

PETITION FROM WOMEN'S RIGHTS ORGANIZATIONS AND SURVIVORS OF GENDER-BASED VIOLENCE TO THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA

PRESENTED ON
9TH DECEMBER 2022 AT 11 AM

16 DEMANDS TO END GENDER-BASED VIOLENCE AGAINST WOMEN AND GIRLS IN KENYA



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16 Demands to End Gender-Based Violence against Women and Girls in Kenya

Background

According to the Kenya Demographic and Health Survey (KDHS) of 2014, women are more likely to experience physical violence than men. 14% of females aged 15-49 years had experienced both physical and sexual violence.¹ A study done by the National Crime Research Centre shows that lifetime prevalence of gender based violence (GBV) was 38% for women and 20.9% for men.²

The Gender Violence and Recovery Centre (GVRC) has reported that they have supported over 50,000 survivors since its inception in 2001. They estimate that they receive reports from approximately 3,000 gender-based violence survivors every year. While the GVRC report acknowledges that men can also be survivors, it notes that the female population is most affected with 56% of survivors being women and 36% being girls. In 90% of the cases that GVRC has handled, men are the perpetrators of violence against women.³

The 2021 Economic Survey reports that persons who committed the offence of defilement in Kenya increased by 26% from 5,397 in 2019 to 6,801 in 2020, and accounted for 79.4 percent of all crimes against morality while incest increased by 23.8 percent over the same period. Similarly, persons reported to have committed rape increased by 2.4 per cent to 973 in 2020 and accounted for 11.4 per cent of all persons reported to have committed offence against morality.⁴

The statistics highlighted above portray how pervasive sexual violence is across Kenya, coupled with high levels of impunity. It manifests itself on a continuum of multiple, interrelated and recurring forms, and in a range of settings, from private to public.⁵ The media is awash with reports on cases of violence against women and girls taking place in the community while many more

¹ Kenya National Bureau of Statistics, Kenya Demographic and Health Survey 2014, published in December 2015, at 309

² National Crime Research Centre - Gender Based Violence in Kenya, 2014 Report. http://crimeresearch.go.ke/wp-content/uploads/2018/02/wwwroot_publications_Gender-Based-Violence-in-Kenya.pdf

³ Gender Violence Recovery Centre; » [Key Achievements \(gvrc.or.ke\)](http://gvrc.or.ke)

⁴ Kenya National Bureau of Statistics, Economic Survey 2021, at 326.

⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, para 6

cases do not make it to the mainstream media. There are various facets of justice that a victim needs to be accorded. In addition to having the perpetrator charged, tried and convicted before a court of law, the psychosocial welfare of the survivor is of utmost importance since gender-based violence is a traumatising event whose ramifications could affect the survivor for life.

The criminal justice system has for a long time been infamous for being unfriendly to survivors of violence. While the courts have addressed some of the problems facing the criminal justice system by taking measures such as creation of specialized GBV courts, there are other problems that need to be addressed in order to ensure that the rights of survivors are protected. These include secondary victimization of survivors, re-traumatization of survivors, application of gender myths and stereotypes and trivialization of sexual offences by players in the judicial system.

Trivialization of sexual offences has been enabled by the Judiciary through the recent judgments by the Machakos High Court,⁶ the Mombasa High Court⁷ and the Court of Appeal in Nyeri⁸ declaring that mandatory minimum sentences for sexual offences is unconstitutional in that it limits the discretion of the court. The direct implication of these decisions is that there are numerous applications for resentencing by prisoners in courts across the country. It claws back on the gains made by women rights movements over the years to ensure that gender-based violence is treated with the urgency and seriousness it deserves. It could also embolden perpetrators who will no longer be deterred by the law.⁹

International, Regional and Domestic Laws and Standards

Under Article 29 (c) of the Constitution of Kenya, 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.¹⁰ The Constitution also places an obligation on all State organs including the Judiciary to address the needs of vulnerable groups within society, including women.¹¹ The right of women to be free from all forms of violence creates a corresponding duty to the State to take measures to protect women from violence. This is known as the principle of State due diligence obligation.

⁶ *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022)

⁷ *Edwin Wachira & others v Republic*, Mombasa HCCHR Pet 97 of 2021 at Mombasa High Court, eKLR

⁸ *Joshua Gichuki Mwangi v Republic*, Nyeri CACRA No. 84 of 2015, eKLR

⁹ The Judiciary Sentencing Policy Guidelines, Chapter 4. See also *Kamaro Wanyingi v Republic*, [2008] eKLR

¹⁰ *Kenya: The Constitution of Kenya* [Kenya], 27 August 2010, Article 29(c)

¹¹ *Ibid*, Article 21(3)

As a general rule, state responsibility is based on acts or omissions committed either by State actors or by actors whose actions are attributable to the State. A long-standing exception to this rule is that a State may incur responsibility where there is a failure to exercise due diligence to prevent or respond to certain acts or omissions of non-State actors.

Paragraph 9 of CEDAW General Recommendation No. 19 of 1992 states that under general international law and specific human rights covenants, States may be responsible for private acts if they fail to act with due diligence to prevent, as well as to investigate, prosecute, punish and provide reparations and compensation¹² for, acts or omissions by non-State actors that result in gender-based violence against women.¹³ States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.

The Judiciary has the due diligence obligation to prevent VAWG, protect survivors from further harm, punish perpetrators of sexual violence if found guilty, and to ensure that victims of sexual violence obtain effective remedy. Under the obligation of due diligence, States parties must adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors, including having laws, institutions and a system in place to address such violence and ensuring that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws.¹⁴

The failure of the state to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violations.¹⁵

CEDAW General Recommendation 19 of 1992 recommends that States parties should take all legal and other measures that are necessary to provide effective protection of women against

¹² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, Paragraph 9

¹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, para 24(2)(b)

¹⁴ *Goekce (deceased) v. Austria*, para. 12.1.2, and *V.K. v. Bulgaria*, para. 9.4

¹⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, para 24(2)(b)

gender-based violence, including, effective legal measures, including penal sanctions, civil remedies, compensatory provisions to protect women against all kinds of violence.¹⁶

CREAW has partnered with UN Women, Forum CIV, Wangu Kanja, Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN), Initiative for Strategic Litigation in Africa (ISLA), International Commission of Jurists (ICJ), Physicians for Human Rights (PHR), ActionAid, the Collaborative Centre for Gender & Development (CCGD), Better for Kenya, Groots Kenya, Teenseed, Youth Alive, Women Human Rights Defenders Hub and Western Kenya LBQT Feminist Forum to present this petition to the Chief Justice of the Republic of Kenya demanding that the Judiciary fulfils its due diligence obligations to survivors of sexual and gender-based violence.

16 Demands to End Violence Against Women and Girls

Preventive measures

1. Ensure that the Judiciary is fully equipped to effectively interpret and enforce gender equality rights.¹⁷ This can be achieved by conducting gender-sensitive training of judicial officers on handling of sexual and gender-based violence cases.¹⁸
2. Provide appropriate and accessible protective mechanisms to prevent further violence against victims with ongoing court cases. Mechanisms should include immediate risk assessment and protection comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance.¹⁹
3. Eliminate gender myths, stereotypes, prejudices and practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.²⁰

¹⁶ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Paragraph 24(t)

¹⁷ Ibid, Article 8(d)

¹⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, Paragraph 24(b)

¹⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, para 31(a)(ii)

²⁰ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, Article 5(a)

4. Develop comprehensive preventive approaches that ensure that secondary victimization of women does not occur because of laws, practices and procedures that are insensitive to gender considerations.²¹
5. Provide adequate budgetary resources for the implementation and monitoring of activities within the Judiciary aimed at preventing and eradicating sexual and gender-based violence against women and girls.²²
6. Reform of existing discriminatory laws and practices in order to promote and protect the rights of women and girls.²³

Protection measures

7. Recognize that sexual and gender-based violence is a form of discrimination²⁴ that disproportionately²⁵ affects women and girls and inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.²⁶
8. Take into account the disproportionate effects of sexual and gender-based violence on women and girls in hearing and determining matters on sexual and gender-based violence.²⁷
9. Integrate a gender-sensitive²⁸ and survivor-centered approach in hearing and determining matters on sexual and gender-based violence.²⁹
10. Ensure that laws against sexual and gender-based violence give adequate protection to all women, and respect their integrity and dignity.³⁰
11. Take all legal measures necessary to provide effective protection of women against gender-based violence, including criminal sanctions.³¹
12. Protect the privacy and safety of victims of gender-based violence through gender-sensitive court procedures and measures, bearing in mind the due process rights of victims/survivors, witnesses and defendants.³²

²¹ UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, Article 4(f)

²² African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 4(2)(i)

²³ *Ibid.*, Article 8(f)

²⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, Paragraph 1

²⁵ *Ibid.*, Para 6

²⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, Para 21

²⁷ *Ibid.*, Para 14

²⁸ *Ibid.*, Para 17

²⁹ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 2(1)(c)

³⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, Paragraph 24(b)

³¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, Paragraph 24 (t)

³² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, Para 31(a)(i)

Prosecution, Penal and Remedial measures

13. Provide effective complaints procedures³³ and ensure effective access for victims to courts and tribunals and that the authorities adequately respond to all cases of gender-based violence against women,³⁴ including by applying criminal law and, as appropriate, ex officio prosecution to bring alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties.³⁵
14. Punish the perpetrators of violence against women and ensure that such punishment is commensurate with the offence committed.³⁶
15. Provide just and effective remedies/reparations³⁷ to victims of gender-based violence against women.³⁸ Reparations should include different measures, such as monetary compensation, the provision of legal, social and health services, including sexual, reproductive and mental health services for a complete recovery, and satisfaction and guarantees of non-repetition, in line with general recommendation No. 28, general recommendation No. 30 and general recommendation No. 33.
16. Ensure that any reparations accorded to victims of sexual and gender-based violence are adequate, promptly attributed, holistic and proportionate³⁹ to the gravity of the harm suffered.⁴⁰

³³ Ibid, Paragraph 24 (i) & (r)

³⁴ See *Vertido v. Philippines, S. V. P. v. Bulgaria and L.R. v. Republic of Moldova*

³⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, Para 32(a)

³⁶ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 4(2)(e)

³⁷ UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, Article 4(d)

³⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Gender-Based Violence against women*, 2017, Para 29(b)

³⁹ *R v Ipeelee*, [2012] 1 R.C.S.

⁴⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 33*, para. 19 & 58(c)