

KIGURU WARUGURU JOSEPHINE LLB/7317/52/DF

**GENDER INEQUALITY VIS-À-VIS VIOLENCE AGAINST WOMEN
THE CASE STUDY OF KENYA**

BY

KIGURU WARUGURU JOSEPHINE

LLB/7317/52/DF



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REQUIREMENTS FOR THE AWARD OF THE DEGREE OF
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DECLARATION

I KIGURU WARUGURU JOSEPHINE, hereby declare that this is my own work, to the best of my knowledge and belief. It has not been submitted for any award in any university or learning institution.

Signed 
KIGURU WARUGURU JOSEPHINE



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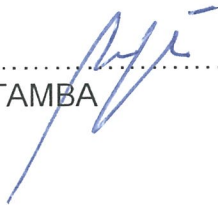
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2009

APPROVAL

This work was done and submitted under my supervision as the university supervisor

Sign.....
Dr. KATAMBA

A handwritten signature in blue ink, appearing to be 'Dr. Katamba', is written over the dotted line of the signature field.

KIGURU WARUGURU JOSEPHINE LLB/7317/52/DF

DEDICATION

This dissertation is dedicated to all women and those who seek to promote Gender Equality and the eradication of violence against women.

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PREFACE

Gender Equality. Every time this word comes to people's mind, it is interpreted differently with each individual. Most women will say, "We want Gender Equality" but I will tell you, majority of those women do not know what is this equality they want. This is what the men will say, "Women cannot be equal to men and vice versa, it's a scientific fact." I do not blame these people and this is why I decided to research on this topic basing my research on my country Kenya and bringing in few examples from other country in Africa and outside Africa in order to enlighten the reader on what he/she does not know.

As a Bachelor of law student and having studied Gender and the Law as a unit, I came up with this analysis that there is double standard when it comes to human rights. It is true that some women in Kenya because of their privileged position are better placed than some men. But, it is also true that every woman in Kenya regardless of her social class suffered discrimination directly simply because of her gender.

By bringing out the areas of inequality and by giving recommendations at the end of the chapter, my thesis has tried to deal with ways we can heal and prevent this discrimination.

After the introductory part of my thesis I decided to deal with violence against women. Violence against women affects both a girl-child and a woman just because she belongs to the feminine gender. Violence against women affects women at home, in the community and even in the state. Violence against women enhances Gender inequality.

It shows the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general. It implies that men hold power in all the important institution of society and that women are deprived of access to such power.

The theme that attended the writing of this dissertation is that Gender Equality can be achieved and violence against women can be prevented.

LIST OF CASES

1. Wambui Otieno vs. Otieno Voyugo and Siranga HCC NO. 4872/1986
2. Peter Mburu Echaria vs. Pricilla Njeri Echaria Nairobi Civil Appeal No. 71/2001
3. Dzito vs. Republic Mombasa Court of Appeal 2007
4. Matheka vs. Republic High Court at Mombasa case no. 126/2000
5. R vs. Hans Vriens CMC criminal case No. 1380/2001
6. Nicaragua vs. U.S.A ICJ reports 1986

BACKGROUND

In Kenya, women who form a majority of the population(52%), play an active role part in the development of the Kenyan society. Kenya is a patriarchal society and the status of women is relatively low with gender inequality/inequity prevailing in many aspects of the Kenya society. Yet they remain marginalized and discriminated upon, a situation that is reinforced by existing laws and policies as well as prevailing social-cultural factors. The government commenced talks on the implementation of policies and laws for the advancement of women however, these talks have only translated in very limited and slow paced tangible change. This raises a concern that the government has minimal commitment to the advancement of women.

There have been forms of inequality between women and men and incomplete integration of women into the development process which has not guaranteed broad participation by women in efforts to strengthen peace and security in the world. The Government has not allocated adequate resources and taken effective appropriate measures to implement Gender Equality strategies as a matter of high priority, including the establishment or reinforcement as appropriate of national machineries to promote the advancement of women, and to monitor the implementation of these strategies with a view to ensure the full integration of women in political, economical, social, and cultural life of their country.¹

Gender equality is sometime understood by majority to mean 'Sex equality'. There are differences between Gender and Sex. Sex is biologically determined while Gender is socially construed. Sex is ascribed conditions you are born into it while Gender is an achieved position, we learn and accomplish it. We are born male or female but we learn to be masculine or feminine. Sex is determined through physical assessment. Gender refers to the social consequences for the individual of that assessment. Gender therefore, is a social and cultural construction, which shape feminine and masculine identities.

"Equality" means equal treatment, rights, quantity and value. Therefore, the words Gender Equality means the equal treatment, rights, quantity and value of both men and women.² The concept of equality is quite complex. It has two distinct meanings: One, requiring that everyone be treated the same i.e. Formal Equality and Secondly, Substantial Equality requiring that different people be treated differently so as to produce an equal result.

The problem with formal equality is that it does not understand groups as it only recognizes rights of individuals rather than groups of people. Individuals have to be similar empirically in order to claim for formal equality. It ignores the fact that people are subordinated because of being members of groups. On the other hand, substantial equality recognizes that the real issue is dominance and that subordination is the problem.

Policies and practices, which treat women and men identically regardless of differences or disadvantages, tend to result in injustice and inequality and to make worse existing inequality. The current system of inequality resulting from centuries of legalized injustice against women cannot simply be

¹ Report of the World Conference on Equality, development and Peace, Nairobi 15-26 July 1985.UN publication Sales N^o E. 85 iv. 10

² Republic of Kenya- Ministry of Education-Gender Policy in Education July 2007.

eliminated by identical treatment of men and women. Gender inequality occurs in various fields including political and public life, nationality, education, employment, health, marriage and family life.

Gender against men occurs where men are forced to join the army in the time of war to protect their country. This can be traced back in the old African culture where able bodied men were picked from each house hold to join the warriors incase of war in the village. Forced circumcision and sexual assault which includes rape are also forms illustrating gender against men. The laws do not recognize the fact that men can be raped and mostly pay attention to women who are known as 'victims' and men as 'perpetrators'.

However, in the past decades, there has been the problem of where men are favoured and women are discriminated. Discrimination against women means, "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, civic or any other field."³

Whereas, the Kenyan constitution defines discrimination under **Section 82**, the definition is not in conformity with the definition contained in Article 1 of the convention, which takes into consideration the prohibition of direct and indirect discrimination. The government is aware that discrimination against women is rampant. Hence there is a prohibition against discrimination contained within the constitution of Kenya in **Section 82(4(b and c))** but the prohibition against discrimination is subject to various limitations, exceptions and qualifications in **Section 82(1 and 2)**. These qualifications when interpreted in patriarchal context makes it difficult for women to actualize their right not to be discriminated against on the basis of gender, especially in matters covered by personal law.

Personal law refers to those rules of law, which govern the status of a person in society. They include legal personality and capacity; nationality and domicile; the family, marriage, divorce and succession.⁴

Apart from the constitution, its also noteworthy that language in the general legislation is mostly gender neutral thus making it difficult to deal with discrimination that result when laws do not specifically define gender discrimination or make discrimination a penal offense.

Although Kenya has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the CEDAW convention, it has not domesticated these conventions as required its dualistic legal tradition and practice. Further to this, Kenya while ratifying these treaties has not ratified the optional protocols such as the one relating to CEDAW. The result has been that the women in particular have not been able to benefit from the conventions; as far as the protocols are concerned non-ratification has meant that Kenyans

³ Article 1 of the Convention on Elimination of Discrimination Against Women

⁴ The S.M.Otieno case- Death and Burial In Modern Kenya Edited by J.B Ojwang and J.N.K. Mugambi

cannot access some of the mechanisms for seeking remedies at the International forum.⁵

Being dissatisfied by the government's apparent lethargic approach, between the years 2000 to 2002 the women civil society organization started to agitate for and to draft gender friendly laws such as the Equality Bill, Affirmative Action Bill and the Family Protection Bill that would give effect to the provisions of CEDAW. Consequently, some of these bills were tabled before Parliament.

However, Parliament was dissolved before any of the bills were passed and most of the bills have not been reintroduced. The Affirmative Action motion was eventually debated and passed. It was subsequently put on hold to await the constitution review process and has not been revisited after the proposed new constitution was defeated in the referendum in November 2005.⁶

Despite widespread and continuing discrimination against women, the government has failed to prioritize the elimination of such discrimination. Whereas, the government recognizes the inadequacy of the existing legislative framework to ensure compliance with the convention, it has not done much to push for legislative reforms. A good example is the Equality Bill which would be instrumental in the elimination of all forms of discrimination against women but was allowed to expire before discussion by parliament and to date no attempts have been made to republish it for tabling in parliament.

As a result of these omission on the part government and the parliament, incident of discrimination against women continue unsanctioned, as there exist no mechanism to ensure or enforce compliance with the ratified conventions; leaving little or no recourse for women who experience discrimination.⁷ Incidences of discrimination occur in the following areas.

Politics; In Kenya, women's access to the political arena is restricted despite the fact that women are 52% of the total population and 60% of the voting population. For example, in 2006 there were only two women cabinet ministers and only 5 Assistance Ministers. Out of 210 elected members of Parliament, only 4% were women and only 50% of the 12 nominated parliamentarians were women. Appointments into public leadership positions also reveal glaring gender disparities. Among the 8 Provincial Commissioners, e.g. none is a woman. At the district level, only 2.8% of the District Commissioners are women.⁸ The Kenyan constitution guarantees the right of all citizens over the age of 18years to vote and participate freely in politics.

However, several factors such as the requirement of large sums of money, the culture of belittling of women by authority figures particularly in respect to elective offices, general lack of adherence to electoral laws during elections, lack of political goodwill in the enhancement of the participation of women in political and in public life at national level including lack of legislative accountability frameworks for political parties, the threat of and actual violence and abusive language targeting women participating in competitive politics,

⁵ The Federation of Women Lawyers-Kenya-A shadow report to the 5th and 6th combined Report of the Government of the Republic of Kenya, on the International Convention on the Elimination of all Forms of Discrimination Against Women.2007

⁶ Ibid

⁷ Ibid

⁸ Daily Nation 9 2006

prevent women from exercising their constitutional right to vote and participate in politics.

The Government has not taken any steps to address these issues nor has it advocated for women's greater participating in public life. There has been reluctance on the part of government to reform electoral laws to empower the electoral commission to deal with blatant violations in both the nomination and electoral process. As a result the whole electoral process continues to be very hazardous and puts off women candidate.⁹

Nationality. Discrimination against women is glaring with regard to citizenship. The determination of citizenship rests with the male, and in line with the current constitution the father's nationality determines that of his spouse and children. The only attempt by government to rectify this was in the proposed new constitution, which was rejected at the referendum on 21 November 2005. There has been no further attempt to amend this portion of the constitution through other avenues. It's hoped that notwithstanding the stalled constitutional review process, the issue surrounding discrimination against women with regards to citizenship will be sorted out either by statute or administrative directives.¹⁰

Prostitution. The government acknowledges that the main reason women resort to prostitution is poverty as high lightened in the report. It must be emphasized that poverty is exacerbated by entrenched discrimination against women in education, employment and property ownership. As a result, they are economically disempowered with little choice but to turn into prostitution or to enter into exploitation amongst women in Kenya-the government has instituted measures through provision of credit facilities, but there is no clarity on the implementation of these measures. Further, there is still no government project aimed at rehabilitating prostitutes which work is left entirely to a very small number of NGOs with little support from the government.¹¹

Another field is in regard to **Physical Integrity**; the issue of Female genital Mutilation arises. **Section 14 of The Children Act 2001** out laws performing female genital mutilation on children under the age of 18. This Act, describes girls who are likely to be forced into FGM as children in need of special care and protection and provides for court to take action against the perpetrators. However the law has faulted for not providing for punishment for offender and also recent statistics indicate that the government needs to take further steps to ensure that the law is observed in practice. Today close to 40% of women have undergone female genital mutilation. This percentage is lower in towns but much higher in some rural areas.¹²

Ownership Rights; The Kenya constitution guarantees the equality of rights: women can buy, own and sell assets as they like. But, this principle does not concern ownership rights in cases of marriage, divorce and/or inheritance. On one hand, it is very difficult for a woman to buy or own asset, on the other hand, the custom prohibits women from owning land(only 4% of land in Kenya is held by women).Even when a woman can buy an asset, her

⁹ Supra Note 5

¹⁰ Ibid

¹¹ Ibid

¹² Supra Note 5

husband often acts as an intermediary in order to avoid conjugal conflicts. This situation has an incidence on women access to credit. Since they rarely have assets of their own, they cannot provide the required collateral to obtain loans.¹³

Hence, ownership rights, which include land, housing and property, are partly exercised in Kenya because discrimination is still allowed in application of personal laws and customs. The right is implicit (Married Women's Property Act and Registered Land Act). Spousal co-ownership is not presumed. Widows do not have equal inheritance rights only the daughters. Upon dissolution of marriage, women's equal rights as to and during marriage are not recognized.¹⁴

Education ; In Kenya, it is estimated that 27% of female aged 6 and above, have not received any formal education compared to 16.5% of males.¹⁵

Discrimination within the family and marriage: The family is the institution that epitomizes patterns of sex domination and subordination. Gender based discrimination in the family occurs in the context of "The head of the family." Men are regarded as the head of the family. A woman can never become the head of the family even if her husband dies. This was illustrated in the case of **Wambui Otieno vs. Otieno Voyugo and Siranga**¹⁶.

Women face violence inside the family throughout their life. The vast majority of crimes do not get recorded. Data compiled by organization against gender violence show that domestic violence is endemic to our society. However, there are specific measures undertaken by the government to combat violence against women. However, the issue of conjugal rape is not sentenced.

The inequalities in marriage often result in discrimination. Marriage is considered to be in the sphere of personal law hence there is very little interference by the government in attempt to stop discriminatory practices that result from marriage i.e. the unequal distribution of household tasks, distribution of matrimonial property between husband and wife, or discrimination that may arise from polygamous marriages.

This discrimination against women becomes most evident upon dissolution of marriages when the women are often left with the children and kicked out of the matrimonial home with nothing but the clothes on their back. These discriminative effect has been reinforced by the Kenyan Court of Appeal, in the case of **Peter Mburu Echaria vs. Pricilla Njeri Echaria**¹⁷ where it was held inter alia, that neither the status of marriage nor the performance of domestic duties would entitle a woman to a beneficial interest in matrimonial property upon dissolution of marriage.

There needs to be greater recognition of women non-monetary contributions to the acquisition of wealth during the acquisition of wealth during the subsistence of marriage. There is there for a need for legislation

¹³ Rights and Reality. Are Women's equal rights to land, housing and equal property implanted. By Marjolein Benschop 2002

¹⁴ Ibid

¹⁵ Ibid

¹⁶ HCC NO.4872/1986

¹⁷ Nairobi Civil Appeal No.75/2001

requiring joint registration of the matrimonial home so that the interest of both husband and wife are protected in the event of dissolution of the marriage.¹⁸

Family Planning; The United Nations 1975, World Plan Action and Declaration which Kenya is a member stated that, "every couple and every individual has the right to decide freely and responsibly whether or not to have children as well as to determine their number and spacing, and to have information, education and means to do so." Women's right and means to control their own fertility also improves the possibility of controlling their lives in general and realizing their other human right. The prevailing thrust of Family planning practices focuses on women alone as acceptors of contraceptives. Sometime they have to seek permission from their husbands. Among the methods used by women, even manufacturers do not yet know even the manufacturers.

Kenya law does not restrict the use of contraceptives. However, several laws potentially impact the supply and manufacture of contraceptives through restrictions imposed in the interests of the public health. **Section 43 and section 44(1)(d) of the Pharmacy Act** grant the minister of health wide powers to prohibit, regulate or restrict the sale of pharmaceutical drugs and medical devices. This restriction, affect women who take these contraceptive drugs.¹⁹

Culture; Culture is termed as the foundation of women subordination. Culture is the whole complex of distinct, spiritual intellectual and emotional features that are characterized as social or social groups. Most cultures in Africa, have built on an ideology of a gender hierarchy where the male is supreme and the woman is subordinate. Thus many customs reflect a negative discrimination against women. For example in Kenya, the luo customary law, women work long hours than the men and carry the major work of household and remain invisible and sometime their work is unvalued and unrecognized. Women are recognized as the property of the husband's family, which can be bought through payment of dowry and remains the same even when the husband dies, the brothers of her husband inherit her.²⁰

General grounds for divorce under customary law are: adultery or unfaithfulness by the wife, extreme cruelty by the husband, desertion by any spouse, failure to provide maintenance for the wife or children and failure by either spouse to perform marital duties. In this case, if a husband commits adultery, divorce cannot be granted but when a wife does, it will be granted. This shows discrimination towards towards the women. In many clans, the rule is that unless dowry is returned, a divorce cannot be granted.²¹

Religion; Religion constitutes one of the shaping forces in identifying formation of the sex gender system. Indeed Religion is one of the important forces in influencing our belief system. Whatever the Sheik, Priest or Pastor is taken as the gospel truth. E.g. after a gender seminar that lasted 3days in 2001, **the parish priest of Hoima diocese Reverend Father Boniface**

¹⁸ Supra Note 5

¹⁹ Women of the World-Law and policies affecting their reproductive laws-The center for reproductive law and policy International Federation of Women Lawyers(Kenya Chapter FIDA)

²⁰ Supra Note 4

²¹ Supra note 13

Wamara in Uganda was invited to give a closing comment on the seminar and this is what he said, "You may hold seminars, conferences and debates until Christ comes back but this will not change anything. The woman must submit to the man as the church submits to Christ. Whatever you say and wish, women will remain women and will remain impregnated by men."

If one is to make an analysis of the Holy Books especially the Bible and the Koran, he or she will find that the woman is accorded a status much lower than that of a man. It is important to note that although these Holy Books were inspired by God, they were written by men.

Taliban's restriction and mistreatment of women, a complete ban on women's work outside the home. There was a ban on women dealing with male shopkeepers, being treated by male doctors, going to school and use of cosmetics, Public stoning of women accused of having sex outside marriage. This is still being practiced in Nigeria. There was a ban on women laughing loudly, wearing high heels, and wearing bright colored cloths. The fact that men dominate the leadership in both Christianity and and Islam increases the problem of sexism and Religion.

Under the Islamic law, the husband can either obtain a divorce unilaterally, by mutual agreement or through the court. In order to divorce his wife, a man does not have to give any reason. A woman may only initiate a divorce for three reasons: her husband's inability to consummate the marriage, his failure to provide for her and if the woman was married as a child, she can repudiate her husband when she reaches puberty.²² This discriminates the woman's right to obtain divorce.

Gender violence; Violence is "an act carried out with the intention or perceived intention of physically hurting another"(Gelles and Straus, 1979) the gender dimension to that definition amplifies it to include violent act perpetrated on women because they are women. Gender violence is a pervasive and prevalent problem world wide, touching all aspects of women's lives from the home to the work place, to the street. Forms of gender violence by the family includes: Physical aggression for example, murder, battering, genital mutilation, Foeticide, Infanticide, deprivation of food, deprivation of medical care and reproductive coercion/control. Another form is sexual abuse, which includes rape and incest. Emotional abuse is another form and includes confinement, forced marriage and threat of reprisal.

Forms of gender violence by the community include: physical abuse e.g. battery, physical chastisement, reproductive coercion/control, witch burning and sati. Another form is sexual Assault e.g. rape. At work place there is sexual aggression e.g. harassment, intimidation, there is also commercialized violence as a form of gender violence e.g. trafficking, forced prostitution, media e.g. pornography, commercialization of women's bodies,

Forms of gender violence by the State include: Political violence (policies, laws) e.g. illegitimate detention, forced sterilization, forced pregnancies and custodial violence (military/police etc) e.g. rape, torture etc.

Women are vulnerable to various forms of violent treatment for several reasons, all based on gender. One of the reasons include, because of being female, a woman is subjected to rape, female circumcision/genital mutilation,

²² Ibid

female infanticide, and sex-related crimes. This reason relates to society's construction of female sexuality and its role in social hierarchy:

Another reason is that, because of her relationship to a man, a woman is vulnerable to domestic violence, dowry, murder, and sati. This reason relates to society's concept of a woman as the property and dependent of a male protector, father, husband, son, etc

Because of the social group to which she belongs, in times of war, riots or ethnic, caste, or class violence, a woman may be raped and brutalized as a means of humiliating the community to which she belongs. This also relates to male perception of female sexuality and women as the property of men.

Several statutes have laid out the right to Equality of men and women, they include: **The Constitution of Kenya, Convention on the Elimination of all Forms of Discrimination against women 1979, Declaration On The Elimination of Discrimination Against Women 1967, General assembly Resolution 2263 (xx-11) of 7th November 1967, Beijing Declaration and Plat form or Action, 4th World Conference on Women, Beijing 4/5 September 1995, The 1949 Geneva Conventions.**

Gender Inequality vis-à-vis gender violence touches most aspects of women's lives and hence in this paper, I will discuss gender violence as one of the problems facing women and give my recommendation and resolution of this problem.

STATEMENT OF THE PROBLEM

Women in Kenya are standing up for their rights but this has brought reprisals. Women politicians, human rights activists and development workers who have fought for women's rights have been intimidated, harassed and imprisoned by authorities. Vulnerable women-detainees, refugees, the displaced-have been raped, tortured and ill-treated by police and solders. Women have been forced from their homes, raped and even killed in political violence instigated or condoned by those in power.

Human rights violation against women frequently relates to their lack of power and economic independence. Because of the discrimination women face in society at large, they are particularly liable to be abused by those in authority and they are in a weak position if they try to gain redress. Women who have been ill-treated and raped by the security forces are usually too frightened to come forward and report the abuses because they fear reprisals or believe that their complaints will be ignored.

Women in Kenya have suffered particular abuses as a result of ethnic based political violence since 1991. Although most of those killed were men, the majority of those displaced from their homes and farms were women and children. They were held in appalling conditions in camps and a number have been forcibly removed from their homes to "ancestral lands" which were left 20 or more years ago.

Forms of gender violence have been listed above.

AIMS AND OBJECTIVES

The objective of this study is to find out to what extent are women protected from gender violence.

- (1) Does the national legislation in Kenya recognizes women's right to physical integrity, right to protection from sexual abuse, emotional

abuse and political violence or do gaps still exist that deny women such a right?

- (2) If women's rights are recognized, do women effectively enjoy these rights-in other words: are these equal rights implemented? Is the national legislation implemented and enforced countrywide or are existing practices and customs on the ground still denying women their rights?
- (3) What are the constraints in effective implementation of national laws? What is being done to address these constraints?
- (4) What is the relationship between customary law and statutory law in Kenya: Can customary law continue to be applied even where it discriminates against women?
- (5) Are women turning to statutory laws to have their rights realized, or do they feel inhibited to do so? What are the main obstacles for women to use statutory laws and the formal court system?

SCOPE OF THE STUDY

The paper intends to look at gender violence as a violation of women human rights in relation to the situation in Kenya

HYPOTHESIS

Whether violence against women can be eliminated in women's lives and what are the strategies to achieve this goal.

SIGNIFICANCE OF THE STUDY

The study is intended to build upon prior research done by human rights scholars and activists, government, NGO's and United Nations 1989 violence against women in the family as a milestone, which advocated for a multi-disciplinary action, both within and outside the United Nations system to deal with the problem.

The study is also aimed at proving that in order to fight violence against women, we need to understand the violence i.e. what is the extent of the problem? What are the physical and psychological effects on women? What kind of resources are available? Etc, we need to respond to the violence i.e. provision of services to the victim and we need to attack the roots of the violence i.e. to lay down new standards of behavior and new values regarding women.

METHODOLOGY

This research will be qualitative and heavily dependent on prior published documents; secondary data, government documents, archives, newspapers, NGO publications, textbooks, reports from libraries.

Desk research will include research work done by various women NGOs in Kenya and the rest of the world. Other desk research includes government policies on the problem, the Municipal and the International Law on violence against women.

LITERATURE REVIEW

According to **Tony Johnston**, in regards to sexual abuse of Kenyan women and girls, he discussed indicators of sexual abuse to include:

Unwanted sexual touch, as an indicator of sexual harassment-and as an indicator of non-consensual assault/contact-which is both an invasion of privacy and an affront to the integrity of any individual. Sexual insults an indicator of abuse calculated to denigrate, embarrass and lower the self-esteem of any person. And Rape as an indicator of the most violent form of sexual abuse, which is both an assault and an insult to the integrity of any individual. In all civilized countries male-on-female non-consensual intercourse is a crime, which carries the most severe penalties.

Tony Johnston also explained why forced marriage is a form of sexual abuse. Forced or arranged marriage denies women the right of choice or freedom to choose a marital partner. Early marriage to very young women poses a significant threat to the health of young women with immature immune and reproductive systems. Early childbirth also carries high risks of maternal and infant death.

He also explained why female circumcision is sexually abusive. He says that it denies women the right to sexual enjoyment or fulfillment. Female Genital Mutilation is a practice, which some societies believe guarantees virginity. And is thus supportive of bride price. Female circumcision is a means of economic slavery: a guarantee that young women are "marriageable".

On violence, Tony Johnston states that the predominant abusers reported by married women are husbands or partners, mothers and father in law. These three categories of within family physical abuser are responsible for 62% of reported domestic violence.

He says that the causes of this abuse are the role perceptions. Kenyan married couples tend to have both similar and different perceptions of their "ideal" roles as husband and wives. The Kenyan married men see themselves as the masters, protectors and providers to the family. They perceive their wives to be their sexual and household servants

Still on violence, he talks of culture and tradition as a known impact upon abuse of women and girls. The practices include, female genital mutilation, arranged marriage, dowry, polygamy, wife inheritance, exclusion of women from decision-making councils and obedience/submissiveness.

In this report he concludes that male abuse on women is because of dependence of women on men (mostly husbands/partners) within the family. Such multiple dependencies only encourage male abuse.

According to a **Publication of the Coalition On Violation Against Women Kenya**, it shows that violence against women is deep rooted in the social, cultural and legal machinery. The society is responsible for the ills and the legal machinery does little to address the situation.

Causes of violence against women included domestic quarrels/conflict, which did not specify the causes of the conflicts, thuggery which subjected women to rape, revenge by ex-boyfriends, and house guards among others. People known to women and girls caused majority of the violations. A number of cases resulted from ambush by strangers who injured and raped women and girls.

The impact of violence against women includes direct costs and indirect costs. The direct costs are those that attract monetary costs such as payment for medical treatment, and indirect costs are intangible costs such as failure to attend work as a result of physical injuries, or time taken in reporting abuse



excess time taken in doing something that would in normal conditions take lesser time. This can be attributed to the psychological stress that engages the energies to seeking solutions for abuse as opposed to channeling these energies to normal duties.

The COVAW recommends that it is the responsibility of every woman and members of the public to report cases of abuse occurring in the family before the condition worsens. To the Police department, create women friendly police stations by setting up gender desks in all police stations where women can report abuse to avoid intimidation.

According to the **International Federation of Women Lawyers (FIDA) Kenya Chapter** on Gender-Based Domestic Violence in Kenya, it examines gender-based violence and intimate partner violence among communities in 4 provinces of Kenya namely, the Coast, Nairobi, Nyanza and Western provinces. Gender-based violence is abuse that is meted on an individual by virtue of their gender.

According to the online Wikipedia Encyclopedia, domestic violence (sometime referred to as domestic abuse) occurs when a family member, partner or ex-partner attempts to physically or psychologically dominate another. Domestic violence often refers to violence between spouses, but can also include cohabitants and non-married intimate partners. Intimate partner violence includes wife or husband beating, battering, "relationship violence", "domestic abuse", and "spousal abuse".

The chapter concludes that the problem of violence against women in Kenya has to be understood within a historical and cultural context. Traditionally, patriarchal domination was the norm and men were recognized as having a right to chastise their wives. Female members of the households were also subject to male supremacy, which could be enforced through violence.

According to Amnesty International USA, on violence against women in Armed Conflict, violence against women is not accidental. It is a weapon of war, a tool used to achieve military objectives such as ethnic cleansing, spreading political terror, breaking the resistance of a community, rewarding soldiers, intimidation or to extract information. This is evident, for example when Rwandan Tutsi women were raped in thousands, many of them also mutilated, before being killed during the 1994 genocide by Rwandan Hutus.

It says that the abuse of women in armed conflict is rooted in a global culture of discrimination that denies women equal status with men. Social, Political and Religious norms, identify women as the property of men, conflate women's chastity with family honor and ethnic identity and legitimize the violent appropriation of women's bodies for individual gratification or political ends.

It recognizes that women suffer Rape and other types of physical violence, Trafficking and sexual slavery, displacement which makes them highly vulnerable to violence e.g. in the Maela Camp for internally displaced persons from the Rift Valley, Kenya women were frequently raped by security personnel when they left camp in search for food or for work as a day laborer.

Amnesty International also discovered that many victims of gender-based violence during armed conflict are reluctant to talk about their suffering. Pressures from parties of the conflict, the government, the family or the community all serve to intimidate many women into silence. Continuing

violence or conflict often prevents women from reporting. In many regions reprisal, shame and social stigma are attached to certain types of violence against women, particularly rape. Fear of consequences of reporting sexual violence such as facing rejection, alienation, divorce, being declared unfit for marriage, and severe economic and social repercussions all discouraged women from reporting the violence suffered.

CHAPTERIZATION

This paper will be divided into 5 chapters.

The first section of the dissertation contains: general introduction, statement of the problem, objective, scope, hypothesis and significance of the study, methodology, literature review and chapterization.

Chapter one will deal with the rights of women against gender violence. This will expound on the fact that violence against women is a crime and a human rights violation. They include women rights to be free from violence, and women right to state protection.

Chapter two contains the manifestation of gender violence in the family. This will include domestic violence, Marital Rape, Female Genital Mutilation and Forced Marriages.

Chapter three contains the manifestation of gender violence in the community. This will include forms of gender violence in social groups e.g. culture, at work place e.g. sexual abuse, rape, sexual harassment in institutions of higher education and at workplace and trafficking.

Chapter four contains forms of gender violence by the state: in times of armed conflict, custodian violence which includes torture and impunity and Police treatment.

Chapter five the final chapter, will give recommendations and concluding remarks to the entire research paper.

CHAPTER ONE

1.0 WOMEN'S RIGHTS AGAINST VIOLENCE

INTRODUCTION

There is the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings. This rights are enshrined in international instruments, including: **The Universal Declaration of Human rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, The Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.**

The implementation of the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** would contribute to the elimination of violence against women and that the **Declaration on the Elimination of Violence Against Women**, will strengthen and complement that process.

I have observed that violence against women is an obstacle to the achievement of equality, development and peace, as recognized in the **Nairobi Forward- Looking Strategies**¹ for the advancement of women, in which a set of measures to combat violence against women was recommended, and to the full implementation of the convention on the Elimination of All Forms of Discrimination Against Women.

Violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, and the long-standing failure to protect and promote those rights and freedoms.

In this chapter, I will discuss the rights of women as provided by international instruments and as provided by the Kenyan Constitution and any other statutory laws.

¹ http://www.un.org/women_watch/daw/platform/plat/htm

1.1 DEFINITION OF VIOLENCE AGAINST WOMEN

“**Violence against women**” is any conduct or act, based on gender, which causes death, or physical, sexual or psychological harm or suffering to women, whether in public or the private sphere².

Article 1 of the Protocol to the African Charter on Human and People’s Rights on the Rights of women in Africa, 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 time and during situations of armed conflicts or of war.

“**Women**” mean persons of female gender, including girls³

1.2 AREAS OF VIOLENCE AGAINST WOMEN

Violence against women is understood to include physical, sexual and psychological violence:

- (a) 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;
- (b) 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
- (c) That is perpetrated or condoned by the **state** or its agents regardless of where it occurs⁴

1.3 WOMEN’S RIGHTS UNDER INTERNATIONAL INSTRUMENTS

² Inter-American Commission on Human Rights. Article 1

³ Article 1(k) of the Protocol to the African Charter on Human and People’s rights on the rights of women in Africa.

⁴ Article 2 Inter-American Commission of Human Rights

THE BANJUL CHARTER.

The preamble of the Banjul Charter stipulates that freedom, equality justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people. **Article 3(2)** provides that every individual shall be entitled to equal protection of the law. This means that both men and women are entitled to equal protection of the law.

This right caters for both men and women.

THE VIENNA DECLARATION AND PROGRAMMES OF ACTION. World Conference on Human Rights, Vienna.

This human right instrument considers that the promotion and protection of human rights is a matter of priority for the international community, and that the conference affords a unique opportunity to carry out a comprehensive analysis of the International. Human Rights system and of the machinery for the protection of human rights, in order to enhance and thus promote a fuller observance of those rights in a just and balanced manner.

No. 38 of this declaration stresses the importance of working towards the elimination of violence against women in public and private life; elimination of all forms of sexual harassment, exploitation and trafficking of women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices; cultural prejudices and religious extremism.

It calls upon the state parties to adopt the draft declaration on violence against women and urges states to combat violence against women in accordance with its provisions. Violations of the Human Rights of women in situation of armed conflict are violations of the fundamental principles of International Human Rights and Humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, requires a particularly effective response.

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.

Article 4 of the protocol provides for the rights to life, integrity and security of the person. Every state party shall take appropriate and effective measures to 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. Hence, women have the right to be protected by the state from violence whether it happens in the public or at private sphere of their lives⁵

The state also has a duty to identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence⁶. The state also has a duty to prohibit all medical or scientific experiments on women without their informed consent⁷. The state shall also provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women and also the state is prohibited to carry out death sentences on pregnant or nursing women⁸. The above sections provide the duties of the state parties in promoting and protecting women's rights.

Article 6 provides the rights of both men and woman in **Marriage**. It provides that the state parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. The state shall ensure no marriage shall take place without the free and full consent of both parties. This shows that both have a right to consent in marriage.

Most women are forced to enter into marriage even at the age of 16 years. The protocol provides the age of marriage to be a **minimum of 18 years**⁹. The protocol encourages monogamous family and incase of polygamous marriage, the rights of women should be promoted and protected. Still on marriage, **Article 20 of the protocol** provides that a widow has the right to remarry and marry the person of her choice. Hence, where wife inheritance is practiced, the window has a right to marry a person of a choice and also it's her choice whether she wants to remarry or not.

⁵ Article 4 (2) Supra note 3

⁶ Article 4 (2) (c) *ibid*

⁷ Article 4 (2) (h) *ibid*

⁸ Article 4 (2) (i) and (j) respectively

⁹ Article 6 (b) of the protocol to the African Charter on Human and People's Rights on the Rights of women in Africa.

In cases of an **Armed conflict**, **Article 11** provides that women have a right to be protected by the state. The state parties should undertake to respect and ensure respect for the rules of International Humanitarian law applicable in armed conflict situations, which affect the population, particularly women. The state shall ensure protection against all forms of violence, rape and other forms of sexual exploitation and to ensure that such crimes are considered as war crimes, genocide and/or crimes against humanity and that the perpetrators are brought to justice before a competent criminal jurisdiction.

Article 12 (c) provides for **protection from sexual abuse**. That the state shall protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices.

Health and reproductive Rights. This rights are provided for under **Article 14 1 (b)**. That the state shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted, they include the right to control their fertility and the right to decide whether to have children, the number of children and the spacing of the children and the right to choose any method of contraception.¹⁰

Women also have the right to be provided for with Health Services. Clause 2, of the Article provide for the right to adequate, affordable and accessible health services, including information, education and communication programmers to women especially whose in rural areas. The state is obliged to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. Women have the right not to be deprived off medical care.

Women's right to Food Security. Women have a right to have nutritious and adequate food. The state shall provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food. Hence, women should not be deprived off food or access to food.

¹⁰ Ibid Article 14 a (b) and (c) respectively

THE PREVENTION OF VIOLENCE against women and children- SADC gender monitor.

The state is entitled to promote the eradication of elements in traditional forms and religious beliefs, practices and stereotypes, which legitimize and exacerbate the persistence and tolerance of violence against women and children¹⁴.

No. 9 states that the state shall adopt legislative measures to ensure the protection and removal of all forms of discrimination against and empowerment of women with disabilities, the girl-child, the aged, women in armed conflict and the other women whose circumstances make them especially vulnerable to violence.

CONVENTION OF BELEM FO PARA-INTER AMERICAN CONVENTION ON THE PREVENTION PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN.

Article 3 provides that every woman has the rights to be free from violence in both the public and private spheres. Private sphere is also domestic sphere and entails the family and public sphere is political, business.

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. They include the right to have her life respected, the right to have her physical mental and moral integrity respected, the right to personal liberty and security, the right not to be subjected to torture, the right to have the inherent dignity of her person respected and her family protected, the right to equal protection before the law, the right to simple and prompt recourse to a competent court for protection against acts that violate her rights¹⁵

Article 9 provides that every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and internal instruments

¹⁴ No. B 13 of the HDDENDUM to the 1997 Declaration on Gender and Development by SADC Heads of State or Government

¹⁵ Article 4 of the convention of Belem Fo Para.

on human rights. The convention recognizes that violence against women prevents and nullifies the exercise of these rights.

Article 6 provides what encompasses the right to be free from violence to include the right of women to be free from all forms of discrimination and the right of women to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination.

In protecting the right of women from violence, **Article 10** provides that the state shall include in their national reports to the inter-American Commission of women information on measures adopted to prevent and prohibit violence against women, and to assist women affected by violence as well as on any difficulties they observe in applying those measures and the factors that contribute to violence against women.

BEIJING: FOURTH WORLD CONFERENCE ON WOMEN PLATFORM FOR ACTION.

In regard to **Religion**, the conference recognized that spirituality and belief play a central role in the lives of millions of women and men, in the way they live and in the aspirations they have for the future. The Right to Freedom of thought, conscience, and Religion is inalienable and must be universally enjoyed. This right includes the freedom to have or to adopt the religion or belief of their choice either individually or in community with others in public or in private, and to manifest their religion or belief in worship, observance, practice and teaching.

1.4 KENYA'S INTERNATIONAL OBLIGATION

Kenya is a state party to the above international instruments relating to human rights, which implicitly prohibit violence against women. Kenya is also a state party to the **UN Convention Against Torture**, which provide protection against violence in a more detailed manner; and the **UN Convention on the rights of the Child**, which constantly uses both feminine and masculine pronouns in its provisions, makes it explicit that the rights apply equally to female and male children.

Kenya ratified the **Convention on the Elimination of all Forms of Discrimination Against Women** on 9th March 1984 and committed itself to the **Beijing Declaration and Platform for Action (1995)**, **Security Council Resolution 1325 (2000)** on women, peace and security and the **African Union Solemn Declaration on Gender and Equality (2004)**.

1.5 WOMEN'S RIGHTS UNDER THE MUNICIPAL LAW.

Section 74 (1) of the Kenyan Constitution states that no person shall be subject to torture or of inhuman or degrading punishment or other treatment.

The **Sexual Offences Act** promote and protect the right of women in regard to violence. It provides penalties to offences towards women like rape, sexual assault etc. **Section 3 (1)** of the Sexual Offences Act 2006, foresees that: A person commits the offence termed as rape if

- (a) He or she intentionally and unlawfully commits an act which caused penetration with his or her genital organs.
- (b) The other person does not consent to the penetration', or
- (c) The consent is obtained by force or by means of threats or intimidation of any kind.

Section 4 defines **attempted rape** thus any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape.

The Act also provide for the punishment of **sexual assault**. **Section 5** states that any person who unlawfully penetrates the genital organs of another person with any part of the body of another or that person or an object manipulated by another or that person except which such penetration is carried out for proper and professional hygiene or medical purpose; manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body is guilty of sexual assault.

Gang rape is also provided for in **Section 10**, that any person who commits the offences of rape or defilement under the Act in association with another or others or any person who, with common intention, is in the company of another or others, who commit the offence of rape defilement, is guilty of the offence.

Both rape and sexual assault carry the penalty of not less than 10 years imprisonment to imprisonment for life. Gang rape carried the penalty of not less than 15 years imprisonment but which may be extended to imprisonment for life.

Section 24 of the Sexual Offences Act foresees the **criminalization of abuse of position of the superintendent or manager of a jail**, remand home or any other place of custody or any other law enforcement officer. The offence includes taking advantage of this position to have sexual intercourse or to commit any other sexual offences under the Act. The perpetrator shall be liable upon conviction to imprisonment for a term of not less than 10 years.

Section 18 of the Sexual Offences Act provides the offence of trafficking for sexual exploitation states that the person is liable, upon conviction, to imprisonment for a term of not less than 14 years or to a fine of not less than 2 million shilling or both.

Harmful tradition practices are prohibited under **Section 14 of the Children Act 2001** which provides that no person shall subject a child to female circumcision, early marriage or 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.

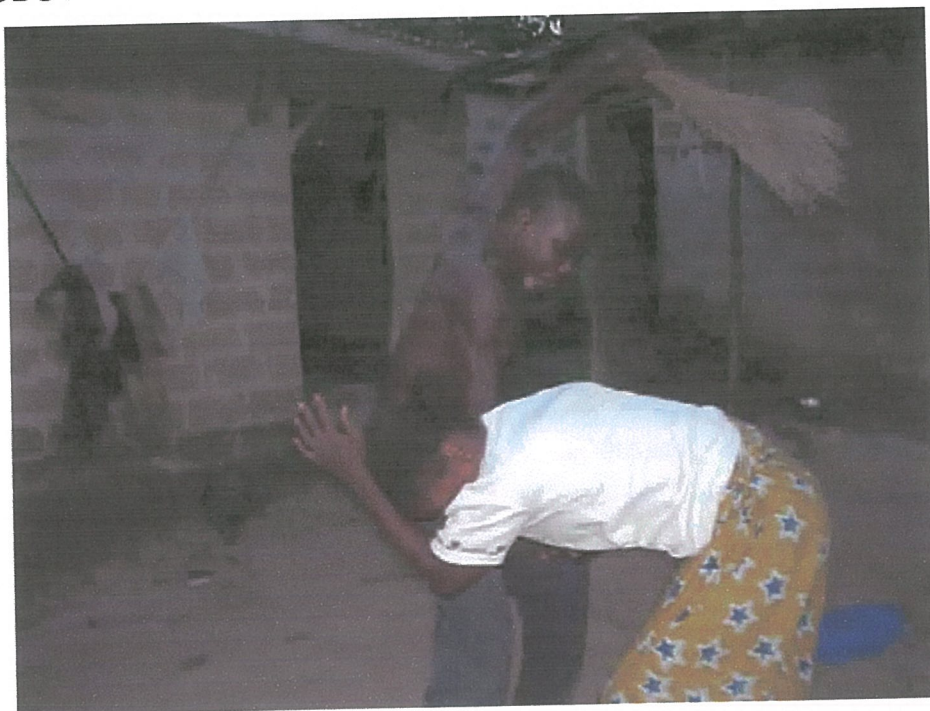
Forced marriage is criminalized under **Section 14 of the children Act**. Also **Section 29 of the Sexual Offences Act**. Which targets in particular sexual acts within this context, provides that "any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years.

In conclusion, the above chapter brings out the rights of women in regard to violence which include the states duties. Since Kenya is a party to the international instruments its obliged to follow the provisions and implement them. The importance of this chapter is to show that woman have a right both in the international and municipal laws and they are entitled to such rights.

CHAPTER TWO

2.0 VIOLENCE AGAINST WOMEN IN THE FAMILY

INTRODUCTION



Many forms of violence take place in the private sphere

A United Nations report on violence against women observes that “violence against women in the family has been recognized as a priority area of intention and national action. ...All the research evidence that is available suggests that violence against women in the home is a universal problem, occurring across all cultures and in all countries”¹⁶

But although the empirical evidence of violence against women is strong, it has not been reflected in the development of international law. The doctrine of Jus cogens, with its claim to reflect central, fundamental aspirations of the international community, has not responded at all to massive evidence of injustice and aggression against women.

The great level of documented violence against women around the world is unaddressed by the international legal notion of the right to life because that

¹⁶ United Nations, Violence against women in the family 20 (1989)

legal system is focused on “public” actions by the state. Also, the international prohibition on torture. That it must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity¹⁷

Although many women are victims of torture in this “public” sense, by far the greatest violence against women occurs in the “private” non-governmental sphere.

Structural explanation of the universal subordination of women: wife beating is not just a personal abnormality, but rather has its roots in the very structuring of society and the family: that is in the cultural norms and in the sexist organization of society¹⁸

Violence against and oppression of women is therefore never a purely “private” issue. Its **Charlotte Bunch** noted, it is caused by “the structural relationships of power, domination and privileged between men and women in society, violence against women is central to maintaining those political relations at home, at work and in all public spheres. These structures are supported by the patriarchal hierarchy of the nation state. To hold states accountable for “private” acts of violence or oppression against women, however, challenges, the traditional roles of state responsibility¹⁹

It could be argued that, given the extent of the evidence of violence against women, failure to improve legal protection for women and to impose sanctions against perpetrators of violence against women should engage state responsibility²⁰

Forms of violence against women in the family include physical Aggression for example murder, battering, Genital Mutilation, Deprivation of food, deprivation of medical care, reproductive coercion or control, sexual abuse for example rape, incest; and Emotional Abuse due to confinement, forced marriage, threats of reprisals etc.

¹⁷ United Nations Convention Against Torture and other (cruel, Inhuman or degrading Inatminet or punishment.

¹⁸ Supra note 1

¹⁹ Gordon (hristenson, Attributing Acts of Omission to the state.

²⁰ Americans Watch, Criminal injustice: Violence Against Women in Brazil (1991)

2.1 DOMESTIC VIOLENCE

Domestic violence against women is a serious and widespread problem in Kenya. This is mainly due to traditional culture permitting a man to discipline his wife. The continuation of this practice may be attributed to the fact that every regime of customary law in Kenya grants husbands the right to “chastise” their wives for “misconduct”²¹



Many African cultures allow for chastisement of wives by their husbands.

Under Kenyan customary laws, only “**unjustified or excessive beating**” by the husband would be sufficient ground for divorce or for the wife to return to her family. Nonetheless, violence against a wife might constitute an offense under any one of the provisions of the penal code criminalizing **assault**, which is defined as the unlawful inflection of bodily harm to any person or the intent to unlawfully harm another person²²

Assault or battery may also be ground for civil actions in tort. But, this usually disregards violence that is perpetrated in the home.

²¹ Eugene Cotran, (1: The law of marriage and Divorce) Restatement of African Law: Kenya

²² Laws of Kenya Cap 63 Section 231, 250, 251

Women and children suffer abuse from parents and husbands. The primary research indicated that the most prevalent form of abuse of women is usually a combination of physical assault followed by emotional stress, sexual violence and neglect both financially and otherwise²³



Deprivation of food is a form of violence against women and children

The enactment of the **Family Protection (Domestic violence) Bill** has been pending since 2002. This bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognizes domestic violence as a crime. The Bill also makes provisions for counseling and psychological attention for the victims of domestic violence and for safe houses for victims who are at risk in their current domestic situations.

It makes provision for protection orders against perpetrators, including denying them access to the matrimonial home, provides for a “friend” to make an application for a protection order on behalf of another, and provides for rehabilitation and setting up of a fund for domestic violence victims. The fund

²³ COVAW, In Pursuit of Justice: Research report on service providers’ response to Cases of violence Against women in Nairobi province, October 2002.

is to be a Government initiative. The attitude of police and other law enforcement officers with regard to the issue of domestic violence further abet the persistence of violence against women.

In most police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in “domestic issue”. Domestic violence is still not treated with the same gravity as other cases when they are reported, often the victim reporting the incident is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

This shows that women are much more disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women’s economic dependence on men. According to **The World Organization Against Torture (OMCT)**,²⁴ the majority of women have limited access to resources for seeking justice, both in terms of legal services and the costs of medical consultations.

Currently, there is no legal aid being offered by the state either for victims of sexual violations or for victims of any other gender-based violence in Kenya. Provision of legal aid in Kenya is still the preserve of civil society organizations such as the **International federation of Women Lawyers-Kenya (FIDA (19), (OUHW (19), Kituo Cha Sheria, CLAN, ANPPCAN Kenya, The CRADLE, and others.**

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, social stigma, or losing custody of their children.

In pursuit of Justice noted that in most police stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny, shame and intimidation. It was also found that some police officers are quite negative about the issue of violence against women

²⁴ See OMCT. Addressing the Economic, social and cultural root causes of torture in Kenya op Cit.

and women's human rights in general; they still think that it is a "family affair" and nothing to do with them²⁵

Reporting violence is challenged by the complicated procedure for filling a complaint. In cases of violence, women are required to produce 3 documents: a police abstract, a "P3" Form and a medical report. It is a long procedure, which clearly deters women wishing to denounce violence.

The P3 form is legally accepted written evidence of physical abuse. Only recently have P3 Forms been made more accessible; the police used to have the monopoly of the Form whereas now, it can be found in hospitals and can be downloaded from the Internet. However, women are not fully aware of the existence of such a form.

Currently, the victims are charged for filling out and signing the P3 Form, although the law does not officially provide for such payment. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, i.e. the majority. The cost of filing out the P3 Form is also not standardized and varies from station to station.

2.2 MARITAL RAPE

Marital rape is not recognized by the penal code as a criminal offence because of the presumption that consent to sexual intercourse is given by the act of marriage. Therefore, the perpetrators often go unpunished or, if at all convicted, are punished for assault.

In the Kenyan context, marital rape remains a concept that is widely not understood or thought even to exist. The view of most legislators is that there cannot be rape within a marital relationship. This therefore means that the offence of marital rape has not yet been expressly criminalized in any legislation, and is often used as a basis for delaying the adoption of any gender-related bills²⁶

Kenya still goes by the principle initiated by **J. Hale** in the, "The husband cannot be guilty of rape committed by himself upon his lawful wife, for their

²⁵ Supra note 8

²⁶ Among the reasons why the Domestic Violence (Family Protection) Bill not yet passed is because it would outlaw marital rape. The sexual offences Act 2006 was passed only after certain provisions, including that recognizing the offence of marital rape, were removed from the bill.

mutual matrimonial consent and contract, the wife hath given up herself in this kind into her husband and she cannot retract"²⁷

Other justifications for the husband's supposed immunity from such a charge includes the agreement that the husband and wife becomes one at marriage with the wife's legal existence be consolidated into that of the husband under whose wing protection and cover she perform everything.

2.3 FEMALE GENITAL MUTILATION

Female Genital Mutilation (here after: FGM), which is condemned widely by international health experts as damaging to both physical and psychological health, is still practiced in Kenya by certain ethnic groups and remains widespread, particularly in rural areas. Often, FGM is institutionalized through culture and tradition.

There are 3 types of FGM: (**Clitoridectomy (incision)** i.e. the chopping of the clitoris; **Excision** i.e. the cutting off of all of or part of the clitoris or labia minora. And **Infibulations** i.e. the removal of the whole clitoris, cutting off the labia minora, scrubbing the habia majora and then join it leaving a small opening for urine and menstrual flow. By the look of it, the practice is inhuman and violates human rights.

²⁷ Criminalizing marital rape. Vanderbilt Journal of Transnation Law 1 March 01,2006, COPYRIGHT 2006 Vanderbuilt University school of Law



The horrors occasioned by Female Genital Mutilation

The **UN Special Rapporteur on Violence Against Women** recognized FGM as a form of violence against women that requires concerted international and national action for its eradication. It warned that Blind adherence to these practices and state inaction with regard to these customs and traditions have made possible large-scale violence against women²⁸

FGM was banned by two presidential decrees and was not allowed in government- controlled hospitals and clinics before being prohibited by law for children under 18 in December 2001. This was provided for under **Section 14 of the children Act**²⁹ that no person shall subject a child to female circumcision, early marriages or cultural rites, customs or traditional practice that are likely to negatively affect.

The law gives women over the age of 18 years a choice. Whether to undergo FGM, as they are considered capable of making a decision at that age. However, the pressure and sanction of culture effectively negate the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

²⁸ Un Doc E/CN.2/1995/42

²⁹ 2001



Forced FGM to avoid being stigmatized by the community

In some parts of the country, FGM has been replaced by 'circumcision with words', celebrating a young girl's entry into womanhood but with words rather than through genital cutting³⁰

FGM denies women their right to sexual enjoyment. Some societies believe that it guarantees virginity and is thus supportive of bride price.

In as much as the law prohibits FGM, the law does not provide for punishment for offender and also recent statistics indicate that the government needs to take further steps to ensure that the law is observed in practice.

A newspaper article in **2008**³¹ reported that "over 90% of all women over 20 years in Laikipia North District in Kenya are circumcised". Laikipia North District, in the Rift valley province of Kenya, is predominantly inhabited by the maasai and Samburu communities who are known to practice FGM. In the predominantly pastoralist communities, hundreds of girls undergo

³⁰ UN Doc. E/CN. 4/2002/83

³¹ The standard, 9 August 2008

circumcision every school holiday. In these communities, parents generally think that pregnancy before circumcision is a curse.

More concrete and practical efforts have to be made by the Government on the issue which should extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found to be condemning or participating in the practice. Stiff penalties should also be meted out to parents who are found to have given away their daughters to be forcibly married³²

2.4 FORCED MARRIAGES

Forced early marriages is still being practiced by communities which practiced female genital mutilation. This is because after FGM one is terms to be ready for marriage.

Most of the girls, some as young as 15 years, are married before the attainment of majority age (18 years) and without their consent and regardless of whether they have reached puberty. In the mentioned press article³³, it was noted by **Helen Gathogo, a manager of Nanyuki Children's Home**, which shelters rescued girls, that the provincial Administration, police and the children's department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

Cases of girls rescued from forced marriage

The standard of 26 May 2008 carried two accounts of girls who had been rescued by the police after being married off by their parents. In one of the incidents, the girls, aged 13 and 14, who were pupils of OI Kinyei Primary school in Mukogodo in Laikipia North District of Kenya, were withdrawn from school after their parents found them suitors. After being rescued, they were taken to Nanyuki children's Home, where the administrator conformed that their middle –aged husbands had run off.

The second case related to the rescue of a 6 year old girl from a forced early marriage in Isiolo District in Kenya. The children's Department, the Provincial Administration police and the child welfare society spent five days combing the remove Kipsing location in Isiolo District where they rescued the

³² See OMCT violence Against Women and children

³³ Supra note 52

minor, who had been hidden by a man who would be husband. The minor's father had given her to a 55-year-old man for marriage³⁴

2.5 CONCLUSION

In as much as the Government caters for violence against women in the public sphere, it should also be noted that most of the violence take place at home and thus women should be protected from such violence. Marital rape is real and thus should be punishable by law.

³⁴ ibid

CHAPTER THREE

3.0 VIOLENCE AGAINST WOMEN WITHIN THE COMMUNITY

According to **UN Declaration on the Elimination of violence against women (1993)**, violence against women within the general community includes rape, sexual abuse, sexual harassment and intimidation at work, education institutions and elsewhere, and trafficking in women and forced prostitution.

Many instances of violence against women outside of the household are acts of sexual violence. There is a lot of trafficking of large numbers of women from Asia, Eastern Europe, and the region (coast of Kenya), who are forced into prostitution against their will and subject to physical, sexual and psychological violence.

3.1 SEXUAL VIOLENCE



Most abused women remain silent on sexual violence and wife battery

Sexual violence has been identified as one of the most teething social problem young female are facing in Kenya. The seriousness of this social ill is well put by **Njoki Ndung'u – Former Nominated member of Parliament-2002-2007** referring to Kenya as a **nation of rapists**.

Sexual violence has made children, girls and women no longer safe in their own homes, schools, and work places or on roads. A report “**The Defilement Index**”,³⁵ revealed that men have become notorious of raping their daughters and if it is not their fathers, it is other male relative³⁶ School, like home, should be made safe haven for young people yet, many girls are sexually harassed and coerced. Teachers have been reported to offer good or passing grades to girls in exchange for sex³⁷. Not uncommon for older students to prey on girls as ‘they walk to school or while they board in dormitories. And “sugar daddies” target girls in the vicinity of schools, luring them into sexual relations with gifts and money.

Sexual violence is one of the greatest impediments to attaining meaningful social development in our society especially among women. The **United Nations Platform of Action (1995)** has described violence against women as an obstacle to the achievement of the objective of equality, development and peace. Young people are being sexually abused in homes schools, on the roads etc.

Sexual violence may also include rape.

3.2 RAPE

Rape is defined under Kenyan Law (**Chapter XV Offences against morality of the Penal Code**). Rape, defilement and incest are the three categories of rape classified according to the age of the victim and the relationship of the perpetrator.

Amnesty international published a report in March 2002 on rape in Kenya; Rape the invisible crime which revealed, violence against women is widespread in Kenya. Every day women are physically and sexually abused. Rape occurs in all social and ethnic groups. It is a crime that shocks and traumatizes the victim, and undermines that states of women in society. Yet it is largely suffered in silence³⁸

³⁵ Prepared by the chamber of justice, (HRE) Kenya and Cradle

³⁶ Daily Nation July 18th 2005 page 11

³⁷ Omaar et al 1994

³⁸ Rape- the invisible crime, Report by Amnesty International March 8, 2002.

Besides the fact that rape occurs regularly in Kenya, there is no effective system to investigate allegations of sexual violence and rape and as a result not many cases are dealt with in court. Police offices are not trained to deal properly with gender-based violence and many see domestic violence including marital rape as a private matter.

This has led to a lack of confidence in the law enforcement response to acts of violence against women and this to the subsequent under-reporting of rape and other forms of violence against women in Kenya.

Amnesty International interviewed many women who states that with regard to sexual violence and rape "they were reluctant to approach the police and had only reported their case when the violence had become so extreme that they need intervention to protect their lives".

Rape exists in every society. Of critical importance is how rape is dealt with; Consequence of rape is closely related to gender relations and women's level of empowerment. In many cases, the reaction to an act of rape may actually re-victimize the survivor. In some cases of rape, the victim, rather than the perpetrator, may be punished so that a family's honor may be restored; rape may result in so called honor crimes or the forced marriage of the victim to the perpetrator.

The Kenyan law defines rape as a man having carnal knowledge (sexual intercourse) of a woman without her consent or agreement. Consent to have sex must be freely obtained. Any consent given because of threat, intimidation or undue influence is in law not acceptable. The maximum sentence of rape is life imprisonment with no minimum sentence. In reality this means that often offenders get away with a light punishment.

Ms Fatma Abeyd Anganzwa, the chairperson of the Kenya Anti-Rape Organization,³⁹, condemned harassment by police whenever rape cases are reported. She says her organization receives complaints on the mistreatment of rape victims by police from all parts of the country. She also blames the rising cases of rape on the judiciary noting that courts hand down light sentences to rapists. " I think there should be a minimum sentence a rapist

³⁹ Article by Zachary Ochieng, 'Kenya –Relegated to Second class citizens, [www. Peace link it\) afrinews](http://www.Peace link it) afrinews).

should receive since judges in Kenya have opted, in most cases, to hand down light sentences including probation⁴⁰

In addition, the judiciary system in Kenya is perceived as discriminatory against women with a low percentage of female judges and little knowledge of gender issues and international standards on women's rights.

Attention should be paid to the procedure for reporting rape and other sexual offences. Currently, the victim can only be treated by one Government medical Doctor, who is also required to attend cost. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim cannot take a bath or wash her clothes lest crucial evidence be lost.

It should also be noted that in most cases, lengthy investigations are undertaken for sexual abuse cases and equally lengthy medical processes long after a suspect has been arraigned in court. The lengthy processes are attributed to the fact that, as noted, there is only one Government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court sessions during the hearings in order to give evidence.

Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are not able to pay for legal representation and are therefore unsure of how to proceed for quick resolution of their cases.

In addition, sexual offences cases are often thrown out of court on account of technicalities. In the case of **Dzito V. Republic** where the appellant was charged with, among other things, rape (**Section 140 of the Penal code**), with the alternative charge of indecent assault on female (**Section 144 (1) of the Penal Code**). The second count related to attempted rape (**Section 141 of the Penal code**). The appellant was convicted and sentenced to serve four years in prison plus three strokes of the cane with hard labour, but he appealed. One of the grounds on which the court allowed the appeal and

⁴⁰ Ibid

acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometime judicial attitudes revealed in the exercise of judicial discretion can be entirely unreasonable. In the case of **Matheka V. Republic**⁶², in which the appellant was convicted of defilement of a girl under the age of 14 years in contravention of **Section 145 (1) of the Penal Code** and sentenced to 14 years imprisonment plus eight strokes of the cane, the judgement of 8 October 2001 states, "The evidence against the appellant was overwhelming ... The conviction was appellant was awarded the maximum as provided by law. In this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed".

3.3 SEXUAL HARASSMENT

Sexual harassment includes but is not limited to the following:

- (a) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature affecting an individual's employment status. Such advances constitute sexual harassment when:
 - (i) Submission to such conduct is made either explicitly or implicitly a term or condition of an individuals employment.
 - (ii) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 - (iii) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
 - (iv) Threats or suggestions are made that the individual's job, future promotions, wages etc. depend on whether or not he/she submits to sexual demands or tolerates harassment.
- (b) Unwelcome sex-oriented comments (kidding, teasing, jokes etc)
- (c) Subtle pressure or requests for sexual activities.

⁶² High Court Mombasa case no.126/2000

(d) Unnecessary touching of an individual (e.g. patting, pinching, hugging, repeated brushing against another person's body, etc).

(e) Demand for sexual favors⁶²

Sexual harassment does not only happen in employment but also in schools, on the roads, in towns, markets etc.



An example of sexual harassment in the offices

3.3.1 SEXUAL HARRASMENT IN INSTITUTIONS OF HIGHER EDUCATION

Institutions of higher education are grappling with issues of justice, fairness, gender equity and democracy. The education and training of students take place in multicultural and multi-ethnic environments where students from different social, economic, age, gender, class and religious backgrounds mix in pursuit of learning. The productivity and quality of teaching and learning in educational institutions is affected by the gender climate that is created in these institutions as all these diverse people interact frequently.

Predominantly, students in colleges and universities are between 18 and 25 years of age and are in their youth. This fact affects the expectations,

⁶² copy write 2009, General Conference of Seventh Day Adventist

knowledge, behaviors, attitudes, learning patterns, emotional and social intelligence of the students. Many students are raised in patriarchal cultures where their gender expectations may be in direct contradiction to that encouraged in colleges and universities. For example, in patriarchal societies, men may regard young women as 'prey' and the rituals of courtship may involve some coercion, exclusion from social and political activities, disparaging of vocal or activist women on campuses and decrying the disciplining of violent staff and student men. Some of the examples of sexual harassment in higher school of learning include.

- (i) Demanding sex in exchange for good grades, a job or promotion to a higher grade for staffs.
- (ii) Sexual assault of students or staff during academic consultations.
- (iii) Sexual bullying by attacking the dress and commenting on the bodies of staff and students.
- (iv) Sexualizing the work or classroom environment by referring to students as 'wives', using specific students as examples on sexual issues, expressing wishes to perpetrate sexual acts on colleagues.
- (v) Scratching students' or colleagues' palms, patting their bottoms or grazing their breast in classrooms or corridors.
- (vi) Collective assaults on women staff or students, defacing election posters with sexual messages or humiliating students during induction, orientation or lecturers with sexual talks or jokes.
- (vii) Placing sexuality abusive messages, pictures and comments about students, staff and others without their consent through IT facilities within and outside the institution.
- (viii) Coercion of women to seek protection from male predation by cults, brotherhoods and other bodies on campuses⁴¹

In many African universities, there are allegations of male staff propositioning vulnerable female students, threatening to fail them, and or else enticing them with the promise of higher grades. Lecturers are in a position of authority with the power to pass or fail students. Utilizing this power

⁴¹ Copy right@ 2009, General Conference of Seventh-day Adventists.

position for sexual favors in clearly unprofessional, and goes against the code of ethics governing the teaching profession.

In order to curb these behaviors in school, the school should develop an ethical code of conduct governing the relationship between staff and students, explicitly outlining what is defined as sexual harassment. Students should then be encouraged to report any forms of sexual harassment. Students who make reports which should be confident that their reports are treated with confidentiality so that they will not be faced with reprisals from a powerful male lecturer. Documentation is important, so that a lecturer who persistently indulges in sexual harassment will accumulate a record.

There should be follow-up actions against persistent offenders, beginning with verbal warnings, culminating in suspension and dismissal where this is appropriate. A grievance reporting system must be instituted which will not result in further victimization of the women who report⁴²

3.3.2 Sexual harassment in the workplace.

Sexual harassment in the workplace is increasingly becoming a topic issue especially amongst feminists and other human rights activists. There are frequent newspaper reports on sexual harassment at work. Subjecting employees to sexual harassment does not only constitute a moral turpitude but it is also demeaning to the victims.

Employees therefore have an obligation to discourage behaviour amongst employees that may be construed to constitute sexual harassment. As it is, **Section 21 of the public officer ethics Act, 2003**, which came into effect on 2nd May 2003, prohibits sexual harassment. It should therefore be the policy of every organization to make it clear that the practice will not be tolerated in the work place.

The victims of sexual harassment, especially, female employees may out of fear, intimidation by their superior or feeling of shames be unwilling to report to management cases of sexual harassment. It may therefore be helpful for an organization to designate a senior officer, preferably a female, as a focal point to whom cases of sexual harassment may be reported.

⁴² Nomcebo O. Simelane, sexual Harassment. A case study of the University of Natal, OSuth Africa, FAWE, Nairobi, 2001

Sometime some staff may make false allegations against their colleagues because of personal vendetta. In this respect, any employee who has been accused of sexual harassment should be given a chance to defend himself / herself and to cross examine the accuser and disciplinary action taken against any employee who has made a false report against fellow workmate⁴³

The Federation of Kenya Employers therefore, recommends adoption by member organization of a sexual Harassment policy.

SEXUAL HARASSMENT POLICY

It is(organizations name) policy that all employees must be allowed to work in an environment free from unsolicited and unwelcome verbal or physical sexual advances or sexual harassment is an unacceptable conduct in the work place and will not be tolerated. Those who may fall victim of this act as encouraged to make it known to the person indulging in the practice, the action is offensive and that should they not stop, then the incident of harassment may be reported to the reported to the relevant authorities.

Sexual Harassment is a violation of Section 21 of the Public Officer ethnics Act 2003. Every employee shall be protected from sexual harassment. Sexual harassment is any unsolicited or unwelcome verbal comment, gesture or physical contact of a sexual nature, therefore: -

- (a) No employee shall be subjected to sexual harassment either by somebody in authority over him/her as a condition, salary progression, career advancement, reward or any other consideration or by his/her fellow workmates as a condition of social acceptance of work.
- (b) Any case of sexual harassment shall be immediately reported by the victim to a designed officer and the perpetrator shall be dealt with in accordance with the organizations disciplinary procedures after having been given an adequate opportunity to defend himself /herself against the charges.

⁴³ Judy Omale. "Tested to the Limit: sexual Harassment in Schools and education institutions in Kenya.

- (c) Sexual harassment shall include any of the following, if the person doing it knows or ought to have known that it is unwelcome (See public officer ethics Act, 2003): -
- (i) Making a request or exerting pressure for sexual activities or favours.
 - (ii) Making intentional or careless physical contact that is sexual in nature; and
 - (iii) Making gestures noises, jokes or comments including innuendoes regarding another person's sexuality.
- (d) Any employee who makes a false report of sexual harassment will be guilty of gross misconduct and subject to disciplinary action.

3.4 TRAFFICKING

The practice of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corporation, internal human trafficking is the most common form of trafficking in Kenya, with women and children commonly identified as victims.

Internal trafficking occurs primarily from rural areas to urban centers, particularly from Kisumu, Malindi, Mombasa and Nairobi. Victims are young and needy girls, especially from the rural areas, who are taken to Urban centers to work as housemaids, sometimes for a fee,

The young girls are lured usually by relatives on the pretext that they will be sent to school once they arrive in the town. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal regions is predominantly for purpose of sexual exploitation because of the tourism sector.

A newspaper report in late 2007⁴⁴, gave the details of the conviction of a Congolese woman who was charged in Nairobi court with trafficking two girls aged 12 and 15 year for sexual exploitation. Persons are also trafficked for

⁴⁴ www.flac-kenya.org/download/sexual/harassment in the office pdf.

the purpose of forced labour in the agricultural sector particularly on tea plantation and flower farms⁴⁵.

In **R VS. Hans Vriens**⁴⁶, 3 girls implicated Hans vriens , a Dutch national with sexually exploiting them. This was related to suspected case of trafficking in children that involved MR Vriens who was accused of exploiting several children in Kenya .He had established school of the slums where he recruited young girls and housed them in a boarding school. It was alleged that he had not only developed a list of over 70 girls against whose names was marked “virgins” or “non virgins” but had exposed the to pornographic material. It was further alleged that he took some of these girls with him for holidays in Mombasa when he introduced to his friends as “springing chicken” which was incidentally the name of the school.

During the investigation, the police continually harassed the young girls including continually arresting and charging members of the families on fabricated criminal charges. At one point witnesses well arrested while they were going to the court to give evidences.

They include 9 and 10 year- old orphaned girls. Unfortunately, due to poor investigations and interference by the police, the accused was acquitted on all counts. It is alleged that he has since moved to western Kenya where he opened and is still operating a new school.

Regarding, international trafficking, a report on the status of human trafficking in Kenya published by **The Cradle in 2006**⁴⁷ identified Kenya as a fast-growing source, transits and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of suspected trafficking of children in Kenya, the objective and method of tracking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at particular risk of trafficking owing to poor birth registration.

Most of the trafficked women are lured abroad with the offer of a job, and are then kept in confident after identification documents have been

⁴⁵ Daily Nation, 15 December 2007

⁴⁶ Violence against women and children in Kenya 2008 pg 15

⁴⁷ CMC Criminal Case no. 1380/2001.

confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teaching but are essentially employed as maids when they arrive at the country of destination.

There has been a delay in the enactment by the parliament of the revised draft of the **Counter-Trafficking in Persons Bill**, if passed; it would be the first comprehensive law that would deal exclusively with issue of trafficking and all its elements. Trafficking as a concept in Kenya is largely unknown, and often perceived to be a moral, not a criminal issue. However, this bill should include prevention measures and provide for the effective prosecution and punishment of traffickers, as well as protecting and supporting for victims.

The issue was also the subject of a recommendation by CEDAW calling upon the state to expedite the adoption of the bill, but also urging the state to include the elements mentioned above⁴⁸. It's a consequence; the issue of trafficking is currently legally dealt with only partially. Other than the **children Act 2001**⁴⁹ and **the Penal code, the Sexual Offences Act** is the only other statute that contains provisions dealing with the issue of trafficking.

But the provision on trafficking for sexual exploitation targets all people where as the one on trafficking for all purposes targets only children.



⁴⁸ The CRAOLE- The Children foundation. Grand Illusions, shattead Oreams: A Report on the status of Human Trafficking in Kenya, 2006.

⁴⁹ UN Doc. CEDAW/C/KEN/Co/6.para 30

CHAPTER FOUR



Protectors or Perpetrators?

4.0 VIOLENCE AGAINST WOMAN PERPETRATED BY THE STATE

Violence against women perpetrated by the state can be divided into 3 types: Violence against women in time of armed conflict, Custodian violence against and violence against refugees and internally displaced women .This violence is either perpetrated or condoned by the state.

4.1 VIOLENCE AGAINST WOMEN IN TIMES OF ARMED CONFLICT

Violence against women during time of armed conflict has been widespread and persistent practice over the centuries. Women are not a homogeneous group and they experience war in a multitude of ways-as victims, combatants or promoters of peace.

War can mean violence, fear, loss of loved ones, deprivation of livelihood, sexual violence, abandonment, increased responsibility for family members, detention, displaced, physical enjoying and sometimes death.

In addition to being killed and mutilated as a consequence of fighting, women are subjected to gender based violence. Rape is used as a weapon of war to reinforce policies of ethnic cleansing, and to torture and trample the dignity of victims and the men in their communities. Thousand of women in Darfur have been subjected to rape multiple times.

Rape has also been documented as a tool of war in Algeria .In Iraq women have been subjected to violence both as a direct result of armed conflict and as a tool in the political process⁵⁰.

In a case study of Congo, **Mawazo**, a 24 year old girl from the village o **Shabonda in the Democratic Republic of the Congo**, is one the victims of sexual violence.” I was working in the field when seven thugs attacked me, They had knives and guns. I screamed and struggled. I was raped by all seven of them. I was torn and cut and there was a lot of blood”. Two years later, Mawazo was abducted by the same armed group and raped again. When she became pregnant, her abductors abandoned her to give birth alone in the forest. Her baby died but she managed to make her way back to her village where she needed surgery for her wounds.⁵¹

In Japan, the case of **Chong**, a former “comfort woman” during second world war, “One day in June, at the age of 13 I had to prepare lunch for my parents who were working in the field and so I went to the village well to fetch water. A Japanese soldier surprised me there and took me away..... I was taken to the police station in a truck where I was raped by several policemen .When I shouted, they put socks in my mouth and continued to rape me. The head of the police station hit me on the left eye because I was crying. I lost my eyesight in the left eye. After 10 days or so, I was taken to the Japanese army garrisonThere were around 400 other Korean young girl with me and we had to serve over 5000 Japanese soldiers as sex slaves everyday. Each time I protested, they hit me or stuffed rags in my mouth, one held a match stick to my private parts until I obeyed him, My private parts were oozing with blood.”⁵²

Rape is used by both sides as a symbolic act. As depicted by Second World War posters in which the rape of a woman was used to evoke the

⁵⁰ MADRE. Announcement for Promising Democracy, Imposing Theocracy: Gender-based violence and the US war in Iraq
<http://www.madre.org/articles/me/iraqreportintro.html>.

⁵¹ Women and War ICRC pg 12
www.icrc.org

⁵² Testimony given to the UN special Rapportuer during the mission to the Republic of Korea and Japan in 1995

image of the “rape” of France, rape is used by one side to demoralize the other, The rape of “their” women is then used to increase the sentiments against the enemy and further demonize them. This process of demonization or dehumanization may in turn lead to more rapes.

Rape during warfare has also been used to terrorize population and induce civilians to flee their homes and villages. It is often seen as one of the “perks” for soldiers and an inducement to display courage on the battlefield in other world as a natural consequence of war. The alleged endemic nature of rape in war has been institutionalized by military through forced prostitution and military sexual slavery.

The 1949 Geneva Convention well promulgated in reaction to international armed conflict and world wars and thus were primarily designed to set standards applicable during times of international armed conflict. Contemporary forms of warfare are not traditionally international in character. Rather, they are being fought within Nation states, generally between States and guerrilla movements. Common **Article 3 of the protocol 2 to the Geneva conventions** apply humanitarian legal standards to internal armed conflict.

Article 3 states that, “the following acts are and shall remain prohibited at any time and any place whatsoever with respect to the above mentioned-persons:

- a) Violence to life and person in particular murder of all kinds, mutilations, cruel treatment and torture;
- b) Taking of hostages;
- c) Outrages upon personal dignity in particular humiliating and degrading treatment.

The International Court of Justice, in **Nicaragua v. USA**⁵³ held that common article 3 is an accepted part of customary international law in addition to being a treaty provision and thus binds all parties to a conflict, whether state or non-state actor, irrespective of whether they are a party to the Geneva conventions.

Article 147 of the Fourth Geneva conventions, states that any one who commits a grave breach is subject to individual criminal liability and universal

⁵³ ICJ Reports, 1986

jurisdiction ,by which any one of the High contracting party can prosecute the crime. Grave breaches includes willful killing, torture or inhuman treatment ,including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation ,unlawful confinement of a protected person e.t.c

Although neither common Article 3 nor grave breaches enumerated in Article 147 include sexual violence per se, recent indictments before the **International Criminal Tribunal for the Former Yugoslavia (ICTY)** have defined **sexual violence** as torture, inhuman punishment, great suffering or serious injury. In addition, the **International committee of Red Cross** In its **aide-memoire 3 of December 1992**, declared that the Article 147 provisions on grave breaches include rape. This expansive interpretation has allowed for the prosecution of individuals for sexual violence as a grave breach of international humanitarian law also under common article 3.

State violence occurs in particular during armed conflict. This is however, largely disputed by security forces and undocumented. A situation analysis of women and children undertaken in **2007⁵⁴ in the Mount Elgon District of Kenya**, a region frequently plagued by land- related conflict, revealed that during the occurrence of violence, both the militia group and the government of Kenya security forces, inflicted sexual violence on women and children.

According to the analysis, security forces violated women and girls during the curfew imposed from 6pm to 6.am While it was in fact acknowledged that the curfew reduced the number of abduction and killing of people by the militia group ,in the area in questions, the most frequent complaints were that security forces harassed people by looting and confiscating their property by illegally extorting money from them and raping women and girls.

The post- election violence that rocked Kenya between December 2007 and March 2008 exposed many women, girls and children to the dangers and vulnerabilities of women and girls in conflict situation. During the post- election violence at the beginning of 2008, women and girls fleeing their homes and those who sought sanctuary in the internally person(IDP)camps, were

⁵⁴ COVAW.Situational analysis on the women and children in the Mount Elgon District in Kenya. October 2007

exposed to and experience gender-based violence ranging from all forms of sexual abuse and exploitation to physical and domestic violence.

The findings of an inter-agency report, undertaken by the **Gender Based Violence(GBV) Sub Cluster**⁵⁵ found that encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and females(not of the same family)were forced to sleep together in one tent. There were also concerns expressed over the lack of regulations and screening procedures at the camp that allowed men from outside to enter the camp without verification of their IDP status or posing as volunteers.

Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during the flight of the victims of violence, as well as within IDP and alternative camps. The assessment was carried out in selected sites in the North Rift Valley, South Rift Valley, Coastal Regional, Nairobi and Central Province.

The findings revealed that in the course of the violence, perpetrators exploited the conflict by committing sexual violence with total impunity, and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear-instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was realized.

Many victims were raped and infected with HIV/AIDS and/or other sexually transmitted infections (STIs) and many others were raped regardless of their HIV status at the time. This in turn caused many new infections and re-infections. To date, no case has been prosecuted by the government regarding the sexual violence that was perpetrated against victims during post-election turmoil.

⁵⁵ Gender-Based Violence Sub cluster. A Rapid Assessment of Gender –Based Violence during the post-election violence in Kenya, conducted January-February 2008

Case of 29 women of Kibera⁵⁶. During the post-election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either Administration police from chief's camp, or General Service Unit Offices reported their abuse to the Gender –Based Violence recovery Center at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers on patrol would break down doors of houses where women were known to reside alone(without an adult male present). They would then assault and rape the women, sometimes in the presence of children.

Given that police officers usually conducted these patrols in squads of 10, the assault were usually collective and the rapes frequently took the form of gang rape. Women were raped either in their homes or in the surrounding neighbour hood. The highly volatile situation prevented the women from accessing immediate post-rape care and they received treatment only in March 2008. For most of them, this was too late.

Among the 29 women raped, 18 are HIV positive, some having contracted the virus before their rape while a number contracted the virus following the incident. One of the victims who was already HIV positive and severely sick at the time, informed the rapists of her status. The 10 Administrative Police officers from the chief's camp never the less proceeded to rape her. Another victim was raped in the presence of her 8year old son and infected with HIV. A third victim became pregnant as a result of the rape and was due to give birth in October 2008.

Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the chief's camp in Kibera, none of them had been apprehended or charged with any crime.

It is worth noting that the report on the findings of the commission of Inquiry into post-election violence(Waki Commission) acknowledged that sexual violence was a crime that was widely perpetrated during the post election

⁵⁶ Cases reported to the Gender-Based Violence Recovery Center (Kenyatta Hospital), a one-stop-shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW(K). The crimes describe were committed between 30th December 2007 and 1st January 2008

violence.⁵⁷ The report further acknowledged that law enforcement agents were in fact perpetrators of the crime and the report therefore called for immediate Security Sector reform. Kenya waits with bated breath to see whether the recommendation of the Waki commission will in fact be taken into consideration and whether that will in turn lead to justice for the women girls and children who were sexually violated by law enforcement agents

4.2 CUSTODIAL VIOLENCE AGAINST WOMEN

Custodial violence against women is particularly egregious violation of a woman's human rights. The state, when it assumes responsibility for an individual, whether such responsibility is undertaken for future or rehabilitative reasons has heightened responsibility for the individual within its custody. since the defacto and de jure parameters of custody vary, Internationally, custody had not been clearly defined.

Most often used in terms of national criminal justice regimes, custody may also be used broadly to describe the many situations of compulsory psychiatric institutionalization or state schooling. Generally, In terms of criminal custody, the term "**custody**" encompasses both police custody and penal custody each of which serve as the site for violence against women perpetrated and condoned by state.

Most of the violence against women by the state occurs in situation of state physcharitic custody, medical custody, educational custody, and police or penal custody women are targeted by the state in their numerous and varied public and private roles, Increasing, women are targeted by the state for further public activism. Women human rights advocates and activists are arbitrarily detained or arrested, tortured, arbitrary murdered, "disappeared" and ill-treated at hands of state actors.

In many cases custodial violence is non-sex specific. Women like men are subjected to enforced disappearance, torture and cruel or inhuman treatment and arbitrary execution. However, even if apparently gender-neutral forms of custodial violence are utilized with gender in mind if authorities select their techniques based on their perceptions of female versus male frailty strength

⁵⁷ Report of the Commission of Inquiry into Post-election violence, October 2008 p.263

or endurance, they are generally not understood as such. Thus, discussion of gender-specific forms of custodial violence revolve largely around custodial rape and other forms of sexual violence against women.

Rape has been used as a form of torture not only directly against the rape victims but also against male family members who are forced to witness the rape of the wives, sisters, partners, daughters or mothers. The act of being forced to watch the rape of another has been recognized as a distinct psychological forms of torture. However in such scenario, the rape itself often has not qualified as torture. Rather, like the electric shock, the shackles or the police baton, the rape of women has been viewed as a weapon of the torture. Thus, the attack on the woman 's body is perpetrated as an attack on the male, and many cases is perceived as such except by the woman herself⁵⁸.

4.2.1 Torture and Impunity

The Kenyan constitution prohibits torture, in human or degrading treatment but does not define torture.⁵⁹

The **UN Special Rapporteur on Torture** visited Kenya and made a report to the **UN commission on human Rights in 2000**⁶⁰, where he sited that a number of his official interlocutors acknowledged that there was a tradition in Kenya of physical rough treatment of suspects of the police. It was apparent to him that such treatment routinely includes sustained beatings on all parts of the body with sticks ,metal bars and lengths of rubber. These beatings are administered generally to obtain confessions or other information.

The Special Rapporteur stated that there is a general sense of impunity among those, notably members of Criminal Intelligence Department charged with investigating suspected criminal activities.

In a case study of Kenya, **Josephine Nyawira Ngengi, a human rights activist and the sister of a well known government critic, has been arrested 3 times and tortured while in detention. She was beaten and blunt objects were forced into her vagina until she bled. According to**

⁵⁸ Report of the special Rapporteur on violence against women, January 1998.

⁵⁹ Article 74(1) Kenyan Constitution

⁶⁰ UN Doc. E/CN.4/200/9/Add.4

Ngengi at one point, one officer got so incensed that he took a wooden plank and hit me hard on the head I was then ordered to wipe the blood from the resulting wound with my tongue which I did.⁶¹

The special rapporteur recommended that Kenya should adopt the **Standards Minimum Rules For the Treatment of Prisoners**. According to **Rules 53**, an institution for both men and women, the part of institution set aside for women, shall be under the authority of a responsible woman who shall have the custody of the keys of all that part of the institution. No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer. And that women prisoners shall be attended and supervised only by women officers.

This does not, however, preclude male members of the staff particularly doctors and teachers from carrying out their professional duties in institution or parts of institution set aside for women.

The Kenya government announced that the Special rapporteur's recommendation would be implemented. In October 2000, the draft criminal law (amendment) Bill on the treatment of detainees and police custody was published but has yet to be enacted. This bill incorporated the above recommendations and included a provision to establish the Standing Committee on Human Rights as independent Human Rights Committee. Therefore the Kenyan government has yet to implement the proposals made by the special rapporteur.

On the 57th UN commission on human rights in 2001, the special rapporteur on torture also reminded the government of a number of cases transmitted between 1996-1998 regarding which no reply had been received. The report also notes that the Kenyan government had not provided information on the measures taken to implement the recommendation contained in the special rapporteurs report of 1999 mission.⁶²

These were also other allegations of sexual assault by the security forces in his report. One case he documented was a group of women and children from Mgare, Mara and Daaba, Isiolo District, ranging in age from 11 to 75 years

⁶¹ Amnesty International, Women in Kenya: Repression and Resistance. AI Index: 32/06/95. 24th July 1995

⁶² ibid

who were allegedly assaulted on August 8th 1998 by security forces looking for stolen guns and livestock. The group was allegedly severely beaten and some raped in an attempt to make them produce the stolen weapons.

4.2.2 Police treatment

Complaints on the mistreatment of rape victims by police are frequent. Women who dare report that they are sexually abused are often not taken seriously. Over the years the Kenyan media reported several cases of sexual violence by the police and it is believed to be a widespread phenomenon. These crimes by police officers often go unpunished as no independent enquiry will be carried out since it is police itself that are in charge of investigation, often even the local station to which the alleged offenders belong.

The UN Special Rapporteur on the independence of Judges and Lawyers, sent communications to the Kenyan Government concerning threats made against the International Federations of Women Lawyers. The information received indicated that in August 2000 five police had tried to force their way into the associations office. In additions, three staff members received anonymous threats that they would be killed because of their work. The harassment was particularly linked to the provision of legal assistance of the FIDA to an alleged rape victims in bringing a case against a minister in the office of the president.⁶³

There are allegations made by local human rights organizations that police abstract the medical investigations into sexual violence and in addition doctors are apparently reluctant to fill in the necessary forms when police officers are the accused.

To conclude, it is so unfortunate that those who are supposed to protect the women are the same people who engage in ill treatment torture of women.

⁶³ UN Doc E/CN.4/2001/65, paras 124-127

CHAPTER FIVE

5.0 RECOMMENDATIONS

Combating violence against the women requires the transformation of culture of tolerance for violence against women and ending impunity for perpetrators of these crimes. Legal codes must reflect an unequivocal stand against violence against women and include legislation, which specifically criminalizes such acts.

Kenya has legislation to prevent and punish domestic violence and challenges lay in enforcing such legislation and providing extra-legal support. However, Kenya has not still adopted Domestic violence legislation and few regard Marital rape as a prosecutable offence. Additionally, difficulty faced by a woman when filling for divorce under current laws, particularly the burden of proof for spousal abuse make it extremely difficulty for a woman to leave an abusive house hold Therefore the family protection (domestic violence) bill which has been pending since 2003 should be enacted.

In order to assure that victims come forward and laws are applied, investigations and court proceedings must not only be fair but must also be conducted in a manner that does not humiliate the victim. Due to close relationship between most victims and the perpetrators of violence against women. Legal system must also assure the victim's right to come forward by providing physical protection.

Ending impunity for all forms of violence against women requires thus not only legal reform, but also training law enforcement and legal officials, and expansion of legal mechanism to support victims. Furthermore, the government should also commit to training both the police and judiciary on women and children's human rights and insist that violence against women and children is unacceptable.

The government has an obligation to ensure that those whose human rights are violated have access not only to justice but also to health care and support service, to address their short-term injuries and long-term needs and to protect them from further violation. Support services for victims of violence against women should not only provide a safe environment and address

practical needs, but should also promote their overall well-being and long term physical and economic security and empower victims to take control of their lives.

The Gender Desk programme should be active. It is an initiative by the police department (through the office of the president) to set up gender desks at selected police stations as a pilot project. The programme established in 2003, aims at mainstreaming the issue of violence against women. Thus every police station is supposed to have a policewoman in charge of dealing with cases of gender-based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

Am glad that the children's Bill came into force in December 2001 and contains provisions that ban forced marriages and female genital mutilation. However, FGM continues to persist in Kenya and is carried out clandestinely in many parts of the country due to strong traditional customs. Therefore the government should launch a public awareness campaign to educate the population especially in the rural areas about the new law and consequences of FGM

International agreements such as CEDAW are not directly applicable in Kenya. The obligations have transformed into domestic law. Some important obligation such as the prohibition of gender based violence remains largely unregulated in the Kenyan law. If the obligation are transformed into laws, provision like Article 5 of the CEDAW which eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women would be available in the Kenyan law.

The fact that rape occurs regularly in Kenya, there is no effective system to investigate allegations of sexual violence and rape and as a result not many cases are dealt with in court. Many police see domestic violence, including marital rape as a private matter. Therefore, all law enforcement personnel and members of the judiciary should receive gender sensitivity training in responding to cases of rape and other forms of violence against women.

The government should also consider including minimum sentence for rape in the penal code.

The de jure discrimination of women exists, including the constitution of Kenya **section 82 (4) (b) and (c)** provide that the constitution guarantees of non discrimination does not apply with respect to personal laws, in particular in areas of marriages, divorce, adoption, and succession. There fore, the government should take agent action to amend this legislation so as to guarantee women equal rights with men in all areas.

Kenyan laws and policies do not currently deal with violence in the context of conflict, including violence perpetrated by those in authority. Legislation has to be amended in order to improve the situation of internally displaced women in accordance with international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during conflict are compensated adequately and receive medical psychological and social rehabilitations.

Kenya should ratify the Optional Protocol to the UN Convention on Elimination of All forms of discrimination against women, which would enable women in Kenya to lodge individual complaints concerning violation of the rights guaranteed under the convention. The government should also implement fully all the provisions of the same instrument. Against women, The Beijing Rules and Platforms of Action and the Declaration on the Elimination of Violence Against women as these instruments provide detailed protection for women against violence in the family, in the community and at the hands of the officials.

The inclusion of gender policy and law enforcement is affected by the fact that women are under-represented in decision-making structures in Kenya as it affects the way such polices are enforced. Therefore, the development of Affirmative Action Programmes designed to increase the numbers of women in the executive legislative and judicial branch should be enacted.

Many countries including Cameroon, Cuba, Egypt and Switzerland, penalize, under either the penal law or administrative functions, sexual intercourse between a man and woman involving the man's professional authority. In Cuba, special sanctions are applied to any one who, while wearing a military uniform or appearing as a public official, violates the physical integrity of a detained woman by sexual abuse or harassment.

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