or her relatives from her husband to be as a condition precedent to a valid customary marriage practiced by several tribes in Uganda is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.*
>
> (c) *The payment of bride price, as a condition precedent for the validity of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.*
>
> (d) *That the custom and practice of demand for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.*
>
> (e) *That the payment of bride price as a condition precedent to a valid customary marriage and of its refund as a condition precedent to the dissolution of a customary marriage which has been demanded for by a woman's parents and/or relatives undermines the dignity & status of women and is therefore inconsistent with Article 32(2), 33(1) and (4), and 21(1) & (2) of the Constitution.*

2.7.6 The economic costs of VAW

Costs of VAW are widespread throughout society. Every recognisable effect of violence has a cost, whether it is direct or indirect. The types of costs can be categorised as follows: direct, indirect, tangible and intangible, borne by individuals, including victims, perpetrators or other individuals affected by violence, by the government at all levels (including the judiciary and other law enforcement actors) and by society in general.

Direct and tangible costs of violence are actual expenses paid, representing real money spent as a result of violence. Examples are the taxi or bus fare to a hospital or salaries for staff in a shelter or GBV recovery centre. Indirect tangible costs have monetary value in the economy, but are measured as a loss of potential. Examples of such costs are lower earnings and profits resulting from reduced productivity and loss of personal income as a result of absenteeism from work as a result of violence.

Direct intangible costs result directly from the violent act, but have no monetary value. Examples include pain and suffering, and the emotional effects of the loss of a loved one through a violent death. The last category comprises the indirect intangible costs resulting indirectly from the violence that have no monetary value. Examples of such cost include the negative psychological effects on children who witness violence.

The United Nations[63] has identified the economic costs as follows:

- Costs imposed on the justice system include: policing, court trials, penal costs and related costs such as victim compensation, administering community sentences and organisations that support the incarcerated; labour (employees who work for the justice system), capital (buildings for police, courts and penal institutions) and material inputs (gasoline for police vehicles or food provided to prisoners). A lot of time is taken by law enforcement officials (the police) off their policing duties to respond to reports of violence and the financial cost involved includes the money spent on building the capacity of the police to respond to VAW. A lot of time is spent on court trials of cases involving VAW and the supervision of probation sentences where these are awarded by the court. The requirement for separate police units dedicated to VAW and the establishment of family and other courts dedicated to cases of VAW can involve the construction of buildings for specialised courts, police units and penal institutions, the payment of salaries to those who work in these institutions and the cost of food for perpetrators of violence serving prison terms.
- Direct health costs in the community include short-run and long-run healthcare in doctors' offices, clinics of all types and hospitals,

including those also paid by the victim through out-of-pocket costs for such things as healthcare services, medications, prosthetics, elective surgeries and alternative health services. Indirect health costs are mostly borne by the individuals. They include such things as reduced longevity, the effects of poor health on lifestyle choices and reduced mobility affecting the ability to participate in public life. These are also included in the personal cost category. Health costs can be multiplied throughout society, such as the spread of HIV/AIDS among women who are compelled by the threat of violence to have sex with infected partners or to participate in prostitution.

- Social services include social welfare agencies helping abused women, abusive men and their children. Any time an individual accesses any public service as a result of VAW, a cost is incurred. The service may be provided through a church, community centre, social worker, religious leader or private agency.
- Education costs can include the added demand for special education services related to behavioural problems and learning disabilities in children who witness abuse at home, as well as school programmes with the aim of reducing violence against girls. Training programmes for women to re-enter the workforce after leaving abusive partners are also included. An indirect cost is the reduced earning capacity of women and girls who have reduced educational attainment as a consequence of violence.
- Business costs include lost time at work and reduced attention, the time co-workers spend covering for absent workers, the time the victim may spend in the restroom or on the phone with friends or family, actual time the victim may need to take off work, administrative time spent processing time off, administrative costs for the search and training of a replacement employee if the victim leaves the job, administration costs for programmes or policies designed to help support victims, lost profits from decrease in output and the increase in overtime payments to other workers who cover for absentee workers. There are additional costs to the business sector beyond the lost productivity reflected in the victim's earnings. Costs to the firm can also include the administrative costs of processing harassment suits or union grievance procedures for violence occurring in the workplace. On a broader scale, VAW lowers their earning potential, which results in lost tax revenue from reduced output and income and consequently lower gross national product (GNP).
- Victims spend a great deal in direct out-of-pocket costs for transportation, childcare, alternative therapies, replacing destroyed

belongings, relocation and medications. These expenditures greatly affect household consumption, skewing it away from the goods and services that would be chosen in the absence of violence. Reduced income stems from time off work, lower productivity while at work, quitting or lost promotions and generally having a more marginal labour force attachment. Another indirect cost borne by victims and their families is the loss of unpaid household production. When a woman is injured or emotionally upset, she performs less of her household responsibilities. Finally, the household faces costs if the victim leaves the abusive household and loses the economies of scale derived from sharing one domicile. That is, more work is required to produce the same level of output in two households than in one.

- Intangibles are very difficult to cost. A few examples include the fear that women harbour as a result of abuse; pain and suffering or the loss of life; and second-generation effects of violence. The costs of VAW are borne by individuals, families, communities and societies as a whole. Individuals pay out-of-pocket expenses and their families experience a change in their consumption choices as a result. Individuals and their families also bear the burden of reduced income, reduced savings and loss of household output. Communities cover the costs of private services provided by the local agencies, such as churches or volunteer workers in crisis centres. Municipal, state or provincial, and national governments bear the costs of public services offered within their jurisdictions, as well as supporting private initiatives through granting programmes. The exact services provided by each level of government depend on the country, its history and its political culture. Overall, the entire economy and the whole national society are affected by the monetary and non-monetary losses resulting from VAW.

The intangible cost is emphasised in *Uganda v Jackline Uwera Nsenga,* in which case the court observed that violence results in physical injury, psychological trauma and at times death – as was in the present case – and yet the consequences can cross generations and truly last a lifetime for the family and society at large. In *Uganda v NA*, in which case the accused (a victim of VAW) was convicted on her own plea of guilt for having killed the father who had sexually abused her for more than three years, the judge noted that the accused ('the convict') deserved empathy and support rather than punishment, as she had to carry the psychological scars of the abuse for life.

In some Commonwealth member countries, the economic costs of VAW have been quantified and compiled in a publication by KPMG, details of which are set out in Table 2.2.[64]

Table 2.2 Table of costs of VAW in some Commonwealth member countries

Member state	Year of publication	Costs (US$)	GDP (%)	Type of violence
Canada	2011	6.9 Billion	0.39	Intimate partner violence (IPV)
United Kingdom	2008	22.8 Billion	0.85	Domestic violence (DV), IPV
Australia	2009	14.7 Billion	1.1	VAW, IPV
South Africa	2014	17.6 Billion	1.3	GBV
Bangladesh	2010	1.8 Billion	2.05	DV

Notes

1 General Assembly Resolution 48/104 of 20 December 1993 (UN General Assembly 1993).
2 Declaration on Elimination of Violence against Women, Art. 1 (ibid.).
3 United Nations Inter-Agency Standing Committee; Establishing-Gender-based-Standard-Operating-Procedures-SOPs-for-Multi-sectoral-and-Inter-organisational-Prevention-and-Response-to-Gender-based-Violence-in-Humanitarian-Settings-ENGLISH. Also available with UNHCR (2005) under the title *Guidelines for Gender-based Violence Interventions in Humanitarian Settings Focusing on Prevention of and Response to Sexual Violence in Emergencies*.
4 CEDAW (1994), Comment No. 6.
5 Ibid, at page 1, paragraph 1.
6 Universal Declaration of Human Rights, article 3 (UN General Assembly 1948); and International Covenant on Civil and Political Rights, Article 6 (UN General Assembly 1966a).
7 International Covenant on Civil and Political Rights, Article 26.
8 Universal Declaration of Human Rights, Article 3; International Covenant on Civil and Political Rights, Article 9.
9 Ibid, Article 7.
10 Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Article 7; and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN General Assembly 1984).
11 Universal Declaration of Human Rights, Article 16; CEDAW (1979), Article 16.
12 International Covenant on Economic, Social and Cultural Rights, Article 12(1) (UN General Assembly 1966b).
13 UDHR, Article 23, CEDAW, Art. 11.
14 CEDAW (1994), at page 1, General Comment No. 6.
15 CEDAW Resolution No. 34/180.
16 CEDAW (1994), General Comment No. 7.
17 The Preamble of the *Declaration on Elimination of Violence Against Women*, paragraphs 5,6,7 (UN GA 1993).
18 Commission on the Status of Women (2013).
19 African Union (2003), *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)*, Article 1(j).
20 Article 2 of the Convention of Belem Do Para.

21 Special issue, Kenya Gazette supplement.
22 USAID, Gender-Based Violence in Tanzania: An Assessment of Policies, Services, and Promising Interventions, available at: http://www.mcdgc.go.tz/data/PNADN851.pdf
23 United Republic of Tanzania (revised 2002), Chapter 16.
24 Republic of Uganda (2010), Domestic Violence Act, No. 3. The preamble states that it is an Act to provide for the protection and relief of victims of domestic violence, to provide for the punishment of perpetrators of domestic violence; to provide for the procedure and guidelines to be followed by the court in relation to the protection and compensation of victims of domestic violence; to provide for the jurisdiction of court; to provide for the enforcement of orders made by the court; to empower the family and children court to handle cases of domestic violence and for related matters.
25 Court of Appeal of Tanzania, Criminal Appeal No. 334 of 2009.
26 United Nations (2006), page (iii).
27 http://www.unodc.org/documents/data-and-analysis/glotip/Tip2014-Press-release-Eng.pdf
28 United Nations, Violence against Women, available at: http://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_chapter6_t.pdf
29 Kenya National Bureau of Statistics (KNBS) and ICF Macro (2010).
30 Kenya National Bureau of Statistics (2015), *Kenya Demographic Health Survey 2014*, pages 58–60.
31 Ibid, pages 58–60.
32 Ibid, pages 61–62.
33 Rwanda Demographic and Health Survey (2010), available at: https://dhsprogram.com/pubs/pdf/FR259/FR259.pdf
34 Rwanda Men's Resource Centre (2013), Baseline study on GBV, available at: http://www.rwamrec.org/IMG/pdf/baseline_study_on_gbv_may_2013-_rwamrec.pdf
35 United Republic of Tanzania National Bureau of Statistics and ICF Macro (2010), *Tanzania Demographic and Health Survey 2010*, at page 275.
36 Ibid, page 279.
37 Ibid, page 253.
38 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Consideration of reports submitted by states parties under Article 18 of the Convention, combined 4th, 5th and 6th periodic reports, Tanzania, Concluding Observations, para 76.
39 Kijo, H and others (eds.) (2014), page 35. See also Human Rights Watch interview with Mary Massay, Executive Director, Commission for Human Rights and Good Governance (CHRAGG), Dar es Salaam, 15 April 2014. See also Help Age International (2011).
40 Office of the Director of Poverty Reduction and Economic Management Network, Africa Region, World Bank, (2004).
41 An Act to amend several laws written, making special provisions in those laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children.
42 Uganda Demographic and Health Survey (2011), at p239.
43 Fourth World Conference on Women (1995), Beijing Declaration and Platform for Action (adopted by 189 countries), Beijing, 4–15 September 1995.
44 CEDAW (1979).
45 CEDAW (1994), General Comments No. 6 and 7.
46 Kivuitu v Kivuitu, Civil Appeal No. 26 of 1985, reported in (1991) 2 KAR 241.
47 In the Matter of the Estate of Lerionka Ole Ntutu, in the High Court of Kenya, sitting at Nairobi, HC Succession Case No. 1263 of 2000, available at www.kenyalaw.org. Also see *Ndewawosia d/o Ndeamtizo v Emanuel s/o Malasi* 1968 HCD No. 127, Tanzania (PC) Civil Appeal 80-D-66, 10/2/68.
48 UN Children's Fund (UNICEF) (2000), page 9.
49 Tibatemwa-Ekirikubinza, L (1999).
50 Ibid.
51 CEDAW Committee, General Recommendation No. 14 (9th session, 1990).

52 General Recommendation No. 14, para 22–23.
53 UNIFEM (2010), CEDAW Committee, General Recommendation No. 14 (9th session, 1990), *The Facts: Ending Violence against Women and the Millennium Development Goals*.
54 Ibid.
55 Ibid.
56 CEDAW (1994), para 17, commenting on CEDAW Article 11.
57 Ibid, commenting on Article 11, para No. 18.
58 CEDAW Committee (1989).
59 CEDAW Committee (1989), citing CEDAW, Articles 2, 5, 11, 12 and 16 in support.
60 CEDAW (1994), paragraph 11, commenting on CEDAW Articles 2(f), 5 and 10(c).
61 Tibatemwa-Ekirikubinza, L (1999).
62 Constitutional appeal No. 2 of 2014.
63 United Nations, *Economic Costs of Violence Against Women*, available at: http://www.un.org/womenwatch/daw/vaw/expert%20brief%20costs.pdf
64 KPMG, *Too Costly To Ignore – The Economic Impact Of Gender-Based Violence In South Africa*, available at: https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Too%20costly%20to%20ignore-Violence%20against%20women%20in%20SA.pdf

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 protection[20]

Declaring a witness vulnerable[21]

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 measures[22] 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 justice[25] 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, 2014[27] 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 constitution[48] 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 rape[53] 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 over ruled 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 spouses[61]

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 contribution[64]

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.

(*continued*)

(*continued*)

Provisions protecting interest in matrimonial property[65]

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 marriage[66]

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 spouses[67]

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 JTF[78] 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.

(*continued*)

(*continued*)

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.

Chapter 4
International Law Standards and State Obligations

4.1 Introduction

The East African Commonwealth member countries subscribe to various international and regional human rights instruments that provide for the protection of the rights of women and children particularly the girl child. The instruments contain definitions, set standards and impose obligations on states parties. They include: the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child (CRC) and the Convention Against Torture, among others. Since the foundation of all these instruments is the Universal Declaration on Human Rights (UDHR), the Commonwealth member countries are also bound by the universal principles set out in the UDHR.

4.2 The status of international law and norms in the Commonwealth member countries in East Africa

Kenya

By virtue of Article 2(6) of the Constitution of Kenya, any treaty or convention which Kenya has ratified forms part of the law of Kenya. The **Treaty Making and Ratification Act**[1] gives effect to the provisions of Article 2(6) of the constitution and provides the procedure for the making and ratification of treaties and connected purposes. The government is required to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms (Article 21).

Where a particular law does not give effect to a right or a fundamental freedom, the court is required, in applying a provision of the Bill of Rights, to develop the law to give effect to the provisions of the Bill of Rights.

In so doing, the court is required to adopt the interpretation that most favours the enforcement of the right or fundamental freedom. Since the general rules of international law and treaties and conventions ratified by Kenya form part of the law of Kenya, the international standard of exercising due diligence to prevent, investigate and punish the perpetrators of violence against women is part of Kenyan law.

Rwanda

According to Article 189 of the constitution, the President of the Republic of Rwanda negotiates international treaties and agreements and ratifies them, and thereafter the parliament is notified. However, treaties that commit state finances, modify provisions of laws already adopted by parliament or relate to the status of persons, can only be ratified after authorisation by parliament. Article 190 provides that upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than the domestic/municipal laws (organic laws and ordinary laws), except in the case of non-compliance by one of the parties.

According to Article 192, where an international treaty contains provisions in the event that the Supreme Court, upon request by the organs referred to in Article 145 paragraph 4 of the constitution, rules that an international treaty contains provisions which are inconsistent with the constitution, the authorisation to ratify the treaty or agreement cannot be granted until the constitution is amended.

Tanzania

In Tanzania, treaties and convention are not self-executing. Rather, execution is through an individual chief executive or cabinet decision, followed by a process of ratification through which provisions of international treaty law may be domesticated.

Uganda

The **Constitution of Uganda** and the **Ratification of Treaties Act, 1998**[2] constitute the country's municipal law on international conventions. Article 123 of the constitution provides that the president or a person authorised by the president, may make treaties, conventions, agreements or other arrangements between Uganda and any other country. According to Article 287 of the constitution, any treaties which had been signed, affirmed or were in force prior to the promulgation of the constitution, still bind and have the force of law in Uganda. Parliament's ratification jurisdiction is reserved for treaties on armistice, neutrality, peace or the subject of which require amendment of the constitution. Cabinet ratifies all the other treaties. According to the Ratification of Treaties Act, treaties ratified by the cabinet must be laid before parliament.

The Bangalore Principles

Whatever the constitutional provisions regarding the applicability of international law is in each country, judicial officers must be cognisant of the 1988 Bangalore Principles. The Bangalore Principles were released as

a summary of issues discussed at a judicial colloquium on The Domestic Application of International Human Rights Norms, held in Bangalore, India, from 24 to 26 February 1988.[3] It was stated that fundamental human rights and freedoms were inherent in all humankind and found expression in constitutions and legal systems throughout the world, and in the international human rights instruments. Furthermore, ten principles hereunder mentioned were agreed upon as important in the work of courts:

1. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
2. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
3. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
4. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
5. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
6. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
7. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries, the national court is obliged to give effect to

the national law. In such cases, the court should draw such inconsistency to the attention of the appropriate authorities, since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

8. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views, it is desirable to make provision for appropriate courses in universities and colleges for lawyers and law enforcement officials; and for meetings for exchanges of relevant information and experience.
9. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.
10. The essence of the Bangalore Principles is that a treaty could give rise to a 'legitimate expectation' (by the citizenry) that the state would adhere to the terms of a treaty that it has ratified. 'This expression seems to encapsulate the modern approach to the use that may be made by judges of International Human Rights principles'.[4]

The equality standard

The **Charter of the United Nations (UN Charter)**, adopted in 1945, is the fundamental and capstone document for subsequent international human rights laws, norms and standards.[5] The charter introduces equality as an international standard, and proclaims and recognises the inherent dignity of all human beings and their equal and indisputable rights. It further proclaims that fundamental rights and freedoms belong to members of the human race without distinction as to race, sex, language or religion.[6] It effectively states that those rights are a subject of international concern and are no longer within the state's exclusive domestic jurisdiction.

Subsequent to the UN Charter is the **Universal Declaration of Human Rights (UDHR),** adopted in 1948.[7] The UDHR is the basic international statement on the unquestionable rights of all members of the human race and, in all the articles, it echoes the principle of equality of men and women, with the preamble stating that:

> *the recognition of the inherent dignity and equal and indisputable rights for all members of the human family, is the foundation of freedom, justice and peace in the world.*

It recognises that the member states of the United Nations have reaffirmed their faith in human rights and the equal rights of men and women. In Article 1, the declaration provides that all human beings are born free and equal in dignity and in rights, while Article 2 declares that everyone is entitled to all the rights and freedoms set forth in the declaration without distinction of any kind such as race, colour, sex, language, religion or other status. Article 7 echoes the principle of equality and non-discrimination by stating that:

> *All are equal before the law and are entitled without discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

Subjecting a person to torture, cruel, inhuman and degrading treatment or punishment is prohibited in Article 5. Women are entitled to enjoy a life that is free of violence, without any discrimination and on a basis of equality with men.

Following the UDHR, equal protection clauses became a standard feature of international and regional conventions and instruments. Such clauses generally proscribe discrimination on the basis of race, sex, religion or national origin or sometimes require simply that all persons be afforded equal protection of the law and equal access to justice. It is the obligation of every state to ensure that all the rights enshrined in the UDHR are enjoyed by all human beings on a basis of equality. It is therefore the obligation of the state to prevent, eradicate, protect, prosecute and punish acts of violence against women and to provide an effective remedy to victims of such violence. These obligations arise from various international and regional human rights treaties which recognise VAW as a form of discrimination and a human rights violation. National constitutions, legislative frameworks, action plans and jurisprudence from national judiciaries and regional human rights institutions supplement these treaties. Under international law, states are accountable for human rights violations and acts of violence perpetrated by the state itself or by its agents, and in some instances by private actors. Such responsibility can arise from state action, omission or failure to take positive measures to protect and promote rights.[8]

Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), also known as the 'the women's convention' and the most comprehensive International Instrument on the rights of women, establishes standards on equality and non-discrimination. In Article 1, it defines 'discrimination' as below (Box 4.1).

Box 4.1 Defining discrimination against women

CEDAW Art. 1

For the purposes of the present Convention, the term 'discrimination against women' shall mean, any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Although the convention does not explicitly address or **define 'violence against women'** or lay down specific standards for addressing the problem of VAW, the CEDAW Committee has interpreted the above definition of 'discrimination' to include gender-based violence. In Article 2, the convention condemns discrimination and creates obligations and standards for states parties '**to pursue by all appropriate means and without delay a policy of eliminating discrimination against women'.** To this end, state parties are required to:

(a) embody the principle of the equality of men and women in their national constitutions and other national legislations in order to ensure the practical realisation of this principle;

(b) establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;

(c) refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions act in conformity with this obligation;

(d) take appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; and

(e) repeal all national penal provisions which constitute discrimination against women and to adopt appropriate legislative and other measures, including sanctions where appropriate, to prohibit all forms of discrimination against women.

Traditional practices that discriminate against women are prohibited in CEDAW Art.2 (f), which creates the obligation on the part of state parties to take all appropriate measures, including the enactment of legislation, to modify or abolish existing laws, customs and practices that constitute discrimination against women. Additionally, Article 5 of the convention creates an obligation for state parties to take all appropriate measures to, among others:

> *modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*

CEDAW, in Article 11, establishes the obligation of state parties to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, and in particular the right to work as an indisputable right of all human beings.

Declaration on the Elimination of Violence against Women

The Declaration on the Elimination of Violence against Women (DEVAW) identifies women belonging to minority groups, indigenous women, women refugees, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict as particularly vulnerable to violence and deserving protection by the state through the exercise of due diligence.

Addressing harmful traditional practices, DEVAW in Article 4 creates another obligation for state parties. The state parties are required to **'condemn violence against women and to refrain from invoking any custom, tradition or religious consideration to avoid their obligation with respect to its elimination'**.

In addition, state parties are required to pursue by all appropriate means and without delay, a policy of eliminating VAW and to *inter alia* take the following steps:

- Refrain from engaging in VAW.
- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of VAW, whether those acts are perpetrated by the state or by private persons.
- Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; and provide them with access to the mechanisms of justice and just and effective remedies for the harm suffered as a result of violence.
- Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish VAW, receive training to sensitise them to the needs of women victims of violence.

- Adopt measures directed towards the elimination of VAW, who are especially vulnerable to such violence.

The CEDAW Committee emphasised that gender-based violence impairs and nullifies women's enjoyment of human rights and fundamental freedoms, including the right to live without violence. The committee has established more obligations on the part of state parties to address VAW and urges them to adopt the following, among others:

(a) Take appropriate and effective measures to overcome all forms of GBV, whether by a public or private act.

(b) Ensure that the laws against family violence and abuse, rape, sexual assault and other GBV, give adequate protection to all women and respect their integrity and dignity. Gender-sensitive training for judicial and law enforcement officers for effective implementation of the convention was recommended, as well as the provision of appropriate protective and support services for victims of violence.

(c) Identify the nature and extent of attitudes, customs and practices that perpetuate VAW and the kinds of violence that result, and report on the measures they have taken to overcome VAW and the effect of those measures.

(d) Take effective measures to overcome these attitudes and practices. Such measures should include the introduction of education and public information programmes to help eliminate prejudices that hinder women's equality.

(e) Take all legal and other measures to address family/domestic violence and to provide effective protection of women against GBV, including: penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including violence and abuse in the family, sexual assault and sexual harassment in the workplace.

(f) Establish support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling.

(g) Include in their reports under the convention, information on legal measures that have been taken to overcome VAW and the effectiveness of such measures.[9]

(h) Take all legal and other measures that are necessary to provide effective protection of women against GBV, including: penal sanctions, civil remedies and compensatory provisions to

protect women against all kinds of violence, including violence in the family, sexual assault and harassment in the workplace.

(i) Take preventive measures, including public information and education programmes to change attitudes concerning the roles of men and women.

(j) Take protective measures, including refuges, counselling, rehabilitation and support for women who are victims of violence or who are at risk of such violence.

(k) Take the following measures with a view to eradicate the traditional practice of female circumcision: the introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision and inclusion in their country reports to the committee, under Article 10 and 12 of the convention, information about measures taken to eliminate female circumcision.

The CEDAW Committee has emphasised that discrimination under the convention is not restricted to actions by or on behalf of the governments (see Articles 2(e), 2(f) and 5 of the convention). Article 2(e), for instance, requires that state parties take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.

In General Recommendation No. 19, the Committee articulated the due diligence standard and states that:

> *under general international law and specific human rights covenants, states may…..be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.*[10]

Convention on the Rights of the Child

The **Convention on the Rights of the Child (CRC)**[11] in Article 2 imposes an obligation on states parties to take appropriate measures and ensure that children are protected from all forms of discrimination. Further, state parties are required to take all effective and appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, exploitation and sexual abuse.[12] In Article 24(3) of the convention, state parties are required to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children such as child marriages and female genital mutilation (FGM).

The African Charter on the Rights and Welfare of the Child

Article 3 of the African Charter on the Rights of and Welfare of the Child prohibits discrimination as follows:

> *Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour,* **sex,** *language, religion, political or other opinion, national and social origin, fortune, birth or other status. (Emphasis added)*

Article 16 provides for protection of children against child abuse and torture thus:

1. *State parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.*
2. *Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment and follow-up of instances of child abuse and neglect.*

Article 21: Protection against harmful social and cultural practices:

1. *State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:*
   (a) *those customs and practices prejudicial to the health or life of the child; and*
   (b) *those customs and practices discriminatory to the child on the grounds of sex or other status.*
2. *Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.*

International Covenant on Economic, Social and Cultural Rights

According to Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[13] state parties to the covenant have undertaken to guarantee that the economic, social and cultural rights set out in the covenant will be exercised without discrimination of any kind as

to race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status. These include the right to enjoy the highest attainable standard of physical and mental health.[14] States parties have an obligation to take steps to achieve the full realisation of this right.

Such steps include those necessary for the healthy development of the child.[15] Child marriages and FGM are a violation of this right, because of their numerous negative and health consequences. The state must therefore act to eliminate FGM and child marriages.

Article 7 of the ICESCR provides the right of everyone to enjoy just and favourable conditions of work. By implication, this requires women to be free from all forms of violence and harassment, including sexual harassment in the workplace. The state has the obligation to legislate against sexual harassment in the workplace.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the Convention against Torture or CAT) bans the use of torture and other cruel, inhuman or degrading treatment or punishment. CAT seeks to effectively support the struggle against the use of torture around the world and requires state parties to: take steps to prevent, investigate and punish those who commit these practices; ensure that any victim (or their dependents in the event of the victim's death) receives adequate compensation, including rehabilitation; and to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, including in relation to:

(a) returning, expelling or extraditing someone where there are substantial grounds to believe s/he will face torture;

(b) arrest, detention and imprisonment;

(c) interrogation;

(d) training law enforcement – civil or military – personnel, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment;

(e) investigating allegations of torture; and

(f) ensuring such offences are punished under criminal law, applying appropriate penalties to reflect the gravity of the offence.

The convention establishes the Committee against Torture, which views VAW, including sexual violence and trafficking, as gender-based acts of torture within the scope of the convention.

States that have ratified the convention are required to submit an initial report documenting compliance with the provisions of the treaty within one year of acceding to the convention, and thereafter submit a periodic report every four years.

Council resolution 11(II) of 21 June 1946 establishing the Commission on the Status of Women

The Commission on the Status of Women (CSW) adopted the DEVAW definition of VAW and urged states to strongly condemn all forms of violence against women and girls, and to refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination, as set out in the declaration.

4.2.1 The obligation to submit CEDAW periodic reports

States are required, under Article 18 of CEDAW, to submit periodic reports to the UN Secretary-General for consideration by the CEDAW Committee. Such reports are to be submitted within one year after the entry into force of the convention for the state party concerned, and thereafter every four years – and further whenever the committee calls for such report. A periodic report should contain information about legislative and other measures taken by the state to protect women from all forms of violence, including measures adopted to eradicate such violence. The committee has emphasised that discrimination under the convention is not restricted to actions by or on behalf of governments (see Articles 2(e), 2(f) and 5 of the convention). Article 2(e), for instance, establishes the obligation to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Consequently, the committee – while articulating the due diligence obligation – affirmed that:

> *under general international law and specific human rights covenants, States may…..be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.*[16]

Kenya

The committee considered the 7th Periodic Reports for Kenya at its 963rd and 964th meetings.[17] In the concluding observations, the committee welcomed the adoption of the current constitution containing a comprehensive Bill of Rights, which enhances protection for women. It noted, among other provisions, Article 27(4) which prohibits direct or indirect discrimination,

among others, on the basis of sex, pregnancy and marital status; Article 27(6) which empowers the state to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination, in order to give full effect to the realisation of the right not to be discriminated against; and Article 2(4) which provides that any law, including customary law, that is inconsistent with the constitution is void to the extent of the inconsistency.

The committee welcomed the fact that the new constitution requires the repeal of many discriminatory provisions that existed in the former constitution, as well as the application of the constitution's guarantee of non-discrimination with respect to all laws, including those in the areas of marriage, divorce, adoption, burial and succession.

In establishing commissions crucial to the implementation of the new constitution, the committee congratulated the Government of Kenya for implementing the constitutional principle contained in Article 27(8) that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

However, the committee among other recommendations urged the government to enact, within two years: the Family Protection Bill 2007; the unified Marriage Bill 2007 and Matrimonial Property Bill 2007; the Prohibition of Female Genital Mutilation Bill (2010), which *inter alia* outlaws FGM for all women; and the Equal Opportunity Bill. It further urged the government to harmonise religious and customary law with Article 16 of the convention. Article 16 of the convention requires states parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and to ensure equality of men and women with regard to entering into marriage, during marriage and at the dissolution of marriage. The first four bills have since been enacted into law.

The CEDAW Committee also urged the government to take all appropriate measures to ensure that CEDAW is sufficiently known and applied by all branches of government, including the judiciary, as a framework for all laws, court decisions and policies on gender equality and the advancement of women.

Uganda

In the case of Uganda, the CEDAW Committee considered the combined 4th to 7th Periodic Reports[18] in 2010,[19] and welcomed the enactment of the 2006 Refugee Act, which contains provisions in line with international standards, including the specific provision recognising discriminatory practices based on gender as a ground for seeking asylum. It also welcomed legislative reforms undertaken by the government and the adoption of a

wide range of legislative measures, including: **the Land (Amendment) Act, 2004; the Employment Act, 2006**; **the Equal Opportunities Commission Act, 2007,** which provides a legal basis to challenge laws, policies, customs and traditions that discriminate against women, as well as the National Equal Opportunities Policy; the amendments to the **Penal Code,** prohibiting defilement of girls and boys (2007); enactment of the **Domestic Violence Act 3, 2010**, criminalising violence in a domestic setting; enactment of the **Prohibition of Female Genital Mutilation Act 5 (2010)**; enactment of the **Prevention of Trafficking in Persons Act (2010)**; and enactment of the **International Criminal Court Act (2010)**, criminalising sexual exploitation of women during conflict situations.

It observed that despite the enactment of the law prohibiting FGM, the practice of FGM remained prevalent in the country; it called upon the government to ensure the effective implementation of the **Prohibition of Female Genital Mutilation Act (2010)**, as well as prosecution and adequate punishment of perpetrators of this practice.

The committee noted, with satisfaction, that the government had adopted a number of policies, programmes and plans of action to promote gender equality and eliminate discrimination against women, and made specific reference to the National Action Plan on Gender for monitoring the implementation of the convention for the period 2007–2010, as well as the National Gender Policy (2007).

The committee further noted with satisfaction that, in the period since the consideration of the previous report, Uganda had ratified the Convention on the Rights of Persons with Disabilities, as well as the Optional Protocol thereto.

It also took note of a number of important decisions of the Constitutional Court of Uganda. These included the case of *Uganda Women Lawyers Association v Attorney General,*[20] which declared parts of existing legislation (the Divorce Act) unconstitutional on the ground of being discriminatory against women. It also noted the case of *Law and Advocacy for Women in Uganda v Attorney General,*[21] which declared the practice of FGM unconstitutional and thereby outlawed it.

However, the committee expressed concern that legislation and customary practices that discriminated against women and which were inconsistent with the convention remained in force. It called upon the government to speed up the law review process, and to harmonise domestic legislation with the constitutional principles relating to non-discrimination and equality between women and men in line with its obligations. The committee further expressed concern about the delay in the passage of the Marriage and Divorce Bill, the Sexual Offences Bill and the HIV/AIDS Prevention and Control Bill. It

urged the government to expeditiously enact these bills into law and to raise the awareness of legislators about the need to give priority to legal reforms in order to achieve equality for women and comply with the state party's international treaty obligations.

The CEDAW Committee also recommended that the government take all appropriate measures to ensure that CEDAW is sufficiently known and applied by all branches of government, including the judiciary, as a framework for all laws, court decisions and policies on gender equality and the advancement of women. The CEDAW Committee in its concluding observations welcomed legislative reforms that had been undertaken and the enactment of various legislations addressing violence against women.

Box 4.2 Law and Advocacy for Women in Uganda v Attorney General

Facts

The petitions were brought by a women's advocacy association challenging s.154 of the Penal Code and sections 2(n) (i) and (ii), 14, 15, 23, 26, 29, 43 and 44 of the Succession Act. The two petitions were consolidated for purposes of hearing. Section 154 of the Penal Code provided for criminal adultery. It stated as follows:

1. *Any man who has sexual intercourse with any woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or a fine not exceeding two hundred thousand shillings; and, in addition, the court shall order any such man on first conviction to pay the aggrieved party compensation of six hundred shillings and on subsequent conviction not exceeding twelve hundred thousand shillings as may be so ordered.*
2. *Any married woman who has sexual intercourse with any man not being her husband commits adultery and is liable on first conviction to a caution by the court and on subsequent conviction to imprisonment for a term not exceeding six months.*

With regards to s.154 of the Penal Code, it was argued by the petitioner that the provision discriminated against women to the extent it penalised married women for having sexual intercourse with any man, whereas married men were exonerated when they had sexual intercourse with unmarried women.

Further, the petitioner argued that such discrimination contravened the constitution to the extent that it treated women with less respect. This, the petitioner submitted, was inconsistent with Article 24 which guaranteed the dignity of every person, Article 31(1) which guaranteed men and women equal rights during marriage and at its dissolution, and Article 33(1) which guaranteed women equal dignity with men.

Regarding the Succession Act, the petitioner argued as follows:

(a) s.2(n)(i) and (ii) were discriminatory to the extent that the legal heir preferred was to be male;
(b) s.27 was discriminatory to the extent that it did not make provision for the distribution of property in case of female intestacy;
(c) s.43 was discriminatory to the extent that mothers could not by will appoint guardians for their minors;
(d) s.44 did not make provision for female relatives becoming statutory guardians and therefore was discriminatory;
(e) s.15 and 16 were discriminatory to the extent that a husband could not take the domicile of his wife.

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On s.154 of the Penal Code Act, the respondent conceded to the petitioner's argument that the provision was discriminatory to married women. However, it was the respondent's contention that the Constitutional Court need not strike out the offence of adultery, but could by virtue of Article 274 of the Constitution modify it to bring it in line with provisions of the constitution.

With regards to the provisions of the Succession Act, the respondent conceded to the arguments advanced by the petitioner. The Constitutional Court held *inter alia* that:

1. Section 154 of the Penal Code Act was inconsistent with Article 21, which guaranteed equality before the law for both men and women and prohibited discrimination on grounds of sex. The provision was equally inconsistent with Article 31(1)(b), which accorded married couples equal rights during marriage and at its dissolution.
2. The Constitutional Court only had powers to declare an Act of Parliament or any other law inconsistent with or in contravention of the provisions of the constitution. The court could not modify a law which it found to be inconsistent or in contravention with the provisions of the constitution and certainly could not create a sentence to be imposed on adulterous spouses.
3. The provisions of the Succession Act were inconsistent with the provisions of the constitution and were therefore void (the court did not evaluate this issue in detail).

Ratio decidendi:

Unjustifiable statutory differentiation between men and women solely on the basis of sex contravenes the principle of equality before and in the law.

Contribution to gender jurisprudence/points to note

- The court's holdings clearly communicate the point that laws which provide for criminal conduct or have a civil effect should not unjustly differentiate on grounds of sex.
- The court struck down provisions that existed prior to Uganda's progressive constitution, which recognises equality between men and women.

Box 4.3 Re MURORUNKWERE Rwanda SUPREME COURT – 2013 SC RS/ Inconst/Pén.0001/08/CS

Facts

The Petitioner, Murorunkwere Spéciose was prosecuted for adultery per Article 354 of the Rwandan Penal Code. Murorunkwere Spéciose's husband, Sehene JMV, filed a claim with the judicial police accusing his wife of committing adultery with Nisengwe Fred and also filed a civil action for damages amounting to 1,000,000 Rwanda Francs (Frw), 500,000 Frw of reference expenses, and the reimbursement of 1,500,000Frw that Murorunkwere syphoned to Nisengwe Fred.

The Primary court found Murorunkwere Spéciose and Nisengwe Fred guilty of adultery and sentenced them to two months' imprisonment each. The Court also admitted and analyzed the civil action submitted by Sehene JMV and found it with merit. It ordered Murorunkwere Spéciose and Nisengwe Fred to pay Sehene JMV damages amounting to 250,000Frw.

Unsatisfied with the verdict of the Court, Murorunkwere Spéciose and Nisengwe Fred immediately appealed to the Intermediate Court of Nyarugenge and filed a claim in the Supreme Court requesting the repeal of Article 354 of the Decree Law N°21/77 of 18/08/1977 of the Penal Code of Rwanda which provided for different penalties for adultery for men and women.

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Counsel for the petitioner stated that Article 354 of the Rwandan Penal Code is inconsistent with the preamble and Article 16 of Constitution of the Republic of Rwanda which provides that man and woman are equal before the Law. Article 354 of the Rwandan Penal Code imposes different punishments on a man and a woman for the same offence. A female offender is not given the opportunity to pay the fine, an option available to a male offender. According to the petitioner, the judge of the primary court of Kagarama resorted to common sense and sentenced the man and woman to the same penalty. The counsel concluded by requesting the Court to exercise its discretion and repeal Article 354 of the Rwandan Penal Code so as to pave way for parliament to amend the law.

Article 185 of the Constitution of Rwanda established the principle of gender equality and a gender monitoring office which monitors and supervises its compliance. Article 354 of the Rwandan Criminal Code is not in compliance with that principle. Articles 2 and 15 of CEDAW prohibit all forms of discrimination against women. In that convention, it is provided that the ratifying countries shall respect the principle of gender equality, which included Article 190 of the Constitution.

State Counsel stated that the request to repeal the Article had already been addressed in the draft law of the Criminal Code which provides that a man and a woman who commit adultery shall be sanctioned in the same way. He continued to argue that the Court should not repeal the whole provision because it may result in a vacuum in the penal code. The court could proceed on the basis of Article 6 of the law N°18/2004 relating to civil, commercial, social and administrative procedure, which states, "Judges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they to do so, guided by judicial precedents, customs and usages, general principles of law and written legal opinions."

OPINION OF THE SUPREME COURT

Article 354 of the Rwandan Penal Code is inconsistent with the Constitution.

Clearly, the penalty for a wife found guilty of the adultery differs from the penalty of a man found guilty of the same crime. The Supreme Court, by law, has been assigned jurisdiction to repeal a law, either in part or in whole, if it finds that it contradicts the Constitution. Nevertheless, during the trial, the Court has to take into account the general interest, the reasons why it should not repeal a provision of the law and then leaves a lacuna, which is likely to incite people to fearlessly indulge in adultery as they are aware that no legal provision shall punish them. To resolve the issue in Article 354 of the Rwandan penal code, the Court resolves to separate the paragraphs of the article. The first paragraph is to be repealed and the second paragraph to be complemented by the insertion of the words "or a woman" after the word "a man". Thus, Article 354 of Rwandan Penal Code is to read as follows: *"a man* or *woman convicted of adultery shall be liable to a term of imprisonment of one month to six months and a fine of one thousand francs or one of these penalties*. Is the Supreme Court competent to amend this provision in this way? To address this issue, the Court finds that it should refer to the practices of other Courts around the world.

In order to settle issues arising from a provision of law which is inconsistent with the Constitution, different countries, like Canada, the United States of America, and South Africa have resorted to different means including "severance" (separation of the parts of a provision which are inconsistent with the Constitution and are repealed in order to remain with parts which are not inconsistent with the Constitution), "reading down" (Interpretation of a provision in a broader way that makes the law easily understood and consistent with the Constitution), and "reading in" (Insertion of some words in a provision of the law in order to eliminate the inconsistency with the Constitution).[a]

In judgement *RS/Inconst/Pén.0001/07/CS* delivered on 11/1/2008, this Court resorted to the procedure of separating the parts of a provision and repealing the part which is inconsistent with the Constitution. In this case, the Court finds that the procedures which are compatible with this issue include "severance" and "reading in". By repealing the first paragraph of Article 354 and inserting words in the second paragraph, the provision is no longer inconsistent with the Constitution.

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Courts that hear and try petitions in which a repeal of law or a provision is requested for the reason that they are inconsistent with the Constitution, they are recognized the competence to complement the law or to take other measures for preventing the vacuum. In the Constitution of South Africa of 1996, in its article 172, it is provided that in the course of trying the case, the Court may rule that a law or a provision which is in contradiction with the law be repealed. It goes on stating that ".....it may make any order that is just and equitable" .....

The Supreme Court of Canada has also taken decisions that cater for the problem of unconstitutional laws. It does this in conformity with Article 52 of the Constitution of 1982 which states that "*The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect*".[b] That Court has explained its jurisdiction in such cases in ***Schachter v Canada***.[c] In this case, the court ruled that per article 52 of the Constitution of Canada, it can repeal the law, in whole or in part, interpret the law so that it does not conflict with the constitution, or inserting some words in a provision of the law, as a relevant remedy for the issues surrounding an unconstitutional law.

Article 200 of the Constitution of Rwanda is similar to Article 52 of the Constitution of Canada which is mentioned above. Article 200 states, "the Constitution is the supreme law of the State. Any law which is contrary to this Constitution is null and void". Therefore, it is clear that the Supreme Court of Rwanda has the authority to repeal part of a provision of law that is unconstitutional and insert words in the remaining part, in accordance with article 200 of the Constitution and supported by article 93 of the Organic Law N°01/2004 of 29/01/2004 which determines the organization, functioning and competence of the Supreme Court as amended to date. That article provides "Where court finds the petition well founded, it abrogates the whole or part of that law depending on substance of the petition....". This jurisdiction prevents the legal loophole created when part of a provision is repealed for being inconsistent with the Constitution.

In regard to avoidance of a legal lacuna when a provision or its part is repealed for unconstitutionality, the Court finds a good example in the South African case *S v. Manamela*. In this case, the Constitutional Court encountered a problem when it found that there was a provision which was inconsistent with the Constitution. The repeal of the entire provision would result in a legal vacuum because it would take the parliament a long time to sit, during which many consequences could arise. The Court decided to insert some words in the provision of the law to avoid the lacuna. It stated that: "The striking down of the reverse onus in section 37, without more, would leave a vacuum in the present legislative structure designed to deal with "fencing" which is a pervasive evil in our society. Parliament could remedy the situation, but that takes time, and in the interim that gap would remain. To read in the words necessary to establish an evidential presumption is less invasive of the legislative purpose of section 37 than simply striking down the presumption".[d]

However, the repeal of a part of a provision and the insertion of words in a provision should be done in a careful manner. The Court should avoid addressing political issues and try to respect the vision and rationale of the legislator during the enactment of disputed law in regard to the aspect of that law after the act of the Court. In the case *National Coalition*, the Constitutional Court of South Africa ruled that the severance of two parts of a provision, one being repealed and the remaining being complemented by the insertion of words, is a decision that the Court takes with care so that even the remaining part of the provision which has been complemented by additional words does not contradict the constitution and respect for fundamental principles of the State. It ruled that: "The severing of words from a statutory provision and reading words into the provision are closely related remedial powers of the court. In deciding whether words should be severed from a provision or whether words should be read alone, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible".[e]

Concerning the usurpation of power by the judiciary and the non-interference in the powers of the legislature by reading in of words in a statute; the Court should only focus on what is necessary in order

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for the Constitution to be respected. As held by the Supreme Court of Canada in the case *Mv H*[f] "remedial precision requires that the insertion of a handful of words will without more, ensure the validity of the legislation and remedy the constitutional wrong." This means that, in order to avoid usurpation, a few words should be inserted in the statute. This is enough for the statute to be valid and to rectify its contradiction with the Constitution. In this case, the repeal of the first paragraph of article 354and insertion of the words, "or a woman" shall only ensure the validity of the legislation and invalidate its inconsistency with the Constitution of the Republic of Rwanda.

In this case, the repeal of the first paragraph of Article 354 of the Penal Code of Rwanda, and the insertion of additional words in the remaining second paragraph is likely to keep Article 354 from contradicting the Constitution of the Republic of Rwanda. This Court also finds that the insertion of words in Article 354 of the penal code of Rwanda does not constitute usurpation. Rather, it is an institutional balance which aims at preventing the negative implications likely to result from the non-existence of a provision which penalizes the offence of adultery.

DECISION OF THE SUPREME COURT

The Supreme Court admits the petition submitted by Murorunkwere Spéciose;

[a] Decides that it has merit.

[b] Repeals the first paragraph of article 354 of Rwandan Penal code.

[c] Rules that the second paragraph of article 354 of Rwandan penal code should include the words "or a woman" after the word man.

[d] Rules that article 354 of the Rwandan penal code is modified as follow: *"a man or woman convicted of adultery shall be liable to a term of imprisonment of one month to six months and a fine of one thousand francs or one of these penalties"*.

[e] Rules in favor of Murorunkwere Spéciose.

[f] Decides that Court fees amounting to 5,900Frw are to be borne by the public treasury.

Contribution to Jurisprudence

The Court's holdings clearly communicate the point that laws which provide for criminal conduct should not differentiate between men and women solely on the basis of sex.

Point to Note

The Court was mindful of the lacuna it would create by annulling the provisions of the law which punished the offence of adultery. To avoid a vacuum, the Court went on to repeal the provision of the law which hitherto provided a (more punitive) sentence for women and then inserted the word woman into the hitherto (more lenient) provision which was only applicable to men. Court therefore adopted the mechanism of "reading into" the law.

a These different ways of addressing issues deriving from provisions that are inconsistent with the Constitution are well explained by law scholars, Iain Currie and Johan de Waal, The new Constitution and Administrative Law, Vol.I, Cape Town, JUTA, 2001, p 290–293.

b Meaning that "*The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect.*"

c Schachter v Canada (1992) 2 S.C.R 679, P21. http://CSC.Lexum.Umontreal.ca.

d S v Manamela 2000 (3) SA1 (CC).

e National Coalition of Gay and Lesbian Equality v Minister of Home Affairs 2000(2) SA 1 (CC) para 75.

f MvH (1999) 2 SCR, para 139

Tanzania

The CEDAW Committee considered the combined 4th, 5th and 6th Periodic Reports of the United Republic of Tanzania in 2008.[22] It welcomed the adoption in 2000 of a National Development Vision 2025, aimed at attaining gender equality and the empowerment of women in all socioeconomic and political relations and culture by the year 2025. It also commended the government for adopting the Policy on Women and Gender Development in 2000, and for the establishment in 2001 of the Commission for Human Rights and Good Governance, which is charged with, among others, the mandate to investigate allegations of human rights violations and to disseminate information on human and women's rights. The committee noted with appreciation that a special gender desk dealing with public education and women's rights was established within the commission in 2004. It commended the government for the 14th amendment of the constitution, providing that the number of women in parliament shall not be less than 30 per cent of a combined number of members and that the president is empowered to nominate ten members of parliament, half of whom should be women.

The committee commended the government for the introduction of legal reforms aimed at the eliminating discrimination against women, including the enactment of the **Village Lands Act No. 5**, which gives women the right to acquire, own and use land equally with men; and the **Land Act No. 4 of 1999**, as amended in 2004. The Land Act in section 114 provides that the mortgage of a matrimonial home, including a customary mortgage of a matrimonial home, shall only be valid if the spouse(s) of the mortgagor living in that matrimonial home has/have assented to the mortgage. It provides further that it is the responsibility of a mortgagee to take reasonable steps to ascertain whether the applicant of a mortgage has a spouse or spouses.

The committee also noted that the 13th Constitutional Amendment in 2000 expanded the grounds of discrimination in paragraph 13(5) of the constitution to also include discrimination on the basis of gender, and that Article 12, section 5, of the Constitution of Zanzibar, as amended in 2002, also includes a reference to gender discrimination.

However, the committee was concerned that although the constitution had been amended to include gender as a ground of discrimination, the definition of discrimination was different from that contained in Article 1 of CEDAW, which prohibits direct and indirect discrimination. It called upon the government to consider amending the existing definition of discrimination to encompass both direct and indirect discrimination in accordance with Article 1 of the convention.

The committee also noted with concern that Tanzania had not domesticated CEDAW, and that without such full domestication, the convention was not a part of the national legal framework and its provisions were therefore not enforceable in the courts. While welcoming the effort to achieve

legislative reform, specifically in the context of the work of the Law Reform Commission, the committee expressed concern at the lack of priority given to comprehensive legal reform to eliminate sex-discriminatory provisions and to close legislative gaps in order to bring the country's legal framework fully into compliance with the provisions of the convention. The committee was concerned, in particular, about: the delay in the passage of the proposed amendments to the **Law of Marriage Act of 1971**; inheritance laws; the law on custody of children; as well as other legislation and customary laws still existing in mainland Tanzania and in Zanzibar that discriminated against women and which were incompatible with the convention.

The CEDAW Committee urged the government to prioritise completing the process of full domestication of CEDAW and to speed the law review process. It recommended the need to work with parliament to ensure that all discriminatory legislation was amended or repealed. Finally, the government was urged to raise the awareness of legislators about the need to give priority attention to such reforms in order to achieve equality for women.

Rwanda

The CEDAW Committee considered the combined 4th, 5th and 6th Periodic Reports of Rwanda (CEDAW/C/RWA/6) at its 883rd and 884th meetings, on 4 February 2009.[23] It also received the combined 7th, 8th and 9th Periodic Reports in October 2015,[24] in which information was provided on the current implementation of CEDAW, challenges faced and the follow-up to the concluding observations and recommendations made by the committee on the single report equivalent to the 4th, 5th and 6th Periodic Reports on the implementation of the Convention on the Elimination of All forms of Discrimination against Women, submitted by Rwanda in 2007.

Rwanda was commended for: the adoption in 2003 of its constitution, which enshrines the gender non-discrimination norm and principle of gender equality and which triggered extensive legal reforms aimed at removing discriminatory provisions; successful use of quotas in political and public life; the outlawing of polygamy; and accession on 15 December 2008 to the **Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women**. In the same session, the Government of Rwanda was requested to take the necessary steps to implement, systematically and continuously, all the provisions of the convention.

4.2.3 The due diligence obligation

The 'due diligence' standard/obligation in relation to VAW was first articulated in General Recommendation No. 19 (1992) by the CEDAW Committee as a yardstick to assess whether the state has met or failed to meet its obligation to combat violence against women. The committee affirmed that:

> *States may also be responsible for private acts if they fail to act with due diligence to prevent, investigate and punish acts of violence and for providing compensation.*[25]

The Declaration on the Elimination of Violence Against Women (DEVAW), adopted in 1993, requires states to exercise due diligence to prevent, investigate and punish acts of VAW whether these are perpetrated by the state itself or private actors. The legal responsibility of the state for human rights violations, including acts of violence against women perpetrated by the

Box 4.3 CK (A Child) through Ripple International as her Guardian and Next Friend & Others and Ripple International v The Commissioner of Police, Inspector General of The Police Service and 2 Others[28]

In a Constitutional Petition before the High Court in Kenya, 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. However, the police failed to conduct prompt, effective and professional Investigations into the complaints. For example, the police did not visit the crime scenes, did not interview the witnesses or collect and preserve evidence, and police officers demanded money before they could intervene in any way. In some instances, the police officers refused to investigate the complaint, claiming that the complaint had been made late; or they interrogated petitioners loudly and in public in the hearing of all present at the police station, thereby subjecting the petitioner to humiliation and inhuman treatment. In some instances, the police refused to arrest or interrogate some perpetrators.

In upholding the rights of the girls, the court held that the respondents were responsible for the physical, emotional and psychological harm caused to the petitioners by reason of their failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement.

It was held *inter alia* that once a report or complaint is made, it is the duty of the police to move with speed, promptly commence investigation, and apprehend and interrogate the perpetrators of the offence. The investigation must be conducted effectively, properly and professionally – short thereof amounts to violation of the fundamental rights of the complainant.

The court stated that:

> *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 ... this to me makes the respondents responsible for physical and psychological harm inflicted by perpetrators ... The state 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 for it to constitute a breach of its obligations.*

The court declared that the neglect and/or failure of the police to conduct prompt, effective and professional investigations into the petitioners' complaints of defilement violated their fundamental rights and freedoms, among which is access to justice.

The court made an *Order of Mandamus* directing the police together with its agents to conduct prompt, effective and professional investigations into the petitioners' respective complaints of defilement and other forms of sexual violence.

state itself or its agents, can arise from state actions, omission or failure to take positive measures to protect and promote women's rights.[26] Under the due diligence standard, states have an obligation to take positive action to prevent and protect women from violence.

States must investigate, prosecute and punish perpetrators of such violence, and provide victims with effective remedies for acts of violence – whether these are committed by private or state actors.[27] In doing so, the state must act with the existing means at its disposal to address both the individual acts of violence and the causes of such violence in order to prevent recurrence.

The due diligence standard was also taken forward in the inter-American human rights system in 1988, with the landmark decision of the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v Honduras.*[29]

Three levels of the due diligence obligation and standard

The first (primary) level of this obligation is that of preventing violence from happening. Activities geared towards the fulfilment of the primary level of obligation include: creating awareness, and changing attitudes, mind-sets and stereotypes. This can be achieved through advocacy and campaigns to expose and convey the unacceptability of VAW. The second (secondary) level of the obligation is the state's immediate response after violence has occurred. The response of the state at this level should aim at limiting the consequences of violence, while the third level is the provision of care and support services for survivors of violence.[35]

Box 4.4 Acting with due diligence to prevent violence

Velasquez Rodrigues v Honduras

The case related to the abduction and disappearance of Velasquez, a graduate student. There was evidence of previous disappearances, which were attributed to government suppression of those it considered dissidents. The court found that the abduction 'was carried out by agents who acted under cover of public authority'[30] and that even if that had not been proved, *'the failure of the state apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed'* under the American Convention on Human Rights. These duties created a positive obligation to ensure Velasquez Rodriguez the 'free and full exercise of his human rights'.[31] Expanding on this analysis, the court found that:

> *An illegal act which violates human rights, and which is initially not directly imputable to a state (for example, it is the act of a private person or because the person responsible has not been identified), can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*[32]

The court further held that where rights are granted (by the American Convention on Human Rights), the state is under obligation to exercise due diligence to ensure their fulfilment. As a consequence of this duty, states must act to prevent, investigate and punish any violation of rights.[33] Finally, the court directed the government to take reasonable steps to prevent human rights violations and to use the means at its disposal to investigate violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[34]

Checking compliance with the due diligence obligation

The establishment, by the Commission on Human Rights in 1994, through Resolution No. 1994/45, of the mandate of the Special Rapporteur on violence against women, its causes and consequences, was an important development in the application of the due diligence standard. It emphasised:

> *the duty of governments to refrain from engaging in violence against women and to exercise 'due diligence' to prevent, investigate and in accordance with national legislation, punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the state or by private persons and to provide access to just and effective remedies and specialized assistance to victims. (para.2)*

In her 2006 report, the Special Rapporteur stated that the due diligence standards to prevent, protect, prosecute and punish gender-based violence, including family violence are connected and, taken together, constitute the obligation to ensure access to justice by all victims of such violence.[36]

The report contains a framework for model legislation on domestic violence.[37] This framework contains a check list (see Box 4.5) to determine state compliance with the due diligence obligation and includes, among others, ratification of human rights instruments; constitutional guarantees of equality of men and women; legislation on VAW and sanctions providing redress for women victims of violence; gender sensitivity of the criminal justice system, including the police; and accessibility and availability of support services. The Special Rapporteur stated in Part II of the report[38] that failure to act against crimes of violence against women renders the state as guilty as the perpetrators of such violence. She reiterated the CEDAW Committee recommendation and urged states parties to act with due diligence to ensure enforcement of laws if they wished to avoid such complicity.[39]

Box 4.5 Check list to determine state compliance with due diligence obligation[40]

- Ratification of international human rights instruments
- Constitutional guarantees of equality of men and women
- The existence of national and/or administrative sanctions providing adequate redress for women victims of violence
- Policies or plans of action that deal with the issue of violence against women
- Gender-sensitivity of the criminal justice system and the police
- Accessibility and availability of support services
- The existence of measures to raise awareness and modify discriminatory policies in the field of education and the media
- The collection of data and statistics concerning violence against women

Judicial officers are in a position to remind the executive arm of government of the value of establishing specialised police and prosecutorial units where necessary or possible. The designation of specialised police and prosecutorial units on violence against women and children is an important intervention that will ensure the discharge, by the state, of the obligation to act with due diligence to investigate and prosecute perpetrators of VAW.

Approaching male police officers can be particularly difficult and sometimes impossible for women and child victims of sexual violence. When these units are staffed with more female than male officers, victims of violence have the option of dealing with women police officers and prosecutors.[41] The establishment of such units can enhance reporting and result in an increase in the number of cases investigated, as such units are more responsive and effective in dealing with VAW.[42] As part of the state's obligation to address violence, it is important that once such units are established, all officers working in those units receive training in gender and human rights to enable them perform their duties with gender sensitivity and understanding.

The establishment of gender desks or units within police stations, as part of the state's response to VAW, is a good practice intervention aimed at making

Box 4.6 Child and family protection units in police stations

Kenya: In Kenya, although every police station is required to establish a gender desk, some stations have positioned such desks so close to the main report office that the envisaged privacy is lacking. This is due to lack of space within the police station and financial constraints. Other police stations lack gender desks and, where they exist, the facilities are poorly staffed and lack adequately trained personnel.[43]

Rwanda: A Child and Family Protection Unit was established under the Criminal Investigation Department of the Police in 2001 to provide a victim-referral service.

Tanzania: In Tanzania, the Ministry of Home Affairs together with the Tanzania Police Force developed guidelines that established the gender and children desk.[44] This facility is designed to address cases of GBV and child abuse in a gender- and child-responsive manner. The desk is situated within the premises of the police station and managed by trained personnel designated by the Officer Commanding the Station (OCS). UNICEF Tanzania supported the police in improving the gender desk and in providing training for officers handling cases of child abuse. The layout and size of the gender desk station includes four rooms: a reception and an interior room with sufficient privacy for interviewing adults, a child-friendly interview room, and a resting room for traumatised survivors of violence.

Uganda: In response to increased reports of VAW and children, the Uganda Police Force established Child and Family Protection Units (CFPU) in police stations, starting with Kampala. These have been replicated in other stations in the country, with a mandate to deal with cases of child abuse and neglect. These units have been instrumental in protecting women and children from violence and abuse, as well as educating the public on laws and legal procedures in such cases.

In 2007, the Committee on the Rights of the Child, considering the report filed by Uganda,[45] noted that some districts/police stations lacked trained CFPU police officers and recommended training more personnel and deploying them evenly throughout the country to protect children from sexual exploitation, as well as other rights violations.

the police more responsive to gender-based crimes. Such desks should be separate from the main police report office or desk in order to ensure that women survivors of rape and sexual violence can report the offence in a private environment and to officers who are trained to interview survivors and investigate the offence in a sympathetic and gender-sensitive manner.

Commission on the Status of Women (CSW) and the due diligence obligation

The Commission on the Status of Women (CSW) reaffirmed the due diligence standard and urged all states to: exercise due diligence to prevent, investigate, prosecute and punish perpetrators of violence against women and girls and end impunity, and to provide protection and access to appropriate remedies for survivors of such violence.[46]

The Beijing Platform of Action (BPfA) and the due diligence obligation

The BPfA also reiterated the due diligence obligation[47] and called on governments to discharge this obligation through the following measures:

- enacting and reinforcing penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to victims;
- adopting, implementing and reviewing legislation to ensure its effectiveness in eliminating violence against women, emphasising the prevention of violence and the prosecution of offenders; and
- ensuring the protection of women subjected to violence, access to just and effective remedies for such women victims, including compensation, indemnification of victims, as well as the rehabilitation of perpetrators.

The due diligence obligation was further reiterated at the five-year review of the BPfA in 2000,[48] where states affirmed that VAW and girls – whether it occurs in public or private life – is a human rights issue. They highlighted state responsibility in addressing such violence. Governments were asked to take all appropriate measures to eliminate discrimination and VAW by any person, organisation or enterprise and to treat all forms of violence as criminal offences. The BPfA established three strategic objectives for national governments in addressing VAW namely:

1. taking integrated measures to prevent and eliminate violence against women and girls;
2. studying the causes and consequences of VAW and the effectiveness of preventive measures; and
3. eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking.

Within these objectives, governments are required to take concrete actions, including implementation of international human rights instruments; adoption and periodic review of legislation on VAW; access to justice; provision of effective remedies; adoption of policies and programmes to protect and support women victims of violence; and awareness raising and education.

In deciding whether the state is culpable for failure to act with due diligence to prevent the occurrence of violence, it is important that the court pays special attention to the circumstances in which some women victims of violence may find themselves – particularly, where those circumstances have previously been brought to the attention of the authorities and the authorities have failed to take action, resulting in the victim suffering violence that could have been prevented in the first place.

As was demonstrated in the South African case of *Carmichele v Minister of Safety and Security & Another,*[49] the obligation of the state to act with due diligence to protect women from violence includes the duty to prevent such violence.

Box 4.7 Acting with due diligence to prevent violence

Carmichele v Minister of Safety and Security & Another

In this case, Carmichele (applicant) sued the respondents after she was sexually assaulted by a man (respondent) who had been released without any security, even though he was awaiting trial for attempting to rape another woman. The police did not bring this fact to the attention of the prosecutor. On two occasions, the accused strayed into her home and on a third occasion he was found trying to open a window. On each occasion, the applicant informed the police and expressed fear that the accused might harm her or someone else. The police took no action to protect her; neither did they bring this information to the prosecutor – who could have applied for cancellation of bail and detention of the accused in custody pending the trial. One day, the accused finally sneaked into the applicant's home, entered the house and sexually assaulted her, inflicting serious injuries. He was charged and convicted.

The applicant sued the respondents for damages. Both the High Court and the Supreme Court of Appeal (SCA) dismissed her case, finding that the police did not owe the applicant a legal duty to take steps to prevent her attacker from causing her harm. She successfully appealed to the Constitutional Court of South Africa and relied on Art. 8 (1&2) of the Interim Constitution (IC), which provided for the equality of all persons before the law and the entitlement to equal protection of the law and which prohibited discrimination of persons for whatever reason.

She also relied on Article 39 of the Constitution of South Africa, which provided that all courts in South Africa should develop the common law in line with the spirit, purport and objects of the Bill of Rights in order to promote the spirit, purport and objectives of the said Bill of Rights.

The Constitutional Court found the respondents liable and held that obligations are now placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the rights of women to have their safety and security protected. Therefore, South Africa had a duty under international law to prohibit all gender-based discrimination that has the effect of impairing the enjoyment by women

(*continued*)

(*continued*)

of fundamental rights and freedoms and to take appropriate measures to prevent the violation of those rights.

It was further held that the police, who are the primary agencies of the state, had a responsibility to protect the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crime – and they had failed to do so in this case. Although the investigating officer had a duty to bring to the attention of the prosecutor any matters in his knowledge which could have helped the court to exercise its discretion to admit the accused to bail or to cancel bail and prevent violence, the court found that he failed to do so, hence the release of the accused pending trial.

In the case of *Van Eeden v Minister of Safety and Security*,[50] the applicant was sexually assaulted, raped and robbed by a known serial rapist who had escaped from police custody. Following the decision in the Carmichele case, the Constitutional Court of South Africa held that the police owed her a legal duty to take reasonable steps to prevent the escape of, and attack by, the well-known criminal who was in their custody. They also owed her a legal duty to protect her from violence perpetrated by the serial rapist. Citing Art. 4(d) of DEVAW and CEDAW Art. 2, it was held that it was the obligation of the state to punish and redress the wrongs caused to women victims of violence.

Obligation to enact a comprehensive legislation on VAW

Legislation is a powerful tool to address VAW and the absence of legislation criminalising VAW impedes women victims' access to justice. The state can discharge the due diligence obligation to address violence through the enactment of legislation on VAW. Such legislation must be comprehensive and multidisciplinary, criminalising all forms of VAW and providing adequate punishment for perpetrators. In addition, it must address the various needs and concerns of victims of violence and provide for support services – e.g. alternative shelter for women victims of domestic violence and their children, medical and counselling services for survivors, legal representation and legal aid, among other services required by victims of violence.[51] Consequently, upon the enactment of such legislation, the state is obliged to review, evaluate and update such legislation on an ongoing basis to remove provisions that allow or condone VAW or which increase the vulnerability or victimisation of victims.[52] Provisions that discriminate against complainants in sexual violence, where the credibility of a complainant is understood to be different from that of a complainant in any other criminal case, ought to be repealed. Where such provisions still exist, it is the duty of the court to strike them out as unconstitutional if the national constitution proscribes discrimination.

Although the police play a crucial role in any co-ordinated response to VAW, survivors of VAW are often reluctant to make reports to the police for fear of secondary victimisation or for fear of not being taken seriously by the police. The callous way in which some police officers handle cases of VAW discourages reporting and subjects victims to secondary victimisation. It is therefore important that any legislation on VAW spells out clearly what is required of police officers, once a report of violence is received at the station. Such

legislation must provide sanctions for non-compliance. This will help the police understand that VAW is not an ordinary crime and that the consequences of such violence are grave. It will also enhance their understanding that complaints of VAW require prioritisation and a swift response. This is important, because failure by the police to act with due diligence to investigate will attract liability in damages and other remedies on the part of the state. Both the Uganda **Domestic Violence Act, 2010,** and the Kenya **Protection against Domestic Violence Act, 2015,** spell out the duties of police officers once a woman victim of violence makes a report of such violence.

Box 4.8 Duties of police under a domestic violence law

Duties of police officers under the Uganda Domestic Violence Act, 2010[53]

The Uganda Domestic Violence Act provides that a police officer to whom a complaint of domestic violence is made or who investigates the complaint shall assist the victim, including giving assistance or advice in obtaining shelter. If the victim has signs of physical or sexual violence, it is the duty of the police officer to ensure that the victim undergoes medical examination and receives treatment. The officer shall also advise the victim of the right to lodge a criminal complaint and the right to apply for relief under the act.

In addition, the officer is required to offer procedural guidance and any assistance that the victim may require. It is the further duty of a police officer to record a statement from the victim or the victim's representative on the nature of the domestic violence.

However, where a victim or a victim's representative desires, the statement shall be taken by a police officer of the same sex as that of the victim. No doubt this is to create a conducive atmosphere within which the victim can recount her experience. This law makes no sanctions where a police officer fails to comply with these provisions. However, these provisions are good practice because they hold the state, through its agents, accountable if they are breached.

Duties of police officers under the Kenya Protection Against Domestic Violence Act, 2015[54]

The Protection Against Domestic Violence Act, 2015 sets out the duties of police officers in relation to domestic violence. These are the same as set out in the Uganda Domestic Violence law. The only departure is that under the Uganda law, if the victim desires, it is mandatory that the statement on the nature of domestic violence be recorded by a police officer of the same sex as that of the victim.[55] On the contrary, section 6(2) of the Kenyan law, which deals with the making of a statement, is not worded in mandatory terms. Rather, it provides that if the complainant desires, the person to whom the complainant makes a statement may be a person of the same sex. This leaves room for statements to be recorded by male officers, before whom victims may not feel comfortable to narrate their experiences.

Obligation to provide integrated support services

The provision of criminal law sanctions alone is not sufficient in addressing VAW. In addition to punishing perpetrators, the law must deal with the structural hurdles that inhibit efficient management of the cases. In particular, the law enacted must provide what is known as a '*one-stop-shop*' model of service provision and ensure that it is implemented. This is part of the state's discharge of its due diligence obligation. '*One-stop-shops*' provide

in one place the various resources available to victims of gender-based crimes: the police gender unit; investigators; medical facilities (testing and examination) and medical treatment; the prosecutor; the trauma counselling services; and other relevant facilities. This contributes to a more effective and efficient investigation and prosecution process, by ensuring that proper forms and certificates are filled, tests taken and evidence preserved. It also greatly supports the victim as she navigates the justice system.

Box 4.9 Model of integrated victim support services

The Nairobi Women's Hospital's Gender Violence Recovery Centre[56]

The Gender Violence Recovery Center (GVRC) at the Nairobi Women's Hospital is among the early 'One-Stop Facilities' providing free medical and psychosocial support to survivors of gender-based violence in East and Central Africa. The GVRC has developed a computerised data management system on GBV in Kenya. This data has been used to influence key national initiatives, including the enactment of the Sexual Offenses Act, 2006, and the establishment of other recovery centres in the country. The centre collects and preserves evidence and information crucial for bringing to justice those responsible for GBV.

Kenyatta National Hospital Gender-Based Violence Recovery Center

The Gender-Based Violence Recovery Center (GBVRC) at Kenyatta National Hospital (KNH) in Nairobi is a good practice attempt by the Government of Kenya in addressing sexual/gender-based violence. The centre is a public–private partnership between the Ministry of Health and the International Center for Reproductive Health (ICRH), set up in 2007 to complement and strengthen services available at the Coast Provincial General Hospital (CPGH), as it was then known. The centre has developed initiatives to provide comprehensive and continuous quality care for survivors of rape, sexual violence and sexual exploitation, as outlined in the 'National Guidelines on Management of Sexual Violence in Kenya'.

Services provided at the KNH Gender-Based Violence Recovery Center:

Medical: Medical services provided include: management of physical injuries, provision of post-exposure prophylaxis (PEP) to prevent HIV transmission, emergency contraceptive pills (ECP), prevention and treatment of sexually transmitted infections (STIs), forensic collection and management (collection of physical evidence and samples) and filling in of post-rape care (PRC) and P3 (Police Form 3) forms.

Psychosocial care: Services provided under psychosocial care include trauma counselling for the survivor and family/relatives, HIV counselling and testing (HCT) and adherence counselling.

Legal counselling and support: Legal counselling and support includes referral to the police to investigate with a view to prosecution, and preparing survivors to attend court and give evidence. Centre representatives attend court and watch the brief during the hearing.

Referral for specialised services: In the event that a survivor requires specialised medical or psychosocial services, the GBVRC, by making referrals, assists the survivor to access such services, including legal services.

Other one-stop centres established elsewhere in the country include: the Center for Assault and Recovery (CARE) situated at the Moi Teaching and Referral Center in Eldoret; the Coast General Hospital GBV Recovery Center; the Taita Taveta District Hospital GBVRC and Biafra Clinic in Eastleigh, Nairobi; and all county hospitals country wide.

(*continued*)

(*continued*)

Uganda

Similar centres have also been established at the Jinja District Hospital and Mulago Hospital in Kampala, Uganda.

Rwanda

Rwanda's police-managed ISANGE One Stop Centre: The One Stop Centre for Survivors of Child, Domestic and Gender-Based Violence, established in 2009, is based in the Kacyiru Police Hospital, Kigali. '***ISANGE***' (meaning 'feel welcome and free' in Kinyarwanda) was initiated through a partnership between the Rwanda National Police Health Services and the United Nations in Rwanda, with support from UNIFEM (now UN Women), the UN Population Fund (UNFPA) and UNICEF.[57] The centre offers a range of services, including protection from further violence, crime investigation, medical testing and court referrals, as well as treatment for physical and psychological trauma, in comfortable and confidential facilities.

Supplementary instruments to address VAW

Supplementing international human rights treaties on the use of due diligence are other international instruments which create obligations for state parties to enact legislation addressing violence against women. These include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children.

This protocol supplements the UN Convention Against Transnational Organized Crime ('the Palermo Protocol') and the Rome Statute of the International Criminal Court ('the Rome Statute').

Box 4.10 State obligations under the Palermo Protocol

- Adopt necessary legislative and other measures to establish trafficking in persons as a criminal offence when committed intentionally (Article 5)
- Ensure that their domestic legal or administrative system contains measures that provide to victims information on court and administrative proceedings and assistance to enable their views and concerns to be presented and considered during criminal proceedings (Article 6)
- Ensure that their domestic legal systems contain measures that offer victims the possibility of obtaining compensation for damage suffered (Article 6)

4.3 State obligations under regional human rights treaties

States supplementing international human rights treaties and regional human rights systems have adopted treaties that condemn VAW and children and promote gender equality. These establish the same obligations as the international instruments – to prevent VAW and to protect women and children from all forms of violence. At the regional level, the East African states have also ratified, among others: the African Charter on Human and

People's Rights, the Convention against Torture, the African Charter on the Rights and Welfare of the Child, and the African Union (AU) Declaration on Gender Equality in Africa. The states must therefore be taken to be committed to protecting the rights of women and children. The obligations inherent in the instruments include protecting women and girls from discrimination and all forms of violence by taking all measures, including the enactment of legislation, policies and adopting national plans of action to address and protect women from violence.

African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACR&WC)[58] offers children protection against harmful social and cultural practices (Art. 21). It creates an obligation on the part of states parties to the charter to take appropriate measures to abolish harmful social and cultural practices which affect the welfare, dignity, normal growth and development of the child and, in particular, those customs and practices prejudicial to the health or life of the child, including those which discriminate against the child on ground of sex. Child marriage is prohibited and state parties are required to enact legislation to specify the minimum age of marriage to be 18 years.[59] Further, the charter requires state parties to take measures to prevent and protect children from sexual exploitation and the use of children in: prostitution or other sexual practices, and pornographic activities, performances and materials.[60]

African Charter on Human and People's Rights

The African Charter on Human and People's Rights (the Banjul Charter),[61] ratified by all the Commonwealth member countries in East Africa, recognises, in Article 6, the right to liberty and to the security of the person. It provides that a person can only be deprived of this right for reasons and conditions previously laid down by law. In Article 2, it echoes the principle of equality before the law and equal protection. Article 8 specifically provides for equality of men and women before the law and equal protection and benefit of the law. State parties are required to take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid. This includes women victims who suffer all forms of violence.

Protocol to the Banjul Charter

The **Protocol to the Banjul Charter**[62] is specific to women and provides for the entitlement of every woman to respect for her life and the integrity and security of her person. It prohibits all forms of exploitation, cruel, inhuman or degrading punishment and treatment, and creates an obligation for state parties to enact legislation and take other measures to prohibit, prevent, eliminate and punish perpetrators of all forms of violence against women.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

The **Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa** (the Maputo Protocol),[63] signed by all the four East African Commonwealth member countries, addresses violence against women in many of its provisions and establishes obligations related to legal reform. It requires state parties to adopt and implement appropriate measures to protect women from all forms of violence, particularly sexual and verbal violence.

The right to life, integrity and security of the person is guaranteed in Article 4, which prohibits all forms of exploitation, cruel, inhuman or degrading treatment or punishment, and requires the state to take appropriate and effective measures to do the following, among others:

(a) Enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or public (Article 4(2) (a)).

(b) Adopt such other legislative, administrative, social and economic measures to ensure the prevention, punishment and eradication of all forms of violence against women (Article 4(2) (b)).

(c) Identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence (Article 4(2) (c)).

(d) Punish perpetrators of violence against women and implement programmes for the rehabilitation of victims of such violence (Article 4(e)).

(e) Establish mechanisms and accessible services for effective information, rehabilitation and compensation for victims of violence against women (Article 4(f)).

(f) Prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women who are most vulnerable (Article 4(g)).

(g) Provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.

In Article 5, the protocol addresses harmful practices and creates an obligation on the part of state parties to prohibit, through legislative and other measures, and to condemn all forms of harmful practices which negatively affect the human rights of women. The protocol explicitly refers to FGM and requires states parties to prohibit, through legislation backed by sanctions, all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of FGM and all other practices in order to eradicate them. Further obligations created by the protocol include protection of women who

are at risk of being subjected to harmful practices or all the other forms of violence, and providing support to women victims of harmful practices.

Such support includes: health services, legal and judicial support for victims, as well as emotional and psychological counselling.[64] Most importantly, the protocol requires states parties to commit themselves:

> *to modify the social and cultural patterns of conduct of women and men, through public education, information, education and communication strategies with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.*[65]

AU Declaration on Gender Equality in Africa

Another regional instrument creating obligations for governments is the AU *Declaration on Gender Equality in Africa,* adopted by the Heads of State and government of member states of the African Union in Addis Ababa, Ethiopia, in July 2004.

Member states confirmed their commitment to the principle of gender equality and other commitments and principles set out in the various regional and international instruments on human and women's rights. They undertook to, among others, discharge various obligations, including: taking the lead in public campaigns against GBV; creating awareness of legislation relating to VAW and enforcing all laws relating to VAW in all its forms; mounting campaigns against the recruitment of child soldiers and abuse of girl children as wives and sex slaves; and implementing legislation on women's land, property and inheritance rights, including the right to housing.

Human trafficking is a form of violence that is on the increase in the world and CEDAW has established the obligation, on the part of state parties, to take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution.[66]

The Maputo Protocol requires state parties to act appropriately and effectively to prevent and condemn trafficking in women, to prosecute the perpetrators of such trafficking and protect those women who are most at risk.[67] By virtue of their circumstances, elderly women and women with disabilities are more vulnerable to violence. State parties are required to protect such women from sexual abuse, discrimination and all other forms of violence.[68]

Treaty for Establishment of the East African Community

The Treaty for the Establishment of the East African Community (EAC), as amended on 14th December 2006 and 20th August 2007, established the East African Court of Justice as one of its organs (Article 9).

The court is a judicial body with initial mandate over interpretation and application of the treaty to ensure compliance by EAC partner states, including Kenya, Uganda, Rwanda and Tanzania. Any legal and natural person resident in the partner states may refer to the court for determination, the legality of any act, directive or decision of a partner state. The treaty did not assign the court mandate to determine cases of human rights violations; however, upon extension of mandate, it would have such other original, appellate, human rights and other jurisdiction to be determined by the Council at a suitable subsequent date. To this end, the partner states were required to conclude a protocol to allow for the extended jurisdiction.

Although presently the court lacks jurisdiction to entertain cases on human rights violations, it has not shied away from adjudicating over matters touching on human rights – as was the case in *James Katabazi & others v Secretary General of the EAC & Another*.[69] Once the court is granted the mandate to determine cases of human rights violations, it will be possible for women victims of violence to seek redress in the court.

4.4 Obligations under international criminal law

The **Rome Statute of the International Criminal Court** ('the Rome Statute') classifies GBV as a crime under international criminal law. 'Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity', committed 'as part of a widespread or systematic attack directed against any civilian population' are classified as crimes against humanity. Article 8(2)(b)(xxii) of the statute classifies these offences as serious violations of the laws and customs applicable to international armed conflicts and therefore classified as war crimes. Since it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, it is 'essential for all States Parties, as well as other states, to amend existing legislation or enact new legislation defining the crimes in accordance with international law'.

Under the statute, individuals may now be held directly accountable under international law, for serious acts of VAW committed in the context of armed conflict. It makes provision for compensation to be paid to victims of such violence.

Other initiatives addressing VAW include intergovernmental conferences and summits that have reaffirmed the commitment to eliminate VAW. The 1994 Cairo International Conference on Population and Development recognised that the elimination of VAW is necessary for the empowerment of women. It called on countries to take full measures to eliminate, among others, all forms of violence against women, adolescents and girls. At the Millennium Summit held in 2000, Heads of State and Government resolved to combat all forms of VAW.

Table 4.1 shows the status of some of the leading regional and international instruments, relevant to VAW, which each of the four East African Commonwealth member countries are party to by way of signature, succession, accession or ratification.

4.5 National legal mechanisms

Over the past two decades, many states have adopted or improved legislation to prevent and respond to VAW, pursuant to the obligation on the state to enact legislation on VAW. Laws increasingly criminalise such violence, ensure the prosecution and punishment of perpetrators, empower and support victims, and strengthen prevention. Victims are also benefiting from civil remedies. National legislative mechanisms responding to or impacting on VAW range from instruments that guarantee protection of the broad range of human rights to statutory law on domestic violence, SGBV, crime, discrimination and marriage, as well as laws on procedural aspects of the rule of law in any given jurisdiction.

4.5.1 National constitutions

The Constitutions of Kenya, Rwanda, Uganda and Tanzania have addressed VAW by embracing the principle of equality of all persons before the law, non-discrimination and equal protection of the law in their respective Bills of Rights. This includes the full and equal enjoyment of all fundamental rights and freedoms on a basis of equality of all persons.[70] Direct or indirect discrimination by the state[71] or by an individual, or any person on any ground including age or sex is also prohibited.[72]

The Constitution of Kenya

The Constitution of Kenya 2010 contains crucial provisions that provide evidence that VAW is not tolerable or allowed by the law. Notable among these are:

(a) Article 159(2), which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles: justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to a condition that traditional dispute resolution mechanisms shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; justice shall be administered without undue regard to procedural

Table 4.1 Instruments and the status of each of the four states

Instrument	Kenya	Rwanda	Tanzania	Uganda
Abolition of Forced Labour Convention	√	√	√	√
African Charter on Human and People's Rights	√	√	√	√
African Charter on the Rights and Welfare of the Child	√	√	√	√
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa	–	√	√	√
African Youth Charter	–	√	–	√
Amendment to Article 43(2) of the Convention on the Rights of the Child	√	√	–	√
AU Convention Governing the Specific Aspects of Refugee Problems in Africa	√	√	√	√
Charter of the United Nations	√	√	√	√
Constitutive Act of the African Union	√	√	√	√
Convention Against Discrimination in Education	-	√	√	√
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	√	√	-	√
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	–	√	–	–
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	–	√	–	–
Convention on Internally Displaced Persons (Kampala Convention), 2009 [Not yet in force]	√	√	√	√
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	√	√	√	√
Convention on the Nationality of Married Women	–	√	√	√
Convention on the Political Rights of Women	–	√	√	√
Convention on the Prevention and Punishment of the Crime Of Genocide	–	√	√	√
Convention on the Rights of Persons with Disabilities	√	√	–	√
Convention Relating to the Status of Refugees	√	√	√	√
Covenant on Civil and Political Rights	√	√	√	√
Covenant on the Rights of the Child				
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	√	√	√	√
International Covenant on Civil and Political Rights	√	√	√	√
International Covenant on Economic, Social and Cultural Rights	√	√	√	√

(*continued*)

Table 4.1 Instruments and the status of each of the four states (*continued*)

Instrument	Kenya	Rwanda	Tanzania	Uganda
Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	–	√	–	–
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999.	–	√	√	–
Optional Protocol to the Convention on the Rights Of Persons With Disabilities, 2006.	√	√	√	√
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	√	√	–	√
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children In Armed Conflict	√	√	–	√
Optional Protocol to the Convention on the Rights of the Child on a communications procedure	–	–	–	–
Protocol of the Court of Justice of the African Union	√	√	√	√
Protocol on Amendments to the Constitutive Act of the African Union	√	√	√	√
Protocol on the Statute of the African Court of Justice and Human Rights	√	√	√	√
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	√	√	√	√
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003	√	√	√	√
Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights	√	√	√	√
Rome Statute of the International Criminal Court, 1998	√	√	√	√
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989	–	√	–	–
United Nations Convention against Transnational Organized Crime	√	√	√	√
Universal Declaration of Human Rights	√	√	√	√

Key to table: √ State party; – Not a state party

technicalities; and the purpose and principles of this constitution shall be protected and promoted.

(b) The Bill of Rights under chapter four (specifically Articles 19 – Rights and fundamental freedoms; 20 – Application of Bill of Rights; 21 – Implementation of rights and fundamental freedoms; 22 – Enforcement of Bill of Rights; 23 – Authority of courts to uphold and enforce the Bill of Rights; 25 – Fundamental Rights and freedoms that may not be limited; 26 – Right to life; 27 – Equality and freedom from discrimination; 28 – Human dignity; 29 – Freedom and security of the person; 30 – Slavery, servitude and forced labour; 32 – Freedom of conscience, religion, belief and opinion; 33 – Freedom of expression; 37 – Assembly, demonstration, picketing and petition; 39 – Freedom of movement and residence; 40 – Protection of right to property; 41 – Labour relations; 43 – Economic and social rights; 44 – Language and culture; 45 – Family; 47 – Fair administrative action; 48 – Access to justice; 50 – Fair hearing; 159 – Judicial authority.

Under Article 20, courts are required to develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights. Under Article 23(1), the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

In order to enhance equality and freedom from discrimination, the Government of Kenya is obliged under the constitution, Article 27(8), to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. This principle is aimed at having women assume positions in such bodies and take part in the development of the country. The right to freedom and security of the person is also protected by the constitution. This includes the right not to be subjected to: violence from public or private sources, physical or psychological torture, and the right not to be treated or punished in a cruel, inhuman or degrading manner.[73]

Article 44(3) prohibits a person from compelling another person to perform, observe or undergo any cultural practice or rite. This includes harmful traditional cultural practices like FGM, child marriages and forced marriages. Article 45(2) of the Constitution of Kenya provides for the right of every

person to marry a person of the opposite sex based on the free consent of the parties, while Article 45(3) provides for equal rights at the time of the marriage, during the marriage and at the end of marriage.

It sets the minimum age of marriage at 18 years, thus prohibiting child marriages. Under Article 45(4), parliament is required to enact legislation recognising: marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition or adhered to by persons professing a particular religion.

In Article 53, children are protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and harmful or exploitative labour, while the right of every child to free and compulsory basic education is also protected in the same article. The constitution further recognises the vulnerability of certain members of the society, who are entitled to special protection and treatment through affirmative action. These include persons with disabilities, the young, minorities and marginalised groups, and older members of the society.[74]

At least 5 per cent of members of the public in elective and appointive bodies should be persons with disabilities,[75] while – through affirmative action – the state has undertaken to ensure that minorities and marginalised groups are provided access to employment opportunities (Article 56). Article 57 requires the government to take measures to ensure that elder members of the society live free from abuse and receive reasonable assistance from their family and the state.

Regarding land ownership and access thereto, the Constitution of Kenya recognises inequalities in land ownership and access. In Article 60, it provides that while land in Kenya shall be held, used and managed in a manner that is equitable, efficient and productive, this will be in accordance with, among other principles, the principle of elimination of gender discrimination in law, customs and practices related to land and property in land. This provision promises women equal protection of the law in matters of land ownership, land inheritance and access to land.

Constitution of the Republic of Rwanda

The Constitution of Rwanda guarantees: the equality of men and women (Art. 10); provides that discrimination of whatever kind in any form is prohibited and punishable by law (Art. 11); the right to physical and mental integrity, and protection from torture, physical abuse or cruel, inhuman or degrading treatment (Art. 15); and equality before the law, which means, without any discrimination, equal protection of the law (Art. 16). This constitution also offers provisions on familial issues, such as marriage and children (Art. 26–28). Moreover, the constitution provides for the

establishment of the Gender Monitoring Office, an independent public institution on matters relating to gender equality (Art. 185).

The Constitution of the Republic of Tanzania

The Constitution of the United Republic of Tanzania contains equality and non-discrimination clauses, which offer protection from violence and discrimination (Articles 12 and 13). Article 24 guarantees the right to ownership of property by both men and women, while the right to life is protected by Article 14.

In the concluding observations of the CEDAW Committee regarding the combined 4th–7th periodic reports by Tanzania, the committee noted that it had much earlier recommended that VAW in all its forms be criminalised and that shelters for women who have been subjected to violence be established. Consequently, Tanzania had taken legislative measures to combat VAW.

The Constitution of Uganda

The Constitution of Uganda, Article 33(1) provides that 'women shall be accorded full and equal dignity of the person with men'. Article 33(2) further provides that the state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement. All laws, cultures, customs or traditions which are against the dignity, welfare or interest of women, or which undermine their status, are prohibited by Article 33(6) of the Constitution of Uganda (Article 24, 31, 33). Article 21(1) provides for equality and freedom from discrimination of all persons.

The Constitution of Uganda also provides for equality of all persons before and under the law in all spheres of political, economic, social and cultural life, and all persons are entitled to enjoy equal protection of the law. Discrimination on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability is prohibited, while Article 22 protects the right to life. Subjecting a person to any form of torture, cruel, inhuman or degrading treatment or punishment is prohibited by Article 24.

4.5.2 Statutory law on VAW in East Africa

It is noteworthy that none of the Commonwealth member countries in East Africa have enacted single pieces of legislation to address the entire spectrum of VAW. However, laws that address domestic violence or GBV have been enacted. Additionally, existing criminal and civil law provides varying forms of protection. For ease of reference, the applicable statutory provisions on VAW have been reduced into tabular form (see Table 4.2).

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Core Incident Type: Rape/Defilement				
Kenya	Sexual Offences Act (SOA) sec. 3 Rape sec. 8 Defilement sec. 10 Gang rape	Minimum sentences imposed to limit judicial discretion to be exercised in favour of lenient sentences	*Rape* - Imprisonment for a minimum term of 10 years, which may be enhanced to imprisonment for life. *Defilement of a child aged 11 years or less* shall upon conviction be sentenced to imprisonment for life. *Defilement of a child aged 12–15 years or less* shall upon conviction be sentenced to imprisonment for a minimum term of 20 years. *Defilement of a child aged 16–18 years or less* shall upon conviction be sentenced to imprisonment for a minimum term of 15 years. *Gang rape* – Imprisonment for a minimum term of which may be enhanced to imprisonment for life (sec. 10). *Where accused is a minor, the court may upon conviction, sentence the minor in accordance with provisions of the Borstal Institutions Act and the Children's Act.	*Esther Nangwanaa Nandi v Jones Chewe Bobo [2006] e KLR*

(*continued*)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Rwanda	Organic Law N° 01/2012/OL of 02/05/2012 Instituting the Penal Code (OLPC) Art. 196: Rape Art. 198: Marital rape Art. 200: Marital rape Art. 190: Child defilement Art. 192: Child defilement by a person having authority over the child Article 193: Child defilement resulting in death or an incurable illness Art. 201: Penalty for rape with intention to infect another person with an infection	Art. 38 GBV Law – right of the victim of GBV to claim damages	Art. 197: ***Rape –*** General penalty, imprisonment of more than 5–7 years. – If victim is elderly person, a person with disability or a sick person – imprisonment of 7–10 years and a fine of 500,000–1,000,000 Rwandan franc (RWF). – If rape results in an incurable disease for the victim, imprisonment of 10–15 years. – If rape results in the death of the victim, life imprisonment. – Art. 199 *marital rape* – imprisonment of at least 2 months but less than 6 months and a fine of 100,000–300,000 RWF. If marital rape results in: – an ordinary disease, imprisonment of 6 months to 2 years; – an incurable illness, imprisonment of more than 5–10 years; – the death of the victim – life imprisonment. Art. 191: *Child defilement* – life imprisonment with special provisions. Art. 192: *Child defilement by a person having authority over the child* - life imprisonment with special provisions and a fine of 100,000–500,000 RWF. Art. 193: *Child defilement has resulted in death or incurable illness* – life imprisonment with special provisions and a fine 500,000–1,000,000 RWF. Art. 201: Rape with intention to infect another person with an infection – imprisonment of 20–25 years.	–

Tanzania	sec. 130 Penal Code, amended by Sexual Offences Special Provisions Act (SOSPA) – Rape sec. 131 A Penal Code, amended by SOSPA – Gang rape	Rape – Compensation of amount determined by the court, to the victim (sec. 131 SOSPA)	sec. 131(1) SOSPA – Imprisonment of minimum 30 years, with corporal punishment and a fine and an order to pay compensation of amount determined by the court, to the victim. sec. 131 (2) – Where accused is a minor (less than 18 years), he shall: (a) if a first offender, be sentenced to imprisonment only; (b) if a second time offender, be sentenced to imprisonment for a term of 12 months with corporal punishment; (c) if a third time and recidivist offender, he shall be sentenced to life imprisonment. sec. 131(3) Penal Code, where victim is a girl under 10 years, the offender shall on conviction be sentenced to life imprisonment. sec. 131 A 2) Penal Code amended by SOSPA – Gang rape – imprisonment for life, regardless of the actual role played in the rape.	–
Uganda	sec. 123 Penal Code Act (PCA) – Rape sec. 129 Defilement of girl under 18 years sec. 130 Defilement of idiots or imbeciles Aggravated defilement	–	sec. 124 – Rape - Death penalty sec. 130 – Defilement of imbeciles – 14 years	*Uganda v Kusemererwa (Criminal Case No: HCT-01-CR-SC-0015-2014)4)*

(*continued*)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Core Incident Type: Sexual Assault				
Kenya	Sexual assault SOA	–	SOA – ***sexual assault*** – imprisonment for not less than 10 (ten) years and a maximum period of imprisonment for life	–
Rwanda	OLPC Art. 182: Indecent assault OLPC Art.183: Indecent assault against a child OLPC Art. 184: Indecent assault with violence, trickery or threats against a person aged eighteen (18) or above OLPC Art. 185: Public indecent assault	–	– *violence by exercising sexual torture or intending to commit sexual torture* – life imprisonment with special provisions [Art. 27, GBV Law]. – *sexually indecent acts against someone* – imprisonment of between 2 and 5 years and a fine between 100,000–200,000 RWF [Art. 31 GBV Law]. – *sexual violence against an elderly person or a handicapped person* – imprisonment of 10–15 years and a fine between 500,000–1.000,000 RWF [Art. 32, Art. 33 GBV Law].	–
Tanzania	–	Miscellaneous Rights of Action Law of Marriage Act – sec. 69 Right to damages for breach of promise of marriage – sec. 70 Limitation of actions for breach of promise – sec. 71 Right to return of gifts – sec. 72 Right to damages for adultery – sec. 73 Right to damages for enticement – sec. 74. Assessment of damages for adultery or enticement	–	–

Uganda	sec. 125 Penal Code Act (PCA) – Attempt to commit rape sec. 129(2) PCA – Attempted defilement sec. 128(1) PCA – Indecent assaults	–	sec. 125 PCA – *Attempted Rape* – life imprisonment. sec. 128(1) PCA – *Indecent assault* – 14 years with or without corporal punishment. sec. 129 (2) – *Attempted defilement* – 18 years' imprisonment with or without corporal punishment.	–
Core Incident Type: Physical Assault				
Kenya	Assaults, offences endangering life or health	–	–	–
Rwanda	OLPC Art. 148: Aggravated assault and battery OLPC Art. 149: Battery or bodily injuries resulting in incapacity OLPC Art. 150: Battery or bodily injuries resulting in incurable illness or permanent incapacity OLPC Art.152: Battery or causing bodily injuries against a child or a person unable to defend him/herself OLPC Art. 154: Administering a substance to a person which may cause illness or death OLPC Art. 155: Intentional minor violence OLPC Art. 151: Battery or bodily injuries resulting in death OLPC Art. 158: Assault and battery resulting from lack of foresight and precaution OLPC Art. 159: Causing illness to another person	–	A judge will have to determine the sentence according to the guilt of the offender, taking into account the motives, previous history, circumstances surrounding the case and the personal background of the offender (OLPC Art. 69). The Code of Criminal Procedure offers general provisions on possible penalties, such as imprisonment (Art. 218–220), fines (Art. 221–224) and public interest works (community service) (Art. 225) and their execution (Art. 226–246). OLPC Arts. 35–96 – General provisions on penalties and their execution, e.g. penalty categorisation, mitigating and aggravating circumstances, and prescription of sentences.	–
Tanzania	sec. 66 Law of Marriage Act No. 5 of 1971 (R.E.2002) prohibits a spouse from inflicting corporal punishment on the other spouse.	–	–	–

(*continued*)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Uganda	Penal Code Act 1 – Chapter XXIII – Assaults causing grievous bodily harm 2 – sec. 219 PCA – Doing grievous harm	–	–	–
Core Incident Type: Psychological Abuse				
Kenya	–	–	–	–
Rwanda	Art. GBV Law – Distorting the tranquillity of one's spouse due to polygamy, adultery, dowry, reproduction and his/her natural physiognomy, or threatening to deprive one's spouse of the right to property and to employment OLPC Art. 203: Sexual harassment OLPC Art. 238: Refusal to provide support to spouse, descendants or ascendants OLPC Art. 239: Denial of freedom to practice family planning OLPC Art. 240: Harassment of spouse OLPC Art. 243: Family desertion **Chapter Iv: Threats to Harm a Person** OLPC Art. 169: Threat to commit an act qualified as terrorism OLPC Art. 170: Verbal threats OLPC Art. 171: Threat by gestures, signs, images or a symbol OLPC Art. 172: Written threats OLPC Art.173: Blackmail OLPC Art. 174: Penalty for blackmail	–	Distorting the tranquillity of one's spouse on grounds of dowry, reproduction and his/her natural physiognomy, or threatening to deprive one's spouse of the right to property and to employment – imprisonment of 6 months to 2 years and a fine between 50,000–200,000 RWF [Art. 26, Law on GBV]. *Harassing one's spouse*: – imprisonment of 6 to 2 years [Art. 20, Law on GBV]. *Adultery for offender and co-offender* – for between 6 months and 2 years [Art.14 Law on GBV].	–
Tanzania	–	–	–	–
Uganda	sec. 128(3) PCA – Indecent assault	–	sec. 128(3) PCA 1 year imprisonment	–

Core Incident Type: Economic Abuse				
Kenya	–	–	–	–
Rwanda	Penal Code Art. 241: Disposal of marital property without consent of either spouse Penal Code Art. 330: Appropriating a spouse's personal belongings Penal Code Art. 404: Causing fire on another person's property Penal Code Art. 406: Demolishing or damaging another person's buildings Penal Code: Distorting the tranquillity of one's spouse by threatening to deprive one's spouse of the right to property and to employment	–	–	–
Tanzania	–	–	–	–
Uganda	sec. 199 PCA – Responsibility of person who has charge of another sec. 200 – Duty of head of family sec. 223 PCA – Failure to supply necessaries Chapter XXXII PCA - Offences Causing Injury to Property	–	–	–
Core Incident Type: Forced Marriage				
Kenya	The Marriage Act – Equality in marriage (section 3(2)) and in section 4 sets 18 years as the minimum age of marriage for all women across religious and cultural divides.	–	Violation of the minimum age requirement – imprisonment for a term not exceeding 5 years, or a fine not exceeding Sh1 million or both (sec. 4 Marriage Act).	–

(*continued*)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Rwanda	OLPC Art. 275: Forcing a person to marry or not to marry a partner of his/her choice OLPC Art. 274: Kidnapping or confinement of a person with intent to live together as wife and husband OLPC Art. 194: Living together with a child as husband or wife OLPC Art. 195: Participating in early or forced marriage of a minor	–	–	–
Tanzania	Law of Marriage Act – sec. 16 provides that marriage can only be contracted on the free will of parties; section 13(1) – 18 years as the age of marriage for boys and 15 years for girls. sec. 13(2) allows child marriages; provides that a party may enter into a marriage, with the consent of the court, if he/she has attained the age of 14.	–	–	–
Uganda	sec. 126(a) PCA – Abduction with intent to marry	–	sec. 126 (a) PCA – 7 years imprisonment	–
Core Incident Type: Female Genital Mutilation/Cutting				
Kenya	Prohibition of Female Genital Mutilation Act – A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person, commits an offence.	–	If in the process of committing the offence of FGM, a person causes the death of another – imprisonment for life.	–
Rwanda	–	–	–	–
Tanzania	sec. 169 A Penal Code – criminalises FGM; protects women below 18 years old, leaving out adult women who are sometimes mutilated forcefully during child birth.	–	–	–

Uganda	Prohibition of Female Genital Mutilation Act, sec. 2 – offence to carry out FGM. sec. 3 – aggravated FGM is committed where death occurs as a result of FGM, the offender is a parent, guardian or a person having authority or control over the victim, the victim suffers a disability, the victim is infected with HIV as a result of FGM or FGM is done by a health worker; – carrying out FGM on oneself, attempting to carry out FGM, procuring, aiding abetting FGM and participating in events leading to FGM; – duty to report FGM acts or intent to make a report to the police; – discrimination, stigmatisation of a female who has not undergone FGM or a person who discriminates or stigmatises another person whose wife, daughter or relative has not undergone FGM.	A Magistrates Court is empowered on application to issue a protection order if the court is satisfied that a girl or woman is likely to undergo FGM (section 14). After convicting a person under this act, the court may in addition to the punishment provided, order the accused to pay compensation to the victim for injuries suffered. Such order shall be deemed to be a decree enforceable under the Civil Procedure Act (sec. 13).	*Carrying out FGM* – imprisonment for a term not exceeding 10 years. *Aggravated FGM* – imprisonment for life. *Failure to report* – a fine not exceeding 12 currency points or imprisonment not exceeding 6 months or both. *Discrimination and stigmatisation* – by imprisonment for not more than 5 years (sec.12 and 13 FGM Act).	–
Core Incident Type: Other GBV				
Kenya	sec. 6, Employment Act addresses sexual harassment in the work place by an employer, representative of an employer or a co-worker. sec. 88 Employment Act – Sexual harassment at workplace. **The Counter Trafficking in Persons Act (CTPA), 2010** – trafficking in persons for purposes of exploitation and that of financing, controlling, aiding or abetting the commission of the offence of trafficking in persons for purposes of exploitation.	–	*Sexual harassment* – a fine not exceeding Ksh50,000 or imprisonment for a term not exceeding 3 months or to both. *Trafficking in persons* – imprisonment for a term of not less than 30 years or a fine of not less than Ksh30 million or both. In both cases, a repeat offender is liable to imprisonment for life.	*HC Constitutional and Human Rights Division petition No. 331 of 2011 WJ and LN (Minors suing through their guardians, JKM and SCM) V Astariko Henry Amkoah & Others and The Cradle and 3 others*

(*continued*)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Rwanda	Law On Prevention and Punishment of Gender-Based Violence, 2008 GBV Law Art. 12 GBV Law – GBV-related cases shall be heard and pronounced at the scene of the crime, if it is convenient for the victim and if it is possible. – intentional transmission of a terminal disease constitutes Art. 29 GBV Law Penal Code: OLPC Article 153: Starving or denying drink to person for whom one is responsible Art. 204: prostitution Art. 206: Encouraging, inciting or manipulating a person for the purpose of prostitution Art. 207: Discouraging efforts to rehabilitate prostitutes Art. 208: Advertisement for facilitation of prostitution Art. 209: Running, managing or investing in a brothel Art. 210: Sharing the proceeds of prostitution Art. 211: Sharing the proceeds of prostitution by a child Art. 212: Aiding, abetting and protecting prostitution Art. 213: Providing a facility for prostitution Art. 273: Kidnapping and unlawful detention of a person Art. 274: Kidnapping or confinement of a person with intent to live together as wife and husband Art. 250: Definitions of human trafficking terms Art. 251: Participating in trafficking persons out of the country Art. 258: Child kidnapping Art. 231: Abandonment or neglect of a child Art. 232: Neglect or abandonment of a child causing disability, death or disappearance Art. 233: Inciting parents to abandon a child Art. 234: Abandonment or neglect of an unable dependent	GBV is a ground for divorce [Art. 6, Law on GBV]	Art. 71: Factors taken into account by the judge in determining a penalty. Mitigating factors/circumstances – Minority of offender or an accomplice less than eighteen (18) years (Art. 72). Provocation (Arts. 73–78) Recidivism (Arts. 79–82) Concurrence of offences (Art. 84) Suspension of sentence/penalty (Arts. 85–87) Prescription of penalties (Arts. 89–94) Prescription of civil damages (Art. 95) Section 5: Ban on entry into a place and restriction of movement Art. 202: Penalties for the offence of gender-based violence committed by use of medical or narcotic drugs, pictures, signs, speeches and writings. Art. 245: Adultery Art. 252: Penalty for human trafficking Art. 253: Penalty for a person owning a place for human trafficking Art. 246: Penalty for bigamy Art. 248: Penalty for cohabitation Art. 254: Penalty for buying a human being Art. 255: Penalties for a person engaged in trafficking in a human being for the purpose of indecent practices Art. 256: Penalties for trafficking in persons as a profession Art. 259: Penalties for a person who engages in child trafficking for the purpose of prostitution or indecent practices	Art. 7 GBV Law, The parent, trustee or any other person responsible for a child shall protect the latter against any GBV.

	Art. 235: Abandonment or neglect of an unable person causing serious illness or death Art. 236: Harassment of an elderly person Art. 403: Arson which results in death of persons Art. 218: Inflicting severe suffering on a child, harassing or imposing severe punishments on him/her Art. 219: Offering alcoholic beverages or tobacco to a child Art. 220: Engaging a child in narcotic drugs and arms trafficking or in the trade of other illegal products Art. 221: Exploiting a child by involving him/her in armed conflicts Art. 223: Refusal to surrender a child Art. 224: Abduction of a child from his/her parents or guardians or where he/she habitually resides Art. 225: Participating in the adoption of a child for the purpose of trafficking Art. 226: Refusal to provide care to a child or unable dependant Art. 227: Child neglect by a parent or guardian without reasonable cause Art. 228: Neglect of a child on the basis of sex Art. 229: Recording and disseminating a child's pornographic picture or voice Art. 230: Advertising of children pornographic pictures Art. 187: Sexual torture Art. 188: Exhibition, sale or distribution of objects of sexual nature Art. 176: Torture Art. 178: Forced labour Art. 161: Throwing at another person anything likely to disturb or dirty him/her Art. 162 Self-induced abortion Art. 163: Causing a woman to abort with or without her consent		Art. 260: Penalties for child trafficking and involving children in indecent practices through different ways Art. 257: Temporary seizure and confiscation of places used for human trafficking Art. 177: Penalties for torture Art. 157: Penalty for involuntary manslaughter Art. 17: GBV Law – *Abduction* – imprisonment of 5–8 years and a fine between RWF100,000–200,000. Art. 21: GBV Law – *Concubinage* – imprisonment of 2–4 years and a fine between RWF100,000–200,000. Art. 22: GBV Law – *Polygamy* – imprisonment of 3–5 years and a fine between RWF300,000–500,000. Art. 22: GBV Law – Any person involved intentionally in polygamy by issuing documents or officiating such marriage – imprisonment of 5–8 years. Art. 23: GBV Law – *Sexual slavery* – imprisonment of 10–15 years and a fine between RWF500,000–1,000,000. Art. 24: GBV Law – *Sexual harassment way of orders, intimidation and terror over a person* – imprisonment of 2–5 years and a fine between RWF 100,000–200,000. Art. 34: GBV Law – *Defamation on grounds of gender aimed at disparaging his/her personality or his/her work* – imprisonment 2–5 years and a fine between RWF100,000 –300,000.	

(*continued*)

Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	Art. 164: Abortion resulting in death Art. 156: Definition of involuntary manslaughter and unintentional bodily injuries Art. 137: Manslaughter and intentional bodily injuries Art. 138: Premeditation Art. 139: Ambush Art. 140: Murder Art. 142: Spousal homicide Art. 143: Infanticide Art. 144: Poisoning Art. 145: Homicide committed by degrading acts or preceded by another felony Section 3: Voluntary manslaughter, assault and battery Art. 215: Refusal to report offences of immorality committed against a child Art. 216: Refusal to assist a victim of violence or to testify on violence Art. 244: Adultery Art. 247: Cohabitation Art. 249: Prosecution of adultery and cohabitation Art. 568: False declaration to civil status registrar Art. 8: GBV Law – Failure to cater for child under one's trusteeship just because of whether the child is male or female. Art. 9: GBV Law – Forbidden to fire a woman just because she is pregnant or on maternity leave Art. 10: GBV Law – Pregnancy and delivery shall not constitute causes for depriving a student of her right to education Art. 10: GBV Law – Use of drugs, films, signs, language, and other means with the intention of exercising GBV Art. 10: GBV Law – Obligation to prevent gender-based violence, rescue and call for rescue to assist the victims of this violence. Art. 11: GBV Law – Indecent (acts or behaviour contrary to good morals and politeness, degrading human being) conduct and behaviour		Art. 35: GBV Law – *Disturbance of someone resulting in deprival rights and thus GBV* – imprisonment of 6 months and 2 years and a fine between RWF100,000–500,000. Art. 36: GBV Law – *Refusal to assist the victim of violence or to testify* – imprisonment of 6 months to 2 years and a fine between RWf50,000 - 200,000. Art. 28: *Gender-based human trafficking* – imprisonment of 15 years to 20 years and a fine between RWF500,000 to RWF2,000,000. Art. 29: GBV Law – *intentionally transmitting a terminal disease sexually to someone else* – life imprisonment. Art. 30: GBV Law – *Using drugs, narcotics, pictures, signs, language or writing to stir up sexual violence* – imprisonment of between 5–8 years and a fine between RWF100,000–200,000. Art. 18: GBV Law – *Child neglect or harassment (putting someone in unrest condition by persecuting, nagging, scorning or insulting him/her and others) on the basis of sex/gender discrimination or for purposes of spousal harassment* – imprisonment of 6 months to 3 years.	

Tanzania	sec. 25 of the Prevention against Combating of Corruption Act, 2007 'sextortion'	–	'Sextortion' – a fine of not less than 1–5 million shillings or imprisonment for a term of not less than 3–5 years or both.	–
Uganda	All offences against morality – Chapter XIV PCA [Ss 131–149 PCA] e.g: sec. 131 PCA – Procuration sec. 149 Incest sec. 156 Desertion of children sec. 157 Neglecting to provide food etc. for children sec. 159 Child stealing sec. 187 Manslaughter sec. 188 Murder; sec. 204 Attempt to murder and other offences connected with murder and endangering life or health, criminal recklessness and negligence [Chapters XX, XXI, XXII PCA] sec. 219 PCA – Doing grievous harm Prevention of Trafficking in Persons Act (2010): – trafficking or aggravated trafficking in persons and does not report to police or other relevant authority – trafficking in persons – aggravated trafficking, where the victim of trafficking is a child; adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation; the offence is committed by a public officer, military personnel or law enforcement officer or the victim dies, becomes a person of unsound mind, suffers mutilation or gets infected with HIV/ AIDS or any other life-threatening illness as a result of such trafficking.	–	S. 131 PCA: Procuration – 7 years' imprisonment *Trafficking or aggravated trafficking in persons and does not report to police or other relevant authority* – a fine of five thousand currency points or imprisonment for six months (section 10). **Prevention of Trafficking in Persons Act:** – *trafficking in persons* – imprisonment for 15 years – *aggravated trafficking* – imprisonment for 15 years, but can also be punishable with death if the offence is committed under any of the circumstances set out in section 5 of the Act – *war crime* imprisonment for life (section 9 ICC Act).	–

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Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	International Criminal Court Act [ICC] (2010) provides that any person who commits a war crime (committing rape, sexual slavery enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence) in Uganda is liable on conviction to imprisonment for life (section 9). Employment Act, 2006 sec. 7(1), sexual harassment – lodge a complaint with a labour officer who is empowered to make all of the orders he/she could have made if the complaint related to unjustified disciplinary penalty or unjustified dismissal. The Employment (Sexual Harassment Regulations)	–	–	–
Other substantive and procedural legislative provisions of general application to VAW				
Kenya	Children's Act 8/2001 **The Children Act, Revised Edition 2007 (2001)** makes provisions for the safeguard of the rights and welfare for the children; prohibitions and offences. **Procedure under the Child Offenders Rules:** these rules apply to proceedings with respect to a child who is charged with an offence. It is the duty of the court to ensure that the rules are implemented to enhance access to justice by children in conflict with the law. The Protection against Domestic Violence Act, 2015: prevention, protection and assistance to internally displaced persons and Affected Communities Act No. 56 of 2012. The Matrimonial Property Act, 2013, was enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property. The Evidence Act (Chapter 80) Laws of Kenya (specially Section 124).	Protection/Restraining orders (sec. 8) – interim ex parte protection order (sec. 12) to remove the perpetrator from the matrimonial home – protection order granting a victim exclusive occupation of the shared residence or a specified part	–	–

	The Criminal Procedure Code (Chapter 75) Laws of Kenya. The Children Act (Chapter 141) Laws of Kenya (especially Section 13, 14, 15, 18.). The Civil Procedure Act (Chapter 21) Laws of Kenya (See Order 32 of the Civil Procedure Rules). The Police Act (Chapter 84) Laws of Kenya. The Law of Succession (Act Chapter (60) Laws of Kenya (See: Section 29, 35, 38, 40). **Victim Protection Act No. 17 of 2014**: the law provides for the protection of victims of crime and abuse of power, to provide them with better information and support services, reparations and compensation and to provide special protection for vulnerable victims. **Witness Protection Act, 2008**: many women victims of sexual abuses, domestic violence and other abuses endure suffering without seeking legal redress due to, among other reasons, the fear of retaliation. Act establishes: – right to privacy from intrusion by the media, health professionals, and any other person – witness protection programme	– restitution or compensation to the victim for, among others, the costs of any medical or psychological treatment incurred by the victim; the costs of necessary transportation, victim restitution, accommodation and other living expenses relating to the court proceedings leading to the conviction; or any other relief (section 26 &24). Under section 23, a compensation order made against a convicted offender may be enforced as a judgement in civil proceedings. However, such order is not a bar to civil proceedings. **Victim Protection Act No. 17 of 2014.**		
Rwanda	**2004 Gacaca law** – for all formal proceedings in respect to the offences of rape and sexual torture it is mandatory that they are conducted in camera (Art. 38). **Hearing in public or in camera** (Art. 141). Constitution 2003 states that court proceedings shall be conducted in public, unless the court determines that proceedings should be in camera on the ground that a public hearing might have an adverse effect on general public order or cause moral embarrassment	–	–	Organic Law N° 01/2012/OI of 02/05/2012 instituting the Penal Code Penalties range from: – Community service (Art. 49),

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Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	(Art. 145). The Code of Criminal Procedure also states that hearings are generally conducted in public. According to this law, a court can order for a hearing to be conducted in camera when it finds that a public hearing can be detrimental to public order and good morals. The court should record whether (part of) the hearing was conducted in public or in camera, because this has to be indicated in the judgement (Art. 150). The 2004 Law on Evidence (Art. 121) **OLPC** Art. 569: Refusal to appear before the judicial police, public prosecution or other authority Art. 570: Concealing an offence or failing to assist a person in danger Art. 571: Destruction of evidence Art. 572: Threats or intimidation with intent to influence a complaint Art. 573: Harbouring or hiding a suspect or an offender Art. 574: Hiding a dead body of a murdered person Art. 575: Denial of justice Art. 576: Refusal to testify Art. 577: Refusal to answer questions from judicial authorities Art. 579: Giving false testimony Art. 580: False testimony due to a gift Art. 581: Influencing witnesses or judges Art. 582: Perjury Art. 583: Suborning of assistants in judicial organs Art. 586: Insulting those in the judicial organs Art. 587: Threats against judicial officers Art. 588: Discrediting a decision of judicial organs Art. 589: Non execution of court decision			– Confiscation of property (Art. 51), – Release on parole (Art. 64), – Loss of civic rights (Arts. 66–68)Article 136: Punishment of the crime of discrimination and sectarian practices Article 590: Penalty for a person who delays to disclose or provide information Article 591: Penalty for refusal to provide information or illegal withholding of information

Tanzania	**Law of Marriage Act – Part IV Property, Rights, Liabilities and Status:** 56. Rights and liabilities of married women; 57. Equality between wives; 58. Separate property of husband and wife; 59. Special provisions relating to matrimonial home; 60. Presumptions as to property acquired during marriage; 61. Gifts between husband and wife; 62. No liability for antecedent debts of spouse; 63. Duty to maintain spouse. **68. Status of widows.** National Employment Services Act (1999): The government domesticated the International Labour Standards through the enactment of the National Employment Services Act (1999). This law provides for equal opportunities to women and men in access to employment services. The Employment and Labour Relations Act No. 6 of 2004: This prohibits discrimination in the workplace on the basis of gender, sex, marital status, disability, pregnancy and HIV status, among others (section 7). Although sec. 5 prohibits child labour. The Refugee Act, 1998: This provides for the protection of refugee women from violent acts. The Act also provides a legal framework for assisting refugees and provides for availability of essential services and amenities to the refugee community. Among others, the law requires that every refugee be provided with education in accordance with the Tanzania National Education Act 1978. Land Act No.4 of 1999: sec. 3 of the Land Act – Equal rights of men and women to occupancy and use.	Law of Marriage Act S. 69. – Right to damages for breach of promise of marriage	–	–

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Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
	The Village Land Act no. 5/1999: Both men and women have equal rights of ownership and access to land, including a customary right of occupancy. Law of the Child Act No. 21/2009 and Juvenile Court Rules: Part II of the Law of the Child Act provides for the rights and welfare of the child, which are set out in sections 4–13. They include the right to be protected from various farms of violence. Section 7 provides for the right of a child to live with his/her parents or guardian. Section 9 provides for the right of a child to be protected from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression.			
Uganda	The Domestic Violence Act (2010) provides protection and relief to victims of domestic violence, punishment of perpetrators of domestic violence, procedure enforcement of orders made by the court and related matters. The implementation system relies on dual jurisdiction by both the local authorities (Local Council Courts), as these are closer to the people, and the formal courts, which are often far away from populations in rural areas. Under the Act, local councils have powers to act to prevent acts of violence. Both local councils and the formal justice system are required to act swiftly and to hear cases within 48 hours. The formal courts are also empowered to issue orders to protect victims from further violence.	Wide range of remedies to victims, including criminal sanctions, civil remedies and compensatory provisions. – Protection Orders – Interim protection orders – Jurisdiction to issue interim protection orders and protection orders is vested in the Magistrates Court, Family and Children Court – Removing perpetrator from matrimonial home	– A fine not exceeding 48 currency points or imprisonment for a term not exceeding two years or to both and the court may give any other remedy it considers fit.	–

	Trial on Indictments (Amendment) Statute, 1990 regulates the grant of bail for serious offences such as rape, defilement. Magistrate's Courts (Amendment) Act, 1990 to abolish the procedure of preliminary proceedings in criminal trials and to render certain serious offences, such as rape, bailable only by the High Court. – offence of failure to comply with the terms and conditions of a protection order. – **The Refugee Act (2006)** – protection for women and child refugees on account of their vulnerability. – equal opportunities and access to procedures relating to refugee status and affirmative action shall be taken to protect women refugees from gender discriminating practices (section 33). – equal enjoyment and protection of all human rights and fundamental freedoms in economic, social, cultural, civil or any other fields, as provided for in the constitution and other relevant laws in force in Uganda and international and regional instruments to which Uganda is a party, and in particular, the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and People's Rights, 1981. The Equal Opportunities Commission Act (2007). The Equal Opportunities Act establishes the Equal Opportunities Commission. The Act provides a legal basis to challenge laws, policies, customs and traditions that discriminate against women.			

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Table 4.2 Statutory law applicable to VAW in Commonwealth member countries in East Africa (*continued*)

Common-wealth state	Legislative instrument and provision	Measures	Sanctions	Case law
Preventive detention and bail provisions				
Kenya	**The judiciary – Bail and Bond Policy Guidelines March 2015** (see from pages 16 to 30 and especially under 4.9(f) 4.16 (in defilement cases) and 4.26(f), especially in offences related to VAWG on views of the victim before bail is granted.	–	–	–
Rwanda	– preventive detention – effective for 30 days (after the expiration of that period, it can be continuously renewed for 1 month) – maximum period of preventive detention for misdemeanours is 6 months – felonies the maximum period of preventive detention is 1 year (Art. 98 – 100) The accused (or his or her defence attorney) can also at any time apply for release on bail to the public prosecutor or to the court depending on the stage of the investigations.	GBV-related conditions for bail (i.e. no contact orders, a prohibition against harassment, stalking and threats to commit abuse, a prohibition of third parties contacting victims on behalf of the accused, confiscation of weapons, liquor abstinence and participation in any available treatment programme or support group). It can also order redetention of the accused, if deemed necessary, because of new and serious circumstances (Art. 101–102).	–	–

Tanzania	–	–	–	–
Uganda	The 1995 Constitution of Uganda: Art. 23(6)(a): right of an accused person to apply to court to be released on bail subject to the legal requirements and conditions which must be fulfilled before court grants bail. Article 23(6)(b): right to be released on bail, if the person has been on remand for 60 days before trial, in respect of an offence that is triable by the High Court or subordinate court (Magistrate's Court) and mandatory bail – where an accused person is remanded in detention before trial starts for a continuous period exceeding 180 days for major offences. Art. 44: Right to a fair hearing sec. 75 (1) Magistrates Court Act, Cap 16 (MCA) A pre-trial detainee may be granted bail Trial on Indictment Act, Cap 23 (TIA) - sec. 15 TIA gives High Court unlimited power to grant or deny accused persons bail upon proof of exceptional circumstances. Police Act Cap. 303 Section 25 – If a person is detained in police custody beyond 48 hours without being charged in court, then he or she can apply to a magistrate within 24 hours, who will then order his or her release.	–	–	*Aliphusadi Matovu v Uganda Criminal Miscellaneous Application No. 15 of 2005*

Policy instruments/guidelines and action plans to address VAW

Kenya

Apart from legislation, the Government of Kenya has adopted other initiatives to address violence against women. These include: policy instruments, guidelines and plans of action, among other initiatives.

The Policy Framework on Sexual Violence in Kenya:

The Policy Framework on Sexual Violence is governed by the *National Guidelines on Medical Management of Sexual Violence/Rape in Kenya 2009* (2004), revised edition.

The guidelines are designed to give general information about the medical management of sexual violence and have set standards for comprehensive care of survivors of sexual violence. To healthcare workers who come in contact with survivors of sexual violence, the guidelines are a practical reference source for service delivery. The guidelines address the medical, psychosocial, legal and humanitarian aspects of sexual violence, to ensure the needs of survivors of sexual violence are addressed as far as possible. Recognising that children form a significant proportion of survivors of sexual violence, the guidelines make special provisions that address the unique aspects of their needs distinct from those of adults. These guidelines are available in health facilities and their implementation is expected to comprehensively address the needs of survivors of sexual violence in Kenya. Kenya has also developed a trainer's manual for rape trauma counsellors (2006) and a trainer's manual on clinical care for survivors of sexual violence. These are interventions addressing VAW.

National Policy on Abandonment of FGM:

Other initiatives addressing VAWG include the National Policy on Abandonment of Female Genital Mutilation, which was approved by Cabinet on 26 June 2010 and the National Plan of Action against sexual exploitation of children in Kenya (2013–2017).

National Action Plan for the Abandonment of FGM (2008–2012):

The National Action Plan for the Abandonment of FGM (2008–2012) was developed by the Ministry of Gender, Children and Social Services in co-operation with the National Committee on Abandonment of Female Genital Mutilation (NACAF). It provides a strategy to create awareness of the harmful effects of the practice of FGM, targeting those who perform FGM and the girl child by making provision for alternative rites of passage. The action plan is implemented under the stewardship of the Anti-FGM Board, which is Government funded.

In approving the National Policy on Abandonment of FGM, and the action plan, the government demonstrated its commitment to the promotion of

gender equality, as envisioned in Vision 2030 whose social pillar focuses on gender, youth and vulnerable groups. It emphasises the importance of reducing vulnerability through the prohibition of retrogressive practices such as female genital mutilation for the empowerment of women and girls.

National Reproductive Health Policy (2007)

This policy identifies priority interventions to include programmes that ensure access to quality treatment and rehabilitative reproductive health services for survivors of sexual gender-based violence.

The policy also identifies promotion of households and community participation programmes as being critical in addressing harmful cultural practices. Other initiatives that address violence against women and girls include: The Plan of Action for Kenya's Adolescent Reproductive Health and Development Policy (2005–2015); National Action Plan on Counter Trafficking in Persons (2011); National Gender Action Plan on accelerated country action on HIV/AIDS for women and girls, the HIV and AIDS Strategic Plan (2009/10–2012/13); National Reproductive Health and HIV and AIDS integration Strategy – August 2009; National Reproductive Health Policy Enhancing Reproductive Health Status for all Kenyans, October 2007; and the 2003 Adolescent Reproductive Health and Development Policy.

National Steering Committee on Counter Trafficking in Persons

In 2012, the government established the National Steering Committee on Counter Trafficking in Persons to monitor the implementation of the Counter Trafficking in Persons Act, while a National Plan of Action (NPA) has been developed as a measure to respond to trafficking in persons. Among the strategies of the action plan is the rescue of women and child victims of trafficking and to provide psychosocial support, rehabilitation, reunification and reintegration services to victims.

The Directorate of Gender

The Gender Directorate is charged with the overall responsibility of promoting and co-ordinating gender equality initiatives. The government has established Gender Units in government ministries and state corporations to spearhead gender mainstreaming, including integration of SGBV initiatives in the various departments.

The National Gender and Equality Commission

The National Gender and Equality Commission is the successor in title to the Kenya National Human Rights and Equality Commission, established by Article 59 of the constitution. Among its functions are: to promote gender equality and freedom from discrimination in accordance with Article 27 of the constitution;

and monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws and administrative regulations in all public and private institutions.

In essence, the commission provides oversight over the government in its obligation to provide protection and promotion of the rights of women, children, youth, the elderly, minorities and persons with disabilities, and other vulnerable members of the community.

Rwanda

The Government of Rwanda is highly committed to the cause of gender equality and women's empowerment, as transpired in the June 2003 National Constitution, the National Gender Policy, the ratification of CEDAW, the implementation of the Beijing Platform of Action (BPFA), the Vision 2020 and the Economic Development and Poverty Reduction Strategy (EDPRS), which highlight gender as a cross-cutting issue and work towards the reduction of gender-based inequalities and promotion of gender equality and equity in all areas.[76]

Since 2006, the Ministry of Justice has opened Access to Justice Bureaus (*Maisons d'Accès à la Justice [MAJ]*) in each of the 30 districts staffed by 90 lawyers (three lawyers per district) to provide improved universal access to legal advice and assistance. Specific desks have been established in the MAJ to deal with legal assistance for women, especially related to cases of gender-based violence.[77]

Rwanda has several governmental departments that play a role in combating gender-based violence. Rwanda's Ministry of Gender and Family Promotion oversees, implements, monitors and evaluates the National Policy Against Gender-Based Violence and implements the National Strategic Plan for fighting gender-based violence for the years 2011–2016, which includes objectives and co-operation among a variety of multisectoral stakeholders – including governmental ministries such as the Ministry of Justice, Ministry of Education, Ministry of Health and several others, as well as the Rwanda National Police, local governments, NGOs, the media and the private sector.[78] The Ministry of Gender and Family Promotion, the Gender Monitoring Office and the National Women Council, respectively: co-ordinate the implementation of national policies and programmes regarding the advancement of women; monitor that implementation of the fundamental principles of gender are respected in all organs at the governmental, private, non-governmental and religious levels and in national policy and programmes intended to ensure the promotion of gender equality; and the mobilisation of women to participate in national development.

Land Policy 2004

The Land Policy adopted in 2004 prohibits all forms of discrimination, such as that based on sex in relation to access to land and the enjoyment of real rights.

Labour Policy

The policy on labour in Rwanda prohibits discrimination on the grounds of gender, marital status or family responsibilities.

The National Gender Policy:

This policy establishes the National Gender Cluster as a co-ordination mechanism that aims at supporting the Government of Rwanda in promoting gender equality and utilising partnership synergies to improve gender interventions in the elimination of discrimination against women.[79]

Other policies include: the Vision 2020 policy, which highlights gender as one of the cross-cutting themes, together with HIV/AIDS, the environment and information and communication technologies (ICTs); the Economic Development and Poverty Reduction Strategy (EDPRS); and the National Gender Policy and the Decentralization Policy.[80]

Tanzania

In addition to the various legislations, Tanzania has adopted other initiatives and established institutions to address VAW. These include: national policy instruments, national plans of action and the Tanzania Commission for Human Rights.

National Plan of Action to Combat VAW

The Government of Tanzania is signatory to the Southern African Development Community (SADC) Declaration on Gender and Development (1997) and its Addendum on the Prevention and Eradication of Violence against Women and Children (1998). The declaration is a commitment by SADC member states, placing gender on the agenda of the SADC programme of action and community building initiatives. Both the SADC declaration and the addendum have been translated into Kiswahili to make them user friendly to the majority of Tanzanians at the grassroots level.

Based on the declaration and addendum, the government initiated the preparation of the National Plan of Action to combat violence against women and children. It was developed in 2001 and disseminated to stakeholders. The plan of action provides strategies and activities to be implemented by various stakeholders. It focuses on legal, socioeconomic, cultural and political services and education, training and awareness raising.

National Plan of Action (NPA) in combating FGM

Based on the NPA in combating violence against women, a National Plan of Action in combating FGM and various programmes were also developed.

The National Plan of Action to combat FGM (2001–2015) was developed to provide guidance on the elimination of female genital mutilation. In implementing the NPA on FGM, various activities were undertaken which include: training of school teachers in order to integrate the knowledge in schools' curricular and sensitisation of communities through campaigns, media programmes, seminars, workshops, drama, books and leaflets on the harmful effects of FGM. Awareness raising on the existing laws against FGM is also provided.

National Development Vision 2025

The National Development Vision 2025, adopted in the year 2000, aims at attaining gender equality and the empowerment of women in all socioeconomic and political relations and culture by the year 2025.

Tanzania Commission for Human Rights

Established in 2001, the Commission for Human Rights and Good Governance has the mandate to investigate allegations involving the violation of human rights and to disseminate information on human rights, including women's rights. The commission also promotes harmonisation of national legislations, and monitors adherence of the constitution to human rights standards enshrined in human rights treaties to which Tanzania is a state party. A special gender desk, dealing with public education and women's rights, was established within the commission in 2004.

Education Sector Development Programme (2000–2015)

The Education Sector Development Programme incorporates the objective of providing education to all women and men by 2015 and other special programmes to promote the education of girls, in collaboration with development partners and NGOs. Such programmes include a training fund for Tanzanian women and community-based education for girls (the building of hostels and boarding schools and setting up of educational trust funds for girls).

Uganda

In addition to legislation, Uganda has adopted other initiatives to address VAW. These include national policy instruments, national plans of action and strategic plans.

The main national policies relating to VAW are: the National Gender Policy (2007); the National Gender Action Plan; the Social Development Plan to monitor the implementation of the Convention for the period 2007–2010;

the National Equal Opportunities Policy and Action Plan; and the National HIV/AIDS Strategic Plan. The goal of all these policies and action plans is to address gender equality and justice, women's empowerment and the elimination of discrimination. The Ministry of Health in Uganda has developed a manual on clinical management of gender-based violence survivors. The manual provides guidelines to all health workers on how to deal with victims of sexual gender-based violence.

Notes

1 Act No. 45 of 2012, Laws of Kenya.
2 Cap 204, Laws of Uganda.
3 Reprinted in Commonwealth Secretariat Developing Human Rights Jurisprudence Vol 3 No 151 and in 1 African Journal of International and Comparative Law/RADIC (1989) 345.
4 'The Bangalore Principles and the Internationalization of Australian Law', Glen Cranwell, Senior Lawyer Australian Government Solicitor. Reported in AIAL FORUM NO. 32.
5 Charter of the UN (1945), available at: http://www.un.org/en/charter-united-nations/
6 UN Charter on Human Rights, Adopted in 1945, Article 13, para 1.
7 UN General Assembly (1948).
8 CEDAW article 2(e); Chirwa, D (2004), 'The Doctrine of state responsibility as a potential means of holding private actors accountable for human rights', *Melbourne Law Journal*, Vol.5, p5.
9 CEDAW (1994), note 5, para. 24(v); see also CEDAW (1989), para. 1.
10 CEDAW (1994), para. 9.
11 Adopted and opened for signature, ratification and accession by GA Resolution 44/25 of 20 November, 1989, entry into force 2 September 1990, in accordance with Article 49.
12 Ibid, Article 19.
13 GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 49, UN Doc. A/6316(1966), 999 UNTS 3.
14 See No. 38 above, Article 12(1).
15 See No. 38, Article 12(2).
16 CEDAW (1994), para. 9.
17 CEDAW/C/KEN/CO/7, during the 963rd and 964th meetings on 19 January 2011.
18 CEDAW/C/UGA/CO/7.
19 47th session held 4–22 October 2010.
20 Constitutional Petition No. 2 of 2003.
21 Constitutional Petition No. 8 of 2007.
22 CEDAW/C/TZA/6 at its 845th and 846th meetings on 11 July 2008.
23 CEDAW/C/SR.883 and 884.
24 CEDAW/C/RWA/7-9, available at: http://www.minijust.gov.rw/fileadmin/Documents/International_Reports/CEDAW_7th_8th_and_9th_Report_September_2014_Final.pdf
25 CEDAW (1994), para 24(a) note 15, para 4(c) note 22, para 13.
26 CEDAW, Art. 2(e); Chirwa (2004), page 5.
27 CEDAW (1994), para 24(a) note 15, para 4(c) note 22.
28 Petition No. 8 of 2012.
29 *Velasquez Rodriguez v Honduras*, 1988, Inter-American Court of Human Rights (IACHR) Ser.c, No. 4, 172 (July 29 1988).
30 Ibid, 182.
31 Ibid, 182.
32 Ibid, 182.

33 Rodriguez case, supra, note 26.
34 Ibid, at para. 174
35 United Nations (2006), para 336.
36 Special Rapporteur on Violence against Women (2006); Special Rapporteur on Violence against Women (2013).
37 13, United Nations (1996), *Model Legislation on Violence against Women.*
38 Coomaraswamy, R (1996), *Report of the Special Rapporteur on violence against women, its causes and consequences.*
39 Coomaraswamy, R (1999), *Report of the Special Rapporteur on domestic violence.*
40 Ibid, paragraph 25.
41 UNDESA (2010), page 19.
42 Ibid.
43 *An assessment of Gender Based Violence Responses in Nine Counties of Kenya, My action counts*. page 38.
44 Human Rights Watch (2014), *No Way Out, Child Marriage and Human Rights Abuses in Tanzania*, October 2014.
45 Committee on the Rights of the Child, Consideration of reports filed by states parties under Article 12(1) of the Optional Protocol to the CRC, CRC/C/OPSC/UGA/1.
46 Commission on the Status of Women (2013), *Agreed conclusions on the elimination and prevention of all forms of violence against women and girls.*
47 Para 125(b) of the Beijing Platform for Action, 1995.
48 See General Assembly Resolution S-23/3 annex, para 69.
49 *Carmichele v Minister of Safety and Security, South Africa*, CCT case No. 48/00.
50 Supreme Court of Appeal of South Africa, Case No. 176/200.
51 UNDESA (2010).
52 UN General Assembly (2010), Model Strategies And Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice ('Model Strategies').
53 The Republic of Uganda (2010), The Domestic Violence Act, section 7(2).
54 The Republic of Kenya (2015), Protection Against Domestic Violence Act, section 6.
55 The Republic of Uganda (2010), The Domestic Violence Act, section 7(4).
56 www.cwch.co.ke
57 http://www.endvawnow.org/en/articles/1564-one-stop-centres-osc.html?next=1565
58 OAU Doc. CAB/LEG/24.9/49 (1990).
59 OAU Doc. CAB/LEG/24.9/49 (1990), Article 21(2), Section 4 of the Marriage Act, 2014, Kenya sets the minimum age for marriage at 18 years.
60 Ibid, Article 27.
61 Adopted June 27 1981 and ratified by Kenya, Uganda and Tanzania.
62 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5,21, ILM 58(1982), Article 4.
63 Adopted by the 2nd Ordinary Session of the Assembly of the Union at Maputo, 11 July 2003; came into force on 25 November 2005.
64 Article 5, *Maputo Protocol* (African Union 2003).
65 Article 2(2), *Maputo Protocol*.
66 CEDAW, Article 6.
67 African Union (2003), *Maputo Protocol*, Article 4(2)(g).
68 Ibid, Articles 22 and 23.
69 Reference No. 1 of 2007.
70 The Constitution of Kenya 2010, Article 27(1) and (2); Constitution of Rwanda 2015, Article 15; Constitution of Uganda, Article 21(1); Constitution of Tanzania, Article 12.
71 Constitution of Kenya 2010, Bill of Rights (Chapter 4), Article 27(4); Constitution of Rwanda 2015, Article 16; Constitution of Uganda, Article 21(2); Constitution of Tanzania, Article 13.
72 Constitution of Kenya, Article 27(4) and (5); Constitution of Rwanda 2015, Article 16; Constitution of Uganda, Article 21(2); Constitution of Tanzania, Article 13(4).

73 The Constitution of Kenya, 2010, Article 29.
74 The Constitution of Kenya, 2010, Articles 54, 55, 56 and 57.
75 Ibid, Article 54(2).
76 Government of Rwanda (2014), The Combined 7th, 8th and 9th Periodic Report on the Implementation by Rwanda of the Convention on the Elimination of all Forms of Discrimination Against Women.
77 Ibid.
78 Immigration and Refugee Board (IRB) of Canada (2013), *Rwanda: Domestic violence, including legislation, state protection, services and legal recourse available to victims* (2011–September 2013).
79 Ibid.
80 United Nations, *Country Assessment on Violence against Women Rwanda*.

Section II

Case Summaries on Violence Against Women

Chapter 5
Domestic/Intimate Partner Violence

Case 5.1 Uganda v Jackline Uwera Nsenga

(Criminal Session No. 0312 of 2013)

High Court of Uganda at Kampala

Aspects relevant to VAWG: Intimate partner violence, role of judiciary in raising awareness, impact on sentencing

Summary of facts

Jackline Uwera Nsenga (accused) was charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of offence were that the accused on the 10th day of January 2013, with malice aforethought, caused the death of one Nsenga Juvenal, her husband. The accused denied the charges and the prosecution called 13 witnesses in a bid to prove its case.

The evidence was as follows. On the night of 10th January 2013 at about 09.00pm, the accused returned to their residence in Bugolobi, where she parked her car outside the gate and waited. She pressed the bell and her husband, Juvenal Nsenga (hereinafter referred to as 'the deceased'), came to open the gate. It was during the process of opening the gate that the accused's car knocked it open and overran the deceased. The deceased was then dragged on the rough surface of the driveway for a distance of 10.3 metres. He sustained multiple injuries on his body. Immediately after the incident, the accused sought assistance from some people to put the deceased into the same vehicle and delivered him to Paragon Hospital in Bugolobi. About five hours later, Nsenga was pronounced dead at the said hospital. Given the marital acrimony between the deceased and accused, it was the prosecution's contention that the accused intentionally knocked down the deceased, hence the charge of murder.

In her defence, the accused presented evidence from five witnesses. The defence case was that although the accused admitted to overrunning her husband with the car she was driving, she didn't intend to kill him. It was her testimony that the car simply jerked and ended up knocking him down. The couple had been married since 1994 and blessed with two children.

Issues and resolution

The prosecution discharged, beyond reasonable doubt, the burden of proving that there was death; the death was unlawful; the death was caused with malice aforethought; and that the accused person participated in or caused the death of the deceased. Evidence of the state of the accused and deceased's marriage was adduced in proving malice aforethought.

The court declined to find that the state of their matrimonial relationship was a manifestation of the ordinary wear and tear typical in marriages. There were very grim marital problems that had gone on for over ten years, had become chronic and life-changing, leading the accused person's search for solutions including counselling with family members and prayers, among other interventions. The conduct of the accused, before, during and after knocking down Nsenga, offered corroboration to the deceased's dying declaration that the accused knocked him down with the car.

Conviction

The accused was found guilty and convicted, as charged, of the offence of murder contrary to section 188 and 189 of the Penal Code.

Sentence

The accused, seeking the lenience of court, stated that she was a first time offender, had two children and was remorseful. Before sentencing her to a period of 20 years in prison, the court noted the fact that the accused person had not enjoyed her marriage, especially in the last ten or so years. The couple had two children and the accused was the surviving parent. If the maximum penalty as prescribed in respect of the offence were to be imposed, the children would suffer even more than any of the affected persons in this whole situation. The court further noted that violence results in physical injury, psychological trauma, and at times death, as in the present case, and yet the consequences can cross generations and truly last a lifetime for the family and society at large. These components of society remain traumatised by the gruesome murder, regardless of the degree of the generation of the marital relationship. The court was of the view that the accused should have sought a lawful, legally acceptable way of bringing her frustrations to an end. This was a family matter that got out of hand; the message is that violence must be stopped. Couples are strongly advised to seek guidance and help from family members, friends and relevant institutions to help resolve their differences.

Ratio Decidendi

(a) In proving malice aforethought, reliance can be placed on circumstantial evidence for a conclusion that an accused person bore an intention to kill.

Contribution to gender jurisprudence/Point to note

- In sentencing the accused, the judge took into account the fact that the accused had maternal duties and that a long sentence would adversely impact on her children.

Case 5.2 Republic v Francis Paul

(Criminal Case No. 25 of 2008)

High Court of Tanzania at Kilosa

Aspects relevant to VAWG: Manslaughter, domestic violence, intoxication does not take away criminal responsibility, role of the court in punishing violence against women, role of judiciary to create awareness of the consequences of VAW

Brief summary of facts

The accused person was charged with manslaughter contrary to section 195 of the Tanzania Penal Code.[1] The particulars of the offence alleged that on the 28th day of August, 2007, at Magolle village, Kilosa district in Morogoro region, he unlawfully caused the death of one Zaina Mohammed. He appeared in court and when the charge was read to him, he pleaded guilty and a plea of guilty was entered and the prosecutor gave the following summary of the case.

On the 28th of August 2007, the accused, the deceased and one Koba Paulo went drinking some local brew at Kaukunga. The accused and the deceased were husband and wife, respectively. The deceased got so drunk that when the accused suggested that they should go back home, she was not able to walk and asked the accused to carry her but he refused and started slapping her on the face. He beat her on the head and stomach as he ordered her to stand up and walk. She stood up and the three started walking to go back home as the accused person continued to assault her all over the body. Paulo tried to intervene and told the accused to stop beating up the deceased, but he did not listen to Paulo. When they reached the home of Mussa, a brother of the accused, the deceased cried out for help and Mussa came and rescued her. The accused then carried the deceased and when they reached their homestead, he dropped her on the ground and dragged her along the ground into the homestead.

The following morning, the accused went to the village chairman and reported that his wife (deceased) had suddenly died. A post-mortem was performed on the body of the deceased and the report thereof revealed that the deceased died as a result of a head injury. The accused person was

arrested and charged with manslaughter. The accused admitted these facts as correct and he was convicted as charged.

Issues and resolution

Although the accused person was a first offender, the prosecutor asked the court to take note of the fact that murder cases arising from domestic violence were on the increase in the area where the offence was committed.

In mitigation, the accused pleaded with the court for leniency saying he was remorseful and that he was drunk at the time of the offence.

He asked the court to consider it in his favour that when he realised that his wife was dead, he went and reported the matter to the village chairman.

Before sentence, the court took into account the fact that both the accused and the deceased were drunk with alcohol at the time of the offence and that no weapon was used in assaulting the deceased. The court condemned excessive drinking, which had resulted in loss of life, and observed that a custodial sentence was called for. The learned trial judge sentenced the accused to imprisonment for ten years.

Ratio Decidendi

The Intoxication of an accused does not absolve him of criminal liability.

Case 5.3 Uganda v Lydia Draru Alias Atim

(Criminal Session Case No. 0404 of 2010)

High Court of Uganda at Kampala

Aspects relevant to VAWG: Domestic/intimate partner violence, verbal abuse, physical violence, threats of violence, provocation, reasonable apprehension of imminent threat to her life, accused acting in self defence

Summary of facts

Lydia Draru alias Atim was charged with the offence of murder. The particulars of the offence were that on or about 10th November 2009, at her home in Namuwongo, Kampala District, the accused murdered Major General James Kazini, by hitting him with a blunt iron bar. When the accused appeared before court for plea, she offered to plead guilty to the lesser offence of manslaughter; but the prosecution was unwilling to amend the charge sheet to reflect the lesser offence, maintaining that the case against the accused was one of murder. The accused was then arraigned for murder and

she pleaded 'not guilty', but maintained her plea of 'guilty' of manslaughter stating that she indeed killed the deceased, albeit unintentionally.

The prosecution witnesses included a pathologist who conducted a post-mortem on the deceased, the doctor who examined the accused after the alleged murder and an eyewitness to the alleged murder.

Other witnesses included the officer who analysed the genetic DNA of exhibits found at the scene of the crime, a scenes of crimes officer and a neighbour, who allegedly witnessed the conduct of the accused after the alleged murder. The accused gave evidence in defence and called no witness.

The prosecution adduced evidences establishing the death of the deceased, as well as the mental and physical disposition of the accused at the time of the offence, and sought to prove the fact that the death was intentional and therefore unlawful. The only eyewitness was a niece of the accused person, who was in the house at the time of the alleged offence. According to her testimony of the events of the morning of 10th November 2009, there were two stages of violence between the deceased and the accused. The first stage ensued upon the couple's return to the accused's house. This entailed a one-sided quarrel with the deceased berating the accused. The witness testified that she was summoned by the deceased and told that her aunt (the accused) was a thief and had been bringing men to her house. As the deceased berated and made the accusations against the accused, the witness said that the accused was crying.

The second stage of the violence that preceded the alleged murder ensued shortly after 6.00am on the same day. The witness testified that the deceased accused her aunt (the accused) of stealing his money, but the accused denied stealing his money and walked away towards the witness's room and asked the deceased to leave the house. Instead he followed her, boxed and slapped her severally, while the accused pleaded with him to leave her. The accused then returned to the sitting room and the deceased again followed her there, threw her on a sofa and attempted to strangle her. The deceased then took the accused's handbag and phone and ordered her to leave the sitting room, which she did. He demanded his portraits, collected his magazines and made for the door. At that stage, the accused dashed into the bedroom and came out with an iron bar with which she hit the deceased on the back and head and he fell down and died.

The defence of the accused was in agreement with the evidence of her niece, who was the only eyewitness for the prosecution.

The accused testified that upon their return to the house, the deceased accused her of theft and befriending other men, boxed and beat her up until the two of them reached the sitting room, where he attempted to strangle her. The accused also stated that during the first stage of their fight, the deceased had

threatened her after breaking a glass on the table and throwing a whisky bottle at her that missed and hit the chair. PW5 who visited the scene of crime confirmed that the sitting room was littered with broken glass, indicative of violence having ensued before the murder. The accused admitted hitting the deceased in self-defence, after he told her he was going to fetch his gun from his car and kill her. The car was parked outside her house in the parking lot. She pleaded provocation and said that when she hit the deceased with the iron bar, she was acting in self-defence as she feared for her life.

Once she realised what she had done, she testified that rather than fleeing the scene of crime as she'd been advised by a relative, whom she had called on phone, she opted to stay and take responsibility since she had not intended to kill the deceased. She broke down repeatedly as she recounted her shock on realising the magnitude of the offence she had committed. The evidence of the scenes of crimes officer lends credence to the accused's fear for her life in so far as it confirms that a loaded revolver was recovered from a brown bag in the deceased's car.

Issues and resolution

The prosecution was required to prove, beyond reasonable doubt, the fact of death and, secondly, that it was the accused who killed the deceased. Finally, the prosecution was required to prove malice aforethought on the part of the accused.

The learned judge was satisfied that the prosecution had proved the fact of death beyond reasonable doubt. On the accused person's own admission, the court also found that she was the person who caused the death of the deceased by hitting him with a blunt object. However, the court found that the violence that ensued during the two confrontations was at the behest of the deceased. On whether the prosecution established malicious intentions on the part of the accused, the court held that the manner in which the 'murder' weapon was used was not proven to indicate malice aforethought. The court rejected the defence of provocation and found that the accused had been harassed, insulted and assaulted by the deceased for most of the early hours of the morning. In those circumstances, the court found that the purported provocation was neither sudden nor did the death take place in the heat of passion.

The court however considered the conduct of the deceased before the alleged murder and found that the deceased was to blame for the events leading to the murder. The court also considered the conduct of the accused before and after the murder and found that malicious intention on her part had not been proved beyond reasonable doubt. The court considered her conduct after the crime and noted that she did not flee the scene, as had been advised by some of those she called. Instead, she made telephone calls to the area chairman

and her relatives and told them what had happened. The court was of the view that her conduct was inconsistent with malice aforethought. The court further noted that her demeanour when she gave her evidence supported the assertion that the accused was in shock when admitting to killing a man that had been quite close to her. The court found that the recovery of a loaded revolver lent credence to the accused's fear for her life, and accepted the defence position that the deceased threatened to get his gun and kill the accused and that she responded to this threat in self-defence. However, considering the injuries inflicted, the court found that the accused's own account did not justify the amount of force she used against the deceased.

Conviction

Finally, the court found that she did not foresee the deceased's death as a natural consequence of her physical attack on him. As the accused person did not foresee the deceased's death as a natural consequence of her physical attack on him, the court found that the prosecution had failed to prove the ingredient of malice aforethought beyond reasonable doubt and acquitted the accused of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The judge, however, found her guilty of the offence of manslaughter contrary to sections 187 (1) and 190 of the Penal Code Act, convicted her of that offence and sentenced her to 14 years' imprisonment.

Ratio Decidendi

a) The defence of self-defence is not available where an accused uses greater amount of force than could be held reasonable for self-defence.

b) The defence of provocation is not available to an accused whose fatal blow which causes death is neither sudden nor within the heat of passion.

Case 5.4 Jackline Vidanya Baraza v Rep.

(Criminal Appeal No 79 of 2011)[2]

Court of Appeal, Nairobi, Kenya

Aspects relevant to VAWG: Murder, domestic violence

Summary of facts

Jackline Vidanya Baraza (the appellant herein), was charged before the High Court at Nairobi, with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the

information were that on 1st February 2008 at Golden Gate Estate, Industrial Area, within Nairobi, the appellant murdered Munax Ashok Kumar Dave. She denied the charge and was tried, found guilty, convicted and sentenced to death. She appealed against conviction and sentence.

The prosecution evidence was that the appellant was a house-help employed by the deceased and her family. She had worked with the deceased for nine months until the fateful day of the deceased's brutal murder. The appellant's routine was to report to work at 8.00am daily, and leave at 4.00pm. Her duties included opening and closing the gate upon the entry or departure of the deceased's family members. On 1st February 2008 (fateful day), the appellant reported on duty and opened the gate for the husband of deceased, who he left for work just before 8.00am. The deceased's 18-year-old daughter (A), a student at an academy in Westlands, Nairobi, had left for school long before the appellant reported to work. On returning home from school at around 5.00pm, she found the front door locked. She rang the bell, but there was no answer. She walked to the back door and found it unlocked. As she opened the door, she saw blood all over the wall and the floor. She ran out to the neighbours inquiring if anyone had seen her mother.

When she did not get a positive answer, she and the neighbours called out for the guard, who accompanied them to the inside of the house, where they found the deceased lying in a pool of blood. She was dead. A then called her father, while the neighbours called the police.

PC Livingstone Kihanda and PC Martin Kamau ('the investigators') were the investigating officers who visited the scene of crime and testified that they found the deceased lying in a pool of blood in the bathroom, with deep stab wounds on the neck, and the deceased's long, black hair wrapped around her neck. They found blood all over the floor of the kitchen, and along the wall to the bedroom and toilet. There were clothes scattered all over. They took pictures of the scene and the body, but were unable to trace the appellant.

In November 2008 Ashok, the deceased's husband, offered to engage a private investigator, and in January 2009, with the help of the police and the local chiefs, the private investigator (Joseph Mutinda) apprehended the appellant in Busia.

Mutinda testified that when he first approached the appellant at the home of her parents, she was visibly shocked and even attempted to escape. Paul Ouma Musunga, an Assistant Chief who had accompanied Mutinda to the home of the appellant's parents, and who was present at the time of the appellant's arrest, also testified that the appellant appeared very shocked on seeing them.

The appellant was then handed over to the police, who arranged for her to be examined by Dr Zephaniah Kamau; he testified that he found stab wounds on the appellant that were consistent in age to those found on the deceased. His

examination of the appellant indicated scars on the left lower face, left of the mouth, below the left lower lip, jaw and upper abdomen, all occasioned by a sharp object.

The post-mortem report on the deceased, prepared by Dr Jane Wasike, showed that the death was caused by 'penetrating neck injury caused by a sharp object'.

In her defence, the appellant gave unsworn statement admitting that she reported to work on the morning of the material day, but denied committing the offence. She testified that on that day, when she left that evening, the deceased was alive and well and in the company of two women. She testified that the deceased had let her out of the gate. The appellant claimed to have reported to work the next two consecutive days, but found no one at home.

Having been satisfied that the prosecution had proved its case, the trial court convicted the appellant and sentenced her to death, a decision which the appeal was lodged against.

Issues and resolution

The appeal was lodged on the grounds that the learned judge erred in law and in fact in failing to find that the prosecution case was not proved beyond reasonable doubt.

The second ground was that the learned judge erred in law and fact in basing the conviction on circumstantial evidence, despite the existence of a reasonable hypothesis of the innocence of the appellant; that the learned judge erred in law by finding that the principle of rebuttable presumption as provided in sections 111(1) and 119 of the Evidence Act Cap. 80 was applicable; that the learned judge erred in law and in fact by convicting the appellant despite there being no eyewitness to the incident leading to the death of the deceased; that the learned judge erred in law and fact by convicting the appellant despite there being no forensic evidence linking the appellant to the death of the deceased; that the learned judge erred in law and fact in failing to find that a crucial witness was not called; that the learned judge erred in law and fact in failing to find that the prosecution's evidence was inconsistent and could therefore not be relied upon to make a safe conviction; and, finally, that the learned judge erred in law and fact in dismissing the appellant's defence.

In his submissions, counsel for the appellant, relying on his supplementary grounds of appeal, argued that the evidence before the High Court was entirely circumstantial and did not meet the threshold required in convicting the appellant. He argued that the appellant's 'disappearance' from the workplace, and the 'shock' she showed on being found several months after the incident, were not sufficient to convict her. He argued that the appellant's

own testimony that she indeed left the deceased alive and well, and that she reported to work the following day and the day after, but found no one at home, should be believed. With regard to the injuries found on the appellant's body, counsel argued that these were not conclusive to determine her guilt.

On the other hand, learned state counsel argued that the appellant, being the last person to be seen with the deceased; having disappeared immediately after the incident; found to be in 'shock' when approached and with the medical evidence that she also had scars that were consistent with a physical struggle with the deceased; and having been occasioned roughly around the time of the deceased's death, all pointed to the appellant's guilt.

The learned judges were in agreement that the case was based purely on circumstantial evidence, as there was no eyewitness account on how the deceased was killed. The prosecution relied on a series of circumstances to establish the guilt of the appellant. The court was of the view that the evidence on record did warrant the conviction of the appellant based on circumstantial evidence. This was because all facts which formed the chain of circumstances relied on by the prosecution were proved to the required standard. The prosecution did establish that the appellant was the last person in the company of the deceased; that she left, presumably at 4.00pm, which was her normal departure time, without anyone, including the guard, seeing her; that she went into hiding for several months; and upon being discovered several months later, she was visibly shocked, tried to escape, but was apprehended; and that a medical examination of her showed she had scars that were consistent with a struggle she had had with the deceased and which roughly coincided with the time of the incident.

The learned appellate judges were satisfied that all this pointed to the fact that it was the appellant who killed the deceased, after which she disappeared and was arrested several months later. They further found that the nature of injuries sustained by the deceased were evidence that they were inflicted with the requisite malice aforethought. Whether or not the motive of the murder was known or could be established, they found that the statutory elements of malice aforethought as set out in section 206 of the Penal Code were established.

Verdict

The court ruled that the appeal lacked merit, dismissed it and upheld the appellant's conviction and death sentence.

Ratio decidendi

In proving the offence of murder, reliance can be placed on circumstantial evidence which incriminates an accused person.

Case 5.5 David Munga Maina v Republic[3]

Court of Appeal, Kenya

Aspects relevant to VAWG: Domestic violence, murder, effect of intoxication, malice aforethought, gender stereotypes/women's roles, gender stereotyping in the courtroom, male supremacy, sentence, role of judiciary in creating awareness and punishing VAW

Summary of evidence

The appellant was charged before the High Court with the offence of murder c/s 203 as read with section 204 of the Penal Code. The particulars of the offence stated that, on the 14th day of October 2012 at Thumaita village, Kirinyaga district in Central Province of Kenya, the appellant murdered Sarah Muthoni Ngari (deceased/victim). He was found guilty, convicted and sentenced to suffer death according to the law. He appealed to the Court of Appeal and the conviction for murder was set aside and substituted with a conviction for manslaughter, on account of intoxication on the part of the appellant prior to the killing.

The deceased was the second wife of the appellant. On 14th October 2002, the first witness (PW1) was passing near the house of the accused when he heard screams emanating from the house. Out of curiosity, he went and found the accused beating up the deceased and demanding an explanation as to why she had come home drunk. The accused used the wooden handle of a hoe to assault the deceased.

He assaulted her with it until it broke, after which the appellant got a branch of a coffee tree and continued assaulting the deceased. PW3, PW4, PW5 and PW6 at some point also witnessed the accused beating up the deceased, but none of them appears to have intervened. PW4 specifically said he did not intervene because the appellant was known to beat up his wives and in each case nobody intervened. PW3 heard the deceased pleading with the appellant to stop beating her, but the appellant continued to assault her. After these witnesses saw what happened, the deceased was never seen again.

On 19th October, the appellant went to the home of his mother-in-law (PW11) and reported that the deceased had gone missing. Acting on information from the local chief of the area and other people, PW8 arrested the appellant on 20th October 2002 and placed him in police custody. The following day, PW12 was passing by the cell where the appellant was held and the appellant called him. As a result of what the appellant told the witness, the body of the deceased was exhumed from the appellant's farm. The body had head injuries and aspirated food in the trachea. There was inhalation of materials from the trachea into the chest cavity. The post-mortem revealed

that the cause of death was head injury using a blunt object and asphyxia due to vomited food material in the trachea.

In his defence, the appellant had told the High Court that on the material day, he went drinking alcohol at a Bar in Kagio town from 2–5 pm and went home feeling drunk. He did not find the deceased, who came back later very drunk. On asking how she could take care of children while drunk, she told him that it was not the duty of women to educate children. He slapped her twice and she ran away and did not return. The appellant said he did not know her whereabouts until 21st October 2002, when he was arrested and three days later told that his wife's body had been found buried. He denied killing the deceased or knowing how she met her death.

Issues and resolution

The prosecution was required to prove the death of the victim, malice aforethought and that it was the appellant who killed her. The post-mortem evidence conclusively proved the fact of death. The assessors returned a unanimous verdict of guilty. The trial court agreed with them and found that, although the appellant had been drinking alcohol between 2 pm and 5 pm on the material date, the drinking was by choice and not by the malicious or negligent act of another person. It had therefore been proved that the appellant was the one who killed the deceased, and he drank voluntarily and the necessary *mens rea* to cause the death of the deceased was present.

On appeal, the Court of Appeal found that there was overwhelming evidence from witnesses, who saw the appellant beating up the deceased. The court observed that the beating appeared to have taken place for a fairly long time with one witness (George) having witnessed it at about 4.00 pm, whereas the other witnesses witnessed it at 6.00 pm and at about 7.00 pm.

In the court's view, that explained why witnesses did not see each other at the scene, and why some witnesses did not see such items as the jembe handle or the coffee tree branch being used in the assault, and with some witnesses saying that they saw the appellant kicking and hitting the deceased with fists. The Appellate Court noted that it was after that beating, which went on into the night, that the deceased was not seen alive again and that the next time that she was seen was when her body was exhumed from the appellant's farm. In the circumstances, the court found that the irresistible inference that any reasonable tribunal would arrive at was that the appellant knew how the deceased had met her death and how she came to be buried at his farm. The appeal court upheld the finding of the High Court, that it was the appellant who killed the deceased and buried her on his farm.

However, the court faulted the High Court finding that in killing the deceased, the appellant acted with malice aforethought. They found that the

learned judge, in her summary to the assessors, did not inform the assessors that intoxication or drunkenness could reduce the charge of murder to that of manslaughter if the assessors found that the appellant, in beating the deceased, was heavily under the influence of drinks to the extent that he was not capable of forming intent to murder. They found that in her judgement, the learned judge considered the appellant's evidence in defence that on the material day, just prior to the incident, he had been drinking from 2.00 pm to 5.00 pm, but she dismissed that as being by choice and not by the malicious or negligent act of another person. The Appellate Court further observed that the learned judge went on to say that there was no evidence that the appellant was so drunk as to be incapable of knowing what he was doing or as to be temporarily insane.

The Court of Appeal faulted the learned judge on the above finding, which the court held was a misdirection as it seemed to suggest that the appellant should have adduced such evidence. The court relied on the case of *Nyakite s/o Oyugi v R*,[4] where the Court of Appeal held that the burden of raising a defence of intoxication so as to negate an intent to kill or cause grievous harm was on the accused person.

The court also faulted the learned trial judge on failure to consider that the response of the deceased to the appellant's question on who would care for the children, though minor, could have amounted to provocation. They argued that the learned judge did not consider such a remark, with the background of rural folk still intent on maintaining men's supremacy over their wives, and that perhaps if she had done so, she may have come to a different conclusion – particularly if she had noted that both were apparently under the influence of alcohol.

Finally, the Appellate Court held that the trial court had failed to deal with the defence of intoxication, which emerged from the defence and which could have reduced the charge to manslaughter had it been properly considered.

The benefit of doubt as to whether the appellant was so drunk as to negate the intent to kill, went to the appellant and together with the mild provocation by the response by the deceased, and considering that both were drunk, the court held that the offence of murder was not established, as required by law, and that the evidence established the offence of manslaughter. The appeal was allowed to the extent that the conviction for murder was reversed and substituted with a conviction for manslaughter c/s 202 read with section 203 of the Penal Code.

It is important to note how gender stereotypes find their way into the courtroom. The Court of Appeal in reducing the offence committed to manslaughter considered, among other things, that being a typical rural

man, the deceased's answer to the appellant's question on whose duty it was to take care of children amounted to provocation. The court seemed to agree that taking care of children is a women's role in the community and that questioning whose role it is to take care of children may not be taken kindly by a typical village man who has consumed some alcohol.

Ratio Decidendi

In considering the defence of provocation, due regard is to be paid to the rural background of the accused before ascertaining whether an act of a deceased person amounted to provocation.

Contribution/Point to note

The basis upon which the Court of Appeal accepted the defence of provocation clearly shows that cultural norms and values find their way into the courtroom.

Case 5.6 Prosecutor v Fatirakumutima

(RPA 0255/09/CS)

Supreme Court of Rwanda

Facts

The appellant killed his wife, with whom he had four children. According to the appellant's evidence before the High Court, the murder had occurred after he attempted to have sex with his wife but was turned down. The appellant resorted to forcing his wife to have sex, which according to the appellant led her to squeeze his testicles. He then proceeded to strangle and beat her. The appellant finally released the deceased, which resulted in her falling to the ground unconscious.

The appellant declined to report the offence as advised by his neighbour and instead went into hiding. On his apprehension, the appellant was charged with multiple offences, which included assassination and murder. He was tried and convicted of the offence of murder; the trial court found that there was insufficient evidence to make out the charge of assassination.

On appeal, it was argued by the appellant that the trial court disregarded the fact that he killed his wife by accident. It was also argued on his behalf that the court had given him a heavy sentence, overlooking the fact that he had orphans who needed to be looked after and the fact that in committing the murder he was provoked by his wife, who had squeezed his testicles.

In affirming the conviction of the lower court, the Supreme Court of Rwanda held *inter alia* that:

1. Beyond the appellant's own assertions, nothing else in the oral and documentary evidence could be relied on to prove that the deceased had squeezed the appellant's testicles, hence the defence of provocation was not available.
2. The appellant had intentionally killed the deceased and this was proved by the fact that he had strangled and slapped the deceased. In addition to this, the appellant had neglected to take the deceased to hospital, despite the fact that she was unconscious after the ordeal and died several hours later.
3. The fact that the appellant had children could not serve as a mitigating circumstance, because it was by virtue of the appellant's action of murder that they had become orphans.

Case 5.7 Prosecutor v Cyuma Miruho

(RPA 0142/10/CS)

Supreme Court of Rwanda

Facts

The appellant repeatedly hit his wife with a machete and thereafter a big piece of wood, resulting in her death. The appellant stated that his wife had delayed to return home and therefore he had left his house to look for her and ascertain what had happened to her. According to the appellant, he found his wife cheating on him, which enraged him causing him to hit her three to four times with the machete. The appellant admitted this to the judicial police during an interrogation.

The appellant was charged with the offence of assault and intentional bodily injuries resulting in unintentional killing. The Intermediate Court of Nyagatare ruled that the appellant should be charged with murder, as opposed to assault and intentional bodily injuries resulting in unintentional killing, and accordingly transferred the case to the High Court, Rwamagana Chamber.

The High Court found the appellant guilty of murder and sentenced him to imprisonment for 25 years.

On appeal to the Supreme Court, the appellant argued that the offence with which he was charged was wrongly classified and maintained he should have been charged with the original offence of assault and intentional bodily injuries resulting in unintentional killing as opposed to murder. The appellant also contended that the High Court disregarded the mitigating

circumstances, which included the fact that the accused had reported himself to the police and the fact that he was provoked by the deceased's actions of sexual infidelity. According to the appellant, no man could abstain from committing an offence when he encountered his wife cheating on him.

In response for the state, the prosecutor argued that there were no grounds upon which the offence could be reclassified. The prosecutor argued that the appellant had departed from his house with the machete, stating that he would hit his wife if he found her at fault. The prosecutor argued that this suggested that he intended to repeatedly hit her with the machete. On mitigating circumstances, the prosecutor argued that the appellant did not prove that his wife was cheating on him and in any case it would not have been sufficient excuse to kill. The prosecutor also contended that the appellant's act of turning himself in could not be considered as a mitigating circumstance.

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

1. The weapon used by the accused, a machete, and the act of repeatedly hitting the deceased, who was defenceless, with the machete and then the big piece of wood indicated that the appellant bore an intention to kill.
2. The trial judge had not overlooked the mitigating circumstances, because he had considered the fact that the appellant was a first time offender and had reduced the sentence from life imprisonment to 25 years.
3. According to Article 35 of the Decree Law No. 21/77 of 18/08/1977, a fixed term of imprisonment could not last more than 20 years and the accused should have been sentenced to 20 years' imprisonment.

Outcome

The accused's appeal partially succeeded and his sentence was reduced to 20 years' imprisonment.

Point to note

The court concluded that a husband's finding his wife in an act of adultery does not constitute provocation for purposes of reducing murder to manslaughter.

Notes

1 Cap. 16 {R.E. 2002}.
2 *Jackline Vidanya Baraza v Republic*, 2015 eKLR, available at: www.kenyalaw.org.
3 {2006} eKLR, available at: http://www.kenyalaw.org.
4 1959 EA 322 at page 325.

Chapter 6
Sexual and Other Forms of Violence Against Children

Case 6.1 Uganda v Sekajija Asuman

(HCT- 00-CR-SC-0087-2012)

High Court of Uganda at Kampala

Aspects relevant to VAWG: Aggravated defilement, evidence of child of tender years, requirement for corroboration

Summary of evidence

The accused was charged with the offence of aggravated defilement c/s 129 (3) and (4) (a) of the Penal Code Act (U). The particulars alleged that the accused on the 5th day of November 2011 at Lufuka Zone, Katwe in Makindye Division in Kampala District defiled Musimenta Akiiki, a girl aged eight years.

On the material day, she had been summoned by the accused into his house. She entered the house and sat on the chair while the accused went to his bedroom, undressed and returned while totally naked. The accused then instructed the victim to undress but she refused. The accused grabbed the victim and tied his socks around her mouth and dragged her to his bedroom. He undressed her and defiled her. Asked what she meant by 'defiling me', the victim said 'he slept on me' and further that 'he fixed his penis into my vagina' and she felt bad. The complainant's mother (PW2) went to the house and found the door locked from inside. The victim's sandals were at the door to the house of the accused.

She raised the alarm as she forced the door open and met the accused moving from the bedroom to the living room completely naked. The victim was also naked and lying on the bed of the accused person and covered with a bed sheet. The victim said that her mother picked her up from the bed and beat her up, but her mother made no mention of this. Some people responded to the alarm raised and came to the scene, beat up the accused until he was rescued by a neighbour and a police officer, who arrested him. The victim was taken to hospital for medical examination, but no medical report was produced in evidence.

In her statement to the police, the mother (PW2), stated that when she entered the house and found the victim on the bed, she asked and the victim said that she had been defiled by the accused. At the police station, the victim denied having been defiled by the appellant. In court, she said she was defiled but that she did not tell the police the truth because she had been beaten by her mother. While at the hospital, she had also denied having been defiled by any man. It was her evidence that, after the medical examination at the hospital, it is the medical personnel who told her mother that she had been defiled. No such medical report or evidence was produced in court. During cross-examination, the victim admitted lying to the police by saying that neither her skirt nor knickers were removed. That she told her mother the truth when they returned from the hospital. Asked why she said she had felt bad when the accused inserted his penis into her vagina, it was her answer that she did not know. In her statement to the police (DE1) the victim admitted to sitting on the bed of the accused and said the accused never did anything to her because her mother came before the accused could do anything.

Issues and resolution

Three issues were framed for determination, namely: the age of the victim (was she aged below 14 years), whether a sexual act was performed on her, and participation of the accused in the crime. These were to be proved beyond reasonable doubt. The prosecution adduced evidence, which was not contested, to show that the victim (PW1) was eight years old at the time of the alleged defilement.

On the issue of absence of corroboration by a medical report, the court found that a charge of defilement can still be proved without medical evidence and the court can convict without such evidence as long as there is strong direct evidence. The circumstances of the offence must be so convincing and compelling as to leave no ground for a reasonable doubt. This is because medical evidence is merely advisory and goes to the fact and not to the law. Finally, the court held that in sexual offences, the court should normally look for corroboration of the evidence of the victim, but may convict on the evidence of the victim alone after due warning. The court noted the many inconsistencies in the testimony of the victim and her mother (PW2), and found no good reason why the victim kept changing her stance on the matter if she had indeed been defiled.

The court was of the view that as much as corroboration by a medical report is not a requirement, in the circumstances of the present case and in view of the numerous contradictions on record, a medical report should have been produced to resolve those contradictions.

In the absence of medical evidence, the court found that it could not be said that there was strong direct evidence or circumstances that leave no ground for a reasonable doubt. The fact of defilement having taken place was therefore not proved beyond reasonable doubt. The participation of the accused in the crime was consequently not an issue and was nevertheless not proved as required by law. The court however found it clear from the evidence that the accused was involved in some indecent behaviour as against the victim, a young child. He locked himself in the house, undressed the child and tied her mouth using his socks but the child's mother came before he could defile her.

Verdict

The judge and assessors were in agreement that the offence of aggravated defilement had not been proved and the accused was acquitted for failure by the prosecution to prove that a sexual act had been performed on the victim. However, the court found that the evidence adduced disclosed the offence of indecent assault c/s 128 (1) of the PCA. That evidence was that the accused locked himself in the house, undressed himself and undressed the victim, who was found naked on his bed. He was convicted of the lesser offence of indecent assault.

Ratio Decidendi

a) Failure to produce a medical report to prove that a sexual act occurred is not fatal to the prosecution case so long as there is strong direct evidence upon which a Court could proceed to convict.

Case 6.2 Uganda v Joseph Baluku

(Criminal Session No. 0015 of 2012)

The High Court of Uganda, Kampala

Aspects relevant to VAWG: Aggravated defilement, evidence of a single witness in sexual offence cases, corroboration, evidence of a child victim, requirement for caution before convicting on such evidence in the absence of corroboration

Brief facts

The accused, Joseph Baluku, was charged with the offence of aggravated defilement contrary to section 129(3) and (4)(a) of the Penal Code Act. The

brief facts giving rise to this indictment were that on or about 30th May 2011 at Nakulabye Zone 4 in Kampala District, the accused allegedly performed a sexual act on one Robinah Nakanyike, then aged 11 years.

At the preliminary hearing that preceded trial the prosecution and defence agreed to the admission of a medical examination report in evidence. The report gave the age of the accused at approximately 18 years old and of sound mental disposition at the time he was examined. The examination took place about one day after the alleged defilement. The Prosecution called three witnesses – the aunt of the victim, the victim herself and the medical doctor who examined the victim after the alleged incident. The evidence of the prosecution was that on the evening of 30th May 2011, the victim's aunt asked the victim to guide the chicken into the chicken house. The victim went to the chicken house as instructed and saw the accused person at a distance. She assumed that he was going to the pit latrine that was near the chicken house where she was. When he came towards her she attempted to bypass him, but he threw her down and defiled her. She screamed and her aunt heard the victim screaming for help. She testified that when she ran to victim's rescue she saw the accused running from the chicken house with an open zip trouser. Medical examination revealed that the victim had been subjected to a recent sexual act and her hymen had been ruptured about one day prior to the examination. The doctor who examined the victim reiterated this evidence.

The defence presented the accused, his father and a relative as witnesses. The accused person gave sworn evidence and denied having defiled the victim. He attributed the prosecution to a grudge against him by the victim's aunt. A relative of the accused raised an alibi and said that at the material time he was with the accused, and that they were not at the scene of the alleged defilement. The defence argued that the doctor's medical findings that the hymen was ruptured a day prior to examination were inconsistent with the victim's evidence to the effect that she had had a previous sexual encounter.

Issues and resolution

The prosecution was required to prove: that the victim was 11 years old; that a sexual act had been performed on her; and the participation of the accused in the crime. A medical examination report in respect of the victim established that she was 11 years old at the time of examination (shortly after the alleged defilement). In her statement to the police, the victim appeared to contradict the medical finding that she had ruptured her hymen a day before the examination, when she stated that she had had a previous sexual encounter with her brother three years prior to the date of the statement. The defence sought to discredit the evidence of the doctor relating to the rupture

of the hymen, as it could not be reconciled with the victim's statement that this was not her first sexual encounter.

According to the defence, the only explanation for this inconsistency must be that no medical examination took place and indeed no medical report was produced in evidence. Indeed, no medical report of the examination was produced. However, the court noted that an eight-year-old is a young child and her perception of what amounts to a sexual activity is quite subjective.

The learned judge noted that the doctor stated categorically under cross-examination, that it was possible for someone to engage in what they deemed to be a sexual act and the hymen remains intact if penetration did not occur. This would, in the court's view, explain the contradiction and reconcile the doctor's evidence with that of the victim. Consequently, the judge was of the view that more weight would be attached to the expert medical evidence than the victim's oral testimony. She was satisfied and found that the prosecution had proved the incidence of a sexual act beyond reasonable doubt.

On establishing whether or not the accused was the person who defiled the victim, the aunt of the victim who responded to the screams of the victim said that the victim told her that the accused person had defiled her. She reiterated the accused person's responsibility for her defilement in her own evidence. The accused person, however, denied defiling the victim and raised an alibi. His relative testified to the fact that at the material time the defilement was alleged to have occurred, he was with the accused and they were not at the scene of crime.

The identification of the accused person in this case was that of a single witness (the victim), who also happened to be a minor. The court examined the victim and established that she understood the nature of an oath. She gave evidence on oath. However, given that she was the sole identification witness, the court was mindful of the requirement for caution before convicting the accused, whose defence was an alibi. The victim's evidence offered the best proof of identification of the person who defiled her. Her aunt, who came to her rescue when the victim screamed for help, saw the accused run out of the chicken house with an open zip trouser and the victim told her that the accused had defiled her. This evidence proved, beyond reasonable doubt, the participation of the accused in the crime.

The judge found this evidence to be credible and coherent, and further found that the victim was very familiar with the accused having lived in the same homestead as him for close to one year. Clearly she had seen the accused, both at a distance and at close range, and had sufficient time to ascertain his identity. In the circumstances, the judge rejected the alibi of the accused and found that the accused person and his witness contradicted each other on the time they left Nsambya, where they had allegedly spent the whole of 30th May

2011. That these two critical witnesses contradicted each other on such a vital component of their defence raised questions as to the authenticity of the alibi.

Conviction

The court found that the prosecution had proved the offence of aggravated defilement against the accused beyond reasonable doubt, found him guilty of aggravated defilement contrary to section 129 (3) and (4) of the Penal Code Act, and convicted him as charged.

Ratio decidendi

a) Where there is conflict between evidence of an expert witness and a victim's evidence, the evidence of an expert is to be accorded greater weight.

Case 6.3 Uganda v Kakuru Johnson

(HCT-05-CR-CSC-0259-2013)

High Court of Uganda at Mbarara

Aspects relevant to VAWG: Aggravated defilement, vulnerable child victim, role of the judiciary in addressing VAW

The accused was charged with the offence of aggravated defilement c/s 129 and (4)(a) of the Penal Code Act. The particulars were that Kakuru Johnson on the 17 February 2013 at Kicece village Ruhaaro Sub-County in the Ntungamo district performed a sexual act with Ninsiima Precious, a girl under the age of 14 years.

Summary of evidence

The victim's mother (PW1) left the victim at home and went to fetch water. On her return, her child was missing and PW1 went searching for her. She heard a baby crying from the house occupied by the accused. She called out the child's name and the accused ran out from the house and stood outside. PW1 entered the house and met the crying baby walking out of the accused's bedroom into the living room. She examined the baby and saw sperm and blood on the thighs and the private parts of the baby. It was her testimony that the accused could not even answer any of the questions she put to him. She reported the matter to Kafunjo police and the accused person was arrested. A medical examination of the victim found that she had suffered bruises on the labia minora. This finding was consistent with the testimony of PW1, who had also seen blood and sperm on the baby's private parts and thighs.

The accused had denied committing the offence. He raised an alibi and said that at the time of the offence, he was at his grandmother's home. He explained that on the material day, he woke up at 7:30 am and went to do some work at his grandmother's place until 8:30 am, when he was accosted by residents who alleged that he had defiled the victim herein. He said that there was a grudge between him and the father of the mother of the child victim. The accused said he had done some work for the father of PW1, and that the said father of PW1 had failed to pay him.

Issues and resolution

The prosecution was required to prove beyond reasonable doubt that the victim was aged below 14 years, that there was a sexual act performed on her and the participation of the accused person in the crime. There was no dispute as to the age of the victim. Although the assessors found that defilement had not been proved, the court found that there was medical evidence that corroborated the evidence of PW1 to the effect that the victim had been defiled. The only question for determination was the participation of the accused. This had to be proved beyond reasonable doubt.

The assessors returned a verdict of not guilty, having found that the fact of defilement had not been proved. However, the court believed PW1, who found her child missing and traced the child (having already been defiled) to the house of the accused. The accused, who had come out of the house running, could not answer any of the questions which PW1 asked him. The court was satisfied that the prosecution had discharged the burden of proof, especially through the evidence of PW1 – who saw the accused in broad daylight. Her evidence placed the accused at the scene of crime. Upon her examining the baby she found sperm and blood on her thighs and private parts. There was no other person in the vicinity or in the house of the accused where the child was found crying.

The court found that all these facts if considered together would lead to the irresistible conclusion that the accused, and no other person, performed a sexual act on the victim. In the circumstances, the accused was found guilty of aggravated defilement and convicted accordingly. It would appear that no forensic investigations were carried out to connect the accused person to the offence. Had he not been identified by PW1 after she called out her child's name and he ran out of the house, a conviction, in the absence of forensic evidence, could not have been possible and the accused person could have been set free.

This case demonstrates how accused persons can escape punishment as a result of careless investigations. The police need to invest in forensic technology for comprehensive investigations in cases of sexual violence.

Ratio Decidendi

a) In a case dealing with sexual offences, medical evidence can be used to corroborate the oral evidence of a witness that a sexual act occurred.

Case 6.4 Uganda v Peter Matovu[1]

(Criminal Session Case No. 146 of 2001)

High Court of Uganda, Kampala

Aspects relevant to VAWG: Discrimination against women, defilement, requirement for corroboration of evidence of a single witness in sexual offence cases, requirement for warning before conviction on the evidence of a single witness in sexual offence cases and not in other cases

Brief summary of facts

The accused was charged with the offence of defilement contrary to section 132(l) of the Penal Code Act. The particulars of the charge alleged that, on the 18th day of July 2001, at Kyebando-Kisenyi Zone in the Kampala District, he unlawfully had carnal knowledge of Nampa Sarah (the victim), a girl under the age of 18 years. He denied the indictment.

The prosecution called four witnesses in support of its case against the accused. The facts of the case were that on 18th July 2001, the victim escorted her aunt who boarded a taxi to Kalerwe at around 7.00pm. On her way back, she met the accused who persuaded her to visit his home at Kyebando. The two set off and on arrival at the accused person's home they entered the house and had sexual intercourse. Later on, she returned home and revealed to her mother what had transpired between her and the accused. Her mother reported the matter to the police, who arrested the accused and charged him with the offence of defilement.

The accused person on the other hand gave evidence on oath and denied that he committed the alleged offence. He pointed out that the indictment was a frame up that arose from a grudge Nakyejwe had against him two weeks before the alleged offence. He stated that two weeks prior to his arrest, one of Nakyejwe's customers abandoned her and instead bought sweet potatoes worth 5,000 Uganda shillings (USh) from the accused. Nakyejwe got angry and warned the accused that she would shortly destroy his business. Two weeks later he was arrested on a charge of defilement, which he knew nothing about.

Issues and resolutions

The court took note of three key established principles that guide the court in determining sexual offence cases. The court noted that the prosecution bears

the burden of proving its case beyond reasonable doubt against the accused person(s), and that burden does not shift upon the accused except in very few circumstances where statutory law specifically provides so; secondly, the standard of proof required in criminal cases is 'proof beyond reasonable doubt'. The third principle was the requirement for corroboration of the evidence of a victim of a sexual offence.

The court declined to apply the common law principle 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 principle discriminated against women, who were the most frequent victims of sexual offences. The learned judge found that this principle was inconsistent with Article 2 of the Constitution of Uganda, which proclaims equality for all persons under the law, equal protection of the law and protection against discrimination on ground of sex.

He also found that this principle was inconsistent with section 132 of the Evidence Act and Uganda's international law obligations under various conventions, particularly CEDAW Article 1. He held that the discriminatory principle was therefore unconstitutional, null and void. The court considered the evidence and found that the prosecution had proved beyond reasonable doubt that the accused had defiled the victim.

Conviction and sentence

The court found the accused guilty of defilement contrary to section 132(1) of the Penal Code Act and convicted him accordingly. However, although the learned judge noted that the offence of defilement was a serious one, and that it exposed the complainant and girls to HIV/AIDS and other sexually transmitted deceases, he declined to impose the maximum capital sentence and sentenced the accused to ten (10) years in prison.

Ratio Decidendi

a) The need for corroboration in sexual offences is discriminatory against women and violates their right to equality with men before the law.

b) **Contribution to jurisprudence/Point to note**

- The Court applied both international conventions and the Constitution in arriving at the conclusion that the need for corroboration was discriminatory to women and in contravention of the Constitution.

- The Court was unwilling to affirm a baseless stereotype which had adverse consequences for women victims of sexual violence and further impaired their dignity and worth in society.

Case 6.5 Uganda v Tigahwa

(HCT-05-CR-SC-0210-2012)

High Court of Uganda

Aspects relevant to VAWG: Aggravated defilement, vulnerable victim of sexual violence, child marriage

Summary of evidence

The accused (Tigahwa Elisam) was charged with aggravated defilement after performing a sexual act with Nasanga Dyana, a girl under the age of 14 years, on 31st December 2010 at Omukabare Cell in Bushenyi District. Then prosecution called six witnesses in a bid to prove its case against the accused person.

The mother of the victim (PW4) told the court that the victim was born on the 29 September 1999 and was, at the time of her testimony, 15 years old. As she did not have a birth certificate, she provided the court with the victim's baptismal card.

PW6, the medical officer who examined the victim, produced a medical report which showed that the victim was 11 years old at the time the incident. On the material date, the victim (PW1) testified that on the instruction of the accused person, she went to the home of the accused to help in carrying his logs. The accused person introduced himself to her as a neighbour, but she did not know him previously. She went to his home and, while at the home, the accused forcefully took her into his bedroom and defiled her. When she attempted to raise the alarm, the accused covered her mouth with his hand. After he defiled her, he gave her 1000/= and warned her not to tell anyone what had happened. The victim's mother (PW4) saw her coming from the house of the accused after the alleged defilement and the victim told her what had happened. Thereafter, the matter was reported to the authorities.

PW2 (Aberi Mabaare) and PW3 (Chairman LC1) said that they confronted the accused over the matter, and the accused told them that he had not defiled the victim but had married her after receiving a vision that he should marry her. PW5 told the trial court that he met the accused, who was in the company of his nephew, and the said nephew of the accused promised to give PW5 2,000,000 shillings in order to exonerate his uncle (accused)

from defilement charges. PW5 refused the offer and arrested and detained the accused person. He was handed over to the police and charged with this offence.

The victim was examined by PW6 (medical personnel), who produced a medical report of the examination. According to the report, there was slight penetration leading to partial rupture of the hymen and subsidiary inflammation of the vulva. The injuries were said to be one-day old. The report concluded that the injuries were as a result of sexual intercourse.

In defence, the accused claimed that he did not know the victim and imputed the existence of a grudge between him and PW2, claiming that he bought land from the uncle of PW2 and that PW2 was not happy about the transaction. The defence further pointed out that there were several contradictions in the prosecution evidence, namely: that the victim was said to have been a Primary 4 pupil and later on it was alleged that she was out of school; that PW1 said that she did not know the accused and yet they were neighbours; that the victim said that she was defiled on a Monday and yet 31st was a Sunday; and finally that the victim claimed to have been examined by a woman doctor, yet the doctor (PW6) testified that he was the one who examined her.

Issues and resolution

The prosecution was required to prove beyond reasonable doubt that the victim was below 14 years old, that a sexual act was performed on her and participation of the accused. Medical evidence established that, at the time of examination, the victim was 11 years old and that she had injuries which were consistent with defilement. The court considered the inconsistencies pointed out by the defence and found that they were minor and they did not go to the root of the prosecution case. The court was of the view that the said inconsistencies did not touch on the issue of the allegation that the accused had defiled the victim.

Finally, the defence counsel submitted that the victim suffered from a mental disability, which might have led to her making false allegations against the accused. However, the court accepted the mother's testimony that on the material day and time, the victim had not suffered any mental breakdown and that she saw the victim coming out of the house of the accused on the material day. Considering her evidence, together with that of the victim and the doctor who examined her and whose findings were contained in the medical report which was produced in evidence, the court found that this evidence was overwhelming and connected the accused to the crime. The assessors returned a verdict of guilty as charged.

Verdict

The court was in agreement with both assessors and held that the prosecution had proved the case beyond reasonable doubt and found the accused person guilty of aggravated defilement contrary to section 129 (3) and (4)(a) of the Penal Code Act, and convicted him accordingly.

Ratio Decidendi

a) Minor inconsistencies which did not go to the root of the prosecution case are not fatal to the prosecution case.

Case 6.6 Uganda v NA

(Msk-CR-AA-132/2013)

High Court of Uganda at Masaka

Facts

The accused was charged with the offence of murder contrary to sec.188 of the Penal Code Act of Uganda.

During the night of 8th of May 2013, the deceased (Majwala Ahmed) was heard making an alarm and exclaiming 'you are killing me'. Upon the other household members and immediate neighbours responding to the cry for help, they found the deceased lying in a pool of blood with deep cut wounds on his neck and head, while the convict (NA, the deceased's 18-year-old biological daughter) was standing outside the house. Matters were reported to police and the convict was arrested and charged with murder.

The convict in her charge and caution statement to the police confessed to having killed the father who had sexually abused her for over three years.

The convict appeared before court and pleaded guilty to murder. The convict in her mitigation informed the court that she had endured repeated sexual assaults by her father. Reports to her mother and relatives did not yield anything, as the family decided to keep the abuse a secret. The judge sentenced her to the rising of the court.

In sentencing the accused, the trial judge held that:

1. Whereas the convict had committed an unlawful act, she had for all intents and purposes been the victim in the circumstances. Though the deceased had a moral obligation to protect the convict, he had instead continually abused her – thereby transforming from protector to perpetrator.
2. The state and its agencies had equally failed in their international and constitutional obligations to protect the convict, and in those

circumstances the convict was deserving of empathy and support rather than punishment as she would have to carry psychological scars for life.

Contribution to jurisprudence/point to note:

1. Realising that a harsh sentence would not serve justice in the case, the court exercised its discretion and gave the accused a lenient sentence – because although she was before court as a perpetrator of violence, her violent act was in reaction to the extreme abuse she suffered at the hands of the deceased.
2. In arriving at an appropriate sentence, the judge placed this case within a broader context recognising that 'her violence' was not an exclusively legal issue.

Case 6.7 Uganda v Rwishosha Geoffrey

(High Court Criminal Session No 322 of 2011)

High Court of Uganda at Masaka

Facts

The accused had summoned the victim, his eldest daughter, to check if she was still a virgin. The victim was aged 13 years. The accused ordered the victim to lie down whereupon he proceeded to sexually assault her. The victim reported the accused to her mother, who attempted to depart from the matrimonial home alongside her other children. However, the accused forcefully kept the victim, threatening to kill the victim's mother if she, the victim's mother, attempted to take the victim out of his custody.

At trial, the wife and daughter of the accused were among the prosecution witnesses.

The accused was convicted as charged.

In sentencing the accused to life imprisonment, the High Court noted that:

1. 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.
2. The court further noted that the convict's actions had left permanent psychological scars with the victim, including an incestuous child who closely resembles the convict.

Point to note

The court placed/situated the experience of the victim within the broader context of human rights violations and, in arriving at the punishment,

emphasis was laid on the fact that the criminal activities of the accused constituted a violation of the fundamental human rights of the victim.

Case 6.8 Prosecutor v Nihimbazwe Samuel

(Case Number RPA min0019/15/HC/KIG)

Rwanda High Court Kigali

Facts

The Rwanda Prosecution Authority accused Nihimbazwe Samuel at the High Court of Gasabo in respect of the rape of a minor called AS, aged four years. Having analysed submissions and the way of pleading by both the plaintiff and the defendant, the Premier Court sentenced Nihimbazwe to seven years' imprisonment in consideration of the assumption that he committed the crime as a child.

Both the Prosecution Authority and Nihimbazwe appealed. The Prosecution Authority insisted that it was not right to regard Nihimbazwe a child, because the National Identity Card Centre confirmed that Nihimbazwe was born on 15/05/1996. Hence, the Prosecution Authority insisted that the defendant had to be punished as an adult. Worse still, he pleaded guilty initially but later changed his plea to innocent. In consideration of the foregoing, therefore, the Prosecution Authority requested the court to sentence Nihimbazwe to life imprisonment.

Nihimbazwe pleaded that he had not intended to lie regarding his age, because as an orphan he did not know when he was born. He excused himself by claiming that he had not committed the crime intentionally; and to have his sentence reduced, that he did not commit crime with malice aforethought.

Issues:

1. Whether Nihimbazwe committed the crime as a child that deserved to be sentenced as a child by the Premier Court.
2. Whether the initial sentence should be reduced by the court appealed to.

Judgement

The Prosecution Authority maintained that justification of its appeal hinged on the fact that Nihimbazwe initially pleaded as a child and was in fact sentenced as a child, contrary to the fact that the National Identity Card Centre confirmed

that Nihimbazwe was born on 15/05/1996 – and as such should be judged as a mature person who should be sentenced to life imprisonment. That, coupled with the fact that initially he pleaded guilty, but then he pleaded innocent, should be sufficient to justify his life imprisonment sentence. Nihimbazwe Samuel alleged that as an orphan he did not know his age at all by the time of pleading at the Premier Court, implying that he did not lie intentionally. As a way of correcting the error made, the High Court acknowledged that the accused committed the crime as a first offender, and as such that could be a reason to justify reduction of his sentence.

Hence, in consideration of Article Number 78 of Penal Code, Law Number 01/2012/OL enacted on 02/05/2012 and its section one; one notes that an accused child that would be sentenced to life imprisonment can have the sentence reduced to an imprisonment of not less than 10 years. Accordingly, Nihimbazwe Samuel could have his sentence reduced to 10 years' imprisonment, because he pleaded guilty as a person that sexually violated a minor and according to Article 191 of Penal Code Law Number 01/2012/OL enacted on 02/05/2012, he would otherwise be sentenced to life imprisonment. The High Court confirmed that Nihimbazwe committed the offence as an adult and in fact he pleaded as an adult. That is why his sentence had to be increased to 10 years' imprisonment instead of 7 years. Accordingly, he also had to be imprisoned with other adults.

Case 6.9 George Hezron Mwakio v Rep

(Criminal Appeal No. 169 of 2008)

High Court of Kenya at Mombasa

Aspects relevant to VAWG: Defilement, child trafficking for sexual exploitation, sentence, role of the judiciary in ensuring perpetrators of violence are appropriately punished, role of judiciary in creating awareness

Brief summary of facts

The appellant was charged in the Magistrates Court with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act and a second count of child trafficking for sexual exploitation contrary to section 18(1) of the Sexual Offences Act. He was tried, found guilty, convicted and sentenced to 30 years' imprisonment. He appealed against both the conviction and sentence.

The prosecution evidence was that on the 27th October 2007 at around 9.00 pm in Taveta district within Coast Province, the appellant had carnal

knowledge of MM, a girl under the age of 16 years. On the material day, the complainant (MM) escorted her sister to C Estate. On her way back home at about 6.00 pm, she met the appellant who professed his love for her. The complainant declined his advances, saying she was a student. The appellant then held her hand and began to pull her along with him. The complainant called out for help, but nobody came to her assistance. The appellant took her to his house. The complainant asked a man there to rescue her, but he just walked away. Then after 8.00 pm, the appellant took her to a nearby sisal plantation where he raped her. They then walked all the way to Tanzania. The complainant was eventually rescued by police from Kitoto Police Post and brought back to Kenya. The appellant was also arrested and handed over to Kenyan authorities.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He made an unsworn statement in which he denied the charges. On 13 March 2008, the learned trial magistrate delivered her judgement in which she convicted the appellant and, after listening to his mitigation, sentenced him to serve thirty (30) years imprisonment. It was against this conviction that the appellant appealed. The appellant opted to rely entirely upon his written submissions, which were filed in court. The respondent/state opposed the appeal.

Issues and resolution

The trial magistrate found as a fact that the victim had been defiled and that she was 15 years old at the time of the offence. The appellant raised four grounds of appeal, namely: defective charge; insufficient evidence; identification; and failure to consider defence.

With respect to the charge, the appellant argued that the words 'unlawful' were not included before the term 'carnal knowledge' in the particulars of the charge. Despite the fact that indeed this was the case, the learned judge found that under the Sexual Offences Act, 2006, any act of sexual intercourse with a child under the age of 18 years is unlawful and that the omission of the word 'unlawful' was not a fatal defect. The court ruled that this ground had no merit and the same was dismissed. On whether the prosecution had adduced sufficient evidence to prove the offence beyond reasonable doubt, the court re-evaluated and re-examined the testimonies given by the victim, the Tanzanian police officers and other witnesses, including the doctor who examined her, and ruled that defilement did actually occur.

On the issue of identification, the learned judge found that the evidence on identification was overwhelming. The complainant herself had ample time and opportunity to see the appellant. Further, her friend and the officer from Tanzania both testified that they saw the appellant with the complainant. With this, the court was satisfied that there was a clear, positive and reliable identification of the appellant by the victim and witnesses and ruled out the possibility of error.

Lastly, the appellant claimed that his defence was not given due consideration. On the contrary the learned judge was satisfied and found that the record of the trial magistrate showed that the trial magistrate considered the defence raised by the appellant – that he had been framed – and dismissed the same as untenable. The court found the totality of evidence in this case to have been cogent, consistent and reliable. All relevant witnesses were called to testify and the court was satisfied that the prosecution proved its case beyond reasonable doubt. The appellant's conviction was both sound and safe.

Verdict

The learned judge noted that, before sentence, the trial magistrate took into account the mitigation by the appellant and the fact that he was a repeat offender, having earlier been convicted of attempted rape. The trial magistrate had also noted that the offence which the appellant committed was aggravated as he forced the victim, a girl child aged 15 years, to walk through bushes throughout the night across the Kenya–Tanzania border in circumstances indicating that he kidnapped/abducted her. The learned judge was in agreement with the trial magistrate and dismissed the appeal, having found that indeed the offence was aggravated and a sentence of 30 years was merited.

Ratio Decidendi

a) Repetitive sexual offending is an aggravating factor in sentencing.

Contribution to jurisprudence/Point to note

- In arriving at the appropriate sentence, the court did not only ensure justice for the victim of this case, but factored in the risk that the offender poised to the society as a whole and women in particular. Court therefore used its discretion to pass a severe sentence and not merely the statutory minimum sentence of 20

years' imprisonment. This was in line with the duty of judicial officers to send out a clear message that violence against women even in circumstances where it is justified as part of culture is unacceptable in contemporary society.

Note

1 *Uganda v Peter Matovu*, High Court of Uganda, Criminal Session Case No. 146 of 2001.

Chapter 7
Sexual and Other Forms of Violence Against Adult Women

Case 7.1 Leonard Jonathan v Republic[1]

High Court of Tanzania

Aspects relevant to VAWG: Gender sexual violence, traditional customary practices that perpetuate VAW, kidnapping, forced marriage, rape, role of the judiciary to create awareness and punish acts of S/GBV, sentence

Summary of evidence

The appellant and three others were jointly charged in the Magistrates Court with rape c/s 130(2) and 131(3) of the Penal Code, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. It was alleged that on 16th December 1999 at 18 hours, at Masama Mula village in Hai District, the appellant had carnal knowledge of one Aminiana Elikira without her consent. He denied the charge and was tried, found guilty, convicted as charged and sentenced to serve 30 years in prison and to receive ten (10) strokes of the cane.

The evidence in support of the charge was that as the complainant was walking home from church on the material day, she met the appellant, who was in the company of the co-accused persons. They forcibly carried her to the house of the appellant. They were armed with a machete and sticks, with which they threatened those who wanted to intervene and rescue the complainant. Once inside the house of the appellant, one Eshiwakwe, who was in the house, held apart the victim's legs as the appellant raped her. When he was through and as Eshiwakwe was about to take his turn, the victim's father, who had learnt of the kidnap of his daughter, broke open the door and disrupted the sexual assault by Eshiwakwe and the victim ran out of the house. The appellant and the co-accused persons ran away after one of them assaulted the victim's father, but they were later arrested and charged, save for Eshiwakwe who at the time of the trial was still at large.

In his defence, the appellant admitted that he had carnal knowledge of the complainant. His explanation was that he was in love with her and that he wanted to marry her, but she had insisted on a Christian marriage which he could not afford. He had then decided to ambush her and marry her under Chagga customary marriage norms. He claimed that people put pressure on the complainant to make a report against him, at the police station.

He took responsibility for the rape and denied that the co-accused were involved in the matter. While the co-accused were acquitted, the appellant was convicted and sentenced to serve 30 years' imprisonment plus ten strokes of the cane. He filed an appeal against conviction and sentence.

Issues and resolution

The prosecution was required to prove beyond reasonable doubt: there was sexual intercourse with the victim, that it was without her consent, and that it was the appellant and others who raped her. The appellant admitted kidnapping the victim, taking her to his house and having sexual intercourse with her. He said he loved her and, since he had no money for a church wedding, he decided to marry her under Chagga customs, which allowed kidnapping and forceful sexual intercourse. In the circumstances, the trial court found that the prosecution had proved the case beyond reasonable doubt.

Dismissing the appeal, the court upheld the conviction and found that:

- The appellant admitted in his defence that he captured and carried away the victim and had carnal knowledge of her without her consent because he wanted to marry her, but she had insisted on a Christian marriage which he could not afford, so he decided to marry her under Chagga customs and norms. The offence of rape was therefore proved.
- Under the Law of Marriage Act No. 5 of 1971, marriage is defined as the voluntary union of a man and a woman intended to last for their lifetime. The victim was therefore protected by the Law of Marriage Act No. 5 of 1971, because without volition and consent, there can be no valid marriage between parties intending to marry or to contract a marriage. The defence of contracting a Chagga customary marriage was therefore improbable and fallacious in fact and in law.
- The complainant was also protected by international norms, notably DEVAW, Article 4, which calls on states parties to protect and offer adequate relief to women victims of violence, to condemn violence against women, and to refrain from invoking custom, tradition or religion to avoid their obligations.
- The victim was also protected by the UDHR, Article 16, which grants individuals the right to marry with the full consent of the intending spouses; CEDAW, Article 16, which guarantees the right to freely choose a spouse and enter into marriage only with their free and full consent; and Article 23 of the International Covenant on Civil and Political Rights, which provides that no marriage shall be entered into without the free and full consent of the intending spouses.

Consequently, the court held that in view of the above international law provisions and national law and, since Tanzania is a signatory to the above conventions, it had a duty to protect women from violence meted out against them in the name of traditional practices that violate their fundamental rights and freedoms. The court found that the appellant offended the complainant's fundamental right to choose her spouse and to marry on her own volition. These circumstances reinforced the complaint of rape, which the court found had been proved beyond reasonable doubt. The entire appeal against conviction and sentence was dismissed. The appellant filed a second appeal to the Court of Appeal of Tanzania,[2] but the same was unsuccessful and dismissed. The decision of the High Court was upheld for the same reasons as those given by the High Court.

Of special note is the fact that in order to reach the verdict, the court interpreted the national law of Tanzania in the context of the international conventions that the country has signed and ratified and which create obligations on the part of the government to protect and offer adequate relief to women victims of violence. This is good practice to be emulated by the judiciary in East Africa.

Contribution to jurisprudence/Point to note:

- The court was firm in condemning a customary marriage practice of wife grabbing which affected a woman's bodily integrity and subjection.
- In emphasizing the need for voluntary consent of the parties when contracting a marriage, court sent a clear message that customary marriages were also subject to this universally recognized principle.

Case 7.2 Okeyo v Ogwayi[3]

Resident Magistrate's Court at Homabay

Aspects relevant to VAWG: Widow harassment, forced widow inheritance, dowry violence

Summary of evidence

Following the death of her estranged husband, the plaintiff (Janet Atieno Okeyo) sought a permanent injunction against her father-in-law (Jacob Ogwayi) to restrain him from forcing her to return with her two children to her marital home. Okeyo (the victim) and her deceased husband Joanes Onyango, who was the son of the defendant, had separated one year prior to his death. Several years after her estranged husband's death, her father-in-law (the defendant) had the plaintiff (Okeyo) arrested on the ground that since

his deceased son had paid dowry for her, she was his daughter-in-law and should be living with her children in her marital home.

He also claimed that a relative of her deceased husband had either inherited her or was available to inherit her.

Issues and resolution

The court was called upon to decide whether the fact of payment of dowry deprived the victim of the right to freedom of association and movement, and if this custom was applicable in this case.

The court held that forcing the victim to return to the marital home would violate her constitutional right to freedom of association and movement. Moreover, as she did not herself choose to be inherited by a relative of the deceased, there was no valid marriage between her and the said relative of her deceased husband. Most importantly, the court held that any customary law which required that the victim returns to the matrimonial home was repugnant to written law and, by virtue of the Judicature Act, section 3(2), the written law prevailed. The court further held that the age of the children and the fact that they had been living with their mother dictated that they remain in her custody. Finally, the court issued an injunction restraining the father-in-law from interfering with the plaintiff and from forcing her to return to the matrimonial home.

Contribution to jurisprudence/Point to note:

- Court interpreted the right to freedom of association and movement to include a widow's right not to be forced to return to her marital home and being remarried by a deceased's relations.

Case 7.3 Mukungu v Republic[4]

Court of Appeal at Nairobi

Aspects relevant to VAWG: Rape, requirement for corroboration in sexual offence cases, discrimination, constitutionality of the requirement of corroboration

Summary of facts

The appellant was convicted, by the senior resident magistrate at Voi, of the offence of rape contrary to section 140 of the Penal Code and sentenced to ten years' imprisonment with hard labour, together with two strokes of the cane. His first appeal to the High Court was dismissed. Being aggrieved by

the said dismissal, he filed a second appeal before the Court of Appeal, which noted that it being a second appeal, only issues of law would be considered.

The prosecution case was that on 20 October 2000 at about 7:30 pm at Mwakingali estate in Taita Taveta district of the Coast Province, the complainant (victim) was returning home from Voi township after some national celebrations, when she was accosted by the appellant. He dragged her into a nearby house, forcibly stripped her naked, threw her onto a mattress which was on the floor and forcibly had sexual intercourse with her. She screamed for help, but no one came to her assistance. After the act, the appellant left her inside the house and went away, after bolting the door from outside to prevent the complainant from escaping. A short time later, the appellant returned accompanied by another man who also forcibly had sexual intercourse with her. She did not identify him. It was the victim's testimony that several people saw the appellant pulling her to the house where he raped her, but when the complainant talked to them they refused to help her. Her effort later to make a telephone report of the incident to the police was fruitless. She then decided to report the matter to a village elder, who on account of ill health could not assist her. He, however, asked his wife and children to escort her to her house, which they did. She made a report the next day to Phoebe Nanzala, a police constable at Voi police station, who later arrested the appellant and charged him with the offence.

Phoebe testified that the complainant reported to her that she had been raped by two men. Her evidence is silent as to how she was able to know that the appellant was one of the two men who raped the victim. It is, however, a matter from which an inference can be drawn that the complainant identified him to her. The victim testified that the appellant was known to her before, although not by name.

The victim was medically examined and her urine and vaginal swabs were analysed. Some pus cells and spermatozoa were noted, a confirmation that she had recently had sexual intercourse. As the appellant was not medically examined, there was no medical evidence to connect him to the alleged offence.

The trial magistrate believed the complainant, looked for and found corroboration in the medical evidence and the testimony of Jenta Kwaze (Jenta) and Nyange Kwanze (Nyange). Jenta testified that someone knocked at her door on the material night seeking help. It was the complainant whom she only knew by appearance. She observed that the complainant appeared distraught and shaken, and was carrying her skirt and blouse in her hand. She had tied a sweater round her waist and, with her assistance, they tried in vain to call the police. The complainant allegedly gave her the appellant's

name, but this she could not recall. Nyange corroborated Jenta's story on the complainant's appearance on the material night. These were circumstances that supported her story that she had been raped. It was on the basis of this evidence that the trial magistrate found the appellant guilty, convicted him and thereafter sentenced him.

The only point of law raised in the appellant's memorandum of appeal in the Court of Appeal was that his conviction was based on uncorroborated evidence.

There were other grounds, but the court found that these were issues of fact and could not under the provisions of section 361(1) of the Criminal Procedure Code be dealt with on a second appeal, which must only relate to matters of law.

The court noted that although in sexual offence cases corroboration was necessary as a matter of practice to support the testimony of the complainant, there have been instances, as in *Republic v Cherop A Kinei and Another* [1936] 3 EACA 124 and *Chila v Republic* [1967] EA 722 at 723 (CA), in which it was held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied, after duly warning itself on the dangers of convicting on uncorroborated evidence, of the truth of the complainant's evidence. It went on to observe that the need for corroboration in sexual offences appears to be based on what the Superior Court restated in *Maina v Republic* [1970] EA 370. There the court said:

> *Before leaving the matter of the first two counts we would state in the hope it will be of use to the magistrate on future occasions, as pointed out by the Court of Appeal in Henry and Manning v Republic 53 criminal appeal rep 150, 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 sometimes 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 should 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 the present case.*

In the present case, the court rightly pointed out that the same caution is not required of the evidence of women and girls in other offences, and that the court found no scientific proof or research findings to show that women and girls will, as a general rule, give false testimony or fabricate cases against men

in sexual offences and yet courts had consistently held that in sexual offences testimony of women and girls should be treated differently.

Ratio Decidendi

a) The requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.

Contribution to jurisprudence/Point to note

- Although it was a long established rule of practice that the evidence of a victim of rape needed to be corroborated with other independent evidence, the court took advantage of Kenya's progressive Constitution to evaluate the said rule within the principle of equality before the law and its prohibition of discrimination on the basis of sex. It consequently held that treating female witnesses differently in sexual cases cannot be justified.

Case 7.4 Uganda v Hamidu & Others[5]

High Court of Uganda at Masaka

Aspects relevant to VAWG: Abduction, rape, forced marriage, dowry, marital rape, the link between VAW and HIV/AIDS, role of the judiciary

Summary of evidence

The defendant, Yiga Hamidu, was indicted in the High Court of Uganda at Masaka on charges that he had hired two men to abduct a woman in his village and had subsequently raped her. The complainant (victim) told the court that she had been engaged to get married to the accused person and dowry had duly been paid in accordance with the customary law governing the parties. She had broken her engagement to the accused when she learned that his deceased wife had died of AIDS. She had insisted that they should each be tested for HIV before marrying, but the accused had refused. The accused hired some people, who kidnapped her, took her to his house, locked the door and raped her while her two abductors held her down on the floor. She told the court that she had not consented to sexual intercourse.

In defence, the accused denied the offence and raised the defence of mistake of fact or honest belief under section 9(1) of the Penal Code of Uganda. He told the court that he had honestly believed that the complainant was his wife, because he had paid dowry to her parents and a customary marriage

had been sealed. He further stated that under Uganda laws, a husband couldn't rape his own wife.

Issues and resolution

The fact that the accused person had the victim abducted and brought to his house, where he locked her in and had sexual intercourse with her, was not disputed. The accused claimed that he acted under the honest and mistaken belief that the victim was his wife, since he had paid dowry for her. It was his case that a husband cannot rape his wife under the laws of Uganda, implying that once a woman got married, she gave an express and irrevocable consent to the husband to have sex all the time and that the question of consent does not arise.

The court found no evidence that a marriage had taken place in accordance with the parties' Islamic faith. Moreover, the evidence demonstrated that the complainant never consented to sexual intercourse. The judge stated that even if the parties had been married under customary law, the facts and circumstances of the case would render the defendant guilty of rape.

He noted that the provision in the Penal Code that deals with rape does not make an exception for married persons.

He observed that some other jurisdictions have constituted the offence of marital rape to counter the outdated presumption of consent by virtue of marriage. The judge stated that the existence of a valid marriage or honest belief of a valid marriage is no longer a defence for rape in Uganda in view of the 1995 constitution, which provides for equal rights in marriage and full and equal dignity of the person. These provisions, he explained, exclude the operation of section 9(1) of the Penal Code to the situation in this case. Finding that the complainant was treated as a 'mere sexual instrumentality', the judge rejected the defendant's defence, found him guilty and convicted him of rape.

Contribution to jurisprudence /Point to note

- The judge innovatively uses the right to equality between husband and wife in marriage and the right to dignity of the person to enhance the protection of women from sexual violence in marriage.

Case 7.5 Ally Hussein Katua v Republic[6]

Court of Appeal of Tanzania

Aspects relevant to VAWG: Sexual gender-based violence, rape by a person in position of authority and trust, role of the judiciary in addressing VAW, sentence, adequate remedy

Summary of evidence

The appellant was charged with the offence of rape c/s 130(1) and 131(1) of the Penal Code, as amended by the Sexual Offences (Special Provisions) (SOSPA) Act No. 4 of 1998. After a full trial, he was acquitted for want of sufficient evidence. Aggrieved by the acquittal, the DPP appealed to the High Court of Tanzania at Tanga, where the learned judge set aside the order of acquittal, convicted the appellant as charged and sentenced him to a term of imprisonment for 30 years, with an order for payment of 500,000 Tanzanian shillings (TSh) as compensation to the victim of the rape. The appellant was dissatisfied and appealed to the Court of Appeal, but his appeal was dismissed as it did not raise any points of law to warrant intervention by the Court of Appeal.

The prosecution case in the trial court was that the complainant, a student at Mlingano Secondary School, lived with her grandmother in the same village where the appellant, a traditional healer and local medicine man, also lived. Prior to the date of the incident, the complainant/victim fell sick and the appellant was approached so that he could treat her.

She was taken to the appellant's home on 21 January 2004 and he initiated treatment. What followed thereafter borders on rituals and sorcery, as the victim was taken to various places.

Finally, the appellant asked her to undress and she obliged. The appellant spread a piece of cloth on the ground, asked her to sleep on it and he raped her. When the appellant was through with the sexual encounter, which he had earlier told her was part of the treatment, he warned her not to disclose the rape to anyone. They put on their clothes and went towards the appellant's home, where PW2 was waiting for her. They then left to go back home and on the way home from the appellant's home, the victim disclosed the rape incident to her grandmother (PW2). The matter was reported to the authorities and the appellant was arrested and charged.

In defence, he admitted having treated the complainant, but denied raping her. He called witnesses, who testified on the sickness of the complainant but not on the alleged rape incident. He was convicted and sentenced and filed an appeal to the High Court.

Issues and resolutions

There were three grounds for appeal, namely that: the charge as framed was defective in that the specific ingredient of an offence under section 130(3) of the Penal Code, as amended, was not stated. To that end, the appellant cited the following passage from the Court of Appeal's decision in *Mhina Hamisi v Republic:*

> *Lack of consent is a vital element in the offence of rape. Yet the charge against the Appellant did not disclose this important element. It is trite law that a charge should disclose the nature of the offence so that an accused person may know the nature of the case he has to answer.*

The second ground of appeal was that the evidence of the complainant (PW1) should not have been believed and acted upon wholesale, because her own grandmother (PW2) testified and told the trial court that the complainant had a history of mental illness and confusion. The third ground was that the judge on first appeal did not address her mind to the issue of time frame, which was important in checking the veracity of the evidence of the complainant and her grandmother (PW2).

The crucial issue in this appeal was whether or not the victim, the key and only material witness, was credible and entitled to be believed. The Court of Appeal found that while it was true that the element of lack of consent ought to be reflected in a charge of rape, with the advent of section 130(2)(e) of the Penal Code, consent was no longer relevant if the victim is under the age of 18 years. In the present case, the complainant was 17 years old at the time of the offence and, although the charge facing the appellant did not state the above provision, the omission was cured by section 388(1) of the Criminal Procedure Act (Cap 20 RE 2002) in that the appellant knew the nature of the charge against him.

The court was of the view that the appellant, being a traditional healer, took advantage of his position and committed rape on the complainant. He should therefore have been charged under section 130(1)(2)(e)(d) and 131(1) of the Penal Code because, being a traditional healer, the offence was committed by a person in a position of authority and trust.

On whether or not the complainant should have been believed, the court found her credible because her narration on what transpired was systematic and she had reported the rape to PW2 at the earliest opportunity, once they left the appellant's home. Even though there were contradictions in her evidence, the same were minor and did not go to the root of the overall prosecution case against the appellant. Since the appeal did not raise any point of law, it was dismissed.

Ratio Decidendi

(a) A history of mental illness will not automatically discredit the evidence of a victim of a sexual offence.

(b) Consent is not an ingredient to be proved in a charge of rape where the victim was below the age of 18 years.

Contribution to gender jurisprudence/Point to note:

- This case demonstrates the fact that courts are bringing back victims of sexual assaults to the centre of the criminal justice process. Instead of limiting the sentence to the punitive dimension normally associated with criminal law, the Court made an order of monetary compensation to the victim.

Case 7.6 Seif Mohamed El-Abadan v Rep

(Criminal Appeal No. 320 of 2009)

Tanzania Court of Appeal at Tanga

Aspects relevant to VAWG: Rape by person in position of authority, sextortion

Summary of facts

The appellant (Dr Seif Mohamed El-Abadan) was charged with the offence of rape contrary to sections 130(3)(c) and 131(1) of the Penal Code, Cap. 16 RE 2002. The particulars of the offence alleged that on the 14th November 2006 at Magunga Hospital in Korogwe District, the appellant abused his office as a doctor and staff of the said hospital and had carnal knowledge of a patient, one Stenala Pwere (PW1/the victim). He was tried, found guilty, convicted and sentenced to 30 years' imprisonment. Aggrieved by the conviction and sentence, he unsuccessfully lodged Criminal Appeal No. 73 of 2008 in the High Court of Tanzania at Tanga. After the High Court dismissed his appeal, he lodged a further appeal to the Court of Appeal.

The complainant, a victim of rape by the appellant, was 24 years old at the time of the offence. She had been suffering from chest pains and on the material day went to Magunga Hospital to collect her x-ray results. She collected the x-ray results from a clinical officer PW2 (Mr Makunga), who directed her to take the x-ray film to the doctor in Room 6, who happened to be the appellant. The appellant instructed her to remove her blouse and brassiere and lie on the bed for examination and she complied. The appellant examined her and told her to remove her underpants for examination of the uterus. She complied and bent with her legs apart as instructed by the appellant. The appellant put his fingers in her vagina saying he was examining her uterus, which he claimed had problems. He then told her to go out and wait until she was called back into the room and she complied.

After attending to some patients, the appellant recalled the victim and told her to go to the examination bed, behind the curtain and she complied.

When the patient he was attending to went out, the appellant locked the door with a key and put the keys on the table. He proceeded to the curtain and told the victim to take off her underpants, but she appeared hesitant and the appellant threatened to withhold treatment if she failed to obey his instructions. He ordered her to take off all her clothes and lie on the bed on her back, which she did. He again put his fingers in her private parts while he caressed her breasts with the other hand, which had no glove on. He asked her to caress his stomach and he unzipped his trousers and put his penis in her vagina while holding tightly onto her. The victim forcibly pushed him and he got out after satisfying his lust. The victim said that she was at that point wet in her private parts and on her thighs. He told her that he had sexually assaulted her out of love, but she told him that she was going to report the matter. The appellant asked her not to do so and offered her TSh1,000/=, which she rejected.

She left the room and remembered that she had left her brassiere behind and went back. The appellant opened the door and she removed it from a box under the bed and left. She then narrated her ordeal to a male nurse she met out there, but he told her not to tell anyone what had happened to her. She met other people including another nurse, PW2, who had directed her to the room where she found the appellant, the hospital secretary (PW4), a clinical officer (PW3) and PW5 and narrated to them all what had happened to her – but they did not appear to have taken any action. She went home and reported the matter to her parents and later to the police on the same day at 7.00 pm. Instead of issuing a PF3 to her for treatment, the police told her to go home and return the following day. The next day the police recorded her statement and gave her a PF3 for a pregnancy test. Thereafter, the appellant was arrested and charged with the offence of rape.

In defence, the appellant gave a sworn statement and denied committing the offence. He admitted treating the complainant, but he denied examining her. He said he read the x-ray results of the complainant and prescribed treatment for her, but later he was called by his immediate superior (PW5) and informed that PW1 had complained that he had raped her, which he denied. He claimed that PW4 (Susan Ilembo) fabricated the case against him due to an earlier misunderstanding between them, after which she threatened to fix him.

Issues and resolution

The appeal was bases on six grounds, namely:

1. That the learned judge failed to appreciate the misdirection of the learned trial magistrate on the issue of credibility of the prosecution witnesses. Had he properly directed himself, he would have

concluded that the complainant acted in a dubious way in deciding to go home and wash herself and/or consult her relatives on the issue before she took any action.

2. That the learned judge failed to draw an adverse inference on the failure to call the first alleged witness of the complainant as a witness in the case.
3. That the learned judge erred in law and in fact in failing to appreciate the weakness of the prosecution case in view of the defence claim that PW4, Susan Ilembo, had bad relations with the hospital after failing to get promotions.
4. That the learned judge should have held that the complainant was not a reliable witness, because she gave contradictory statements to the police and in court on how she left her brassiere in the consulting room.
5. That there was no credible evidence of penetration and that the finding on penetration was based purely on conjecture.
6. That the courts below misdirected themselves on the burden and standard of proof.

On the claim of there being 'bad blood' between the appellant and PW4, and that PW4 had earlier threatened to 'fix' the appellant one day, the court dismissed those allegations and found that they were mere afterthoughts, because PW4 was not cross-examined on such allegations which were safely introduced by the defence behind her back. The court noted that PW4 received the complaint from the victim and referred the matter to the medical officer for action. There was no evidence that PW4 went to the examination room at any time, and the appellant's claim that she planted the victim's brassiere in the room was rejected by the court.

On the issue of the case not having been proved to the required standard, because an important witness (Mary) had not been called by the prosecution, the court noted that the said Mary only listened to the rape complaint and for reasons known to her, she walked away leaving the victim with PW4, who referred the victim to the medical officer for action. The court was of the view that if the defence considered Mary Chorogondo an important witness, they would have called her.

On the grounds of appeal relating to credibility of the victim and other witnesses, the court found that being a second appeal, the court did not have advantage of seeing, hearing and assessing the demeanour of the prosecution and defence witnesses to justify interfering with the findings of the trial court on credibility. Dismissing the grounds relating to credibility of witnesses, the court cited the case of Augustino Kaganya & others versus Republic (1994)

TLR 16, wherein the court considered the issue of credibility of witnesses and held that–

> *… as the decision regarding who attacked the deceased was wholly based on the credibility of the witness, it is the trial judge who saw and heard the prosecution and defence witnesses as they testified who is better placed than the appellate court to assess their credibility …*

Finally, the court considered the submissions of either party and failed to find a ground for denting the credibility of the complainant. It did not find any contradictions in the evidence of PW1, the victim of the sexual assault by her doctor (the appellant). The court was in agreement with the learned trial judge, who had remarked that:

> *It is treacherous for one to stray away from a professional calling and turn against one amongst the very lot who bestowed their trust unto the person.*

In this case, it was treacherous for the appellant doctor to rape his patient, PW1. In the circumstances, the court was satisfied that the prosecution established the guilt of the appellant beyond all reasonable doubt, found no merit in the appeal and the same was consequently dismissed.

Case 7.7 Onesphory Materu v Republic

(Cr. Appeal No. 334 of 2009)

Court of Appeal of Tanzania at Tanga

Aspects relevant to VAWG: Rape, sextortion, sexual violence in places of detention, sentence, role of the judiciary to punish sexual violence by persons in position of authority

Summary of facts

The appellant was charged with sextortion, tried, convicted and sentenced to 30 years' imprisonment, with 24 strokes of the cane. The court further ordered him to pay TShs700,000/= as compensation to the complainant. This aggrieved the appellant and he preferred a first appeal to the High Court of Tanzania at Tanga, which appeal was dismissed. He filed a second appeal to the Court of Appeal at Tanga.

The prosecution evidence was that on 25th February 2007, PW4 (a woman police officer working at Lushoto Police Station) was resting at her home. At 2.20pm she received a telephone call from PC Jumanne, a fellow police officer, asking her to go to the police station to attend to an emergency. She went there and found one suspect, who was in police custody, crying. That suspect was the complainant/victim (PW2). On asking her why she was

crying, she (PW2) alleged that the appellant had raped her inside a police cell and had promised, in writing, to release her from police custody. The suspect (PW2) produced a written note, which she gave to PW4 (WP3503 Anna).

PW4 said that the written note (exhibit P1) was in the appellant's handwriting and it directed the release of PW2 from police custody. She directed the officer who had called her (PC Jumanne) to report the matter to their seniors. PC Jumanne did not testify.

In cross-examination by learned defence counsel, PW4 told the trial court that the complainant was crying out and asking why the appellant had carnal knowledge of her, promising to release her, and why he had refused to release her. The victim was also saying that the appellant had washed her (PW4's) private parts with water after the act of sexual intercourse in order to wash away the seminal fluid. PW4 further told the court that it was unprocedural for a male police officer to enter a cell where female suspects are held and it was also unprocedural for a suspect to be released through a written note in the form of exhibit P1.

Although PC Jumanne was not called to testify, the senior officer to whom he made the report, as directed by PW4, testified as the first prosecution witness (PW1). This witness (PW1) interviewed the victim and reported the matter to the officer in charge (SP Maganga), who was not called to testify.

The following day, Corporal Agripina (PW3) escorted the victim to hospital, where she was examined and a medical report PF3 filled in and tendered in court as exhibit P2. WP Corporal Agripina (PW3), in her evidence told the trial court that during the medical examination, the victim was found with bruises and remains of semen in the vagina.

In her narrative to the court, the victim, a 14-year-old girl, gave evidence under affirmation after voire dire examination. She first gave evidence on 12 October 2007 and was duly cross-examined by the accused person and was recalled to court on 12 December 2007 on the application of the defence counsel. In her testimony on 12 October 2007, the victim alleged that the appellant first undressed her and then undressed himself, and the sexual act followed, whereas in her testimony on 12 December 2007, she said the appellant first undressed himself before undressing her. Apart from this inconsistency, the evidence of the victim was straightforward and it was to the effect that on the material day, she was in remand custody at Lushoto Police Station on a charge of theft. At 11 in the morning the appellant, who was a police officer on duty at the police station, approached her, removed her from her police cell where she was the lone suspect, to a bench outside where she could sit in the sun. Apart from affording her the sunshine treat, the appellant gave her TShs1,000/=. Thereafter the appellant took her back to her cell and wrote her a 'release note'. The note, which was quoted in full by

the learned first appellate judge, was to the effect that the victim had been released from police custody because she had been found without fault. It was signed by the appellant and bears the stamp of Lushoto Police Station.

After giving the complainant the 'release note' the appellant left her inside the police cell. He went back to her at about 2pm and had sex with her. The appellant disengaged from the sex act when PC Jumanne (not a witness) called and this is what made the complainant cry out when she realised that the appellant would not keep his promise of releasing her after the sex act.

The appellant gave sworn testimony and admitted that he was on duty at the police station, as alleged by the prosecution witnesses. He also admitted that he wrote the 'release paper', as alleged by the prosecution witnesses who were fellow police officers. He explained that he wrote the 'release note' on behalf of one PC Mboka of Bumbuli Police Station, who made a verbal promise to release the complainant/victim, but did not put the promise into writing. The appellant alleged that the complainant became agitated and demanded written assurance that she would be released. He explained that it was at that point that he (the appellant) gave the written note on behalf of PC Mboka. After receiving the note, the complainant cooled down and the appellant reported off duty. The appellant refuted the allegations of sexual misconduct levelled against him, and called one witness, Getruda Aloyce (DW2), who told the trial court that she saw the appellant writing the 'release note' in order to cool down the complainant. The trial court dismissed the appellant's defence, found him guilty, convicted and sentenced him.

Issues and resolutions

The first ground of appeal was that the trial court erred in failing to warn itself of the dangers of convicting on the uncorroborated evidence of the victim. He urged the court to find that the victim was not be believed, because she contradicted herself by first saying that the appellant undressed her before undressing himself, and later changing to say the appellant undressed himself before undressing her. In the second ground, the appellant faulted the two courts below for relying on the 'release note' written by the appellant as proof that the offence was committed.

On the requirement of a self-warning by the trial court, the Court of Appeal noted that the appellant had raised this same point in the second ground of his memorandum of appeal to the High Court, and the High Court addressed this point very adequately at page 60 of the record by tracing the history of the law before and after the advent of section 127(7) of the Evidence Act, as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. The court noted that prior to the amendment, there was a requirement for the court to warn itself of the dangers of basing a conviction on the uncorroborated evidence of

a child where a sexual offence was involved. The court further noted that after the amendment, the need for the warning was done away with and the only burden imposed on the court after the amendment is to give reasons that it is satisfied that a young child or the victim of the offence is telling nothing but the truth. Consequently, the court found that the first ground of appeal lacked merit and the same was dismissed.

In the second ground, the appellant faulted the courts below for relying on the 'release note', which he wrote to the complainant. The appeal court noted that the record of trial showed that the note was tendered in evidence without any objection from the appellant and, in his defence, the appellant had admitted to writing the 'release note' and even fielded a defence witness DW2 Getruda Aloyce to prove that the appellant indeed wrote the note (exhibit P1). In the circumstances, the second ground of appeal also lacked merit and was dismissed. In the final analysis, the court found that the appeal lacked merit and dismissed it in its entirety.

Ratio Decidendi

a) A trial court need not warn itself of the danger of convicting on the uncorroborated evidence of a child victim of a sexual assault as long as the court is satisfied that the victim is telling the truth and gives reasons to that effect.

Contribution to jurisprudence /Point to note

- The court completely did away with the requirement of having to warn itself when convicting on the uncorroborated evidence of a child victim of a sexual assault.

'Victims of defilement are often children of tender years; and in many cases the only other witness (apart from the victim) to the act of defilement is another child of tender years. The rule on corroboration in sexual offences makes proof of cases in sexual offences difficult.

In sexual offences where the victim is a child of tender years, evidential rules make the prosecution case doubly difficult – there is need to corroborate the testimony of the complainant in a sexual offence; there is need to corroborate the evidence of a child of tender years who gives evidence not on oath.

It is perhaps not in doubt that the rules of evidence that undervalue and discredit the evidence of children exacerbate the difficulties of proof.'

- This decision is therefore exceptionally important because it does not only improve legal protection for adult female victims of gender based violence but also that of a group which has hitherto been doubly vulnerable – for being female and for being young.

Case 7.8 Foro Yahaya v Uganda

(Criminal Appeal No. 83 of 1995)

Court of Appeal of Uganda, Kampala

Aspects relevant to VAWG: VAW, vulnerability to violence due to age, rape, murder

Summary of facts

The appellant was charged with the offence of murder contrary to section 183 of the Penal Code Act, tried and found guilty. He was convicted and sentenced to death and appealed against conviction and sentence. The prosecution evidence was that on 23 September 1993, the body of the deceased was found lying in a bush near the place where her cattle used to graze. It had two cut wounds, one on the scalp and another on the abdomen. According to the medical evidence, the cause of death of the deceased was hypovolemic shock due to the cut wounds.

The prosecution case was that on 22 September 1993 at about 1.00pm, the appellant went to the home of the deceased looking for her. The deceased was not at home then, but he found Twahika the grandson (PW3) who asked the appellant why he wanted the deceased. The appellant replied that she had promised him a job involving the thatching of a house. As the deceased was not at home, the appellant went away promising to return later. Indeed he returned an hour later, but the deceased had not returned yet. The appellant waited until she returned and lured her into going with him to the grazing place to see one of her cows, which he claimed had collapsed near a dam. Surprisingly, the appellant did not allude to the alleged job of thatching a house, which he had told PW3 the deceased had promised him, neither had he told PW3 about a cow having collapsed near a dam.

When the deceased failed to return home, PW3 reported her disappearance to the local council chairman (PW2) and informed PW2 that she had left home in the company of the appellant to see a cow that the appellant claimed had collapsed near a dam. It was the evidence of PW2 that after he received the report from PW3, the next morning, he collected the appellant from his house and asked him to show them the cow that had collapsed the previous day. The appellant said there was no such cow and said that he had taken the deceased to have her dress repaired and not to see a cow. PW2, together with PW1, PW3, the appellant and others, mounted a search which led to the discovery of her dead body in the bushes. The appellant, who was in the team, tried to run away, but was arrested since he was the last person to be seen with the deceased when they left her home – apparently to see a cow which the appellant alleged had collapsed.

It was the testimony of both PW2 and PW3 that the appellant told PW2 that he had killed the deceased after raping her for fear that she would report the matter to the authorities. A written confession made by the appellant to the police was admitted in evidence as exhibits P3 and P4. In the statement, the appellant explains that his brother and others planned the death of the deceased, that his brother asked him to be present to witness the murder, and that indeed the appellant witnessed the murder.

The appellant made his defence in an unsworn statement. He was silent about the day of the incident, but stated that on 23 September 1993 he was in the search party of Paulo Sabiti and Stephen Twahika and others when the deceased's body was discovered. He denied having killed her.

In convicting the appellant, the trial judge relied on the circumstantial evidence of how the appellant had tricked the deceased to go with him on the fateful journey, after which she was never seen again until her body was discovered lying in a bush. The court also relied on a written confession of the appellant before Inspector of Police, Samuel Kato, and which was admitted in evidence.

The court also believed the testimony of PW2, which was to the effect that the appellant had led him to his house and shown him a panga which was hidden under a bed and the evidence that, upon the discovery of the body of the deceased, the appellant had tried to run away but was restrained by the people around.

PW1 and PW3 testified that indeed the appellant attempted to flee the scene where the dead body of the deceased was found. In view of the above evidence, the appellant's defence of denial was rejected by the trial judge.

Issues and resolution

The appeal was based on one ground: that the learned trial magistrate erred in law and in fact in holding that the inconsistencies in the prosecution case were minor, resulting in the wrongful conviction of the appellant.

At the hearing of the appeal, counsel for the appellant argued that there were three contradictions in the state case which were major and thus vitiated the conviction of the appellant. The first was that the alleged confession to PW2 and PW3 was in contradiction with that made to the police in exhibits P3 and P4. The second contradiction was with regard to the discovery of the panga from the appellant. According to PW2, the appellant led him alone to his house and gave him the panga; but according to PW3, the panga was found in a bush 10 metres from the scene of crime. It was the appellant who showed the panga to PW2 and PW3.

The third contradiction according to defence counsel was that according to PW3, when the deceased's body was discovered, the appellant tried to run away, whereas according to PW2, the appellant did not do such a thing.

The court was of the opinion that there were no serious contradictions in the written and oral confessions of the appellant. The court found that in both confessions the appellant admitted having participated in the killing of the deceased. The only difference was that to the police, he did not allude to the rape and also named two other parties to the killing. In both confessions, the court noted that the appellant cited a panga as the murder weapon. It was of the view that the alleged contradictions lay not in the evidence of the prosecution witnesses, but in the statements of the appellant, and did not therefore affect the credibility of the prosecution witnesses. The court was satisfied that the evidence against the appellant was overwhelming. The injuries the deceased sustained and the assault on the vulnerable parts of her body were evidence of malice aforethought. Her assailants must have either intended to kill her or must have anticipated death as the probable result of the assault. The Court of Appeal was in agreement with the findings of the trial court.

Verdict

The court ruled that the appellant was rightly convicted and dismissed the appeal.

Ratio Decidendi

(a) Minor contradictions or inconsistencies which do not go to the root of prosecution evidence are not fatal to the prosecution case.

Contribution to gender jurisprudence/Points to note

- Women's experience of violence is not only at the hands of intimate partners.

Notes

1 *Leonard Jonathan v Republic*, High Court of Tanzania at Moshi, Criminal Appeal No. 53 of 2001 (original Criminal Case No. 292 of 2000 D/Court HAI).
2 Tanzania Court of Appeal, Criminal Appeal No. 225 of 2007.
3 In the Resident Magistrates' Court at Homabay, Kenya, Civil Suit No. 66 of 2001 (unreported).
4 {2003} AHRLR 175 {KeCA 2003}, {2002} 2 EA 482.
5 *Uganda v Hamidu & others*, in the High Court of Uganda at Masaka, Criminal Session Case No. 2002.
6 High Court of Tanzania, Cr. Appeal No. 99 of 2010.

Chapter 8
Female Genital Mutilation

Case 8.1 Pauline Robi Ngariba v Rep

(Criminal Appeal No. 6 of 2014)[1]

High Court of Kenya at Migori

Aspects relevant to VAWG: Female genital mutilation, forced circumcision, harmful cultural practices, role of judiciary in addressing FGM and other harmful cultural practices.

Brief facts

The appellant in this case was charged on two counts, with the offence of performing female genital mutilation contrary to section 19(1) as read with section 29 of the Prohibition of Female Genital Mutilation Act (Cap 62B of the Laws of Kenya). In the first count, it was alleged that on the 11th day of December 2012 in Kuria East District within Migori County, she performed female genital mutilation on SGC. In the second count, it was alleged that on the 14th day of December 2012 in Kuria East district within Migori County, she performed female genital mutilation on ECM. She was convicted as charged on the second count and sentenced to seven years' imprisonment and acquitted on count 1. She appealed against conviction and sentence.

Summary of evidence

The subject of count 2, which formed the basis of the conviction, was the circumcision of ECM, who was circumcised on 14th December 2012. The victim (ECM), a girl in standard six pupil, testified that she knew the appellant. She recalled that on 14th December 2012, she was at her uncle's place and she was woken up by her friend who was going to be circumcised. On reaching the place, the appellant came and circumcised her using a razor blade purchased by her friend.

Her father recalled that on the material date, he woke up to find that his daughter was absent. As it was the circumcision season, he suspected that she had joined the other children for circumcision. He called a fellow pastor to find out where the ceremony was taking place. They proceeded to the place where the ceremony was being conducted and found his daughter among the children who were waiting to be circumcised. He identified his daughter, but when he went to hold her hand, he was warned that he would be attacked.

He left with his daughter and, on the way back home, some young men attacked them with pangas, bows and arrows and went back with his daughter. He went back with his daughter and asked the appellant not to circumcise her. He then left and later learnt that the appellant had circumcised her. He reported the matter to the police and the appellant was arrested and charged. The fact of her circumcision was corroborated by the clinical officer, who examined ECM and found that the clitoris and hood were absent and a fresh scar, without active bleeding, was noted. She concluded that the injury was caused by a sharp object and assessed the injury as harm.

In defence, the appellant said that on 11th December 2012 she was arrested on allegations that she had circumcised someone's daughter on 10th December 2012. She stated that on 11th December 2012, she was at home when members of the public came to her house, forced the door open and removed her by force. There were police officers who tried to prevent her from going, but they were overpowered by the public. She stated that she was forced to perform the circumcision on 10th December 2012. She confessed that the District Commissioner had warned her not to carry out circumcision and she had stopped it three years prior to this incident.

Issues and resolution

The prosecution was required to prove beyond reasonable doubt that ECM underwent female genital mutilation on 14th December 2012, participation of the appellant in the crime and that the appellant wilfully circumcised ECM. The trial magistrate found that the evidence of ECM was corroborated by that of her father and the medical person who examined her. He also found that it was the appellant who circumcised her and that she did it voluntarily. The appellant was convicted and sentenced.

She appealed against conviction and sentence on the following grounds, which form the issues for determination on appeal:

1. that the learned trial magistrate erred when he convicted the appellant on the second count while the evidence was similar to that availed in support of the first count on which the appellant was acquitted;
2. that the learned trial magistrate erred in law and in fact when he convicted the appellant on count 2 of the charge while the evidence clearly manifested that the appellant had no free will in the commission of the offence; and
3. that the learned trial magistrate erred in law and in fact when he sentenced the appellant to seven years in prison.

The High Court found that in her testimony, the appellant did not say anything touching on 14th December 2012, neither did she state where she was on that date. The learned judge further found that there was no evidence to show that on 14th December 2012, the appellant was forced, by the youth or by the elders or anyone else, to perform the circumcision.

Both the appellant and the second defence witness (the assistant chief) confirmed that the circumcision period was between 10th and 14th December 2012, which supported the prosecution case. Finally, the learned judge held that the prosecution proved beyond reasonable doubt that the appellant performed the prohibited act on 14th December and that she had done so voluntarily.

Sentence

The trial magistrate took note of the fact that section 29 of the Prohibition of Female Genital Mutilation Act provides for a minimum sentence of three (3) years imprisonment. In sentencing the appellant to seven (7) years imprisonment, the trial magistrate decried the prevalence of FGM within the court's jurisdiction, the adverse effect on the lives of victims and the need to pass a deterrent sentence. A deterrent sentence was therefore necessary to send out a message to the community, that the court will not tolerate the practice of FGM. Similarly, on appeal, the learned judge took judicial notice of the prevalence of FGM and of the fact that the accused had been warned against performing FGM by the District Commissioner, yet she still proceeded to do so. Finally, the Appellate Court held that the verdict and sentence by the trial magistrate could not be faulted, upheld the conviction and sentence and dismissed the appeal.

Contribution to jurisprudence/Point to note

Aware of the need to protect children from a hitherto deeply valued but harmful cultural practice, court used its discretion to pass a severe sentence and not merely the minimum statutory sentence of 3 years' imprisonment.

This was in line with the duty of judicial officers to send out a clear message that violence against women even in circumstances where it is justified as part of culture is unacceptable in contemporary society.

Comment: In light of the fact that the law on FGM was new at the time of trying this offence, the case is evidence that actors within the criminal justice system are taking on their responsibility to enforce a law specifically passed to protect women from violence.

Case 8.2 SMG & RAM v Republic

(Criminal Appeal No. 66 of 2014)[2]

High Court of Kenya, Migori

Aspects relevant to VAWG: Female genital mutilation, harmful cultural practices, role of the justice system to create awareness, sentence

Brief facts

The appellants, a husband and wife, were charged with the offence of failing to report commission of female genital mutilation, contrary to section 24 of the Prohibition of Female Genital Mutilation Act, 2011. The particulars of the offence alleged that on 15th December 2012 in Kuria East District, they jointly, being aware that the offence of female genital mutilation (FGM) had been committed on their daughter BM, failed to report the same to a law enforcement officer.

They pleaded not guilty and were tried, convicted and sentenced to pay a fine of KShs300,000 and in default to serve four years' imprisonment.

They appealed against the conviction and sentence on the ground that there was insufficient evidence to convict them, as they were not involved in taking BM to undergo FGM and that the sentence imposed on them was harsh and excessive. Learned state counsel opposed the appeal on the ground that the prosecution proved that the appellants, knowing that their daughter had undergone FGM, failed to report the incident.

Summary of evidence

According to the prosecution evidence, the victim (BM) who was 16 years old at the time of the offence, told the Magistrates Court that on 15th December 2012, at about 1.00pm, she went for 'tohara' on her own volition, but ended up in hospital due to excessive bleeding. The medical superintendent at Kehancha District Hospital who examined BM on 17th December 2012 and prepared the P3 medical report observed that her clitoris had been incised and that there was 6mm wound at its base. He concluded that she had undergone genital mutilation and that a sharp object had been used.

A police officer (PW4) visited the victim at Kehancha District Hospital on 16th December 2012. He found the victim (BM) undergoing treatment as a result of excessive bleeding and she told him that she had undergone FGM on her own volition and that her parents were not present on the material date. The appellants were present at the hospital and he asked them to accompany

him to the police station, where they were arrested by the investigating officer and charged.

The appellants elected to make unsworn statements when put on their defence and denied knowing that their daughter had undergone FGM. The first appellant added that even after he came to know of the fact, he did not know that it was his duty to report the matter to the police. As for the second appellant, she said that she had much earlier warned the victim against going for FGM, but she later went and was circumcised without her knowledge. She only came to know about it when the victim fell sick and she took her to hospital.

After the conclusion of the prosecution case but before the judgement, the trial magistrate admitted that the prosecution case was wanting, after the defence had closed its case and invoked section 150 of the Criminal Procedure Code and re-summoned BM so as to establish when the appellants knew that BM had undergone FGM and when they took her to hospital.

At the conclusion of the defence case and when the matter was pending judgement, the trial magistrate issued a ruling to recall the victim to testify further. He purported to do this under section 150 of the Criminal Procedure Code[3] in order for the victim to clarify when she was taken to hospital and by whom. Section 150 of the criminal Procedure Code provides that:

> *A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:*
>
> *Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

Issues and resolution

The fact that the victim was circumcised was proved by her evidence and medical evidence to that effect.

The trial court was satisfied and found that the appellants were aware of this fact, but deliberately decided not to report the matter to the authorities. However, the High Court did not make a finding on whether the prosecution had proved that the appellants knew that their daughter had been circumcised.

The appellate judge was of the view that, whereas section 150 of the Criminal Procedure Code entitles the court to call or summon any witness at any stage of the proceedings or re-call any witness who has testified, this provision does not entitle the court to call witnesses after the close of the defence case, just because the court feels that the prosecution has not established its case. He stated that there may well be exceptional circumstances where the provision may be invoked, but this was not one of them.

The appellate judge further noted that it was not the duty of the trial magistrate to assist the prosecution to make up its case by recalling BM. The record showed that the prosecution had called BM to testify and after she had given sworn testimony she was stood down and was not recalled to complete her testimony. When she testified on behalf of the defence, the prosecutor elected not to cross-examine her. Furthermore, the learned magistrate did not ask her any questions to clarify any points of evidence he may have noted. The prosecutor had the opportunity to present the relevant evidence or elicit necessary facts from the victim, but he did not. In the circumstances, the learned judge found that the only option available to learned magistrate was to acquit the accused.

Verdict

The appeal was allowed, the conviction quashed and sentence set aside and the appellants were set free.

Contribution to jurisprudence/Point to note

- In this particular case, the prosecution failed to prove that the parents knew that their daughter had been mutilated. Nevertheless, it is a case which establishes the duty of a parent to protect a child from harmful practices such as FGM. Therefore, the law has the potential to punish not only persons who are directly engaged in the act of mutilation, but also those charged with parental responsibility, if having knowledge of the mutilation, they do not report to the relevant authorities.
- The decision was also in line with international laws on the duty to protect the girl child from the harmful practices like FGM.

Case 8.3 Law and Advocacy for Women in Uganda v AG[4]

Constitutional Court of Uganda, Kampala

Aspects relevant to VAWG: Female genital mutilation, harmful cultural practices, role of judiciary in stemming harmful cultural practices

Summary of facts

This petition was filed by Law and Advocacy for Women in Uganda, a non-governmental organisation (NGO) under Article 137(1) (3)(a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petitions and References) Rules. The petition sought the following declarations and orders:

- that the custom and practice of female genital mutilation as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995, to the extent that it violates Articles 2(2), 21(1), 24, 27(2), 32(2) and 33 thereof;
- that as a result of this violation, the custom and practice of female genital mutilation should be declared null and void and unconstitutional;
- that no order be made as to costs and that the court should make any other declaration that the court may deem fit to grant.

Issues and resolutions

The Attorney General initially contested the validity and merits of the petition. At the pre-trial the issues that were isolated for the court to make a decision were whether the petition raised any matter for constitutional interpretation and whether the custom and practice of female genital mutilation was unconstitutional and should be declared null and void. At the trial the Attorney General did not wish to contest the petition and the petitioners treated this as a concession. The petitioners did not make any submissions and left the matter to the court to consider and deliver judgement.

The petitioners made available to court two documents, namely: 'Eliminating Female Genital Mutilation: An Interagency Statement by UNCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO' and another document entitled *Female Genital Mutilation in Uganda,* compiled by Hon. Dora C Kanabahita Byamukama on behalf of Law and Advocacy for Women in Uganda (Law-Uganda).

In the petitioners' view, these two documents contained enough literature on female genital mutilation, which information would help the court in understanding the meaning and effects of the practice.

Verdict

After due consideration of the unchallenged petition and the evidence contained in the affidavits, which were on the court record, the judges made several pronouncements:

1. That any person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment. Social and cultural claims cannot be evoked to justify female genital mutilation (International Covenant on Civil and Political Rights, Article 18.3; UNESCO 2001, Article 4).
2. That the practice of FGM does exist in Uganda, especially among the Eastern and North Eastern tribes, and it has very harmful consequences to the health and dignity of women and girls. Almost all those who have undergone female genital mutilation experience pain and bleeding as a consequence of the procedure. The procedure itself is traumatic, as girls are usually physically held down during the procedure.
3. That female genital mutilation is a violation of the rights of women enshrined in Articles 21, 24, 32(2), 33 and 44 of the Constitution of Uganda. To the extent that girls and women are known to die as a direct consequence of female genital mutilation, it contravenes Article 22, which provides protection of the right to life and therefore is a violation of the right to life.

To this end, the court was of the view that it was clear beyond any doubt that the practice of female genital mutilation is condemned by both the Constitution of Uganda and international law (the treaties, covenants, conventions and protocols to which Uganda is a party). In particular, the practice contravenes the provisions of Articles 21(1), 22(1), 24, 32(2), 33(1) and 44(a) of the constitution. The court therefore declared the practice to be wholly inconsistent with the Constitution of Uganda and outlawed the practice.

Ratio Decidendi

(a) Unjustifiable statutory differentiation between men and women solely on the basis of sex contravenes the principle of equality before and in the law.

Contribution to gender jurisprudence/Points to note

- The Court's holdings clearly communicate the point that laws which provide for criminal conduct or have a civil effect should not differentiate between men and women solely on the basis of sex.
- The Court struck down provisions which existed prior to Uganda's progressive Constitution which recognises equality between men and women.

Point to note

1. Regarding the law on criminal adultery, the Court opined that the duty of the Court is only to make a declaration on the constitutionality of the impugned section and that the court cannot create a sentence to impose on adulterous spouses. In other words, the duty of courts is to enforce sanctions prescribed by the legislature.

To date the Legislature has not enacted a law on criminal adultery – neither men nor women can be punished for adultery.

Case 8.4 Joyce Nakacwa v AG and 2 Others

(Joyce Nakacwa v AG, Kampala City Council & Mrs Miwanda)[5]

Constitutional Court at Kampala

Aspects relevant to VAWG: Discrimination, denial of medical care, subjection to cruel, inhuman and degrading treatment, torture, violation of right to personal privacy, denying a baby care and protection

Summary of facts

This petitioner filed this petition to the Constitutional Court in Kampala and averred that she delivered a baby girl by the roadside near Naguru, Kampala City Council Clinic. She then approached the said clinic with the baby still attached to the afterbirth in order to complete the birth process, but she was denied medical care and instead referred to Mulago Hospital, without any referral letter. The petitioner was then forced to walk immediately thereafter, inspite of the fact that she was still bleeding and weak from the delivery and her clothing was all soaked in blood. She was unable to walk due to dizziness from excessive bleeding and was forced to sit outside in the early morning with a baby barely two hours old. The petitioner was later rescued by a passer-by on her way to work and taken to a clinic in Kireka, and later ended up at her sibling's house in Kireka. She returned to her house in Nakawa area later that day, and at the instigation of some boda cyclists she was accused by some area residents and the local council chairperson (third respondent) of having stolen the baby.

She averred that the residents stormed her room and in the presence of the third respondent pushed her outside and led her to the home of the third respondent, where they subjected the petitioner to mob justice. While at the house of the third respondent, the third respondent and another subjected the petitioner to unlawful vaginal examination, using polythene bags for gloves, in full view of both male and female area residents. The

third respondent then called the police who came, arrested her and took her to Naguru Clinic for medical examination and it was confirmed that the petitioner had gone to the clinic that morning with a baby still attached to the afterbirth. The third respondent refused to accept this position and convinced the police that she had never seen the petitioner pregnant and that she must have stolen the baby.

The petitioner and her baby were thereafter placed in custody at Jinja Road Police Station. Here, the petitioner, on suspicion of child stealing, was made to sit in the cold at the police reception desk through the night until the following day.

The petitioner's baby was forcefully removed from her, thereby preventing her from breastfeeding the baby who was kept apart in the cold and fed on water and glucose supplied by the third respondent.

The baby was later taken to Sanyu Children's Home through the Probation and Social Welfare Office without making proper inquiries. The petitioner was held in police custody for five days, without any charge being made against her. While in police custody, she had no access to sanitary and toilet facilities and she began to emit a foul smell which turned her inmates against her, forcing the police to take her for a medical examination which established that she had been delivered of a baby a few days before the examination. While she was in police custody, there was no female prison officer to attend to female prisoners, as provided under S28 of the Prisons Act. Finally, the petitioner was released on police bond, without any charges being preferred against her. She was asked to report back to the station, which she did diligently.

Upon her release, the petitioner asked for her baby, but the police at Jinja Police Station did not produce the baby. She repeatedly went to the station and asked for her baby, but no information concerning the baby was given to her. After one week, she was told that her baby had been taken to Sanyu Babies' Home, but when she went to the said home she was informed that the baby had died on 2nd of July 2001 and was buried at Lusaze cemetery. She was shown a burial permit, but she had no evidence to prove that the burial permit shown to her related to her baby since it related to the death of a two-day-old baby while the petitioner's baby was 11 days old. It was the petitioner's case that the loss of her baby, either by death or otherwise, was caused by negligence of all the respondents, and that had not the facts above stated taken place, the petitioner's child would be alive and/or in her custody and care today.

In these circumstances, the petitioner sought the following declarations:

- that the acts and/or omissions of the respondents stated in this petition are in contravention of and inconsistent with the

petitioner's rights as guaranteed in the constitution in Articles 22(1), 24, 33(3), 27(1) (a) and (b), 34(1), and 23(4) (a);

- that the respondents contravened the deceased child's rights under Article 34 (1);
- that the petitioner is entitled to compensation for unlawful detention, pain and suffering, embarrassment and humiliation and loss of her baby from respondents jointly and severally;
- an order for redress due to the petitioner so as to cut down her costs of litigation as it is empowered to do under Article 137 (4) (a);
- any other relief as the court may deem appropriate.

Issues and resolutions

Five issues were framed for determination, namely whether: the petition was time barred, the court had jurisdiction to hear the matter and whether these acts and/or omissions were actually committed against the petitioner and her child. The fourth issue was whether these acts or omissions contravened constitutionally guaranteed rights and freedoms and who was responsible for these acts or omissions. Since the respondents had raised a preliminary objection, arguing that the petition had been filed outside the limitation period, and also challenged the jurisdiction of the court, the court decided to first adjudicate on the preliminary objection.

Having heard and considered arguments from both sides, the court dismissed the preliminary objection and directed that the petition be fixed for hearing and determination.

This case raises substantial issues on VAW. First it raises the issue of women's reproductive rights and how these are violated by some health institutions, which discriminate against some women by refusing to provide maternal care to those who might not be able to pay the hospital expenses. This petition discloses that not all violence against women is perpetrated by men. Some women perpetrate violence against other women. The petition also raises the issue of VAW in places of detention manifested through failure to provide women victims with sanitary pads, taking the baby away from the petitioner and denying her the right to breastfeed the baby. It also brings out the plight of children who accompany their mothers in places of confinement.

This petition must have generated a lot of interest and it would be important to find out how the court determined the petition.

Comment: The case is a clear example of violation of several rights committed by agents of the State for example Kampala City Council and the Police.

Notes

1 {2014} eKLR, available at: www.kenyalaw.org.
2 {2015} eKLR, available at: www.kenyalaw.org.
3 Chapter 75 of the Law of Kenya.
4 High Court of Uganda, Constitutional Petition No. 8 of 2007.
5 Petition No. 2 of 2001.

Chapter 9
Sexual Harassment in the Workplace

Case 9.1 Vishaka v Rajasthan & Others

(Vishaka & Others v State of Rajasthan & Others)[1]

Aspects relevant to VAWG: Sexual harassment in the workplace, absence of legislation prohibiting sexual harassment in the workplace, discrimination, gang rape, gender equality, obligation of the state to protect women from sexual harassment in the workplace, the role of the court in addressing sexual harassment in the workplace

Summary of facts

This case does not emanate from the East Africa jurisdiction and is only used to demonstrate international good practice decisions.

The petitioners in this case were various social activists and non-governmental organisations (NGOs). They were concerned with finding suitable ways for the realisation of the true concept of 'gender equality' and the prevention of sexual harassment of women in the workplace through the judicial process and in the absence of legislation prohibiting sexual harassment in the workplace. Although the Government of India has an obligation to provide legal protection from sexual harassment in the workplace, there was no legislation in India prohibiting sexual harassment in the workplace.

Following the brutal gang rape of a publicly employed social worker (Bhanwari Devi) in a village in Rajasthan in India, she, together with five women's organisations including Vishaka, filed a group suit under Article 32 of the Constitution of India against the government and others.

Issues and resolution

In the petition, she sought the court's enforcement of the fundamental rights provisions relating to working women, namely: the right to equality (Art. 14), the right to practice one's profession (Art. 19(1)(g)), and the right to life (Art. 21). Other issues raised by the petition included: the fundamental right to non-discrimination (Art. 15), and India's international obligations under CEDAW Article 11, which requires the government to take all appropriate measures to eliminate discrimination against women in the field of employment, and CEDAW Article 24, which requires the government to adopt all necessary measures at the national level aimed at achieving the full realisation of all the rights recognised in CEDAW.

The petition also questioned India's official commitment at the Fourth World Conference on Women in Beijing to, inter alia:

> *formulate and operationalize a national policy on women which would continuously guide and inform action at every level and in every sector; to set up a Commission for women's Rights to act as a public defender of women's human rights; and to institutionalize a national level mechanism to monitor the implementation of the Platform for Action.*

In determining the petition, the court relied on the constitution and India's international obligations and held that the fundamental right to carry on any occupation, trade or profession depends on the availability of a safe working environment, free of sexual harassment, and the right to life means a life with dignity.

The court held that the responsibility of ensuring such safety and dignity through the enactment of legislation and creating mechanisms for its enforcement rested with the government. It further held that the workplace should be free of sexual harassment and, in the absence of legislation prohibiting sexual harassment in the workplace, the government of India was in breach of its international obligations to take legislative and other measures to protect women from violence and to prevent such violence from taking place.

The court recognised the right to gender equality and held that such right includes legislating against sexual harassment in the workplace. Noting the absence of legislation on sexual harassment in the workplace, the court applied judicial creativity within the confines of the Constitution of India, and used this case to produce the first enforceable civil law guidelines on gender equality and non-discrimination in the workplace, and the right of working women to be free from sexual violence and harassment in both public and private employment.[2] The court directed that those guidelines were to be treated as a declaration of law in accordance with Article 141 of the constitution. The court further stated that the guidelines were to be treated as a declaration of law under Article 141 of the constitution, and were to be observed in order to enforce the right to gender equality and to prevent discrimination against women and sexual harassment in the workplace.

This prompted the government, in 2007, to introduce the long awaited Bill on Sexual Harassment in the Workplace. This case inspired other reformers in the region and, in 2009, the Supreme Court of Bangladesh – referring to the Vishaka case – recognised that, 'the harrowing tales of repression and sexual abuse of women in their workplaces' were due to failure on the part of the government to enact a sexual harassment law.

Points to note/contribution to jurisprudence

1. The Court gave a wide interpretation to the right to practice any profession or to carry on any occupation and clearly brought out the reality of the indivisibility of several rights. The right was said to include the right to a safe environment free from sexual harassment. The judgement brought out the fact that sexual harassment results in violation of several rights: the fundamental right of a woman to equality with men and protection from discrimination on the basis of sex and her right to life and to live with dignity, the right to liberty, and right to practice any profession or to carry on any occupation, trade or business.
2. Cognisant of the need for effective redress and protection of women's rights, in dealing with the legal vacuum created by the failure of Parliament in its legislative obligation, the Court made law when it crafted guidelines which would be applicable until Parliament would duly carry out its mandate.
3. In order to promote and protect constitutional guarantees courts can have recourse to the content of international conventions and norms in construing fundamental rights guaranteed by the Constitution. The Court read international law into the legislative vacuum.
4. Following the Vishaka Guidelines for prevention of sexual harassment developed by the Supreme Court, Parliament enacted the Sexual harassment of Women at Workplace (Prevention, Prohibition and Redress) Act 2013. This is evidence that courts can take the lead in pushing Parliament to fulfil its mandate.

Notes

1 Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.
2 The guidelines and norms were to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women and to protect them from sexual harassment.

Chapter 10
Matrimonial Property

Case 10.1 Kivuitu v Kivuitu

(Civil Appeal No. 26 of 1991)[1]

Kenya Court of Appeal

Aspects relevant to VAWG: Inequality in rights of ownership of matrimonial property, role of the judiciary in ensuring equality of rights at the end of marriage

Summary of facts

The parties in this case (husband and wife) married in 1966 and cohabited as such. The husband was a Member of Parliament. In 1970, the husband entered into an agreement with M to purchase a house for KSh160,000 and paid the deposit of KSh20,000. He was however dissatisfied with the location and security and he agreed with his wife to purchase another house at a different location for their occupation as the matrimonial home. He travelled to New York to attend sessions of the UN Assembly and left his wife in charge of finding the alternative property. While he was away, the wife searched and found a suitable house at Garden Estate in Nairobi, negotiated the purchase price at KSh170,000, signed the sale agreement and paid a deposit of KSh17,000. The deposit was paid out of moneys obtained from a business owned by the husband and a third party. All this was done with the concurrence of the husband. The husband paid the mortgage instalments from his salary. Upon the husband's return from New York, he attempted to register the house in his sole name but this was promptly rejected by the wife. Eventually, the house was registered in the joint names of the spouses without specifying the shareholding of each party.

In 1972, the marriage broke down and a decree for divorce was granted and the wife moved out of the matrimonial house, leaving behind the husband and children. Nine years later, the wife filed an application in High Court seeking, among others, an order that the house, the subject matter of the application, was the matrimonial house of the parties and that it should be sold and the proceeds shared between her and the husband in equal shares. The trial judge ruled that she was entitled to a 20 per cent share in the house, because she did not make any financial contribution to the acquisition of the disputed property.

The wife appealed on grounds she had contributed to the property and that, in any case, her title as joint tenant was absolute and entitled her to a half share in the property.

The husband cross appealed, arguing that the trial court erred in awarding the wife a 20 per cent share after finding that she had made no financial contribution. The court, Omolo Ag. JA (as he then was), in the lead judgement, made the following observations which the rest of the court agreed with and which formed the judgement:

- *If a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the courts must take it that such property, being a family asset is owned in equal shares.*
- *The wife contributed indirectly, both non-monetarily as a wife and financially through her alternative employment and businesses.*

The court awarded the wife a 50 per cent share in the property and ordered a valuation to be carried out so that the husband could pay to the wife half the value of the house.

Most importantly, though orbiter, the learned judge recognised that a 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. Such services can be quantified to entitle a wife to a share in matrimonial property.

Ratio Decidendi

(a) A 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. Such services can be quantified to entitle a wife to an equal share in matrimonial property.

Contribution to jurisprudence:

The decision is an invaluable contribution towards gender justice and indeed the rights of women. It destroyed society's gender stereotype of devaluing a wife's housekeeping role and emphasised that the contribution of a 'house wife' to the family's growth and wellbeing can be quantified and remunerated like that of a man who earns a living through work outside the home.

Case 10.2 Nderitu v Nderitu

(Civil Appeal No. 203 of 1997)[2]

Kenya Court of Appeal

Aspects relevant to VAWG: Inequality in rights of ownership of matrimonial property, role of the judiciary in ensuring equality of rights at the end of a marriage, discrimination on medical grounds

Summary of facts

The parties in this case got married under Kikuyu customary law in 1968 and were blessed with five children, three of whom were born through caesarean section. The husband was in a charcoal-selling business, while the wife was a housewife. The business was not doing well and the wife went back to her parents' home until 1972, when she returned to Nairobi and joined her husband in his business of selling second hand clothes. This was closed in 1985 and a wholesale business opened.

She continued helping to run the wholesale business. It was not in dispute that with regard to the businesses, the wife always gave the proceeds of sale to the husband who deposited it in his account at the Kenya Commercial Bank. As a result of these businesses, the husband was able to buy nine land properties, five motor vehicles and various household goods. All these properties were registered in the sole name of the husband. The marriage got into trouble in 1992 and a suit for divorce was filed. The wife applied to the court under the Married Women's Property Act (MWPA) for orders regarding ownership of the properties acquired during the subsistence of the marriage.

Issues and resolution

The wife applied to the court under the Married Women's Property Act (MWPA), seeking orders that all the property acquired during the subsistence of the marriage was jointly owned by her and her husband. She sought a further order that these properties should be sold and the net proceeds shared equally between the parties. She contended that she had contributed financially to the acquisition of the properties. The husband objected and downplayed her contribution and argued that she made no financial contribution. The trial judge held that the MWPA, being a statute of general application, applied to customary law marriages in Kenya. He considered the wife's non-monetary contribution in taking care of the children and awarded her a 50 per cent share of the matrimonial home in Tigoni and 30 per cent share in the remaining properties, apparently because the caesarean operations that she underwent reduced her productivity. She appealed on the basis that the trial judge erred in failing to award her a 50 per cent share in all the properties.

The Court of Appeal found that there was evidence before the trial court to the effect that the appellant was engaged full time in helping to run and expand the business, and that there was no evidence on record to show that the caesarean operations that she went through were adequate justification to reduce her share to 30 per cent and further held that the pregnancies were for the welfare of the family, as they increased the numerical strength of the family. Finally, the court held that the wife had proved that she made an equal

indirect contribution and she was entitled to, across the board, an equal share in all the properties registered in the husband's name. The court allowed the wife's appeal, set aside that part of the order giving her a 30 per cent interest over designated properties and assets and replaced it with an order giving her a 50 per cent share across the board. This was except one property, LR No. 209/1233 Murang'a Road, Nairobi, which was at the time of the trial in the High Court registered in the name of one Benedict Kariuki, a son of the couple.

It is important to note that both this case, as well as the Kivuitu case, was decided before Kenya enacted the Matrimonial Property Act.

Ratio Decidendi

(a) A wife's contribution to a family's welfare can be both direct (financial) or indirect through housekeeping and such must be quantified as work worth remuneration.

(b) Property whether immovable or movable acquired jointly by a husband and wife during a subsisting marriage is to be shared in equal proportions upon dissolution of the marriage.

Contribution to jurisprudence

- Court recognised the value of a woman's (wife) natural maternal functions as quantifiable contribution in a marriage relationship.
- The decision is also an invaluable contribution towards gender justice and indeed the rights of women. It destroyed society's gender stereotype of devaluing a wife's housekeeping role and emphasised that the contribution of a 'housewife' to the family's growth and wellbeing can be quantified and remunerated like that of a man who earns a living through work outside the home. (See *Kivuitu v Kivuitu*)

Case 10.3 Bi Hawa Mohammed v Ally Sefu

(Civil Appeal No. 9 of 1983)

Court of Appeal at Dar Es Salaam

Aspects relevant to VAWG: Discrimination, equality of parties at dissolution of marriage, matrimonial property, wife's contribution to acquisition of matrimonial property, direct (financial) contribution, wife's indirect contribution by providing services on the domestic front, role of the judiciary in upholding property rights.

Summary of the facts

The appellant (Bi Hawa Mohamed) and the respondent (Ally Sefu) were wife and husband respectively until the dissolution of their marriage by a decree of the Court of Ilala District, at Kariakoo, Dar es Salaam in 1980. In subsequent proceedings, seeking the division of matrimonial assets, the trial court held in effect that the appellant was not entitled to any share in the matrimonial assets because, to use the words of one of the assessors, 'She was only a mere wife, and the house was bought by the husband with his own money'. The trial court accepted the offer made by the respondent to pay a sum of TSh2,000/= as a parting gift to the appellant in accordance with the religious tenets of the respondent. On appeal, the High Court substantially agreed with the views of the trial court, but increased the amount of the parting gift to TSh3,000/=. Bi Hawa Mohamed (appellant) was further aggrieved by the decision of the High Court and she filed an appeal to the Court of Appeal.

The appellant and respondent were married according to Islamic rites in Mombasa, Kenya, sometime in 1971. The respondent had a house in Mombasa and they used it as the matrimonial home. The respondent was a seaman and his work involved travelling abroad and being away for many months. While so travelling, he would provide adequate maintenance for the appellant, who remained at Mombasa, to look after the matrimonial home. On one occasion, he gave her an additional sum of KSh18,000/= to set up business activities. She failed to set up any business and the money could not be accounted for. In 1974, the respondent purchased house No. 40 along Swahili/Mhoro Street in Dar es Salaam. This house was bought with his own money and was the subject matter of this case. In 1975, the couple moved from Mombasa to this house in Dar es Salaam and they were using this house as the matrimonial home at the time of their divorce. It was the appellant's contention that this house was matrimonial property and that she was entitled to a share in the property.

Issues and resolution

The High Court certified that the appeal raised a point of law which should be determined by the Court of Appeal. The point of law was framed thus: 'Did the High Court and Primary Court act in error in holding the view that domestic services of a housewife do not amount to contributions made by her in the acquisition of matrimonial assets'.

The Court of Appeal noted that the power of the court to divide matrimonial assets is derived from section 114(1) of the Law of Marriage Act, 1971, which gives the court the power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties 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. The court noted that from the wording of this section, the assets envisaged must firstly be matrimonial assets; and secondly, they must have been acquired by them during the marriage by their joint efforts. The second issue for determination was whether the disputed house was matrimonial property and whether it was acquired through the joint effort of the parties.

In defining what constitutes matrimonial property, which the court found to mean the same thing as 'family assets', the court relied on paragraph 1064 of *Lord Halsbury's Laws of England*, 4th Edition, p491, which defines the phrase 'family assets' to mean: those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.

Consequently, the court held that on the facts established in the two courts below, the house in dispute was used by the parties as their matrimonial home after they moved from Mombasa to Dar es Salaam and was therefore a matrimonial or family asset. The next point of law for consideration and decision was whether this matrimonial or family asset was subject to division between the parties under the provisions of section 114(1) of the Law of Marriage Act.

The next issue for determination was whether the acquisition of the disputed house was brought about by the joint effort of the parties. It was the appellant wife's contention that her efforts in performing her domestic duties had the effect of placing the respondent husband in a financial position to buy the house in question. The two courts below rejected this contention on the ground that performance of domestic duties by a housewife does not count in the acquisition of matrimonial or family assets. The question for determination by the Court of Appeal was whether the above view of the two courts below was erroneous. The court considered two schools of thought on whether a wife's domestic services amounted to a contribution in the acquisition of matrimonial property.

The first school of thought consisted of those who maintain that under section 114, the term 'joint effort' is limited to a direct contribution by a spouse by way of money, property and work, to the acquisition of the asset in question and that housekeeping and raising the children count for nothing. On the other hand, the second school of thought consists of those who take the view that household work must be regarded as part of the joint effort or indirect contribution towards the acquisition of any asset by the husband. Such indirect contribution entitles her to a share in the matrimonial assets.

The learned trial magistrate had argued that since traditionally looking after the household and caring for the children is the occupation and

responsibility of a wife, just as the feeding and clothing the family is the occupation and responsibility of the husband, the appellant's (wife's) said duties assigned by tradition and custom, should not be considered as a contribution or joint effort towards acquisition of the house in dispute. The next issue for determination was whether the trial magistrate was wrong in the above view on the issue of contribution.

The court noted that parliament had not legislated on this issue and considered whether a judge can assume the role of parliament and legislate through its judgements. It was of the view that if there was any grey area in respect of the matter, the appropriate solution to the problem lay in the intervention of the legislature and not in judicial legislation. The court considered the overall purpose of the Law of Marriage Act as an instrument of liberation and equality between the sexes and, guided by this objective of the act, the court was satisfied that the words 'their joint efforts' and 'work towards the acquiring of the assets' have to be construed as embracing the domestic 'efforts' or 'work' of husband and wife.

On whether the appellant was entitled to any share in the house in question, the court was of the view that on the facts established by the two courts below, the appellant's domestic 'efforts' or 'work' consisted mainly in looking after the matrimonial home. She neither cooked food nor washed clothes for her husband, nor did she make his bed except on the few occasions when he was not travelling in ships abroad. Moreover, the couple had no children for her to take care of. As the respondent (former husband) was frequently away from home while working as a seaman, the court observed that the main beneficiary of such 'effort' or 'work' was not the respondent but the appellant herself, who lived in that house. This did not imply that her domestic 'effort' or 'work' was worthless, because lack of care of a house results in deterioration of such house.

In determining the shares of husband and wife in the matrimonial or family assets, section 114(2) required the court to apply the custom of the community to which the parties belonged and take into account their respective contribution to acquisition.

The parties were Muslims and the court found that, according to Islam, the respondent was expected to give a parting gift to his former wife according to his abilities.

The court was satisfied that such religious practice, which was undisputed, could properly be construed as a 'custom of the community to which the parties belong'. The High Court had found that the appellant was entitled to TSh3,000/= under this head and the record showed that she received the money in court. The court found no reason to interfere with this payment.

On whether she was entitled to a share of the house, the court held that she squandered KSh18,000 given to her to start a family business when the couple lived in Mombasa and she could not account for it, as she did not start any business.

The court regarded this money as an advance made by the respondent towards the future needs of the appellant. Taking into account the nature of the appellant's contribution discussed above, the court was of the view that the advance of KSh18,000/= at the time was sufficient provision for the future needs of the appellant, and held that she was not entitled to claim a further share in the matrimonial or family assets. Secondly, the court held that the squandering of that money by the appellant when weighed against her contribution was a matrimonial misconduct, which reduced to nothing her contribution towards the welfare of the family and the consequential acquisition of the matrimonial or family assets.

The court dismissed the appeal with an order that each party bear its own costs of the appeal, because it was a legal aid case.

Ratio Decidendi

(a) Domestic work of a wife is an indirect contribution towards the acquisition of matrimonial property and entitles her to a share in the matrimonial assets. However, the percentage which accrues to a wife who is not employed outside the home and who therefore does not make direct financial contribution to the matrimonial property depends on the nature and amount of household chores she engaged in. The Court took into consideration the nature of the man's employment which took him away from the matrimonial home for long periods and the fact that the couple did not have children to arrive at the conclusion that the chores were minimal.

In addition to the above, the Court also took note of the fact that the woman had earlier on squandered money given to her by her husband to set up business activities. Court consequently arrived at the decision that She would not be entitled on the share of the property on divorce.

Case 10.4 Lawrence Mtefu v Germana Mtefu

(Civil Appeal No. 214 of 2000)[3]

High Court of Tanzania at Dar es Salaam

Aspects relevant to VAWG: Cruelty, adultery with niece of the victim, psychological/ emotional violence, equality of parties at dissolution of

marriage, division of matrimonial property, contribution to acquisition of property during marriage, role of the court in ensuring equality of property rights at the end of a marriage

Summary of facts

The parties in this case were united by a Christian marriage contracted in 1975, which was later dissolved on the grounds of cruelty and adultery – allegedly committed by the appellant (husband). The divorce proceedings in the Magistrates Court were initiated by the respondent (wife). Following the grant of divorce, the trial magistrate ordered division of the three houses and sixteen (16) sewing machines equally between the parties. An order for maintenance at TSh10,000 per month, effective from the date when the case was filed, was also made. The husband was aggrieved by the entire decision of the court and filed an appeal before the High Court of Tanzania.

Issues and resolution

The appeal raised four grounds, namely that: the trial magistrate acted in error of law by holding that the marriage had broken down irreparably on account of cruelty and adultery on the part of the husband, which adultery she had condoned. He argued that the wife was well aware of the adulterous affair between him and one Domina Lawrence Msoka, a niece of the respondent, and that the respondent did not complain about it and that, in any case, she even facilitated the adulterous affair by taking care of the said Domina and her children.

Regarding the third and fourth grounds, the trial magistrate was faulted for having erred in law in ordering the husband to pay the wife TSh10,000 per month without first ascertaining his income, and for ordering equal distribution of all the houses and the 16 sewing machines. Concerning the three houses, his case was that the respondent was a mere housewife and had made no financial contribution to their acquisition.

The court dismissed the first ground concerning the respondent's alleged condoning of the appellant's adultery, and found that she had opposed it. The fact that she had complained to the elders was proof that she was opposed to it. The court noted that as a result of her complaint to the elders, the appellant caused her to be arrested and detained at the police station for three days, until she was bailed out by one Siril Martin. The court further noted that during her stay in police custody, the appellant was not bothered. The court found that the appellant's adultery with the respondent's niece and the arrest and detention of the respondent for three days after she complained to the leaders, were acts of cruelty that subjected the respondent to mental torture. Consequently, the first ground of appeal was dismissed.

The court also dismissed the second ground concerning the order of TSh10,000 for maintenance in view of the fact that the appellant had a coffee farm and 16 sewing machines, all of which generated income.

Concerning the order of equal distribution of the three houses and sewing machines, the court took into account the respondent's housekeeping duties, which the appellant referred to as 'conjugal obligations'. The court recognised that housekeeping, as was held in a previous case, amounted to services that required compensation because the rendering of such services makes the other spouse stable and enhances the ability to concentrate on development and acquisition of properties. The court then held that the respondent, through housekeeping services, contributed to the acquisition of the three properties and was entitled to a share at the dissolution of the marriage. Citing CEDAW, Article 15, the court held that it was the obligation of the Government of Tanzania to accord women equality with men before the law. The court was alive to the fact that the two houses at Moshi were constructed on ancestral land, and it would be extremely difficult for the respondent to access them. The court expressed itself thus on this issue:

> *The only thing which I fear may make the Respondent fail to get the remedy is the grant of the division in the two houses at Moshi. Customary rites may be an obstacle towards realization of what was granted to her….*

Bearing this in mind, the court then set aside the order of the trial court on the division of matrimonial assets and replaced it with an order awarding the Tandika house to the respondent as her share in the matrimonial assets and the rest of the assets given to the appellant. The court was of the view that in that way, the remedy to the respondent would be more effective than the remedy granted to her by the trial court.

The court in this appeal applied the law in the context of CEDAW Article 15 to which the Republic of Tanzania is a state party, to declare the rights of the parties. Article 15 requires the government to accord women equality with men before the law.

Ratio Decidendi

(a) The efforts of a wife in maintaining a home amount to work deserving compensation on divorce and cannot be conveniently cast as conjugal obligations to the benefit of a husband.

Contribution to jurisprudence/points to note:

- The Court was emphatic in its refusal to reinforce stereotypes that result in discrimination against women.
- The court applied International laws alongside domestic legislation (Constitution) to protect the woman's right to matrimonial property.

- The Court also recognized the challenges women are likely to face in utilising clan property in a patriarchal society. The court then made an order for the respondent wife to take full possession of the properties which did not have any clan links. On the other hand, the appellant husband received full possession of the two remaining properties which were situated on clan land. This action by the Court demonstrates that the Court was wary of delivering the respondent a hollow remedy and thus crafted an effective remedy.

Case 10.5 Gatera Johnson & Kabalisa Teddy v The Supreme Court

(RS/Inconst/Pén.0003/10/CS)

Supreme Court of Rwanda

Facts

The two plaintiffs, Gatera Johnson and Kabalisa Teddy, were married. However, prior to their marriage, Kiza Anita who sustained an unrecognised marriage with Gatera Johnson, filed a claim before the Second Instance Court at Gasabo requesting the distribution of common assets acquired before Gatera Johnson married Kabalisa Teddy.

The Second Instance Court at Gasabo reached a decision ordering Gatera Johnson to share the asset, a house, equally with Kiza Anita.

Gatera Johnson and Kabalisa Teddy then lodged an appeal to the Supreme Court against the judgement. On appeal, the main contention of the plaintiffs was that Article 39 of Law N°59/2008 of 10/09/2008, which prevented and punished any gender-based violence, be repealed as it contradicted the Constitution of the Republic of Rwanda.

Article 39 of Law N°59/2008 of 10/09/2008 provided as follows:

> *Those people entertaining unrecognised marriages shall be married in accordance with monogamous principle.*
>
> *If a person concerned with the provision of the previous paragraph of this Article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands and wives equally.*

The specific arguments of the plaintiffs were that Article 39 contradicted Article 26 of the Constitution of the Republic of Rwanda, which stipulated for a civil monogamous heterosexual marriage as being the only recognised marital union. The plaintiffs argued that marriages or unions which are not

recognised by the constitution did not claim equal rights and obligations like those within recognised marriages.

The plaintiffs also made reference to the second paragraph of Article 39 and interpreted it as allowing those who are married under unrecognised marriages to share assets, which contradicted the constitution. The plaintiffs contended that this would entitle them to the status enjoyed by legally recognised marriages.

Counsel for Kiza Anita on the other hand maintained that the article does not contradict the constitution, but offers a way for those in unrecognised marriages to share commonly owned assets upon divorce. This position was supported by the representative of the government in the case. The representative also added that a party has a right to assets commonly owned in a marriage or out of marriage.

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

1. The rationale guiding the distribution of assets in Article 39 was by virtue of the fact that a party to a marriage had rights to assets which were commonly acquired or owned and the rationale was not the fact of a legally recognised marriage.
2. Upon dissolution of an unrecognised marriage, the law did not require parties to it to share their assets equally, regardless of the contribution each of them had to acquiring or increasing the value of the assets. Instead, it only allowed them access to commonly owned or acquired property. This was different for legally recognised marriages, where equal distribution upon divorce was required as per the community property regime or limited community property regime and such rights originated from the marriage contract.
3. Article 39 of Law N°59/2008 of 10/09/2008 did not contradict Article 26 of the constitution, as it did not stipulate that a marriage between one man and more than one wife or one wife and more than one man was legally recognised, or that a marriage contract signed elsewhere apart from the civil service of the government was legally recognised.
4. The import of Article 39 Law N°59/2008 of 10/09/2008 was that before a man living with more than one wife or a woman living with more than one man decided to have a legally recognised marriage as per Article 26 of the constitution, they were required to share commonly owned belongings with that husband/wife equally. This was the way the legislator had provided to prevent any violence of rights to property if parties to an unrecognised marriage decided

to stop living together as husband and wife and one of them elected to marry according to law.

5. The fact that Article 39 provides a way for those in unrecognised marriages to share property was not particular to Rwanda. Jurisdictions like Canada, Australia and New Zealand all had statutory provisions for the distribution of commonly owned assets at the dissolution of an unrecognised marriage. This was affirmed by various court decisions within these same jurisdictions, which provided that parties to an unrecognised marriage were entitled to commonly owned or acquired property.

Notes

1 *Kivuitu v Kivuitu*, Civil Appeal No. 26 of 1985, reported in (1991) 2 KAR 241.
2 Civil Appeal No. 203 of 1997, eKLR, available at: http://www.kenyalaw.org.
3 *Lawrence Mtefu v Germana Mtefu*, High Court of Tanzania, Dar-Es-Salaam District Registry, Civil Appeal No. 214 of 2000.

Chapter 11
Divorce on Account of Violence

Case 11.1 Kirungi Doreen v Mugabe Ronald

(Divorce Cause No. 48 of 2013[1])

High Court of Uganda at Kampala

Aspects relevant to VAWG: Domestic violence, cruelty, psychological and mental torture

Summary of facts

This is a petition for divorce filed by the petitioner against the respondent for a decree that the marriage between her and the respondent be dissolved and that custody of the only child of the marriage be granted to her. She also sought an order for maintenance. The parties got married in church on 19th July 2008 in accordance with the provisions of the Marriage Act, had their matrimonial home in Massachusetts in the United States of America and were blessed with one child (Evana) who was three years old at the time of the judgement.

The case of the plaintiff (wife) was that the marriage had been rocky and had irretrievably broken down on account of the respondent's extreme cruelty and desertion, leading to the petitioner's mental torture. The husband did not file any reply within the required time, though he was served with the summons to answer petition. Consequently, the registrar of the court, on application by the petitioner, entered an interlocutory judgement against the husband on 23rd September 2013. When the matter came up for formal proof, the court granted the petitioner's prayer to proceed in camera.

It was her testimony that the marriage was not peaceful and after cohabiting for only two years, they separated and lived apart. Within two years of their marriage, the husband was cruel to her, beating her all the time in addition to coming home drunk and abusing her. He denied her sexual intimacy from the time they got married, and would sleep in the sitting room while the petitioner slept in the bedroom. The petitioner decided to leave the matrimonial home, but their families and other elders intervened and reconciled them. Following the reconciliation, the petitioner conceived and gave birth to their only child, a daughter called Evana Busingye. The husband went back to his old habits when the petitioner conceived.

He resumed sleeping in the sitting room and was not involved in the petitioner's pregnancy, neither did he provide anything for the child. He eventually left the matrimonial home and went to live with his mother in Metheun area, which is 45 minutes' drive from Woburn. Life became too hard for the petitioner as a single mother in the United States and she discussed the matter with her family. Consequently, her family brought her back to Muyenga in Uganda, where she was living with her daughter at the time when the petition was heard. She catered for her daughter's needs, including her education, single-handed.

At the request of the court, the petitioner submitted in evidence pay slips for purposes of guiding the court in making appropriate awards. The two pay slips showed that she paid USh1,310,000/= (one million three hundred thousand and ten) on 15 March 2013 and USh1,300,000/= (one million three hundred thousand) on 27 August 2013 as fees for the child at Swan Academy, Muyenga. She asked the court to dissolve the marriage and grant her full custody of the child, and to make the respondent pay maintenance for the child. She told the court that personally she did not need alimony from the petitioner and that all she needed was for him to maintain his daughter. She testified that though the respondent was agreeable to ending their marriage, the petition had not been filed in collusion with him or with any other person.

The court noted that there was evidence adduced under oath by the petitioner that the respondent was on several occasions cruel to her. This was manifest in his denial of sexual intimacy, physical and verbal abuse, heavy drinking, and unreasonable abandonment of the matrimonial bed and home. This conduct caused mental and psychological torture to the petitioner. There was further evidence that the parties were no longer living together, with the respondent having moved out to live with his mother. The court found that the respondent had neglected the petitioner when she was pregnant with their daughter, Evana Busingye, never contributed to the child's maintenance when she was born and had never provided for the child, who was in school at the time of the case with the petitioner meeting all her expenses. The court found that the evidence of the petitioner had not been denied and that on the authority of *Eridadi Ahimbisibwe v World Food Programme & Others*, a party who does not file a defence is deemed to have admitted the allegations.[2]

The court was therefore satisfied and found that the respondent was guilty of cruelty manifest in his denial of sexual intimacy to the petitioner, physical and verbal abuse, and heavy drinking and desertion, and that this conduct had caused mental and psychological torture to the petitioner and amounted to cruelty by the respondent.

On the undisputed testimony of the petitioner, the court granted decree nisi for dissolution of the marriage. On custody of the child, the court took note

of Article 34 of the constitution and section 3 of the Children Act which provide that the best interests of the child shall be the primary consideration in all matters concerning children. On maintenance of the child, section 5 of the Children Act puts a duty on parents to maintain their children. That duty gives the child a right to education and guidance, immunisation, adequate diet, clothing, shelter and medical attention. The court took the age and welfare of the child into account, as well as the fact that the child has always been in the custody of the petitioner, and granted the petitioner custody of the child. The petitioner was ordered to pay maintenance for the child at the rate of $400 (four hundred dollars) or its equivalent in Uganda shillings, per month.

Ratio Decidendi

(a) Whether a marriage has irretrievably broken down is deduced from the circumstances of a particular case.

Contribution to jurisprudence/Point to note

- We note that in Uganda, the doctrine of irretrievable breakdown of a marriage is not found in any statute. However, the judge formulated a principle that in determining whether marriage had irretrievably broken down, Courts should consider the facts of the case in their entirety. The judge therefore effectively dealt with an existing gap in the law.

Notes

1 In the High Court of Uganda at Kampala, Divorce Case No. 48 of 2013.
2 {1998} IV KALR 32.

Chapter 12
Discrimination

Case 12.1 Ndewawiosia v Emanuel

(Ndewawiosia D/O Ndeamtizo v Emanuel S/O Malasi)[1]

High Court of Tanzania

Aspects relevant to VAWG: Discrimination through customary law norms, discrimination on account of sex, right of daughters to inherit father's land, equal protection of the law

Summary of facts

The deceased, who died intestate, was survived by his five daughters, four of whom had married, and the appellant, who was the youngest and the only unmarried daughter of the deceased. He was also survived by a son of the appellant, born out of wedlock and whom the deceased had recognised.

The defendant was a nephew of the deceased, and both the plaintiff and the defendant belonged to the Chagga tribe in Tanzania. Both of them claimed the right to inherit the land of the deceased. When the matter of inheritance of the disputed land went before the court, the respondent's evidence was that he was the nephew of the deceased who died leaving no sons and therefore the rightful person to inherit the land. He based his claim to the land on custom and stated that, under Chagga customary law, women were not entitled to inherit clan land. He asserted that shortly before death, the deceased had asked him to take charge of the land.

The plaintiff told the trial court that the deceased was her father and since she was not married and had a son, whom the deceased had recognised before his death, she, together with her son, were entitled to inherit her deceased father's land. The trial court held that since the parties to the case belonged to the Chagga tribe in Tanzania, they were governed by the custom that prevented women from inheriting clan land. The court awarded the land to the defendant (the nephew of the deceased). Dissatisfied with the decision, the plaintiff filed an appeal against the judgement.

Issues and resolution

The court took note of the said custom and was required to determine if it had any value and if it applied to the parties in this case. It considered the

provisions of the Restatement of Customary Law [G.N.436 of 1963, Cap. 333 of the Law] and held that:

- Traditionally, among the Wachagga and various other tribes of Tanzania, women were disabled from inheriting the property of their fathers in order that such property would stay within the clan.
- The provisions of the Restatement of Customary Law[2] paragraph 29 declares a daughter to be a principal heir if the deceased has left no sons, while paragraph 20 provided that: '*Women can inherit except for clan land which they may receive in usufruct but may not sell*'. The court found these two provisions contradictory and not resolving the issue.
- Citing *Bi-Mwana Amina Mukabali v Severini Shumbusho*,[3] and *Saidina d/o Angovi v Saiboko Mlemba*[4] the court stated that:

  It is clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice and equality, daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality.

Finally, the court held that the claim of the plaintiff's son was superior to that of the defendant, because a child born of the appellant out of wedlock was a member of his maternal family, in this case, the family of the deceased. The appeal was allowed with a direction that the plaintiff and her son be put in possession of the land in question.

Ratio Decidendi

(a) Daughters like sons have the right to inherit clan land owned by their deceased parents.

Lessons learnt/Points to Note:

- The decision had the effect of modifying a customary practice or law limiting the right of girls/daughters to only usufructuary rights of land inherited from deceased parents to full inheritance.
- Court recognised and protected matrilineal relations by allowing the son of a daughter to inherit property from his maternal grandfather.

Case 12.2 Rono v Rono & Another

(Civil Appeal No. 66 of 2002)[5]

Kenya Court of Appeal

Aspects relevant to VAWG: Discrimination on account of sex, gender stereotypes, denying daughters the right to inherit fathers' property on basis of equality with brothers

Summary of the facts

The subject of this appeal was a piece of land comprising part of the estate of the deceased, who died intestate leaving two wives, three sons and two daughters from the first house and four daughters and no sons from the second house. In the trial court, the parties agreed on the distribution of all the assets of the deceased except for his 192-acre freehold land.

Concerning division of the piece of land, the first house proposed that each widow and daughter get 14 acres while each son get 22 acres, while the second house proposed that each house gets 96 acres. The trial judge considered the customary law of the deceased, wherein succession was patrilineal with equal allocation to each house but daughters receiving no share of inheritance. She also considered statutory (the Law of Succession Act), which provides for distribution to dependants irrespective of their sex, and also provides that in the case of polygamous families, division should be made to the houses according to the number of units, adding the widow as an additional unit. As there was no agreement between the two houses of the deceased, the trial judge, did her own independent distribution in which she gave each daughter an equal share of five acres, each son an equal share of 30 acres, with the two widows getting 20 and 50 acres respectively.

She had, prior to the distribution, ruled that although the daughters of the deceased were entitled to inherit the land of their deceased father, they could not inherit an equal share with their brothers because they were expected to leave the clan and get married, an implication that they would also inherit from their husbands.

Issues and resolution

The second house filed an appeal to the Court of Appeal, arguing that there was no statutory basis for discriminating against the daughters of the deceased by awarding differential shares to daughters and sons. In response, the first house argued that the subject land was agricultural land and therefore was exempt from the statutory directions on distribution, and

that division of the land was therefore subject to the customary law of the deceased.

The court was required to determine whether customary law applied to the land in dispute and whether the mode of distribution adopted by the trial court had subjected the daughters of the deceased to discrimination.

The Court of Appeal held that:

- Discrimination on grounds of sex is prohibited in the constitution, but with a proviso excluding laws relating to adoption, marriage, divorce, burial and succession. However, international customary law may be relevant in determining what constitutes discrimination, including the fact that Kenya has ratified – though not adopted – numerous international instruments prescribing elimination of discrimination against women (Longwe v International Hotels [1993] 4 LRC 221 adopted).
- Customary law was applicable in Kenya only insofar as it is not repugnant to justice and morality and not inconsistent with any written law.
- Customary law was excluded from application in statutory succession, except where there is an express provision allowing its application. The act did not allow customary law to be applied in respect of agricultural land and crops thereon, but only in such areas as the Minister by notice in the Gazette may specify. The Minister did publish a list of various districts, but the domicile of the deceased was not included. Hence the law applicable to the distribution of the agricultural land was statutory law.
- Under statutory law, the Superior Court has discretion to take into account fairness in determining the distribution to dependants. This discretion must be exercised on sound, factual and legal basis.
- The possibility of girls marrying is only one factor that may be considered. Equal treatment of the children by the deceased was another factor. However, in intestate succession, there was no principle of law that the houses of the deceased, or the children/beneficiaries, must inherit equally.
- The court allowed the appeal, set aside the distribution, upheld the principle of non-discrimination on account of sex, and found that the learned judge had no factual basis for drawing a distinction between the sons of the deceased on one hand and the daughters on the other and ruled that both the sons and daughters of the deceased were each entitled to an equal share (14.4 acres) of the land.

It is noted that this case was decided under the old constitution, which provided that in matters of devolution of property, the personal (customary) law of the deceased would apply. Customary law is patrilineal and does not recognise inheritance of clan land by daughters of a deceased person.

Ratio Decidendi

1. The application of African Customary Laws is legal only if it is not repugnant to justice and morality or inconsistent with any written law.
2. The Constitution outlaws any law that is discriminatory in itself or in effect on grounds of sex.
3. However, discrimination through statutory law is allowed by the Constitution in respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.
4. In adjudicating matters regarding discrimination, Kenyan Courts must make reference to, and are guided, not just by domestic legislation alone but also the relevant international laws which Kenya has ratified. (Note: this case was handled before the promulgation of the new Constitution in August 2010. The 2010 Constitution gives international law a more prominent role in the domestic legal system through the inclusion of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law.)
5. Where dependants of an intestate deceased seek a fair distribution of the deceased's net estate, the possibility that girls in any particular family may be married is a factor, albeit only one factor among others, which the court may consider in arriving at how much each child will receive. It is not a determining factor
6. Where a polygamous man dies intestate, the net intestate estate is to be distributed according to houses, each house being treated as a unit. Nevertheless, the Judge doing the distribution has a discretion to take into account or consider the number of children in each house. It is not the law that there must be equality between houses.
7. It is not the law that each child of a deceased intestate must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice.

Point to Note

Although the decision of the Court resulted in gender justice for the women in this particular case, the essence of the decision cannot be said to have destroyed the stereotype expectation that a girl child would get married and thus acquire property from her marital family. It cannot therefore be celebrated as having contributed to gender justice in its entirety. What the Court held was that in the particular circumstances of this case, there was no reasonable factual basis for drawing a distinction between the sons on the one hand and the daughters on the other hand in distributing the property and thus inheritance from their intestate father. And the question remains: had the women in this case been younger (with the expectation that marriage remained possible), would the court have arrived at the same decision? Had the women been married, would their marital status have been used against their 'right' to equal treatment with their brothers for purposes of acquiring the property of their father, a father who in his life time did not offer differential treatment to his children on the basis of sex?

Case 12.3 Re-Estate of Lerionka Ole Ntutu

(In the matter of the Estate Of Lerionka Ole Ntutu)[6]

High Court of Kenya at Nairobi

Aspects relevant to VAWG: Discrimination, customary laws that perpetuate inequality and discrimination in property rights, right of daughters to inherit fathers' land, role of the judiciary to create awareness

Summary of the case

This case was decided before Kenya enacted the current Constitution of Kenya, 2010. The brief facts of the case were that the deceased, a member of the Maasai, a pastoral community in Kenya, died intestate leaving land (LR Narok/Cismara/Ochora Oirwua/24) among other properties for inheritance. Maasai customs and traditions do not recognise the right of daughters to inherit their father's land or any part of the estate, because daughters are expected to get married and inherit from their husband's clan.

The sons of the deceased, relying on this custom, urged the court to find that distribution of the deceased's estate was governed by Maasai customary law, which does not recognise the right of daughters to inherit the estate of their fathers. The daughters contended that they were entitled to inherit their father's land and any custom which provided otherwise was discriminatory and not applicable.

The court, in deciding the matter, relied on *Rono v Rono* in which the Court of Appeal (Waki JA) in the lead judgement cited provisions of CEDAW and other international conventions in applying the principle of non-discrimination in the distribution of the deceased's land among his children.

The High Court held that a customary law which denies daughters the right to inherit their father's land was repugnant to justice and morality and had no place in present day Kenya. It could not therefore be applicable to the estate of the deceased. The court further held that the personal law of the deceased could not be used to discriminate against women in property inheritance and made reference to CEDAW, among other human rights instruments which Kenya has ratified and which establish gender equality and non-discrimination standards for all human beings. Finally, the High Court ruled that the daughters of the deceased, together with their brothers, had an equal right to inherit their father's land.

Ratio Decidendi

(a) A customary law which denies daughters/women the right to inherit their father's estate is repugnant to justice and morality.

(b) A customary law which differentiates between male and female children in regard to the right to inherit their father's estate is no longer good law.

(c) A customary law which differentiates between married and unmarried daughters in regard to the right to inherit their father's estate is no longer good law.

Contribution to jurisprudence/Point to note:

- The court not only made reference to the obligations of the country arising from international instruments it had ratified but also cited principle 7 of the Bangalore Principles on the Domestic application of International Human Rights norms to get support to apply the International Covenants and treaties.
- The court strived to interpret the provisions of the Succession Act and the country's Constitution in tandem with the country's obligations flowing from international human rights instruments.

Comment: We note that this case was brought to court before Kenya enacted its Constitution (progressive) which expressly prohibited discriminatory laws on the basis of sex. However, the judge in arriving at the decision applied the Succession Act alongside international human rights laws. The judge stated that after Kenya was exposed to International laws, the country had knowingly and rightly taken a bold step to eliminate the discrimination of all manners and types against women.

Case 12.4 Stephen Gitonga M'Murithi v Francis Murithi

(Civil Appeal No. 3 of 2015)

The Court of Appeal at Nyeri

This was a case in which the issue related to distribution of the deceased's estate among his widow, sons and daughters. The Court of Appeal held:

> *That all children of the deceased were entitled to equal distribution of the deceased's estate and further held as per widow having been given an outright tangible shareholding in the net estate of the deceased as opposed to life interest the court found nothing in Section 40 of the Law of Succession Act that prevents a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interest of justice to all affected parties.*

Case 12.5 JAO v Home Park Caterers

(JAO v Home Park Caterers Ltd & 2 Others)

(Nairobi HT Civil Case No. 38 of 2003)[7]

High Court of Kenya at Nairobi

Aspects relevant to VAWG: Discrimination on account of HIV status

Summary of facts

The plaintiff, JAO, filed suit against her former employer, arguing that the company unlawfully terminated her employment based on her HIV status, in violation of her constitutional right to be free from discrimination. She also sued her doctor and hospital, claiming that they violated her constitutional rights to privacy and confidentiality by testing her for HIV without her consent and disclosing her status to her employer.

In addition, the plaintiff claimed that the defendant doctor breached his professional and statutory duty to disclose her HIV status to her and to counsel.

The facts giving rise to this case were that the plaintiff was an employee of the first defendant. The first defendant (employer) sent her to the company doctor for tests and, without informing her, the doctor did some tests including one for HIV/AIDS. He found her positive for HIV and secretly passed this information to her employer. He did not inform the plaintiff that he had tested her for HIV, neither did he inform her of the outcome. Upon

receiving the doctor's report on her HIV status, the employer terminated her employment on account of her HIV status, whereupon the plaintiff filed this case against the employer, the doctor and another.

The defendants filed a Chamber Summons asking the court to dismiss the suit on the ground that it failed to disclose a reasonable cause of action.

The court held that the complaint disclosed a cause of action that was reasonable in light of the nature of the case, the universality of the HIV pandemic and the development of human rights jurisprudence, together with attempts that were then ongoing to harmonise international human rights conventions with the national law of Kenya. The defendants' application was dismissed with costs to the plaintiff.

Contribution to jurisprudence/Point to note:

- Although the case was reverted to the lower court for the fact that the presiding officer of the matter was found to be biased, the court emphasised that termination of employment on basis of one's HIV status amounted to discrimination.

Case 12.6 Uganda Association of Women Lawyers & Others v the Attorney General

(Constitutional Petition No. 2 of 2003)

Facts

The petitioners challenged several provisions of the Divorce Act (Cap. 249 Laws of Uganda) as being inconsistent with the provisions of the 1995 constitution. In particular, they contended that the provisions of Sections 4(1), 4(2), 5, 21, 22, 23 and 26 of the Act were inconsistent and in contravention of Articles 21(1) and 21, 31(1) and 33(1) and (6) of the constitution.

Issues:

1. Whether the impugned sections of the Divorce Act were in contravention of the constitution as alleged.
2. Whether the petitioners were entitled to the reliefs prayed.

The petitioners in brief argued and adduced evidence to the effect that:

1. The Divorce Act discriminated against women in violation of express provisions of the constitution.
2. The Act perpetuated inequality between sexes.
3. The Act was against the dignity, welfare and interest of women and undermined their status.

The petitioners argued that the impugned sections were discriminatory, because they made prescriptions for divorce on the basis of sex. For instance, the sections allowed a man to divorce his wife solely on proof that she had committed adultery, whereas a wife could not divorce her husband on commission of adultery alone; in addition to adultery, the man had to have committed an additional marital wrong e.g. cruelty or desertion. Furthermore, on dissolution of a marriage, wives were entitled to alimony, but husbands were not. The sections also required that where a husband petitioned for divorce on the basis of his wife's adultery, he names a co-respondent (i.e. the man with whom the wife had committed the adultery). On the other hand, where a wife petitioned for divorce and one of the grounds was the husband's adultery, it was not required to name a co-respondent (i.e. the woman with whom the husband had committed the adultery).

In essence, the provisions contravened Articles 21, 31 and 33 of the constitution, which provide as follows:

> *Article 21: (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*
>
> *(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.*
>
> *(3) For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.*
>
> *Article 31: (1) Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.*
>
> *Article 33: (1) Women shall be accorded full and equal dignity of the person with men.*

Held

All the five justices held that the cited provisions of the Divorce Act were inconsistent with the constitution. However, Twinomujuni JA who wrote the lead judgement went beyond merely declaring the provision unconstitutional, and further stated that:

> *All the grounds of divorce mentioned in Section 4(1) and (2) are available to both parties to the marriage and the provisions of the Act relating to*

naming of the co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage.

Similarly, Justice Okello held that:

(the impugned sections) of the Divorce Act discriminate on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with the Constitution … they are null and void.

This means that the grounds for divorce stated in section 4(1) & (2) are now available to both sexes. Similarly, the damages or compensation for adultery (S.21), costs against a co-respondent (S. 22), alimony (S. 23 and 24) and settlement under section 26 are now applicable to both sexes. Application of this order is likely to meet some difficulties. It is, therefore, necessary that the relevant authorities should take appropriate remedial steps as soon as possible.

Contribution to jurisprudence/point to note:

- The court was emphatic in striking down a law which was discriminatory in some instances against women and in others against men. The decision enabled the protection of the right to equality before and in the law to both women and men at the dissolution of the marriage.
- The judgement is also an example of judicial innovation/activism in that the judges did not only declare the law unconstitutional (which often creates a vacuum), but also modified the existing law to ensure that it applied equally to men and women.

Notes

1 1968 HCD No. 127, Tanzania (PC) Civ-App. 80-D-66, 10/2/68.
2 GN 436 of 1963, Cap. 333 of the Laws of Tanzania.
3 *Digest Of Appeals from Local Courts*, 1955–1956, No. 88.
4 *Digest of Appeals from Local Courts*, 1961, Vol. VIII, (No. 205).
5 In the Court of Appeal, Kenya, Civil Appeal No. 66 of 2002, available at: www.kenyalaw.org.
6 High Court of Kenya sitting at Nairobi, High Court Succession Case No. 1263 of 2000, available at: www.kenyalaw.org.
7 High Court of Kenya at Nairobi, Civil Case No. 38 of 2003.

Chapter 13
Discrimination at the Workplace

Case 13.1 George Opiyo and 2 Others v Deputy County Commissioner Gem, & Another (Siaya)

(HCCP NO. 1 of 2015)

Facts

The petitioners George Opiyo, George Ocheng and John Okinyo challenged the constitutionality of the appointment of the second respondent – Pauline Apondi – as an assistant chief of Ulamba sub-location by the first respondent, the deputy county commissioner, Gem, Siaya County.

The petition was brought for and on behalf of the people of Ulamba sub-location, who were displeased and dissatisfied with the actions of the first respondent, who appointed the second respondent without any consultation.

The basis of the petition was that the first respondent in appointment of the second respondent contravened **Article 27 of the constitution**, acted unprocedurally and was not fair. The appointment was not done in the best interests of the people of Ulamba sub-location as the sub-location was inhabited by numerous thugs, who caused the area to have 'run away insecurity' leading to loss of lives. Further, that the second respondent had always stayed out of Ulamba by staying in Sudan, and therefore was not well conversant with the area. Given the area's large size, location and the nature of the work, which required both day and night patrols, the second respondent was not in a position to effectively perform the task needed: the terrain called for a stronger personality (a man) to manage it.

The petitioners further alleged that the first respondent, throughout the appointing process of the second respondent as the assistant chief of Ulamba, did not consult and co-operate with the people of Ulamba and this denied them the right to access public services. As such, the right to security of the person as enshrined in the constitution had been violated by the first respondent, by appointing someone who was not principally qualified to handle the insecurity in Ulamba sub-location. The first respondent violated the principle of supremacy of the constitution in Articles 1 and 2, 6, 10, 20, 22, 23, 27 and 48.

Issues:

1. Whether the appointment of the second respondent was in accordance with the constitution and the law.

2. Whether the petition was premature, misconceived and lacked merit.
3. Whether the petition violated Article 27 of the constitution.

Held that:

1. The first respondent, in making the appointment of an assistant chief should be guided by the national values and principles set out in Article 10 of the constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Upon evaluation of the evidence and considering the relevant provisions of the constitution and counsel submissions, due process and conformity with the constitution was complied with, as the second respondent emerged among the top in the selection process. The first respondent made appointment of the second respondent on the basis of clear constitutional criteria and complied with Articles 10 and 73 of the Constitution of Kenya, 2010. The second respondent, who was appointed to the position of assistant chief, met certain integrity and competence standards as set out under chapter 6 of the Constitution of Kenya. Inquiry was made with regard to the suitability of the second respondent under the provisions of the constitution by the first respondent assisted by a panel, which included members of public, who represented the public. The court therefore found that there was public participation.
2. As to whether the petition violated Article 27 of the Constitution of Kenya, the petitioners sought to discriminate against the second respondent on the ground of sex in her efforts to secure the job of assistant chief. The petitioners portrayed the second respondent as weak, because she is simply a woman; that she should not be offered the job because it was tedious in nature and in which one was expected to work during day and night. In the court's view, this was discrimination on the ground of sex; it was against human dignity and scornful to women and the second respondent. Further, the petition intended to ensure that women and men should not have the right to equal treatment, including the right to equal opportunities in economic, cultural and social spheres.
3. In constitutional references where a petitioner is seeking to enforce his purported violated constitutional rights, he should not be allowed to violate or breach and/or infringe the right of others or another so as to have his purported right enforced. The petitioners were in the court's view seeking to violate the constitutional rights of the second respondent by discriminating against her. The

petitioners violated the same constitutional provisions that they relied on to seek redress before the court. The petitioners should have realised that the second respondent had the right to equal treatment and the right to equal opportunities, as she was also protected by the same constitution as they were – and should not be discriminated against by virtue of her gender or sex.

Order of court

The petition was without merits and was dismissed.

Contribution to jurisprudence/ point to note:

- The court rejected the stereotype that certain types of employment do not suit women. It emphasised the right to equality and work opportunities for both men and women.

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' 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.

Annex 1
Child, Early and Forced Marriages in East Africa: The Role of the Judiciary

Elizabeth Ibanda-Nahamya, Hon Justice International Crimes Division, High Court of Uganda

I. EXECUTIVE SUMMARY

Forced marriage especially that involving children is one of the greatest challenges facing individuals around the world and integral to the full realisation of universal human rights, women's rights, and the rights of the child. This paper examines the effects of child, early and forced marriages (CEFM) within the Commonwealth, with a specific focus on East Africa, and highlights how to best address the issue using international, regional, and national legal norms and judicial processes currently in place. The East African countries examined are Kenya, Rwanda, Uganda and Tanzania.

The paper begins with a general introduction of why combating CEFM is an important topic for consideration by the Commonwealth Secretariat and the efforts being made to address it. The introduction is then followed by the background section which gives a historical overview of CEFM at the global level. The paper defines 'CEFM', which is crucial since the definitions often vary depending on how CEFM is worded in respective jurisdictions, followed by CEFM's manifestation within East Africa. Discussing the history of CEFM often helps one understand the hidden challenges that hinder effective implementation of efforts to counter it. The discussion on hidden challenges illustrates how culture and customs play an important role in the prevalence and acceptance of CEFM, as well its damaging effects on education and health. The rest of the paper examines the legal frameworks in place to address CEFM within the four jurisdictions. This includes examination of international instruments such as the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* to regional instruments such as the *Protocol on the Rights of Women in Africa to the African Charter on Human and People's Rights*, in an attempt to analyse the legal obligations that arise from these Conventions. Considering that the main target audience of this paper are those within the judiciary (most specifically East Africa), it is important also to take a closer look at the national legal frameworks in place, comprising national constitutions and statutory laws. The paper then concludes with a section on recommendations and finally, and most importantly, relevant case law in an appendix.

II. INTRODUCTION

1. This paper was developed following a three-day workshop organised by the Commonwealth Secretariat and held in Nairobi from 24 to 26 February 2016. The purpose of the workshop was to review and validate a Commonwealth Judicial Bench-Book (JBB) on Violence against Women and Girls (VAWG) for East African jurisdictions. The participants comprised mainly judges from the four East African Commonwealth jurisdictions and other experts who deliberated on the adequacy of the JBB in addressing judicial intervention in tackling VAWG in East Africa. The workshop focused on critical issues raised, lessons learned and best practices. In addition, the review exposed several gaps, which would necessitate reforming the law. This workshop would in turn lead to the launch of the JBB in Nairobi on 29 June 2016.

2. The Commonwealth's mandate on Child Marriage arose from the recognition that *'gender equality and women's empowerment are essential components of human development and basic human rights'* and therefore the existence of CEFM is not only a violation of basic human rights but also a violation of the rights of young girls and women. Additionally, CEFM was made a key mandate area in the 2015 Commonwealth Heads of Government meeting in Malta. The Commonwealth's commitment to end CEFM resulted in the Kigali Declaration[1], whereby the Commonwealth national human rights institutions agreed to prevent and end child marriages. They also made commitments towards the monitoring and enforcement of legislation, improving data collection and the promotion of compulsory education for girls.

3. This paper takes a close look at the efforts being made by Kenya, Rwanda, Uganda and Tanzania to address CEFM in their courts of law, if any, and the efforts being made at the national government level to raise awareness and bring about the elimination of CEFM through the creation of national action plans in order to ensure the efficiency and success of the Kigali Declaration.

III. BACKGROUND

Overview

4. Historically, CEFM is a practice that has been prevalent in various communities around the world as early as the 19th century.[2] Despite the progressiveness and advancement of international human rights law, this issue is one that many States still struggle to

eliminate, both in the global north and south. In the United States for example, only 9 states and 1 territory (US Virgin Island) have statutes criminalising forced marriages[3], which means that within 41 States, young women and girls have no legal recourse against CEFM. The statistics provided indicate that the legal protection needed to prevent child marriages is not merely a problem in the developing world but an issue that transcends borders regardless of a State's standing in terms of economic development.[4] This ultimately means that states need to implement far more aggressive and protective laws to effectively tackle and eliminate CEFM. It should be noted however that as recently as July 2016 Tanzania and the Gambia (the latter being a former member of the Commonwealth) have outlawed child marriages, with Gambia giving a jail time of 29 years for anyone found marrying a child under the age of 18.[5]

5. A recent report by UNICEF estimates that, worldwide, approximately 700 million women were married before the age of 18 years. Compounding this statistic is the fact that one in three of these women (250 million) were married before the age of 15.[6] It should be noted that, despite the fact that it is girls that are disproportionately affected by child marriage, boys too in some instances are married as children. Statistically CEFM is most prevalent in South Asia and sub-Saharan Africa; in fact the highest rates of child marriages are found within these two regions.

Definitions

6. The definitions of CEFM often vary depending on how the abbreviation is used. For purposes of this paper the definition will focus on 'forced marriage' and 'early marriage.' The reason for this is that by definition, 'child' marriages[7] can be considered 'forced marriage', or a form thereof, because children especially those under the age of 15 are not able to make an informed decision as to whether or not they want to be married. Most often this decision is influenced by a parent or family member.
7. Forced marriage is often defined as a marriage conducted without the valid consent of one or both parties and where duress is a factor, or as a union of two persons at least one of whom has not given their full and free consent to the marriage.[8] Furthermore, it is important to differentiate between a forced marriage and an 'arranged marriage', as the latter is often described as one where a third party or parties may have proposed the union, but both parties are free to decline it.[9]

8. Early marriage is defined as a union where at least one of the parties is a child below 18 years in countries where the age of majority is attained earlier or upon marriage. Early marriage, also refers to marriages where both spouses are 18 years and over but certain factors make them unready to consent to marriage, for example their level of physical, emotional, sexual and psychosocial development, or lack of information regarding the person's life options.[10] Within the context of the law in East Africa, CEFM does not have a concrete definition. Therefore it is often presented in terms of rights and prohibitions around the institution of marriage, including marriage involving children.[11]

Manifestation of CEFM in East Africa

9. The prevalence of CEFM in sub-Saharan Africa is of increasing concern, as the numbers keep rising. Most information gathered on CEFM places child marriages into two categories: those married before 15 years and those married before 18 years. This categorisation is of importance as it enables those researching CEFM to understand the trends in various countries. For example in Niger, one third of all girls are married off before they are 15 years old, whereas in Burkina Faso more than half are married before 18 years, meaning that fewer girls in Burkina Faso marry before the age of 15.[12] Other factors too often change the rate at which children are married; for example rural versus urban dynamics. In Ethiopia, it has been shown that the rate of child marriages is higher in northern region of Ethiopia at 75 per cent, versus those married in Addis Abba which stands at 26 per cent.[13]

The following chart shows the statistics of prevalence of child marriage for children aged below 15 and 18 years in East Africa:[14]

Statistical Information East Africa 2015[15]

Country	Married by age 15 in %	Married by age 18 in %
Kenya	6	26
Rwanda	1	8
Uganda (Highest Prevalence in East Africa)	10	40
Tanzania	7	37

10. In East Africa, CEFM is evident in the various forms of marriage it often manifests itself. Some of these manifested forms are: levirate marriage whereby marriage is forced upon a widow to the brother of her deceased husband, also known as 'wife inheritance'; and sororate marriage whereby the sister of a deceased or infertile wife is forced to marry or have sex with her brother-in-law or widower/husband).[16] The other forms of CEFM in East Africa include the trafficking of brides, marriage as a dispute settlement mechanism, and forced marriage in the context of armed conflict. The latter form was seen in Northern Uganda during the Lord's Resistance Army (LRA) conflict whereby young girls were taken as 'bush wives' by the LRA.[17]
11. 'Bush Wives' is a term given to the thousands of women who are abducted and forced to become the wives of the soldiers, regardless of age. During the Sierra Leonean civil war many young girls were taken against their will and forced to be the *'domestic and sexual slave of their "husbands."*[18]' It has been reported that around 60,000 women and girls were victims of sexual violence and CEFM in Sierra Leone.[19] Compounding this statistic is the thousands of other women and girls in conflict/post-conflict zones like eastern Congo and northern Uganda who are forced to endure forced marriage. Encouraging, however, are the landmark case rulings of the Sierra Leone's special court and the International Criminal Court (ICC) that have classified forced marriage as a crime against humanity.[20]

IV. HIDDEN CHALLENGES

Cultural Norms and Customs

12. In order to truly comprehend the forces that drive child marriages, one needs to understand the social dynamics and cultural customs that bring about and allow this practice to occur in the first place. Within East Africa, the various cultures and customs often define the gender roles played by women and girls, creating an environment whereby the rights of women and girls are undermined in favour of traditional practices that often perpetuate CEFM.
13. One aspect of the hidden challenges related to CEFM can be seen in what is known as widow inheritance. In Western Kenya the practice of widow inheritance is where a girl, usually the younger sister/cousin to the deceased is 'compelled' to marry her deceased sister's widower. The identified girl hardly has a choice to opt out of being the replacement wife.

14. In Tanzania, a cultural practice that exacerbates CEFM is known as *Nyumba Ntobu*.[21] This cultural practice involves an older, wealthier woman paying bride price for a young girl to become her 'wife'. A man is then chosen to impregnate the girl and any children who are born belong to the older woman. This practice is perpetrated by wealthy and influential older women to protect themselves from becoming victims of VAW through marriage to men. This act is meant to reduce acts of VAW, as the marriage is between two women and the role of the man is merely to foster the conception of a child and the man does not have a significant role in the domestic set-up. This practice, however, still does not give the girl a chance to decide on whether or not she wants to join a marriage union or engage in sexual intercourse with a man who often is far older than the girl. In addition, bride price can also be a motivation for parents; a younger bride means a higher bride price for the family.

15. In Uganda, the Pokot tribe, the majority of whom are of Kenyan origin, have settled at Amudat/Nakapiripit. This tribe is known to marry off girls at the age of 12 years upon the receipt of 12 heads of cattle. The girls are married off as they are viewed as a source of economic wealth and stability. Marriage by capture, abduction or kidnapping is a common phenomenon. In Karamoja, it takes the form of a cultural practice known as 'wrestling', which determines which young girl will be the new bride. Another common practice within this ethnic group is where a victim of defilement is required to get married to the perpetrator. This practice is extended within the Buganda region and in some clans in Acholi region, whereby when a girl is defiled the parents will offer the girl to the defiler for marriage,[22] even if the girl does not wish to marry her defiler.

16. Among the Baganda,[23] prior to the enthronement of the king, it was a customary requirement that he have sexual relations with a virgin girl commonly known as 'Nakku'. The 'Nakku' would henceforth not be permitted to marry any man after she has been defiled by the King in-waiting. It should be noted that the current King of Buganda Ssabassajja Kabaka Ronald M. Mutebi issued a public decree against this specific cultural practice and therefore prior to his coronation it is alleged that he did not defile a 'Nakku.' However, despite this, the 'Nakku', who had been selected, had to undergo other rituals, and will remain unmarried for the rest of her life.

Education

17. The right to education is a fundamental human right codified in most national constitutions and in international human rights law conventions such as the *International Convention on Economic Social and Cultural Rights*. Having a right to access education is not only essential in decision making but also in economic development whereby an individual can gain the skills needed to rise out of poverty. Despite this being a basic right, within most East African countries, girls bear the brunt of not attaining education especially as a result of CEFM. A Uganda Demographic Health Survey, conducted in 2006 in relation to the correlation between CEFM and education, showed that 67% of women aged 20-24 years had no formal education, while 58% with primary education were married or in a union at age 18 in comparison to 14% of women with secondary education or higher.[24] Although the government of Uganda has established a universal primary school education (UPE) policy nationwide, the realities on the ground, such as underfunding and overcrowding (leading to higher drop-out rates) have resulted in poorer families especially in rural areas, marrying off their daughters when they are unable to afford paying school fees anymore.[25]

Health

18. It has been well documented that CEFM has a devastating effect on a girl's health which often results in life long complications. These complications can manifest in various forms:

    i. *Early Pregnancy*, where statistics have shown that girls aged 10-14 years are five times more likely to die in pregnancy or childbirth than women aged 20-24 years, and girls aged 15-19 are twice as likely to die. One of the most damaging consequences of early pregnancy and the need to prove fertility after marriage, regardless of age, is obstetric fistula whereby the vagina, bladder and/or rectum tear during child birth, which if left untreated causes lifelong leakage of urine and faeces;[26]

    (d)

    ii. *Exposure to Violence*, which takes the form of physical harm and violence, psychological attacks, and, most common of, all forced sexual acts including marital rape,[27] which in most East African societies and legal systems is still considered taboo;[28]

(e)

iii. *Infant Mortality*; a child born to a young teen mother is more likely to die before the age of one; and

(f)

iv. *HIV/AIDS*; girls exposed to CEFM are more likely to contract HIV especially from partners who are much older and whose sexual history might have exposed them to HIV.

19. Another major health risk that CEFM presents is in relation to a traditional practice known as female genital mutilation (FGM), which is outlawed in most East African countries. Legally CEDAW and CRC Committees have defined FGM as a harmful practice violating the human rights of girls and women on par with child marriage.[29] Despite this, FGM is still widely practiced and seen as a prerequisite after achieving puberty and before marriage.[30] In relation to CEFM, FGM can be forced upon a girl who is to be married as young as nine years old. Lastly, FGM can cause *'severe bleeding and problems urinating and later lead to medical conditions, including infertility, complications in childbirth and increased risk of new-born deaths.'*[31]

V. CEFM AND THE COURTS

The Role of the Judiciary

20. Judicial intervention, depending on how progressive the judicial officer is, may have both positive and negative impact on the phenomenon of VAWG. Court records reveal the role played by legal processes in disrupting or reinforcing patterns of domestic violence.[32] The role of the judiciary in CEFM cases is to adjudicate CEFM cases brought before the judicial officers under the relevant laws; to create a victim centred courtroom with sufficient safeguards and support for victims and witnesses in these cases; and to engage in efforts outside the courtroom aimed at changing mind-sets and influencing positive change. Each of these roles will ensue a further disposition.

Adjudication and application of relevant laws

21. In most of the EAC countries, judicial officers handle cases of sexual and gender-based violence according to laws relevant to the acts specifically charged. A number of relevant cases have been identified and appear in the annex to this paper.

22. In Uganda and in Tanzania, until recently, the laws do not explicitly provide for forced marriage. Kenya makes mention of 'forced marriage' in the definitive part of *Protection against Domestic Violence Act* under section 4 but it does not create an offence of 'forced marriage.' Incidents are majorly handled as defilement cases, or cases of abduction with intent to marry, and not as CEFM in Uganda, Tanzania and Kenya. Rwanda, on the other hand makes 'forced marriage' a distinct offence and criminalises it.[33] For Tanzania and Uganda, the laws on age and consent exist for marriages contracted under different legal regimes, notably customary marriages and marriages conducted under the various statutory provisions applicable to marriage such as the *Marriage Act 1904 Uganda* and the *Law of Marriage Act of Tanzania*. However, the disjuncture between customary and formal marriage laws makes it challenging to lay down sanctions for customary marriages.[34] One way of initiating the prosecution of such cases is for the complainants to file cases if disagreements emerge; for instance, after failing to agree on the bride price. When this happens, the matter becomes a criminal matter falling within the ambit of 'Defilement' or rape. In Uganda, the cases will either be prosecuted as 'Simple Defilement' cases for girls between 15 and 18 years of age or 'Aggravated Defilement' for children below 14 years; or where the accused is found to be HIV positive; or where the victim is a mentally challenged person or where the defiler is a parent, guardian or a person in authority. This scenario can be exemplified by the case of *Uganda vs. Kintu Yusuf, Mbd CRB 2023/2015 AA 038/2016* in which the victim was allegedly 17 years old when she left Mubende and went to live with the accused as husband and wife in Kampala. She left after about two months and when it was discovered that she was pregnant, a case of defilement was reported. The accused was charged but the complainants later lost interest in the case. In a similar case of *Uganda vs. Mwesigye Abdul Shaban, MBD CRB 794/2016*, the victim aged about 16 years escaped from home and joined the accused with whom she stayed as a wife until when her parents found her already pregnant. The baby died shortly after birth. A case of Aggravated Defilement was reported. The accused was recently committed to the High Court for trial. Meanwhile the victim has refused to leave the 'so-called husband's' home. The accused is HIV positive while the victim is HIV negative.[35] It may also be due to the fact that the issue of marriage is a civil matter and as such, it is incumbent upon an individual to file or not to file a suit against the person who has wronged her. The process of initiation may not be so different from

that in Tanzania. However, in Kenya and Rwanda, which have clear marriage laws, the prosecution process may be commenced upon violation of the law.

23. Additionally, CEFM cases are matters that involve the parents of the girl, the groom and his parents. As such they are categorised as private matters. The parents of the girl and those of the groom would negotiate the marriage of the girl and agree on a common position. Another contributing factor is that there are societal pressures not to expose private matters, with norms encouraging silence and subordination. Considering that the victims are young persons who depend upon their parents, they may not be capable of suing on their own. They will require the support and cooperation of their parents. Also, the parents might be ignorant about the law and the procedure to be applied in pursuing such cases. The high cost of engaging Counsel to institute a case, even where parents are knowledgeable is another setback. In the JBB, it is noted that '*many women, particularly those in rural areas find Courts inaccessible due to a number of reasons including financial cost, complexity of procedures. Also, women and girls govern their lives by informal norms, practices and institutions that apply customary norms to issues of VAW and girls*.'[36] In order to overcome some of the hurdles, in some countries efforts have been made by the Law Reform bodies.[37]

Creation of a victim-centred Court[38]

24. It is expected that judicial officers, in handling any case relating to CEFM, will apply creativity to promote access to justice by ensuring accessibility, appropriateness, equity, efficiency and effectiveness.[39] In addition, judicial officers are expected to take into account the vulnerability of victims and witnesses. Judicial officers are encouraged to ensure that at all stages of court proceedings, the following rights and guarantees for each victim are applied to the extent provided by law in their jurisdiction. These include 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 his or her rights (delivery of the judgement and damage compensation, i.e. filing a property claim);
    (d) have the child's identity protected from the media, in accordance with relevant legislation and practice;

(e) be protected from 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 acts of violence;

(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 the victim may avoid being questioned in the same room

25. Also during court proceedings, judicial officers are encouraged to take extra protective measures to make the courtroom environment user friendly and do the following:

(a) Inform both the victim and the accused of their rights.

(b) Handle bail applications by balancing the vulnerability of the victim and prosecutor's version of events[40]

(c) Set conditions for bail during such as non-molestation orders, contact with children.[41]

(d) Consider special protection orders such as giving evidence by live TV link from a room outside the courtroom, giving evidence in camera; use of video recorded interviews to the extent permitted by due process.[42]

(e) Where necessary appoint an intermediary in the interests of justice[43]

(f) Take cognisance of the fact that corroboration requirements may be dispensed with in such cases in line with the constitution and also in accordance with the best practices internationally.

(g) Vary protection orders for sound reasons.

(h) Permit the use of recorded statements as evidence in chief or part of such evidence.

(i) Hold special sittings to examine vulnerable witnesses.[44]

(j) Allow arrangements for accused persons to hear/observe examination of vulnerable witness and ensure that the accused person can communicate with court during examination.

(k) Control cross examination by paying attention to the views of witnesses, nature of questions put to them, accused's conduct towards the witness during proceedings and nature of relationship between witness and accused.

(l) Judges may consider victim and witness vulnerabilities and needs when determining lengths of adjournments.

(m) Use in camera proceedings to protect the identity of the witness or avoid intimidation.[45]

(n) Use specialised gender responsive courts – e.g. Mobile Domestic Violence and Family Courts.

(o) Use of a psychologist or other expert to assist the victim during testimony; and provide adequate support services – depending on the court's organisational capacities so that the victim is afforded both physical and psychological support as well as provision of care and referral as needed afterwards.[46]

26. Further during trial, it is incumbent upon judicial officers to exercise procedural fairness. They should be mindful of ensuring fairness to victims of sexual violence whilst at the same time balancing the due process rights of the accused.[47] Also the judicial supervisory considerations presented in the JBB are pertinent.[48] The judicial officers are encouraged to creatively explore ways of dealing with evidence which requires corroboration.[49] At the sentencing stage, the procedural considerations on judgement and sentencing found in the JBB will be applicable.[50]

Efforts outside the Courtroom[51]

27. The role of judicial officers to address VAW is not confined to the courtroom. They can take part in creating awareness of the adverse effects of violence and in sensitising women and the community in general, of women's rights and the consequences of violence on the lives of women and children.

28. 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.[52]

29. The judicial officers should engage in extrajudicial efforts to address CEFM. Some potential options include:

(a) Participate in cross-sectoral exchange with relevant actors including GBV/Child protection service providers, social workers, police, and prosecutors to establish clear SOPs and referral pathways regarding law, evidence collection and

requirements, psychosocial and physical support/protection in GBV and children's rights cases, including CEFM;

(b) Improve witness protection/safe shelter options and referral mechanisms;

(c) Engage in community outreach strategies concerning CEFM with traditional leaders, grassroots groups, schools and other entities; and

(d) Enhance the role of judicial officers as role models and champions for girl-education and safe environments.

VI. LEGAL INSTRUMENTS AND LAWS AT INTERNATIONAL, REGIONAL AND NATIONAL LEVELS

International and Regional Laws

30. CEFM is directly or indirectly addressed in several international human rights conventions and declarations. These legal instruments include, at international level: the *Universal Declaration of Human Rights*; *International Covenant on Civil and Political Rights (1966)*; *International Covenant on Economic, Social and Cultural Rights (1966)*; *Convention on the Elimination of Discrimination Against Women (CEDAW)*; *Convention on the Rights of the Child (CRC) (1989)*; *Convention to Suppress Slavery and the Slave Trade (1926)* and *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)*; and the *Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)*. At the regional level the legislative instruments include: *African (Banjul) Charter on Human and People's Rights (1981)*; *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2005)*; *African Charter on the Rights and Welfare of the Child (1990)*; *African Youth Charter (2006)*; and the *Kigali Declaration (2013)*.

31. For the purposes of this paper, focus is on the following international laws: *CEDAW*, and the *Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)*; and the following regional laws: The *African Charter on the Rights and Welfare of the Child (1990)*, *African Youth Charter (2006)*, and *Kigali Declaration (2013)*.

32. The CEDAW adopted in 1979 was a landmark legal instrument of international human rights laws ensuring the added protection of women. Within CEDAW, the following provisions specifically

address aspects of CEFM: Article 16 – *The same right to freely choose a spouse and to enter into marriage only with their free and full consent*[53] and *The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage.*[54]

33. The *Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage* adopted in 1962 plays an extremely important role because it codifies into international law provisions addressing forced marriage (within East Africa, Rwanda is the only State to have ratified the convention). Article 1 of the convention states – *No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.*[55]
34. The *African Charter on the Rights and Welfare of the Child (1990)* is considered the regional extension of the CRC and plays an important role within the CEFM discourse as it codifies specific rights of a child. The following provisions have been selected as they relate directly to the issues discussed in the paper in regards to manifestations and hidden challenges. The convention in Article 2 begins with the definition of a child – *a child means every human being below the age of 18 years.*[56] Article 16 protects the child from all forms of child abuse and torture whereby it calls upon states to – *take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.*[57]
35. Seen as one of the most important articles in the convention, in relation to CEFM is Article 21 which grants protection against harmful social and cultural practices. The article states – *Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: those customs and practices prejudicial to the health or life of the child;*[58] and *those customs and practices discriminatory to the child on the grounds of sex or other status.*[59]
36. Two major initiatives in the fight to end CEFM were launched in Africa and amongst the Commonwealth member countries. The first, known as the African Youth Charter, was adopted in 2006 and provides that – *young men and women of full age who enter*

into marriage shall do so based on their free consent.[60] The latter, known as the *Kigali Declaration* was adopted in 2013 and aims to prevent and end child marriage by providing Commonwealth national human rights institutions with a comprehensive framework.[61] In addition, the *Kigali Declaration* includes a list of seventeen commitments to be pursued by Commonwealth national human rights institutions, some of which include but are not limited to: *advocating for legal reform including bringing the age of marriage in line with international standards and strengthening systems for the registration of marriages and births.*[62]

National Constitutions and Protective Laws

37. Considering that the applicable laws for each country differ, a summation of the laws from each jurisdiction will follow juxtaposed with a summary of the relevant case law on CEFM and if none exists, case law from other jurisdictions will be considered.

Kenya

38. The *Constitution of Kenya* recognises that 'every adult has the right to marry a person of the opposite sex, based on the free consent of the parties' and also provides for equality for all before the law. Kenya has made significant steps in addressing CEFM by enacting several laws, including the *Marriage Act of 2014*, a uniform law to govern celebration of marriages across all religious and cultural divides. Section 4 of the Act sets 18 years as the minimum age to marry for all women, violation of which carries an imprisonment term not exceeding 5 years or a fine not exceeding 1 million Kenya shillings or both. The Act is progressive, and under section 11, a union is void where at least one of the parties is underage, or where consent was not freely given.
39. Another Act of significance is the *Protection against Domestic Violence Act No. 2 of 2015* which recognises child marriage, forced marriage, wife inheritance and FGM as forms of domestic violence and provides for protection orders and other measures for victims. Police officers who receive or investigate complaints of domestic violence have various duties which include advising victims on access to shelter, medical examination and right to lodge a criminal complaint.[63] In *C.K. (A child) & 11 others vs. COP& 2 others* the Police were condemned for culpable systematic violence and it was held that while the perpetrators of harm on the

victims were directly responsible, the respondents could not escape responsibility as their failure to ensure effective investigation and prosecution of the perpetrators had created a climate of impunity in which perpetrators knew that they could defile more children. A person who believes that domestic violence is being committed is required to report the offence to authorities. Court may, upon application, grant a protection order to a person who is facing domestic violence. A person who suffers personal injuries or other loss may apply to court for compensation.

40. FGM is also prohibited under the *Prohibition of Female Genital Mutilation Act 2011*. Kenya has also enacted laws that incriminate concealment of FGM; this was enforced in *S M G & R A M v. Republic (Criminal Appeal No. 66 of 2014)229*.

41. Other laws include the *Sexual Offences Act* which punishes sexual acts with children below 18 years of age. Defilement of a child below 11 years attracts a sentence of life imprisonment, while the sentence for conviction of defilement of a child of 12-15 years attracts a sentence of twenty years. In the case of defilement of a child aged 16-18 years, the sentence meted out is fifteen years' imprisonment. A person who commits attempted defilement is liable to a term of imprisonment of no less than 10 years. Section 8 (6) of the *Sexual Offences Act* avails an accused person with a defence. In the aforementioned section, if it is proved that the accused took diligent steps but failed to find out the actual age of a child, then such an accused would not be guilty of defilement. This was illustrated in *Martin Charo vs. Republic [2016] eKLR*. The trial court convicted the appellant and sentenced him to serve twenty years in prison. The girl's testimony was that she had opted to dodge her brothers after going to the beach and sneaked into the appellant's house with the only motive being to have sex and go back home. On appeal, the conviction was quashed. The Judge also stated that the appellant should not be condemned for the voluntary acts of the complainant as she was enjoying the sex relationship. Consequently, the appellant was set free.

42. *The Children Act 2001* provides a framework for child protection and recognises the rights and best interests of the child. A child has a right to live and be cared for by its parents, and to be protected from sexual exploitation. Further 'no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.'

43. *The Counter-Trafficking in Persons Act (2010)* defines exploitation to include slavery, forced labour, sexual exploitation, child marriage, and forced marriage. Trafficking in persons is committed when a person aims to exploit by coercion, fraud, deception, abuse of power, or bribery.

Rwanda

44. In Rwanda, the laws on CEFM comprehensively protects the rights of the child. Rwanda has ratified almost all international conventions relating to the promotion and protection of child rights including the *UN Convention on the Rights of the Child (CRC)* and its additional protocols, the Convention on the protection of children and cooperation in respect of inter country adoption, as well as the *African Charter of the Rights and Welfare of the Child (ACRWC)*. Article 34 of the CRC specifically obligates governments to protect children from sexual abuse while article 35 of the same speaks against child abduction. Rwanda submitted to the Committee on the Rights of Children overdue reports on the implementation of CRC protocols; the report on the implementation of ACRWC was submitted to the concerned Committee of Experts.

45. The *Constitution of the Republic of Rwanda of 2003 revised in 2015*, in Article 17 provides that no one can be married without his or her free and full consent. This provision is in tandem with Article 16(2) of the *Universal Declaration of Human Rights* which strictly states that marriage shall be entered into only with the free and full consent of the intending spouses.

46. *The Organic Law instituting the Penal Code (OLPC)* in Article 275 prohibits forcing a person to marry or not to marry a person of his or her choice. Article 274 prohibits kidnapping or confinement of a person with intent to live together as husband and wife. Article 194 prohibits living with or attempts to live together with a child as husband and wife, and a person who commits this offence is liable to life imprisonment. This article also makes it an offence to live with or attempt to live with a person, as husband or wife who has attained eighteen years of age but is below twenty years of age. In effect, the minimum age of marriage is 21 years. Furthermore, any person who plays a role in early or forced marriage of a minor is liable to a term of imprisonment of six months, according to Article 195 of the *Organic Law instituting the Penal Code*.

47. The *1988 Civil Code* contains provisions related to marriage. The age of consent to marry for both men and women is 21

years. Where the challenge is based on the fact that either or both spouses were not of age at the time of the marriage, such a challenge can be brought by the spouses, by any interested party, or by the *Ministère Public*. Under Art. 165(1) and (2) of the OLPC, a pregnancy resulting from forced marriage or rape can be terminated.

48. Formerly, Article 47 of the Law 27 of 2001 relating to the *Rights and Protection of the Child against Violence* defined 'forced marriage' as any marriage of a boy or girl of less than 21 years of age, and without his or her consent while 'child marriage' is 'any conjugal living-together of a boy and a girl where one of the two or both of them are below the age provided for [in the Code Civil].' Articles 48 and 49 of the law of 2001 relating to the rights and protection of the child were repealed by the *law N° 54/2011 of 14/12/2011 on the Rights and Protection of the Child*, which is in force today. Unfortunately, the new law does not define 'forced marriage.' The shortfall of the new law in this regard is not as fatal as the gap is covered by similar provisions in Articles 194 and 195 of the OLPC. Under Article 197 concerning the penalty for rape on a person aged eighteen (18) years or above, the Penal Code stipulates that any person who rapes a person aged eighteen (18) years or above shall be liable to a term of imprisonment of more than five (5) years to seven (7) years. If rape results in the death of the victim, the offender shall be liable to life imprisonment.

49. In Article 198, the law defines 'marital rape' as any act of sexual intercourse committed by one spouse on the other by violence, threat or trickery. The penalty for 'marital rape' is found in Article 199, where is provided that such a person shall be liable to a term of imprisonment of at least two (2) months but less than six (6) months and a fine of one hundred thousand (100,000) to three hundred thousand (300,000) Rwandan francs or one of these penalties. If 'marital rape' results in an ordinary disease, the offender shall be liable to a term of imprisonment of six (6) months to two (2) years. On the other hand, should 'marital rape' result in an incurable illness, the offender shall be liable to a term of imprisonment of more than five (5) years to ten (10) years. Where 'marital rape' results in the death of the victim, the offender shall be liable to life imprisonment. Interestingly, under Article 200: prosecution of 'marital rape' is instituted only upon complaint of the offended spouse but he or she may, at any stage of the procedure, apply for the termination of the prosecution, when he/she withdraws his/her complaint. The offended spouse may

also demand that the execution of the judgement be terminated in the best interest of the family.

50. Rape is a crime under Article 360 of the 1977 *Penal Code*, and is punishable by five to ten years' imprisonment.

Tanzania

51. According to section 13 of the *Constitution of Tanzania*, all people are equal before the law. However, the Constitution is silent about the age of marriage. Tanzania recognises three types of laws which govern marriages including customary law, civil law and religious law. Section 13 (1) of the *Law of Marriage Act, (LMA) 1971* sets the minimum age for marriage at 18 years for men and 15 years for women. The LMA allows the court to grant permission in special circumstances for a marriage where the parties are below the prescribed ages but have attained at least 14 years of age.[64] Under section 17, a female who has not attained the apparent age of eighteen years must seek consent from her father; if he is dead, then her mother; or if both are dead then from her guardian. No consent is required if all those persons are dead.[65] Where court is satisfied that consent has been unreasonably withheld, or is impracticable to obtain, it may, on application give such consent.[66] Recently, the High Court of Tanzania declared sections 13 and 17 of the LMA unconstitutional[67] on grounds that the sections contravene the right to equality and the right against discrimination provided for under articles 12, 13 and 18 of the *Constitution of the Republic of Tanzania*.[68] The Petitioner, Rebecca Gyumi, filed an application under Article 26 (1) (2) and 30 (3) of the *Constitution of Tanzania* challenging the constitutionality of sections 13 and 17 of the *Law of Marriage Act*. In their finding, their Lordships associated themselves with the *Loveness Mudzuru* decision and noted that the requirement of parental consent impacts negatively on the child and subjects her to complex matrimonial and conjugal obligations. The Court also found that the right to equality was negated because of the differential treatment given to boys and girls on the minimum age of marriage and parental consent. The Court noted that the provisions had 'horrific, social and health impact to the child' and declared these provisions unconstitutional. The Court also noted that a defence under section 130 (2) (e) of the SOSPA that a child was a wife of the accused person could not stand.

52. Furthermore, under the LMA, marriages are void if either party is below the minimum age and leave has not been granted.[69] In

Section 16 of the LMA, provision is made for free and voluntary consent of the parties to a marriage.

53. It is noteworthy that recognition of the application of customary law under the *Judicature and Application of Laws Act*[70] and the *Local Customary Law (Declaration) Order*, GN 279 of 1963 allows communities to apply customs and traditions which may promote practices such as early marriage. In *Leonard Jonathan vs. Republic*,[71] the case involved an adult woman but it is cited to underscore traditional customary practices (Chagga customary norms) which perpetuate VAWG, kidnapping, forced marriage and the role of the judiciary and application of international standards. The appellant and three others were jointly charged with rape contrary to section 130 (2) and 131 (3) of the *Penal Code as amended by the SOSPA*. The appellant was alleged to have had carnal knowledge of the victim without her consent. The appellant admitted that he kidnapped the victim, took her to his house and had sexual intercourse with her. He told the court that he loved the victim but since he had no money for a church wedding, he pursued her under Chagga custom which permitted forceful sexual intercourse. The appellant was convicted and sentenced to 30 years in prison. The High Court found that the defence of contracting a Chagga customary law marriage was improbable and fallacious in fact and law. This case also highlighted the right to marry with full consent provided for under article 16 of CEDAW and article 23 of the ICCPR.

54. *The Law of the Child Act, of 2009*, while silent on child marriages, recognises that a child is a human being less than 18 years.[72] The Act recognises the rights and principles relating to the child, including the right to live free from discrimination on the basis of gender, age or custom.[73] The Act also requires parents to register child births at the office of the Registrar General.[74] Children may not be denied the right to live with their parents[75] and are not to be exposed to sexual exploitation.[76] A court may, upon application by a social welfare officer, issue a care order where there is a likelihood that a child is suffering from significant harm.[77] Members of the community who have evidence that a child's rights are being infringed upon have a duty to report the matter to the local government authority in the area. The social welfare officer, will upon receiving this report summon the person against whom the report was made to discuss the matter, after which a decision in the best interests of the child will be made.[78]

55. The *Penal Code of Tanzania* prohibits the abduction of a woman with intent to marry, an offence which is punishable with imprisonment of seven years.[79] Another law, the *Sexual Offences Special Provision Act (SOSPA) of 1998* criminalises rape, defilement, and sexual exploitation of children.[80] Rape is punishable by no less than thirty years in prison, with corporal punishment, a fine and restitution[81] while attempted rape is punishable by a range of ten years in prison to life in prison.[82] Sexual exploitation of children is punishable by five to twenty years in prison.[83] The Act also prohibits various acts of cruelty against children, including FGM.[84] However, the SOSPA provides that a man does not commit rape if the woman is his wife, and is below 18 years, but above 15 years, and is not separated from the man.[85] Recent reforms include the *Education Act*, Section 60 which has been amended by the *Written Laws (Miscellaneous Amendment) Act No. 2 of 2016* to the effect that anyone who marries a primary or secondary school girl or school boy is liable to thirty years imprisonment. In addition, the same new provision 60A stipulates that anyone who makes a primary or secondary school girl pregnant is liable to thirty years' imprisonment.
56. There are significant challenges relating to legal pluralism and contradictions in different statutory laws which need to be addressed in order to prevent CEFM. As already mentioned, Tanzania recognises three types of laws which govern marriages. Applying different types of laws to marriages allows for promotion of certain practices which may drive early and forced marriages. Disharmony in the country's laws has also given rise to various legal contradictions.

Uganda

57. *The Constitution of the Republic of Uganda* stipulates the age at which one can enter into marriage, which is at 18 years. Article 31(1) of the *Constitution of Uganda*, 1995 establishes the minimum age required for marriage at 18 years thereby providing a uniform minimum for both men and women. The article further provides for free consent of the man and woman to enter into marriage.[86] Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.[87] Just like India, in Uganda a child cannot consent to marriage. This was well explained in *Singh V. Singh 67 Misc.2d 878 (1971)*. Article 33(6) prohibits laws, cultures, customs or traditions which

are against the dignity, welfare or interest of women or which undermine their status. Other protective provisions are contained in Articles 20, 21, 24, 33, 34 and 50 of the Constitution.

58. The Constitution operates alongside marriage laws in Uganda. *The Marriage Act of 1904* sets 21 years as the age of consent for marriage but allows for marriages below that age with the written consent of the father, or if he is dead, absent or of unsound mind, then the mother. Where both are dead, then consent can be sought from guardians. *The Marriage and Divorce of Mohammedans Act of 1906* makes no mention of the age of consent while the *Hindu Marriage and Divorce Act of 1961*[88] and the *Customary Marriages (Registration) Act 1973*[89] provide for the age of consent at 16 years for girls and 18 years for boys. The latter act voids marriages where parties have not attained the prescribed age of marriage. Still under the *Customary Marriages Registration Act*, if the married party is under 21, consent of the father or the mother is required.[90] While these provisions have been outlawed by the Constitution, they still exist on Uganda's law books and may cause contradictions or hinder effective implementation of the laws targeting CEFM.

59. *The Penal Code (amendment) Act, 2007*, criminalises sexual acts with another person below the age of 18 years. Unlawful and indecent assaults are punishable by fourteen years in prison, with or without corporal punishment. If the victim is a minor, ignorance of age is no defence.[91] Sex with a female child is punishable by death while attempted sex with a female child is punishable by eighteen years in prison.[92] Knowledge of the age of the female is immaterial 'except as otherwise expressly stated.'[93]

60. A sentence of life imprisonment[94] or death will be imposed if the offence of defilement is committed with a child below 14 years, or by a person in authority, a parent or guardian, where the victim is disabled, or is infected with HIV/AIDS.[95] In *Uganda vs. Ssekatawa Yokana Kazibwe HCCS No. 092 of 2016,* the accused person, being the biological father of the complainant, a girl aged 13 years, was found guilty of aggravated defilement and sentenced to life imprisonment. *The Children (Amendment) Act 2016* provides a framework for protection of children. The Act defines a child as one below 18 years.[96] It introduces new rights including the right of a child to registration after birth.[97] Children are also protected against social and customary practices, such as CEFM, that are harmful to their health.[98] Any person who exposes a child to such practices commits an offence and is liable to imprisonment of

seven years or a fine.[99] Section 42A creates a protective framework of children from all forms of violence including child marriage and FGM. It establishes child protection organisations or authorities[100] which receive complaints of child abuse or imminent danger, or circumstances where the child may be in need of protection or care.[101] Protection of children also involves protection of child victims in child marriages. This was manifested in *Madley & Madley and Anor [2011] Fmca Fam 1007,* in which parents made arrangements for the child to marry a person whom, on her evidence, she had met on one occasion. The wedding was planned to take place within two weeks' time and would involve this child flying from Australia to Lebanon for the purpose of that marriage occurring. The court intervened and held that it was required to consider the need to protect the child from physical or psychological harm in circumstances whereby the child is being forced to marry, a principle that would render the marriage void under Australian law, as it is devoid of genuine consent.

61. The section makes it mandatory for a medical practitioner, social worker or teacher to report any matter which may affect the wellbeing of the child under their charge.[102] Under section 37, the Probation and Social Welfare Officer or Police or authorised person believing that a child is in a harmful situation may remove the child from emergency protection for a maximum period of 48 hours and inform the Secretary of Children's Affairs in writing before doing so. In sections 38 and 39, the child's parent or guardian with parental responsibility may apply to vary or stop the protection order. The community also has a duty to report to the Local Council any abuse of rights or neglect to provide, inter alia, education.[103] Practitioners may also look to the rights of the child and the guiding principles on the welfare of children provided under the Act.

62. Uganda also enacted other laws which could be useful in preventing CEFM. *The Prohibition of the Female Genital Mutilation Act, 2010* criminalises FGM[104] while the *Prevention of Trafficking Act of 2009* notes that the recruitment and transportation of persons for purposes of child marriage or forced marriage constitutes trafficking and is punishable by fifteen years in prison.[105] Trafficking in persons also includes, among other things, abusing power or vulnerability to exercise control over another person, for the purposes of exploitation.[106]

63. Aggravated trafficking in persons covers exploitation of children by parents and close relatives, including situations

where adoption/guardianship is undertaken for the purposes of exploitation; and is punishable by life in prison.[107] Trafficking in children covers acts under section 3 that involve children.[108]

64. Uganda, like Tanzania, is faced with the challenge of legal pluralism in relation to the laws governing marriage yet the *Marriage and Divorce Bill of 2009*, a law intended to govern all marriages has been and it is still pending before the parliament.[109] The danger of such pluralism was manifested in an Indian case, *Court on Its Own Motion (Lajja Devi) Vs. State, Smt. Laxmi Devi and another vs. State Maha Dev V. State, Devender @ Babli vs. State*. In this case, Court found that although there were several laws on marriages, the *Prohibition of Child Marriage Act 2006* contained loopholes which made child marriages voidable and not void.

I. POLICY INTERVENTIONS

National Action Plans

65. In Tanzania, the National Action Plan for the Prevention and Eradication of Violence against Women and Children ('National Action Plan'), 2001-2015, highlights several problem areas in the eradication of violence against women. Challenges include the existence of discriminatory legislation against women and children, legal illiteracy and poorly disseminated laws including the SOSPA; discrimination against women and children as a result of cultural norms, traditional practices and other factors in the social, economic and political spheres; and inadequacy of existing legal and paralegal systems to help victims and survivors of violence. The National Action Plan calls for the amendment of laws that affect and discriminate women and children's rights, including the Marriage Act of 1971. It calls for the minimum age of marriage to be increased to 18 years for women; the need to introduce a gender function into the existing legal and administrative mechanisms in order to address issues of women and children; and to amend laws and ensure the protection and removal of all forms of discrimination against and empowerment of women; and the need to create awareness about the impact of early marriage. It also highlights the need to build capacity of grassroots women and men on eradication of traditional norms, religious beliefs, practices and stereotypes; and the need for increasing gender awareness on violence against women. The new Education and Training Policy makes provisions for readmissions of girls to school after they have given birth.

66. In the case of Uganda, the National Strategy to end Child Marriage and Teenage Pregnancy (NSCM & TP) 2014/2015-2019/2020, a joint effort between the government of Uganda and UNICEF, highlights the need for amendment and consolidation of marriage laws. It also notes that the 'current widespread resistance to reforms in marriage laws proposed by the Marriage and Divorce Bill tabled in the 9th parliament underscores the deeply entrenched social norms and expectations of marriage, as well as male bias.'[110] It notes that there are poor or no structures to enable victims of early marriage to access legal redress or other forms of arbitration.[111] The NSCM & TP proposes several strategies including improvement of the legal and policy environment by reviewing, promoting and implementing government policies and laws; and also sensitising communities about the available laws. Other proposed strategies include the increased access to quality, education and reproductive health services; empowerment of girls and boys with comprehensive and appropriate information on life skills; and changing communities' mind-sets, knowledge aspirations, behaviours and social norms.

67. The Gender in Education Policy of the Ministry of Education, Science Technology and Sports (2009), Uganda, commits to ensure that girls who drop out of school due to early marriage and pregnancies are able to attend school again while the National Adolescent Reproductive Health Policy (2004) seeks to review existing legal and social barriers to access to health services; to protect adolescents against harmful practices and to promote the provision of sexual and reproductive health.

II. CONCLUSION

(g)

68. Many developing countries, including those in East Africa, face significant economic, political and resource constraints which prevent the enforcement of laws prohibiting child marriage. This is especially the case in rural and remote areas where government and justice institutions are often a distant presence. Failure to enforce legislation consistently or to impose penalties, combined with a lack of community awareness of laws which prohibit child marriage, means that many parents who arrange child marriages for their daughters do not realise they are breaking the law.[112] 'Girls have the right under the human rights system to freely consent to marriage; a right to education and to sexual

and reproductive rights. Ultimately, States are accountable for the harms that married girls experience as a result of this denial.'[113]

VII. RECOMMENDATIONS

69. In order for Kenya, Rwanda, Tanzania and Uganda to enhance the capacity of to address CEFM in their respective judiciaries, a number of reforms have to be put in place. Where such measures have already been instituted, there is a need to strengthen them.

I. Legislative Measures and Judicial Intervention

Legislative Measures

70. States which lack such legislation are encouraged to set the Minimum age of marriage to 18 years with no exceptions such as with parental consent or court's authorisation.

71. States should adopt model law, as seen with the Model Law on Access to Information in Africa,[114] and it be developed on a regional level for governments to set standards on how to address CEFM on a legal level.[115] Although model law is seen as 'soft law' it would still help create a set of standards that states could adopt. It has been stated that even if model law is not domesticated it can be used for advocacy purposes and/or enabling civil society to hold government accountable. In addition, the drafting of a model law addressing child marriage could: *'provide guidance, promote human rights and bring about commonality of approaches'*.[116]

72. States to ensure that the legislation criminalises child marriage and provide for clear sanctions, including the provision of a minimum sentence for those who will be convicted of CEFM offences.[117]

73. States to harmonise laws and policies including personal laws and laws on domestic and sexual violence including marital rape, reproductive health, marriage and birth registration, education, property and citizenship, and dowry with human rights standards and constitutional guarantees to ensure a minimum legal age of marriage of 18 years and to address gaps and inconsistencies that leave girls vulnerable to child marriage and limit married girls' access to legal remedies.

74. States to urgently enact, condense and enforce laws and policies relating to child marriage to effectively prevent child marriage and ensure women and girls who seek to leave child marriages can

benefit from existing policies and programmes that provide legal remedies for survivors of VAWG, including safe housing, legal support, access to sexual and reproductive health counselling and services, vocational training, and readmission to school.

75. States to recognise the practice of child marriage as a human rights violation through legislation as other jurisdictions have done such as the United States Senate promulgating the *International Protecting Girls by Preventing Child Marriage Act*.[118]

Judicial Intervention

77. Enhance and encourage judicial officers to take leadership roles outside the courts of law through: advocacy; mentorship; participation as good citizens by becoming role models in communities and making an impact in their own community's social organisations/associations, among others.
78. Ensure the enforcement and implementation of judicial decisions and remedies obtained by girls harmed by child marriage to enforce their legal rights and due protection.
79. The judicial officers are implored and encouraged:
    1. To give full effect of the Bangalore Principles by making reference to International Conventions and Treaties.
    2. To embrace the notion of *persuasive authority* and exercise judicial creativity and judicial activism as they adjudicate on CEFM.
    3. To enhance their roles in court by embracing 'out of the box' methods outside the Courtroom e.g. through advocacy, mentorship; personal efforts in their immediate communities or social organisations (Churches, Rotary, School Boards etc.) which further expose them to the psycho-social aspects of VAWG and equip them to better adjudicate over the cases.

II. Policies, Action Plans and Coordination Mechanisms

80. States to establish institutional framework and enforcement mechanisms such as specialised Children's Courts, and Child Protection Police Units. Institutions such as National Human Rights Institutions, the Office of an Ombudsperson for Children, National Commission for Children, responsible for coordinating the implementation of children's rights must also be established and operational. Additionally, conscientious efforts should be made to stop secondary trauma both outside and inside the Courtroom.[119]

81. States to conduct further research into the prevalence, causes and consequences of child marriage and endeavour to have disaggregated data. This could be further enhanced by establishing, at national level, an EAC Data Collection Centre on CEFM in readiness to compile such disaggregated data.
82. Implement the 2015 CHOGM Communiqué, which includes a commitment to tackle early and forced marriage, including a pledge to develop a Plan of Action to end child marriage in the Commonwealth.[120]
83. Conduct monitoring and evaluation of laws and policies relating to child marriage, including prosecutions where the law is violated, prosecution of offenders; implementation of judicial decisions, and remedies received by women and girls harmed by child marriage to ensure that the legal rights of women and girls are duly protected.
84. Adequate training to be given to judicial officers to enhance capacity to ably adjudicate CEFM cases.
85. States to ensure cooperation with regional and global efforts, and take concerted actions at the national level in order to develop and implement holistic, comprehensive and coordinated responses to address this issue, including those aimed at the eradication of poverty, and protecting girls' and women's right to education.[121]
86. Ensure compliance with the laws on CEFM through the establishment of enforcement and monitoring mechanisms which will report to a Central Monitoring and Evaluation Unit, most preferably set up at the relevant Ministry.
87. Establish effective birth and marriage registration systems.

III. Engagement of Religious and Traditional Leaders and Service Providers

88. States to run media campaigns encouraging religious, village and traditional leaders and parents to devise strategies to prevent child marriages.
89. States to employ a participatory approach to the solution of CEFM by involving teachers, health workers, law enforcement and judicial officials and social workers in State programmes which provide support to women and girls who are already married.

IV. Protection Measures

90. States be encouraged to establish a strong holistic child protection system that incorporates interventions in the 'education with

incentives',[122] health and social protection sectors to tackle child marriage.[123]

91. States to adhere to their commitment to international standards on the rights of the child through accountability to treaty bodies; submission of reports explaining measures put in place to prevent child marriage and protect children.

V. Education and Empowerment of Girls and Women

92. Recognising the risks of early, frequent, and forced pregnancy linked to child marriage, Nations to ensure that married girls have access to reproductive health care services and information tailored to their needs[124] and situation, including comprehensive sexuality education, contraceptive information and services, safe abortion, and maternal health care.

93. States to ensure adequate allocation of financial resources to implement laws/policies/programmes and ensure girls' access to legal remedies, including any related support needed to help them survive independently and rebuild their lives.

APPENDIX

CASE LAW

African Case Law

I. *Loveness Mudzuru (2) Ruvimbo Tsopodzi vs. (1) Minister of Justice, Legal & Parliamentary Affairs N.O (2) Minister of Women's Affairs, Gender & Community Development, (3) Attorney General of Zimbabwe*

Summary

In this case, an application was brought by two former child brides, Loveness Mudzuru and Ruvimbo Tsopodzi who according to their Affidavits were 16 and 15 years, respectively, when they were married. Their affidavits recount their experiences, narratives which depicted all too vividly the cycle of child marriage, poverty and domestic violence.

Issues and Resolution

On presentation of this application, the two applicants were young women of 19 and 18 years respectively. They sought a declaratory order;

(a) That under the Constitution of Zimbabwe, no one whether boy or girl may enter into a marriage, including an unregistered customary law union, before attaining the age of 18 years.

(b) That Section 18 of the *Marriage Act* was unconstitutional to the extent that it allowed for marriages of people below the age of 18 years.

(c) That the *Customary Marriages Act* (chapter 5:17) was unconstitutional to the extent that it did not provide for a minimum age of 18 years in respect of any marriage conducted under the same.

After hearing the submission of the parties, the Constitutional Court made the following finding and orders; -

(a) That Section 78 (1) of the Constitution of the Republic of Zimbabwe Amendment (NO.20) 2013 sets eighteen years as the minimum age of marriage in Zimbabwe.

(b) that section 22(1) of the *Marriage Act* (Chapter 5:11) or any other law, or custom authorising a person under eighteen years of age to marry or to be married is inconsistent to the provisions of section 78 (1) of the Constitution and therefore invalid to the extent of the inconsistency.

(c) That with effect from 20 January 2016, no person male, or female, could enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years.

The court struck down Section 18 of the *Marriage Act* which allowed girls to marry at 16 and boys at 18. The ruling outlined the 'horrific consequences' of child marriage and said there had long been a '*lack of common social consciousness*' on the problems faced by girls who marry early.

Contribution to jurisprudence

The effect of this ruling upon child marriages in Zimbabwe is that child marriages have been abolished in Zimbabwe. The case defines 'child' pursuant to Article 81 of the Constitution to mean a girl or a boy under the age of eighteen years. Therefore, no child i.e. a boy or a girl under the age of eighteen years, has the capacity to enter into a valid marriage in Zimbabwe. Another outstanding effect of the Ruling is that Section 22(1) of the *Marriage Act* which provided that a girl who attained the age of sixteen years could get married and that a boy under eighteen years and a girl under the age of sixteen years could get married with the consent of the Minister of Justice, Legal and Parliamentary Affair is no longer part of the law. Whilst in the past there was no age limit in respect of customary law unions and marriages, now there is an age limit in respect of such customary law unions and marriages. The age limit is now definitely eighteen years.

Additionally, a girl child who falls pregnant before the age of eighteen years remains the responsibility of her parents in that she will still be a child. It is also pertinent to note that pregnancy is no longer a basis for child marriages.

In this regard the Court said, '*A girl does not become an adult and therefore eligible for marriage because she has become pregnant…the pregnant girl is entitled to parental care and schooling just as any other child is entitled. This means that the parental obligation to care for and control the girl child does not cease because of her pregnancy*.'

Lastly, customary practices or customs as well as religious rites can no longer be used to justify child marriages. There is, however one setback and that is that, whereas child marriages have been outlawed, they are yet to be criminalised. This problem is still persisting in many jurisdictions in Africa and Asia.

II. *Rebecca Z. Gyumi vs. Attorney General, Miscellaneous Civil Cause No. 5 Of 2016*

Relevant aspects to CEFM; minimum age of marriage in Tanzania, discrimination in the minimum age for marriage, child marriages.

Summary

The Petitioner, through her Lawyer, filed an Originating Summons under Art. 26(1), (2; 30(3)) of the Constitution of the United Republic of Tanzania ('the Constitution'); Sections 4&5 of the *Basic Rights & Duties Enforcement Act, Cap 3 (Revised Edition 2002)*; Rule 4 of the *Basic Rights & Duties Enforcement (Practice & Procedure) Rules 2014*. She was challenging the constitutionality of the provisions of Sections 13 and17 of the *Law of the Marriage Act, Cap 29*. She sought declarations that the provisions of Ss. 13 and 17 of the *Law of the Marriage Act ('Marriage Act')* are unconstitutional as they contravene Articles 12, 13 & 18 of the Constitution 1977 as amended. Further that the provisions of the *Marriage Act* be declared null and void and be expunged from the Statute. Additionally, that 18 years should remain the minimum age of marriage until the Government of the United Republic of Tanzania amends the law.

Issues and resolution

The Petitioner contended that Ss. 13 and 17 of the *Marriage Act* provides for different ages of marriage for boys and girls. Moreover, they stipulate the need for the requisite parental consent, both of which contravene the right to equality under the Constitution. Also the provisions of Ss. 13(1) (2) of the *Marriage Act* allow a female person to get married at the age of 14 years yet

the boy can marry at 18 years. This is discriminatory and contravenes the anti-discrimination provisions of the Constitution. She also raised the ground that the provisions of S. 17 of the Marriage Act allow a child of 15 years of age to get married, if her father, mother, guardian or court consents, yet all human beings are equal so to let another person decide on behalf of another contravenes the right to equality and dignity of a person and is discriminatory. An additional ground was that S. 13(2) of the Marriage Act, which requires leave of Court for marriage of one who is aged 14 years, can be too vague and is wanton to arbitrary interpretation. As such, this might result in denial of children of their right to education, which is the cornerstone of the freedom of expression as stipulated in the Constitution. The girls' Advocate, Mr. Jebra Kambole, citing the Zimbabwean case of *Loveness Mudzuru and Another,* argued his case ably. In reply, the Attorney General vehemently denied the fact that there was any infringement on the children's rights. Judge Munisi decided in favour of the Petitioner and declared the said provisions null and void as prayed by the Petitioner and declared that the minimum age of marriage in Tanzania is 18 years for children of both sexes.

Contribution to jurisprudence

The necessity for a national jurisdiction to adhere to international standards relating to minimum age of marriage.

III. *MARTIN CHARO vs. REPUBLIC [2016] eKLR (In the High Court of Kenya)*

Relevant aspects to CEFM: wilful consent of a minor to sexual intercourse as a defence.

Summary

The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act. The particulars were that the appellant on diverse dates between 2nd December 2011 and 3rd January 2012 intentionally and unlawfully defiled E N a girl aged 13 years. The trial court convicted the appellant and sentenced him to serve twenty years in prison. The girl's testimony was that she had opted to dodge her brothers after going to the beach and sneaked into the appellant's house with the only motive being to have sex and go back home. When her brothers interfered, she opted to ran away to the appellant's parents' home where they continued to have sex for three days after which she decided to go home.

On Appeal, Justice S. Chitembwe based his finding on Section 8 (6) of the Sexual Offences Act and explained that the Appellant was not expected to

inquire from several people about the age of the complainant (PW1). That since the girl consistently had sexual intercourse with the Appellant, the relationship continued for quite a long time to the extent that age became a non-issue. The judge faulted the prosecution for not going to lengths to prove that the Appellant had not taken the necessary due diligence to find out that the complainant was below the age of 18 years. The judge also stated that the appellant should not be condemned for the voluntary acts of the complainant as she was enjoying the sex relationship. Consequently, the appellant was set free.

Contribution to jurisprudence

To illustrate the need for judges/judicial officers not to take motive into consideration but to try and ascertain the ages of the children involved. Also that the feelings of such children should not be countenanced considering their tender ages.

Commonwealth Case Law

IV. *M &M and Anor. [2011] Fmca fam. 1007 (Family Court of Australia)*

Relevant aspects to CEFM: Judicial creativity, forced marriages, role of Legal Aid in stopping CEFM, lack of consent, protection of victims.

Summary

Ms. M. was 16 years old when she asked Legal Aid NSW to help prevent her proposed marriage, which was planned to take place within two weeks in a country outside Australia to a person she had only met once. With the help of Legal Aid, Ms. M. made an application for ex parte orders to the Federal Magistrates Court of Australia. In her evidence she was insistent that she did not want to marry or travel overseas. She also gave evidence that she was fearful for her safety when her family became aware of the legal proceeding. The Court commended Legal Aid NSW 'for their prompt action and their efforts in accordance not only with their charter but with the spirit of the legislation [(the *Family Law Act 1975*)] to protect this young person's rights.' In making his orders, Federal Magistrate Harman observed, '*it is not the right of any parent to cause their child to be married against their will, whether in accordance with Australian law or otherwise*' The Court ordered that her parents be restrained from removing, attempting or causing her removal from Australia. Ms. M's passport was surrendered to the court and she was placed on the airport watch list.[125]

Contribution to jurisprudence

The promptness of action in accordance with the spirit of the legislation in order to ensure the protection of the rights of a young person.

V. *Court On Its Own Motion (Lajja Devi) Vs. State, Smt. Laxmi Devi And Another Vs. State Maha Dev V.State, Devender @ Babli Vs. State. (The High Court of Delhi at New Delhi)*

Relevant aspects to CEFM: loopholes in the law prohibiting child marriages, need to make child marriages void *ab initio*, validity of child marriages, custody of the minors.

Summary

This was a consolidated petition. In all scenarios, the girls being minors were found to have got married to men above 21 years of age, out of their own free will.

Issues and resolution

The questions that arose in each case was that of the validity of the marriage, and who was in the circumstances entitled to the custody of the minor girl. The larger bench went to the minutest detail to conclude that the object behind enacting the *Prohibition of Child Marriage Act* was to curb the menace of the prevalent child marriages. Court noted that indeed such marriages were illegal for several sociological and seemingly moral reasons. However, Court was dissatisfied that all the relevant laws contradict their illegalising clause by turning the disputed marriages voidable other than void *ab initio*. Section 3 of the PCM Act which relates to child marriages specifically states that a child marriage shall be voidable at the option of the contracting party to the marriage who was a minor at the time of contracting the marriage.

In conclusion, Court found that the PCM Act contains loopholes which make child marriages voidable and not void. (Not banned outright). As such, simply because the marriage is not void, it would automatically follow that the husband is entitled to the custody of the minor girl. However, the Court was of the view that the welfare principle in each case depending on the circumstances would be the best approach.

Contribution to jurisprudence

The illegality of child marriages due to several sociological and seemingly moral reasons and stipulating the standard that court will employ the welfare principle in each case depending on the circumstances.

VI. *Singh v. Singh 67 Misc.2d 878 (1971)*

Relevant aspects to CEFM: custom and child marriages.

Summary

This action was brought by the plaintiff to have his purported marriage to the Defendant declared null and void pursuant to section 5 of the *Hindu Marriage Act (Act. No. 25 of the Laws of India, 1955)*. The complaint and the evidence submitted all showed that the marriage was arranged by the respective parents of the plaintiff and the defendant without the consent of either of the parties and that certain ceremonies and rites customary and essential in marriages performed according to the Hindu Marriage Act were not observed. These ceremonies included the invocation before the sacred fire and the 'saptapadi' – that is, the taking of seven steps by the bride and bridegroom before the sacred fire. The defendant's failure to perform the saptapadi and to her present refusal to acknowledge herself the plaintiff's wife was because the defendant was in love with someone else and did not want to marry the plaintiff.

Resolution

Court held that this marriage was void *ab initio* due to the defendant's failure to perform the saptapadi – an essential element in the marriage rites

Contribution to jurisprudence

The yardstick for consent and meaning of duress in arranged marriages is provided.

VII. V's story

In 2010, the Department of Human Services (DHS) in Victoria received a report that 'V', then aged nearly 14, had ceased to attend school because she was about to be married. In response to the report, DHS interviewed V and applied to the Family Court for orders to prevent her from being taken out of Australia. V told the DHS child protection officer she was engaged to be married to her 17-year-old fiancé and she was going to travel overseas to meet him. V had not met her fiancé but had seen his photograph.[126]

Contribution to jurisprudence

The timely issuance of protection orders to prevent child marriages is important.

International Law Cases

VIII. *The Prosecutor V. Germain Katanga ICC-01/04-01/07-717 30 September 2008 (International Criminal Court at The Hague)*

Relevant aspects to CEFM: Recognition of abduction of civilian women, rape, sexual slavery, forcing women to become bush wives, cook and clean as amounting to forced marriage; protection of children from actively participating in hostilities; lessons from international criminal tribunals

Summary

Germain Katanga was a commander of the FRPI, an armed group in the Ituri Province of the DRC. Katanga was charged with the crime against humanity of sexual slavery and rape under article 7 (1) (g) of the *Rome Statute* (enslaving civilian female population of Bogoro); and sexual slavery and rape constituting a war crime under article 8 (2) (e) (vi) and article 8 (2) (b) (xxii) constituting a war crime in non-international and international armed conflicts respectively. Katanga was also charged with using children under the age of fifteen to actively participate in hostilities pursuant to article 8 (2) (b) (xxvi). The Prosecution alleged that Katanga was criminally responsible and committed the crimes jointly with other commanders of the FRPI and the FNI by agreeing to a common plan to wipe out Bogoro.

Issues and Resolution

In the Decision on the Confirmation of Charges, the Pre-Trial Chamber held that:

> *The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that civilian women were abducted from the village of Bogoro after the attack, imprisoned, forced into becoming the 'wives' of FNI/FRPI combatants, required to cook for and obey the orders of FNI or FPRI combatants.*[127]

The PTC noted that the sexual slavery could be described as a particular of enslavement and referred to the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 which recognises practices such as forced marriage as a form of slavery. In the view of the Chamber, sexual slavery includes situations where women and girls are forced into marriages to soldiers.[128] It also noted that there were substantial grounds to believe that a large number of the FNI/ FRPI combatants who participated in hostilities were under the age of fifteen, and were being used as body guards and escorts.[129]

When the judgement came, the Trial Chamber acquitted Germain Katanga of rape and sexual slavery as a crime against humanity and the war crimes

of using children under the age of fifteen years to participate actively in hostilities, sexual slavery and rape.

The Chamber noted that although there was evidence beyond reasonable doubt that the crimes of rape, sexual slavery and using children to actively participate in hostilities were committed, the evidence presented did not satisfy it beyond reasonable doubt that the accused was responsible for these crimes. It was noted that, in relation to the crime of using children to participate actively in hostilities, there were children within the militias and combatant who attacked Bogoro.[130]

Contribution to jurisprudence

The discussion of what constitutes sex slavery in international law will assist national jurisdictions when adjudicating on similar cases.

IX. *Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06 14 March 2012 (International Criminal Court at The Hague)*

Relevant aspects to CEFM: protection of children from actively participating in hostilities; lessons from international criminal tribunals

Summary

Thomas Lubanga Dyilo was the President of UPC, a political party which later took control of Bunia. He was charged, as co-perpetrator, with the offences of conscripting and enlisting children under the age of fifteen years into an armed group (the FPLC, an armed wing of the UPC) and using them to actively participate in hostilities within the meaning of article 8 (2) (b) (xxvi) of the Rome Statute. The Prosecution alleged that the FPLC systematically enlisted and conscripted children in large numbers, provided them with military training and later used them to participate actively in hostilities. Girls were also subjected to rape and sexual violence although these acts were not charged.

Issues and Resolution

It was noted that the evidence available showed that the children were subjected to severe training regimes and were subjected to harsh punishments. The Trial Chamber found that the evidence available established that children below 15 years were conscripted and enlisted into the UPC/ FPLC forces, and were deployed as soldiers in various areas including Bunia, Tchomia among others, and took part in fighting there. They were used as military guards and as body guards.[131] It was held that Lubanga was guilty of the crimes of conscripting and enlisting children under the age of 15 years and using them to actively participate in hostilities.[132] The

Trial Chamber also heard that the children were subjected to rape and sexual violence by commanders. Girls who were conscripted and enlisted were also used by the FPLC commanders to carry out domestic work, and to work as nurses. However, it declined to make any findings of fact on whether the accused person was responsible for these acts since acts of sexual violence did not form part of the charges against Lubanga.[133]

Contribution to jurisprudence

The case defines conscription and enlistment children under the age of 15 years and the use of such children to actively participate in hostilities, which definitions can be used when handling cases of exploitation of children.

Notes

1 Commonwealth Secretariat; Kigali Declaration, http://thecommonwealth.org/sites/default/files/press-release/documents/Early%20and%20Forced%20Marriage%20-%20Kigali%20Declaration.pdf accessed 21 July 2016.
2 Jodi O'Brien, *Encyclopedia of Gender and Society* (Vol.2, Sage Publications 2009).
3 Tahirih Justice Center, 'Criminal Laws Addressing Forced Marriage in the United States' (Tahirih Justice Center, July 2013) http://preventforcedmarriage.org/wp-content/uploads/2015/01/Tahirih-MEMO-State-Criminal-Laws-Forced-Marriage.pdf accessed 20 June 2016.
4 See also Birech, Jeniffer, 'Child Marriage: A Cultural Phenomenon', International Journal of Humanities & Social Science Vol. 3 No. 17, September 2013.
5 BBC, 'Gambia and Tanzania outlaw child marriage' (BBC World Africa, 8 July 2016) http://www.bbc.com/news/world-africa-36746174 accessed 21 July 2016.
6 United Nations International Children's Emergency Fund (UNICEF), *Ending Child Marriage: Progress and Prospects* (New York 2014).
7 See also Muller, Karen PhD, Early Marriages &The Perpetuation of Gender Inequality, Institute for Child Witness Research & Training, S. Africa, Research Associate University of Zululand, p. 202.
8 The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
9 Ibid; On forced marriage see also Phillips, A. & Dustin, M., UK Initiatives on Forced Marriage: Regulation, Dialogue &Exit[online]. London: LSE Research online (http://eprints.lse.ac.uk/archive 00000546).
10 Sexual Rights Initiative (SRI), 'Analysis of the Language of Child, Early, and Forced Marriages' (2013) SRI Working Paper http://sexualrightsinitiative.com/wp-content/uploads/SRI-Analysis-of-the-Language-of-Child-Early-and-Forced-Marriages-Sep2013.pdf#accessed 2 July 2016.
11 The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
12 United Nations International Children's Emergency Fund (UNICEF), Ending Child Marriage: Progress and Prospects (New York 2014).
13 Caroline Harper and others, 'Unhappily ever after: Slow and Uneven Progress in the Fights Against Early Marriages' (Overseas Development Institute Report, 2014).
14 Child marriage prevalence is defined as the percentage of women 20-24 years old who were married or in union before age 18.
15 Figures were compiled from, UNICEF State of the World's Children Report 2015 and the Girls not Brides organization.

16 The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
17 Ibid; '"Breaking God's commands": the destruction of childhood by the Lord's Resistance Army' - *'I would like to give you a message. Please do your best to tell the world what is happening to us, the children so that other children don't have to pass through this violence.'* Amnesty International Report, September 1997.
18 Freetown, Sierra Leone — *Fatmata Jalloh was just a kid selling pancakes on a rural road in Sierra Leone when a rebel soldier snatched her and made her his wife. I was a child. I didn't know anything about love at that time … but he said, 'If you don't take me [as your husband], I'll kill you…'*; see below for source of reference.
19 Jina Moore, 'In Africa, Justice for "Bush Wives"', (Christian Science Monitor, 2010) http://www.csmonitor.com/World/Africa/2008/0610/p06s01-woaf.html accessed 19 July 2016.
20 Case Law on CEFM can be found in section 'X' of the paper, reference to ICC ruling The Prosecutor vs. Germain Katanga & Mathieu Ngudjolo Chui & The Prosecutor v Thomas Lubanga.
21 'Child Marriage around the World: Tanzania', http://www.girlsnotbrides.org/child-marriage/tanzania/ accessed 25 July 2016.
22 In one of the criminal sessions in Gulu in 2005 in the case of *Uganda vs. Otenya Michael* (High Court Criminal Session Case No. 0209-2012) a girl aged 13 years was defiled by a man aged 18 years old. It has been stated that the girl was taken to the man's house by her mother and grandmother to become Otenya's wife.
23 The Baganda are the largest ethnic group in Uganda. Bantu in origin they comprise approximately 17 percent of the population in Uganda
24 Joy for Children, 'Child Marriage in Uganda: A Call for Urgent Action' (Publication) http://www.joyforchildren.org/?q=content/child-marriage-uganda accessed 2 July 2016.
25 Ibid but see also Early Marriage: A Harmful Traditional Practice-A Statistical Exploration (UNICEF) 2005, p. 6.
26 Joy for Children (Uganda), 'Child, Early, and Forced Marriage in Uganda' (Unpublished)
27 Human Rights Watch (HRW), 'Ending Child Marriage in Africa' (HRW, December 2015)
28 In Uganda's Sexual Offences Bill (proposed) of 2015, 'Marital Rape' is termed as Marital Sexual Assault which carries a much lesser sentence than the existing offence of Rape.
29 ECPAT International, 'Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage' (Thematic Report, ECPAT October 2015).
30 FGM is normally performed on young girls sometime between infancy and age 15 that intentionally removes or injures (partially or wholly) the female genital organs for non-medical reasons and with no health benefits; *see footnote 19 for reference.*
31 ECPAT International, 'Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage' (Thematic Report, ECPAT October 2015).
32 Emily Burrill, Richard Roberts, and Elizabeth Thornberry, 'Domestic Violence and the Law in Africa' http://www.ohioswallow.com/extras/9780821419281_intro.pdf accessed 25 July 2016.
33 See Section on National Laws in this Paper.
34 Commonwealth Roundtable on Early and Forced Marriage, 14-15 October 2013, Marlborough House, London, page 15.
35 As per the Resident State Attorney, Mubende, Uganda, Mr. Stanley Moses Baine; See also S. 129(3) & (4) of the Uganda Penal Code Act Cap 120.
36 Page 68 JBB.
37 At the launch, the chairperson of the Uganda Law Reform Commission (ULRC) through Ms. Vastina Rukimirana Nsanze, informed participants about the efforts of the ULRC to translate some of the laws into several local languages to make them accessible to the users. See also pg. 77 JBB.
38 Prior to the trial, it will be the role of judicial officers to ensure compliance with the due diligence principle to investigate CEFM. See page 57 JBB and *CK (A child) & 11 others vs. COP & 2 ors*.
39 Also see pg. 59 of the Judicial Bench Book (JBB).

40 See pg. 39 of the JBB.
41 See pg. 40 of the JBB.
42 See pg. 41 of the JBB.
43 See pg. 42 of the JBB; Section 31 (5) Sexual Offences Act, Kenya, Regulation 7.
44 Challenge has been how to identify 'vulnerable witnesses'. Kenya has court rules governing the interpretation of the Sexual Offences Act that may be useful as an example.
45 See pg. 41 of the JBB.
46 Courts may identify relevant partners in civil society who can assist in this function because in the usual set up, Courts in many jurisdictions lack this support facility.
47 See pg. 45-46 of the JBB.
48 See pg. 55 of the JBB.
49 See pg. 46 of the JBB.
50 See pg. 49 of the JBB.
51 See pg. 55 of the JBB -Judicial outreaches to community to educate the masses and render advice on legal matters. See pg. 95 of the JBB.
52 See pg. 69 of the JBB.
53 The Convention on the Elimination of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Art 16 (1)(b).
54 CEDAW (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Art. 16 (2).
55 The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (adopted 10 December 1962, entered into force 9 December 1964) 521 UNTS 231; Art. 1 (1).
56 The African Charter on the Rights and Welfare of the Child (ACRWC) (11 July 1990); Art. 2
57 Ibid; Art. 16 (1).
58 The African Charter on the Rights and Welfare of the Child (ACRWC) (11 July 1990); Art 21 (1)(a).
59 Ibid; Art 21 (1)(b).
60 African Youth Charter (2 July 2006); Art. 8 (2).
61 The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
62 ibid.
63 Section 7 of the Domestic Violence Act, 2010.
64 Section 13 (2) of the Law of Marriage Act, 1971 (LMA).
65 Section 17 (1) LMA.
66 Section 17 (2) LMA.
67 Human Rights Watch, *Dispatches: Tanzania High Court Rules against Child Marriage* 8 July 2016.
68 I acknowledge Ms. Anna Mavenjina-Mkelame's input. She informed me about a recent Tanzanian Ruling which held that the minimum age for marriage is 18 years. See *In the Matter of the Constitution of the United Republic of Tanzania 1977-as amended from time to time [Cap. 2 R.E 2002] & In the Matter of Basic Rights and Duties Enforcement Act [Cap 3 R.E 2002] & In the Matter of a Petition to Challenge Constitutionality of Section 13 & 17 of the Law of Marriage Act Rebecca Z. Gyumi vs. The Attorney General [Cap. 29 R.E 2002] High Court of Tanzania, Miscellaneous Civil Cause No. 5 of 2016.*
69 Section 38 LMA.
70 Section 11 of the Judicature and Application of Laws Act Cap. 358 R.E 2002.
71 *Leonard Jonathan vs. Republic, High Court of Tanzania at Moshi Criminal Appeal No. 53 of 2001; Judicial Bench Book p. 163.*
72 Section 4 (1) Law of the Child Act, 2009.
73 Section 5 (2) Law of the Child Act, 2009; See also Part II of the Act, which provides for the rights and welfare of the child in sections 3–14.
74 Section 6 (3) Law of the Child Act, 2009.

75 Section 7 Law of the Child Act; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
76 The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
77 Section18 Law of the Child Act, 2009; Part III of the Act contains provisions meant for the care and protection of the child through issuance of care and supervisory orders; duties of the social welfare officer among others.
78 Section 95 Law of the Child Act 2009.
79 Section 133 of Penal Code Cap 16.
80 Section 5 & 12 of SOSPA.
81 Section 131 SOSPA; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
82 Section 132 SOSPA.
83 Section 138 B SOSPA.
84 Section 169A (1) of SOSPA.
85 Section 5 SOSPA/ Section 130 (2) (e) of the Penal Code Act.
86 Article 31 (3) of the Constitution of Uganda.
87 Article 31 (5) of the Constitution of Uganda; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
88 Section 2(3) & (4) of the Hindu Marriage and Divorce Act.
89 Section 11 (a) & (b) of the Customary Marriages Registration Act.
90 Section 32 of the Customary Marriages Registration Act.
91 Section 128 of the Penal Code Act; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
92 Section 129 of the Penal Code Act; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
93 Section 144 of the Penal Code Act; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
94 The First Schedule to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013 stipulates for 30 yrs. as being the starting point for sentencing a person convicted of aggravated defilement.
95 Since the Constitutional Court's decision in Constitutional Petition No.6 of 2003 *Susan Kigula and 416 vs. The Attorney General*, the death penalty is no longer mandatory so if a person is sentenced to death but is not executed for three years, his case will be reviewed by the Court and the death sentence is commuted to imprisonment for a specific period or life imprisonment depending on the circumstances of each case.
96 Section 2 Children Act Cap. 59.
97 Section 4 Children (Amendment) Act 2016.
98 Section 7 of the Children (Amendment) Act 2016.
99 Section 7 (3) Children (Amendment) Act 2016.
100 See also section 42 Children (Amendment) Act 2016.
101 Section 42A (2) Children (Amendment) Act 2016.
102 Section 42A (3) Children (Amendment) Act 2016.
103 Section 11 (1) of the Children Act; under article 34 (2) the right to basic education must be provided by the government of Uganda and parents of the child.
104 See sections 3, 4, 5 of the PFGMA among others.
105 Sections 2(e) and 3 (3) of the Prevention of Trafficking in Persons Act.
106 Section 3 Prevention of Trafficking in Persons Act.

107 Section 4 Prevention of Trafficking in Persons Act; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
108 Section 5 Prevention of Trafficking in Persons Act; The support of UC Berkeley Human Rights Center researchers Naomi Fenwick, Aaron Murphy, Kevin Reyes, and Prof. Kim Thuy Seelinger and Prof. Marci Hoffman.
109 The bill does not govern marriages conducted under the Muslim faith.
110 National Strategy to end Child Marriage and Teenage Pregnancy (Uganda, 2014) 27.
111 National Strategy on Child Marriage and Teenage Pregnancy (Uganda, 2014) 37.
112 Catherine Turner, 'Out of the Shadows: Child marriage and slavery' (Anti-Slavery International, 2013) 36.
113 Shameem, N., Amnesty USA, Women's Human Rights Coordination Group.
114 Staff Writer, 'Lawyer demystifies model law' (The Sentinel, 2015) 1.
115 This vision of creating a model law on child marriage was proposed by a lawyer of the SADC Parliamentary Forum (SADC PF); the model law would be known as SADC Model Law on Child Marriage; reference to the work can be found in the footnote below.
116 Staff Writer, 'Lawyer demystifies model law' (The Sentinel, 2015) 1.
117 Other EAC Countries should follow that Kenyan example which has set a minimum sentence for convicts of defiling children below 18 years. The practice can be used in the proposed new law on CEFM.
118 Government of the United States of America, 'International Protecting Girls by Preventing Child Marriage Act of 2011' https://www.govtrack.us/congress/bills/112/s414 accessed 25 July 2016.
119 Outside the Courtroom e.g. corrupt Police Officers at Police Stations sexually harass and force victims to give bribes e.g. in Kenya. Inside Courtroom – EAC Courts can replicate a Protocol set up by the Bosnian Court with necessary modifications*; see* Anna Kithaka *'Enforcement of the Sexual offences Act Kenya' (Pambazuka News)* www.pambazuka.org/governance/enforcement accessed 1 July 2016.
120 See also Empowering Girls: 'What the Commonwealth can do to End Early and Forced Marriage' (discusses 2011 CHOGM).
121 CHOGM Communiqué (2015) Para. 31; See also Meeting summary on the Strategic discussion with key AU mandate-holders working on child marriage, 29 January 2015, Addis Ababa, Ethiopia.
122 Programs such as the Zomba Cash Transfer Programme (Malawi) where parents of girls and girls were given cash incentives; Berhane Hewan (Ethiopian) (light of Eve') targeted both unmarried and married girls and gave them incentives such scholastic materials, goats etc.
123 Rwanda Children's Rights References in the Universal Periodic Review-23rd Session 2015(4 November 2015) (Compilation of UN Information)-Rwanda compiled what it accepted and supported as recommendations from other countries. Most of the recommendations to enhance children's rights are included in this paper. Rwanda supported the following countries' recommendations para. 134.18 (Guatemala); para. 134.33 & 134.41 (Portugal); para 134.33&134.41 (Portugal); para. 134.37&134.50 (Italy); para 134.38 (Sierra Leone); para. 134.40 (Ukraine) and para 134.46 (Djibouti).
124 See Child Marriage in Eastern & Sothern Africa: Determinants, Consequences & the Way forward, pp. v-vi; pp. 14–17.
125 Plan International Australia 'Just Married, Just a Child: Child Marriage in the Indo-Pacific Region' (Plan Child Marriage Report, July 2014).
126 *Department of Human Services & Brouker and Anor* [2010] FamCA 742 at [9].
127 ICC, Pre- Trial Chamber I, *The Prosecutor vs. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, para 348.
128 *The Prosecutor vs. Germain Katanga & Mathieu Ngudjolo Chui*, para s 430–431.
129 *The Prosecutor vs. Germain Katanga & Mathieu Ngudjolo Chui* paras 250–261.

130 Case Information Sheet, Situation in the Democratic Republic of the Congo: *The Prosecutor vs. Katanga*, ICC-PIDS-DRC-03-011/15_Eng 25 March 2015.

131 ICC, Trial Chamber I, *The Prosecutor v Thomas Lubanga*, Judgement Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras 1355–1357: See also ICC, Trial Chamber I, *The Prosecutor v Thomas Lubanga*, Summary of the Judgement Pursuant to Article 74 of the Statute, ICC.01/04-01/06, 14 March 2012, paras 30–32.

132 *The Prosecutor v Thomas Lubanga*, Summary of the Judgement Pursuant to Article 74 of the Statute, para 42.

133 ICC, Trial Chamber I, *The Prosecutor v Thomas Lubanga*, Judgement Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras 629-631. Also see 'The war crimes charges: on why they were insufficient' in Sonja C. Grover; Humanity's Children: ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children 2012.

Annex 2
Additional Materials for Reference

Agency for Cooperation and Research in Development (ACORD) (2009), *Kenya, An Audit of Legal Practice on Sexual Violence*, ACORD.

African Union (2003), *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)*, (adopted 28 March 2003, entered into force 25 November 2005), available at: http://www.refworld.org/docid/3f4b139d4.html [accessed 15 January 2016]

Amnesty International (2004), *International Criminal Court: Guidelines for Effective Implementation*, available at: http://www.amnesty.org/en/library/info/IOR40/013/2004/en/

Bangalore Principles on the Domestic Application of International Human Rights Norms, 26 February 1988, *14 Commonwealth Law Bulletin*, 1196 (1988), Principle No. 2.

Chirwa, D (2004), 'The Doctrine of state responsibility as a potential means of holding private actors accountable for human rights', *Melbourne Law Journal*, Vol.5.

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Consideration of reports submitted by States Parties under Article 18 of the Convention, combined 4th, 5th and 6th periodic reports, Tanzania, Concluding Observations, available at: www.refworld.org/publisher,CEDAW.STATEPARTIESREP,TZA,4744oa962,o.html

CEDAW (1990), General Recommendation No. 14: Female Circumcision, A/45/38 and Corrigendum.

CEDAW (1994), General Recommendation No. 19, 29 January 1992, Adopted at the 11th session, UN Doc. HRI/GEN/1/Rev.1 at 84.

CEDAW (2007), *Consideration of Reports submitted by States Parties, under Article 18 of the Convention: United Republic of Tanzania*, 16 April 2007, pars 50 and 51, available at: www.bayefsky.com//Reports/Tanzania_CEDAW_c_tza_6_2006.pdf

CEDAW Committee (1989), General Recommendation No. 12 (8th session), on violence against women.

CEDAW Committee (2010), 47th session, 4–22 October 2010. CEDAW/C/UGA/4-7.

CEDAW Committee (2011), Concluding observations of CEDAW for Kenya's 7th Periodic Report (5 April 2011), CEDAW/C/KEN/CO/7.

CEDAW Resolution No. 34/180, UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, adopted and opened for signature, ratification and accession by General Assembly Resolutions 2200A (XX1).

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577, UNTS 3.

Commission on the Status of Women (2013), *Agreed conclusions on the elimination and prevention of all forms of violence against women and girls*, Item No. 16/2013/27, E/CN.6/2013/11, CSW, 57th session, March 2013, New York.

Committee on the Rights of the Child (2008), Consideration of reports filed by states parties under Article 12(1) of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, CRC/C/OPSC/UGA/1.

Coomaraswamy, R (1996), *Report of the Special Rapporteur on violence against women, its causes and consequences*, PT II, 26, U.N.Doc.E/CN/4/1996/53, 5 February 1996.

Coomaraswamy, R (1999), *Report of the Special Rapporteur on domestic violence*, E/CN.4/1999/68.

Government of Rwanda (2014), *The Combined 7th, 8th and 9th Periodic Report on the Implementation by Rwanda of the Convention on the Elimination of all Forms of Discrimination Against Women*, available at: www.minijust.gov.rw/fileadmin/Documents/International_Reports/CEDAW_7th_8th_and_9th_Report_September_2014_Final.pdf

Help Age International (2011), *Violence against older women: Tackling witchcraft accusations in Tanzania*, prepared by Sleap, B, available at: http://social.un.org/ageing-working-group/documents/HelpAge%20briefing%20violence%20against%20older%20women%20Aug%2011.pdf Human Rights Watch (2014a), interview with Mary Massay, Executive Director, Commission for Human Rights and Good Governance (CHRAGG), Dar es Salaam, 15 April 2014.

Human Rights Watch (2014b), *No Way Out, Child Marriage and Human Rights Abuses in Tanzania*, October 2014.

Immigration and Refugee Board (IRB) of Canada (2013), *Rwanda: Domestic violence, including legislation, state protection, services and legal recourse available to victims* (2011–September 2013) [RWA104588.E], 18 October 2013, available at: www.ecoi.net/local_link/261949/375254_en.html [accessed 06 February 2016].

The International Association of Women Judges (IAWJ) Case summaries on selected by JEP participants, available at: http://www.iawj.org/jep/jep.asp

Kenya Demographic and Health Survey (KDHS) Report (2014).

Kenya National Bureau of Statistics (KNBS) and ICF Macro (2010), *Kenya Demographic and Health Survey 2008–2009*, KNBS and ICF Macro, Calverton, Maryland, available at: http://dhsprogram.com/pubs/pdf/fr229/fr229.pdf

Kenya National Bureau of Statistics (2015), *Kenya Demographic Health Survey 2014* (December 2015), available at: https://dhsprogram.com/pubs/pdf/FR308/FR308.pdf

Kenya Women Judges Association (2008), *Training Manual*, KWJA.

Kijo, H and others (eds.) (2014), *Tanzania Human Rights Report 2013*, Legal and Human Rights Center and Zanzibar Legal Services Center, available at: www.humanrights.or.tz/downloads/Tanzania-human-rights-report-2013.pdf

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.

Mutua, M (2007), 'Sexual Offences Guide Launched', *EA Standard Newspaper*, 20 December 2007.

National Institute of Statistics of Rwanda (NISR) [Rwanda], Ministry of Health (MOH) [Rwanda], and ICF International. 2015. Rwanda Demographic and Health Survey 2014-15. Rockville, Maryland, USA: NISR, MOH, and ICF International. https://dhsprogram.com/pubs/pdf/FR316/FR316.pdf [accessed 28 November 2016]

Office of the Director of Poverty Reduction and Economic Management Network, Africa Region, World Bank, (2004), *Tanzania: Strategic Country Gender Assessment*, prepared by Blackden, CM and others, http://documents.worldbank.org/curated/en/2004/06/6348400/tanzania-strategic-country-gender-assessment

Organization of African Unity (1981), African Charter on Human and People's Rights.

Republic of Kenya, Penal Code, Cap. 63, Laws of Kenya, available at www.kenyalaw.org.

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, available at: www.kenyalw.org.

(2007), The Children Act No. 8 of 2001, Revised Edition 2007, date of assent 30 September 2011, Date of commencement 4 October, 2011, published by the National Council for Law reporting, available at http://www.kenyalaw.org

Republic of Kenya (2008a), Sexual Offences Regulations, Legal Notice No. 132/2008.

Republic of Kenya (2008b), Sexual Offences (Dangerous Offenders [DNA Data Bank]) Regulations 2008, Legal Notice No. 133/2008.

Republic of Kenya (2010), *The Constitution of Kenya* [Kenya], 27 August 2010, available at: http://www.refworld.org/docid/4c8508822.html [accessed 15 January 2016]

(2011) Act No. 32 of 2011, Revised Edition 2012 {2011}, published by the National Council of Law Reporting, available at: http://www.kenyalaw.org.

(2006, revised 2012), The Sexual Offences Act, Chapter 62A, Laws of Kenya, published by the National Council for Law Reporting, available at www.kenyalaw.org.

Republic of Kenya (2012), Sexual Offences (Medical Treatment) Regulations, Legal Notice No. 133/2012.

Republic of Kenya (2013), The Matrimonial Property Act, Act No. 14, date of commencement, 16 January 2014, available at www.kenyalaw.org.
Republic of Kenya (2014), Sexual Offences Rules of Court, L.N. 101/2014, made under the Sexual Offences Act.
Republic of Kenya (2015), Protection Against Domestic Violence Act, Special Issue, Kenya Gazette Supplement.
Kenya Judiciary Transformation Framework, 2012–2016.
Republic of Kenya, The Law of Succession Act, Chapter 160, Laws of Kenya, available at http://www.kenyalaw.org.
Republic of Rwanda (2003), *The Constitution of the Republic of Rwanda*.
Republic of Uganda (1995), *The Constitution of Uganda*.
Republic of Uganda (2010), Domestic Violence Act, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_172625.pdf [accessed 15 January 2016].
Republic of Uganda (2010), The Domestic Violence Act, section 13(2), available at http://www.news.ugo.co.ug/90-of-ugandan-women-sexually-harassed-at-work.
Republic of Uganda (2012), Employment (Sexual harassment) Regulations, made under section 7 & 97(1) of the Employment Act, No. 6 of 2006, available at: http://www.news.ugo/90-of-ugandan-women-sexually-harassed-at-work http://hrbcountryguide.org/wp-content/uploads/2016/05/Uganda-Country-Guide-02.02.161.pdf; http://www.svri.org/forums/forum2011/EffectsHarassment.pdf
Special Rapporteur on Violence against Women (2006), *Annual Report, Standard of due diligence*, E/CN.4/2006/6, 12 January 2006.
Special Rapporteur on Violence against Women (2013), *Annual Report, State responsibility for elimination of violence against women*, A/HRC/23/49, 14 May 2013.
Tibatemwa-Ekirikubinza, L (2005), *Criminal Law in Uganda: Sexual Assaults and Offences Against Morality*, Fountain Publishers, Kampala.
Tibatemwa-Ekirikubinza, L (1999), *Women's Violent Crime in Uganda: More Sinned Against than Sinning*, Fountain Publishers, Kampala.
Uganda Bureau of Statistics (2012), *Uganda Demographic and Health Survey 2011, Key Findings of the UDHS*, Uganda Bureau of Statistics, August, available at: http://www.ubos.org/onlinefiles/uploads/ubos/UDHS/UDHS2011.pdf
United Nations (1996), *Model Legislation on Violence against Women*, UN Doc. E/CN.4/1996/53/Add.2, 2 February 1996.
United Nations (2006a), 'Ending violence against women, from words to action', Study of the Secretary General, United Nations Publications, sales no. E.06.IV.8
United Nations (2006b), 'In depth study on all forms of violence against women', Report of the Secretary General, A/61/122/Add.1, available at: www.un.org
United Nations *Country Assessment on Violence against Women Rwanda*, available at: www.un.org/womenwatch/ianwge/taskforces/vaw/VAW_COUNTRY_ASSESSMENT-Rwanda-1.pdf
United Nations, Department for Economic and Social Affairs (UNDESA) (2010), *Handbook for Legislation on Violence Against Women*, UNDESA, Division for the Advancement of Women, New York, ST/ESA/329.
United Nations, Department of State, Office of the Under Secretary for Democracy and Global Affairs and Bureau of Public Affairs (2007), *Trafficking in Persons Report*, Washington, DC, available at: http://www.state.gov/documents/organization/82902.pdf
UN Children's Fund (UNICEF) (2000), *Domestic Violence against Women and Girls, Health consequences*, Innocenti Research Centre, Florence, Italy. No. 6, June 2000, available at: https://www.unicef-irc.org/publications/pdf/digest6e.pdf
UN General Assembly (1948), Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), (adopted by the UN General Assembly on 10 December 1948).
UN General Assembly (1966a), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

UN General Assembly (1966b), International Covenant on Economic, Social and Cultural Rights, article 12(1).

UN General Assembly (1981), Resolution 44/25, adopted 27 June 1981.

UN General Assembly (1984), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, pp. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html [accessed 14 January 2016].

UN General Assembly (1993), *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: http://www.refworld.org/docid/3b00f25d2c.html [accessed 15 January 2016].

UN General Assembly (1998), *Rome Statute of the International Criminal Court* (last amended 2010), (adopted 17 July 1998, entered into force 1 July 2002), available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 15 January 2016]

UN General Assembly (2010), *Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice (Model Strategies)*, Resolution A/Res/65/228, adopted at the 71st Plenary Meeting, 21 December 2010.

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.

UNIFEM (2010), CEDAW Committee, General Recommendation No. 14 (9th session, 1990), *The Facts: Ending Violence against Women and the Millennium Development Goals*, UNIFEM. http://www.unwomen.org/en/digital-library/publications/2010/1/ending-violence-against-women-and-girls-unifem-strategy-and-information-kit [accessed 15 January 2016]

UN High Commissioner for Refugees (UNHCR) (2005), *Guidelines for Gender-based Violence Interventions in Humanitarian Settings Focusing on Prevention of and Response to Sexual Violence in Emergencies*, available at: http://www.unhcr.org/453492294.pdf [accessed June 2016].

UN Office on Drugs and Crime (2010), *Hand Book on Effective Police Responses to Violence against Women*, Criminal Handbook Series, United Nations, New York.

UN Population Information Network (1994), Report of the International Conference on Population and Development, Cairo, 5–13 September 1994, United Nations Publication, Sales No. 95. XIII. 18.

United Republic of Tanzania National Bureau of Statistics and ICF Macro (2010), *Tanzania Demographic and Health Survey 2010*, available at: www.nbs.go.tz/takwimu/references/2010TDHS.pdf

United Republic of Tanzania National Bureau of Statistics, *Tanzania Demographic and Health Survey 2010*' (United Republic of Tanzania National Bureau of Statistics, May 2011) http://dhsprogram.com/pubs/pdf/FR243/FR243[24June2011].pdf

United Republic of Tanzania (1971, revised 2002), The Law of Marriage Act No. 5 of 1971, Tanzania.

United Republic of Tanzania (1977), *The Constitution of the United Republic of Tanzania*.

United Republic of Tanzania, (revised 2002), Sexual Offences Special Provisions Act, Chapter 16 of the Laws of Tanzania.

US Agency for International Development (USAID) Gender-Based Violence in Tanzania: An Assessment of Policies, Services, and Promising Interventions, available at: http://www.mcdgc.go.tz/data/PNADN851.pdf

Wolayo, H (2007), *The Role of Judges' Associations: A perspective from Uganda*, November 2007, available at: http://www.iawj.org/20071100_v.

World Bank (1994), 'Violence Against Women: The Hidden Health Burden', World Bank Discussion Paper No. 255, prepared by Heise, LL and others, World Bank, Washington, DC, available at: http://documents.worldbank.org/curated/en/1994/07/442273/violence-against-women-hidden-health-burden

World Health Organization (2002), *World Report on Violence and Health*, prepared by Krug, EG and others (eds.), World Health Organization, Geneva.

World Health Organization (2008),'Violence against women', Fact Sheet No. 239, November 2008, available at: www.who.int/mediacentre/factsheets/fs239/en

International Rescue Committee (2012), 'My action counts: An assessment of gender based violence responses in nine counties of Kenya', International Rescue Committee, available at: http://www.rescue.org/resource-file/my-action-counts-assessment-gender-based-violence-responses-nine-counties-kenya-decemb

Fourth World Conference on Women (1995), Beijing Declaration and Platform for Action, Beijing, 4–15 September 1995.

(2008), Report of the 'Partners for gender justice' Conference, 19–21 November 2008, Accra, Ghana.

The TWJA Sextortion Tool Kit.

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