



**Strathmore University**  
**Law School**

**RETHINKING ABORTION IN KENYA: A REPRODUCTIVE HEALTH RIGHT FOR  
VICTIMS OF RAPE AND SEXUAL ABUSE**

BY

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#HereIsToUs!

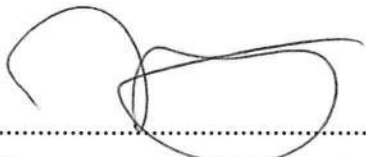
**DECLARATION**

I, KIRAGU GILBERT MACHARIA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 6<sup>th</sup> MARCH 2018 .....

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed:  .....

Date: 6 MARCH 2018 .....

[Dr. J. O. AMBANI]

## **ABSTRACT:**

In Kenya today, abortion is and has always been considered as an emotive and sensitive matter. The public is torn between being pro-choice and pro-life. The pro-life advocating for the unborn children while the pro-choice advocating for the woman's reproductive right to procure an abortion. Kenya's law on abortion as put out in the Constitution under article 26<sup>1</sup> criminalises abortion while subsection (4)<sup>2</sup> of article 26 gives the extent to which an abortion can be procured. The extent to which abortion is allowed is in cases of emergency where the life or health of the mother is in danger and if it is permitted by any other written law. Further, article 26 (2)<sup>3</sup> of the constitution of Kenya states that life begins at conception which is debatable and not factual for it is purely based on opinion, one's school of thought and religious affiliations.<sup>4</sup> When life really begins is a question that even medical experts have failed to agree on. Precedence set over the past years also fails to really determine when life actually begins. Case law that actually agrees that life does really begin at conception does agree that an unborn child is no person thus rights cannot apply to them for civil rights in a civil society only apply to persons.<sup>5</sup>

The Kenyan Penal Code under section 158<sup>6</sup>, 159<sup>7</sup> and 160<sup>8</sup> completely outlaw abortion without regard to the exceptions as provided under article 26 (4) of the constitution. This creates an inconsistency with the abortion laws in Kenya as a country.

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<sup>1</sup> Article 26, Constitution of Kenya, Right to Life.

<sup>2</sup> Article 26 (4), Constitution of Kenya, ) abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment , or the life or health of the mother is in danger, or if permitted by any other written law.

<sup>3</sup> Article 26(2), Constitution of Kenya, The Life of a Person Begins at Conception

<sup>4</sup> [http://www.bbc.co.uk/ethics/abortion/legal/introduction\\_1.shtml](http://www.bbc.co.uk/ethics/abortion/legal/introduction_1.shtml)

<sup>5</sup> *United States V 24 Live Silver Black Foxes: in this case the court ruled that indeed life does begin at conception, En Ventre sa Mere (in his or her mother's belly) but to create a civil right a child must be born.*

<sup>6</sup> Section 158, the Penal Code Chapter 63, Attempts to Procure an Abortion.

<sup>7</sup> Section 159, the Penal Code Chapter 63, the like by Woman with Child.

<sup>8</sup>Section 160, the Penal Code Chapter 63, Supplying Drugs or Instruments to Procure Abortion.

## **LIST OF CASES**

Bourne Case, (Rex V. Bourne, 1<sup>st</sup> Kings Bench 687, Central Criminal Court, London) 1938.

Doe V Bolton, 410 US, 179 of 1973.

Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others [2016] eKLR

*L.C. v. Peru*, CEDAW/C/50/D/22/2009.

Paulina Del Carmen Ramirez Jacinto V. Mexico (2007) Inter-American Commission on Human Rights.

Petition 266 of 2015, High Court of Kenya, Constitutional and Human Rights Division.

R v Morgentaler [1988] 44 DLR 4th 385, Supreme Court of Canada.

Roe V Wade, 410 US 113, 1973.

United States V. 24 Live Silver Black Foxes, No. 8686, October 4<sup>th</sup>, 1924.

Zoilamerica Narvaez Murillo V Nicaragua, IACmHR 2009.

## CHAPTER ONE

### 1.0 Introduction

8000 of maternal deaths in Kenya are as a result of unsafe abortion.<sup>9</sup> In Africa, the statistics are about 13 percent.<sup>10</sup> This is far much lower than in Kenya. In our country today, women and girls of all ages are sexually abused and a big number of them end up with unwanted pregnancies.<sup>11</sup> To try and run away from this, these women look for means of procuring an abortion which is unsafe and lead to their deaths because these women are denied their reproductive rights especially a right to access safe and legal abortion by the Constitution under Article 26. 2,600 women die from unsafe abortions every year and 21,000 more end up been hospitalized due to complications arising from unsafe abortions.<sup>12</sup> A good number of those hospitalized do not make it and most often succumb due to complications that arose from these unsafe abortions. These statistics are inconclusive for they do not take into account all those other women who die from complications that arise from unsafe abortions due to the fact they could not and cannot access health facilities<sup>13</sup>. With Kenya's rape statistics at about 40% for women between the ages of 15-49<sup>14</sup> who are sexually abused yearly ending up with unwanted pregnancies and attempt to procure an abortion, they indeed form a good number of the women who die from unsafe abortions and complications that arise thereafter. A sad fact that we as a country have to live with is that even the people entrusted to protect these women and children under the Constitution of Kenya are some of the people committing these atrocities.<sup>15</sup> Police officers form part of the problem yet they are

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<sup>9</sup> Naomi Barasa, Campaign Officer Amnesty International Kenya; Advocacy with Policy Makers to Reduce Unsafe Abortion and Maternal Deaths in Kenya.

<sup>10</sup> Association of Media Women in Kenya (AMWIK); Jamillah Kilahama.

<sup>11</sup> Unintended Pregnancies in Kenya: A Country Profile.

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.570.1232&rep=rep1&type=pdf>

<sup>12</sup> Center for Reproductive Rights, IN Harms Ways; The Impact of Kenya's Restrictive Abortion Law.

<sup>13</sup> "Professor Boaz Otieno-Nyunya convenor of the Kenya Medical Association Reproductive Health Committee, estimates more than half of all abortions are performed unsafely, with herbs, coat hangers, spoons, knitting needles and harmful pharmaceuticals," Dangerously Cheap; Kenya's Illegal Abortions, Aljazeera.

<sup>14</sup> Agnes Odhiambo, Senior Researcher Women's Rights Division; Human Rights Watch; Misunderstanding Rape in Kenya.

<sup>15</sup> Anna Dubuis: They Always Protect One of Their Own: Police and Rape in Kenya; Police to Probe Rape Claim After Shocking Newspaper Advert, 29<sup>th</sup> January 2016.

supposed to be part of the solution. The public health care system in Kenya is mediocre; ill-equipped that is it falls short of equipment, trained medical personnel and supplies. Post-rape medical care is not adequately provided for victims of rape which makes unwanted pregnancies resulting from sexual abuse more prevalent.<sup>16</sup> This begs the question; what is the way out for this women and girls?

The question of whether abortion is right or wrong is purely based on one's opinion, school of thought, level of education and religious beliefs.<sup>17</sup> Having a law founded on opinion is catastrophic for it secludes a certain group of people whose voices cannot be clearly heard thus discriminating against them. The scope<sup>18</sup> of legal abortion should be expanded and legalized to allow and accommodate victims of sexual abuse get access to abortion after falling victims to such ordeals. No one dreams and agrees to be raped so why is the law so quick to enforce a law that prevents a way out for this women.<sup>19</sup>

By Kenya's constitution under Article 26 restricting abortion, it is making it difficult and illegal for women who are victims of sexual abuse and who end up with unwanted pregnancies access safe and legal abortion. Because of this, they have no avenue to seek redress for an act of violence done to them. This is discriminatory to them based on their gender and the act of rape committed against them. Restrictive abortion laws have a devastating effect on a woman's life in cases of rape.

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Susan Estrich, Real Rape, 1987.

Lee Madigan and Nancy Gamble, The Second Rape; Society's Continued Betrayal of the Victim, 1991.

<sup>16</sup> World Health Organization, Delivering post-rape care services: Kenya's experience in developing integrated services.

<sup>17</sup> [http://www.bbc.co.uk/ethics/abortion/legal/introduction\\_1.shtml](http://www.bbc.co.uk/ethics/abortion/legal/introduction_1.shtml)

Abortion debate; <http://www.medic8.com/healthguide/abortion/abortion-debate.html>

Human Rights Quarterly, Abortion as a crime, Vol. 25 has it that many African countries derive their law from customary law which derives offences from religious concepts of sin and good thus treating abortion as a sin for religion considers abortion a sin.

<sup>18</sup> Article 26 (4), The Constitution of Kenya (2010).

<sup>19</sup> <http://edition.cnn.com/2015/08/13/americas/paraguay-young-rape-victim-gives-birth/> on 13<sup>th</sup> August 2016

### **1.1 Assumptions:**

The Kenyan Government is allowing thousands of women in Kenya to needlessly die and suffer severe complications every year due to unsafe abortion and this deaths and injuries can be prevented. Sexual violence women and girls form part of this statistics.

Denying a woman pregnant as a result of sexual abuse access to the critical reproductive health care she needs leads to devastating consequences in her life, her family, her community and the Kenyan society as a whole.

It is time for the laws to take decisive action to protect the health, lives, families, and future of Kenyan women before more women are needlessly harmed by its policies. The law in accommodating women victims of sexual abuse with resulting pregnancies to procure an abortion would go a long way to remedy an injustice done on them. Without a doubt, criminalization of abortion for victims of sexual abuse is founded on ideologies that are inconsistent with women's reproductive rights.

### **1.2 Justification of the study:**

Looking back on this issue of procurement of an abortion in regards to terminating a pregnancy as a result of rape, there is no substantial legal work done on the matter. What are easily available are articles in newspapers and interviews about the issue that are based on opinion whether it is right or wrong but lack the legal framework to support and assert the effects criminalizing abortion has towards victims of rape and that criminalizing abortion is catastrophic and demeaning to women's reproductive rights as human rights. This is a research aimed at taking on the government to legalize abortion and provide safe abortion mechanisms to victims of rape and sexual abuse who end up pregnant as a result. Pleasure has its consequence but in this we are talking about rape; an act that is barbaric and takes away a woman's dignity and having a law that further allows a victim of such act to be constantly reminded of that act by making it illegal for her to terminate a resulting pregnancy is far from justice but an injustice on top of an injustice towards a woman in a civil society.

### 1.3 Statement of objectives:

The main objective of this research is to discuss, rattle and give rise to change in Kenya's legal framework on abortion so as to accommodate rape victims. This is highly advocated for. The current laws are discriminatory on women, victims of rape and sexual abuse and pose an injustice to the high numbers of these victims. This objective will be achieved through:

- i. Assessing rape and abortion in light of Kenya's vast Cultural and traditional systems in view of legalising abortion for rape victims.
- ii. Assessing and discussing whether Kenya's legal framework is protecting rape victims or discriminating against them in regards to abortion laws.
- iii. Provision of well thought out remedies to counter Kenya's legal framework that is discriminatory to women victims of rape who end up with forced pregnancies and changing it to suit affected parties without any discrimination.

### 1.4 Literature review:

In countries with strict and restrictive abortion laws like the one we live in Kenya, not much is written about abortion as a result of rape or sexual abuse. Most of the writings and research heavily deal with laws restricting abortion in general but not laws restricting the right to abortion for victims of rape and sexual abuse with this law been discriminatory. "The fixate of most discourse has not been a concern for nations to take necessary measures to ensure safe and legal abortion for victims of rape and sexual abuse although this is highly advocated for by international instruments, regional instruments<sup>20</sup> and even victims of rape."

Dickens in collaboration with Cook has it that criminal provisions have been adduced to support spiritual values inherent in unborn life<sup>21</sup>, rather than to give explicit recognition to women's countervailing rights to protect their own lives or health endangered by the

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<sup>20</sup> Article 14(2) (c), Health and Reproductive Rights, Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Convention).

<sup>21</sup> Evangelium Vitae, To the Bishops Priests and Deacons Men and Women religious lay Faithful and all People of Good Will on the Value and Inviolability of Human Life, Ioannes Paulus PP. II.

continuation of pregnancy. This is the influential Bourne case of 1938.<sup>22</sup> Further, Cook and Dickens concur that laws and legal systems should be structured in a way so as to restore victims of crimes of human violation (rape) to a state they would have been in if the violation had not been forced on them. This can be achieved by allowing safe and legal abortion for rape victims and doing away with laws that prohibit it for they are discriminatory to a woman as set out in CEDAW. The Beijing Platform also backs this in its Beijing Platform for Action- Violence Against Women.<sup>23</sup>

“It is accordingly a human rights infringement when women who have suffered the violation of rape are compelled to endure a pregnancy against their will by the coercion of criminal sanctions. The Platform further condemns “torture . . . sexual slavery, rape, sexual abuse and forced pregnancy”<sup>24, 25</sup>

Graber in his book *Rethinking Abortion* argues that equal choice is the new constitutional argument for legalising abortion. He further argues that equal choice is equality right and should be available to every woman. Denial of it will constitute discrimination in violation of the Fourteenth Amendment guarantee of equal protection under the law.<sup>26</sup> This is the Kenyan Context and can aver the fact that denial of safe and legal abortion by the law for rape victims constitutes discrimination.

Great reliance is also made on Rosalind P. Petchesky on his book on *Abortion and a woman's choice* in regards to the state, sexuality and reproductive freedom.<sup>27</sup>

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<sup>22</sup> Bourne Case, (R V. Bourne, 1<sup>st</sup> Kings Bench 687, Central Criminal Court, London) 1938 where a physician was found not guilty for helping a 15 year old girl get an abortion after she got pregnant after a rape ordeal for the pregnancy had health and mental complications on the girl.

<sup>23</sup> Beijing Platform, pg. 96.

<sup>24</sup> Forced Pregnancy described as forced initiation of pregnancy (through rape, incest and sexual abuse) or and the forced continuation of pregnancy (by denial of safe and legal abortion).

<sup>25</sup> Beijing Platform, pg. 135.

<sup>26</sup> Mark Graber, *Rethinking Abortion; Equal Choice, the Constitution and Reproductive Politics*. Reviewed by Margaret Severson, University of Kansas, December 1997.

<sup>27</sup> Petchesky Rosalind P. *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom*.

### 1.5 Theoretical framework:

Roe V Wade<sup>28</sup> a case decided by the Supreme Court of America in 1973 set the ball rolling for the abortion debate. The court ruled in its judgement dated 22 January 1973 that the right of a woman to procure an abortion extended to her right of privacy. Further, the court also ruled in Doe V Bolton that the word person as used in the 14<sup>th</sup> Amendment only considered the born thus an unborn had no rights thus was not protected under law.<sup>29</sup>

These two cases further opened up the world to a new form of the jurisprudence of when abortion should be legal and who should determine the legality of an abortion.

#### 1.5.1 Feminist's jurisprudential approach to rape and abortion:

Rape is the epitome of the inequality of women, the degradation and oppression of women by men in any given society.<sup>30</sup> It is a deeply entrenched social practice that both expresses and reinforces the inequality, degradation, discrimination and oppression of women. Laws enacted denying women a right to procure an abortion on the grounds of rape do not fall far from this definition of rape. Justice Koome draws her wit and intelligence from this. In her interview with the Judicial Service Commission, Koome when she was asked whether she would allow for abortion she said that she will allow victims of rape procure an abortion for it is a fundamental right for them for an injustice was done to them thus it is only right for the law to make it just for them.<sup>31</sup> An argument that pro-life advocates use to defend their views on abortion is that pleasure indeed has its consequences<sup>32</sup> but feminists on rape which I agree with clearly state that there is nothing pleasurable about rape. With this, they advocate for abortion where a woman is a victim of rape.

#### 1.5.2 International and Regional Jurisprudence on Abortion:

Center for Reproductive Rights puts international and Regional jurisprudence as case laws, treaties and conventions that in this instance of rape/sexual abuse advocate and push for

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<sup>28</sup> Roe V Wade, 410 US 113 of 1973.

<sup>29</sup> Doe V Bolton, 410 US, 179 of 1973.

<sup>30</sup> Radical Feminism on Rape, Hebrew University, Jerusalem.

<sup>31</sup> Justice Martha Koome, Interview for the position of Supreme Court Judge, October 17, 2016.

<sup>32</sup> Cook, Abortion and a Woman's Choice, Questions for Feminism.

women's right to procure an abortion<sup>33</sup>. They have it that denying access to safe and legal abortion violates fundamental human rights. Example: the Inter-American Commission on Human Rights has it that carrying a pregnancy resulting from rape to term has serious mental health consequences for both the woman and child.<sup>34</sup> Further, in *L.C V Peru* 2011, the CEDAW<sup>35</sup> Committee held that denial of access to a therapeutic abortion is discriminatory and gender stereotyping. L.C was a 13-year-old girl raped and impregnated by a 34-year-old man. After finding out she was pregnant she became depressed and tried committing suicide by jumping off a roof. She however survived and rushed to the hospital where the doctors refused to perform an emergency spinal surgery for that it would affect the foetus. She requested for a therapeutic abortion but was denied. The doctors would perform the surgery only after L.C had a miscarriage and this delay left L.C a quadriplegic.<sup>36</sup> CEDAW Committee ruled that:

“The failure to provide L.C with a therapeutic abortion was discriminatory and a violation of article 12 of CEDAW concerning equality and non-discrimination in access to health care. Further, the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother”.<sup>37</sup>

The list is endless on case law, treaties and conventions that set out that it is discriminatory for laws to deny victims of rape a right to abortion.<sup>38</sup> This new jurisprudence is quick and firm to advocate abortion rights for rape victims and forms the basis of this research proposal.

“Treaty body jurisprudence has clearly indicated that denying women access to abortion where there is a threat to the woman's life or health, or where the pregnancy is the result of rape or incest violates the rights to health, privacy and, in certain cases, to be free from cruel, inhumane and degrading treatment”.

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<sup>33</sup> *L.C. v. Peru*, para. 9(b) (i) 2011.

<sup>34</sup> *Zoilamerica Narvaez Murillo V Nicaragua*, IACmHR 2009.

<sup>35</sup> CEDAW: Convention on the Elimination of All Forms of Discrimination against Women.

<sup>36</sup> Quadriplegic: a person affected by paralysis of all four limbs.

<sup>37</sup> *L.C. v. Perú*, CEDAW/C/50/D/22/2009, para. 8.15, Committee on the Elimination of Discrimination Against Women.

<sup>38</sup> *Paulina Del Carmen Ramirez Jacinto V. Mexico* (2007) Inter-American Commission on Human Rights.

## 1.6 Proposition/Hypothesis:

The laws in Kenya on abortion are subject to colonial ideals and the moral convictions of culture and religion. By this, they are inadequate in protecting the rights of women victims of sexual abuse by denying them their reproductive rights.

Through law, the state has failed to promote, preserve and protect women's reproductive rights as per the constitution. The health, social, economic and legal effects are not on the woman alone but on the nation.

Other commonwealth jurisdictions reproductive health rights are a non-issue. How did they get to this point yet Kenya as a country is still struggling with the issue at hand?

How we could borrow from them and enact laws and policies that interpret and clarify article 26 (4) in solving and allowing women victims of sexual abuse enjoy their reproductive health rights.

## 1.7 Research questions:

- i. Does the Constitution of Kenya discriminate against women who end up pregnant as a result of rape/sexual violence?
- ii. Other jurisdictions have reached a balance where the laws are not discriminating on women's right to terminate a pregnancy as a result of rape. How have they managed this?
- iii. Kenya as a country, how can she remedy the aspect of laws been discriminatory (1) above and reach a balance as depicted by other jurisdictions as depicted in (2) above?

"People must not forget the basic message of unsafe abortion. Our commitment must be great to ensure that women do not face unwanted pregnancies and when they do, they do not have to put their very lives in jeopardy".<sup>39</sup>

## 1.8 Limitations

The main limitation of this research is that the researcher is a student thus his access to resources and certain information that might be vital for this research is limited to some

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<sup>39</sup> Wendy Baldwin, Preventing Unsafe Abortion and its Consequences. Priorities for Research and Action.

extent. A vital argument in this research on when life really begins might or might not be answered for even experts in the field of medicine cannot seem to reach to an understanding. This argument forms the main point of arguments for those that are against abortion. But, the research will not be limited to trying to show why having a law that takes side with an opinion is discriminatory for no two people are ever the same. Thus the Kenya constitution clearly stating that life begins at conception is wrong and unfounded for it is only an opinion and not a fact.<sup>40</sup>

### 1.9 Research Methodology and Approach:

The research design that is used to accomplish the objectives of this study will depend highly on the review of primary, secondary and tertiary sources of qualitative literature. This literature will be diverse and relevant and will include books, reports, articles, journals, international and regional treaties, conventions and declarations, case laws that are local, regional and international and scholarly works from renowned authors and institutions. Books to be heavily relied upon will include jurisprudential ideologies on rape and abortion in regards to sexual abuse and rape especially a feminist point of view for women are the ones who are greatly affected by the issue at hand.

This research will be purely comparative<sup>41</sup>, analytical and critical without emotional or religious arguments but purely factual thus will heavily borrow and rely on statistics. The comparative approach in this research will be to bring forth the best practices in other jurisdictions that Kenya can adopt so as to ensure maximum protection of women victims of rape and sexual abuse who end pregnant as a result.

Kenya has been a colony of Britain thus a commonwealth country, it has borrowed its legal system from Britain. Due to this, there is a similarity in laws and legislation thus a comparative approach of both jurisdictions on laws in regards to abortion and rape will form a substantial part in this research in trying to see what can be done better for Kenya that has

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<sup>40</sup> [http://www.bbc.co.uk/ethics/abortion/legal/introduction\\_1.shtml](http://www.bbc.co.uk/ethics/abortion/legal/introduction_1.shtml)

Abortion debate, <http://www.medic8.com/healthguide/abortion/abortion-debate.html>

<sup>41</sup> P. De Cruz on Comparative Law in Changing the World, 1999: comparative research as the explicit comparison of rules and laws of different jurisdiction to ascertain similarities and differences.

been done or not yet been done in UK so as to ensure women are not discriminated upon by enacted laws.

All the above will compromise mostly of desktop research.

#### **1.10 Chapter breakdown:**

Chapter one: This chapter introduces the topic of discussion and further brings forward how the research will be conducted and accomplished.

Chapter two: this chapter will consist of a head-on review of the law in Kenya. Generally what the law on abortion in Kenya is, how it got to be, what influenced it to be law all in relation to victims of sexual abuse.

Chapter three: this chapter will bring out the effects<sup>42</sup> brought about by Kenya's abortion laws as a result of these laws not allowing and providing safe and legal abortion to victims of sexual abuse.

Chapter four: this chapter will be of a comparative analysis of Kenyan legal framework on abortion in regards to women who are victims of sexual abuse in relation to legal frameworks from other commonwealth jurisdictions. This will take into consideration international laws, case laws, conventions and treaties advocating for the right to access safe and legal abortion for rape victims.

Chapter five: This chapter will be the conclusion and in it will include the findings of the research and suggest/recommend ways and means of improving the Kenyan legal framework on abortion so as not to be discriminatory to women who are victims of rape and sexual abuse.

#### **1.11 Timeline/duration:**

The estimated timeline and duration for conducting refining and finalising this research and putting it down as a dissertation which is the final project to completion of a Bachelor of Law degree is one academic year as per Strathmore Law School curriculum.

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<sup>42</sup> Effects bring out the inadequacy or lack of something.

## CHAPTER TWO

### 2.0 Introduction:

#### 2.0.1 The slow recognition of pregnancy as a result of rape as a form of women's reproductive health right violation.

Pregnancies resulting from rape have always been a blind spot in societies.<sup>43</sup> It has been a topic missing in the works about communities. It has been ignored and neglected by everybody else especially the lawmakers and the laws that govern and rule a society. Rape is in theory severely punished under the law<sup>44</sup> but in practice, perpetrators are punished lightly while the victims are rejected, ostracized, ignored and even blamed for the violence. Especially women who become pregnant as a result of rape and sexual violence. Worse when it occurs in our own schools and institutions of learning.<sup>45</sup> Victims with resulting pregnancies are further forced to bring forth the pregnancies by the same laws that are supposed to safeguard them.<sup>46</sup> Georges Vigarello in his seminal works observes that victims of rape and sexual violence were and are suspected of seducing the perpetrators which is taken as tacit acceptance hence the victim is considered to have consented. From this form of assumed 'consent', a resulting pregnancy is not considered as a violation of a woman's reproductive health right thus a right to have these women procure a safe and legal abortion is brushed off and not given much thought. Further to this, sexual violence occurs mainly among people who know each other instead of strangers thus making allegations made by victims hard to believe and prosecute. An example is where victims fall victims to their fathers, brothers, uncles, religious leaders or people very close to them which makes it hard to believe that such people who play a vital role in society could be behind such atrocities. Where indeed rape or defilement has occurred, in societies families tend not to prosecute so as to protect or preserve the 'integrity' of the family.

The sexual violence main aim is to dominate women and this is fully accomplished when these women become pregnant as a result. For example in Congo rebels use sexual violence as a weapon of war and a tool of social control. The rebels know that women are the centre of

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<sup>43</sup> Paul Bouvier, *Sexual Violence, Health and Humanitarian Ethics: Towards a Holistic, Person-centred Approach*.

<sup>44</sup> Section 3(3) and Section 4, *Sexual Offences Act, Laws of Kenya*.

<sup>45</sup> Amanda HESS' February 24<sup>th</sup> 2010; *When Rapists Graduate and Victims Drop Out*.

<sup>46</sup> Section 158,159 and Section 160, *the Penal Code, Laws of Kenya*.

the community and that if you damage them, you tear the community apart, destabilize the area and gain a stronghold.<sup>47</sup> This not so different in Kenya.

Times are changing. In a world classified between already developed countries and developing countries, the slow recognition of pregnancies as a result of rape and sexual violence as a form of women's reproductive health rights violation is only in the developing countries. Already developed countries tackled this issue decades ago while developing countries are starting to think on the issue.

This chapter seeks to address what the law in Kenya is on rape and sexual violence with a resulting pregnancy on the victim. This will be done through a head-on review of the law in Kenya and its sources. Generally what the law on abortion in Kenya is, how it got to be, what influenced it to be law all in relation to victims of sexual abuse and with resulting pregnancies. This is also to answer why in Kenya there is so much organized opposition to safe and legal abortion.

## **2.1 The law on Abortion in Kenya, how it got to be law and what influenced it to be law.**

### **2.1.1 Kenya's History as a colony of Britain.**

The roots of the colonial history of Kenya go back to the Berlin Conference in 1885 when East Africa was first divided into territories of influence by the European Powers. Later in 1895, the British Government founded the East African Protectorate whereby the fertile highlands were opened to white settlers. Before Kenya was declared a British Protectorate in 1920, the white settlers were allowed a voice in the governance of Kenya while the Africans were banned from taking part in direct participation in governance until 1944. Between 1944 and 1960 is when African political activity and pressure intensified. This resulted in the formation of political parties and movements which had a say in governance and making of laws.

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<sup>47</sup> Diana Buckhantz and Naama Haviv, 17 September 2014; Rape as a Weapon of War: What Happens to Pregnant Survivors?

## 2.2 Abortion laws of Kenya as a British Colony.

### 2.2.1 Colonial Period:

During this period, Kenya was under the control of Britain and any legislation and precedence that was applicable in Britain were directly applicable in Kenya as a colony of Britain and that was the law of the land. This can be seen by;

#### 2.2.1.1 *The English Offences Against the Person Act of 1861.*

This was an act of parliament of the United Kingdom of Great Britain and Ireland. In it, it consolidated the provisions related to the offences against the Person. By the virtue, it was an act of parliament in Britain and thus British Law, it was directly applicable to all British Colonies in Africa, Kenya being one of the colonies.<sup>48</sup>

The act under section 58 stated that every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or another noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable to be kept in penal servitude for life.<sup>49</sup> This made it illegal for anyone to try to or procure an abortion.

Further, section 58 was read together with section 59 which stated that, whosoever shall unlawfully supply or procure any poison or any other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude.<sup>50</sup>

As per the Law at that time, it was illegal to try, to procure and help procure an abortion. The law was explicit and subsequently applied in the same manner and form in Kenya.

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<sup>48</sup> Rebecca J. Cooks and Bernard M. Dickens, *Abortion Laws in African Commonwealth Countries*, 1981.

<sup>49</sup> Section 58, *Offences Against the Person Act 1861*.

<sup>50</sup> Section 59. *Offences Against the Person Act 1861*.

**2.2.1.2 *Rex Vs Bourne Case* 1 K. B. 3 All E. R. 615 [1938]<sup>51</sup> commonly referred to as the Bourne Case.**

This was and is a 1938 case and precedence in the Central Criminal Court of England where a physician was charged with procuring an abortion to a minor against the law and which on its conclusion set out a precedence that set the ball rolling for the topic at hand.

The facts of this case were that, a 14-year-old girl got pregnant as a result of being raped by five soldiers and that the parents consented to the physician to procure an abortion for the girl for the pregnancy could result to health and mental complications on the girl as testified by experts.<sup>52</sup> The physician was subsequently charged under section 58 of the Offences Against the Person Act for unlawfully procuring an abortion.

The Justice on the case acquitted the physician and directed that;

“If the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of continuance with the pregnancy will be to make the woman a physical or mental wreck, the jury are entitled to take the view that the doctor who under those circumstances and in that honest belief operates, is operating for the purposes of saving the life of the mother.”<sup>53</sup>

This was a landmark ruling in not only the British Colonies but in other jurisdictions on the development of abortion laws in that;

- i. It did, in fact, take into consideration the mental health of the pregnant woman as she experienced it to extend the exception provided by the law so as to allow procurement of an abortion. With this, it extended the exception required by law to procure an abortion beyond the narrow confines of immediate necessity to save the life of the pregnant woman.
- ii. In itself, it did allow therapeutic exception as a defence for procurement of an abortion.

This case in an aspect opened up strict abortion laws that explicitly outlawed abortion. This was achieved in that therapeutic exceptions such as the mental health of the victim was taken into consideration to determine whether the victim really deserved the procedure or not. The

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<sup>51</sup> *Rex Vs Bourne case*, 1938, Crown Court of England and Wales, Central Criminal Court, Macnaghten J.

<sup>52</sup> E-lawresources.co.uk, *R Vs Bourne* 1938, 3 All ER 615.

<sup>53</sup> Justice McNaughten, *Rex Vs Bourne Case*, 1938.

mental health aspect brought about by the trauma the victim went through as a result of being raped and as a result becoming pregnant.

This landmark ruling did reform the abortion laws in Britain which trickled down to British Colonies including Kenya. Although Kenya, as will be shown, did not amend its strict abortion laws to envisage therapeutic basis as a need for safe and legal abortion, it did expand its laws to allow for safe and abortion where the health of the mother is in danger.

### **2.2.2 Post-Independence Period Kenya:**

This is the period after Kenya got its Independence from Britain on 12 December 1963 and later on became a republic the following year till now. Kenya as a republic continued to enforce laws that were still in use in the colonial period without much been done to change them. This applies also to the laws relating to abortion in Kenya.

#### *2.2.2.1 The 1970 Penal Code Cap 63.*

The 1970 Penal Code explicitly criminalizes abortion in section 158, 159 and 160. Section 158 explicitly states that any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or any other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.<sup>54</sup>

Further section 159 states that any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to imprisonment for seven years.<sup>55</sup>

Also, section 160 states that any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.<sup>56</sup>

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<sup>54</sup> Section 158, Kenya Penal Code Cap 63, Attempts to Procure Abortion.

<sup>55</sup> Section 159. Kenya Penal Code Cap 63, the Like by Woman by Child.

<sup>56</sup> Section 160, Kenya Penal Code Cap 63, Supplying drugs or instruments to procure abortion.

The laws on abortion as portrayed by the Penal Code Cap 63 post-independence Kenya are a complete and direct replica of the laws provided for in the Offences Against the Person Act of 1861. This provisions of the law explicitly make abortion unlawful to an extent it criminalizes it with the consequence of incarceration to anyone who takes part in it.

However, the Kenyan Penal Code though still applicable in Kenya at the moment under section 158, 159 and 160 completely outlaw abortion without regard to the exceptions as provided under article 26 (4) of the constitution. This creates an inconsistency with the abortion laws in Kenya as a country. The inconsistency is as a result of the direct application of laws from a colonial regime to an independent regime without alteration so as to fit and address the context Kenya finds itself in as an Independent Country.

#### *2.2.2.2 Constitution of Kenya 2010.*

At a historical moment of Kenya's history, the legal position of Kenya's law relating to abortion changed through the passing of the new constitution through its promulgation on August 27<sup>th</sup>, 2010.<sup>57</sup> With the new constitution under article 26 (4), the parameters allowing for safe and legal abortion were expanded.

Article 26(4) of the Constitution of Kenya 2010 allows for safe and legal abortion in where in the opinion of a trained health professional there is a need for an emergency treatment or where the life or health of the mother is in danger.<sup>58</sup>

Currently, this is where we stand as a country in relation to abortion laws. Abortion laws not fully outlawing abortion but allowing for safe and legal abortion though still restrictive. Article 26 (4) was a step in the right direction but still not yet there in fully doing away with the violation of women's reproductive health. According to one Dr Nyamu who is a gynaecologist; "before the constitutional law reform, most health workers were afraid of talking about abortion openly. Abortion was never performed in government hospitals. <sup>59</sup>It was hoped that the constitutional reform would provide an opening to amend the criminal law further but still even after it was passed not much has been done."

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<sup>57</sup> Kenya Information Guide, Kenya Constitution

<sup>58</sup> Article 26 (4), Constitution of Kenya 2010.

<sup>59</sup> Fjerstad M. "It was worth the sacrifice": Kenya's Dr. John Nyamu on why he spent a year in prison. Rewire, 3<sup>rd</sup> December 2012.

**2.2.2.3 Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.** Hereby and commonly referred to as the Maputo Convention

This convention was formulated in 1995 and adopted in 2003 in Africa following the realization that women's rights were often marginalized in the context of human rights. Its main aim was and is to guarantee comprehensive human rights for women politically, economically, socially and health-wise. The convention entered into force in 2005 after being ratified by the required 15 member nations of the African Union.

Subsequently in 2010, Kenya ratified the Maputo Convention which article 14 (2) (c) urges states in all their undertakings to take all appropriate measures to protect the reproductive rights of women by allowing abortion in cases of sexual assault, rape, incest and where the continuation of pregnancy endangers the mental and physical health of the mother or life of the mother of the foetus.<sup>60</sup>

Kenya however put a reservation on Article 14 (2) (c) therefore it is not mandated to implement this reform despite the fact that the provision of Article 14 (2) (c) would have opened the door to law reforms on abortion laws in Kenya to include sexual abuse victims who end up with unwanted pregnancies.

However, what the 2010 constitution brought with it is the fact that in its own positive way, it did away with the law that made it illegal for procurement of abortion but it also put a restriction on when abortion is legal and permitted.<sup>61</sup> Further to this, the lack of guidance on how the change brought about by the 2010 Constitution should be addressed and implemented brought about an uncertainty. An uncertainty in the sense that, it was not clear the circumstances in which abortion was legal. Following this uncertainty, the Center for Reproductive Rights Kenya collected a data in 2010 that showed that there existed at least three court cases whereby women were charged with having illegal abortions with some of them remanded in custody for up to a year.<sup>62</sup>

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<sup>60</sup> Article 14(2) (c), Health and Reproductive Rights, Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Convention).

<sup>61</sup> Article 26 (4), Constitution of Kenya 2010, "Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."

<sup>62</sup> Center for Reproductive Rights, 2010. p.68.

June 2015 saw a petition filed in the High Court<sup>63</sup> of Kenya against the Attorney General, the Ministry of Health and the Director of Medical Services Kenya by the Federation of Women Lawyers Kenya (FIDA), a rape survivor who is an adolescent and suffers from kidney failure as a result of complications arising from an unsafe abortion and two community human rights mobilisers on behalf of Kenyan Women who are denied their reproductive rights and are in their reproductive age.<sup>64</sup> This case was/is to put into perspective the abortion laws in Kenya and add clarity to them so as to do away with their ambiguity on when abortion is legal or illegal. Also, it seeks to compel the reinstatement of the Standards and Guidelines relating to abortion. The sitting Judge, Judge Isaac Lenaola in his orders exercised his discretion and referred the matter to the Chief Justice to constitute a bench of judges under article 165 (4) of the Constitution of Kenya to hear and determine the issues raised. He did cite that the issues raised were weighty and that they are yet to be resolved by the courts for they raise substantial questions of law.<sup>65</sup> Although the case failed to take off on 15 December 2016 as it was supposed to, it was later slotted for May 2017 for directions. The case was slotted to be heard on 12 October 2017 but was pushed to February 2018 due to lack of quorum for two of the three judges who were to hear the matter were presiding over election petitions. (Should be an interesting one)

### **2.3 Where we are at the moment in Kenya on abortion laws can be attributed to:**

#### **2.3.1 Feminism jurisprudence:**

Feminism Jurisprudence according to Radical Feminism on rape has it that rape and sexual abuse is the epitome of the inequality of women, their degradation and their oppression in a society. Further to this, having restrictive abortion laws that deny victims of sexual assault

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<sup>63</sup> Petition 266 of 2015, High Court of Kenya, Constitutional and Human Rights Division.

<sup>64</sup> Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others [2016] eKLR; facts of the case are that on December 2014, JMM (the 15 year old minor and a victim of sexual abuse who got pregnant as a result of being defiled) was vomiting and bleeding heavily at a local clinic where she was seeking treatment. PKM (the guardian to JMM) received a call from a relative informing her of JMM'S situation. JMM admitted to the clinic staff that she had gone through an unsafe abortion and was there for post-abortion treatment and care. JMM at the moment suffers from chronic kidney disease and requires a transplant.

<sup>65</sup> High Court of Kenya, Petition 266 of 2015, Federation of Women Lawyers (Fida-Kenya) & 3 others v Attorney General & 2 others [2016] eKLR, Ruling delivered on 19 February 2016, Judge Isaac Lenaola.

and abuse procure a safe and legal abortion tops it all in oppressing women in a society.<sup>66</sup> The known feminist in Kenya Justice Martha Koome does agree that victims of sexual abuse should be allowed safe and legal abortion as a reproductive right. Also, Justice Njoki Ndung'u speaking during a judge's conference in Mombasa in July 2017 urged that the law should be amended to give more women access to safe and legal abortion. Justice Njoki Ndung'u argued that Article 24 of the Constitution of Kenya does not give the legal status of the foetus and where life begins and that that is an area that needs to be developed by Judicial Activism. This was an open call to people to challenge the abortion laws in Kenya.<sup>67</sup>

### **2.3.2 International and regional jurisprudence:**

There exists a number of international and regional instruments that advocate for women reproductive rights in cases of sexual assault and abuse. This also includes case laws, treaties and conventions. Article 60 of the African Charter on Human and People's Rights which Kenya is a signatory provides for this. Article 60 advocates and encourages African National Courts to draw lessons from other regional and human rights instruments in developing their own regional and national human rights standards.<sup>68</sup> Such international and regional jurisprudence include:

A global consensus the 1994 Programme of Action adopted at the International Conference on Population and Development in Cairo and the Fourth World Conference on Women in Beijing 1995 framed reproductive health rights as human rights. Reproductive health as per the World Health Organization is a state of complete Physical, mental and Social well-being of a woman and not only the absence of disease or infirmity.<sup>69</sup> This expanded the notion that reproductive health does not only encompass the physicality of a woman but also it is mental and social well-being.

The Inter-American Commission on Human Rights has it that carrying a pregnancy resulting from rape to term has serious mental health consequences for both the woman and child.<sup>70</sup>

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<sup>66</sup> Radical Feminism on Rape, Hebrew University, Jerusalem.

<sup>67</sup> Justice Njoki Ndung'u rallies fellow judges to back safe abortion, July 5<sup>th</sup> 2017, Mkamburi Mwawasi.

<sup>68</sup> Article 60, African Charter on Human and People's Rights.

<sup>69</sup> International Conference on Population and Development, 1994 Cairo.

Beijing Platform for Action-Violence Against Women, 1979 adopted by the UN General Assembly.

<sup>70</sup> *Zoila America Narvaez Murillo V Nicaragua*, IACmHR 2009.

Further, in *L.C V Peru* 2011, the Convention on the Elimination of all forms of Discrimination Against Women hereby referred to as the CEDAW<sup>71</sup> Committee held that denial of access to a therapeutic abortion is discriminatory and gender stereotyping.<sup>72</sup> L.C was a 13-year-old girl raped and impregnated by a 34-year-old man. After finding out she was pregnant she became depressed and tried committing suicide by jumping off a roof. She however survived and rushed to the hospital where the doctors refused to perform an emergency spinal surgery for that it would affect the foetus. She requested for a therapeutic abortion but was denied. The doctors would perform the surgery only after L.C had a miscarriage and this delay left L.C a quadriplegic.<sup>73</sup> CEDAW Committee ruled that:

“The failure to provide L.C with a therapeutic abortion was discriminatory and a violation of article 12 of CEDAW concerning equality and non-discrimination in access to health care. Further, the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother.<sup>74</sup>”

More International and regional jurisprudence such as the Maputo Convention ratified by Kenya, the CEDAW Committee<sup>75</sup> advocate for women reproductive rights especially in cases of sexual assault and sexual abuse.

### 2.3.3 Religious and cultural jurisprudence:

The basic composition of the majority if not all societies in Kenya is based on religion and culture as a strong foundation. Due to this, laws and regulation, especially those of a criminal nature attribute their legislation from spiritual values to an extent of having criminal provisions been adduced to support spiritual values inherent in the unborn life in the victim of sexual abuse.

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<sup>71</sup> CEDAW: Convention on the Elimination of All Forms of Discrimination against Women.

<sup>72</sup> *L.C Vs Peru*, 2011, CEDAW committee.

<sup>73</sup> Quadriplegic: a person affected by paralysis of all four limbs.

<sup>74</sup> *L.C. v. Perú*, CEDAW/C/50/D/22/2009, para. 8.15, Committee on the Elimination of Discrimination Against Women.

<sup>75</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1997 by the UN General Assembly.

Religion and culture assume to act as a guardian of morality in Kenya. To an extent in that when it comes to legislation of national laws, different religious groups and cultural groups play a vital role in determining what these laws will be.<sup>76</sup>

For religion:

Genesis chapter 9 verse 6; “Whoever sheds human blood by humans shall their blood be shed; for in the image of God has God made mankind.”

Psalms chapter 139 verse 13, “for you created my inmost being; you knit me together in my mother’s womb.”

Exodus chapter 21 verse 22 as read together with verse 23 provide that where people are fighting and a pregnant woman suffers serious injury, a life must be taken for the life of the unborn child. Basically, anyone who takes away the life of an unborn, only death can make it right.

Aden Duale Bare during the parliamentary proceedings of the new constitution according to the Hansard dated 31 March 2010 clearly put it out there that he will not accept abortion. He asserted that in their history as a Muslim religion they will not accept abortion. He further stated that if the worst comes to the worst, it will be upon the millions of Christians and Muslims to decide the fate of the article on abortion. The article should be deleted and if not, the people of this country who believe in good morals will deal with it on the day of the referendum.<sup>77</sup> This clearly shows how religion depicts itself as guardians of morality and dictate and decide what becomes laws.

Kenya boasts of about 70% of its population as Christians, 25% as adherents of indigenous religions and 5% as Muslims.<sup>78</sup> From above scriptures, it is clear what the bible of the Christian religion thinks of abortion. Given the Christian religion is the prominent religion and the fact that religious teachings are taken into account to legislate laws on abortion, this clearly brings about laws that are discriminatory for they will end up favouring those against abortion while discriminating those for abortion especially victims of sexual abuse.

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<sup>76</sup> Powerful Churches target Kenya’s Constitution over Abortion, Scott Baldauf, May 14<sup>th</sup> 2010.

<sup>77</sup> National Assembly Official Report, Wednesday 31 March 2010.

[http://info.mzalendo.com/hansard/sitting/national\\_assembly/2010-03-31-14-30-00#entry-109523](http://info.mzalendo.com/hansard/sitting/national_assembly/2010-03-31-14-30-00#entry-109523)

<sup>78</sup> <https://www.africa.upenn.edu/NEH/kreligion.htm>

## 2.4 Conclusion:

This chapter was about what the law in Kenya is in regards to abortion with respect to sexual violence and rape, how it got to be law and what influenced it to be law. From the above, it sought to try and unearth if the current laws are formulated on the same ideology used in the colonial period of Kenya and what influenced these laws and what does still influence these laws in the post-colonial period. The findings were that:

The abortion laws currently in Kenya indeed trace their roots back to the ideology applied and used in the colonial period. Laws were indeed directly applied in Kenya as they were legislated in England. Although the laws have now changed in England, Kenya is yet to advance its laws fully so as to accommodate victims of rape and sexual abuse. Though Kenya has introduced some form of reforms, the laws are still discriminatory to an extent. The slow advancement of Kenya's laws is indeed attributed to how the different societies in Kenya are. Societies in Kenya are highly religious and culture based. Anything contrary to their beliefs is not acceptable. Even if it is right just and vital to society. An example is the topic of discussion in this paper. Those who advocate for abortion as a woman's reproductive health right even in cases of rape and sexual violence is termed immoral, uncultured and a traitor and a danger to the societies well-being. An example is feminists in Kenya such as Martha Koome and Njoki Ndungu who are said to be on the payroll of pro-choice activists to push for the abortion agenda in Kenya. It is a fact that religion and culture determine what is moral and what is not and such is used to influence what is law what should or should not be law. Because religion and culture have no room for abortion even on the grounds of rape and sexual violence there has been and there will always be a strong organization against law providing for safe and legal abortion for victims of rape and sexual violence.<sup>79</sup>

All the above put together clearly shows the predicament position in which abortion laws in Kenya sit. The Law is divided among different ideals. Trying to fit and satisfy each and every different idea is catastrophic for it fails to address the main issue. If an idea is left out the laws end up being discriminatory. In this case, victims of sexual abuse who become pregnant as a result are the ones being discriminated against. And that simply put is the situation in Kenya.

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<sup>79</sup> National Assembly Official Report, Wednesday 31 March 2010.

[http://info.mzalendo.com/hansard/sitting/national\\_assembly/2010-03-31-14-30-00#entry-109523](http://info.mzalendo.com/hansard/sitting/national_assembly/2010-03-31-14-30-00#entry-109523)

The positive theory of law refers to the application of laws that are actually laid down by separating what 'is' law from what 'ought' to be law. According to this theory, rules made by the sovereign are laws irrespective of any other considerations. It is based on three elements. One is the command which is the rule given to the people under the sovereign, second is the sovereign which refers to the subjects and people demanding obedience in state and thirdly is the sanction which is the effect that follows the violations of the commands. Kenya is, in my opinion, adheres to this positive law theory which is discriminatory and a form of dictatorship. This is because of the laws that restrict abortion for victims of rape and sexual violence are no way taking into considerations the victims themselves. The law dictates to them that they cannot get safe and legal abortion thus subjecting them to the effects brought by unsafe and illegal abortion as will be shown in the next chapter. The realist theory of law is the solution. This is because the realist theory of law is interested in the actual working of the law rather than its traditional definitions or how they were formulated. With this laws are based on the interests of the society and the victims aggrieved at the moment of legislation. This is because times are changing and that what was law two years cannot be law today or tomorrow. Legal realism advocates for the advancement of laws depending on the issues raised so as to solve them in a just way and in a manner that settles the dispute amicably.

Realism theory of law should guide laws made so as to achieve laws that are neither discriminatory nor oppressive.

“It is insane for matters relating to abortion even for victims of rape and sexual abuse to be decided on the moral conviction of societies inclinations in a nation without regard to the victims while the stigma attached to abortion does nothing to reduce the incidents of abortion for they are still high”.

## CHAPTER THREE

### 3.0 Introduction:

“The moral problem of abortion is difficult because it is unusual. It is unusual both because the human foetus is so unlike other individuals and because the relationship between the foetus and the pregnant woman is so unlike other relationships”.<sup>80</sup>

Abortion has been and will always be a heated discourse. It is subjected to religious and cultural ideologies. In the previous chapter, this research sought out to determine how abortion laws in Kenya were and are legislated upon. It was concluded that the laws trace their roots back to colonial ideology and that religious and cultural aspect which form the foundation of almost all societies in Kenya command what should be law.

Philosophical ideologies, socio-economic perspectives with regards to population and legal issues especially as a human rights violation issue and also as an ethical issue also form part of the discourse on abortion. Each and every time the term abortion is mentioned, temperatures rise.<sup>81</sup> Rape and sexual abuse victims have few or at times no exceptions with regards to restrictive abortion laws adopted by their countries.<sup>82</sup> Pro-life advocates view such exceptions as too liberal,<sup>83</sup> this is because it allows for termination of unwanted pregnancies. In Kenya, this would be termed as allowing abortion even to pregnancies that do not pose a significant risk to a woman’s physical health. With this, the restrictive abortion laws forget that even mental and psychological health plays a vital role in a woman’s autonomy.

This chapter seeks to bring out the effects that are brought about by abortion laws as a result of these laws not allowing and providing safe and legal abortion to victims of rape and sexual abuse. This will be done through at first taking a quick look at the different views of different players in this discourse on abortion in relation to sexual violence and rape.

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<sup>80</sup> David Boonin, *A Defense Of Abortion*, 2003; Cambridge University Press.

<sup>81</sup> OW Giorgis, *Legal considerations of women’s reproductive rights and abortion in Ethiopia*.

<sup>82</sup> D Hansson & D Russell, *Made to fail: The mythical option of legal abortion for survivors of rape and incest* (1993) 9 *South African Journal on Human Rights* 500.

<sup>83</sup> D Hansson & D Russell, *Made to fail: The mythical option of legal abortion for survivors of rape and incest* (1993) 9 *South African Journal on Human Rights* 500.

### 3.0.1 Pro-life Versus Pro-choice:

Pro-life advocates are founded on the idea that all lives matter even for the unborn. They advocate for the sanctity of life; that a baby has a life from when he/she/it was conceived. Under the pro-life, a woman's reproductive health right is immaterial for a woman is deemed to be a giver of life<sup>84</sup> and not one who destroys one.<sup>85</sup> For them, safe and legal abortion should not be provided for even in instances where a woman becomes pregnant as a result of rape and sexual abuse.

The Pro-choice is founded on the idea that a woman's body is hers to do as she pleases. With this, they advocate that it is for a woman to have a child or not to have a child as she deems fit. When it comes to pregnancy, the pro-choice have it that it is only a woman's choice to have the child or not to have the child. It is her life, her human right and her reproductive right.<sup>86</sup>

### 3.0.2 How victims of Rape and Sexual Violence view Abortion:

Abortion is defined as the intentional termination of a pregnancy after the fertilization of the egg and the embryo in the womb before the foetus becomes viable. Abortion is indeed a very complicated issue. It touches on the very basis of which any society is founded on. This includes the entire context in which people live in a society<sup>87</sup> and as an African Country, values, culture and religion form the basic foundation of social interactions. Kenya as an African country suffers from such society inclinations of religion, culture and values. Religion condemns abortion and labels it a sin and an immoral act. So does cultural values and attachments.<sup>88</sup> Tradition dictates that childbirth is a normal duty of a woman and a blessing to a community thus any form of fertility control or abortion is not tolerated at all

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<sup>84</sup> "Pro-lifers must emphasize that no matter the circumstances of conception; there should never be embarrassment about bringing a child into the world. The value of a person is not determined by the circumstances of his or her conception. Rape and incest victims need support and compassion, not a "quick-fix solution" like abortion. Abortion only adds to the trauma and injustice already inflicted upon the mother;" Georgia Right to Life (GRTL), Rape and Incest... Is Abortion Ever Okay?

<sup>85</sup> OW Giorgis, Legal considerations of women's reproductive rights and abortion in Ethiopia.

<sup>86</sup> Petchesky, Questions for Feminism; Abortion and Woman's Choice (1986).

<sup>87</sup> World Health Organisation, (1995) 4 World Health Series 4.

<sup>88</sup> Women's perceptions about abortion in their communities; perspectives from western Kenya.

cost.<sup>89</sup> This is supported further whereby in Traditional African Culture where a woman could not give birth, she was labelled as an outcast and a curse to an extent she was banished from the community. This clearly shows how childbearing in a society is regarded as a good thing regardless of how such was reached upon. In her book, Cheryl Alexander provides that rape victims are often blamed for attracting the crime of rape and are treated as if they are the offenders.<sup>90</sup> Personal testimonies of victims indicate that the trauma they experience is attributed to such attitudes and treatment.<sup>91</sup>

Abortion as a result of sexual violence and rape carries with it different views even on the victims themselves. Culturalist and victims who are pious fall under the above category. Where a child is a blessing to a community and to oneself regardless of how the child came to be. They frown upon abortion and distant themselves from such conversations. A stance I highly respect although I do not agree with. The remaining half is of the view that abortion as a result of rape and sexual violence should be permitted for it is a way out for them from an injustice and an act of cruelty done to them.

### 3.1 General effects of denying safe and legal abortion.

Legal, social and health repercussions of unsafe abortion for women in Kenya have, are and will always be disastrous regardless of how the pregnancy got to be.

#### 3.1.1 Health and Social repercussions.

The African Commission on Human and People's Rights has adopted Article 14 General Comments of the Protocol to the Maputo Convention in regards to women reproductive

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<sup>89</sup> M Roba, 'Tripartite interest in abortion: The woman, the father and the foetus under Ethiopian law.' Addis Ababa University 2009.

<sup>90</sup> CS Alexander; the Responsible Victim: Nurses' Perceptions of Victims of Rape (1980) 21 Journal of Health and Social Behaviour, John Hopkins University School of Hygiene and Public Health.  
<http://www.jstor.org/stable/2136691>

<sup>91</sup> CS Alexander; the Responsible Victim: Nurses' Perceptions of Victims of Rape (1980) 21 Journal of Health and Social Behaviour, John Hopkins University School of Hygiene and Public Health.  
<http://www.jstor.org/stable/2136691>

rights. From the General Comments, the African Commission noted that abortion was, is and will still be the leading cause of death and illness among women in Africa if the issue is not adequately addressed and dealt with. Further to this, the African Commission also noted that unsafe abortions and the legal regulation of abortion tremendously contribute to deaths and illnesses among women. The General Comments has it that, “Only a very low percentage of abortions practised in Africa are safely conducted. Unsafe abortions remain a factor in preventable mortality. It has been demonstrated that in a context where national laws allow therapeutic abortion when it proves necessary, and where health services are available, accessible, acceptable and of good quality, the prevalence, as well as the complications arising from unsafe abortions, are generally lower than in countries where the legal conditions for abortion are restricted.”<sup>92</sup> Still, on the matter at hand, the World Health Organization further agreed that unsafe abortions remain and still are a lasting danger, especially in developing countries.<sup>93</sup>

A matter of fact is that unsafe abortion causes preventable deaths, disabilities and illnesses to so many African Women with a large number of Kenyan women included who are marginalized and poor at the same time. The global mortality rate arising from unsafe abortions has widely declined over the years.<sup>94</sup> This global decline though positive has however resulted from a decline in unsafe abortions from other parts of the world but Africa’s mortality rate as a result of unsafe abortions has been stagnant if not on the rise.<sup>95</sup> Africa as a continent lags behind in efforts to try and reduce mortality rate as a result of unsafe abortions. According to WHO, 60% plus of the world’s mortality rate due to unsafe abortions can be traced back to Africa.<sup>96</sup> With this numbers, Africa was at best least

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<sup>92</sup> Article 14 (1) (a) (b) (c) and (f) and Article 14 (2) (a) and (c), African Commission on Human and People’s Rights General Comments on of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.

<sup>93</sup> World Health Organization, *Unsafe Abortions; Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality*; 2008.

<sup>94</sup> World Health Organization, *Unsafe Abortions; Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality*; 2008; ‘69000 deaths in 1990, 56000 deaths in 2003 and 47000 deaths by end of 2008.’

<sup>95</sup> Mortality rate as a result of unsafe abortion set at 13%, Association of Media Women in Kenya (AMWIK); Jamillah Kilahama.

<sup>96</sup> World Health Organization, *Unsafe Abortions; Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality*; 2008.

positioned to meet the Millennium Development Goal<sup>97</sup> which sought out to reduce by three quarters between 1990 and 2015 the maternal mortality ratio<sup>98</sup> and by 2015 achieve a universal access to reproductive health.<sup>99</sup> Africa in itself failed to meet the Millennium Development Goal and Kenya did not fail to contribute to Africa's failure to meet the target. The maternal mortality rate in Kenya has remained unacceptably high at around 488 maternal deaths per 100,000 live births in some areas recording 1000 deaths per 100,000 live births.<sup>100</sup> Most of this maternal deaths are attributed to unsafe abortions which is a direct causation. Statistics have shown that in Kenya alone about 49% of all pregnancies are unwanted and about 41% of the unwanted pregnancies end up in unsafe abortions.<sup>101</sup>

So many women who manage to survive unsafe abortions suffer serious health consequences as a result which some amount in disabilities some of which are permanent.

"I have seen so much misery at the Kenyatta National Hospital where women with abortion-related problems have died and others have lost their uteruses. There is no doubt that the existing laws are colonial and too strict in a modern society".<sup>102</sup>

Also, unwanted pregnancies aggravate development issues in Kenya. It is a barrier to Kenya achieving progress in sexual and reproductive health. Each year unwanted pregnancies result in a high dropout rate of teenage girls from Kenyan schools<sup>103</sup> with some of them ending up dead as a result.

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<sup>97</sup> World Health Organization, Millennium Development Goal 5; Improve Maternal Health.

<sup>98</sup> World Health Organization, Millennium Development Goal 5A; Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio.

<sup>99</sup> World Health Organization, Millennium Development Goal 5B; Achieve, by 2015, universal access to reproductive health.

<sup>100</sup> United Nations Development Program Kenya; Improve Maternal Health, Where we are? Maternal Mortality in Kenya.

<http://www.ke.undp.org/content/kenya/en/home/post-2015/mdgoverview/overview/mdg5.html>

<sup>101</sup> Ministry of Health Kenya. Women's Lives Matter; Preventing Unsafe Abortion in Kenya, <https://www.guttmacher.org/sites/default/files/pdfs/pubs/FB-abortion-in-Kenya-2013.pdf>

<sup>102</sup> Professor Julius Meme, Permanent Secretary, Kenya Ministry of Health, 1999.

<sup>103</sup> Jane Mugambi; July 29 2016: Rape, Defilement cause high dropout rate among school girls in Boni forest Lamu.

Center for Reproductive Rights puts pelvic inflammatory disease and secondary infertility as permanent disabilities that arise due to unsafe abortions.<sup>104</sup>

### 3.1.2 Legal repercussions.

Further to all this, a data collected in 2010 by the Center for Reproductive Rights Kenya showed that at least three court cases every week involved women been charged with having procured an illegal abortion. According to them, in Nairobi, the numbers were estimated to be more. A sad fact according to the data is that 10 out of the 20 researched on were school going girls majority of them were minors.<sup>105</sup> The women who were arrested and charged although they were given probation, those who could not afford bail were remanded up to a year in police remand.

Case law can be used to show such legal repercussions that follow victims who try to acquire an unsafe and illegal abortion.

The Kenya National Commission on Human Rights reports that in 2011 a 40-year-old woman was arrested and held in Muranga police station for allegedly having procured an abortion. It was said that she had tried terminating her pregnancy by swallowing chemicals. She, however, died in police cells after developing abortion-related complications before she could be charged in court for the procurement of an abortion.<sup>106</sup>

The case of Edna Achilla<sup>107</sup> This was a 2013 case no 3651 of 2013 where a 21-year-old girl was arrested by police and charged under section 158 of the penal code for an attempt to have an abortion. Edna was released on a 20,000 shillings bail which was paid by FIDA. The facts of the case were that Edna was frog-marched to the chiefs camp with a crowd that assaulted her. She was forced to carry a basin full of blood with the foetus that she tried to abort. Edna at the time of being charged was working as a househelp in Mathare an informal settlement.

In addition, denial of safe and legal abortion to victims of rape and sexual violence with resulting pregnancies denies them other rights enshrined in the Constitution of Kenya. Such rights include; (i) equality and freedom from discrimination where the state shall not

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<sup>104</sup> Center for Reproductive Rights, In Harms Ways; The Impact of Kenya's Restrictive Abortion Law.

<sup>105</sup> Center for Reproductive Rights, 2010, p.68 and 69.

<sup>106</sup> Kenya National Commission on Human Rights, 2012.

<sup>107</sup> Lyoyd Mudiwa, Slum girls of Kenya take a stand, 10 January 2014.

discriminate directly or indirectly against any person on such grounds as pregnancy<sup>108</sup>, (ii) right to human dignity<sup>109</sup>, and (iii) freedom and security of person and right not to be subjected to any form of violence either by private or public sources or any form of torture either physical and psychological<sup>110</sup>. Victims of rape and sexual violence with resulting pregnancies are indeed discriminated against when denied safe and legal abortion on the grounds of their pregnancies. This further results in them been subjected to both physical and psychological torture when they are forced to bring the pregnancies to term. Which transforms into a form of institutional violence that deprives the victims their basic human dignity.

### 3.2 Conclusion:

This chapter was about the effects brought about by denial of safe and legal abortion by legislated laws in Kenya. From the research done it is clear that abortion laws that restrict or deny safe and legal abortion do more harm than good. In this case, victims who themselves try to procure an abortion or victims who try to assist one to procure an abortion takes a hit legal wise, health wise and all this has a negative impact in society. Legally it was observed that victims who are mainly from poverty and informal settlements are the biggest casualties. When charged with trying to procure unsafe abortions they are faced with an insane amount of bail or bond so as to be released failure to which they end up spending time in prison. Healthwise and the negative impact it has on societal interactions is even worse. Unsafe and illegal abortion is a leading cause of maternal mortality. Further to this as seen in the research is that those who are able to survive end up with permanent injuries that scar and disrupt their

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<sup>108</sup> Constitution of Kenya, Article 27 (4), Equality and freedom from discrimination, The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

<sup>109</sup> Constitution of Kenya, Article 28, Human dignity, Every person has inherent dignity and the right to have that dignity respected and protected.

<sup>110</sup>Constitution of Kenya, Article 29Freedom and security of the person

Every person has the right to freedom and security of the person, which includes the right not to be—

(c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological.

entire livelihoods. The effects are not pretty at all. Safe and legal abortion should be provided for as a mandatory reproductive health right. This especially to victims of rape and sexual violence for they the victims had no consent to the pregnancy given it was forced on them. Laws should be flexible and provide such victims a recourse. State law denying safe and legal abortion is a form of Institutional Violence towards women reproductive health rights that is oppressive and discriminatory especially to victims of unwanted pregnancies resulting from rape and sexual abuse. Especially given the repercussions such victims go through.

## CHAPTER FOUR

### 4.0 Introduction:

Over the years, governments all over the world in conjunction with human right bodies have linked restrictive abortion laws and laws that criminalise abortion as a direct causation of unsafe abortions and effects that come with it. As shown in the previous chapter, denial of safe and legal abortion contributes immensely to the distraction of women's health, livelihoods and further denies them their human dignity. This has further brought to the attention that provision of safe and legal abortion is no longer only a health issue but a vital and important human rights issue.

Treaties both regional and international and also national courts and laws all over the world have provided adequate jurisprudence on the issue of abortion as a necessary human right. Further to this, they have challenged and called upon countries that are behind in implementing laws that provide for safe and legal abortion to do so so as to ensure women rights are fully protected and provided for. Failure to which countries will fail to meet their constitutional obligation to its citizen's given human rights provision and all interrelated. Denial of one is a denial of the other.<sup>111</sup> All this especially to victims of rape and sexual violence.

Chapter two brought into context how the abortion laws in Kenya got to be up to date. This chapter in itself is a comparative analysis of Kenyan legal framework as compared to other jurisdictions especially commonwealth countries. This is because other commonwealth jurisdictions reproductive health rights are a non-issue yet in Kenya it is a problem without a remedy in sight anytime soon and deeply rooted in society. This all in relation to victims of rape and sexual violence.

### 4.1 Commonwealth countries.

Commonwealth countries simply referred to as the Commonwealth is an intergovernmental organisation of states that were formerly territories of the British Empire. It dates back to the mid-20<sup>th</sup> century with the decolonization of the British Empire through increased self-governance of its territories. The member states have no legal obligation to one another but

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<sup>111</sup> World Health Organisation, Safe Abortion: Technical and Policy Guidance for Health Systems.

instead, they are united by language, history, culture, and their shared values of democracy, free speech, human rights and the rule of law.<sup>112</sup>

Kenya is part of the commonwealth. Other countries that will be used in comparison to Kenya and are part of the commonwealth are the United Kingdom, Canada, and India.

#### 4.1.1 United Kingdom

Abortion laws in the UK are governed by the 1967 Abortion Act.<sup>113</sup> In the UK, abortion is only allowed within the first 24 weeks of pregnancy as a general law. From this, two doctors must decide that the risks to a woman's physical or mental health or the risk to her child's physical and mental health will be greater if she continues with the pregnancy than if she ends it.

However, where two doctors agree that a woman's health or life is gravely threatened by continuing the pregnancy or that the foetus is likely to be born with severe physical or mental abnormalities there is no time limit on abortion. Also in the event that an abortion must be performed as a matter of medical emergency a second doctor's agreement/opinion does not need to be sought.

When it comes to consent, providing two doctors confirm the need for an abortion fits the legal criteria, a woman does not need the consent of her own doctor, parent or her family to procure an abortion.

The act has it that a legal abortion must be:

At first, performed by a registered medical practitioner, performed, except in an emergency, in a National Health Service (NHS) hospital or in a place for the time being approved for the purpose of the act.

Second, certified by two registered medical practitioners as justified under one or more of the following grounds: (i) the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy was terminated; (ii) the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant

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<sup>112</sup> Charter of the Commonwealth, 19 December 2012.

<sup>113</sup> The Abortion Act, 27 April 1968.

woman; (iii) the continuance of the pregnancy would involve risk, greater than if the pregnancy was terminated, of injury to the physical or mental health of the pregnant woman; (iv) the continuance of the pregnancy would involve risk, greater than if the pregnancy was terminated, of injury to the physical or mental health of any existing child(ren) of the family of the pregnant woman; (v) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped; or in emergency, certified by the operating practitioner as immediately necessary; (v) to save the life of the pregnant woman, or (vi) to prevent grave permanent injury to the physical or mental health of the pregnant woman.

From the above, the scope for legal and safe abortion has been expounded and addressed so as to avoid any ambiguity. The Bourne case of 1938<sup>114</sup> set the ball rolling for abortion in the UK. This case extended the parameters for the health of the mother to include mental suffering and not physical suffering only. This is after the court acquitted the defendant after he helped a 14-year old girl procure an abortion after she was raped and became pregnant. It has been a landmark precedence till to date that has guided the abortion debate in the UK.

#### 4.1.2 Canada

Abortion was illegal in Canada until 1969 when the Canadian parliament passed a law that allowed abortion in certain circumstances to protect the health of the mother. Later on, the Minister of Justice introduced a bill that amended section 251 of the criminal code of Canada<sup>115</sup> which provided for abortions where the health of the mother was in danger and that it had to be approved by a therapeutic committee consisting of three doctors. Further to this, abortion could only be done in accredited hospitals and only by licenced physicians. Any other abortion carried out that did not fit the new amendments was subject to the criminal code sanctions.

January 1988 saw the law on abortion challenged in the Supreme Court of Canada.<sup>116</sup> Three doctors did challenge the constitutionality of section 251 of the Canadian criminal code

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<sup>114</sup> Rex Vs Bourne case, 1938, Crown Court of England and Wales, Central Criminal Court.

<sup>115</sup> Section 251, Canadian Criminal Code; allowing abortion to be performed solely at accredited hospitals with proper certification and approval from the hospitals Therapeutic Abortion Committee.

<sup>116</sup> R v Morgentaler [1988] 44 DLR 4th 385, Supreme Court of Canada.

which only permitted abortion when performed at accredited hospitals and only with the approval of a therapeutic abortion committee that the abortion in question was necessary to protect the woman's physical and mental health. It was argued that the restrictions imposed by section 251 of the Canadian Criminal Code were a violation of section 7 of the Canadian Charter of Rights and Freedoms<sup>117</sup> herein referred to as The Canadian Charter which guarantees the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Majority of the 7 Judges sitting in the supreme court of Canada ruled that the section in question section 251 of the criminal code of Canada violated section 7 of the Canadian charter. The court ruled that forcing a pregnant woman to carry a pregnancy to term was a violation of her right to security of the person. "Forcing a woman, by the threat of sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations is a profound interference with a woman's body and a violation of security of the person." Chief justice Dickson further pointed out that the requirements of certification by section 251 of the Canadian criminal code were excessive and unnecessarily and that its only aim was to prevent women from procuring a safe and legal abortion. With this, the requirements failed to comply with the requirements of justice.

1989 saw a bill presented to restrict abortion fail in the Senate. The bill provided that abortion would be allowed for health reasons only and that any contravention would lead to a maximum jail term of two years. Due to the failure of the bill, abortion laws in Canada are non-restrictive and available to all.

#### 4.1.3 India.

Looking back at the Indian penal code, section 312 to 316 did outlaw abortion and termed it a criminal offence.<sup>118</sup> Section 312 talked about the unlawful termination of a pregnancy which was defined as the offence of causing miscarriage to a woman 'with child'<sup>119</sup> and carried with it a jail term sentence of 3 years or a fine or both. Further, section 312 also did categories the

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<sup>117</sup> Section 7, Canadian Charter of Rights and Freedoms; everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

<sup>118</sup> Indian Penal Code, 1860.

<sup>119</sup> Indian Penal Code, 1860, Section 312; with child defined as period of gestation.

induced miscarriage of a woman 'quick with child'<sup>120</sup> as a criminal offence that carried with it a jail term of 7 years or a fine or both. Section 312 only allowed for the termination of a pregnancy on medical grounds only to protect the life of the mother.

The Indian Penal Code sections on the termination of pregnancies were made void by the coming into force of the Medical Termination of Pregnancy Act of 1971 (MTP Act) which is the governing law on abortion in India.<sup>121</sup> This was formulated so as to create exceptions to the strict provisions that were provided for by the Indian Penal Code. The MTP Act only allows termination of pregnancy only on the first 20 weeks of pregnancy if the continuance of the pregnancy would affect the health of the mother either physically or mentally. Also, where there is a risk that if the child is born, it would suffer physical or mental abnormalities such as to be seriously handicapped and where a pregnancy is caused by rape for the anguish caused by rape and such pregnancy constitute a grave injury to a woman's mental health<sup>122, 123</sup> Further on mental health, abortion is permitted where a pregnancy occurs as a result of the failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children for the anguish caused amounts to injury caused to the mental health of a woman.<sup>124</sup> In India, consent needed to terminate a pregnancy by a woman is her own consent whether married or unmarried and where a woman is below 18 years or mentally challenged, the consent of the guardian is needed. Although abortion is not an absolute right, termination of a pregnancy completely relies on the decision of a medical practitioner based on good faith. If in good faith a medical practitioner allows for abortion on the grounds allowed by the MTP Act, then it is legal but if it is based on bad faith and not in accordance with the MTP Act then the abortion is illegal.

India's abortion laws are complex. But at least they are figured out, unlike Kenya's abortion laws.

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<sup>120</sup> Indian Penal Code, 1860, Section 312; quick with child defined as when there is motion of the foetus and is felt by the mother.

<sup>121</sup> The Medical Termination of Abortion Act, 1971.

<sup>122</sup> The Medical Termination of Abortion Act, 1971, Section 2, Explanation 1.

<sup>123</sup> The Medical Termination of Abortion Act, 1971, Section 2.

<sup>124</sup> The Medical Termination of Abortion Act, 1971, Section 2, Explanation 2.

## 4.2 Conclusion

The Kenyan law on abortion has been extensively discussed in chapter two. Article 26 (4) of the Constitution of Kenya allows for abortion only if in the opinion of trained health practitioner there is a need for emergency treatment or the life or health of the mother is in danger or if it is permitted by any other written law. Further to this, the penal code of Kenya is inconsistent with the provision of the Constitution in Kenya in that it completely outlaws abortion even in the grounds provided for in the constitution.

Kenya when compared to the United Kingdom, Canada and India, it faces most of the issues the three countries did face before changing their abortion laws that were restrictive or denying safe and legal abortion. India and the United Kingdom came up with specific acts to address the issue of abortion. With this, they moved from their previous vague acts that were ambiguous or discriminatory to women's reproductive health rights to new acts that critically addressed the issue. An example as shown above under the Abortion Act in the United Kingdom is that the act clearly lists circumstances under which safe and legal abortion is allowed. Further, it also lists the procedure required to acquire an abortion. The break down clearly shows a clear guideline on the issue which Kenya evidently lacks. India just like the United Kingdom has in place a specific act to address the issue of abortion with clear guidelines on the procedure. The new acts formulated to do away with previous acts or legislation that restricted or denied abortion. This structured the laws on abortion and did away with any confusion or ambiguity. Canada to achieve full protection of women's reproductive health rights had to challenge its law in their highest court which led to the full realisation of women's reproductive health rights.

All these countries share a common history. Been commonwealth countries and having a common system of government. If they have managed to align their laws so as to achieve the full protection of women reproductive health rights especially for victims of rape and sexual violence, why is Kenya still reluctant? Is it that Kenya does not care? Is it that we are ignorant on the issue? Or is it that we are just backward?

## CHAPTER FIVE

### 5.0 Introduction.

Without a doubt, legislation on abortion passed in Kenya clearly shows the laws discriminatory nature on the reproductive health rights of women especially women victims of rape and sexual abuse who end up becoming pregnant. State-sanctioned legislation denying such women their reproductive health right, the right to safe and legal abortion has further resulted in a hostile environment for such women which has resulted further in curtailment of other rights provided for in the Constitution. Such rights include the right to human dignity, equality and freedom from discrimination and freedom and security of person.

A fact is that the proponents of such legislation on abortion attribute their 'wit' from cultural beliefs that are outdated and out of place in a modern society and religious views that are unfounded and a matter of human beliefs not founded on facts. To an extent, they do portray abortion as immoral and a product of western influence that has no room in Kenya. To further deny victims of rape and sexual violence with resulting pregnancies their right to safe and legal abortion, the proponents argue that such laxity on abortion laws destroy the foundations on which our country is built on that is morality and the right to life.

### 5.1 Restating the initial problem.

This study was triggered by the fact that the current abortion laws of Kenya are discriminatory in that they do not take into consideration victims of rape and sexual violence. As brought forth while introducing the problem question, it was argued that pleasure has its consequences but in rape and sexual violence, there is nothing pleasurable. Rape and sexual violence is an act that is barbaric and demeaning to women in society. Further to this, forcing women who are victims bring to term pregnancies as a result of such heinous acts is a form of institutional violence that is discriminatory to them, their human dignity and subjects them to torture both physical and psychological. The constitution of Kenya 2010 in its attempt to fully envisage women reproductive health rights allowed for abortion on the grounds to protect the life or health of the mother when in danger with the opinion of a trained health professional and if permitted by any other written law. As this was a step in the right direction it failed in that it was filled with so much ambiguity. Ambiguity such as who is a

trained health professional and it failed to define what is meant by the life or health of the mother been in danger. This triggered the question is the health of the mother only physical or could encompass both physical and even mental health. Due to this ambiguities, the laws on abortion have ended up been inapplicable and thus discriminatory. From this, the need to rethink abortion as a topic of discussion came to light.

## **5.2 Research Findings**

Through thorough desktop research of international/regional instruments, case laws, jurisprudence on abortion, reports and journals on reproductive health and their related articles, the following was arrived at;

### **5.2.1 The history of abortion laws in Kenya is one founded on colonial ideal fueled by cultural and religious entitlement.**

Chapter two of this study extensively highlighted how the abortion laws in Kenya were born, what they are now and what influenced them into law.

Abortion laws in Kenya were first as a result of colonialism. Colonialism brought with it new religions and ways of life that indeed left an indelible mark on Kenyans. This brought with it new ways in which Kenyans saw life and changed how they would interact from then henceforth. Law that was applicable in Great Britain was directly applied in Kenya as a colony of Britain. The laws did alter the social, cultural and political systems in Kenya in a manner never imagined before. With this, abortion was illegal and carried with it a legal penalty. After Kenya got its independence, the same laws were still applicable in Kenya for the criminal codes used were still used in post-colonial period. This was until the coming in of a new constitution of Kenya. For the first time in Kenya's History, Kenya had the opportunity to formulate its own supreme law. As usual, Kenya never disappoints. The proponents retreated to their religious and cultural cocoons to push for their best interests to be applied as law. This was clearly seen when religious settings and religious groups pushed against abortion claiming it was against their beliefs and an insult to the morals of our great nation. Majority of Kenyan's been religious, supported the move not to allow for abortion with many of them fronting their religious books as the basis for not allowing for safe and

legal abortion even for victims of rape and sexual violence. With this, they failed to take into consideration the effects the denial of safe and legal abortion would have on victims of rape and sexual violence. Clearly, the adage that religion is a determining factor in determining societal attitudes towards abortion proved real. From a personal point of view, this highly contributed to the shady and ambiguous provision of abortion brought forth in the constitution. The lack of independent thinking by lawmakers from their ideological preferences in the making of laws did cost women especially victims of rape and sexual violence their reproductive health right. This also applies to citizens who voted and supported the shady provision on abortion based on their ideologies and not based on facts that denial of such a right to women victims of rape and sexual violence would have catastrophic effects on society at large.

From the effects brought about by laws denying and restricting safe and legal abortion as shown in chapter three further brings into context how laws not thought on and formulated on practical reasonableness or realism damage a society in all aspects. Such laws curtail basic human rights provided for in the constitution further making the situation worse instead of solving the issues that arise.

It cannot be overemphasised that, it is insane for matters relating to abortion to be decided on the moral, religious and cultural convictions of a nation. Such discourse solves no issue. They instead make it worse and that is where we find ourselves in Kenya today.

### **5.2.2 Kenya is and stills lags behind when it comes to women's reproductive health rights.**

As brought forth in chapter four of this research, Kenya is way behind in achieving full women reproductive health rights. It is almost 55 years since Kenya got its independence from its colonial masters. It is true that Rome was not built in a day so Kenya cannot achieve the full realisation of women's reproductive health rights in a day but 55 years is a long time. This is because precedence already set in other jurisdictions and the numerous international and regional treaties advocating for women reproductive health rights that Kenya is part of should form a foundation for Kenya to provide safe and legal abortion especially for victims of rape and sexual violence. Taking commonwealth countries that Kenya is part of, countries that boast of a modern democracy just like Kenya have already dealt with women

reproductive health rights and it is a non-issue. They have in place laws that provide for safe and legal abortion for victims of rape and sexual violence with resulting pregnancies. The term non-issue is used in Kenya not as used in this research paper. In this paper, non-issue means that they have already dealt with the matter, solved it and moved on. In Kenya, a non-issue, as used by The President of Kenya in addressing the plight of the LGBT movement in Kenya, used the word to mean that it is not an issue of concern to Kenyans. People against the reproductive health rights for women victims of rape and sexual violence term this as a non-issue (in the Kenyan context). To them, it may be a non-issue but to the victims, it is a pressing matter that needs to be addressed and dealt with for they are suffering an institutional oppression where laws that are meant to safeguard them are the same laws oppressing them. 55 years later surely the issue cannot still be a non-issue.

### 5.3 Conclusion.

Without a doubt, this study confirms the hypotheses that the laws on abortion in Kenya denying safe and legal abortion for victims of rape and sexual violence is discriminatory to them. It is oppressive and that the laws are based on ideological thinking that should and cannot govern a modern democracy. The laws are founded on colonial ideology fueled by religious and cultural entitlement. Law is directly linked to beliefs and where a majority holds a specific belief they tend to discriminate against the minority. The majority can be wrong while the minority can be right. In this instance the majority is wrong. This leads to discrimination of the minority who are mostly victims of rape and sexual violence and literate like-minded people who are advocating for women's reproductive health rights to procure a safe and legal abortion. Other jurisdictions have solved the issue. Why not Kenya?

### 5.4 Recommendations.

A deep analysis of the laws on abortion in Kenya, how they got to be, what they are and what influences it to be law clearly bring out the ideological contradictions in our legal systems. This then becomes the root of the problem and the reason why we are where we are as a country. Laws formulated on ideology. As clearly put at the beginning of the research, no two people are the same. Not now not tomorrow. What was law yesterday cannot be law today and what is law today could not possibly be law come tomorrow. Times are changing and we

should move with time. Laws should be flexible to allow for the changes that come with human interactions in a growing democracy and a changing world.

Further to this, as a country, we should seriously deliberate on how our laws ought to be legislated and what should form the basis of our laws. We should appreciate that we are a nation of a population of over 40 million people categorised in different ethnic, religious and cultural backgrounds. This brings out different ideologies. With this appreciation of our diverse nature, laws should and cannot be based on the ideology of the majority and that our ideologies should not dictate law simply because we are the majority. A realism approach should be used. Law should not be what law is but the law should be what it ought to be. It should address the issue in question and solve it in the best way that brings justice to the affected. For the law to be law, it must not necessarily be appealing to the majority but appealing to the affected. In this instance, the affected are victims of rape and sexual violence who end up being pregnant. The law should be legislated in a way to allow such victims access to safe and legal abortion. It might not be what the majority wants but if it is what the minority who are the affected want then it is good enough to be law. That is legal realism. Promulgating laws to solve an issue at hand. Law formulated on the ideology of the majority or in any form of ideology that discriminates the minority just because they hold a different view is not law.

With respect to the now laws on abortion, they should be revised on a rational basis far from personal beliefs and ideologies. This will do away with the ambiguity that exists and that women victims of rape and sexual violence would have a remedy to an injustice done to them and a way out of the Institutional Violation of their human rights that has persisted for 55 years and still counting.

## 5.5 Recommendations for further research.

The courts in Kenya should address the legal question on when life begins. This is a difficult question that did emerge in the course of the research. Some jurisdictions have answered the question but it varies from jurisdiction to jurisdiction. Failure of the court to adjudicate over this question in our Jurisdiction will make it difficult to address the question of abortion. For pro-life advocate's advocate that life begins at conception while pro-choice advocate that life

begins at birth. Judicial activism is highly recommended from the public so as to finally put the issue on when life begins to bed for it holds the key to the whole abortion debate.

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