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18 March 2022

## **Information on Kenya for Consideration by the Committee against Torture at its 73<sup>rd</sup> Session (19 April - 13 May 2022)**

### **Introduction**

1. Equality Now respectfully submits this report in advance to the Committee against Torture (CAT) for consideration of the third periodic State Party report in relation to Kenya. Our submission details our concerns with regard to laws related to rape and other forms of sexual violence and procedures and practices which effectively deny access to justice for survivors of sexual violence, female genital mutilation (FGM) and sex trafficking.
2. Equality Now is an international human rights NGO with ECOSOC status with the mission to achieve legal and systemic change that addresses violence and discrimination against all women and girls around the world. Founded in 1992, Equality Now is a global organization with partners and supporters in every region. Ending sexual violence, ending sexual exploitation, ending harmful practices and achieving legal equality are the main areas of Equality Now's work.

### **Recommendations of the Committee to Kenya in the Concluding Observations on the second periodic report**

3. We reiterate the Concluding Observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013) and specifically, that the State Party should:
  - *Take immediate and effective measures to ensure that the provisions of the Witness Protection Act are upheld in practice in order to effectively protect witnesses and their families, all allegations of violations are promptly, effectively and impartially investigated, and alleged perpetrators are prosecuted and*

*punished. The State Party should allocate adequate resources to the Witness Protection Agency to enable it to function effectively in practice.*

- *Take effective measures to ensure that all victims of torture and ill-treatment have effective access to complaint mechanisms and their cases are promptly, effectively and impartially investigated. In particular, the State party should:*
    - a) *Review the “P3” form to ensure compliance with the standards of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) and make the form available free of charge at all public hospitals;*
    - b) *Ensure that the medical professionals filling in the “P3” form are adequately remunerated, including for giving testimony in court, to ensure that the right of a complainant is not tied to their economic situation;*
    - c) *Take measures, including training medical professionals, to integrate forensic medical services in the mainstream health framework;*
    - d) *Take effective measures to ensure that victims alleging abuse in places of detention can complain to an independent and impartial institution.*
  - *Promptly table the Legal Aid Bill (2012) in Parliament, together with the National Legal Aid policy, and ensure that it is operational countrywide and provide it with adequate resources to function properly so as to ensure that lack of resources is not an obstacle to accessing justice.*
  - *Strengthen its complaints mechanisms, follow-up procedures and support services for children who have been tortured and abused, including by extending Child Protection Units to police stations countrywide and by affording countrywide child helpline call centres.*
  - *Take effective measures to ensure that all children are always protected from violence and other forms of mistreatment in schools and institutions.*
  - *Consider ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*
4. With this submission, we urge the Committee to reiterate Kenya’s obligations under the Convention, in particular with respect to ensuring access to justice for survivors of sexual violence, sex trafficking and FGM and bringing perpetrators to justice by preventing acts of torture (Article 2) and cruel and inhuman treatment (Article 16); conducting a prompt and effective investigation (Article 12); and ensuring the right to a remedy (Article 13) and redress (Article 14).

## **Sexual Violence in Kenya**

5. According to statistics from the Gender Violence Recovery Centre (GVRC) of Nairobi Women’s Hospital in Nairobi, 45% of women between ages 15 – 49 have experienced physical or sexual violence, with women and girls accounting for 90% of gender-based violence (GBV) cases reported.<sup>1</sup> According to the Kenya Demographic

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<sup>1</sup> Kenya’s Report on the Progress on implementation of the Beijing Platform for Action – Review and Appraisal, July 2019

<[https://www.uneca.org/sites/default/files/uploaded-documents/Beijing25/kenya-beijing25\\_report.pdf](https://www.uneca.org/sites/default/files/uploaded-documents/Beijing25/kenya-beijing25_report.pdf)>

and Health Survey (KDHS) 2014<sup>2</sup>, one in five Kenyan women (21%) has experienced sexual violence while about 43% of married women have experienced sexual violence. About 83% of women and girls in Kenya reported one or more episodes of physical abuse in childhood,<sup>3</sup> 75% of women report having experienced gender-based domestic violence in their homestead<sup>4</sup> and about 46% of the Kenyan population report at least one incident of sexual abuse as a child.

6. The COVID-19 pandemic has further exacerbated the levels of sexual and gender based violence (SGBV)<sup>5</sup> in the country. Since 13 March 2020, sexual offences have constituted 35.8% of cases recorded by the Judiciary<sup>6</sup> while the Ministry of Public Service, Youth and Gender Affairs reported a 42% increase in SGBV in the country. Cases reported through the GBV toll-free number 1195 also spiked following the imposition of countrywide curfews.<sup>7</sup>
7. Additionally, the pandemic has unveiled crippling inequalities that exist in Africa, and specifically Kenya, with women and children bearing the brunt of fragility and disparity.<sup>8</sup> It has increased the gender inequality gap and exposed the Kenyan government's failure to ensure that its COVID-19 response measures are gender-responsive, much to the detriment of women and girls' rights.

## Sex Trafficking

8. Trafficking in persons is prevalent in Kenya with the most common forms being for sexual exploitation (sex trafficking), forced marriage, and forced labour.<sup>9</sup> There are several factors that cause certain groups of people in Kenya to be vulnerable to situations with a high risk for trafficking. These include lack of livelihood opportunities among different vulnerable groups, such as but not limited to child-headed households, adolescent girls and migrant communities, exacerbated by

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<sup>2</sup> Kenya Demographic and Health Survey, 2014 <https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf>

<sup>3</sup> National Policy for Prevention and Response to Gender Based Violence(2014) <http://psyg.go.ke/docs/National%20Policy%20on%20prevention%20and%20Response%20to%20Gender%20Based%20Violence.pdf>

<sup>4</sup> The Kenya Federation of Women Lawyers (FIDA) Gender based violence in Kenya: A study of the Coast, Nairobi, Nyanza and Western Provinces of Kenya, African Charter on Human and Peoples' Rights, Nairobi.

<sup>5</sup> Closing Statement of the Chairperson of the African Commission on Human and Peoples' Rights, Honourable Commissioner Solomon Ayele Dersso, delivered at the Closing Ceremony of the 67th Ordinary Session on 3 December 2020 <https://www.achpr.org/sessions/statements?id=140> . See also the Dialogue between the Three Human Rights Courts of the World: The impact of COVID-19 on Human Rights.

<sup>6</sup> Statement on justice sector operations in the wake of the COVID -19 pandemic, 1 April 2020 <https://www.judiciary.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic/>

<sup>7</sup> The Judiciary, Directorate of Criminal Investigations, Cabinet Secretary for Gender and Civil Society Organizations have raised the alarm at the increase in SGBV. See <https://unsdg.un.org/blog/fighting-shadow-pandemic-violence-against-women-and-children-during-covid19> <https://www.nation.co.ke/gender/5362750-5520184-wkx0gy/index.html> <https://www.nation.co.ke/gender/5362750-5553544-wmts5p/index.html> <https://www.voanews.com/covid-19-pandemic/kenya-activists-fear-spike-violence-against-women-during-covid19>

<sup>8</sup> "Gender and the Coronavirus Outbreak: Think Global Health". Council on Foreign Relations. 10 April 2020.

<sup>9</sup> National Crime Research Centre (2015), Human Trafficking in Kenya,available at <http://crimeresearch.go.ke/wp-content/uploads/2018/05/Human-Trafficking-in-Kenya.pdf>

gender and age inequality, in addition to poverty, drug abuse, illiteracy, loss of parent(s), and harmful cultural practices.

9. Sexual exploitation in international and local travel and tourism also contributes to the high instances of trafficking for sexual exploitation in Kenya, especially of young women and girls to and within the coastal region.<sup>10</sup>
10. Young girls are particularly vulnerable to traffickers because of men's demand for sex with young girls, and they are also easier for traffickers to coerce and control. In Kenya, the government's implementation of anti-trafficking laws and policies is inadequate to address this global problem, and traffickers and other perpetrators continue to exploit women and girls with impunity.

### **Female Genital Mutilation**

11. The national prevalence of FGM has slowly been declining over the years. According to the KDHS, the prevalence rate stood at 38% in 1998 before declining to 27 % in 2008-09 and 21% in 2014.<sup>11</sup>
12. The steady decline may be attributed to the government's interventions, including the adoption of the Prohibition of Female Genital Mutilation Act of 2011 (the Anti-FGM Act),<sup>12</sup> the establishment of the Anti-FGM Board, the government's commitment to end FGM, and the collaboration of various state actors and non-state actors to raise awareness across the country on the Anti-FGM Act.
13. On 4th June 2019, during the Women Deliver Conference in Vancouver Canada, H.E. President Uhuru Kenyatta declared his government's commitment to eliminate FGM in Kenya by the year 2022. He later reinforced this commitment during the ICPD +25. In November 2019, during a High-Level Forum with religious and cultural elders from the 22 FGM hotspot counties,<sup>13</sup> he called for a multi-agency technical team to be established to give baseline data appropriately disaggregated among practising communities which would form the basis of reporting progress.
14. Consequently, the Multi-Agency Technical Committee (MATC) was established to coordinate action and implementation of programmes from the sub-county level to national level. It is a multi-stakeholder body involving representatives from all the relevant Government Ministries, Departments, Agencies, County Governments, civil society partners, and other stakeholders. The MATC prepares progress reports every six months highlighting the achievements, challenges and lessons learnt during that

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<sup>10</sup> Global study on sexual exploitation in travel and tourism (2015) country specific report: kenya, available at <http://www.anppcan.org/wp-content/uploads/2016/12/SECTT-Kenya.pdf>

<sup>11</sup> *Ibid* (n 2) pp 61 - 62

<sup>12</sup> Kenya Law, The Prohibition of Female Genital Mutilation Act (2011) <[ProhibitionofFemaleGenitalMutilationAct32of2011.pdf](http://www.kenyalaw.org/Uploads/2011/12/ProhibitionofFemaleGenitalMutilationAct32of2011.pdf) (kenyalaw.org)>

<sup>13</sup> The 22 FGM hotspot Counties are Marsabit, Isiolo, Mandera, Wajir, Garissa, Tana River, Meru, Tharaka Nithi, Embu, Narok, Bomet, Baringo, Kajiado, Taita Taveta, Kisii, Nyamira, Migori, Elgeyo Marakwet, West Pokot, Laikipia, Samburu and Bungoma

period. This report is then submitted to the Presidential Delivery Unit which advises the President on the level of implementation of his directive and the MATC on the areas that need redress. However, the MATC is yet to fully actualise its mandate and potential through each of the distinct ministries and agencies taking up their specific responsibilities in a multisectoral approach towards ending FGM.

15. In 2019, the government adopted the National Policy for the Eradication of Female Genital Mutilation<sup>14</sup> which is anchored in the United Nations (UN) Sustainable Development Goal (SDG) 5 on achieving gender equality. To facilitate the implementation of the strategies within this policy, County Anti-FGM Steering Committees have been established and operationalised in the 22 FGM hotspot counties. The members of the committees are both state and non-state actors coming from different sectors to provide county-specific strategic policy direction, mobilize resources for FGM prevention and response, and to share information on policy and legal decisions affecting FGM prevention and response in their respective sub-counties. At the Sub-County level, the Anti-FGM Steering Committees act as the community watchdog for prevention and response to FGM.
16. The Anti-FGM Board coordinates anti-FGM campaigns and programmes across the country and has been leading the MATC as well as the establishment of the Anti-FGM Steering Committees. It has also supported County Governments to develop county specific anti-FGM policies to ensure that they are then able to allocate resources to programmes geared towards ending FGM. However, the Anti-FGM Board receives limited funding from the government and this has resulted in it relying greatly on civil society organisations (CSOs) and development partners to implement many of its awareness-raising programmes among its other functions as outlined in Section 5 of the Anti-FGM Act (2011).<sup>15</sup>
17. Kenya is a signatory to the Regional Action Plan to End Cross-Border FGM (2019 – 2024) together with the Governments of Uganda, Tanzania, Ethiopia, and Somalia which is aimed at strengthening coordination and cooperation to eliminate cross-border FGM. These governments hold Inter-Ministerial Cross Border Meetings to share progress, challenges and good practices in implementing programmes to eliminate FGM and cross-border FGM. This has resulted in the creation of a communication platform for state and non-state actors along the Kenya-Uganda border to facilitate exchange of information and coordinate joint response to cases of cross-border FGM.

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<sup>14</sup> Republic of Kenya, National Policy for the Eradication of Female Genital Mutilation (2019) <[NATIONAL POLICY FOR THE ERADICATION OF FEMALE GENITAL MUTILATION \(gender.go.ke\)](https://gender.go.ke)>

<sup>15</sup> Section 5 of the Anti-FGM Act (2011).

<http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/P/Prohibition%20of%20Female%20Genital%20Mutilation%20Act%20-%20No.%2032%20of%202011/docs/ProhibitionofFemaleGenitalMutilationAct32of2011.pdf>

18. In 2019, the case of *Dr Tatu Kamau v the Attorney General and 2 Others*<sup>16</sup> was filed before the Constitutional Division of the High Court of Kenya challenging the constitutionality of the Anti-FGM Act, by alleging that it denied women the right to practice their culture, specifically their right to choose to go through FGM. Additionally, the petitioner alleged that the Anti-FGM Act was discriminatory as it prohibited Types 1 to 3 of FGM but did not ban Type 4.
19. The government worked with the Interested Parties and *Amici Curiae* in the case to ensure that all the questions raised in this constitutional petition were addressed in the pleadings submitted. Parties based their arguments on international human rights obligations such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) to support the need for prohibition of FGM. In March 2021, the Court made a favourable judgement finding that FGM violates several rights of women such as the right to dignity, the highest attainable health, life, security of the person, and freedom from discrimination. Therefore, because the right to culture is not a non-derogable right, the government was within its powers to limit it. It also found that the Anti-FGM Act had lacunae by not criminalising Type 4 FGM and therefore directed the government to make amendments to the Act to address it.
20. In June 2021, the Government of Kenya made bold commitments during the Generation Equality Forum (GEF) to end gender inequality by 2026. One of them was to invest USD 23 million in GBV and FGM prevention and response by 2022 and increase the resource allocation to USD 50 million by 2026 through a co-financing model. It is critical that these commitments are kept even with the change in administration in the August 2022 election as they address the fundamental aspects of prevention and response to GBV in the country.
21. The Government has integrated harmful cultural practices within its education curriculum, the Competency Based Curriculum (CBC), which was rolled out in 2017. However, there is insufficient information on FGM within the curriculum, with proper definition of FGM, detailed explanation of its drivers as well as its negative impacts both immediate and long term missing. Further, the curriculum only caters for one grade within school with subsequent lessons at any other stage in learning not being addressed.

### **Enabling Legislative Framework**

22. Kenya is a State Party or signatory to international and regional human rights treaties that champion gender equality and address sexual and gender based violence,<sup>17</sup> and

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<sup>16</sup> Constitutional Petition 244 of 2019 (Formerly Machakos High Court Petition 8 of 2017) <[Constitutional Petition 244 of 2019 \(Formerly Machakos High Court Petition 8 of 2017\) - Kenya Law](#)>

<sup>17</sup> Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (ICCPR) (1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the Convention Against Torture (1984), the Convention on the Rights of the Child (CRC) (1989), the African

also instruments such as the Sustainable Development Goals and the Beijing Declaration and Platform for Action. At the national level, Kenya boasts of a robust and progressive legislative framework aimed at ending GBV including sexual violence, sex trafficking, FGM and child marriage.

23. However, there are some legal gaps that hinder access to justice. For example, Section 43(5) of the Sexual Offences Act (2006) expressly excludes the recognition of marital rape as a sexual offence in Kenya. This is despite the Constitution of Kenya providing for equal rights for parties in marriage<sup>18</sup> and that every person has the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources.<sup>19</sup>
24. There is a noted lack of harmony between Section 13 of the Children's Act and Sections 4 and 5 of CTIP which contain similar offences relating to trafficking of children, including for purposes of sexual exploitation, but with the latter Act providing stiffer sentences. Despite the prevalence of sexual exploitation in travel and tourism, it is only a crime in relation to children as defined under the Sexual Offences Act. A gap therefore exists where the victim-survivor is not legally defined as a child.
25. To strengthen the implementation of the Anti-FGM Act, the Office of the Director of Public Prosecutions (the ODPP) launched its Standard Operating Procedures Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases (SOPs).<sup>20</sup> These SOPs provide general principles that law enforcement officers and prosecutors should adhere to in investigating and prosecuting cases of FGM and other harmful cultural practices. They also seek to standardize and bring consistency in prosecuting FGM cases and ensure that all prosecutors are aware of and protect the rights of victims and witnesses of FGM cases during trial.

### **Lack of Effective Implementation of Existing Legislative Framework**

26. Article 2 of the Convention Against Torture requires State Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Despite Kenya's fairly robust legislative and institutional framework on sexual violence, there is a failure to effectively implement laws on sexual violence, which breeds impunity for perpetrators and hinders access to services and justice for survivors.

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Charter on Human and Peoples' Rights (ACHPR) (1981), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003), the African Charter on the Rights and Welfare of the Child, the African Youth Charter (2006), the African Charter on Democracy, Elections and Governance (2007), and the African Union Solemn Declaration on Gender Equality.

<sup>18</sup> Constitution of Kenya (2010), Article 45(3)

[http://www.kenyalaw.org/lex/actview.xql?actid=Const2010#KE/CON/Const2010/chap\\_4](http://www.kenyalaw.org/lex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_4)

<sup>19</sup> Ibid. Article 29(c)

<sup>20</sup> ODPP, Standard Operating Procedures Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases (SOPs) <[SOP-Manual-Rapid-Reference-Guide-on-Prosecution-of-FGM-Cases.pdf](#) (odpp.go.ke)>

27. The Sexual Offences Act (2006) defines various forms of SGBV and their punishment and sets out the State's duty to prevent, protect and fulfil human rights. Stiffer penalties and minimum sentences provided in the Act have served as deterrent factors. However, the enforcement of this legislation in its entirety remains one of the biggest impediments to addressing sexual violence in Kenya. The government is in the process of reviewing and streamlining legislation on GBV.
28. The Prevention of Torture Act (2017) defines physical torture to include rape and sexual abuse, mutilation including amputation of parts of the body such as the genitalia.<sup>21</sup> It provides that in sentencing a person convicted for an offence under this Act, the court shall take into consideration the severity of the act of torture or cruel, inhuman or degrading treatment or punishment.<sup>22</sup> The Act gives effect to the State's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Alleged perpetrators of torture continue to be prosecuted under the Penal Code and the National Police Service Act as there is little knowledge in the criminal justice system of the Prevention of Torture Act and therefore it is not widely used. This means also that additional protections afforded under the Act are not available to victims.
29. The County Government Policy on Sexual and Gender Based Violence 2017 elaborates a comprehensive framework to progressively eliminate sexual and gender-based violence through the development of a preventive, protective, supportive and transformative environment. However, this Model Policy has only been adopted by a handful of county governments and even those with the Policies in place barely implement them due to inadequate political will and insufficient budgeting to support their realization.

## **Sex Trafficking**

30. The Counter Trafficking in Persons (CTIP) Act (2010) is Kenya's most comprehensive enactment on trafficking in persons. It prohibits trafficking in persons, including for sexual exploitation (sex trafficking) which is defined to involve the commission of an offence under the Sexual Offences Act, (2006).<sup>23</sup> It also prohibits associated acts which include the promotion of trafficking,<sup>24</sup> acquisition of travel documents by fraud or misrepresentation<sup>25</sup>, facilitating entry into or exit out of the country<sup>26</sup> and interfering with travel documents and personal effects.<sup>27</sup>

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<sup>21</sup> Schedule, Prevention of Torture Act (2017)

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PreventionofTortureAct2017.pdf>

<sup>22</sup> Ibid. Section 11

<sup>23</sup> Counter Trafficking in Persons Act (2010) Section 2

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct\\_No8of2010.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf)

<sup>24</sup> Ibid s. 5

<sup>25</sup> Ibid s. 6

<sup>26</sup> Ibid s. 7

<sup>27</sup> Ibid s. 8

31. Whereas the Act is robust, its implementation by the State is not ideal. This is because the National Assistance Fund for Victim of trafficking in persons is under-funded and therefore victims get inadequate assistance in the course of prosecution of trafficking in person offences and as such are unable to attend court and provide the necessary evidence for a compelling or complete case. They are also not provided with basic assistance including psychosocial and medical support or repatriation back home.
32. Further, there is a noted lack of awareness on the CTIP Act and duty bearers including police investigators, prosecutors and even judicial officers are not well trained or capacitated to understand the complexities of the trafficking in persons offence. The investigation and prosecution as well as adjudication of trafficking in persons offences therefore is usually not done well with police officers and prosecutors for example preferring to proffer simpler offences or charges in court. Perpetrators who are often well resourced therefore oftentimes get away without accountability or with light sentences. The government needs to invest in the training of the different criminal justice actors to avoid impunity for trafficking in persons offences.
33. As with other GBV offences, trafficking in persons requires a multidisciplinary response. Whereas the government of Kenya has set up interdisciplinary response units in two cities Mombasa and Nairobi, the rest of the country does not benefit from this approach and as such the investigation, prosecution and overall response to these cases is inadequate due to limited coordination amongst criminal justice actors.
34. The legal framework in place to address trafficking in persons requires harmonization. As in its current state it is incongruent which impedes access to justice for victims of trafficking. For example, there are discrepancies in laws that criminalize trafficked persons under the Kenya Citizenship and Immigration Act<sup>28</sup>, and the provisions of the Penal Code<sup>29</sup> that criminalize living off the earnings of prostitution, read against CTIP which provides that trafficked persons should not be criminally liable for offences committed as a result of their being trafficked.

### **Female Genital Mutilation**

35. The Anti-FGM Act has not been implemented fully due to the difference of knowledge and capacity among the police, prosecutors, and medical personnel on FGM matters. As there are no mechanisms put in place to train them on FGM during the course of their foundational training, they learn on the job once posted to FGM-practicing communities or counties. This has created a huge gap in the way cases of FGM are being investigated and prosecuted, therefore becoming an obstacle to FGM survivors' access to justice.
36. Firstly, there is no official form that guides medical examiners on what medical evidence to record on FGM. They have to record this in the Post-Rape Care (PRC)

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<sup>28</sup> Section 43

<sup>29</sup> Section 154

form, which is limited. Secondly, medical examiners are not trained to record medical evidence in the PRC form therefore they often record conflicting conclusions, resulting in this crucial piece of evidence being disqualified as unreliable. Thirdly, due to lack of capacity building on the intersectionality of FGM with other criminal offences such as child marriage and defilement, when girls have been rescued from child marriage, the only evidence that medical practitioners record is that relating to defilement, ignoring FGM completely. Fourthly, collusion of some police officers and community members leads to non-reporting and failure of cases to proceed to court as they illegally encourage out-of-court settlements through the traditional courts or negotiations. Finally, long judicial processes have discouraged community members from pursuing justice through courts, opting for the quick negotiations and traditional courts.

37. Weak coordination among law enforcement agents in East Africa, coupled with the porous borders, have led to an increase of cross-border FGM with Kenyan girls and sometimes cutters being moved to Uganda, Tanzania, Somalia, and Ethiopia where there is weaker enforcement of the law. The Government of Kenya has not allocated adequate resources to enhance coordination and collaboration of its law enforcement agents with the neighbouring countries. Further, police stations near the border counties are poorly resourced in terms of human and financial resources, yet they cover large areas. This has resulted in FGM cases having to compete with other cases relating to security.
38. While medicalisation of FGM is criminalised under the Anti-FGM Act, Kenya is ranked third among countries practising medicalised FGM in the world.<sup>30</sup> No medical practitioner has been prosecuted or sanctioned for performing FGM. Additionally, the Kenya Medical Practitioners and Dentists Council (KMPDC) has not made a clear statement denouncing medicalised FGM within its community.
39. FGM policies adopted by County Governments have not been allocated funding and therefore not implemented. This therefore means that sensitisation programmes are not led by County Governments as they should be, but by CSOs supporting the Anti-FGM Steering Committees and the Anti-FGM Board.

### **Data on Sexual violence, including trafficking, and FGM**

40. Data is critical to inform interventions and provide insights on trends that require action. The data provided in the State Party's report on the rates of prosecuted cases and convictions for sexual violence do not provide useful analysis due to the disparity in the rates, the fact that many cases are unreported, and the few reported ones at various places such as hospitals, police stations, and with gender officers, children officers and local administration are not in fact prosecuted. There is thus a need for disaggregated data by gender and age on the full cycle from reporting to investigation

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<sup>30</sup> Egypt is ranked first with 75%, Sudan has been ranked second with 50% while Kenya has the rate of 40%.

to prosecution and conviction so as to note the bottlenecks that hinder access to justice and so the government can respond accordingly.

### Access to Justice for Survivors

41. The right of access to justice is a fundamental element of the rule of law, and it is essential to the realisation of human rights everywhere. This right is multidimensional and comprises six interrelated and essential components: justiciability, availability, accessibility, good quality and accountability of justice systems, and provision of remedies for victims.<sup>31</sup>
42. The Legal Aid Act (2016), mandates the provision of legal aid services at the expense of the State in criminal, children and public interest matters, among others, to needy persons including children. The Victim Protection Act (2014) provides far-reaching rights and reliefs to survivors including that the expenses incurred for the treatment or professional counselling of a victim of torture are charged on the Victim Protection Trust Fund established under the Victim Protection Act. The Trust Fund Regulations are yet to be approved and gazetted, which means that the Act has not benefited victims as intended despite its enactment in 2014. These two Acts, and the Witness Protection Act (2006) are hampered by lack of full implementation and inadequate resourcing. Survivors and other witnesses in cases of sexual violence are often intimidated, threatened and even killed by perpetrators and rarely have resource under the Witness Protection Agency. In Kenya, many survivors of sexual violence do not receive legal aid in terms of advice or representation; many cases do not make it to the court system; and the few that do are not afforded legal support to ensure that access to justice is fulfilled.
43. The Constitutional and Human Rights Division of the High Court of Kenya on 10<sup>th</sup> December 2020 in *COVAW and 11 Others Versus the Attorney General and 5 Others, Petition 122 of 2013*<sup>32</sup> held that the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence is a violation of the positive obligation on the Kenyan State to investigate and prosecute violations and thus the Government of Kenya failed to protect the right to life, the prohibition of torture, inhuman and degrading treatment and the security of the person. As Kenya heads to the election period in August 2022, there is a need for the government to put in place preventive measures and adequate response to ensure the violence that occurred previously is not repeated, but that, in the breach, all perpetrators will be held accountable and survivors have the adequate support and services.

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<sup>31</sup> Committee for the Elimination of All Forms of Discrimination against Women 'General Recommendation 33 on Women's Access to Justice' CEDAW/C/GC/33 3  
<https://undocs.org/pdf?symbol=en/CEDAW/C/GC/33>.

<sup>32</sup> COVAW and 11 Others Versus the Attorney General and 5 Others, Petition 122 of 2013  
<https://phr.org/wp-content/uploads/2020/12/NAIROBI-HC-CHR-PETITION-NO.-122-OF-2013-COVAW-11-OTHERS-V-A.G.-10-OTHERS-4.pdf>

## **Suggested Recommendations for the State Party**

We respectfully urge the Committee to recommend to Kenya with regard to violations of the Convention addressed here:

44. Fast-track the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
45. Publish annual reports on the allocations and expenditures by its Ministries and Departments, as well by County Governments, on programmes geared towards addressing GBV and eliminating FGM. The government should also include analysis of the impact made by those programmes after conducting regular monitoring and evaluation.
46. Establish safe houses, rescue centres, and one-stop centres for survivors of GBV, including FGM and sex trafficking, in all counties and ensure that psychosocial and specialised services are freely available, appropriate and promptly accessible to all survivors of GBV.

## **Sexual violence**

47. In an effort to prevent SGBV and its consequences, create public awareness on the gender inequalities and stereotypes that are the root cause of cases of SGBV and take steps to dismantle them, and sensitize members of the public on the legislation on SGBV including the Sexual Offences Act and the Prevention Against Torture Act.
48. Repeal Section 43(5) of the Sexual Offences Act (2006) so as to recognize marital rape.
49. Fast-track a comprehensive review and amendments to the Sexual Offences Act (2006) to ensure an effective legislative framework that adequately prevents and protects all persons from sexual violence.
50. Ensure the full implementation of legislation on sexual violence including through specialized training of actors in the criminal justice system such as the police, prosecutors, judicial officers and medical practitioners during their induction programmes and undertaking continuous specialized training throughout their careers.
51. Ensure adequate financial and human resources are provided towards the full implementation of the legislation on sexual violence, specifically the Legal Aid Act, Victim Protection Act and Witness Protection Act and the institutions established thereunder so as to enhance access to justice and services for survivors.
52. Encourage County Governments to adopt and adapt the Model Policy on Sexual and Gender Based Violence and support its full implementation.
53. Streamline data on GBV from the actors in the criminal justice system in order to strengthen GBV prevention and response programming including the implementation of the National Gender and Equality Commission's National Monitoring and Evaluation Framework on the Prevention and Response to Gender Based Violence and support the operationalization and use of the Information System.
54. Expedite SGBV cases by prioritizing them just as the Judiciary does with election petitions.

55. Establish GBVRC centres in all the counties.

### **Female Genital Mutilation**

56. Amend the Anti-FGM Act (2011) in line with the judgement of the Constitutional Court to ensure that all forms of FGM are prohibited and to fill the gaps that have been observed through its implementation.
57. Allocate adequate funding to the Anti-FGM Board and the Anti-FGM Steering Committees to enable them to conduct more advocacy and to respond swiftly to prevent cases of FGM.
58. Allocate more funding towards the capacity building of police officers, prosecutors, judges, and medical practitioners to enable them to facilitate access to justice for survivors of FGM and be able to deal with emerging issues.
59. Integrate training on FGM and how to handle FGM-related cases into the curriculum of police officers and medical practitioners, at introductory and continuous education level, as well as the continuous education courses of prosecutors, particularly on the ODPP's SOPs.
60. Invest towards the implementation of the Regional Action Plan to End Cross-Border FGM by allocating more resources to police stations located in counties along the borders to enable them to respond swiftly and effectively to reported cases and to coordinate with their counterparts across the border.
61. Prosecute all medical practitioners who perform medicalised FGM as well as police officers and community members who collude to frustrate prosecution of FGM cases or facilitate their settlement through negotiation or traditional courts.
62. Invest in a centralised information management system include data from all state actors recording data on FGM and produce disaggregated data on FGM.
63. Revise the education curriculum to include curated and detailed information on FGM, from a gendered and human rights lens, in all the school grades throughout the education system to ensure that youths are well equipped to advocate against FGM.

### **Sex Trafficking**

64. Amend laws to ensure more punitive measures for trafficking in persons including for sexual exploitation.
65. Streamline the definition of sexual exploitation between the Sexual Offences Act and the Children's Act to ensure clarity and consistency in their application.
66. Harmonize trafficking related crimes, legislation and penalties between the Children's Act, Sexual Offences Act and the Counter Trafficking in Persons Act and adopt the stiffer penalties provided for in the Counter Trafficking in Persons Act.
67. Build the capacity of the specialized units established within the Directorate of Criminal Investigation (DCI), National Police Service, general law enforcement officers, ODPP, medical practitioners, CSOs, private sector, and all other service providers on all elements of the offences related to trafficking for sexual exploitation.

68. Include human trafficking in the basic training curriculum and provide ongoing periodic specialized training for all police officers and prosecutors paying attention to the specific aspects of trafficking for sexual exploitation and the vulnerabilities of survivors.
69. Disseminate and sensitize duty bearers and members of the public on the National Referral Mechanism Guidelines in order to offer service delivery to victims and survivors of sex trafficking.
70. Through the Secretariat of the CTIP Advisory Committee the Government, develop a mechanism for the collection and analysis of gendered and disaggregated data from multi sectoral State agencies and actors to enhance evidence based programming, delivery and interventions on all aspects of human trafficking including for sexual exploitation.