



**GAPS AND
CHALLENGES
WITHIN THE
CRIMINAL JUSTICE SYSTEM
AND ACCESS TO JUSTICE FOR
SURVIVORS OF SEXUAL VIOLENCE**



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ABBREVIATIONS

CEDAW	Convention on the Elimination of Violence against Women
CHV	Community Health Volunteer
COVAW	Coalition on Violence against Women
CREAW	Centre for Rights Education and Awareness
CSOs	Civil Society Organisations
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers (K)
GBV	Gender Based Violence
ICJ	International Commission of Jurists
KNCHR	Kenya National Commission on Human Rights
LAA	Legal Aid Act
LRF	Legal Resources Foundation
NGEC	National Gender and Equality Commission
NGOs	Non-Governmental Organisations
NLAS	National Legal Aid Services
ODPP	Office of the Director of Public Prosecution
PADVA	Prevention against Domestic Violence Act
PRC	Post Rape Care
PWDs	Persons with Disabilities
SGBV	Sexual and Gender Based Violence
SOA	Sexual Offences Act
WKF	Wangu Kanja Foundation
WPA	Witness Protection Act
VPA	Victim Protection Act

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T_{his} is a Qualitative Study conducted in three counties of Kenya namely Nairobi, Meru and Kitui to understand the challenges faced by survivors of sexual and gender based violence while trying to access justice. With support from the UNDP Amkeni Wakenya program and the Urgent Action Fund we were able to conduct the research with collaborative effort of many individuals and institutions. Firstly, we acknowledge the Centre for Rights Education and Awareness Kenya and Wangu Kanja Foundation under the leadership of Ms. Wangechi Wachira (Executive Director – CREAM) and Ms. Wangu Kanja (Executive Director - WKF) respectively together with their lead co- researchers Angelina Cikanda, Elsie Milimu and Naomi Kajira for developing the study objectives, research questions, their input into the design of the study; and CREAM and WKF program Officers at the study Counties, Veronica Komutho, Leah Mutumbu, George Meme, Elsie Milimu, Catherine Kamau, Sarah Mutsami and Joshua Ajigo for the pivotal role in ensuring the successful implementation of the study. Secondly, we are grateful to the County Management teams in Nairobi, Meru and Kitui for approving the study and offering their staff to participate in the key informant interviews. Our gratitude extends to all the study participants for taking time and voluntarily sharing their experiences during the interviews as well as the counselling team Nereah Akoth, Faith Kiema and Carolyn Wanjiku in Nairobi, Kitui and Meru for their exemplary job in providing quality psychosocial services to the study participants and research team during and after the study and beyond. Thank you to the study principal investigator (RTD) Lady Justice Violet Mavisi and her team Viola Somukwo for providing the transcription and translation services, for designing and implementing the study and writing this report.

EXECUTIVE SUMMARY

Sexual and Gender based Violence remains an endemic problem that disproportionately affects women and children. Emerging data and reports from those on the frontline have shown that cases of SGBV take long to be prosecuted and most of the time the cases are prosecuted without using a gender lens at all levels of the criminal justice system. This lack of accountability to survivors of Sexual and Gender based violence (SGBV) means that there is delayed and at times denied justice that violates human and women rights as articulated by the various laws and policies provided for at the local and global levels.

However, most of the literature in Kenya on Sexual and Gender Based Violence has been anecdotal from commentaries, organizational reports, and news sources. Additionally, the reports have mainly focused on the number of Sexual and Gender Bases Violence (SGBV) cases with limited information from the survivors' experiences.

The Centre for Rights Education and Awareness (CREAW) in partnership with Wangu Kanja Foundation therefore conducted this qualitative study between January and March 2022 in Nairobi, Kitui and Meru counties in Kenya. The objective of this study was to understand women and girls' survivors' experiences on accessing justice and give a case of making special considerations that alleviate their struggles.

Data was collected through key informant interviews with 45 service providers, comprising of Police, lawyers, judges, magistrates, health practitioner, prosecutors, CHVs, and Paralegals. Additionally, 7 magistrate court cases on defilement, 15 high court cases on defilement & rape and 4 court of appeal judgements on rape and defilement analyzed. In-depth interviews with 24 survivors who have experienced Sexual and Gender Based Violence.

The findings give a testimony on the areas of service provision in the criminal justice system that require further evaluation and the need to have special judiciary units that give special attention to survivors of violence seeking justice. Further it provides key recommendations for duty bearers to improve service delivery to be more dignified.



Victim or survivor?

Individuals whose rights have been abused or violated are normally described as “victims” of human rights violations or crimes. For example, this is the terminology used in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁶ and it is also used in the practice of the Rome Statute of the International Criminal Court.⁷ Women human rights defenders tend to use the term “survivor” instead of “victim” as a way of reflecting the agency, resilience and courage of women and girls subjected to violence. For them, the term “victim” is seen as implying passivity and acceptance of the violation. However, sometimes both terms are seen as appropriate – “survivor” celebrates the individual, but “victim” recognises the enormity of the system of gender-based discrimination that women and girls face (Rahilb Gupta, “Victims v Survivors”: feminism and language. Open democracy 16 June 2014



CHAPTER 1

BACKGROUND AND CONTEXT OF SEXUAL AND GENDER BASED VIOLENCE IN KENYA

Violence against women is perhaps the most widespread and socially tolerated human rights violation, cutting across borders, race, class, ethnicity, and religion (UNECA 2012). Gender based violence in Africa, as elsewhere in the world, is a complex issue that has at its root structural inequalities between men and women, young and old. This results in the persistence of power differentials between the sexes.

Sexual Violence, like other forms of gender-based violence, has become an epidemic of great proportion across Africa. Sexual Violence amounts to the violation of women's fundamental rights and freedoms recognized in international and regional human rights instruments. In particular, it undermines the right to sexual and reproductive health of women and constitutes an act of discrimination against women. Acts of sexual violence are imposed on survivors through physical, emotional or psychological violence inflicted through threats or actual violence. It often violates rights such as dignity, liberty, security of person and freedom from discrimination. Women who suffer sexual violence often do not have the requisite access to sexual and reproductive health services (including psychosocial services) and legal remedies.

SGBV is defined as 'any act of violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life'. (United Nations Declaration on Violence Against Women (DEVAW), 1993)¹. Natural and legal persons may commit GBV. State parties are required to act with due diligence to prevent, investigate, punish acts of violence and provide compensation to GBV survivors by undertaking legislative and other measures to address GBV.

At a regional level, the Protocol to the African Charter on Human's and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) defines violence against women to include;

'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on, or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or war.'

In Kenya, the most comprehensive definition of violence is within the Protection against Domestic Violence Act, 2015 that models the definition by the World Health Organization. Section 3 of the Act defines violence to include such as acts as:

- Abuse includes *child marriage, female genital mutilation; forced marriage; forced wife inheritance; interference from in-laws, sexual violence within marriage, virginity testing, defilement; Incest, and Sexual abuse.*
- Sexual violence includes offences such as *rape, attempted rape, defilement, incest, sexual abuse, sexual exploitation, sodomy, pornography, forced prostitution, sexual violence as a weapon of war and torture and trafficking for sexual exploitation.*

Sexual violence violates several rights of the person. The courts have held it as the most prevalent form of human rights violation. In the case of **P.O. v Board of Trustees, A F & 2 others [2014]eKLR**, the court held that:

"The International Labour Organization [ILO] in Working Paper 3/2011 titled 'Gender-Based Violence in the World of Work: Overview and Annotated Bibliography' by Adrienne Cruz and Sabine Klinger characterises

1 CEDAW General Comment No 19 on acts of sexual violence committed by organisations and enterprises

Gender-based violence as “the most prevalent human rights violation in the world. Of the varied ways in which sex discrimination manifests across the globe, such violence is exceptionally dehumanising, pervasive and oppressive. No other form of sex discrimination violates so many fundamental human rights as articulated in the 1948 United Nations Universal Declaration of Human Rights. These include Article 1 [All Human beings are born free and equal in dignity and rights]; Article 3 [Everyone has the right to life, liberty and Security of the Person]; and Article 5 [No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment].” The Authors state that gender-based violence reflects and reinforces inequalities between men and women. At least one in three women in the world, according to this paper, is estimated to have been coerced into sex, physically beaten and/or otherwise abused in her lifetime. This form of violence not only causes pain and suffering but also devastates families, undermines workplace productivity, diminishes national competitiveness and stalls development.”

The effects of rape on a women were well articulated in the case of Equality Now & Ethiopian Women Lawyers of Association (EWLA) v Federal Republic of Ethiopia (2016) considered by the African Commission on Human and Peoples’ Rights which held that:

“In the Commission’s view, by rape, the victim is treated as a mere object of sexual gratification against his or her will and conscience. The victim is treated without regard for the personal autonomy and control over what happens to his or her body. By rape, the personal volition of the victim is gravely subverted and disregarded, and the victim is reduced from being a human being who has innate worth, value, significance and personal volition to a mere object by which the perpetrator can meet his or her sadistic sexual urges. Inevitably, rape may, and often does, inflict physical pain and invokes in the victim a sense of helplessness, worthlessness, and gross debasement, which cause unimaginable mental anguish beyond the physical suffering. Clearly, rape degrades and humiliates the victim. Thus, even though not expressly listed under Article 5 of the Charter, rape is one of the most repugnant affronts to human dignity and the range of dignity-related rights, such as security of the persona and integrity of the person, respectively guaranteed under Article 6 and 4 of the Charter.”

STATISTICS ON SEXUAL VIOLENCE

Sexual violence continues to be a significant challenge and threat to human rights and public health. Sexual violence comes with both short and long term effects on the survivor’s life. The challenges can be mental, physical, sexual and reproductive health-related. GBV in its various forms is endemic in communities worldwide and cuts across class, race, age, ethnic and social origins, gender and religion. GBV² statistics show that it remains one of the most pervasive human rights violations of our time and endemic in Kenya, both in times of conflict and stability. In particular, violence against women and girls is worryingly high. However, statistics show that the consequences of GBV also affect children, men and boys.

The Kenya Demographic Health Survey (KDHS) 2014 found that 45 % of women and 44% of men age 15-49 had experienced physical violence since the age 15, and 20% and 12% have experienced physical violence within the 12 months before the survey. 40% of married women aged 15 to 49, had experienced either physical or sexual violence at the hands of their partner or spouse. According to the report, the main perpetrators of physical violence against women were husbands, whereas the main perpetrators against men were parents, teachers and others. The report further pointed out that 14% of women and 6% of men had experienced sexual violence at least once in their lifetime. The 2019, Violence Against Children (VAC) Survey Report showed a reduction in childhood physical

² Gender-based violence is an umbrella term for any harmful act that is perpetrated against a person’s will, and that is based on socially ascribed (gender) differences between males and females. IASC [Guidelines on Gender-based Violence Interventions in Humanitarian Settings](#). Sexual violence is considered as falling within this definition.

violence for both male and female and a reduction in childhood sexual violence for female. However, the report showed an increase in certain forms of physical and sexual violence among adolescent girls aged 13 – 17.

The National Crime Research Centre in 2014 showed that lifetime prevalence of GBV was 38.0% for women and 20.9% for men, while the current prevalence was 37.7% for women and 48.6% for men. The report shows that while women's vulnerability remained relatively constant, men's increased appreciably in the last year of the study. Further, the results showed that only 15.2% of female and 16.7% of male respondents who had been sexually violated had reported or had someone else report the act of sexual violence. Only 10.3% of female and 6.8% of male respondents reported having been asked at a health facility of any GBV physical or sexual experience they might have encountered.

Research carried out by the Centre in 2020³ established that the number of GBV cases recorded between January and June 2020 increased 92.2% compared with those between January and December 2019. The GBV cases recorded included rape/attempted rape, sexual offences, defilement, child marriage and murder. Of the 2,416 cases of GBV reported during the same period, 71% were female victims, that is ten females daily. The most common violations affecting children in the same period included incest, defilement, attempted defilement, maintenance and custody.

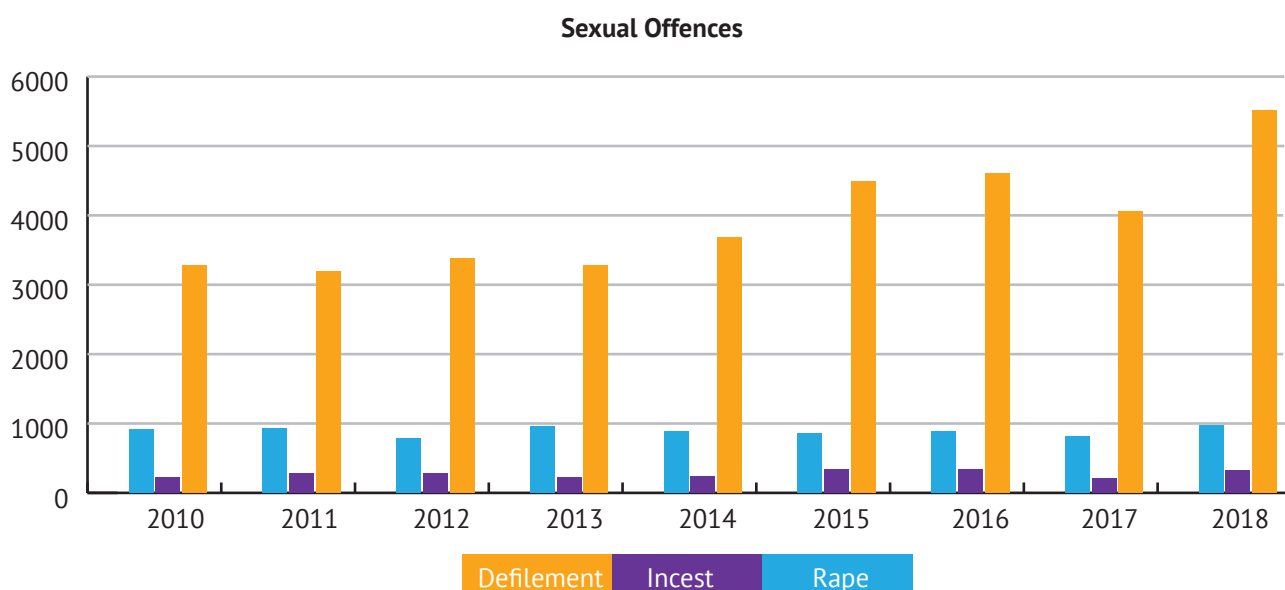
The Kenya Police Service Annual Crime Reports between 2014 and 2018 showed the following figures which still consider GBV cases as crimes against morality.

Table 1: Kenya Police Service Annual Crime Reports between 2014 and 2018

OFFENCES	2010	2011	2012	2013	2014	2015	2016	2017	2018
Offences against Morality (Totals)	4819	4703	4806	4779	5184	6164	6228	5492	7233
i. Rape	922	934	786	953	893	851	889	817	979
ii. Defilement	3273	3191	3387	3286	3685	4495	4601	4056	5506
iii. Incest	220	277	284	226	240	336	341	213	319
iv. Unnatural Offence/Sodomy	154	114	110	108	106	124	98	96	115
v. Indecent Assault	136	115	134	116	141	187	176	213	204
vi. Abduction	79	55	75	59	68	110	64	60	72
vii. Bestiality	25	12	19	18	33	43	38	18	11
viii. Bigamy	8	5	11	13	18	18	21	19	27

The above statistics show that defilement, incest and rape cases continue to rise. However, this figure only shows the number of cases that were reported. It is impossible to know the number of cases that went unreported.

Graphic display of the statistics of Sexual offences of Rape, Defilement and Incest



A study by the National Gender and Equality Commission and UN Women *on Gender Based Violence in Kenya: The Economic Burden of GBV*⁴ revealed that GBV imposes tremendous costs to survivors and their families. The average cost of medical-related expenses per survivor and family amounted to KES 16,464; reporting the incident to chief and community structures (KES 3,111); reporting to police (KES 3,756); productivity loss from serious injuries (KES 223,476); productivity loss from minor injuries (KES 18,623), and productivity loss from premature mortality from GBV with present value of KES 5,840,664. The average medical-related expenses per household was KES 3,417 after outliers (extremely high costs) were removed. The weighted cost of GBV incident per survivor and family was estimated at KES 24,797 annually. At the national level, annual medical-related expense in terms of out-of-pocket (money which a survivor of the family paid out of their own financial resources) was estimated at a staggering KES 10 billion annually. The productivity losses from serious injuries were estimated at about KES 25 billion and from minor injuries at KES 8 billion. The total loss amounts to KES 46 billion which translates to about 1.1% of Kenya's gross domestic product. The cost of GBV on an individual, family and the nation is prohibitive.

ACCESS TO JUSTICE

Access to Justice is the provision of dispute resolution mechanisms that are affordable, proximate and ensure speedy Justice and whose processes and procedures are understood by users. Access to Justice requires that dispute resolution mechanisms (police, prosecution and the courts) be available and accessible. But such a mechanism should resolve such disputes promptly, be effective and impartial.

Access to Justice is one of the fundamental freedoms and human rights available to all people as a matter of importance and devoid of any discrimination. Article 48⁵ provides that the State **SHALL** ensure access to Justice for all persons and, if any fees are required, they shall be reasonable and shall not impede access to justice. Such access is supposed to be accessible, affordable, and comprehensible to ordinary people. Article 27(1) of the Constitution provides for the right to equal protection of the law, expressly stating that everyone is equal before the law and has the right to equal protection and equal benefit of the law

⁴ National Gender and Equality Commission accessed at; <https://www.ngeckkenya.org/Downloads/GBV%20Costing%20Study.pdf>

⁵ Constitution of Kenya 2010

Article 22 (3)⁶ confirms that factors such as fees and strict legal requirements such as locus standi, procedural formalities are not necessary. The constitution guarantees one the right to have their disputes resolved by applying the law. Such a dispute is to be decided in a fair and public hearing before a court of law or another independent and impartial tribunal or body. One can have an advocate and is allowed to use intermediaries in advancing their case⁷. Article 159 of the Constitution also provides overriding principles designed to guide the courts to ensure that there is the expeditious provision of judicial services and guarantee equality of opportunities to access Justice. The courts and tribunals in exercising their judicial authority are guided by the following principles:

- Justice shall be done to all irrespective of status
- Justice shall not be delayed
- Alternative forms of dispute resolution mechanisms shall be promoted and
- Justice shall be administered without undue regard to procedural technicalities

These principles if well followed by all the actors in the criminal justice system will guarantee and ensure justice for survivors of sexual violence without any form of discrimination and hardship.

*Access to Justice was discussed in the case of **Dry Associates Ltd vs Capital Markets Authority and Another, Nairobi Petition Number 388 of 2011 [2012]eKLR**. The court noted as hereunder:*

“Access to Justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system, particularly the formal adjudicatory processes; availability of physical, legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

PURPOSE OF THE CONSULTANCY

The purpose of the consultancy is to conduct research on the following:

- Identify challenges faced by survivors of SGBV in accessing justice;
- Identify best practices within the region or other jurisdictions in supporting survivors of SGBV access justice.
- The use of DNA Evidence in sexual offences; to convict or exonerate accused individuals;
- What delays or major stabling bocks within the criminal justice system while prosecuting and handling cases of SGBV?

⁶ Constitution of Kenya

⁷ Constitution of Kenya: Article 50

METHODOLOGY

The research adopted a quantitative approaches and tools to collect and analyse data. The purposive sampling approach was used to identify key informants including representatives actors in the criminal justice system being magistrates and judges, lawyers, health practitioners, police and prosecutors; women's rights organization, national commissions, community health volunteers and paralegals. The research data was collected through secondary or desk review and analysis of available literature, policy documents, case files and laws.

Data collection tools: including key informant questionnaire and FGD guide was used which were shared. In person face to face interviews were held with the survivors while virtual interaction and tele interviews were held for other key informants.

Literature review: the desk review covered relevant documents such as court cases, perusals of judgement, policies and legislations with regard to access to justice for survivors. The review also involved other relevant literatures and relevant documents on access to justice locally and internationally.

Key informant interviews: This included by way of Zoom meetings and telephone interviews to obtain information from stakeholders. This method was also utilized in view of the short period to collect information.

Focus Group Discussion: the face-to-face discussions were held with survivors from Nairobi, Kitui and Meru. These were survivors having been assisted by Wangu Kanja Foundation and CREAM

Case studies: Judgments from the Magistrates' Court, High Court and Court of Appeal on sexual violence were analyzed to understand the implementation of access to justice policies, evidence used in the determination of the cases and identify gaps and challenges and promising practices that could be replicated. This methodology was used to understand whether there were any gaps and challenges in the laws and policies as written and the gaps and challenges in the implementation and or enforcement of the law itself by the actors in the criminal justice system.

Table 2: Summarizes the distribution of the specific data collection process in each county

Activity	Target	Number administered
FGDs	Survivors of Sexual Violence	3
Key informant interviews	Police, lawyers, judges, magistrates, health practitioners, prosecutors, CHVs, Paralegals,	15
Magistrates court cases analyzed	Defilement	7
High Court Judgments analyzed	Defilement and rape	15
Court of Appeal Judgments analyzed	Defilement and rape	4

Data analysis: data collected was analyzed to bring out the key areas of concern regarding gaps and challenges, recommendations and best practices. This report is the culmination of the said data.

Limitation of the research: the study was constrained by time. This study took a period of 6 weeks including data collection, key informant interviews.



CHAPTER 2: LITERATURE REVIEW

NOMATIVE FRAMEWORK IN ADDRESSING SEXUAL VIOLENCE

THE CONSTITUTION OF KENYA, 2010

The Bill of Rights under Chapter 4 in the Constitution of Kenya 2010 guarantees a wide range of rights and fundamental freedoms. The Constitution further recognizes several important general principles that are important to gender equality and have a bearing on gender-based violence in the country.

Article 10 (2) (b) sets out the national values and principles of governance which include human dignity, equity, social Justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and promote social Justice and the realization of the potential of all human beings. The Constitution further imposes a positive duty on the State and all State organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

The Constitution guarantees every person the enjoyment of the all the rights and fundamental freedoms in the Bill of Rights. These rights are guaranteed to the greatest extent consistent with the nature of the right or fundamental freedom⁸. The Bill of Rights applies to all law and binds all State organs and all persons.

Article 21 (4) imposes on the State the obligation to observe, respect, protect, promote and fulfill the rights and fundamentals freedoms in the Bill of Rights and to enact and implement legislation to fulfil its international obligations regarding human rights and fundamental freedoms. Kenya has enacted numerous laws in fulfillment of the Article as discussed. The Constitution also guarantees Equality and freedom of discrimination which includes equality before the law and equal benefit of the law and full and equal enjoyment of all rights and fundamental freedoms⁹. In this regard, every person has the right to institute court proceedings where their rights have been denied, violated or infringed or is threatened¹⁰. Article 28 is key as it protects the dignity of the person and the right to have that dignity respected and protected. Article 29(c) provides that every person has the right to freedom and security of their person including the right not to be subjected to any form of violence from either public or private sources, any form of torture whether physical or psychological or cruel, inhuman or degrading treatment¹¹. The constitution also protects the rights of children, Persons with Disabilities, the youth and elderly from all forms of violence and harmful practices¹². The above provisions of the constitution protect the children from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour¹³. Article 54 protects PWDs by requiring that they be treated with dignity and respect, to have reasonable access to all places which would include institutions dealing with access to justice, and to use of sign language, braille or other appropriate means of communication for ease of communication of their complaints and participate in their cases. The youth are protected from harmful cultural practices and exploitation¹⁴, while the elderly are expected to live in dignity and respected and be free from abuse¹⁵. Under Article 43 (1) everyone is guaranteed the highest attainable standard of health, which includes the right to health care services, including reproductive health care and the right to social security¹⁶.

8 Constitution Article 20 (2)

9 Constitution Article 27

10 Constitution Article 22 (1)

11 Constitution Article 27 (d), and (f)

12 : Constitution of Kenya Articles 53, 54, 55 and 57 respectively.

13 Constitution Article 53 (1) (d)

14 Constitution Article 55 (d)

15 Constitution Article 57(c)

16 Constitution Article 43(1) (e)

SEXUAL OFFENCES ACT, CHAPTER 62A LAWS OF KENYA

It makes provisions for the sexual offences, their definition, prevention and protection of all persons from harm arising from unlawful sexual acts. It prohibits all manner of sexual offences such as defilement, attempted defilement, child prostitution, rape, attempted rape, sexual harassment and sexual exploitation. The Act also protects vulnerable witnesses and provides for a conducive environment in which they can give evidence. Such vulnerable witnesses include the victim, a child or a person with mental disabilities¹⁷. Other persons may be declared vulnerable due to their age, intellectual, psychological or physical impairment, trauma, cultural differences, race, religion, language or relationship of the witness to any party to the proceedings, nature of the subject matter of evidence or any other factor that the court may consider relevant¹⁸. Due to the vulnerabilities, the witness may give evidence through a number of measures including giving evidence through an intermediary and other measures¹⁹. However, the Act does not, criminalize marital rape in Kenya²⁰. The courts need to declare such actions as crimes in recognition of the fact that Kenya has signed the protocol under the ACHPR (Maputo protocol) which outlaws marital rape, and CEDAW which outlaws all forms of violence against women. Lastly, the Act envisages a multi-sectoral nature of coordination in the implementation of the Act. The Regulations under the Act provide for a register of offenders²¹ and experts who can give evidence in court including nurses and clinical officers²². There is need to review the Act to be in harmony with the constitution and take into account any new and emerging offences.

THE PENAL CODE, CHAPTER 63 LAWS OF KENYA

The Penal Code prohibits all acts of violence. It, however does not sufficiently address GBV cases. GBV for instance, is only inferred by interpreting the vice as an assault as provided for under sections 250 and 251. Section 146 of the Penal code provides for the offence of defilement of idiots or imbeciles and a person who commits such an offence and if proved guilty of a felony and liable to imprisonment with hard labour for fourteen years. This sentence is contrary to the provisions of offences and sentences provided for in the SOA and a discrimination against persons with intellectual disabilities. The language too used is contrary to the provisions of Convention for Persons with Disabilities (CPD) which protects them from use of derogatory language.

THE CHILDREN'S ACT, CHAPTER 141 LAWS OF KENYA

The Children's Act makes provisions for the safeguard of the rights and welfare of the children. Section 13 guarantees children (both girls and boys) the right to protection from physical and psychological abuse, neglect and any other form of exploitation, including sale, trafficking or abduction. Under section 14, children are protected from female circumcision, early marriage or other cultural rites, customs, or traditional practices which are harmful to the child's development. There is room for this Act to be amended to align with the protection guaranteed under the Constitution.

PROHIBITION OF FEMALE GENITAL MUTILATION ACT, CHAPTER 62B LAWS OF KENYA

This Act prohibits the practice of female genital mutilation and safeguards one against violation of one's mental or physical integrity through the practice of FGM. This is done by prohibiting actions that would lead to FGM being conducted or the act of actual conducting FGM on a person²³.

17 Sexual Offences Act Section 31(1)

18 Sexual Offences Act Section 32(2)

19 Sexual Offences Act Section 32(4)

20 The Prevention against Domestic Violence under section 3 recognizes sexual violence within the marriage which does not declare such actions as offences.

21 Sexual Offences Regulations, 2008 Rule 7 and Sexual Offences (Dangerous DNA DATA BANK) Regulations, 2008 Rule 3(1)

22 Sexual Offences Regulations, 2008 rule 6

23 Actions include aiding and abetting FGM, procuring a person to perform FGM on another, using a premises for performing FGM, medical practitioner conducting FGM or possessing tools for the conducting FGM

PROTECTION AGAINST DOMESTIC VIOLENCE ACT, NO. 2 OF 2015 LAWS OF KENYA

This Act defines the various forms of violence, including economic abuse, emotional, verbal or psychological abuse, sexual violence within marriage, female genital mutilation, sexual abuse, incest, harassment, and domestic violence²⁴. However, the various forms of violence are not deemed offences that one can be charged in a criminal court. The Act aims to provide protection and relief measures to victims of domestic violence, to spouses and their children, or other dependents through the provisions of protection orders²⁵. The orders can be applied by any of the following persons on behalf of the survivor. This includes the police, social welfare officer, guardian of a child, a relative, neighbour of the applicant, a medical practitioner, a counsellor, a non-governmental organization concerned with the welfare of victims of domestic violence, community leaders or even religious leader. Such protection orders can be applied without notice and outside ordinary court hours or day. The police are under a duty in relation to domestic violence, to advise the complainant of all relief measures available to the complainant including access to shelter, medical assistance or they are to assist the complainant in other suitable way. The Act also provides for financial and other welfare assistance to victims of domestic violence and support programmes including counselling. There is no provision for emergency or temporary shelters for victims of domestic violence.

THE VICTIM PROTECTION ACT, NO 17 OF 2014, LAWS OF KENYA

It aims at giving protection to victims of crime and abuse of power which includes the victims of GBV. The Act allows for the full participation of the victim of a crime in the trial. Section 9 of the Act provides for the rights guaranteed for the victim. This includes the right to be present at their trial, for the trial to begin and conclude without unreasonable delay; to give their views in any plea bargaining, to have a fair trial; to be informed of the charge the offender is facing and have their views considered at stages of the proceedings. The Act also gives information and support services to victims²⁶, provides reparation and compensation to victims and provide special protection for vulnerable victims. The Act also operates even where there are several victims due to an act of terrorism and international civil unrest or war. The services are offered to secure restoration of their emotional, mental, physical, legal and economic status from harm occasioned by the offence. The Act envisages safe houses²⁷ for vulnerable victim or any other person related to the victim. This Act also creates a fund²⁸ to support victims of GBV. There is a need to provide resources develop and implement regulations that will help implement the Act. This Act has not been fully implemented as envisaged. The Act recognises the place of restorative justice

THE LEGAL AID ACT NO. 6 OF 2016, LAWS OF KENYA

This is intended to facilitate access to Justice and social Justice for those who cannot afford legal services. Such legal aid includes the provision of legal advice, legal representation, legal assistance in resolving disputes, drafting relevant legal documents and reaching an out of court settlement²⁹. The implementation of this Act would go a long way in assisting victims of GBV in accessing Justice. The services has only been devolved to five counties³⁰. The government needs to enhance the capacity of the National Legal Aid Services in terms of financial and human resource and devolve the Service to all the counties.

24 Protection against Domestic Violence Section 3

25 Protection against Domestic Violence: Part II Protection orders gives information on the application of protection orders, who can apply for the same and the procedures to be followed in the application of protection orders

26 Victim Protection Act Part IV Victim Services

27 Victim Protection Act Section 11

28 Victim Protection Act, section 27

29 Legal Aid Act Part VI which gives more information on who is eligible for legal aid and in what matters legal aid is granted.

30 These are the counties of Nairobi, Nakuru, Kisumu, Mombasa and Eldoret

COUNTER TRAFFICKING IN PERSONS ACT, CHAPTER 61 LAWS OF KENYA

The Act proscribes trafficking of persons and related offences and imposes stringent penalties for the offences. It seeks to protect trafficked persons from exploitation which includes sexual exploitation, forced marriage and child marriage³¹. The Act allows for the use of Victim Impact Statements during the trial in order to provide that the offence was committed against the victim³². The Act provides for the restitution or compensation of the victim for costs of any medical or psychological treatment, costs of necessary transportation, accommodation and other living expenses and any other relief that the court may consider just³³. Support for victims of trafficking including resettlement, return to and from the Kenya, appropriate shelter and other basic needs, psychosocial support, appropriate medical assistance and legal assistance is guaranteed under section 15. The mandate of the Counter-Trafficking in Persons Advisory Committee includes: the formulation and implementation of rehabilitation and reintegration programmes for victims of trafficking in person; research on TIP to inform policy formulation; and monitoring and evaluation of prevention, protection and prosecution efforts on TIP. The Act also establishes the National Assistance Trust Fund for Victims of Trafficking in Persons.

CRIMINAL PROCEDURE CODE, CHAPTER 75 LAWS OF KENYA

The law sets out the procedure for investigating, prosecuting and disposing of crimes including GBV. The Code makes provision for victim impact statements to be submitted to the court during proceedings to inform the sentence meted by the court³⁴. Victim impact statements provide an opportunity for victims of GBV to notify the court of how they have been affected by the violence.

EMPLOYMENT ACT CHAPTER 226 LAWS OF KENYA

The Act elaborates on what constitutes sexual harassment in employment³⁵ and requires an employer with more than twenty (20) employees to have a policy statement on sexual harassment which limits the protection of employees in an establishment of less than 20 employees.

EVIDENCE ACT, CHAPTER 80 LAWS OF KENYA

The Act stipulates what is considered as the admissible evidence in civil and criminal matters. Of significance is Section 124 of the Act, which seeks to give effect of the Children's Act and the Sexual Offences Act. The Section provides that where in criminal cases involving a sexual offence the only evidence is that of the alleged victim of the offence, then the court shall receive that evidence and proceed to convict the accused person if, the court is satisfied that the alleged victim is telling the truth and for reasons which the court will record in the proceedings. This provisions does not limit itself to the need of collaboration of such evidence by any other means. Section 125 of the Evidence Act on the other hand while it acknowledges that a person with intellectual disability is a competent person to give evidence contrary to the general belief, the language used is derogatory and needs to be reviewed.³⁶ A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them. The language of the Act on PWDs is derogatory.

31 Counter Trafficking in Persons Section 2

32 Counter Trafficking in Persons Section 12

33 Counter Trafficking in Persons Section 13

34 Criminal Procedure Code Part IXA Victim Impact Statements.

35 Employment Act Section 6

36 Evidence section 125 used the following language "A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them"

HIV AND AIDS PREVENTION AND CONTROL ACT, CHAPTER 264A LAWS OF KENYA.

The Act prescribe the procedure governing healthcare facilities and employers concerning the prevention, control and management of HIV and AIDS. The Act also safeguards the right to confidentiality and non-discrimination³⁷. Section 13 provides that a person charged with a sexual offence may be compelled to undergo an HIV test.

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS, NO. 2 OF 2013, LAWS OF KENYA

The Act has elaborate provisions on the conduct of prosecution by the Office of the Director of Public Prosecution. The Director has power to direct the Inspector General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with such direction. The Director can also institute and undertake criminal proceedings against anyone except the court martial, take over and continue any criminal proceedings or discontinue at any stage before judgment of any criminal proceedings instituted³⁸. This is in line with the provisions of section 40 of the SOA where the DPP is only one who can discontinue any investigation of sexual violation. Section 30 of the Act allows the Director to appoint legal practitioners as public prosecutors. Under the provision, the Director of Public Prosecution has appointed legal practitioners to prosecute gender-based violence cases.

WITNESS PROTECTION ACT, CHAPTER 79 LAWS OF KENYA

The Act protects witnesses who may be at risk and in danger because of being crucial witnesses. The Act establishes Witness Protection Agency to facilitate and give protection to such witnesses. The Act also provides for the protection of witnesses in court through the Witness Protection Rules of the Court.

TRUTH, JUSTICE AND RECONCILIATION ACT OF 2008.

The Act established the Truth, Justice and Reconciliation Commission to investigate and make recommendations for reparation of injustice, including human rights violations such as sexual offences committed between 12 December 1963 and 28 February 2008. This Act is still pending to be implemented.

TEACHERS SERVICE COMMISSION ACT CHAPTER 212 LAWS OF KENYA

For purposes disciplinary action to be taken against teachers³⁹, the Third schedule of the Act provides disciplinary offences to include sexual intercourse, sodomy and sexual harassment or flirtation and lesbianism. Disciplinary action which can be taken against a registered teacher after interdiction include warning, surcharge, suspension for a period not exceeding six months, retire the teacher in the public interest, dismissal, termination of services or undertaking any other lawful action. The provision does not provide for taking criminal action against such a teacher while the acts are criminal in nature.

³⁷ HIV and AIDS Prevention and Control Act, Part V Confidentiality.

³⁸ Office of the Director of Public Prosecutions Section 5

³⁹ Teachers Service Commission Act Section 34

ELECTIONS OFFENCES ACT 2016 NO. 24 OF 2011

The Act is intended to prevent election offences and corrupt and illegal practices at elections and other matters which are incidental thereto. The National Crime Research Centre in its research⁴⁰ identified rape as one of the election crimes and offences. However, the Act does not identify rape as one of the offences but recognizes use of force or violence during election period one can deduce that it includes rape. Such violence includes inflicting injury, damage, harm or loss on or against a person⁴¹. In the case of *Coalition on Violence Against Women & 11 Others vs Attorney General of the Republic of Kenya & 5 others*; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (*Amicus Curiae*) [2020]eKLR the courts awarded damages to survivors of sexual violence that happened during the 2007 general elections.

COMPUTER MISUSES AND CYBER CRIMES ACT, 2018

The Act provides for offences relating to computer systems, and to enable timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes. The Act also recognizes the international nature of such crimes and allows for the facilitation of international co-operation in dealing with computer and cyber crimes matters. Some of the offences created by the Act includes child pornography⁴² which includes downloading, distributing, transmitting, disseminating or circulating, selling or offering to sell among other crimes. Section 27 provides for the offence of Cyber harassment which includes communicating either directly or indirectly in whole or in part of an indecent or grossly offensive nature which affects another person. A person who aids or abets the commission of any of the offences also commits a crime⁴³. A body corporate involved commits a crime⁴⁴.

MARRIAGE ACT 2014

- The Act prohibits marriage of a person who is under the age of 18 years⁴⁵. A union between parties where either party was below the minimum age of marriage is said to be void⁴⁶. The law also prohibits marriage within certain relationships⁴⁷. Part XIII of the Act provides for offences and penalties which include marriage to a person under the minimum age of 18 years⁴⁸, marriage of persons within the prohibited marriage relationship⁴⁹, and knowingly participating in a marriage where there was lack of consent or coercion under section 89. While the law protects children from early marriage as it sets the age of marriage to be 18 years, the cases of Romeo and Juliet” who enter into marriages while below the age of 18 years complicate this fact.

40 National Crime Research Centre: Election Crimes and Offences in Kenya 2016

41 Election Offences Act Section 64

42 Computer Misuses and Cyber Crimes Act section 24 Child Pornography

43 Computer Misuses and Cyber Crimes Act: section 42

44 Ibid section 43

45 Marriage Act Section 4

46 Ibid Section 11

47 Marriage Act Section 10

48 Ibid Section 87

49 Ibid section 88

INTERNATIONAL CRIMES ACT OF 2008, CHAPTER 60 LAWS OF KENYA

This Act ensures that Kenya cooperates with the International Criminal Court and confers jurisdiction on the Kenyan courts over genocide, war crimes and crimes against humanity committed in Kenya. The Act does not define these crimes but refers to the Rome Statute. Consequently, mass rapes, sexual slavery, enforced prostitution and other forms of sexual violence recognised as international crimes can be prosecuted in Kenyan courts.

THE NATIONAL POLICE SERVICE ACT(CHAPTER 84 LAWS OF KENYA)

The Act provides for the functions of the police which include the investigations of cases, ensuring proper investigations are carried out by giving the police power to compel witnesses to attend at the police station, take photographs, finger prints and forensic evidence, to search and arrest among others⁵⁰

THE PERSONS WITH DISABILITIES ACT CHAPTER 133 LAWS OF KENYA

This Act provides for the rights and privileges of persons with disabilities. This include the right not to be discriminated, the right to health⁵¹

THE HEALTH ACT 2017

The Act give a right to any person to file a complaint about the manner in which they have been treated. However, the national and county governments are required to establish and public a procedure for the laying of such complaints and which needs to be displayed by all health facilities. This requires to be enforced to give survivors an avenue to lay their complaints. These acts create offences, prescribe the mode of investigation and the management of offenders.

INTERNATIONAL TREATIES AND CONVENTIONS

Kenya is a State Party to number of international treaties that aim to address SGBV. Articles 2 (5) and (6) of the Constitution of Kenya provide that the general rules of international law and any treaty or convention ratified by Kenya form part of the law of Kenya. These provisions are of significance to the Kenyans as they allow for the use of those mentioned above international and regional human rights treaties that Kenya has ratified to interpret one's rights.

50 National Police Service Act Part VII General Functions, Powers, Obligations and Rights of Police Officers in the Service.

51 Persons with Disabilities Act: Part III Rights and the Privileges of Persons with Disabilities

The treaties impose obligations on Kenya as a State Party to undertake legislative Policy measures, and other administrative measures to ensure the enjoyment of the rights within the treaties on an equal basis between men and women and prevent SGBV.

Table 3: International and Regional Milestones in addressing SGBV

United Declaration on Human Rights

Under the declaration, the governments committed to take progressive measures to secure the universal and effective recognition and to observe the human rights set out in the Declaration. The

declaration establishes the basic concepts of dignity, liberty and equality. It also protects one from being subjected to torture or to cruel, inhuman or degrading treatment or punishment and guarantees one the right before a court of law and equality to a fair and public hearing, and non-discrimination and to medical care

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) Establishes the Human Rights Committee under which State Parties are to report to periodically on measures undertaken to ensure equality of men and women in enjoyment of the Covenant's rights. HRC has made General Comments on how this should be realized. Notable General Comments are: 'State Parties should ensure traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and enjoyment of all Covenant rights'.

and

'Women are particularly vulnerable in times of internal and international armed conflicts. State Parties should inform the Committee on of all measures taken during these situations to protect women from rape, abduction and other forms of gender-based violence.' State Parties have to report to the HRC on measures undertaken to address violence against women.

Declaration on the Elimination of Violence Against Women (DEVAW): the declaration broadly defines violence against women which includes physical, sexual or psychological harm or suffering to women occurring in the family, within the general community which includes rape, sexual abuse and sexual harassment or one that is perpetrated by the state. Further, the declaration guarantees women rights which include the right to equal protection under the law, equality, free from non-discrimination, right to the highest standard attainable of physical and mental health and not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment. It also outlaws the state from using custom, tradition or religious consideration to avoid its obligation with respect of its elimination.

INTERNATIONAL COVENANT ON THE ELIMINATION OF ALL FORMS OF VIOLENCE AGAINST WOMEN (CEDAW) Committee held in *Goekce v. Austria* and *Yildirim v. Austria* that State have to exercise due diligence to prevent, investigate and punish intimate partner violence in line with Articles 2(a), 2(c) and 2(f) of CEDAW read together with General Recommendation 19.⁵² General Comment NO 35 on gender based violence against women, updates general recommendation NO 19. *It is worth mentioning that this argument formed the basis of petition and the judgment in the Petition No. 8 of 2012 at High Court of Meru known as 160 girls' cases. In which for the first time in*

52

Other land mark cases on due diligence principles include: *Velasques Rodrigues v Honduras* which established due diligence obligation of the state for private acts, *Inter American Court of Human Rights Judgement of 29th July 1988, Maria de Penha v Brazil* which established due diligence obligation in violence against women. In order for the laws to protect women from violence, they must be effectively implemented. *Inter American Commission on Human Rights Report No 54 /01 Case No 12.051, April 16, 2001. Equality Now & another v Ethiopia*; eld that the states had the obligation to protect women from abduction, rape and forced marriage; *Interrights & another v Egypt*

Kenyan history the government was found to have failed to exercise due diligence in promptly and effectively investigating and prosecuting defilement of the 160 girls.

UN CONVENTION ON THE RIGHTS OF CHILDREN (CRC) calls on State Parties to prevent all forms of violence against children including by enhancing capacity of families and institutions to prevent this violence; engaging men and boys as strategic partners to stop violence; and places emphasis on child-rights approach to preventing and while responding to violence against children.

UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) affirms the rights of PWD and imposes obligations on State Parties to ensure safeguard of the rights of PWD that include freedom from violence and abuse. It establishes Committee on CRPD which examines State Parties implementation of the Convention. The Committee underscored State Parties obligation to ensure access to justice of PWD and protect PWD women from forced sterilization. (CRPD's Committee Draft General Comment on Article 12 of the Convention on Equal Recognition before the Law). Kenya has not signed the Protocol to the African Charter on the rights of Persons with Disabilities Which requires states to take appropriate and effective measures including policy, legislative, administrative, institutional and budgetary steps to ensure, respect, protect, promote and fulfil the rights and dignity of persons with disabilities, without discrimination on the basis of disability, including by among other issues by modifying, outlawing, criminalizing or campaigning against as appropriate any harmful practices applied to persons with disabilities⁵³

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES. It affirms the rights of all migrant workers particularly women in irregular situations to be free from all forms of violence and ill-treatments in the hands of private entities, employers and state actors. (Committee on Migrant Workers General Comment no. 2 on the rights of migrant workers in an irregular situation and members of their families).

UNITED NATIONS FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, CHINA 1995. The Platform for Action; recognizes, 'all governments irrespective of their political, economic and cultural systems are responsible for promotion and protection of women's human rights. This document specifically states that violence against women is one of the twelve (12) critical areas of concern and an obstacle to achievement of women's human rights.

PROTOCOL TO THE AFRICAN CHARTER ON HUMAN'S AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (Maputo Protocol). Acknowledges that, despite ratification of the African Charter on Human and Peoples Rights and other international human rights instruments by State Parties and their solemn commitment to eliminate discrimination and harmful practices against women, women in Africa still continue being victims of discrimination and harmful practices. The Protocol therefore aims at ensuring the rights of women are promoted, realised and protected in order to enable them fully enjoy all human rights. The document outlaws all forms of exploitation, cruel, inhumane or degrading punishment and treatment. The document specifically requires governments to prohibit all forms of harmful practices which negatively affect the human rights of women by taking all measures including adopting legislative, administrative, social, and economic measures as necessary to ensure the prevention, punishment, and eradication of all forms of violence against women; punishing perpetrators of GBV; preventing and condemning trafficking in women and prosecuting perpetrators of trafficking; identifying the causes and consequences of GBV and taking appropriate measures to prevent and eliminate such violence; and providing accessible services for survivors of GBV.

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC). The Charter imposes obligation on State Parties to ‘take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.’

PACT ON SECURITY, STABILITY AND DEVELOPMENT IN THE GREAT LAKES REGION AND ITS PROTOCOL ON THE PREVENTION AND SUPPRESSION OF SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN 2006 AND THE GOMA DECLARATION ON ERADICATING SEXUAL VIOLENCE AND ENDING IMPUNITY IN GREAT LAKES REGION, 2008. It calls on the State Parties within the Great Lakes region to undertake measures to prevent and combat violence against women and children. It recognises that women and children are particularly vulnerable to violence during conflict and calls on the State Parties to ensure peace, security and stability in the Great Lakes region.

POLICY FRAMEWORK

The following are pertinent policies in Kenya aimed at addressing SGBV

NATIONAL POLICY ON GENDER-BASED VIOLENCE

The overall goal of the Policy is to accelerate efforts towards the elimination of GBV in Kenya. The purpose of the Policy is to put in place a framework to accelerate the implementation of laws, policies and programmes for prevention and response to GBV by State and non-state actors for the realisation of a society where men, women, boys and girls are free from all forms violence. The Policy objectives include:-

- To facilitate a coordinated approach in addressing GBV and to ensure effective programming.
- To improve enforcement of laws and policies towards GBV prevention and response.
- To increase access to quality and comprehensive support services across sectors.
- To enhance the sustainability of GBV prevention and response interventions.

The policy calls for a multisectoral and coordinated approach in addressing SGBV.

NATIONAL GUIDELINES ON THE MANAGEMENT OF SEXUAL VIOLENCE IN KENYA

This guiding Policy framework sets out the essential procedures and services for management of survivors of sexual violence. The guidelines provide essential information on management of sexual violence in a multi-pronged manner. It gives medical practitioners information on steps when treating a survivor of sexual violence, preservation of evidence for court use, issues of psycho-social support and other ethical issues related to managing health-related problems of sexual violence. It provides a good documentation system of information on the violations meted out on the survivor through the Post Rape Care Form, which is also a legal document used in court.

NATIONAL STANDARD OPERATING PROCEDURES FOR THE MANAGEMENT OF SEXUAL VIOLENCE AGAINST CHILDREN

These standards seek to enhance the capacity of Health Care Providers and Health Management Teams to respond to and support child survivors of sexual violence. The Standards provide standardized user-friendly guide on how to apply child centered approaches for effective management and support of child survivors of sexual violence;

describes procedures, roles and responsibilities of the health care providers including the collection, protection and storage of evidence. The SOPs recognize the need for a comprehensive, multisectoral approach that is supported by strong referral and linkages which complement interventions taken.

NATIONAL FRAMEWORK TOWARD RESPONSE AND PREVENTION OF GENDER-BASED VIOLENCE IN KENYA

The framework is a specific strategy to coordinate the various state and non-state actors' responses to domestic violence in Kenya. It acknowledges the need for a multi-dimensional approach to address GBV and provides guidance for coordination among government, non-governmental and the civil society organisations actors among others. It also aims at eliminating duplication of, strengthening and enhancing the effectiveness of interventions

Other significant policies that touch on SGBV in Kenya include:

National Policy on the Abandonment of FGM and National Action Plan for Accelerating the Abandonment of FGM/C (2008-2012); National Guidelines on the Management of Sexual Violence; National Plan of Action Against Sexual Exploitation of Children (2013-2017); National Gender and Development Policy; National Plan of Action for Combating Human Trafficking (2013-2017); The National Children Policy; National Policy on Orphans and Vulnerable Children; National Plan of Action for the Elimination of the Worst Forms of Child Labour (2009-2013); National Plan of Action for Children for the Realisation of the Rights of the Child (2015-2022); Kenya Adolescent Reproductive Health Policy; Education Gender Policy; Policy Framework for the Implementation of Post Rape Care Services 2005; Multi-sectoral Standard Operating Procedure for Prevention of and Response to Sexual Violence in Kenya 2013; and Vision 2030 and its second term plan 2013; Bail and Bond Policy, 2014; Sentencing Policy, 2015; National Action on Human Rights; the Framework for the National Child Protection System for Kenya (2011) which, seeks to promote linkages between the different actors and provide coordinated interventions and responses through statutory mechanism; and the County Child Protection Systems Guidelines, which set out an agenda for coordinated action at county level and includes work practice direction for all formal and informal actors so that they are able to deliver more coordinated and professional services within the realm of child protection system thinking and guarantee more sustainable actions and responses towards children and their families.

The KDHS report 2014 indicates that only 7.0% of women victims of physical violence and physical and sexual violence sought any help from the police. On one hand, a total of 0.5% sought help from a lawyer and 1.7% sought for help from a social work organisation. On the other hand, the percentage of men who suffered physical and sexual violence who sought help were 18.7% reported to the police, 0.2% reported to a lawyer and 0.6% reported to a social service organisation.



CHAPTER 3

RESEARCH FINDINGS

Prosecution of cases has several life cycles around it, including before the investigation stage, where victims of the sexual violence have to decide whether they will report the case and seek accountability for the crime committed against them. The second stage is the investigation and prosecution of the case itself. The police and their investigators must investigate the crime once reported and collect the necessary evidence during this stage. The prosecutors working with the police must formulate the charge against the perpetrator to prove such a case. The third stage is the trial one, where the victims/survivors must attend court and give evidence on the commission of the crime against them. Lastly is the post-trial phase, when the court determines the outcome of the case and issues an appropriate sentence and where a perpetrator appeals, they must go through the appeal process.

The findings are informed by the information received from the key informants and literature review. Despite having a robust legislative and institutional framework, several challenges prevent survivors of sexual violence from accessing justice. Such challenges are detailed under the following categories touching on the different key stakeholders in the criminal justice system:

INVESTIGATION GAPS AND CHALLENGE

The investigation stage provides the first contact for the survivors with the criminal stage. However, this stage faces a lot of challenges which include:

1) Non-Reporting/Late Reporting of Sexual violence Cases

For every case of sexual violence reported to any organisation or institution of health, many other cases go unreported to law enforcement agencies. The National Crime Research Centre study on GBV⁵⁴ showed that only 2% of the males interviewed and 15.2% of the females interviewed who had ever experienced the different types of sexual violence from an intimate partner ever reported their incident to anyone. On the other hand, about 16% of the female respondents who had ever experienced the different types of sexual violence from a non-intimate partner had reported the incident to someone. The research and discussions with survivors of sexual violence between January and February 2022 have shown that many do not report the crimes, delay making reports, and or withdraw their reports. This corroborates an earlier study by the Kenya Institute of Economic Affairs in 2009 on the [STATUS OF GENDER DESKS AT POLICE STATIONS IN KENYA: A CASE STUDY OF NAIROBI PROVINCE](#)⁵⁵ found that fifty six (56%) percent of the women had never reported the violence to anyone. In a research carried out in 2018 on “Missed Treatment opportunities and barriers to comprehensive treatment for sexual violence survivors in Kenya: a mixed methods Study”⁵⁶, the results showed that in a majority of the cases, 461 out of 530 (87%), only one perpetrator was reported.

The danger of late reporting was considered by the courts which in some cases, the courts have taken the issue of late reporting to favour the accused person. In the case of [REPUBLIC VS KEN KINYNAJUI GATHOGO SEXUAL OFFENCE CASE NO 104 OF 2016, CHIEF MAGISTRATES COURT AT MAKADARA](#), the court held that

“it also beats logic why the matter was not reported immediately. When a child is violated, the same should be reported at the fastest instance, especially if the alleged violator lives in the same house as

54 Gender Based Violence in Kenya 2014 accessed at <http://crimeresearch.go.ke/wp-content/uploads/2018/05/Gender-Based-Violence-in-Kenya.pdf> on 5th March 2022

55 Institute of Economic Affairs: Status of Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province accessed at [file:///C:/Users/ENVY/Downloads/Status%20of%20Gender%20Desk%20in%20Police%20Stations%20\(1\).pdf](file:///C:/Users/ENVY/Downloads/Status%20of%20Gender%20Desk%20in%20Police%20Stations%20(1).pdf)

56 Gatuguta et al . BMC Public Health (2018)

the minor. no amount of threat can stop a mother from reporting such an incident. I have considered the accused person's evidence on the fact that there was a grudge between him and his estranged wife. That could be the case since the evidence presented before me does not hold any water."

It is clear that the low levels of reported cases exist despite having elaborate laws in place to protect survivors, awareness creation conducted to the communities, training of state officers, including police, judges, prosecutors and health officers and other actors on SGBV. The challenges being that the enforcement and implementation of these laws is still weak. Despite the above findings, the stakeholders still recommended that there is a need for continuous awareness creation and training for all the community members and criminal justice actors. The respondents interviewed cited the following reasons for underreporting and non-reporting, low reporting or later reporting of GBV incidents:-

- a. **Lack of knowledge by survivors of their rights (legal illiteracy):** there is no requirement that citizens be informed of their rights in law. Many citizens are not aware of the protection offered in the various laws. Legal literacy involves the ability to recognise when a problem or conflict is a legal one; when a legal solution is available; knowledge on how to take the necessary action to avoid further legal problems; where this is not possible, how to help oneself appropriately; knowledge on how and where to find information on the law; being able to find information that is accessible; knowledge on when and how to obtain suitable legal assistance; being confident that the legal system will provide a remedy; and understanding the process enough to perceive that justice has been done. Many of the community members and survivors still suffer from legal illiteracy.

The work done around citizen awareness has been carried out largely by CSO, with no government national or county government funding involved. The County Government, which is also responsible for issues GBV and carrying out Civic Awareness, does not carry it out⁵⁷. Section 99 has as some of the purpose and objectives of civic education to enhance awareness and mainstreaming of the Bill of Rights and National Values and a heightened demand by citizens for service delivery by institutions of governance at the county level. Lack of knowledge has made it difficult for people to pursue their rights in law and demand accountability from the various duty bearers.

- b. **Stigma and reprisal by the Community/family and perpetrators.**

Sexual violence survivors and their families suffer a lot of stigma from the community members and in some cases from their families. They also fear reprisal from the community at large and from perpetrators. Women also fear that they may lose status in their community and family if they disclose they are victims of Sexual Violence. In cases of incest or defilement, women and guardians of such children are afraid to report due to threats from the perpetrators. Witnesses too, suffer from threats and fear reprisal. For the above reasons, survivors are forced to drop charges against the perpetrators for their safety or to "save the family honour". Many of these cases are then dealt through the traditional justice process.

- c. **Doubt in the ability to get help from the justice process.**

Doubt in the criminal justice actors' actions make many survivors not report. Some do not see the value of going through the criminal justice process. During the interviews, it was disclosed that there was a strong public perception that the police would not take any appropriate action when a case was reported. A social worker in Nairobi remarked that when survivors see that no action has been taken over other cases in the neighbourhood and see how they are treated, they would rather die with their shame. The trauma victims face deter them from reporting their experiences to others or the police.

d. Lack of knowledge of the referral systems and mechanisms in the community.

The survivors and the general community at large not aware where to go and report , or in some instances where to go for help apart from the police. They are not aware of the referral mechanisms and institutions available in the community. This includes organizations and institutions to report to, that provide safe houses that protect the rights of survivors, that offer psychosocial and counselling support, that provide facilitation and other assistance, and that provide legal aid. Where these are known, they may be too far away to access. Such access may be hampered further by poverty. Many of the survivors interviewed depend on the word of mouth, are informed of the same by the police or health institutions or by paralegals and community health volunteers . or NGOs.

“I did not know where to go after I was raped. I was in hospital for two weeks and even I was discharged, I was not told anything about reporting my case. I think then the doctors and nurses did not know the importance of reporting”.

A rape survivor in Kitui

The Survivors interviewed had no prior knowledge or experience with the criminal justice system. This fact was confirmed by the Community Health Volunteers, paralegals, counsellors and even lawyers interviewed. Some of the cases have been reported days, weeks or months after they have happened. Most of the community members report their cases to the police through the trained Community Health Volunteers (CHV) and the paralegal networks

To alleviate this problem, CREAM and several organisations have acquired hotlines to be used in times of crisis. The challenge with the CREAM hotline is that the prompts are in English, assuming that the survivors all understand the language and that all survivors have telephones.

e. Societal/Family, Cultural or Religious Reasons:

In certain circumstances, GBV cases are understood from societal, cultural and religious reasons. The perception of power of men over women has played a significant role in hindering access to justice. This type of toxic masculinity has blended with local authorities. The police, chiefs, and village elders view women as deserving of this treatment for overstepping their mandates. On the flip side, where men are concerned, society places preposterous ideals that men should not display any vulnerability. As such, most SGBV inflicted on men is rarely reported or dealt with the seriousness it deserves.

Cultural taboos against incest and the attendant stiff sentences put pressure on survivors and their families and prevent/deter them from reporting such offences. From the interviews held, some of the marriages of women who pursued such cases on behalf of their children are destroyed. SGBV cases get terminated by the elders, chiefs, police, and religious leaders.

f. Corruption and compromise of cases:

many cases of SGBV do not reach the court due to corruption and compromise at the family level, at the community level or even at the police level. Negotiations for compromise are carried out the administration (Chiefs and their Assistants, Village Elders) where beyond a payment of money, the survivors may be married

off to their perpetrators. Cases at the family level are compromised by the parents of the survivors where it involves children. Some parents are known to use their children to extort funds from alleged perpetrators. Case are also compromised by police officers who work on behalf of the perpetrator.

g. Lack of Economic Empowerment/Poverty:

Poverty is a barrier to GBV survivors' movement to seek medical treatment, report the GBV incident to police, pursue the investigation of the cases, and attend the trial in court. Apart from travel, the survivors do not have the funds to pursue hospital treatment because of the attendant costs. In some health facilities, survivors have to pay for their treatment and the filling of the PRC and P3 forms. However, these services, according to the law, are free. In a petition filed in court on whether the payment for P3 forms by victims of a crime amounted to the violation of victims' rights to access services and justice, the court observed⁵⁸

"considering the foregoing decision, i am convinced that the fee charged on the issue and filling of p3 forms is illegal and that the victims of assault, sexual offences and related crimes are entitled to the benefits of the principle of legitimate expectation....the law was purposed to help the victims of crime and abuse power. the assistance included providing better information and support services to vulnerable victims. such services are explained in section 2 of the act as "all services offered to the victim of the offence to secure restoration of their emotional, mental, physical, legal or economic status from any harm occasioned by the offence committed

Under the Sexual Offences Act, expenses incurred in the treatment or professional counselling of any victim of a sexual offence is to be borne by the state. Such treatment is to be undertaken at a public hospital or institution or any other institution approved or gazetted by the minister responsible for health. Hospitals such as Mater and Nairobi Womens Hospital, have special services targeting survivors at no cost. Most government hospitals do not charge for the services. CREAM and Wangu Kanja Foundation have had to come to the rescue of survivors.

We have seen what poverty can do when survivors come here. Many of them do not pursue their cases once they are compromised. As an institution we would like to do some work around economic empowerment for women" A doctor at Mater Hospital

" We had a case where the mother of the child who was defiled made the child recant her statement. Later we learnt that she was using the child to make money from the perpetrator" FGD Kitui

" We pursued a case of defilement. The mother had taken the child away after the report. When we followed up we were informed she had been paid Kshs 300,000" FGD Nairobi

During the FGDs meeting, it was revealed that poverty and lack of economic empowerment make survivors and their families compromise on SGBV cases. After the compromise, the survivors are relocated to other areas or turn hostile witnesses in court. In some instances, the parents of the survivors have a hand in the violation meted out. They use their own children as a source of income.

h. Lack of Trust and Confidence in Law Enforcement Officers, health service providers and the Judicial System:

The treatment of GBV survivors at the police station and in the courts determine whether they will report the cases and pursue the same through the justice system. Many survivors feel humiliated during interviewing while reporting sexual violence incidents at police stations report desks. This fact is not diminished when they report at some gender desks. The survivors also find the services offered by the police too slow. These may be due to the inadequate number of police officers available at a particular police station, lack of a designated officer at the gender desk, lack of resources to fuel their vehicles, and the issuing of P3 forms at a fee. In some instances, police do not arrest the perpetrators immediately. In some cases, the police ask the survivors to arrest the perpetrator or seek money to arrest the perpetrator. In a research conducted by Human Rights Watch, survivors noted their hesitation to report abuse to authorities, citing their belief that they would not receive any assistance as well as the fact that they would have to pay bribes if any service was to be given⁵⁹.

In the case of *CK (A Child) through Ripples International as her guardian & next friend) & 11 others vs Commissioner of Police/Inspector General of the National Police Service & 3 others [2013]eKLR*, the court held that the survivors had proved their case and declared the police had infringed their fundamental rights and freedoms, where it was alleged that the police had neglected, omitted, refused and or failed to conduct prompt, effective, proper and professional investigations in cases of defilement and other sexual violence acts. The court held the respondent who included the police responsible for the physical and psychological harms inflicted by the perpetrators because of their laxity and their failure to take prompt and positive action to deter defilement.

GBV survivors face re-traumatization at the health facilities when they are not treated immediately or are passed from one doctor to another, or at the police station and when the cases take too long in the courts. According to the interviewees, in some circumstances, judicial officers do not understand the trauma a victim has gone through to demand that evidence given must specify the acts of violence committed to the survivor, thereby re-traumatizing them and shattering their confidence in the legal process. Where a judicial officer is transferred, the case may be retried afresh, requiring the survivor to go through the evidence all over again.

i. Fear of appraisal and intimidation (Lack of Protection for Survivors and GBV Witnesses)

GBV survivors, witnesses, and families face many threats and intimidation from the perpetrators and other interested parties, including the administration (chiefs and police), to ensure that they do not give evidence. Placing victims in environments where the perpetrators are persons in positions of authority or trusted by the victims compromises their safety and that of their witnesses and jeopardizes the investigation process. Where an influential person in society of family member is involved, the police are also used to intimidate the survivors or witnesses. This makes

“ I tried following up a case on behalf of a child who had been violated. I reported the case to the police. However, since the perpetrator is known, he was called while we still at the police station. We left the place and I took the child for safe custody. Later I was informed that I am being investigated for a charge of kidnapping a child” A survivor in Kitui

“ I reported my case to the police. Afterwards, the police and the perpetrator started harassing me. They would come to my house and threaten me. I would even hear them knocking on my door at odd hours” A survivor in Nairobi

59 Human Rights Watch < <https://www.hrw.org/news/2021/09/21/kenya-survivors-gender-based-violence-lack-help> > accessed 10th February, 2022

the survivors fear reporting their cases, giving evidence, and attempting to withdraw the GBV cases. The CHVs, paralegals and members of the community sometimes face intimidation and threats from perpetrators and in some cases from the police. In some instances, police officers too are threatened by being reported to IPOA where there is an interest in the case on behalf of the survivor.

Many of the actors in the criminal justice system, NGOs, CHVs and paralegals are not aware of the laws and other measures that protect the survivors, including the Witness Protection Act and agency, the Victims Protection Act and board, PDVA, the Bail and bond policy and the Legal Aid Act and services. These pieces

A case of sexual violence was reported at our station. We then started investigating the matter. However, the CHV who had reported it seemed to have a lot of interest in the matter and ensure the perpetrator was arrested. Our investigations showed that the case was a frameup. In the meantime, the CHV reported me to IPOA that I had refused to arrest and charge the suspect. Due to such pressure, we had to arrest the perpetrator and he was charged with the offence of defilement. The case went through the whole hearing and he was acquitted. A police officer in Nairobi

of legislation and the attendant institutions offer a lot of services to the survivors of criminal acts. The criminal justice actors, including the Non-governmental organisations, paralegals and CHVs, the police, the prosecutors and even the courts, have been unable to advise SGBV survivors properly regarding action to be taken.

Many of the stakeholders do not know these institutions, which denies the survivors their rights protected and promoted through the criminal justice system⁶⁰. This challenge is compounded further by the fact that most of these institutions are not devolved to the counties to be within reach of the general population and work in silos.

This calls for multisectoral coordinated efforts that bring together all these institutions and others that work in this sector to map out a significant awareness programme in the community on their mandates

j. Trauma suffered and lack of psychosocial services

Trauma coupled with the lack on knowledge on what help to seek and where to seek such help makes many survivors not report the cases. This is further compromised by the lack of psychosocial and counselling services within the community. Such services are provided to a large extent by NGOs usually free or are privately accessed but at a cost. Some of the National Referral hospitals and hospitals offering SGBV services provide such services offer this service. Under the SOA, such services are to be granted for free to a survivor of SGBV. Such services are also to be provided under the Victim Protection Act and the Protection against Domestic Violence Act. However, such services are not in all government institutions and the institutions mandated to provide these services under the various Acts are not in a position to provide such services. The survivors too do not go through the whole process of counselling either due to a lack of knowledge of the need to do this, lack of funds for follow up or fatigue in following up such services.

2. Handling of GBV cases

The Kenya Police Service Act provides the functions of the police service⁶¹ which include: the provision of assistance to the public when in need, maintenance of law and order, protection of life and property, investigation of crimes,

⁶⁰ The Victim Protection Act offers the survivors a number of services including the development of a preliminary victim assessment report once a crime is reported which provides for preliminary measures to be taken once the victim reports an offence under section 6(1)

⁶¹ Sections 24 and 27 provide for the functions of the Kenya Police Service and the Administration Police Service respectively.

collection of criminal intelligence, prevention and detection of crime, apprehension of offenders and enforcement of laws and regulation. The police are among the first responders in the criminal justice system. The Police play a central role in the criminal justice system by their functions and its abdication from that role would deprive claimants access to courts and lead to miscarriage of justice or deny justice altogether⁶².

Cases of SGBV tend to be very personal and require personalized handling. Reporting of SGBV needs to be done in a manner that gives confidence to the victim that they are understood, appreciated and their cases are taken seriously. This fact led to the creation of gender desks at police stations. The officers manning such desks are well trained in GBV. Not all counties have such gender desks. However, in the stations where they are found, many are well handled. However, survivors face a lot of challenges when they go to report their cases. Some of the challenges faced by the survivors include the following:

- **Insensitive/negative attitudes of police officers.** This deters women and men from reporting their cases or from pursuing them. This is portrayed through foul insulting language, ashaming the victim and blaming them for the rape that has occurred to them, failure to provide the survivor's privacy at the report desk, and threatening the victim, especially in cases where the perpetrators are known within the community. The survivors feel humiliated, re victimized (secondary victimization) by the questions asked by the police. Information gathered from Pro Bono Lawyers, Community Health Volunteers, Paralegals, Survivors, Health Workers, and Community Focal persons agree there is insensitivity in receiving victims and taking down their statement and filling the occurrence book at the report desk
- **Slow or no action taken by the police:** Many of the women interviewed confirmed that any report handled with haste was the one where they were accompanied by lawyers, officers from CREAM or Wangu Kanja Foundation, the Community Health Volunteers or Paralegals. In many instances, the police did not take any action on the report as no investigations were carried out, known perpetrators, when reported were not arrested, which caused much fear in the survivors. Courts have held that the police have a duty to investigate reports made to them and protect the survivors from further harm. This was held in the case of **Charles Murigu Muriithi & 2 others vs Attorney General**[2019]eKLR and, which is in line with their mandate under the Police Service Act. In the case of CK(a child) through Ripples International as her guardian & next friend) & 11 others vs Commissioner of Police/Inspector General of the National Police Service & 3 others [2013]eKLR, the court held that

“ once a report or complaint is made, it is the duty of police to move with speed and promptly, commence investigations and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally short thereof amounts to violation of fundamental rights of the complainant”

The Police Standing orders and the Standing Operational Procedures on SGBV including the Policy on Prevention and Response to Gender Based Violence

- **Lack of resources by police:** Police lack the resources to enable them to investigate the cases. In some instances, police seek funds from survivors to visit the crime scene or to collect the DNA exhibits from the hospitals. In many of these cases, officers with a passion for matters SGBV use their resources to investigate these cases. A police officer interviewed noted that sometimes they have to use their resources to offer transport to the survivors, obtain P3 forms, and follow up the evidence with the government chemist. Survivors also reported that the police required them to invest and manage evidence of their abuse by producing witnesses. This discourages many survivors from pursuing such cases once they have been reported. The Gender desks that pursue sexual violence cases are not well funded and are understaffed.

- **Lack of trained and committed officer at gender desks:** Officers at the gender desk who have been trained are usually very good at handling survivors. In addition, working at the gender desks need committed personnel. However, most of the officers who at times work on sexual violence cases are not trained. Some of the trained officers are transferred from one station to another, leaving a gap where there are no other trained and committed officers. In cases where there are few officers, the survivors are referred to the general police services at the O.B desks to report their matters. However, the process of reporting a crime at the police station discourages many survivors. Some officers at the report office are insensitive and do not know how to handle survivors. There is also no privacy at the report desk. Some of the officers, especially those not trained in matters GBV, do not know how to handle survivors of sexual violence. Frequent transfers of trained gender desks officers also leave a lacuna in the treatment of survivors who report such cases.
- **Lack of gender desk, ineffective and deplorable gender desks.** Some of the police stations do not have gender desks that would deal with sexual offences effectively. In some instances such gender desks are in a deplorable state and cannot effectively handle sexual violence due to lack of resources that require the survivors to purchase of government documents like P3 forms.
- **Corruption at police station.** Police officers are compromised and collaborate with the perpetrators. In such instances, the perpetrators are informed of the report made which leads to harassment and intimidation of the survivor in other cases, the perpetrator escapes. Where the accused is a member of the Police service or a person in authority, the police are entirely reluctant to take down any details and instead take the victim through loops to avoid carrying out their mandate.
- **Poor handling of evidence:** This range from a failure in securing the scene of the crime; collection of evidence and poor storage of the exhibits, thus compromising the integrity of the evidence. In some cases, evidence is tampered with, lost or destroyed. The scene of crimes is rarely visited as the police have their challenges. Many of the officers concentrate on the survivor only as the scene of crime. In other instances, in its pursuit of the perpetrator, the community also tamper with and destroy the scene of crime. Experience from one of the health institutions indicated that police officers do not collect the DNA samples collected from the survivors, which ends up being destroyed. Where it is collected, it is not retrieved by the police, it is not taken for analysis, and the same is not used in evidence in court⁶³. In some other cases, there is deliberate mismanagement of such evidence by the police in favour of the perpetrator. According to one of the lawyers interviewed, the police gave the survivor her samples to keep and produce in court.

The police do not cross-match between the accused and the samples collected. One of the interviewees remarked that there is no connection between the DNA collected and the evidence adduced in court to connect the perpetrator to the commission of a crime. The medical evidence collected through the Post Rape Care Form only proves that sexual violence was committed but not by whom. However, in the case of **George Kioji v Republic Criminal Appeal No 270 of 2012 Nyeri**, the court held that:

“ where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome, we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubt that the defilement was perpetrated by the accused person. In deed under the provisions of Section 124 of the Evidence Act, the court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if the court believes that victim and records the reasons for the belief”

In the case of *Kassim Ali v Republic Criminal Apperal No 84 of 2005*, the court held that “ the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of the victim of rape or by circumstantial evidence”. This was also reaffirmed in the case of *AML v R [2012]eKLR* the court held that” A fact of rape or defilement is not proved by D.N.A test but by way of evidence”

The above authorities attest to the fact that where there is no D.N. A evidence, sexual violence cases can still be prosecuted in court contrary to the general belief.

3. Quality of Investigations of GBV Cases

Successful prosecution of sexual violence cases requires that cases are properly investigated and adequate evidence collected. In some cases, there is the need to have some coordination between the prosecutors and investigators for effective evidence collection.

Where cases reported to the police and other administrative officers are not handled seriously, then the law does not seem to be a deterrent to would be perpetrators. Some of the Police investigators have not been trained adequately on how to handle GBV cases. Compounding this is that they are not well resources, and lack capacity to handle enormous GBV work.

However, courts have held that the failure on part of the police officers to conduct prompt, effective, proper and professional investigations into the petitioners complaints of defilement and other forms of sexual violence infringes on the complainants fundamental rights and freedoms, under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1) (d) of the Constitution of Kenya, 2010’ (*C.K. (A Child) & 11 others vs. the Commissioner of Police & 2 others*).

CAPACITY OF INVESTIGATING OFFICERS

Many investigating officers do not have adequate capacity to investigate sexual violence cases because of:-

- a. Lack of equipment and facilities to collect, store and analyse the evidence on GBV especially sexual cases.
 - b. Lack of capacity to collect and transport evidence for analysis. The Government chemist takes a long time in releasing reports on analysis of evidence.
 - c. Lack of capacity in documenting evidence by the health practitioners, police, government chemist and judicial officers or use of documentary evidence such as the PRC forms.
 - d. Lack of official government documents such as P3 forms. The Officers handling such cases are therefore made to purchase such documents government.
 - e. Lack of resources to assist witnesses in giving evidence in court. Many of the witnesses including expert witnesses are not compensated when they come to court.
 - f. Lack of capacity and facilities by police, prosecutors and judicial officers to collect evidence from PWD and children.
- **Lack of training by of law enforcement officers:** Police lack training in handling cases involving sexual violence. Many lack the capacity in the detection and investigation of such cases. This is made more difficult in cases involving Persons with Disabilities. Lack of training for many police officers in the handling of survivors and witnesses and collecting and handling evidence impacts the investigation and prosecution of such cases, which to a large extent end up with weak or no evidential value.

COLLECTION, PRESERVATION AND USE OF FORENSIC EVIDENCE IN COURT

Sexual violence usually leaves traces of physical evidence which if handled properly can positively identify the perpetrator. Evidence is collected by the health practitioners and the investigators. In some instances, evidence is collected by the community members and/ or survivors and their families. Some of the actors in this chain do not know how to collect such evidence, preserve and transmit the same for analysis. This leads to tampering of such evidence either deliberately by investigators or through error due to a lack of knowledge for example by family and community members. Such evidence is also destroyed, compromised or lost. Forensic evidence faces the following challenges:

- **Delayed Collection:** The nature of the evidence is also dependent on the timing within which the survivor seeks help. The need to have the evidence collected within 72 hours from the time of the sexual violence incident, the collection of such evidence at the first point of contact and the preservation of such evidence is critical. However, as noted earlier, some health institutions, especially the dispensaries, have no capacity to collect and preserve such evidence. Where the evidence is collected, its preservation is compromised due to its storage.
- **Corruption and compromise in medical report:** A survivor may be taken to a private hospital for treatment in some instances. However, to get a “good” medical report, the survivor has to be retaken to a public hospital. In some cases, the health care workers are compromised to write reports that compromise the case of the survivor or, in some cases, they exaggerate the injuries or find injuries where there are none. A state council interviewed noted that they preferred evidence from a public hospital. In some instances, the evidence of the doctor from a private hospital is usually challenged by the defence.
- **Cost of documentation:** The survivor has to pay for a PRC form and P3 form in some cases where these documents are photocopied at a police station and taken to the hospital to be filled.
- **Lack of Forensic Labs:** Evidence is further compromised due to a lack of forensic labs, DNA data bank and registers for sexual offenders. Such forensic evidence like the high virginal swab is important in GBV cases to corroborate the evidence of the survivors. The available labs are found in Nairobi, Kisumu and Mombasa counties. Its efficiency is affected by a lack of staff, facilities and resources. The examination of the samples takes a long time and delays the quick prosecution of such cases. Further, DNA examinations are expensive and require a laboratory that is well equipped, with trained staff and well resourced.
- **Production of Evidence in Court:** While the SOA regulations allow medical practitioners, including nurses, to give evidence on the treatment and collection of evidence, some courts do not let these practitioners do so nor consider P3 Forms filled by them. Not all doctors have been trained in filling up the medical documents. Many of the doctors do not like court experience and do not attend court. Most hospitals have specific doctors to fill the forms and attend court.
- **Inadequate resources:** notably human and financial among the service providers, in the criminal justice system has hindered efforts in terms of dealing with GBV promptly and effectively. Some health facilities have medical practitioners who can fill in PRC Form only on certain days of the week, thus compelling GBV survivors to travel for long hours to proximate health facilities to have PRC Form filled in. By the same token some health facilities that handle GBV survivors have wait for long to receive PRC Forms from county government, causing apprehension among the already stressed medical personnel that they may not provide adequate medical and psychosocial support to GBV survivors.
- **Limited communication:** Communication between the police, the forensic analyst or government analyst and the medical personnel is limited. This does not allow for the maintenance of a proper chain of evidence as envisaged in the PRC form and law. The police are obligated to follow the standard operating procedures in the collection, preservation and production of such evidence in court.

The National Standard Operating Procedures for the Management of Sexual Violence against children⁶⁴, the National Guidelines for the Management of GBV and National Police Service Standard Operating Procedures for Prevention and Response to Gender-Based Violence in Kenya all deal with the collection and preservation of evidence and eventual production of the evidence in court.

It is worth noting that under the Penal code, it is an offence to deceive witnesses, destroy evidence and even to conspire to defeat justice and interfere with witnesses⁶⁵

HEALTH GAPS AND CHALLENGES

Health facilities play a crucial role in treating survivors both physically and emotionally, collecting and preserving evidence. These institutions are also required to provide treatment to survivors for free. They are also mandated to give treatment to the perpetrators of sexual violence. Generally health facilities:-

1. Provide clinical treatment and care to GBV survivors.
2. Provide psychosocial support and counselling services to survivors.
3. Conduct forensic medical examination.
4. Prepare the medical reports, including the PRC form and P3 forms.
5. Collect and preserve physical evidence.
6. Give expert evidence in court.

Lack of health facilities to treat Sexual violence cases, attitude of health professionals and a lack of training for health professionals on sexual violence impacts a lot on access to justice for the survivor. **Lack of access to justice is impacted a lot by lack of access to health including the following reasons⁶⁶**

- **Inaccessibility of health facilities:** The facilities which can offer all the above services are few and inaccessible in most areas. Many of the palliative level health facilities like dispensaries, lack basic supplies for treating, collecting and storing evidence, lack PRC forms and are manned by health care providers who have not been trained on the treatment of GBV survivors, collection of evidence and offering psychosocial support. Where the services are offered, the survivor may not have the resources to attend treatment. A survivor remarked that because of where she used to live, she could not attend all the counselling sessions. A counsellor in CREAM office also confirmed that many of the survivors do not finish their sessions as one of the reason is the cost of going for the service. The community members also do not have knowledge on the need to seek medical attention which is compounded by stigma.
- **Late presentation:** survivors do not seek treatment immediately after the violation has occurred. Some of

64 Ministry of Health: National Standard Operating Procedure for the Management of Sexual Violence Against Children 2018: This provides that in maintaining continuity: once a specimen has been collected, its subsequent handling should be recorded. Details of the transfer of the specimen between individuals should be recorded. An exhibit register should be maintained at each facility and give a list of evidence that should be collected, how it should be collected and stored.

65 Penal Code Sections 115, 116 and 117 respectively

66 See also: Anne Gatuga et al. BMC Public Health (2018): Misses Treatment opportunities and barriers to comprehensive treatment for sexual violence survivors in Kenya: a mixed method Study which concluded that Nationally survivors at higher risk of not accessing healthcare include older survivors, partnered or ever partnered survivors; survivors experiencing sexual violence from intimate partners, children experiencing violence in schools; and men. Interventions at the community level should target survivors who are unlikely to access health care and address barriers to early access to care. Staff training and specific clinical guidelines/protocols for treating children are urgently needed.

the reasons for presenting late include lack of knowledge on the need to seek treatment, stigma, the cost of accessing health facilities due to the distance and cost of transport, fear of disclosure and threats from the perpetrator or where the parents were compromised

- **Lack of health professional/attitude of health professionals:** due to a poor coordination of health services at the health facility, survivors face a challenge when there is no doctor to treat them or they are referred from one doctor to another, or one service point to another which traumatises them. In other facilities, only a particular doctor treats survivors of sexual violence, and in their absence, the survivor does not get medical attention. In some instances services offered are marred in disrespect and insensitive utterances that further traumatise the survivor. Health care workers are also compromised in documenting the P3 and PRC form either for the benefit of the survivor or the perpetrator or some of them simply lack the requisite training in the treatment and documenting their findings.
- **Lack of equipment:** some health institutions lack the necessary equipment for use in the treatment of survivors and to carry out comprehensive management such as a lack of rape kits. Health facilities like dispensaries are not equipped in treating survivors, collecting and storage of any DNA collected and in filling up the PRC and P3 forms. They staff members are not trained in handling such cases. This is a major gap as the dispensaries are the nearest health facilities to many people.
- **Non Collection of Evidence from the Survivor**

In some instances, the doctors fail to examine the survivors and do not collect the evidence and the notes filled in the PRC form are from memory. It was also pointed out that the perpetrator compromises the police and the health workers to destroy the information in some instances.

Forensic evidence is never collected at the lowest level of health facilities, usually the dispensaries, due to a lack of training of the officers and a lack of equipment to collect the samples. Survivors who visit such facilities as the first point of call are usually referred to the referral hospitals or higher-level hospitals. This is a challenge where they do not have money to make the journey. The intention of the county government of Kitui is to train the lowest level health facility workers where the survivors get their initial treatment⁶⁷.

DNA evidence is rarely collected from the perpetrator which would help in confirming or disproving a supposition concerning the identity of the person who committed the alleged sexual offence. Section 122A of the Penal Code allows for a Senior Police Officer of or above the rank of inspector to order DNA sampling procedure on the suspect. The DNA procedure provided is elaborate on what can be collected from the perpetrator. However, such evidence cannot be used in court at the request of the prosecution in any proceedings against the suspect unless an order is obtained or the perpetrator consents to it being used.

Generally, handling cases through reporting, medical examination and collection of evidence, protecting and preserving the evidence and delivering evidence in court is tedious, time-consuming. This needs to be supported by adequate resources human, financial and facilities.

- **Lack of knowledge on the referral pathways:** Some of the health facilities are not aware of the referral pathways or the need to refer the survivor to the police for further action. Some of the survivors failed to report to the police as they were unaware of the same, and the health workers did not advise them accordingly. However, on a positive note, most health facilities inform the police where minors are involved.
- **Cost on survivors of sexual violence:** Some health facilities demand payment to fill out the PRC and P3 forms and to attend court. The money demanded is illegal and out of reach for the GBV survivors. However,

it was pointed out that the government does not support doctors who attend court. Doctors and other experts are expected to foot their bill for every court attendance. This is also expected in instances, where the doctor has been transferred to another station which places a financial burden on the doctor.

PROSECUTION GAPS AND CHALLENGES

Sexual violence cases are often culturally influenced, which hinder survivors from describing in detail what happened to them. Due to cultural influence where it is not easy to talk about sex, stigma, trauma and myths around rape, the survivors cannot freely explain the violation done to them. Accordingly, survivors and other witnesses are reluctant to give evidence where it is required that such information must be given. Where children are involved, they are unable to explain the sexual organs and the defilement. This may, in some instances, compromise the investigations and prosecution of such cases in court.

- **Inadequate knowledge and lack of training:** The prosecution of GBV cases, particularly the sexual ones, requires specialised skills, knowledge, and expertise in prosecuting such cases, drafting of charges, and handling survivors. Some prosecutors lack such training and skills in ensuring the investigations are properly carried out and all evidence required is in place, the skills in drafting or reviewing charges drafted by the police to ensure they are in tandem with the law and lastly in handling survivors of sexual violence.
- **Lack of psychosocial support in court.** Compounding this is the fact that survivors and their witnesses need psychosocial support during the prosecution of cases that are often unavailable to them. Such support is also needed after finalising the case, which is rarely provided. Some of the witnesses do not go through all the sessions of counselling where it is provided due to a lack of funds, or they do not understand the value of the same. According to one of the prosecutors interviewed, they have to rely on Non-governmental organization to counsel the witnesses. Children officers are called in where children are involved.
- **Lack of transport for survivors to attend court:** Survivors and their witnesses face challenges in attending court. Often they lack money to attend court, especially where the courts are far, there are numerous adjournments and mentions, missing court files, failure of witnesses showing up like doctors, transfer of either the judicial officer, the prosecutor or the investigating officer resulting in lengthy delays in the finalisation of the case some taking several years. Survivors and their witnesses may be compromised, especially in instances where the prosecution of cases takes a long time. Although the Judiciary reimburses survivors' fare for court attendance as a witness, the Judiciary's witness fund is not sufficient to reimburse the witnesses of the numerous cases in court. There is also much bureaucracy which does not allow for the immediate refund of the transport. Finally, the prosecutor must apply for a witness refund in court. If this is not done, the witness will not receive the refund. In Meru, the procedure of refund is immediate.
- **Lack of expert witnesses to attend court:** Due to the lengthy time, it takes in prosecuting cases, expert witnesses, particularly medical practitioners, would rather spend their time attending to patients instead of attending court to adduce evidence. Such witnesses also find the courts and the cross-examination intimidating. There is also the challenge of facilitation for the witness to attend court. To solve this challenge, some facilities have designated one doctor to carry out the function of signing the medical reports and P3 forms and giving evidence in court⁶⁸. The challenge with this is that the doctor is quite busy, may confuse about the medical reports and may not be available in court when needed. In Nairobi county, the county government has taken it upon itself to facilitate the doctors going to court as the courts do not

68 During key informant interviews, an example was given of the Jaramogi Oginga Odinga Teaching and Referral hospital that has one doctor carrying out this service.

have sufficient funds to refund them⁶⁹. The Mater hospital, only specific trained doctors attend court to give evidence. The courts have solved in some way by having designated days for expert evidence, giving the experts priority in giving evidence and allowing different cadres of officers to give evidence in accordance with the law.

Coupled with the above challenge is the one found with the use of the PRC form and the P3 form. In some instances, there are conflicts in the information found in the two documents in terms of the findings. In other instances, there is missing PRC forms as this may not be available in the hospital settings and in some other instances, the health professionals do not have experience in filling the same⁷⁰. However, according to some judicial officers interviewed, the PRC form forms the best evidence in terms of the findings.

- **Compromise/hostile witnesses:** In cases where there is intimidation or threats from the perpetrator, undue influence from the family or community, or compromise, the survivors and their witnesses recant their evidence or turn hostile. Witnesses too recant their evidence or expect to be paid for being witnesses. In other instances where the sexual act is between adolescents who regard each other as boyfriend and girlfriend, commonly known as the Romeo and Juliet cases, the witness may refuse to give evidence. The prosecutor ends up having the witness placed in a remand home until after giving evidence. In other instances, the survivors are removed from the jurisdiction of the court.
- **Volume of work:** The prosecutors handle different cases daily. In some instances, a prosecutor may have over twenty (20) cases to handle, including hearings, mentions and applications. The volume of work does not allow prosecutors to prepare their witnesses through a pre trial conference. Survivors, too, do not have the resources to go for pre-trial sessions with the prosecutors before the hearing. In some cases, survivors and witnesses are intimidated by perpetrators' advocates, how the courts are conducted, and questions asked. Court proceedings can be intimidating to a layman. Therefore, lack of preparation tends to frustrate the prosecutors in conducting their cases. Some of the witnesses end up contradicting themselves, recanting their evidence, being declared as hostile witnesses leading to the acquittal of many of the perpetrators. Such acquittals often discourage survivors and their witnesses from cooperating with the prosecution to the logical conclusion of cases.

Pro bono lawyers interviewed gave examples of how they come to the aid of the prosecutors when they provide a watching brief for the survivors. They help in the research on submissions, draw attention to the prosecutors on the conduct of the case, can speak on behalf of the survivor in court and generally prepare witnesses for court on behalf of the prosecution. The Investigating officers also help in preparing the witnesses on the court procedures and reviewing their evidence.

Adolescents: This is another key area of concern in prosecuting GBV cases under SOA where both the perpetrators and survivors are adolescents who supposedly had 'consensual sex'. Judicial officers, police, prosecutors and even the CHV/Paralegals noted that often in such cases, girls' parents pressed for charges to be proffered against boys for the offence of defilement. This causes an outcry by the boys and their parents that they are being discriminated against. In the case of *P O O (A Minor) v Director of Public Prosecution & another* [2017]eKLR, the court noted that the accused, a young boy accused of defilement had been disadvantaged in conducting his own trial without legal aid and that a child remained a child whether the victim of an offence or a child in conflict with the law. Such cases are also a challenge to the prosecutors as evidence has to be forced out of the complainant. Prosecutors noted that they have sought

69 Presentation by GBV Coordinator Nairobi High Level Meeting 17th November 2020

70 See findings by Gatuguta et al BMC Public Health (2028) page 6

to address this quandary by using their diversion policy in cases where the boys and girls are children in conflict with the law and are in need of care and protection. One of the prosecutors noted that this is an area that requires a re-look at the SOA.

JUDICIARY AS THE CRITICAL ACTOR IN HANDLING SEXUAL VIOLENCE CASES

Article 159 of the Constitution mandates courts and tribunals to exercise judicial authority guided by various principles: namely that justice shall be done to all irrespective of status, justice shall not be delayed and shall be administered without undue regard to procedural technicalities. Challenges experienced include:

- **Lack of access to justice for survivors.**

Access to justice includes affordability of legal services and awareness. Legal aid for survivors is offered mainly by CSOs, which is limited in scope, coverage, and services rendered. Under the Office of the Attorney General and Department of Justice, the National Legal Aid Services' mandate is to provide Legal Aid, including free legal advice, legal representation, alternative dispute resolution, and psychological counselling. The Service does not cover the whole country. The NLAS has offices located in five regions of Nairobi, Kisumu, Mombasa, Nakuru and Eldoret. Depending on the circumstances of the case, the Service may grant partial legal aid to an aided person on the condition that they make a financial contribution to the fund. This fact is a drawback to many survivors who cannot afford it. Government agencies and institutions that provide legal aid include the NGEC and the KNCHR.

Key informants in this research receive their support from CREAW and Wangu Kanja Foundation. These services are given by in-house and pro bono lawyers, and their paralegals and Community Health Volunteers give awareness and advice. However, these services face the challenge of funding. Some pro bono lawyers interviewed acknowledged having given such services for a season, and the same has stopped. Other organisations that provide such services include COVAW, FIDA, CRADLE, LRF, ICJ, etc.

- Lack of confidence in court and Delays in handling cases.

The Case backlog. In the 2018/2019, a total of 437, 387 criminal cases were pending by June 2019 and out of this, 7% were sexual offences. In the year 2019/2020, a total of 266,599 of criminal cases were pending and 9% (23,993) of this were sexual offences cases.

Table 4: SGBV cases filed 2018/2019

	Criminal cases		Sexual offences	
	Filed	Resolved	Filed	Resolved
Nairobi				
Kibera	2,808	2,724	139	101
Makadara	10,644	9,509	363	350
Milimani	5,122	1731	33	18

Report extracted from the records of the SOJAR 2018/2019

These delays have been attributed to:

- Lack of adequate judicial officers to handle the cases. There about 542 magistrate in 127 courts stations in the country.

- Lack of training in handling sexual violation cases
- Poor financing
- Lack of courts in all parts of the country that are accessible to all.

Many survivors do not have faith in the Judiciary especially due to the length of time it takes to finalise the case⁷¹, the manner in which they are treated by judicial officers and their safety is not assured in court due to inadequate court infrastructure. Courts need to have a good case management in the handling of sexual cases. Survivors interviewed noted that SGBV cases are not given priority, yet other ills in the society such as corruption are treated with more vigilance to the extent of having specialised courts. It was suggested that there needs to be specialised courts for SGBV and implementation of services such as the Policare and GVRC in all the counties.

- **Lack of protection of survivors:** The participation of survivors is critical in meeting the ends of justice. Since most survivors and their witnesses have had no previous experience with the courts and the court system, the trial-related process often discourages and even intimidates them from testifying. Survivors and their witnesses may face threats and intimidation from perpetrators, their families and community. At times the process of giving evidence traumatises some survivors. Often survivors expect the courts to protect them and ensure that they are not intimidated by the process. A good example is seen in the case of *Republic v Bonface Mugodo Kivangi Sexual Offences Case No 127 of 2016 Chief Magistrates court at Makadara*, where the court made its observation when the child was giving evidence “**Shaking and teary, avoids eye contact with the accused**”. In this case, the court provided a screen to shield the survivor from the perpetrator. In another case *Republic v Benjamin Loka Sexual offences case no 5 of 2017, In the Chief Magistrates Court at Makadara*, the court noted that “**the child looks confused not sure of what she says**” during cross-examination.

In some of the cases analysed, no protective measures were given to enable survivors to give evidence. However, such children could have been protected under the provisions of the SOA to give their evidence through an intermediary. The fact of their vulnerability ought to have been brought to the court’s attention by either the prosecutor, the lawyer holding brief or by the court on its own motion. Unfortunately, as was also noted by key informants, not all judicial officers have training, skills and knowledge in handling GBV survivors.

The courts need to implement the various protective measures that have been developed to protect GBV survivors’ and their witnesses in court and outside the court. The implementation of the SOA rules of procedure, the Witness Protection Rules of Court and the Victim Protection Act are critical in meeting this objective

- **Lack of access for PWDs**

Sexual violence survivors and witnesses with disability face challenges while reporting their cases, attending health facilities for treatment and giving evidence in court. Their access to the various institutions is not prioritized for example there are no ramps. There is a lack of qualified interpreters in the ODPP, police and Judiciary who can interpret their evidence especially for survivors with intellectual disability. There do not have sign language interpreters and braille. Other challenges include the lack of facilities such as toilets that serve PWDs.

⁷¹ See also International Justice Monitor, Article by Lydia Muthiani < <https://www.ijmonitor.org/2020/06/in-kenya-we-are-late-delayed-justice-and-impunity-for-election-related-sexual-violence/> > accessed 10th February, 2022. Petition No 122 of 2013 took over 5 years before being finalised.

- **Lack of facilities and privacy of survivors**

There are no separate waiting rooms for survivors in court. Survivors and perpetrators use the same entrance and use the same facilities such as toilets. Survivors and their witnesses get easily intimidated when they meet with the perpetrators in court. This also revives the traumatic experiences they have gone through.

- **Adversarial nature of Criminal Proceedings:** given the adversarial nature of criminal proceedings, GBV survivors are bound to be re-traumatised during the trial of their cases particularly during cross-examination. This is a harsh reality for GBV survivors especially wherein courts do not use protective measures such as use of pseudonyms, use of protective covers, protection of identity of the witness, *in-camera* hearing, and admit in evidence recorded evidence of GBV survivors. Many of the witnesses have never been to court and this can be intimidating, and they are not familiar with the court set up and the trial procedures.
- **Lack of training in handling sexual violence cases:** While judicial officers play a crucial role in determining how cases are conducted, it was also noted by key informants that not all judicial officers have training, skills and knowledge in handling GBV cases. Some judicial officers are not aware of the protective procedures for the survivors under the SOA, the WPA, PDVA and VPA and how to handle vulnerable witnesses. Given the adversarial nature of criminal proceedings, survivors are bound to be re-traumatised during the trial of their cases. This is a harsh reality for survivors, especially where courts do not use any protective measures found in the law. Many survivors, therefore, do not have faith in the Judiciary, mainly due to the length of time it takes to finalise the case and how judicial officers treat them.
- **Lack of knowledge and effective implementation on the Data Bank on Sexual violence offenders:** Key informants in the criminal justice process were not sure of the working of the register of sex offenders provided for under section 39 of the SOA. The register is supposed to aid the prosecution to identify whether perpetrators of sexual offences are first offenders or repeat offenders and inform the court that the appropriate sentence is given. This has been actualised but is yet to take root. Prosecutors are not able to get the information regarding an offender immediately. Compounding this is the lack of a DNA data bank, thus compromising investigations and prosecutions of repeat offenders. The prosecutors, however, relied on other sources to get information regarding the accused persons. Where this information was lacking, it is likely that repeat offenders would be treated as first offenders.
- **Lack of knowledge of the court process:** many of the people do not know the workings of the court which leads to a fear of going to court. Unless informed by the paralegals, CHVs, Lawyers and NGO many people visit and experience the court process for the first time for the hearing of their cases. The trial process can be intimidating and it is more intimidating to the survivors. Many witnesses including expert witnesses are also intimidated. This leads to many survivors and their witnesses giving up. The Legal Aid Service and the Victim Protection Board have the responsibility to educate the victims on the court processes. Pro bono lawyers and lawyers given under legal aid are also appropriate in educating the victims of the court processes and participating in the court process on behalf of the victim⁷². Article 50(7) and 9 of the Constitution and Sections 4(2) (b), 9 (1) and 2 of the Victim Protection Act gives parameters of the victim's involvement during trial to include; the victim's views and concerns at various stages as the court may determine either directly by the victim or his/her representative, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not throughout the trial and parallel to the prosecution⁷³.

72 Joseph Lendrix Waswa v Republic [2020]eKLR .

73 Criminal Procedure Code Section 150 allows for the victim or his or her advocate or representative to exercise the powers of the court with the permission and directions of the trial court. See also the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) on the role of victim in a criminal trial.

- Lack of compensation for survivors:** At the time of conducting research, key informants were not aware of any court handling GBV case had imposed sanctions of compensation and restitution upon GBV perpetrators. Only a few courts use victim impact statements that would assist perpetrators' sentencing, including ordering compensation. One of the state counsels noted imposition of a compensation under the Criminal Procedure Code would be difficult to enforce due to the economic status of the accused persons, who in some instances cannot afford their bail terms. As such, survivors are left to fend for themselves, including meeting the huge treatment costs.. The Victim Protection Board, which would have come to the rescue of victims, is not fully operational in terms of funding.

What do survivors get after going through the court process? We have the perpetrator jailed and then what? We are still left where we started with a lot of challenges including medical, mental and taking care of ourselves”

Survivor in Kitui

- Ineffective Court users committee:** this is a platform that brings actors and users in the justice sector in order to enhance public participation, stakeholder engagement, develop public understanding of the court operations. It also aims at promoting effective justice sector partnership for a coordinated, efficient, effective and consultative approach in the Some court users committees have failed to fulfil their mandate of bringing together key stakeholders in the justice system and to have their voices heard.. In some courts, their existence is not known. In others, the blame is placed on lack of funding, while in others, any resolution or guideline arrived at is not implemented. This is a good forum for survivors to have representation.
- Alternative Justice system:** An easily accessible alternative justice system and mechanism of compensation that is handled by the community elders such as Njuri Nchek in Meru and Maslha in the Somali community, religious leaders, and administration officers (chiefs and others), may provide relief in many cases, such as destruction of one's property, This has the overall effect of undermining the judicial process in cases of sexual offences⁷⁴. These mechanisms work to the detriment of the survivors. Unfortunately, most informal justice systems tend to be biased towards women as they are hinged upon gender norms and stereotypes that disadvantage women. The decisions made by these systems are not enforceable in a court of law. In law, cases of sexual violence that are criminal in nature are not subject to the traditional dispute resolution system. The key informants noted that courts had referred certain GBV cases to the informal justice system. In practice, where the court has allowed SGBV case to be resolved through such a system, it has resulted in little or no justice for the victim. Reported cases by the key informants point out the following challenges:

1. In most traditions, women, children and orphans are rarely, if ever, given an opportunity to speak before the 'Elders'; as such, their case is heard and determined without their input;
2. Where the perpetrator is an elder, it will be determined in favour of the elder. For example, in Meru, a survivor was required to be cleansed and forced to marry the perpetrator; and
3. In other cases, the sexual violation is blamed on witchcraft' over the victim's account of events and evidence from hospitals'

⁷⁴ Constitution Article 159 (2) (c) recognizes the place for alternative dispute resolution mechanism which allows for easy access to justice.

GAPS AND CHALLENGES ON IMPLEMENTATION OF GBV LAWS

- **Lack of implementation of laws by courts:** these laws protect and promote the rights of survivors of Sexual Violence. Such protection is provided outside the court and inside the court. These laws include the SOA and attendant rules, the PDVA; the VPA; the LAA and the WPA and the Witness Protection Rules of the Court. These laws emphasise the need for legal information and advice and the protection of victims and witnesses. This is compounded by the fact that criminal justice actors and survivors have little awareness of these laws. And as such sexual survivors have not enjoyed the range of rights guaranteed by the VPA and WPA. For example, High court and magistrates' court decisions reviewed showed that in most cases, the prosecution does not disclose whether the survivor is a vulnerable one to enable the court to take prompt and appropriate action that would afford vulnerable survivors adequate protection of the law. The need to protect the survivor and their witnesses is never brought to the court's attention for necessary orders. The prosecution and other actors can apply for protection orders under the PADVA.
- **Lack of safe/shelter houses and recovery centres:** There are no public run shelters and safe houses in the national and county governments⁷⁵. Many shelters are run privately, especially by NGOs and Faith-Based Organisations that depend on donor funding. These institutions face many challenges, including lack of or inadequate funding, inadequate capacity, lack of guidelines on how to set them up, lack of training for the staff of these institutions in handling GBV cases, including psychosocial support, and lack of knowledge of a proper referral mechanism for other services.
- In many cases, these safe houses are to a great extent, unsustainable. Coupled with the lack of safe houses is the duration of staying in the safe house. These are expected to be short periods to give one enough time to plan their next move. However, in most cases, such time is not enough. According to the prosecutor in Meru, in other instances, due to the lack of safe houses for children, they are usually kept in the remand homes for children, which stigmatise them as they are not criminals. The children are also taken away from their homes without regard that they are children still needing parental care. The children may be placed in homes where their parents cannot visit due to distance, thus traumatising them. The Children Act recognises the role of charitable children's institutions in providing shelter for children, this is recognised as a measure of last resort. However, these have become the first placement for such children. Some of these institutions are overwhelmed with numbers which compromise the quality of services provided

The State Department of Gender, with the support of other organisations, developed the Safe Spaces Models and Applicability manual for Strengthening Safe and Protective Spaces for Women, Girls and Children in Kenya. It gives a framework among stakeholders who include policymakers, political leaders, civil society members, families and community members the essence of essential services for women, girls and children in need of protection. There is need to have the guidelines disseminated to the various county governments to ensure the establishment of shelters following the guidelines.

- **Lack of a referral mechanism and coordination among organisations:** The other challenge is the fragmented efforts of the organisations working in the area of SGBV response by the different players in the community. Many organisations work in silos and there is a lack of coordination among them. According to an interviewee from the KNCHR, this hampers the provision of services for the survivors. There is need for a strong coordination of such networks through the TWGs and under the counties to help enhance access to justice.

A sound referral system within and among organisations is critical to ensure such services. This will guarantee easy provision of services, effective monitoring of service provisions. The government agencies, county government and some Non-Governmental Organisations have the Integrated Public Complaints Referral Mechanism or Uwajibikaji Pamoja.

This is an automated web-based Integrated Complaint Referral Mechanism that is available to community members at the grassroots level to facilitate the referral of complaints from one aid or basic service provider to another. This mechanism has been cascaded to the county level government⁷⁶. The Service enables members of the public and organisations to submit and refer complaints concerning aid and service delivery to the relevant public and non-public authorities at the County level through toll-free SMS line, email and walk-ins. Those without mobile phones or internet may visit the nearest office of a partner organisation participating in the intervention or speak to their front line staff on the field to lodge their complaints.

A robust, coordinated referral network among the service providers in the criminal justice process will enhance collaboration, guarantee services and ensure accountability in the justice system.

- **Lack of knowledge of SGBV or sexual violence database management system.** This will help in terms of programming. This data will give information on the numbers of survivors, age, gender, nature of violation and county. This information will enable the country and organisations plan their programmes better. The information should be collected from the hospitals, the police and from the courts. The new system of registering crimes can easily tell how many cases get to the courts, the nature of the rulings meted out in acquittals and convictions, how many cases are appealed and the results of such appeals. The National Gender and Equality Commission hosts the Sexual Gender Based Information System (SGBVIS) which collates aggregated data on cases of SGBV reported to five sectors in Health, Education, Police, Prosecution and Judiciary. This information is uploaded on a quarterly basis into the system. The system has been upgraded to include other variables of GBV like FGM. Child pregnancy, early marriages and will be known as the Gender Based Violence and Information and Management System.
- **Lack of an effective Multisectoral Coordination of Sexual Violence: This includes an effective multisectoral coordination anchored in the SOA.** The Sexual offences Act envisages a multisectoral nature of coordination in the implementation of the Act⁷⁷ by the minister preparing a national policy framework to guide the implementation of the Act. The regulations prepared under Section 47 were to deal with the inter-sectoral implementation of the Act which included the Internal security, prisons, social services, education and health. The National Policy on Gender Based Violence has as one of its objective the facilitation of a coordinated approach in addressing GBV and to ensure effective programming. At the county level, it has been proposed that county governments adopt a multisectoral approach with all actors in response and prevention of SGBV. Such a multisectoral group is expected to work through the Gender Based Violence Technical Working groups which at the level of the counties include government and civil society organisations. Every county has a technical working group. However, some of the challenges include capacity, lack of a common agenda and delay by counties in adopting gender initiatives and policies⁷⁸. This includes establishing centres and integrated SGBV services with referral linkages to police, health services, psychosocial support and legal aid in a collaborative manner⁷⁹.
- **Support Services for survivors:** Absence of a framework of support groups for GBV survivors to encourage them to seek a logical conclusion and facilitate their recovery from GBV incidents. This includes rehabilitation of survivors and financial support. Where the survivors are students, their rehabilitation and return back to schools is key.
- Absence for a strong mechanism to afford protection of GBV service providers and champions facing threats and intimidation:

76 The project is implemented by TI Kenya in the counties of Turkana, West Pokot, Wajir and Marsabit in partnership with over 45 state and non state service provider both at local and international capacities.

77 Sexual Offences Act Section 46.

78 Only about 5 counties have gender policies. This includes the counties of Isiolo, Kirinyaga, Makueni, Kisumu and Meru

79 Model Legislative Framework on Sexual and Gender Based Violence For County Governments 2017

- Lack of early preparedness to protect survivors during elections. Some of the survivors were violated during an election period which may have been associated with politics.

ACCOUNTABILITY AND HOLDING DUTY BEARERS ACCOUNTABLE

Lack of an effective accountability process to gauge the effectiveness of access to justice. An effective accountability mechanism will ensure that laws guarantee access to justice through implementation and enforcement of the same. Laws and policy frameworks are not an end to themselves. They are not sufficient drivers for the elimination of any gaps and challenges including barriers in the access to justice. Such laws must be made effective through the enforcement of those laws and this can be made possible by having an effective accountability mechanism in place. In June 2021, the Government made a stand to end Gender Based Violence (GBV) including sexual violence by 2026. The government promised to intensify its campaign to end the violations and remove systemic barriers that allow GBV to thrive by carrying out the following⁸⁰:

- Ensuring full implementation of GBV laws and policies by adopting a GBV indicator in the government performance contracting framework which would track duty bearers accountability on enforcement of these laws and policies by 2022.
- Investing in GBV prevention and response. The government promised to invest USD 23 million by 2022 and increase these resources to USD 50 million by 2026 through a co-financing model. The government also committed to institute an accountability framework for tracking the expenditure
- Introducing a module on GBV in the 2022 Kenya Demographic Health Survey to strengthen the utilization of gender statistics in informing the design, scale up and evaluation of FGM and GBV programming.
- Develop a GBV management and information system by 2022 to strengthen GBV prevention and response programming
- Invest USD 1 million annually for GBV research, and innovation to boost evidence based programming by 2026
- Integrating GBV services – medical, legal and , psychosocial support services into the essential minimum package of the Universal health Coverage UHC by 2022
- Scaling up the national police service integrated response to GBV (Policare) and establishing GBV recovery centres and shelters in all the 47 counties by 2026
- Establishing a GBV survivors fund through a co-financing model in partnership with private sector, civil society and other stakeholders for economic empowerment of GBV survivors
- Strengthen collaboration with non-state actors including girl-led, women's rights organizations, male champions, and private sector through coordination structures such as the Gender Sector working groups at the national and county level.
- Adopting and institutionalizing the multi-sectoral GEF Leadership structure comprising the National Advisory Committee, the National Steering Committee, and the county leadership structure to guide the implementation of Kenya's GEF Commitments in the GBV Action Coalition up to 2026.

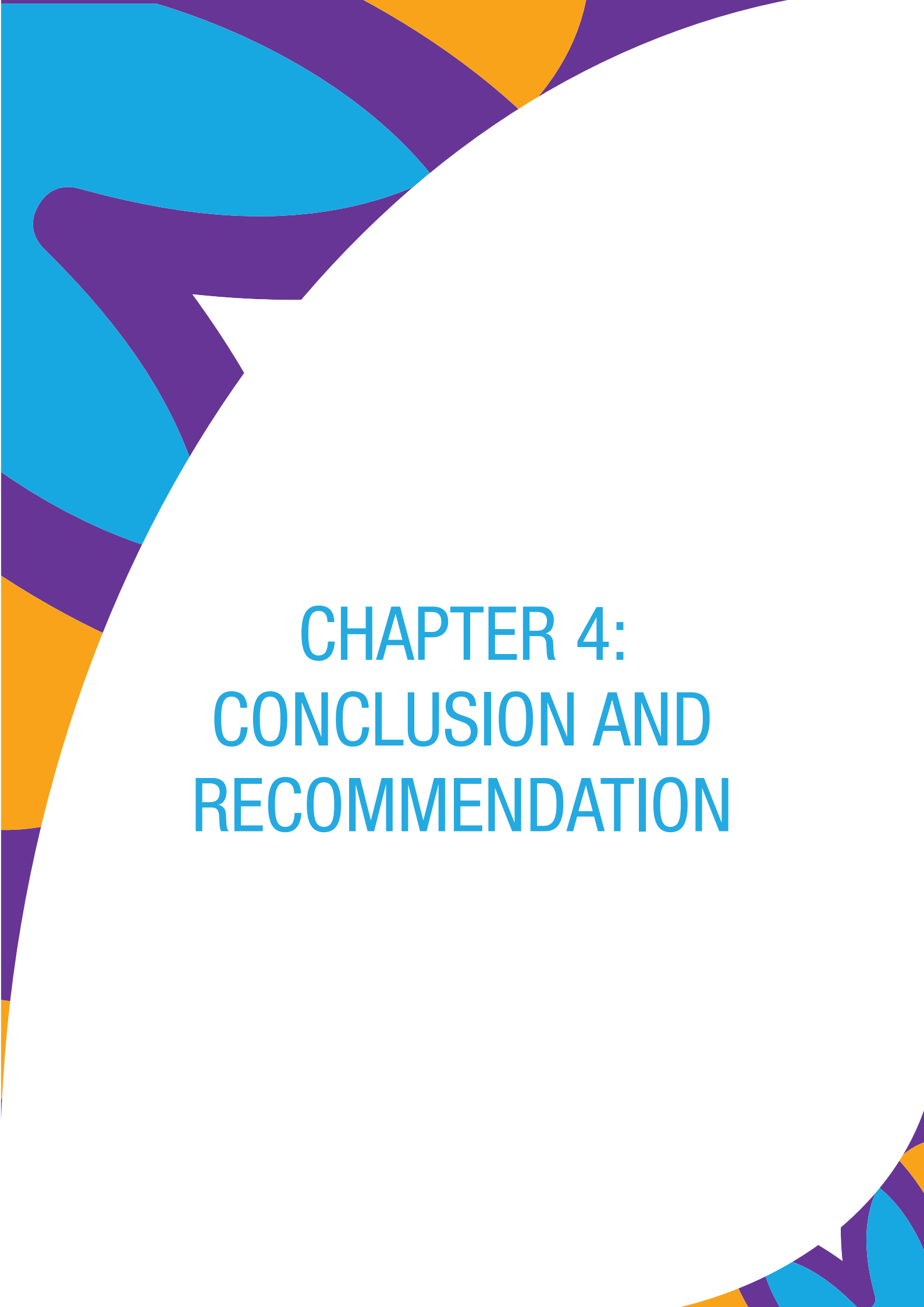
80 Republic of Kenya: Generation Equality Forum: Kenya's Roadmap for Advancing Gender Equality and Ending all Forms of Gender Based Violence and Female Genital Mutilation by 2026 accessed at https://www.icrw.org/wp-content/uploads/2021/06/GEF_Kenya_GBV_summary-05.21-web.pdf; /,-09876543\OIUYTREWQ /,-MNB

/;LKJH Equality Now: Kenya Just Committed to End Gender Based Violence in Five years. Here's How They Plan to Do It. August 10, 2021 accessed at https://www.equalitynow.org/news_and_insights/kenya_just_committed_to_ending_gbv_in_5_years_here_s_how_they_plan_to_do_it/; The Standard : Government commits to ending gender violence in five years accessed at <https://www.standardmedia.co.ke/national/article/2001425794/government-commits-to-ending-gender-violence-in-five-years>

The measures to hold government and other duty bearers accountable are ineffective and need to be enhanced. This will ensure that policies, administrative measures and laws work for the survivors. Article 10 of the constitution on National values and principles of governance, bind all state organs, state officer, public officers and all person whenever any of them either applies or interprets the constitution, enacts, applies or interprets any law or makes or implements public policy decisions. This is where the duty bearers should be held accountable.

POST-TRIAL

Survivors of sexual violence are crucial in a trial because they are perceived as witnesses to give evidence in court. As such, the rights of the survivors as victims of GBV are not considered to a large extent beyond the right to a fair trial. During this research, it emerged that the Victim Protection Act is not being implemented to fulfil various rights of the victim, including compensation, psychosocial support during and after the case, preparing the victim for hearing and integration of the perpetrator back into society. The Victim Protection Fund under the Act has not been operationalised. The Victim Protection Act must be implemented to afford survivors comprehensive protection of the law. The funding and resourcing of the Legal Aid Services are also important to ensure the provision of these services to the survivors. Other services that need critical attention are the resourcing of the gender desks and the creation of others where there is a need, training of criminal justice actors on sexual offences and aggressive awareness in the community on sexual violence and other gender-based violence cases.



CHAPTER 4: CONCLUSION AND RECOMMENDATION

CONCLUSION

The aim of this research was to assess the extent of Access to justice for survivors of sexual violence through looking at the gaps and challenges they face. The research was also to give practical recommendations that if put in place would enhance access to justice. This research makes the following conclusions:

- Access to justice is assured through the laws and policy measures in place. This is guaranteed through the various laws and policies and conventions and treaties signed which are part of our law
- Access is also assured with the availability of institutions in the criminal justice system that are supposed to ensure one gets access to justice. These institutions have very strong mandates to do this. However, such access is hindered in many ways including due to lack of training for the various actors, lack of funding, long time taken in the disposition of cases, lack of a well coordinated referral mechanism, lack of resources, investigation challenges of collecting, protecting, preserving the evidence and psychosocial services for the survivors in court.
- All these gaps and challenges need to be strengthened by the national and the county government for access to justice to be made a reality. This is through resources allocation (human and financial) and training and enhancing the capacities of the various actors
- Community awareness is important.
- There is a need to carry out very robust monitoring of the criminal justice system in order to hold the duty bearers accountable in ensuring access to justice. This can be done with effective collaboration among all the actors in this sector (governmental and non-governmental)
- There is a need to enhance the enforcement of the laws that protect and promote the rights of the survivors by all the actors in the criminal justice system. These opportunities are guaranteed in the following instruments:
- Constitution of Kenya 2010 articles 20(1) and (2), 21(1) (3), 22, 27(1), (2) (3), (4) and (5), 48, 50(7) and (9), 54
- International treaties and conventions (UDHR ICPD, ICESCR, ICCPR, ACHPR, Maputo Protocol, CRC, CRPWD which Kenya has signed and are part of our national laws.
- National laws including the Persons with Disabilities Act, the Sexual Offences Act, the Children's Act, the Penal code, the Trafficking on Persons Act, Policies such as the Vision 2030, the SGDs

RECOMMENDATIONS

These recommendations attempt to give practical steps to the national and county governments, actors in the justice system and Non-governmental organisations.

UNDERTAKING LEGISLATIVE INITIATIVES

These are areas that limit the enjoyment of the rights and protections assured to the survivors.

- Undertake a comprehensive review of the laws, policies, guidelines and any administrative measures and other implementation framework undertaken that deal with sexual violence to enhance access to justice and protection of the survivors

- Develop standardized and comprehensive training resources or information packs on GBV for justice actors (police, lawyers and judicial officers) on laws and policies on GBV. It was noted that institutions have their own information pack which is not standardized and may be confusing.
- Create an awareness of the laws and policies on GBV to the general public, the justice actors and other stakeholders. Such laws include the newly enacted laws such as VPA, Legal Aid Act, and the rules of procedures under the WPA.
- Ensure effective implementation of laws on GBV including the Legal Aid Act, the VPA. The implementation of the laws includes the development and enactment of the necessary regulations and guidelines. This also includes the operationalization of the VPA to ensure the provision of services for victims going through the criminal justice system. These will also provide the thresholds in law of survivors who can benefit from some of the provisions in the Witness Protection Act, the Victim Protection Act, the Legal Aid Act through regulations.
- Monitor the implementation of all the laws on GBV.
- Develop protocols and guidelines on GBV response and prevention. This includes the development and implementation of standard operating procedures at each service delivery throughout the criminal justice process.
- Develop effective protocols and or streamline protocols that guarantee proper collection, storage and analysis of evidence and an effective chain of custody. This includes the training of the various service providers on these protocols and guidelines. However, protocols and guidelines are not effective if there is a lack of facilities to ensure the storage and analysis of such evidence. Currently, the three institutions for analysis found in Nairobi, Mombasa and Kisumu are not sufficient. There is a need for additional decentralised well-resourced facilities that will enable faster analysis and prosecution of GBV cases. The government therefore, needs to allocate more budgetary resources towards having more facilities countrywide.
- Ensure that all police stations have working gender desks and where they exist, the same are effective. This also calls for the Implementation of the Standard Operating Procedures on SGBV and training for police investigators and those serving at the gender desks. This will ensure professionalism around GBV cases ensure proper interviews are conducted, and sufficient evidence is collected.

ENHANCING THE CRIMINAL JUSTICE SYSTEM

An effective criminal justice system will enforce the laws and hold the perpetrators accountable for their acts. The following are suggested areas to ensure effective and speedy investigation and prosecution of GBV cases.

- Scale-up activities on awareness creation within communities to encourage reporting of GBV cases and cooperation with ODPP in the prosecution of GBV perpetrators.
- Scale up training of criminal justice actors including the police, the health sector, the prosecution, the judiciary and the court users committee members on matters of sexual violence. This will include handling survivors of sexual violence, investigation of cases, collection and protection of evidence and the court system.
- Develop a strong and effective referral mechanism that guarantees GBV survivors can report their case to the police in dignity and have them promptly and effectively investigated. This could be enabled by: -

i. Having strong and effective institutional linkages between the health and legal programmes to ensure the health and safety of GBV survivors and ensuring the perpetrator is brought to justice.

ii. Having effective gender desks at the police station that are well resourced with human and financial resources

iii. **Improving coordination between the medical and legal sectors for a seamless one-stop functional GBV centre.** These linkages from the health perspective may establish entry points into the legal system for the survivor who decides to pursue their claim after seeking medical attention. This can ensure that medical-legal evidence is properly collected, stored, and transferred between the medical and legal sectors. The properly trained and informed health care workers can then refer the survivors to other service providers, including the police. The WHO Guidelines for Medico-Legal Care for Victims of Sexual Violence urges policymakers to adopt such a model, arguing 'the ideal is that the medico-legal and health services are provided simultaneously; that is to say, at the same time, in the same location, and by the same health practitioners' (WHO Guidelines for Medical-Legal Care for Victim of Domestic Violence, Geneva: WHO 2003) The police have the Policare system, which can be strengthened and scaled down to the counties for easy access if managed and resourced well. This can increase the number of sexual violence cases that may ultimately go to court. It is important to determine which ministry or department of government is suitable in coordinating matters of SGBV in Kenya.

Rwanda Isange One Stop Centre: This is said to be a holistic approach to Sexual and Gender Based violence. It is a multi-sectoral and interdisciplinary program implemented by the Ministry of Gender and Family Promotion, Ministry of Health, Rwanda National Police, Ministry of Justice under the coordination of the Ministry of Gender and Family Promotion. The program is aimed at providing psychosocial, medical, police and legal services adult and child survivors of gender based violence and child abuse.

- Develop an effective coordination of justice actors system especially around the provision of psychosocial services. Trauma counselling is key as trauma affects the victims participation in the criminal justice system, from the police station upto the judiciary during the hearing of the case.
- **Harmonization of medico/legal documents:** Medical and legal documents used by the care providers and law enforcement to record key facts in GBV cases ought to be streamlined for optimal coordination. In particular, the use of PRC Forms and P3 forms ought to be harmonised. The county governments must train and resource their healthcare workers to treat, preserve, and record information in the PRC and P3 forms. The officers must be trained on the court system and give evidence in court as experts.
- **Address issues of delay in legal response:** Legal responses to GBV remain slow and ultimately ineffective. Cases can take more than three years to resolve⁸¹. The lack of financial support and protection services during the process leaves GBV survivors economically vulnerable with little confidence that justice will be served. This leads to many survivors abandoning their cause or compromised and witnesses being fatigued or compromised. Such cases can lead to interference by the perpetrator and many threats and intimidation. The Police also need to establish a department/unit devoted to GBV, particularly those of sexual nature within the police service. This would be attained by creating a pool of police experts. Such a unit will increase police receptivity to the reporting of cases. The particular unit should be staffed with trained

81 Constitution Article 50(2) provides that every accused person has a right to a fair trial which includes the right to have their trial begin and conclude without unreasonable delay. Such right too guarantees the sexual survivor's case will be heard without undue delay.

police officers who have experience in dealing with GBV. This unit should be well resourced to meet this objective.

- **Strengthen the court users committees** and gender desks for the proper coordination of the criminal justice system at the court level and police stations. This should also include the sexual violence survivors working in the community.

Training of criminal justice actors/duty bearers: continuous training of prosecutors, police officers, administration officers and judicial officers on: various protection mechanisms for GBV survivors; the survivors' rights before, during and after the trial; the provisions of WPA Rules of the Court, VPA and Sexual Offences Court Rules; use of medico-legal documentation including psychological evidence; trainings relating to new laws, policies and regulations on SGBV and the procedures in the Criminal Procedure Code on victim impact statements is important. This capacity-building should be augmented by government-owned social protection mechanisms such as shelter for survivors to ensure the survivors' safety before and during legal proceedings. The who training should include the training of senior management level officers within the duty bearers who can make decisions. It is further recommended that there is a need to conduct the trainings from the duty bearers institutions for training to guarantee strengthened capacity among all the duty bearers. This calls for a standardized training curriculum and training packages that can be used by any organization that needs to train the duty bearers. For example the Department of Gender has a training curriculum that can be standardized and use for training.

- **Engage the Traditional justice systems:** There is need to have a policy and legal framework of the workings of the Alternative Dispute resolutions mechanism in line with Article 159 of the Constitution of Kenya. There is a bill in the Senate The Alternative Dispute Resolution Bill, 2021. This will make it clear to those pursuing this mechanism which cases can be handled at that level. It is also important to engage the traditional justice system and carry out some of the following activities pending the bill.
 - Awareness creation on laws and policies on Sexual violence
 - The role of traditional justice system in criminal matters
 - The rights of sexual survivors

ROLE OF THE JUDICIARY IN THE PROTECTION OF SURVIVORS OF GENDER-BASED VIOLENCE

- **Have a gender and victim responsive courts:** this includes the establishment of specialised courts on GBVAWG, designating specialised magistrates and or dedicated court times in the regular courts and introducing special measures in regular courts to respond to the needs of victims (including special waiting rooms, special access doors for minors, support system are available including counselling, legal assistance for victim and witness protection measures). This will guarantee effective and efficient case management and a conducive environment for the victims. However the criminal justice actors must therefore carry out a research or implement such a court on a trial basis before implementing the same fully and preferably in a rural set up.
- **Use of protective measures in court:** this include the use of the protective measures under the Witness Protection Rules of the Court, Sexual Offence measures of vulnerable witnesses and the measures under the Victim Protection Act and the Prevention against Domestic Violence. The courts should also allow care givers as persons who can give evidence for persons with intellectual disability as vulnerable witnesses. However, there is need to review the law to ensure intermediaries who are also the abusers are not allowed to participate in the proceedings.

- Put in place mechanism for the provision of psychosocial support for the victim during the hearing of cases. This includes having an effective referral mechanism that will enhance referral to other institutions for such services.
- Have qualified and well-trained translators on matters SGBV. This includes having PWDs responsive measures designed to ensure access to justice for PWDs. This includes having interpreters in sign language, communication with persons with intellectual disability and others.

ENHANCED PROTECTION, PROMOTION AND FULFILMENT OF THE RIGHTS OF SURVIVORS:

This includes the following:

- Financial Compensation for Survivors of Sexual Violence:

There is a lack of proper systems to support and protect women who report sexual violence cases.

In the case of Coalition on Violence Against Women & 11 others vs Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curie) [2020]eKLR the court held that sexual violation was just like any other violation of human rights and freedom which should be compensated. Sexual violence carries with it both physical and mental pain. There is need to implement and enforce the laws that provide financial compensation for victims of crime including the SPC, VPA and WPA. This calls for the operationalize the laws and guidelines on such institutions such as the Victim Protection Board. This calls for in some instances for Public Interest Litigation to urge the government to enforce the laws that provide for compensation and support for survivors.

- Right to information: the survivors need to be informed about their case throughout the justice system. This includes information on the investigation of the case, the trial process at the magistrates' court and appeal. The information includes the release of the perpetrator on bond, the appeal process and eventual outcome of the case at the magistrate level and or on appeal. This is a role given to the Victim Protection Board and which board does not have the capacity to carry out this mandate.

HOLDING DUTY BEARERS ACCOUNTABLE

It is vital to hold duty bearers accountable in the justice system. The various duty bearers have specific roles at the national or county government. The Keeping The Promise End GBV Campaign – Duty Bearers' Handbook gives several duty bearers, their roles and their accountability profile. This can help institutions seek to find out the performance of the various duty bearers on their role in ending GBV, which includes sexual violence. CREAM has carried out some Multisectoral Rapid Assessments on Gender-Based Violence in some of the counties. The assessment brought out the structural, systematic, and environmental challenges limiting the county's effective implementation of GBV laws. There is need to Monitor the effectiveness of laws, and institutions and recommend institutional reforms where systemic failures appear. A number of cases have been determined that point out the role of the various duty bearers in matter sexual violence. This includes Petition No 122 of 2013, Petition No 8 of 2012 and Legal Resources Foundation Trust v Attorney General & 2 others; Council of Governors & 2 others (Interested Parties) 2[2019] eKLR among others that have made various determination on the role of duty bearers including on P3 forms, investigations and access to justice that need to be implemented. It is important to push for the implementation of the court decisions. Lastly, there is need to hold the various duty bearers through the commitments made by government to end GBV by 2026. This includes the duty bearers at the national and the county level of government.

DEVELOPMENT AND IMPLEMENTATION OF PROTOCOLS IN THE MANAGEMENT OF SEXUAL VIOLENCE

One of the challenges realised during the research was the lack of protocols or in some instances and a lack of implementation of protocols that guide the work of the various actors in the criminal justice system. It was noted that the police service for example, has Standard Operating procedures in the management of sexual violence. In the health sector, it is noted that while the protocols in the management of gender-based violence exist, not all health workers have been trained. Lastly, it was noted that in the prosecution sector, there are templates that guide the nature of the information that must be on the file before prosecution takes place. It is there clear that there is a lack of institutionalising such protocols where they exist. It is therefore critical that such protocols are implemented and where they are lacking to be developed. Civil society organisations can help in the identification and development of such protocols.

ENHANCED INTER AGENCY COLLABORATION:

This can be through the NCAJ, the gender sector working groups and other inter agencies. This will ensure people do not work in silos, reach the whole country and enhance access to justice.

Effective protection can be established by preventing GBV, identifying risks and responding to survivors using a coordinated, multisectoral approach.

- Improve Coordination between the Medical and Legal Sectors. In areas characterized by a lack of confidence in the law enforcement or judiciary, victims of sexual violence may be more likely to seek medical care than police or legal assistance right after the attack. Consequently, strengthening the links between the legal system and the hospitals and clinics where victims seek medical care can increase the number of sexual violence cases that are ultimately filed in court. These linkages establish an entry point into the legal system for victims who decide to pursue a claim after seeking medical attention; they can also help ensure that case-related information is transferred properly between the medical sector and the legal sector. One structural innovation is the “integrated model” of medical and legal services.

A good example is the Thuthuzela care centres. This is a one stop facilities project led by the National Prosecution Authority’s sexual offences and community affairs units (SOCA) in partnership with various departments and donors as a response to the urgent need for an integrated strategy for prevention, response and support for rape victims. The first centre was established since 2006. They operate in public hospitals near the community. The centres are facilitated by a top level inter departmental management team comprised of the departments of Justice, Health, Education, Treasury, Correctional Services, Police, Social Development and designated civil society organisations. Various donors have also contributed to making the model child-friendly, through offering technical expertise for the installation and availability of special equipment and furniture. These include two way-mirrors, posters, CCTV, drawings, and anatomically correct dolls comprising five family members, to help prepare children to appear in court, should that become necessary. The Thuthuzela model has already improved the process of reporting and prosecuting rape and other sexual offences, and reducing secondary trauma to survivors as the entire process takes place in a dignified and friendly environment.

Another Example of a Multisectoral approach in dealing with Sexual Violence is of Bangladesh Multi-Sectoral Programme on Violence against Women in the Ministry of Women and Children Affairs. The project started in 2004 and is carried out in collaboration with the Ministry of Law, Justice and Parliamentary Affairs, Ministry of Home Affairs, Ministry of Health and Family Welfare, Ministry of Youth and Sports and Ministry of labour and Employment, Ministry of Posts and Ministry of Local Government, Rural Development and Cooperative.

STRENGTHEN SGBV DATA COLLECTION.

There is need to have an effective Database Management System on SGBV. This calls for the institutionalize GBV case reporting to feed into a national database from all sectors. This also calls for the digitalization of such records by having the involvement of the different stakeholders in the criminal justice system. The data bank developed and hosted by the National Gender and Equality Commission will help in ensuring evidence based data from all the ministries and departments in the national and county government. This data should be linked to the judiciary register of serious offenders to give an accurate status of SGBV in the country. The database ought to take into account:

- a. Recorded cases as well as unreported. The former can be gathered at the police stations with the latter being gathered from the communities through a collaboration with the private organizations;
- b. Record of sexual offenders with their DNA as well to easily match repeat offenders; and
- c. Forensic evidence collected and analysed. This will allow for evidence to be destroyed in order to create more room for storage purposes as well as presentation of evidence in court in instances of delay.
- d. In addition to creation of the database, private organisations should work together in sharing information and resources. This can go further in assisting survivors in different regions with similar issues as well as in amplifying the voice for change from government as well as civic education to the masses

IMPLEMENTATION MATRIX OF THE RECOMMENDATION							
National Government	County Government	Ministry of Interior	National and County Health	Judiciary	Prosecution	National Commissions (KNCHR, NGE, CAJ)	Civil society organisation
States obligation to protect and promote the rights of the survivors by ensuring that there are adequate measures in place to protect the survivors from actual acts of sexual violation, investigate, arrest and prosecute the perpetrators and ensure accountability of the various duty bearers.	Ensure access to health facilities	Training of police officers on SGBV	Availability of health services including psychosocial services	Separate waiting rooms for survivors of sexual offences	Development of and implementing an investigation check list on SOA	Monitoring and evaluation on the protection and promotion of the rights of survival by duty bearers	Training of CHV and paralegals on Sexual violence and their role
Implementation and enforcement of laws by providing resources (financial and human)	Ensure availability of equipment	Training police officer on handling survivors of sexual violence	Availability of services and equipment to collect and protect DNA and other evidence collected	Ensuring accessibility of court premises for PWD	Training officers SOA	Training duty bearers on their roles in matters sexual violence	Training of community members on Sexual violence matters
Implementing court decisions	Development of policies on gender based violence	Implementing court decision on Provision of P3 forms	Availability of resources to support doctors and other health care workers giving evidence in court	Ensuring facilities such as toilets for PWDs	Training officers on drafting of charges	Research on crucial issues on Sexual violence	Pursuing compensation on behalf of the survivors
Review of policies on SGBV	Training of health ministries on GBV	Creating gender desks at police station	Availability of PRC forms	Ensuring equipment for the delivery of evidence by children eg dolls			Monitoring and evaluating service providers (police, health, prosecution and judiciary)
Research on the implementation of laws and policies	Building and equipping of safe houses	Retraining gender desks officers	Training on the treatment of sexual violence survivors, filling up the PRC forms and P3 forms				Pursuing legal and policy implementation by criminal justice actors

	Development of policy on safe house	Training and retraining on investigation techniques	Training on court process and the criminal justice system					Lobby and advocate for resource allocation to support institution on matters sexual violence with Parliament, Treasury and the respective ministries. This includes resourcing both financially and human resources for institutions such as the (Victim Protection Board, Legal Aid Services, Children Department, Health, Police, Prosecution and the judiciary
	Budgetary allocation for SGBV	Implementing the Standard operating procedures on sexual offences						
	Provision of civic education to community	Training officers on drafting of charges						
	Promoting and supporting the GBV technical working groups in the county							

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