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Law Research Centre

# **Violence Against Women in Kenya**

## **An Analysis of Law, Policy and Institutions**

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## **I. Introduction**

The issue of violence against women has only recently become a subject of specific scientific inquiry. Previously, violations of women were dealt with within the general purview of law dealing with assault. Within the African context, there is still not much literature to go by and this is attributable primarily to lack and/ or scarcity of reported cases and the inadequacy of data gathering methods.<sup>1</sup> Further compounding the problem is the diversity of actions that constitute violations of women. Moreover, the limitation of violence against women to the criminal law context leaves out those violations that are not perceived of as crimes.

### **A. Typology of violence against women**

Violence against women occurs both within and outside the family and could take various forms. It could comprise physical violation of the woman's body through such acts as kicking, pushing, burning, punching, pulling hair and may result in minor bruising or death. It may also constitute sexual violence such as rape or psychological tormenting through verbal abuse, harassment, deprivation of resources or denial of access to various facilities.

For our purposes, we will use the definition of violence against women that is used in the Declaration on the Elimination of Violence Against Women which deals exclusively with the subject. It defines violence as "any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether ... in public or private life".

### **B. Causes of Violence**

Violence is part of a historical process. It is not natural or born of biological determinism. Male dominance over women has historical roots and its functions and manifestations change over time. Oppression of women is therefore political, and an analysis of the state's institutions and society, the conditioning and socialization of individuals and the nature of economic and social exploitation is required in any analysis of the phenomenon of violence against women.

While certain forms of abuse are universal such as rape, others are specific to regions and countries. It is argued that the institutions of state and civil society must accept responsibility for female subordination. The state must refrain from encouraging acts of violence against women in state institutions such as prisons for instance.

Among the historical power relations responsible for violence against women are the economic and social forces, which exploit female labour and the female body. Economically disadvantaged women are more vulnerable to sexual harassment, trafficking and sexual slavery. In addition, denying women economic power and economic independence is a major cause of violence against women, as it prolongs their vulnerability and dependence.

In the family institution, historical power relations are often played out. While the family is a source of positive nurturing and caring values it also doubles up as a social institution where labour is exploited, male sexual power is violently expressed and where socialization that disempowers women takes place. In any event, it is in this environment where female sexual identity is often created. In some cases, familial expectation may lead to negative images of the self, which inhibit women from realizing their full potential.

Another manifestation of power relations is in the area of technology particularly the reproductive sector. Although it has allowed women greater freedom and choice with regard to the important function of childbirth, it has also created problems for women, which have resulted in female deaths. Its allowance for pre-selection of the sex of the child results in killing of female foetuses and selective abortion.

In this same context of power relations, women must also confront the control of knowledge systems of the world by men. Be it in the field of culture, science religion or language. This makes women victims of violence and also part of a discourse, which legitimizes violence against women. A brief look at some of the factors will reveal how this takes place.

### *1. Sexuality*

Violence is used to control female sexual behavior and this is why violence against women often finds expression in sexual forms. Either as rape, sexual harassment or female genital mutilation. The control of female sexual behavior is to ensure chastity. In many traditions a woman's sexuality is linked to concepts of honour. In this context, violence against women who are seen as being the property of the males in a rival social group becomes a means of defiling the honour of that social group. It then becomes important for society to 'protect' its women from the violence of "the other". This protection entails restrictions and those who respect these restrictions are protected and those who assert equality and independence are more vulnerable to violence.

### *2. Cultural Ideology (ies)*

The prevalence of ideologies justifying female subordination promotes this problem. In many ideologies, a traditional legitimacy is given to using violence against women. There are cultural sanctions for husbands to beat their wives in certain circumstances. The ideologies base their discussion on a particular construction of sexual identity. Masculine construction requires manhood to be equated with the ability to exert power over others, especially through the use of force. Masculinity, it is espoused, gives man power to control the lives of those around him, especially women. Women are construed to be passive and submissive and to accept violence as part of the woman's estate. Such ideologies link her identity and self-esteem to her relationship to her father, husband or son. An independent woman is denied expression in feminine terms. The other ideologies related to this are the standards of beauty, which require women to mutilate themselves or to damage their health to ensure compliance to some beauty standards.

Custom, tradition and religion are frequently invoked to justify the use of violence against women. In the realm of religion, certain man-made practices performed in the name of religion denigrate accepted norms of women human rights. Such are exemplified by fundamentalist practices. The customary practices and some aspects of tradition are often the cause of violence against women. These include female genital mutilation, foot binding, male preference, early marriages, virginity tests, dowry deaths, and female infanticide among others. Blind adherence to these practices and state inaction with regard to these has made possible continued violence against women.

Elements of national and international media also cause attitudes, which give rise to violence against women. For example, the media reproduces negative stereotypes of women as being weak and helpless or the use of pornography, which is a symptom, and a cause of violence against women.

### 3. *State ambivalence*

In modern times, state inaction in situations of violence against women is one of the major factors that allow violence to continue. The state is an arena of conflict, on the one hand it acts according to legislation and practices which are against women's interests. On the other hand, it emerges as the major instrument in transforming certain legislative, administrative and judicial practices which empower women to vindicate their rights. Therefore, the state's negligence may be another cause of increased violence against women and its active intervention may be the catalyst for reforming power relations within society. For instance, the doctrine of privacy especially in the home is usually invoked by the state in its refusal to act unless the violence in the home becomes a public nuisance. Secondly, the sanctioning of institutions of conflict resolution within societies which involve using violent means are likely to entertain violence against women than against their male counterparts.

## **C. Consequences of Violence against Women**

The result of violence against women is degradation, humiliation and belittling of women. This in turn engenders a sense of fear and insecurity in women victims. It prevents women from leading independent lives, curtails their movement and determines their dressing manner. It also increases vulnerability and dependence. The overall effect is that their potential remains unrealized and their energies are stifled as violence prevents women from participating fully in the life of the family and the community and society at large.

In cultural contexts, a woman is denied her existence as a sexual being with needs and expectations. This by extension violates her fundamental human rights. Women may also suffer from mental and physical health problems as a result of violence. Abused women are for instance, subject to depression and personality disorders such as high levels of anxiety and somatic disorders. All these greatly affect a woman's confidence and self esteem.

Lastly, the cost to the society is phenomenal. The financial implications in dealing with violent/violence cases as well as the time spent are costly. Yet this material cost is superseded by the more intangible costs relating to the quality of life, the suppression of human rights and the denial of women's potential to participate fully in their societies.

## **D. Scope of study**

This report looks at violence against women in Kenya. It lays out the general international and national legal framework within which violence against women is dealt with noting the general non-domestication of international legal instruments dealing with women's human rights generally and women's rights in particular. It also discusses the procedural laws that have a bearing on violence against women and addresses violations against women that do not as yet constitute crimes and which are therefore not currently dealt with in the law. It identifies gaps in the laws and highlights recent interventions that have sought to empower women to confront violence. Finally and by way of conclusion, the report makes recommendations for requisite changes in the law that would enhance women's capacity to deal with violence.

## II. Contextual Framework of Analysis

### A. A General Note

It is now internationally accepted that all women irrespective of their race, colour, economic status, religious affiliation or other distinctions face the problem of violence directed at them specifically because they are women. The fact of being a woman is a complex web of cultural, social and economic factors, which have the cumulative effect of leaving any woman vulnerable to a whole host of acts that men may be shielded from.

In order to understand the phenomenon of violence against women therefore, it is imperative that we consider gender relations, which many perceive to be a central factor to the issue. In this context, male power is seen as a feature of all inter-personal male and female relationships and encounters. The argument runs that women's engendered vulnerability to intimidating and violent male behaviour is due to their social position.<sup>2</sup> The fear of violence limits women's freedom of movement and constrains what they can do, where they can go and with whom. In other words, the reality and threat of violence acts as a form of social control influencing women's choices under set conditions.<sup>3</sup> Within this schema, patriarchy has been blamed for the prevalence of violence against women in Africa. It refers to a situation where the male gender heads and dominates the organization of society and makes all decisions that determine how the society is run.

### B. Historical Background

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 households were also subject to male supremacy, which could be enforced through violence. Third parties were however not allowed to exercise any violence on women and would be punished for it. Moreover, domestic chastising was regulated in that the husband was not allowed to cause physical impairment that would disable the woman from performing her functions in the home. The forms of redress available to the woman included for instance returning to her natal home or reporting the matter to established organs of the community that would investigate the matter to ensure that the woman was not chastised for no cause. This system was facilitated by the fact that marriage was not an affair between two individuals but represented familial and clan ties. Stability of the family was therefore a concern of a wider clientele than the parties to the marriage.

Colonial rule and the attendant introduction of new economic and social structures disrupted this state of affairs. The males moved from their societal setting to search for work outside the community. Family and society ties weakened and people became less interested in what was happening to other members of the community. This had the effect of making women more vulnerable to male aggression given the already prevailing perception of women as subordinate to men. The isolation of the nuclear family from the wider society relegated the problem of violence against women to the personal/ private realm.

The British legal system, which was imposed, also contained facets that cast women as subordinate to men within the family. The man was, for instance the head of the household and therefore the owner of the family property. Further the law recognised the conjugal rights of the man to a far greater degree than those of women and did not conceive of the concept of rape within marriage. Moreover the introduced legal system did not make provision for dealing with violence against women as a special problem within or outside marriage.

The government made an attempt to address some manifestations of this problem in 1966. It set up a Commission on the Law of Marriage and Divorce whose terms of reference included among other things, looking into the status of women in the society. The Commission considered the problem of wife beating to be pertinent to the issue of status and after examining it, proposed a Bill, which would have criminalized wife battering. The predominantly male Parliament rejected the Bill and justified the practice of wife chastisement as an inherent traditional right of an African man and also as a matter within the private domain and thus not enquiring state

intervention. The failure of this Bill to become law means that a woman who is the victim of violence from her spouse has to rely on the general criminal law, as we will see below.

Since then women have been seeking to have the state address their concerns including their need for protection from violence both in the home and outside the home. Recently there have been some farsighted initiatives such as the Criminal Law Amendment Bill, 2000 and the Domestic Violence (Family Protection) Bill, 1999 that speak directly to the issue of violence against women. We will analyse these initiatives below.

### III. The Legal Framework

#### A. International Legal Standards on Violence Against Women

##### 1. Institutionalisation of the “woman” issue in international human rights law

In recent times, the norms and standards of international law have developed a concern for the “women” question. This is more so in the field of international human rights law as the problems associated with violence against women have gained increasing recognition by the international community. Many international legal instruments dealing with human rights include the protection of women from violence in their provisions.

##### a) The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) in Article 1 states that all human beings are born free and equal in dignity and rights. Article 2 provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as...sex...or other status.

Under Article 5, it is provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The non-discrimination clause taken together with Articles 3 and 5 means that any form of violence against women which can be construed as threat to her life, liberty or serenity of person or which constitutes torture or cruel, inhuman or degrading treatment is not in keeping with the spirit and purport of the UDHR and is therefore, a violation of the international obligations of member states.

##### b) The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

Other instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibit violence against women. Article 2 of the ICCPR contains a non-discrimination clause similar to that contained in Article 2 of the UDHR. In addition, Article 26 provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex”.

Taken with Article 6.1 of the Covenant, which protects the right to life and Article 7 which protects everyone from torture or cruel, inhuman or degrading treatment or punishment, and Article 9.1, which protects the right to liberty and servility of person, the Covenant may be construed as covering the issue of gender-based violence.

Article 3 of the ICESCR guarantees the equal right of women and men to the enjoyment of all rights set forth in that covenant and many of the substantive rights set forth cannot be enjoyed by women, if gender based violence is widespread. For instance, Article 7 ensures the right of everyone to the enjoyment of just and favourable conditions of work. This, by implication, requires that women must be free of violence and harassment at the workplace.

c) *The Convention Relative to the Protection of Civilian Persons in Time of War (The Fourth Geneva Convention)*

In times of war, the Convention Relative to the Protection of Civilian Persons in Time of War (The Fourth Geneva Convention) states clearly in Article 27 that women shall be especially protected against any attack on their honor in particular against rape, enforced prostitution or any form of indirect assault. This is echoed in common Article 11 to the Geneva Conventions.

**2. *Instruments on women's rights***

a) *The Convention on the Elimination of All Forms of Discrimination against Women*

The most extensive instrument dealing exclusively with the rights of women is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It is an international bill of rights for women as it sets out practices regarded to be discriminatory and lists actions to be taken to remedy this situation. Although CEDAW does not explicitly deal with violence against women except in the areas of trafficking and prostitution (Article 6), many of the anti-discrimination clauses contained in it provide the basis for the protection of women from violence. In addition, the Committee for the Elimination of Discrimination Against Women has made a number of recommendations which address the issue of gender-based violence and provide another source of legally binding material at the international level dealing expressly with violence against women.

In General Recommendation 12, adopted in 1989, the committee requested that states include in their reports information about violence against women and the measures taken to eliminate such violence. General recommendation No. 19,36/ formulated in 1992 deals entirely with violence against women and explicitly states that gender-based violence is a form of discrimination which inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men and asks that state parties have regard to this when reviewing their laws and policies.

It also argues that the definition of discrimination in Article 1 of the Convention includes gender-based violence. Article 1 of CEDAW defines discrimination as "...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 their political, economic, social, cultural, civil or any other field". Gender-based violence is defined as violence directed against a woman because she is a woman or which affects women disproportionately. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. The definition of discrimination therefore necessarily includes gender-based violence.

The General Recommendation 12 also deals with specific articles of CEDAW and how they relate to violence against women. The areas discussed are: traditional attitudes; customs and practices; all forms of traffic and exploitation of prostitution of women; violence and equality in employment; violence and health; rural women and family violence. Its argument is that certain traditions and customs and practices whereby women are regarded as subordinate or as having stereotyped roles perpetuate various practices, including violence and

coercion and that such prejudices and beliefs may be used to justify gender-based violence as a form of protection or control of women, as a result of which women are deprived of the equal enjoyment of their human rights and fundamental freedoms. With regard to prostitution, traditional and new forms of trafficking, the Recommendation states that these activities put women at special risk of violence and abuse. The state parties are consequently directed to take special preventive and punitive steps against such violence.

On employment, it states that gender-specific violence such as sexual harassment in the workplace can seriously impair equality in employment. With regard to health issues, states are directed to provide a support service for all victims of gender-based violence, including refuge, specially trained health workers, rehabilitation and counseling services.

Rural women are recognized as being at special risk of violence due to the prevalence of traditional attitudes in many rural communities and it imposes an obligation on states to ensure that services for victims of violence are accessible to rural women. Family violence is seen to be widespread and present in every part of the world and measures necessary to eradicate it are listed. Lastly, the Recommendation also directs state parties, in their reports to describe the extent of each problem in their countries, the measures taken to prevent and punish the occurrence of such problems and the effectiveness of such measures. Through CEDAW, women's rights are conceptualized as human rights.

#### b) *The Declaration on the Elimination of the Violence against Women*

More direct is the Declaration on the Elimination of the Violence against Women (DEVAW) which deals exclusively with violence against women. Although it is not legally binding, it sets out international norms which states have recognized as being fundamental in the struggle to eliminate all forms of violence against women. It defines violence against women in Article 1 as *“any act of gender-based violence that results in, or is likely to result in: physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether owing in public or private life”*.

Violence against women is defined in the Declaration as including but not limited to physical, sexual and psychological violence that occurs in the family. Such violence includes battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, and non-spousal violence related exploitation. The Declaration also points to the prevalence of violence in the general community including rape, sexual abuse, sexual harassment and intimidation at work in educational institutes and elsewhere, trafficking in women and forced prostitution. Finally, it recognizes violence, which is either perpetuated or condoned by the state.

This definition is a broad one. It includes all forms of action which disempower women because of the fear of violence whether the fear is instilled by the state, actors in the community or members of the family.

#### c) *Vienna Declaration and Program of Action*

Article 1 Paragraph 18 of the Vienna Declaration and Program of Action adopted at the World Conference on Human Rights in 1993 provides that the human rights of women and of the girl child are an unalienable, integral and indivisible part of human rights. It also provides that gender-based violence and all forms of sexual harassment and exploitation including those resulting from cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person and must be eliminated. This provision states that human rights of women should form an integral part of the United Nations Human Rights activities including the promotion of all human rights instruments relating to women. Lastly, it urges governments and other organizations to intensify their efforts for the protection and promotion of human rights and the girl child.

It is further stated in Part II paragraph 37 of the Declaration that the equal status of women and the human rights of women should be integrated in to the mainstream of United Nation's system-wide activity. In particular, in Part II, paragraph 38 states that the World Conference on Human Rights stresses the importance of working towards the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may occasion bias against women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. It further states that violations of the human right of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind including particularly murder, systematic rape, sexual slavery and forced pregnancy require a particularly effective response.

d) *The Convention the Rights of the Child*

At the same time, the Convention the Rights of the Child, in Article 19 urges states to take all appropriate legislative, administrative, social and educational measure to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. In Article 32, states parties are called upon to take all necessary measures to ensure that the child is protected from economic exploitation and from performing any work that is likely to be hazardous or harmful to the child's health or physical, mental, spiritual, moral or social development. Further, Article 34 provides for the protection of the child from all forms of sexual exploitation and sexual abuse and in Article 37, states parties are called upon to ensure that no child is subjected to torture or other cruel inhuman or degrading treatment or punishment. In Article 38, states parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. Furthermore, in accordance with their obligations under international humanitarian law, states parties are required to take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

In the World Declaration on the Survival, Protection and Development of children, further attention is called for in order to strengthen the role of women in general and ensuring their equal rights as this is seen as advantageous to the world's children. It calls for girls to be given equal treatment and opportunities from the very beginning.

e) *The African Charter on Human and People's Rights*

At the regional front, the Organisation of African Unity through the African Charter on Human and People's Rights in Article 18 (3) makes provisions for states to ensure the elimination of every discrimination against women and to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

This provision is brief and concise but it may be properly construed as conferring very extensive mandate on states to eliminate any form of discrimination against women including practices that constitute violence against women.

f) *The African Charter on the Rights of the Child*

As far as children issues are concerned, the African Charter on the Rights of the Child in Articles XVI on Protection Against Child Abuse and Torture, XXI on Protection Against Harmful Social and Cultural Practices, XXII on Armed Conflicts Situation, XXVII on Sexual Exploitation and XXIX on Sale, Trafficking and Abduction all constitute legal provision protecting the child against violent acts or practices. These may properly be construed as applying to the girl child as well.

## **B. National legal provisions protecting women from violence**

Kenya has ratified the International Covenants on the Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It is also party to the African Charter on Human and Peoples Rights and the African Charter on the Rights of the Child. Kenya has also ratified the Conventions on the Elimination of Discrimination against Women and on the Rights of the Child. In principle, Kenya is also supportive of the principles enshrined in the UDHR and DEVAW. Theoretically, therefore, Kenya is committed to safeguarding women and girls from all forms of violence.

Despite the fact that Kenya has ratified these international instruments, many of them have not been incorporated into Kenya's Municipal Law. An international convention does not become part of Kenyan Law until it is incorporated into the domestic law by a Bill or Motion passed by Parliament making it an Act of the Parliament of Kenya. The effect of ratification without incorporation into domestic law is that although the Kenyan state is bound in international law by an international instrument, the citizenry is not able to rely on the convention. Save for a motion on the Beijing platform of action, there is no domestic law incorporating an international human rights instrument into domestic law. Therefore, despite its willingness to commit itself in international law to women's human rights instruments very little has been done to ensure that Kenya's domestic law conforms to international standards in respect of women's human rights.

At a practical level though, some of the principles that are contained in the declarations, covenants and conventions mentioned above are part of the national legal system. We will look at some substantive and procedural laws governing this area.

### **1. The Constitution**

The Constitution of Kenya enshrines in Chapter V, the fundamental rights and freedoms of the individual. These are blanket provisions, which safeguard the rights of men and women alike. They also apply to children.

In Section 70, the rights safeguarded are those to life, liberty, and security of the person and his/her protection of the law. The freedoms of conscience, expression, assembly and of association. The section also provides further protection of one's privacy and home, property and from deprivation of property without compensation. These rights and freedoms are not absolute, hence in enjoying these; one must respect the rights enjoyed by others and therefore, the public interest. Sections 70–83 expound on these rights. However, for enforcement of these rights and freedoms, Section 84 empowers any Kenyan whose rights and/or freedoms are infringed upon to apply to the High Court for redress. The High Court has original jurisdiction in such cases.

As far as violence against women and girls is concerned, the Constitution does not provide for it explicitly, what it does provide for however is protection from inhuman treatment or torture or any other form of degrading punishment. This applies to men and women alike. (Section 74)

Under Section 82, there is a blanket provision protecting all Kenyan citizens from discrimination either by law itself or in effect. Under Section 84 (4) b and c, this section is excluded from applying with respect to family law issues and in cases where one is governed by customary law. It is argued that this provision in the constitution not only facilitates but also shields from judicial sanction practices that have the effect of discriminating against women and perpetuating commission of violence against women.

## 2. *The Penal Code*

The other substantive law in Kenya pertaining to violence against women is the Penal Code (Chapter 63 of the Laws of Kenya) which provides the general criminal law framework. This law defines offences as either misdemeanors or felonies and prescribes the penalties thereof. The various offences under which questions of violence against women are handled are divided into two categories: Sexual Offences and Offences against the Person.

### a) Sexual Offences

These are also referred to as offences against morality and include:

#### **1. RAPE (SECTIONS 139-141):**

The term “rape” is derived from the Latin word “rapere” meaning “to steal, seize or carry away”. It constitutes the oldest means by which a man could steal or seize a woman to be his wife. Forcible rape became a crime when marriage evolved into a sanctioned institution where women were viewed as a proprietary interest, infringement upon which was a crime against the father or husband of the victim.<sup>4</sup>

There are three categories of rape within Kenyan law classified according to the age of the woman or girl raped and the relationship between her and the perpetrators. These are rape, defilement and incest. If one combines the figures for rape, defilement and incest, one will discover that an increasing number of women and girls report rape every year. In 1993 the combined figure was 1274, in 1994 it was 1310, in 1995 it was 1455 and by 30<sup>th</sup> June 1996 1020 rape incidents had been reported to the Kenya Police. If one uses the 1993 figure, at least 3 Kenya girls and women report rape to the Kenya Police on a daily basis. This is disturbing given that rape is perhaps the most under-reported offence particularly when it is a case of incest or the perpetrator is a person well known to the victim.

Rape is prohibited under section 139, of the Penal Code and carries a maximum sentence of life imprisonment. Under this section, rape is committed under Kenyan Law when a man has unlawful carnal knowledge of a woman or girl, without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm or by means of false representation as to the nature of an act or in the case of a married woman by impersonating her husband.

The language used by the law in defining rape illustrates the discomfort of the legal system with regard to this and other sexual offences. Unlawful carnal knowledge is not defined by the Penal Code. Moreover, the Penal Code does not state what constitutes unlawful as opposed to lawful sexual intercourse. Thus sexual intercourse between a man and a female person he believes is his wife (even if she is under 14 years of age) can be construed to be lawful intercourse. It is a defence to a charge of defilement that the person charged did in fact believe and had cause to believe that the girl raped was his wife, (Section 145(2) of the Penal Code).

What is unlawful carnal knowledge proves even more problematic as section 162 of the Penal Code prohibits some forms of consensual sexual intercourse. Section 162 (c) makes it illegal for any person to consent to carnal knowledge that is against the order of nature. The fact that acts against the order of nature are not defined means that a whole range of consensual intercourse is prohibited under this section. It is possible for example that consensual oral and anal intercourse is prohibited under this section. Although lesbianism is not expressly prohibited under the penal code, it is also possible that sub-section (c) of Section 162 may be interpreted to criminalize it.

On the other hand the focus of the sexual offences on morality instead of consent results in rape narrowly being defined as forced penetration of the vagina by the penis. Thus if a man pushes a bottle into a woman's vagina or forces her to perform oral sex, or sodomises her, this does not constitute rape but a less offence of either indecent assault or an offence against the order of nature.

## **2. DEFILEMENT (SECTION 145-146):**

A man does not rape a girl under the age of 14; if he has sexual intercourse with/without her consent the offence committed is the lesser one of defilement. Proscribed under Section 145 of the Penal Code, defilement of girls less than fourteen years of age is a felony punishable by imprisonment with hard labour for fourteen years together with corporal punishment. Attempts to defile have a less stiff penalty of a five-year jail term. In this latter case, corporal punishment is optional. It is a sufficient defense if the accused person had reasonable cause to believe that the victim was over fourteen years or that the victim was his wife.

The other category is defilement or attempt thereof of imbeciles or idiot girls. It is a felony punishable by imprisonment with hard labour for fourteen years. Corporal punishment is optional. It is apparently committed in circumstances that do not amount to rape. The accused must have known that the girl was an idiot of imbecile.

The relationship between the man and the victim also determines what sexual offence an accused will be charged for. If the perpetrator is a father, son grandfather or brother of the victim, the offence is classified under incest and charged under section 166 of the Penal Code.

It is indeed perplexing that Kenyan girls under the age of 14 are less protected by the Laws of rape than adults are.

## **3. OTHER PERSONS PERMITTING DEFILEMENT OF THE GIRL (SECTIONS 149-150)**

The Penal Code provides that any person who is an owner or occupier of premises or who acts or assists in the management of such premises who induces a girl under thirteen years to be upon those premises for purposes of defilement is guilty of a felony. It is punishable by imprisonment for five years. Not surprisingly, it is sufficient defense if the accused had reasonable cause to believe that the girl was above the prescribed age limit.

Where the girl is under the age of eighteen but over the age of sixteen, it is categorized as a misdemeanor and it is sufficient defense that the accused had reasonable cause to believe and did in fact believe that the victim was above the prescribed age limit.

## **4. CONSPIRACY TO DEFILE (SECTION 157)**

Conspiracy to defile is a felony liable to imprisonment for three years with or without corporal punishment.

## **5. INCEST (SECTION 166)**

This is defined as having carnal knowledge of a female person who is a granddaughter, daughter, sister or mother of the accused. It is a felony punishable by imprisonment for five years. Any attempt to commit incest is a misdemeanour. If the 'victim' is under the age of thirteen years, the offender is liable to imprisonment for life. It is immaterial that the female person consented. If the victim is over thirteen years, the maximum sentence is 5 years imprisonment. If the incest victim is above the age of 16, she may face a charge under section 167 of the penal code which states that "any female person of or above the age of 16 who with her consent permits her father, grandfather, son or brother to have carnal knowledge of her (knowing him to be her grandfather, son, father or brother as the case may be) is guilty of a felony and is liable to 5 years imprisonment".

The Court may divest the male offender in incest cases of all authority over the female and appoint any other person as the guardian to such female. This divestiture can be made redundant by an order of the High Court. The Attorney General must however sanction the commencement of any prosecution on a charge of incest.

The milder punishment for men committing incest with a girl or woman over the age of 13 and the fact that this punishment is equivalent to that passed on a girl or woman over the age of 16 who has consensually agreed to an incestuous act, suggests that the legal philosophy underpinning the laws of incest where the victim is an adolescent or adult is that whatever happened must have occurred with their permission. Yet rape, regardless of the perpetrators relationship to the victim is extremely traumatic. A Lamu court on 1<sup>st</sup> July 1996 ordered the arrest of a man who raped his mother causing her to attempt suicide. It is therefore recommended that the punishment for incest be based on whether or not the sexual act occurred by consent not the age of the person alleging that she was raped.

#### **6. ABDUCTION (SECTIONS 142-143)**

This is defined in Section 256 as forcing or compelling or by any deceitful means inducing any person to go from a place. As an offence, any person who takes a woman away or detains her against her will with the intent to marry or carnally know her or cause her to be married or carnally known by any other person is guilty of a felony. The penalty for this crime is imprisonment for seven years. Ironically, if the ‘abductee’ is an unmarried girl under the age of sixteen years the offence is a misdemeanor and no penalty is imposed. Yet, it involves taking the girl out of the custody or protection of her parents or guardian. Although the penalty is not provided for, misdemeanors are governed by the provisions on punishments especially Section 27.

#### **7. INDECENT ASSAULTS ON FEMALES (SECTION 144)**

Under Section 144(1), it is stated “ Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for five years with or without corporal punishment”.

That this crime is a felony indicates that law treats it as serious. The Code however does not delimit the parameters of the offence, leaving the matter to courts to decide what constitutes indecent assault. Courts have in practice defined indecent assault very narrowly as the case of *Stephen Muendo Kieti V. Republic* (discussed below) demonstrates. Consent is not a defense to a charge of indecent assault on a girl under the age of fourteen. Ironically, if the accused had reasonable cause to believe that the girl is above the age of fourteen, it shall be a sufficient ground on which the court can acquit him of the charges.

This offence includes any utterances, sounds or gestures that are intended to insult the modesty of any woman or girl. These are categorized as misdemeanors and are punishable with one-year imprisonment. It is suggested that one may bring a charge of sexual harassment under this provision but proving it may present considerable difficulties.

#### **8. PROCURATION (SECTIONS 147-148)**

This is a misdemeanor punishable by corporal punishment at the court’s discretion in addition to any term of imprisonment. It involves any procurement or attempts to procure any girl or woman under 21 years of age, to have unlawful carnal connection with other persons in Kenya or elsewhere; be a common prostitute; leave Kenya with the intent that she may become an inmate of or frequent a brothel elsewhere or a prostitute therein.

It also involves use of threats or intimidation or use of false pretences or false representations or application or administration of any drug or matter or thing in order to overpower so as to enable the accused to have carnal connexion with the woman or girl. To obtain a conviction under this provision, the evidence of witness is not

enough. Corroboration is required.

#### **9. DETENTION OF FEMALES FOR IMMORAL PURPOSES (SECTION 151)**

Detention of females for immoral purposes is a misdemeanor. It is deemed to be detention if the accused withholds from the victim (woman/girl) any wearing apparel or other property belonging to the victim with intent to compel her to remain in the premises or brothel. One wonders what happens if one is forcefully locked up without any possibility of exit or escape.

In this offence, the victim is authorized to use all means at her disposal to facilitate her escape from this detention. The Penal Code provides that any magistrate may issue a warrant authorizing a search within a place believed to be a detention facility for any woman or girl. The magistrate may cause the person accused of detaining the girl or woman to be apprehended and brought before him or her for proceedings to be taken for punishing that person. This provision applies to girls detained for immoral purposes unlawfully and against their consent. The age limits include those under the age of sixteen or if over sixteen and under eighteen, are detained against their will or that of their parents or guardian.

#### **10. PROSTITUTION (SECTIONS 153-156)**

This is not an offense per se under the Penal Code. However, living on earnings of prostitution by a man is a misdemeanor and would bring under the legal purview men who act as pimps and thus violate women's rights. Further, persistent solicitation for immoral purposes is a misdemeanor. Where one has been convicted on this charge and this conviction is followed by subsequent conviction on a similar charge the Court may sentence the offender to corporal punishment in addition to any term of imprisonment awarded.

One is deemed to live on the earnings of prostitution where he lives with or is habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute. This is in a manner that shows either abatement or compulsion or aiding the prostitution.

The provision similarly applies to women who live on earnings of prostitution.

#### **11. UNNATURAL OFFENCES (SECTION 162)**

The Penal Code also provides that unnatural offences are felonies liable to imprisonment for fourteen years with or without corporal punishment. Attempts to commit unnatural offences are felonies punishable by a seven-year imprisonment term with or without corporal punishment. Under this rubric one may be able to subsume sexual acts that are not covered under rape such as forced bestiality, sodomisation of women or the forcing of objects other than the penis into the woman's vagina.

##### **b) Offences against the Person**

This is another legal bracket under which violent acts against women are governed. Thus acts that result in the death of the woman may be charged as murder or manslaughter. To sustain a charge of murder, the prosecution must establish that the accused had malice aforethought. It is punishable by death. The felony of manslaughter attracts a sentence of imprisonment for life.

**Any attempt to murder is a felony liable to imprisonment for life.**

#### **ASSAULTS (SECTIONS 250-253)**

The offence of assault is a misdemeanor and it attracts a sentence of imprisonment for one year if it is not committed in circumstances for which the Penal Code provides greater punishment. Any assault that occasions

actual bodily harm is a misdemeanor attracting a sentence of imprisonment for five years, with or without corporal punishment.

In all these, it is quite clear that no remedy provided is aimed at compensating the victim or making reparation thereby. The sentences imposed are aimed at punishing and hopefully reforming the accused. The woman victim has no good made out to her at the personal level. Perhaps this is a lacuna in the law that needs to be addressed especially in some offences such as those of rape, defilement among others.

### 3. *Sexual offences in the marital context*

The issue of the age at which a girl is deemed a woman and able to give her consent to a sexual relationship with an adult is critical for the prosecution of sexual offences in light of the fact that Kenya does not have a minimum age for marriage. Girls under the age of 14 are particularly vulnerable as it is a clear defence to charge of defilement that the perpetrator believed or had reason to believe that the victim was his wife. In a country where customary laws permit arranged marriages for minors this lacuna in the law places girls in an extremely dangerous position.

Further the issue as to whether Kenyan law envisages spousal rape or whether all sexual intercourse within marriage is deemed to be consensual by dint of the Common Law marital exemption to rape is a contentious one. Some authors argue that the marital exemption does not apply in Kenya and that indeed the Penal Code provisions envisage marital rape.<sup>5</sup> Such authors however concede to the dearth of reported cases and envisage an aggressive approach by courts in interpreting the legal provisions, which as yet is the exception rather than the rule. The more prevalent view is that by mutual matrimonial consent and contract, a wife gives herself up to her husband. Our law probably needs to concede to the wife's right to withdraw her consent as was upheld in the House of Lords' decision in *Regina V. R* (1991), which stated in part:

*"[T]he common law was however capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition (propounded in 1736 to the effect that a husband cannot be guilty of raping his wife) reflected the state of affairs in those respects at the time it was enunciated. Since then, the status of women and particularly married women has changed out of all recognition...one of the most important changes was that marriage was in modern times regarded as a partnership of equals and no longer one in which the wife was to be the subservient chattel of the husband ... on the grounds of principle there was no good reason why the whole proposition of marital exemption to rape should not be held inapplicable in modern time."*

A change in law would have to contend with prevailing social and cultural perceptions of women as well as the power relations between the parties to a marriage. As long as women are economically dependent on men, their capacity to negotiate on conjugal rights is almost inexistent.

The non-recognition by law of the possibility of a man raping his wife is thus problematic in respect of two instances. Firstly, the rape of minors who are forced into an early marriage and secondly, within the context of domestic relations where the male spouse forces himself onto his wife even after battering her or where the wife would not consent for fear of being infected with a sexually transmitted disease. There is no law that

protects a girl from rape by her husband where a marriage has been contracted on her behalf, if the marriage is considered a valid one within her customary law. At most she can hope to have the marriage annulled which is a civil law redress. In not having legislative provisions that require a minimum age for marriage and prohibit marriages that have not been contracted by mutual consent, Kenya is in contravention of several international conventions dealing specifically with the age of marriage and consent to marriage, to which it is a state party. Furthermore the fact that there are no legislative prohibitions against forced marriages of minors undermines the constitutional right of personal liberty.

### 3. *Procedural Laws impacting on violence against women in Kenya*

#### a) *The Evidence Act, Cap 80 of the Laws of Kenya*

As far as procedural issues are concerned, the Evidence Act, Cap 80 of the Laws of Kenya, governs collection and submission of evidence in cases involving violent acts against women. Thus, in cases where one has to seek redress in a Court of law either under constitutional provisions or under the criminal law provisions, he/she must follow the rules set out in this Act. Some of the rules in this Act make it difficult to convict the accused persons due to their requirements.

There is a need to recognize, for instance that the consent to sex can be vitiated by alcohol or administration of drugs. The current provisions do not envisage this scenario in light of the fact that in a rape case, this defence is allowed to impeach the character of the victim by questioning her morality under Section 163 of the Evidence Act. In a conservative society like Kenya's where the word sex is not even allowed into the legal definition of rape, the fact that a woman imbibes alcohol will be held against her in a rape trial. Section 163 deals with grounds for impeaching the credit of a witness. Under Section 163(1) (d)

*“when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character”.*

Taking alcohol may well lead to implications of immorality on the part of a woman.

The strict rules of evidence applied in respect of sexual offences, militate against the victims and often result in a charge of rape being reduced to indecent assault. First the legal philosophy underpinning the evidential rules in respect of sexual offences is that women and girls are liars. It is therefore a matter of judicial practice that the evidence of victims of sexual offences be corroborated. In the classic legal case of *Maina vs. Republic*, Chief Justice Mwendwa, warned magistrates that “girls and women do tend to tell an entirely false story which is very easy to fabricate, but extremely difficult to refute...” thus branding women and girls liars. When the victim of a sexual offence takes the witness stand, she, unlike other victims of crime is on trial. The situation is exacerbated if she is a child victim. Under Section 124 of the Evidence Act, the evidence of a child of tender years requires corroboration for it to sustain a conviction for an offence. The Evidence Act does not state what the age guide for a child of tender years is but case law has delimited this to the age of fourteen years. (*Oloo s/o Gai V. Republic* [1960] East African Law Reports 86).

The requirement for corroboration (independent evidence that confirms or supports evidence already adduced by another witness or other witnesses that the accused committed the offence with which he is being charged) in sexual offences has connotations of lack of trust of the complainant. The view of Judge Mwendwa in *Maina V. Republic* is still good law and it is to the effect that women victims of sexual offences are likely to mislead the court as to the nature of their sexual encounter with the supposed attacker.

Examples of other evidential rules include:

1. In criminal cases, the standard of proof is that beyond reasonable doubt. Anything short of that will not succeed. In rape cases, this standard gives many accused persons a chance to get away as the victim is put at a disadvantage. This similarly is the case in defilement and incest cases.
2. Another rule of evidence is on the incidence of the burden of proof, both legal and evidential. The legal burden of proof is borne by the prosecution team. While the evidential burden is borne by the party adducing the evidence. The party bearing this burden must discharge it effectively in order to sustain her case. (Sections 107-109 of the Evidence Act). This is also complicated by the fact that all criminal offences are prosecuted by the state. The prosecutors have in many cases proved to be very incompetent and in cases of violent acts against women, many 'guilty' persons accused walk away scot-free due to the prosecution's inability to discharge this burden. The failure to discharge the burden has to be seen within the context of the nature of the evidence that it required to sustain a conviction for sexual offences obtaining which is an onerous task. (See *Republic V. Duncan Gichuhi Waiyaki* below).
3. The rule governing admissibility of legal or illegal evidence. The legality is determined by the manner in which it was acquired. Therefore, if the prosecution introduces evidence that it acquired illegally, it may interfere with chances of success of the case. Illegally obtained may be the only available evidence in view of the fact that sexual offences may occur in very private domains.
4. The other rule is that requiring corroboration in rape cases where the victim is a minor. In this instance, if prosecution does not meet this requirement which is more often than not, the chances of success are minimal. (See *Francis Charo Opo V. Republic* Criminal Appeal No. 39 of 1980).
5. Other rules of evidence are those relating to confessions and recording of the same. The process of identifying a suspect in a parade and the judges rules are set down to facilitate a fair identification, admission of documentary evidence and hearsay evidence. Such rules may ruin a prosecutor's case.

**b) Criminal Procedure Code, Chapter 75 of the Laws of Kenya**

Other procedural matters are those governed by the Criminal Procedure Code. Questions involving arrests of suspects, searches, the place (s) of trial, institution of proceedings and drawing the necessary documents, provisions as to bail among others are stipulated in the Code. The casual way in which courts treat instances of violence against women ensures that the arrest of suspects is not as rigorously pursued as is the case for suspects of other kinds of offences.

**c) Civil Procedure Act, Chapter 21 of the Laws of Kenya of the Laws of Kenya**

A person who suffers damages may seek legal redress in a civil court for compensation. The relevant documents to use and the procedure to be followed are outlined under the Civil Procedure Act. Again, non-adherence to the rules will lead to the matter being thrown out by the court on technical grounds.

In all cases, it is imperative for the prosecution/applicant to understand these provisions and follow the proper procedure lest the matter is thrown out of court on technical grounds. These illustrate just how significant procedural issues are in enforcing criminal law especially those pertaining to violence against women.

#### *4. Judicial Interventions*

Cases dealing with violence against women are increasingly coming before courts. We have a few examples here to illustrate the manner in which these are handled.

##### *Wilmina Achieng Case Number 177736/98:*

In this case, a man, one Dan Ndenda Wamamba, tortured his wife, Wilmina Achieng by beating her and lacerating her private parts in a most brutal attack. He was punishing her for coming home late and for failing to account for her whereabouts between 1.00p.m. and 8.00p.m. on December 6, 1997. The man was subsequently arraigned in court for the offence where he admitted to it and remained unrepentant claiming that his action was consistent with his Luhya community's way of dealing with such behaviour. He was fined Kshs. 10,000, which he promptly paid, went home and beat his still sick wife. He was rearrested, charged with the offence of assault and eventually jailed for six months.

This man was released shortly afterwards through a presidential pardon during a national holiday in December 1999. This case shows that there is need to reassess the case histories of prisoners who really deserve to be pardoned. Those who commit such violent crimes against their own spouses should not benefit under such schemes.

##### *Zainab Mohammed Case Number 4728/98:*

In this case, Edward Wafula Ochoya defiled a Standard Three girl, Sheila Mohammed and infected her with syphilis and HIV-AIDS on 27 November 1997. All evidence laid out before the court pointed to the guilt of the accused. In giving judgment, the presiding Magistrate Mrs. Jane Ondieki noted, "In essence, he (the accused) has literally sentenced a little girl to death and a slow and painful one at that. He deserves the maximum sentence as provided by law. Indeed in my view, the law is not sufficient. He deserves more than that but the court's hands are tied by the penal provision. I will therefore award the accused the maximum sentence as provided by law". She sentenced the accused to 14 years in prison with 20 strokes of the cane and hard labour.

This case should have been tried as a murder case since in any event the little girl is dying. It also illustrates the inadequacy of the law in dealing with issues involving violence against women and girls.

##### *Stephen Muendo Koti V. R*

The appellant was charged with, among other things, indecently assaulting a woman by touching her private parts. According to the evidence adduced in court, Muendo went to the complainant's home drunk and indecently assaulted her by touching her underpants. Muteti then fled to inform her husband in the shamba. The court of first instance convicted the appellant and sentenced him to three years and one stroke of the cane for indecent assault. On appeal, the High Court overturned the ruling on the ground that there was no sufficient evidence to prove the offence of indecent assault. The Court opined that, "The evidence by Muteti is limited to the appellant coming to her house drunk and expressing intentions to have sex with her. But that he only tried to remove her underpants but she fled. Now that does not constitute indecent assault on a female."

The court was at pains to define indecent assault and it limited this to the touching of private parts. In the court's view, though the appellant had touched the complainant's underpants, this did not constitute touching her private parts, hence the charge of indecent assault was not established. The court relied on the definition of indecent assault given in the case of *Omambia V. Republic* Criminal Appeal No. 47/95 where the court stated,

*“ These particulars that the appellant touched the private parts of the complainant mean and can mean nothing else, than that the appellant touched with his hand the ‘private parts’ of the complainant which, to give the well known and ordinary meaning of the phrase, means genitalia of the complainant and no other part of her body, or as defined in the Shorter Oxford English Dictionary, the ‘pudenda’ or external genital organs. ”*

In the *Omambia Case*, the appellant had, in the High Court's view, not touched the complainant's 'private parts' but "merely touched the complainant's bottom and put his hand under her blouse". This did not constitute indecent assault in the court's reckoning.

Courts thus seem to take a very restrictive approach to the definition of what constitutes indecent assault. This leaves women without protection for a plethora of activities that really do amount to a violation of their person.

*Republic V. Joseph Mutuku Muania Case Number 6884 of 1999.*

This was a man who had defiled many young girls. The man was convicted and given the maximum sentence, which in my opinion was insufficient given the number of girls that the man had defiled.

*Republic V. Duncan Gichuhi Waiyaki Criminal Case No. 929 of 1995*

Waiyaki was charged with two counts of incest by a male contrary to Section 166 of the Penal Code and one count of failing to consult a medical practitioner for treatment for a venereal disease contrary to Section 163 of the Public Health Act, Chapter 242 of the Laws of Kenya. The victims of Waiyaki's incestuous acts were his twin daughters aged nine years at the time of the offence. Waiyaki pleaded not guilty and was released on a bond of Kshs. 30,000 and a surety of a similar amount. The prosecution asked the court to warn the accused against threatening the two girls and interfering with other witnesses. Medical evidence showed that Waiyaki had a venereal disease. There was evidence that one of the girls was also infected with a venereal disease. The prosecution did not bring evidence to link the infection of the girl with that of the accused and after a grueling four years, the court ruled that Waiyaki had no case to answer because there was lack of material evidence implicating the accused person with the offence.

Critics of this decision point to the callous manner in which the judicial process handles victims of incest and other sexual offences. The magistrate in this particular case was close to quoting Mwendwa's sentiments in *Maina V. Republic* to the effect that women prosecutors of sexual offences are malicious and bitter persons whose sole intention is to frame the accused. In his judgement he stated:

“ The evidence adduced on record regarding the sexual offence is ... that of the mother [of the girls]. The evidence of the mother indicated that she had noticed the girls feeling pain when they went to the toilet ... and when she asked them why they were feeling pain the girls informed her that they had been raped by the accused person and after that she went and reported the matter to Kikuyu Police Station. It is important here to note that [the mother] had been quarrelling with the accused person until she later left him to go and stay with her father and now they are preparing for a divorce, which shows that their relationship as husband and wife had gone sore. As the evidence adduced on record stands, I find the prosecution had not made a *prima facie* case against the accused person to enable the court put the accused on his defence.”

The failure of the prosecution to establish a *prima facie* case may be more the result of lack of diligence in the quest for such evidence than the non-availability of the evidence *per se*. The Federation of Women Lawyers of Kenya’s rendition of the case categorises the quality of prosecution of the case as mediocre. There has recently been publicisation of an incident in which a father defiled his two daughters aged seven years and nine years between 1999 and 2000. It will be interesting to see how this case is handled when it gets to court given the bad rap that courts got over the *Waiyaki* case.

## IV. Extra-Legal Forms of Violence

These normally take the form of traditional practices that are sanctioned within communities but which in fact amount to violation of women. Under this category, we will discuss practices such as wife battering, female genital mutilation and witch burning.

### A. Wife battering

Wife battering can be defined as “physical beatings, with fists or other objects, choking, stabbing, whippings and any form of husband-inflicted physical violence as well as psychological mistreatment in form of threats, intimidation, isolation, degradation, mind games.”<sup>6</sup>

A notable factor is the under-reporting of domestic violence involving wives. One reason for this may be the tolerance by law of “chastisement” of wives by their spouses as outlined above. It is difficult to draw a line between what is acceptable as mere chastisement and what is not. In addition to this, there seems to be a limitless right by the father and husband to chastise the members of the family and wife flowing from their being undisputed heads of families.

Violence against women by husbands and boyfriends occurs at every level of society irrespective of age, income, education, ethnicity, race, colour and occupation. Repeated victimization leads to low self-esteem on the woman’s part and a sense of helplessness and powerlessness in some or all areas of life.

So tolerated is this affliction that at common law, the plea of provocation mitigated the punishment where serious injury or death occurred. Similarly, the defence of honour was acceptable (and still is in some jurisdictions) where a man kills his adulterous wife.<sup>7</sup>

In an African context, it has been contended that the question of bride-wealth exacerbates the position of women vis-à-vis battering. The modern trend whereby huge amounts of money are demanded as bride-wealth leads to the conception of bride-wealth as wife purchase whence the buyer can deal with his “property” as he wishes. The practice of wife battering cannot be pegged to tradition since under most traditional societies a certain amount of censorship and control was in place over a husband who regularly inflicted beatings on his wife.

The surprising factor is that many women victims of spousal violence do not report occurrences. In the African context support from one’s natal family may not be forthcoming owing to their inability or unwillingness to pay back the bride price. Closely associated to this is the hostility of a woman’s male siblings towards her coming back to their home attributable to the inheritance of property dimensions especially where she has male issue. A female victim of battering by her spouse may refuse to report the occurrence to protect the batterer who may be the family’s sole breadwinner. She may also blame herself for the incidents and promise herself to behave well next time.

Other reasons for not reporting may be fear of reprisal from the abuser, shame, anticipated lack of support from society and the desire to keep the family unit intact for the sake of the children. Some women also believe that women are inferior to men and deserve to be disciplined, as do children by their parents.

A woman who is a victim of battery from her partner could prosecute him for assault and/or seek to divorce him. Unfortunately many women choose to stay and sweep the battering under the carpet owing to the factors enumerated above. In certain instances, the woman may refuse to testify against her husband in criminal proceedings, which renders the prosecution’s case unprovable. Some factors leading to not testifying include the church teachings of the husband and wife being one. In the majority of the cases women hope the battering will stop and do not wish to rock the marriage boat (See Piah Njoki Kagwai V. Jackson Kagwai, High Court of Kenya Civil Case No 3897 of 1986 where the defendant gorged out the plaintiff’s eyes rendering her permanently blind) until grievous harm is occasioned or death results from the battering.

Law enforcement agencies are not keen to deal with matters pertaining to wife battering. They see it as a family matter or attribute it to culture and tradition terms, which exonerate even the most obvious violations of the person.

## **B. Witch burning**

Witch burning generally occurs in rural communities and appears to be associated with political, social and economic conflicts. It often leads to victimization of vulnerable and/or marginalized individuals such as women and the elderly.

In Sukumaland in Tanzania for instance, witch burning had reached such alarming numbers that it became an issue of national concern in the 1980s (Masanja: 1993). The Department of Sociology at the University of Dar es Salaam was asked to carry out research to determine the cause(s). Women who were targeted as witches by the community were markedly those who exhibited unusual characteristics seen as not atypical of women by the society. They included women with long hair, strong personalities and those who owned property.

We have also had in Kenya witches being burnt in some parts of the country the majority of who are women. These activities do result in deaths and only a few of the perpetrators are brought to book. The fact that such practices are labelled traditional may remove them from the purview of criminal law. It is disturbing that women happen to be the majority of victims whereas being a witch is not a female's exclusive preserve.

### **C. Female Genital Mutilation.**

This is also referred to as the female circumcision and is carried out as a traditional practice among pockets of populations all over the African continent and elsewhere. There are several different kinds of female circumcision practiced ranging from the removal of the clitoris hood to clitoridectomy (removal of the clitoris) to infibulation which entails the complete removal and scrapping of the external genitalia and closure of the wound through sewing and leaving only a tiny opening for the passage of urine and menstrual blood.

Female genital mutilation is alive and well in Kenya among some communities. A Samburu girl about to get married for instance, must be circumcised before the wedding ceremony begins. Similarly in Meru and Nyaberi, female circumcision is practised. In a study carried out in four districts by Maendeleo ya Wanawake Organization in Kenya, the proponents of female circumcision argued that it is the most significant rite of passage to adulthood whereby societal values are passed on to a girl child. While this situation may have obtained prior to the breaking up of traditional structures, one today finds that female circumcision involves only the physical operation without the education that went with it. Another argument was that it increased marriage opportunities for the girl, which was an economic boon for her family would receive dowry. The rite is also viewed as useful in preservation of the girl's virginity and promotion of easy childbirth.

It is interesting to note from the above study that it is women and young boys who wanted the practice to continue while older men wanted to see the practice eradicated. In fact it is women who are involved in circumcising the young girls and when they discover an uncircumcised woman among themselves, they do not hesitate to forcefully circumcise her together with the girls. Forceful circumcision of a woman is assault and depending on the nature of the operation could even be assault causing grievous bodily harm. A victim of such an ordeal will more often than not keep it within the community rather than take it to the public arena. The fact that it occurs during the community circumcision period may make the police want to pass it off as a traditional ceremony totally ignoring the victim's feeling. In one case in Meru, intruders among whom, she told the Court, was her father in law and brother in law had forcefully circumcised a woman in the night. The presiding magistrate took this case very lightly and only cautioned the accused without meting out any fine or custodial sentence.

There are risks associated with the practice of female circumcision. In the short term there are haemorrhage, tetanus, blood poisoning and one cannot even rule out the passing of HIV. A forced victim may die from one of the above yet it passes off as a culture rite. On the part of the typical girl initiates who are under the age of fourteen, one wonders where their recourse is given that their parents and the community decide for them. In the long term such circumcised women may have to contend with chronic urinary tract infections, pelvic infections that can lead to infertility, painful intercourse and vicious scars that can cause tearing of tissue and haemorrhage during child birth and obstructed labour. These effects are long term and can befall a young unwitting initiate as they can a forced older woman.

We appreciate that female circumcision serves a purpose among communities that practice it. However, there are things that could be done to make it safer for the initiates and there are aspects of it that constitute criminal acts. Research ought to be done into the cultural factors that are significant in the circumcise rite. The dangerous and harmful aspects should be underplayed in favour of the more positive ones. It is encouraging here to

note that Maendeleo Ya Wanawake has been working with communities to develop an alternative rite of passage for girls that entails their induction into adulthood through counselling and advice rather than through physical mutilation.

## **V. Institutional Structures**

The main institutional structures that deal with violence against women are the police force (to which one reports instances of abuse), chiefs and elders (in localised community settings) and the courts. It is indeed ironical that structures such as these could be the source of violations against women. Institutionalised violence against women is a common problem in Kenya especially where the police are concerned.

### **A. Institutionalised violence against women**

#### **1. Police Brutality**

Article 3(h) of DEVAW, Articles 7 and 9 of the ICCPR and Sections 72, 74 and 76 of the Kenyan Constitution [the rights not to be subjected to torture, cruel, degrading and inhuman treatment and punishment; the right to personal liberty and security of persons and the right to not be searched arbitrarily] provide protection against violation of rights of suspects by law enforcement officers.

In 1996 there were two highly publicized cases of police brutality against Kenyan women. The cases of Lucy Muthoni Muthumbi, in October 1996, and Josephine Njoki, which took place in October, but did not become public until 17<sup>th</sup> November 1996. Violent robberies taking place in Nairobi between June and October 1996 were attributed to a gang led by a woman described as “big and middle aged”. In October the then Police Commissioner, Shedrack Kiruki, announced to the public that the police had finally apprehended the woman. The woman held in police custody was Lucy Muthoni Muthumbi, her ordeal began on 17<sup>th</sup> October 1996.

Section 77(2(a)) of the Constitution clearly states “every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.” Even if Lucy Muthumbi and Jennifer Njoki had committed offences and were suspects it would not justify the torture they underwent at the hands of the Police. What makes their ordeal even worse is that they both appear to have been considered suspicious because they were related to men that the Police suspected of being guilty of offences. The arrest of Jennifer appears to have been a tactic to gain access to her brothers. If Lucy and Jennifer were suspects, in neither case do standard police procedures appear to have been followed. For instance, at no time was Lucy informed that she has been arrested, neither of the two was charged and brought to Court and neither of them had access to a lawyer during the time that they were making statements. Their right to remain silent was circumscribed by the diligent methods used the officers to procure statements from them.

#### **2. Penal Conditions of Women**

On 18<sup>th</sup> July 1996 members of the pressure group Release Political Prisoners (RPP) were holding a cultural festival in memory of their slain secretary-general, Kariuki Nduthu, when the Police disrupted the meeting and arrested twenty-one members of the group. They were charged with holding an illegal meeting and publishing seditious literature. Among those arrested were three women, Josephine Nyawira Ngengi, Wanjiru Kahiga and Veronica Wanjiru.

The conditions in which the women were held and the solidarity statements issued by human rights groups, in support of them, focussed public attention on the conditions that female suspects are held in. There is no remand centre for women in the country, so women suspects are subjected to prison conditions. In this particular case, they were held at the Langata Women's Prison. In essence a woman accused of an offence in Kenya serves a jail term whether she is eventually acquitted or not particularly if she is denied bail.

In the case of Josephine, this was particularly serious since she was ill having just undergone surgery. The court refused to grant her bail. She spent over two weeks in jail during which time only her lawyer was allowed access to her. Remand procedures were not adhered to. Holding women suspects in prison as opposed to remand conditions amounts to contravention of Article 2(a) of CEDAW in which state parties undertake to "repeal all penal provisions which constitute discrimination against women." Unlike the men, women end up serving a prison sentence whether or not they are proven guilty of an offence. The summarized penal conditions that women are subjected to that contravene article 2(a) are:

- i. There are no remand centres for women in Kenya.
- ii. Women in prison have no access to basic amenities such as sanitary towels, soap, blankets and mattresses.
- iii. Young children are kept in prison with their mothers.
- iv. Female minors are subjected to the same prison conditions as adult female offenders.
- v. Presence of male warders in prisons for female offenders which presents opportunity for violence

## B. Courts

Courts play an important part in both the enforcement of law in Kenya as well as determining directions for changes in law. Judges are responsible for interpreting the law. Upper courts decisions are binding on lower courts. Thus judges make law in the process of their decisions, as these decisions are binding on lower members of the bench. To effectively deal with violence against women, the courts must of essence be sensitive to the needs of women victims of violence. The *Omambia* case in which the Court of Appeal decided that touching a woman's bottom and bosom did not constitute indecent assault as a woman's buttocks are not part of her private parts, illustrates the importance of a sensitised bench as does the case of *Koti* where the High Court adopted the definition of indecent assault laid out in the *Omambia* case and ruled that touching a woman's underpants did not constitute indecent assault of the woman.

Sensitised judicial officers and an independent judiciary are particularly important in the realisation of women's human rights. The incorporation of International Human Rights instruments such as CEDAW into Kenya's municipal law would greatly enhance women's rights in Kenya. International human rights instrument can be incorporated into domestic law through Acts of Parliament or by judges using them in the administration of Justice. However, the conservatism of the Kenyan bench and their restrictive approach has militated against the incorporation of human rights instruments through case law. Although judges from Commonwealth Countries have been meeting to discuss the incorporation of human rights norms into their work, Kenyan judges have been slow in taking the cue. It has been argued that the domination of men in the judiciary may be to blame for the failure of courts at all levels to embrace international provisions on women's human rights.

### **C. Elders**

Another often-used institution in dealing with violence against women is elders and the chief. In most localised settings, the first point of call when one has a complaint about violence is the chief or elder in the community. As with judicial officers, the eradication of violence against women can only be attained where the chiefs and elders are sensitive to the needs of women for protection. The casting of both the elders and chiefs in a patriarchal mould could and does reinforce cultural perceptions of women as subservient and in need of chastisement to ensure conformance to their roles. The effect of this is the disempowerment of women, making them more vulnerable to acts of violence. Moreover, the fact that most elders and chiefs are men renders this institution less than effective in protecting women against violence.

## **VI. Gaps in the National Laws**

We have identified above under various laws the gaps that we see in these laws. We however think that there are some gaps that deserve to be highlighted at this point. Firstly, the constitutional provision in Section 82(4) is not in conformity with international standards. This is because it excludes claims of discrimination where customary law applies. It is a well-known fact that most customary belief systems discriminate against and perpetuate commission of violence against women. The failure of the Constitution to expressly mention violence against any person in its list of fundamental rights and freedoms coupled with this provision is a fertile ground for violation of women outside the sanction of law.

Secondly, The Penal Code's provisions are not as wide as to encompass all incidences of violence against women especially where they leave the definition of offences to courts that take a narrow view. As already mentioned, the State machinery is hesitant to prosecute cases involving domestic violence and sexual harassment. The latter is difficult to prove.

Further, the penalties imposed by the Penal Code for the offences of rape, defilement, incest and assault are insufficient. There are no safeguards from the perpetrators of these crimes. Instead, it is left to the victims to pursue this through the civil justice system. As a result, owing to the inability of the victims to pursue justice in the civil courts they most opt out of and hence remain unrecompensed. There is no machinery for making reparation to the victims.

Most notably, Kenya has not domesticated the rights contained in the various international instruments already discussed. Therefore, her commitment to the standards enshrined in the CEDAW and the other instruments remain lip service.

As far as meeting the calls for enforcement of rights of women is concerned, the security forces have not been trained on ways of handling cases involving abused women. There are no counseling facilities or safe homes for these women. In fact, even sentences handed out to these women are lenient considering the gravity of the committed crimes. Consequently, it is apt to state that in the area of violence against women very little exists in the justice system to protect the abused and other women and girls in general.

## VII. Recent Interventions

### A. Criminal law ammendment bill, 2000

This Bill speaks to the concerns that the Penal Code is not as effective in combating violence against women as it should and it revises provisions in the Code dealing with sexual offences. In the Memorandum of Objects and Reasons for the Bill, it is stated in respect of sexual offences that:

- “(i) There has been inconsistency in penalties for those found guilty of sexual offences. For example [,] a person guilty of defilement of a girl under 14 years can be sentenced to [a] maximum of 14 years imprisonment while a person found guilty of rape of an adult can be sentenced to life imprisonment. The proposed amendment seeks to harmonise all the penalties so that those found guilty of any sexual offence can be sentenced to a maximum of life imprisonment.
- (ii) It is also proposed that the court hearing a criminal case involving a sexual offence committed on a child of tender years can convict on the evidence of the child if satisfied, for reasons to be stated, that the said child of tender years is telling the truth. This does away with the requirement of corroboration. If passed the proposals at paragraph (i) and (ii) hereof will enhance the protection of minors.
- (iii) It is also proposed, that the proceedings in cases relating to certain sexual offences like defilement of minors and rape be held in camera. This is to protect the identity and safeguard the privacy of the victims of those offences.”

Section 16 of the Bill for instance, revises the Penal Code’s provision on defilement (Section 145) replacing it with a new provision that states:

- “145(1) Any person who unlawfully and carnally knows any girl under that age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.
- (2) Any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life:  
Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was above the age of sixteen years or was his wife.

This provision raises the age for defilement from fourteen years to sixteen years and also raises the sentence for the offence.

Most of the sexual offences covered in the Penal Code are classified under the bill as felonies and not as misdemeanours as was previously the case.

Under section 95 of the Bill, Section 124 of the Evidence Act, which requires corroboration for evidence of children of tender years, is amended by the addition of a proviso in the following words:

*“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”*

This bill has not yet become law but when it does, it will go some way towards enhancing the ability of women and girls to prosecute cases of violence.

## **B. Domestic Violence (Family Protection) Bill, 1999**

This Bill seeks to provide for the intervention of courts in cases of domestic violence, to provide for the grant and the enforcement and variation of court orders for protection from such violence. The definition of spouse encompasses persons living together who may not necessarily be legally married ensuring that women in cohabitation situations are protected from violence too. Violence for the purposes of the bill includes physical abuse, sexual abuse and psychological abuse. The Bill provides for the issuance of protection orders for victims of domestic violence. It also makes provision for the establishment of a Fund to provide financial assistance to victims of domestic violence.

This Bill will, when it becomes law go along way towards protecting women from violence in the home. The provision for the Fund is especially innovative given that most women remain in violent relationships for economic reasons.

## **C. Affirmative Action Bill**

Women leaders have been championing to have their rights implemented nationally as stipulated in the recommendations of the previous world women conferences. A key challenge has been the enactment of enabling affirmative action legislation to break the social lag.

This started with the 1997 Affirmative Action motion moved in parliament by the then Karachuonyo MP Phoebe Asiyo. It was defeated. In 1999 Beth Mugo/Martha Karua under the aegis of the leading pro-women NGOs introduced another private members motion. A poor reception was noted but discussions are still going on in and outside Parliament.

## **D. National Council for Gender Development Bill, 1999**

This Bill seeks to establish a Council to ensure gender mainstreaming in national development policies, initiate legal reforms on issues affecting women; formulate programmes on gender development and to prepare reports on Kenya's international obligations relating to women among other things.

This Council is a vital coordination mechanism for the diverse initiatives being taken in this country to address women's concerns. With regard to violence against women, it can push for Kenya's adherence to its international obligations to eliminate both discrimination and violence against women.

# **VIII. Conclusion and Recommendations**

It is clear from the foregoing that a lot still remains to be done to effectively deal with violence against women. It is imperative that the Bills that have been drafted become law before we can say that meaningful advances have been made in addressing the issue of violence against women. In addition to the recommendations in the Bill, we would also like to suggest some further changes in the law and practice on violence against women.

## **A. International Human Rights Instruments on Violence against Women**

- The government should comply with its obligations in international law and incorporate CEDAW and the other instruments' provisions into Kenya's domestic law.
- All Kenya's law should be amended and repealed so as to ensure their compliance with the principles contained in these instruments.
- The government should articulate a clear policy on gender to keep up with international norms and the state's obligations in international law. Further, such a policy should be complemented by a mechanism for monitoring to ensure compliance.
- The government should also make reports to all relevant committees established by the various instruments in how far she has implemented her obligations.

## **B. The Constitution:**

- The Constitutional Review Process should consider incorporating in the new constitution a provision for domesticating any international instrument as soon as Kenya ratifies it, as part of the domestic laws.
- Section 82 (4) should be deleted as it encourages violence against women under the guise of customary law.
- All other discriminatory provisions in the Constitution such as Section 91 on citizenship should be repealed as they may be the cause of violence.
- In the same light, the language of the constitution should be reviewed to reflect the principles of gender equality and neutrality so that gender neutral terms such as person be used where possible and if not, to be she/he as opposed to using terms such as man to represent both sexes.

## **C The Penal Code**

- All forms of rape regardless of the age of the victim should attract a maximum sentence of life imprisonment and entail making reparation to the victim. It is suggested that there be an offence of statutory rape and any adult who coerces a minor (that is to say a person under the age of eighteen) into sexual activity, be found guilty of statutory rape.
- That when sentencing a rapist if it is found that he has committed the offence before, the maximum sentence of life imprisonment should be meted.
- That the language of the Penal Code be revised in respect of sexual offenses, to exclude the term "carnal knowledge", and include sexual intercourse. Furthermore, that rape should be defined to include non-consensual oral and anal sex and the insertion of objects into the vaginal and anal orifices of the females.
- That there should be a clear distinction between consensual and non-consensual activity in the formulation of laws prohibiting sexual offenses and the focus of the law be on punishing non-consensual sexual activity. Where it is found that a rapist threatened the victim with murder should he scream or speak out, there should be a charge of attempted murder.
- Where the victim of a rape is so young that the physical injuries suffered during the rape could have resulted in her death, for example an infant, the rapist should be prosecuted for attempted murder.
- That there be a police officer in every station specifically trained to deal with cases of rape.
- Extend the definition of incest to include rape committed by an uncle and cousins given the guardianship roles played by them.
- All rape cases should be prosecuted by State Counsels, given the evidential and other complexities involved in trying a rape case.
- That the penalties for the offences of abduction, indecent assaults against any female, incest should be reviewed in view of the prevalence of the crime in present day societies.
- That there be a section to the Penal Code specifically criminalizing spousal abuse.

## D. General Law Reform

- That Kenya should comply with her obligations under Article 16 of CEDAW, by making all child marriages illegal. The minimum age of marriage should be 18.
- Section 169 of the Penal Code be repealed and there be no requirement of the Attorney General's consent in order to prosecute a case of incest.
- There should be a judicial review of the *Wilmina Achieng Case* and the *Zainab Mohammed* cases. The same action should be taken in the case of *Maina v Republic* in light of Chief Justice Mwendwa's castigation of all women and girls as liars.
- The procedures should be simplified so as to enable abused women seek legal redress and for those who cannot afford the financial implication
- That there be police officers at every station, specifically trained to deal with incidents of domestic violence.

## D. Policies

- That the State commits itself to providing shelters for victims of spousal abuse.
- That when intervening in cases of domestic violence, the police should be trained to not interrogate the person alleging that they have been battered, in front of the alleged perpetrator as this is intimidating and is likely to lead to a withdrawal.
- Awareness of the existing laws has to be encouraged so that women can put their grievances through the right channels.
- Training programs should be aimed at the police and the judiciary to enable them to effectively deal with instances of violence against women.
- Images of violence on the media should be decreased, pornography and advertisements that exploit the bodies of women should be discouraged or stopped.
- Women who get the HIV virus through violence should be assisted.
- Allocate funds to ensure that violence against women is reduced by way of providing refuge, relief, support, medical aid, psychological counseling, affordable or free legal aid as provided by FIDA and Kituo cha Sheria and other such organizations.
- Promote peaceful conflict resolution, peace, reconciliation and tolerance through education, training, community actions and youth exchange programs, in particular for young women.
- Take steps to involve women in planning assistance to refugees (including internally displaced).
- Ensure the safety of Kenyan women and physical safety of girls by condemning the systematic use of rape and other degrading treatment as a deliberate instrument of war and ethnic cleansing or intimidation tool.
- Eliminate all forms of discrimination against the girl child in the country and eliminate negative cultural attitudes and practices against girls.
- Remove educational barriers and develop programs that enable girls to develop positive self-image.

The recommendations above in no way exhaust all that needs to be done to protect the woman or the girl child from violence. They are suggestions on some of the starting points towards achieving this goal.

## Endnotes

- <sup>1</sup> R. B. Flowers, 1987, *Women and Criminality*, Practitioner Greenwood Press, USA.
- <sup>2</sup> E. A. Stanko, 1985, *Intimate Intrusions*, Routledge & Kegan Paul, New York, USA.
- <sup>3</sup> J. Hanmer and M. Maynard eds., 1987, *Women, Violence and Social Control*, MacMillan Academic and Professions Ltd., Hong Kong.
- <sup>4</sup> Flowers, *supra note 1*.
- <sup>5</sup> J. M. Migai, 1995, "The Kenyan Penal Code and Spousal Rape: Is there need for Legislative Intervention?", *University of Nairobi Law Journal Issue No. 2*.
- <sup>6</sup> Flowers, *supra note 1*.
- <sup>7</sup> L. Heise, 1989, "Crimes of Gender", *World Watch*, April.

