

**THE INVESTIGATION AND PROSECUTION OF SEXUAL AND GENDER
BASED VIOLENCE IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

ROSE WAMBUI MBURU

083688

Prepared under the supervision of

JERUSHA ASIN OWINO

FEBRUARY 2018

WORD COUNT: 14141

TABLE OF CONTENTS

CONTENT	Page
Acknowledgements	v
Declaration	vi
Abstract	vii
List of Abbreviations	viii
List of cases	ix
List of Legal Instruments	x
CHAPTER ONE: INTRODUCTION	
1.1. Background of the Problem	1
1.2. Statement of the Problem	3
1.3. Statement of Research Objectives	3
1.4. General Aims of the Study	3
1.5. Hypothesis	4
1.6. Research Questions	4
1.7. Justification of the Study	4
1.8. Limitations	4
1.9. Definition of Terms: SGBV	5
1.10. Outline of the Dissertation	6
1.11. Summary of Overall Results	6
1.12. Summary of Overall Conclusion	6
1.13. Chapter Summary	7

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1. The Social Contract Theory	8
2.2. Feminist Legal Theory	9

CHAPTER THREE: LEGISLATIVE FRAMEWORK

3.1. National Instruments	12
3.1.1. The Constitution of Kenya	12
3.1.2. The Sexual Offences Act	13
3.1.3. The Penal Code	14
3.1.4. Children's Act	14
3.1.5. Criminal Procedure Code	14
3.1.6. The Prohibition of Female Genital Mutilation Act	14
3.2. National Policies	15
3.2.1. Monitoring and Evaluation Framework	15
3.2.2. Education and Gender Policy	15
3.2.3. Adolescent and Reproductive Health Development	16
3.3. Regional and International Instruments	17

CHAPTER FOUR: THE INVESTIGATION AND PROSECUTION OF SGBV: PARTICIPANTS

4.1. Victim	20
4.2. Police Services	21
4.3. Medical Personnel	24
4.4. Prosecution	26

CHAPTER FIVE: CASE STATISTICS IN THE CRIMINAL JUSTICE SYSTEM AND PEV

5.1. Case Statistics in the Criminal Justice System	29
5.1.1. Subordinate Courts	29
5.1.2. High Court: Criminal Appeals	30
5.1.3. Remand Admission	30
5.2. Post-Election Violence 2007: Sexual Offences	31
5.3. Post-Election Violence 2017: Sexual Offences	33

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1. Conclusion	36
6.2. Recommendations	38
Bibliography	41

Acknowledgements

I would like to thank my parents and friends for their continued support and encouragement to complete this dissertation. I further appreciate the input and insight offered by my supervisor that helped shape the dissertation. I would also like to thank all the researchers and writers who furthered work that contributed to my research. Your efforts in the field do not go unrecognised. Lastly I would like to thank God for through him all things are possible.

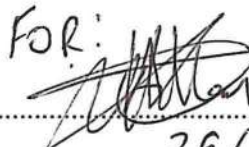
Declaration

I, ROSE WAMBUI MBURU, 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:

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

FOR: 

Date: 29/3/18

JERUSHA ASIN OWINO

ABSTRACT

The objectives of this research project are to outline the laws currently enacted to govern and combat Sexual and Gender Based violence in Kenya (SGBV), to outline the investigation and prosecution process of SGBV by laying out the roles of the participants in the process and to determine whether the process has been successful in responding to SGBV. The process shall also be examined from the lens of SGBV in Post-Election Violence. The participants are the victim, police officers, medical officers, and the prosecution. The scope of the project is the practice of investigation and prosecution of SGBV and does not assess the causes and effects of SGBV. The methodology used is desk based research with a focus on internet and library qualitative resources. The project finds that the practice of investigation and prosecution of SGBV in Kenya has not been successful in its response to SGBV. It is concluded that it is mainly because the roles of the participants in the process are not fully performed by them as required by law and policy thus creating gaps in the investigation and subsequently the prosecution of SGBV. The main suggestions are the proper implementation of the legislation and comprehensive policies already in place, creation of gender desks at all police stations and for the continued training of the participants.

LIST OF ABBREVIATIONS

ACORD	-	Agency for Cooperation and research in Development
ACRWC	-	African Charter on the Rights and Welfare of the Child
ARV	-	Antiretroviral
CEDAW	-	Convention on the Elimination of Discrimination against Women
CIPEV	-	Commission on the Investigation of Post-Election Violence
DEVAW	-	Declaration on the Elimination of Violence against Women.
FIDA-KENYA	-	Federation of Women Lawyers Kenya
HRW	-	Human Rights Watch
ICC	-	International Criminal Court
IPOA	-	Independent Police Oversight Authority
KHDS	-	Kenya Health Demographic Statistics
MOH	-	Ministry of Health
NCAJ	-	National Council on the Administration of Justice
NCRC	-	National Crimes Research Crimes
NGEC	-	National Gender and Equality Commission
ODPP	-	Office of the Director of Public Prosecutions
P3	-	Kenya Police Medical Examination form
PEP	-	Post Exposure Prophylaxis
PEV	-	Post Election Violence
PRC	-	Post Rape Care
PRSP	-	Property Reduction Strategy paper
SAE Kit	-	Sexual Assault Evidence kit
SGBV	-	Sexual and Gender Based Violence
STI	-	Sexually Transmitted Infection
UNHCR	-	United Nations High Commissioner for Refugees

LIST OF CASES

1. *JWM, COVAW & 10 others v The Attorney General, Director of Public Prosecutions Kenya and five others* [2013].
2. *CK (a child through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police, the Inspector General of the National Police Service & 3 others* [2013] eKLR.
3. *Republic v Anthony Mutua Mutinda*, [2008] KWJA 1 at 24.
4. *Jacob Odhiambo v R*, [2008], eKLR.
5. *Republic v Samuel Wanjala Njongirire*, [2008], KWJA 1 at 76
6. *Julius Mwangi Kinyanganya v Republic*, [2015] eKLR

LIST OF LEGAL INSTRUMENTS

National Instruments

1. The Constitution of Kenya, 2010.
2. Sexual Offences Act, No 3 of 2006
3. Sexual Offences Regulations, 2008
4. National Police Service Act, No 11 of 2011.
5. Sexual Offences (Dangerous Offenders, DNA databank) Regulations, 2008.
6. Sexual Offences Rules of Court, 2014
7. The Penal Code, Cap 63 of the Laws of Kenya
8. The Female Genital Mutilation Act of 2011
9. The National Gender and Equality Commission Act 2011.
10. The Criminal Procedure Code, Cap 75 of the Laws of Kenya
11. The Office of the Director of Public Prosecutions Act, 2013.
12. Children Act 2001.

International Instruments

1. Convention on the Elimination of all Forms of Discrimination against Women, 1979, UNTS 1249, 13.
2. African Charter on the Rights and Welfare of the Child, 1990, CAB/LEG/24.9/49 Vol. 1249.
3. The United Nations Declaration on the Elimination of Violence against Women, 1993, A/RES/48/10

CHAPTER ONE

INTRODUCTION

1.1. Background of the problem

The Commission of Inquiry into Post-Election Violence (CIPEV) published a report in 2008 that gave an analysis of the violence that occurred between December 2007 and March 2008. Chapter six of that report is specifically dedicated to sexual violence during that time. In the Report, it is clearly established through witness and victim statements including statements from expert witnesses that sexual crimes of rape, gang rape, defilement, genital mutilation, sodomy, forced circumcisions and sexual exploitation were experienced by both men and women, adults and children alike.¹ The perpetrators of these crimes identified by the witnesses included state agents such as the police, members of organized gangs, neighbours, friends, relatives and aid workers in displacement camps.² The Report provided a basis for investigation and issued recommendations for the prevention of such crimes in the future such as the creation of Gender Units in every police station that will treat sexual crimes with the sensitivity they demand and training of security personnel on the sensitivity required to handle sexual violence.³

Six years after the CIPEV Report was published, a constitutional petition was lodged in the High Court of Kenya in Nairobi, on 20th February 2013, by four Kenyan non-governmental organizations, six women and two men against the Attorney General, the Director of Public Prosecutions, the Inspector General of the National Police Service and others.⁴ The petitioners claimed a failure on the part of the government during the 2007/2008 post-election violence (PEV) in; preventing sexual and gender based violence (SGBV), providing emergency medical services to the victims, protecting the victims of SGBV perpetrated by both state actors and non-state actors and failing to establish investigations into the unlawful acts of SGBV during the 2007/2008 PEV.⁵ The case lodged was a constitutional case seeking to establish a violation of the repealed and current constitution by the Government of Kenya in protecting, addressing and redressing SGBV victims during

¹ Commission of Inquiry into Post-Election Violence (CIPEV) Report, Chapter Six, 244, 2008.

² CIPEV report, Chapter six, 252, 2008.

³ CIPEV report, Chapter six, 269.

⁴ JWM, COVAW & 10 others v The Attorney General, Director of Public Prosecutions Kenya and five others [2013].

⁵ Open Society Justice Initiative, SGBV Victims Seek Justice for Post-Election Violence, February 2013.

2007/2008 violence. The case is still ongoing.

In the same year the constitution petition was filed before the High Court, a case was filed before the High Court in Meru. The case was brought by 11 petitioners, survivors of defilement among other forms of sexual violence and child abuse between the years of 2008 and 2012. The petitioners had made numerous reports on the same at various police stations in Meru County but the police either neglected, omitted, refused and or failed to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' complaints which was a miscarriage of justice. The court, found that neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement violates the petitioner's fundamental rights and freedoms including that of equal protection and benefit before the law.⁶ The judge said;

Having considered the evidence in the petitioner's' affidavit and the petition herein, the relevant articles in the Constitution of Kenya, 2010, the general rules of international law, treaty or convention ratified by Kenya and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence infringes on the petitioners fundamental rights and freedoms, under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1) (d) of the Constitution of Kenya, 2010.⁷

This was more so evident when the functions⁸ of the police were reviewed as stipulated in the National Police Service Act as the

Provision of assistance to the public when in need;

(b) Maintenance of law and order;

...

(e) Investigation of crimes;

⁶ *CK ((a child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police, the Inspector General of the National Police service & 3 others* [2013] eKLR

⁷ *CK (a child through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police, the Inspector General of the National Police Service & 3 others* [2013] eKLR, 15/17.

⁸ Section 24, National Police Service Act, No 11 of 2011.

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime

(h) Apprehension of offenders ;(-) enforcement of all laws and regulations with which it is charged...”⁹

The many laws surrounding SGBV are not however reflected in the practice. The Kenya Health Demographic Survey (KHDS) conducted in 2014 found that 20 percent men and 12 percent women had experienced a form of physical violence twelve months before the survey and that 8 percent of the women and 3 percent of the men had experienced sexual violence 12 months prior to the survey.¹⁰ The violence fits the definition of SGBV by the United Nations High Commissioner for Refugees of SGBV as involving physical, emotional, psychological and sexual violence against men and women.¹¹ Thus, we can identify a disconnect between the numerous laws enacted to combat SGBV and the response on the ground in regards to investigations by the police as well as prosecutions by the Office of the Director of Public Prosecutions (ODPP).

1.2. Statement of the Problem

The practice of investigation and prosecution of SGBV in Kenya has not been successful in responding to the prevalence of incidents. The problem emerges when the actual investigations and reported prosecutions of SGBV are compared and contrasted to the wealth of laws and policies enacted to combat the same. A question is raised on the quality of practice of investigation and prosecution of SGBV in Kenya

1.3. Statement of Research Objective

The general objective of this paper is to analyse the legal process of investigation and prosecution of SGBV in Kenya in light of the relevant legislation and policies enacted to govern the same both nationally and internationally. The paper shall thus identify the agents charged with the functions of investigation and prosecution of SGBV in Kenya. The paper shall also look at how and why functions are not fulfilled.

1.4. General Aims of the Study

⁹ *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* [2013] eKLR.

¹⁰ Kenya Health and Demographic Survey (KHDS), Domestic Violence, 207-300.

¹¹ United Nations High Commissioner for Refugees UNHCR, Sexual and Gender Based Violence, <http://www.unhcr.org/sexual-and-gender-based-violence.html> on 08 February 2017.

The general aims of the study are to outline the laws and policies governing and combating SGBV in Kenya, to outline the process of investigation and prosecution of SGBV and to identify the reasons why the process has not been successful.

1.5. Hypothesis

There is insufficient application and implementation of the laws and policies that exist to combat SGBV by the participants directly involved in the investigation and prosecution of the same which is due to lack of enforcement mechanisms, coordination efforts and training.

1.6. Research Questions

What is the legal process of investigation and prosecution of SGBV in Kenya as per the legislation enacted? How does it disconnect from actual practice on the ground as facilitated by the National Police Service as investigators and the office of the Director of Public Prosecution as prosecutors? What is the aftermath of the practice on the ground when compared to the legislation?

1.7. Justification of the Study

The investigation and prosecution of SGBV has not been successful in its response to SGBV. This is in spite of the numerous laws that have been enacted towards preventing and responding to SGBV. Prevalence and perpetuation is

The study is justified on the basis that although there are numerous laws and policies that Kenya has enacted towards the response to SGBV, there is a great disconnect between the expected outcomes of these laws and the practice of investigation and prosecution of SGBV. This paper seeks to identify and address this disconnect.

1.8. Limitations

This paper limits its study to the prevalence of SGBV in Kenya when contrasted to the investigation and prosecution of the same in Kenya. The paper shall not look at the forms, causes and effects of SGBV.

The paper is further limited by the lack of a personalised view of the victims of SGBV who have interacted with the process of investigation and prosecution process in Kenya while in the search of legal recourse.

Finally, the paper is limited by a lack of published statistics regarding the prosecution of SGBV in Kenyan courts, the strengths and weaknesses in the process of prosecution,

success of conviction and appeals made regarding sentencing and errors of law.

1.9. Definition of terms: SGBV

Sexual and Gender Based Violence entails two elements. The first is sexual based violence which is violence of a sexual nature and the second is gender based violence which is violence that is meted out on the basis of gender.

Sexual Based Violence is defined in Kenyan policy as the actual, attempted or threatened rape including marital rape; sexual abuse and exploitation; forced prostitution; transactional/survival sex; and sexual harassment, intimidation and humiliation.¹² The policy paper on sexual and gender based violence of the International Criminal Court (ICC) describes sexual crimes as an act of sexual nature, against a person, and by force or coercion or force of threat or coercion. The act is not limited to physical violence and may not include physical contact for example, forced nudity. The definition thus covers both physical and non-physical acts with a sexual element.¹³ The policy paper is relevant to Kenya insofar as it captures extensive international policy debates on the definition of SGBV.

Gender based violence in Kenya is defined as violence visited upon a person based on their gender and includes sexual violence, intimidation, physical abuse, verbal abuse, stalking or any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health, wellbeing of the person, or any other act that results in or is likely to result in physical, sexual or psychological harm or suffering including threats of such acts, coercion, or arbitrary deprivations of liberty, whether occurring in public or private life.¹⁴ The ICC policy paper defines Gender Based Violence crimes as crimes committed against persons whether male or female because of their socially constructed gender roles. They are not always sexual violence crimes and may include non-sexual attacks on women or men based on their gender.¹⁵

These different definitions clearly show that sexual violence is a type of gender based violence. Perhaps because of how rampant sexual violence is, it requires a more specific understanding for better prevention and response. Gender based crimes are crimes based on gender. The UNHCR,¹⁶ thus summarises SGBV as any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It

¹² NGECC, County Government Policy on Sexual and Gender Based Violence, 2017, 8.

¹³ ICC, Office of the Prosecutor, Policy Paper on Sexual and Gender Based Crimes, 2014, 3.

¹⁴ NGECC, County Government Policy on Sexual and Gender Based Violence, 2017, 8.

¹⁵ ICC, Office of the Prosecutor, Policy Paper on Sexual and Gender Based Crimes, June 2014, 3

¹⁶ UNHCR, <http://www.unhcr.org/sexual-and-gender-based-violence.html>, on 03/02/2018.

encompasses threats of violence and coercion. It can be physical, emotional, psychological, or sexual in nature and can take the form of denial of resources or access to services. It inflicts harm on women, girls, men and boys.

1.10. Outline of Dissertation

The first chapter serves as an introduction to the dissertation by giving the background of the problem and the objectives of the dissertation. The second chapter, the theoretical framework, focuses on the social contract theory and Feminist Legal Theory. The third chapter outlines the legislative framework governing SGBV in Kenya. This is inclusive of national policies and regional and international instruments. The fourth chapter will address the participants in the process of investigation and prosecution of SGBV and their roles. These participants are the victims, police officers, medical officers and public prosecutors. The chapter further looks at how these roles are not met. The fifth chapter discusses the failure of the investigation and prosecution process of SGBV through the lens of case statistics and Post-Election Violence. The final chapter, chapter six, concludes the dissertation and gives recommendations on the ways the process can be improved.

1.11. Summary of Overall Results.

This dissertation finds that there is a wealth of legislation and policies enacted to combat SGBV in Kenya. Additionally, there exists in place a system that is intended to respond to SGBV. This system functions because of the direct participation of the victim, the police officers, medical officers and prosecutors. They all have roles to play. Case statistics in the criminal justice system indicate that withdrawals, acquittals and appeals are high for SGBV crimes which calls into question the quality of prosecution and subsequently investigation of these crimes. Lastly, during Post-Election Violence the roles by medical and police officers are played very poorly.

1.12. Summary of Overall Conclusion

The wealth of legislation enacted does not comprehensively cover aspects of SGBV such as marital rape and forced circumcisions. The roles of the participants in the investigation and prosecution process are not fully occupied. This means that the process has gaps which results in poor prosecution of cases. The consequence of this is that SGBV crimes have a high likelihood of withdrawal, acquittal or appeals. The investigation process is rarely successful after Post-Election Violence mainly because of the inaction of medical officers

but more so police officers.

1.13. Chapter summary

This chapter introduces the reader to the dissertation topic which is on the investigation and prosecution of SGBV in Kenya. The general purpose of this chapter is to contextualize the topic and clarify on the research questions that the writer will focus. This is achieved through stating the hypothesis, justification and limitations the writer is relying on so as to discuss the problem stated which is that the process of investigation and prosecution has not been successful. The chapter further offers the reader an outline of the entire dissertation and defines terms that will be used in the paper. The chapter concludes by giving a summary of the results and the conclusion of the dissertation.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1. The Social Contract Theory

Based on the UNHCR definition of SGBV, this paper will largely rely on the social contract theory and its views regarding the obligations of the state as regards its nationals. The theory was given its full exposition by Thomas Hobbes¹⁷ and furthered by John Locke¹⁸ and Jean Jacques Rousseau¹⁹. Before the social contract, man was in a state of nature and was governed by the law of the jungle. Each man was capable of survival only to the extent of their prowess. While this state of living worked for some it mainly failed to succeed first because the law of nature was not clear and each individual gave the law of nature their own unique interpretation. Second, there were no impartial and objective judges to interpret the law of nature. Third and finally, there was no common and competent authority to enforce the law of nature.²⁰

The advancers of the theories differed on their view of man and on some details of the theory such as the God status of the elected leader. They did however agree that the theory imposed on the government responsibilities in regard to its citizens. The principle function of government is to protect the lives of the citizens, to protect the remaining liberties of the citizen and to protect the property rights of the citizen.²¹

Generally, the theory states that the social moral and political obligations of persons rely heavily on an agreement among them to come together and form a fully functioning society; government included. Like any other contract, there is consideration from both parties to a contract, the nationals that make up a sovereign and the appointed assembly governs the sovereign. There is thus an exercise of restriction on certain liberties and maintenance of social order as enforced by the appointed authority who is in turn paid tax for the exercise of their power and the fulfilment of their obligations.²²

It should be noted however, that while the theory addresses the exercise of power over nationals for the fulfilment of obligations, it further advocates that the people rise up against

¹⁷ Hobbes T, *Leviathan*, England, Oxford University Press, Oxford 1651.

¹⁸ Locke J, *Second Treatise of Government*, London, 1689.

¹⁹ Rousseau J, *The Social Contract*, E. P. Dutton & Co., New York 1913.

²⁰ John Locke Social Contract Theory, www.studylecturenotes.com, on 20th January 2018.

²¹ Classical Theory of Government and the Social Contract, www1.udel.edu, on 20th January 2018.

²² Internet Encyclopaedia of Philosophy, Social Contract Theory, <http://www.iep.utm.edu/soc-cont/> on 28th January 2017.

the government when it fails to enforce to enforce their rights and security. This is in itself a limitation in its application in the paper as the stand is not echoed in this paper. What this paper does emphasize on however is that the basic will of the people and the basic function of the government is to protect natural and inalienable rights. Failure to meet its obligation should result in a change of the government through the democratically outlined options available to the people.²³

The obligation of governments to protect its citizens is performed through the enactment of legislation. Legislation is intended to organise citizens and protect the society through the means seen fit by the legislative bodies. Numerous laws have been passed in Kenya to combat SGBV but the expected outcome of lowered prevalence and combating of SGBV is yet to be felt. Why have the laws enacted failed to successfully intercept the commission of SGBV as intended?

2.2. Feminist Legal Theory

Feminist legal theory attempts to answer the foregoing question. The basic precept of feminist legal theory is that the law has been fundamental in the historical subordination of women. For example, the most basic theory that feminists have posed to traditional views of rape lies in the recognition of rape as a crime against the individual herself. For much of recorded history, women were the property of men. In this context, rape was regarded as a property crime against a woman's husband or father. Access to justice for survivors of marital rape in Kenya is extremely difficult and rare. If at all the perpetrator makes it to the courts, they are charged with sexual assault instead because the law has failed to comprehensively articulate marital rape as a criminal offence.²⁴ The marital rape exemption from sexual offences law is clearly a remnant of this approach assuming as it does that no crime is committed when a man forces himself upon his wife.²⁵ The theory thus seeks to explain the ways in which the law played a role in women's former subordinate status. The theory additionally focuses on changing the status of women through a reworking of law and its approach to gender.²⁶

²³ John Locke Social Contract Theory, www.studylecturenotes.com, on 20th January 2018.

²⁴ National Crime Research Centre, Gender Based Violence in Kenya, Nairobi, 2014, 27

²⁵ Stanford Encyclopaedia of Philosophy: Feminist Perspective on Rape, <https://plato.stanford.edu/entries/feminism-rape/>, on 01 February 2018

²⁶ Scales A, Legal Feminism, Activism, Lawyering and Legal Theory, New York University Press, 2006. Fineman M, Feminist Legal Theory, Journal of gender, social policy and the law, 13-32.

Liberal feminists would state that the law has not been successful because of the biased attitude of police officers, prosecutors and judges, the majority of whom are male. Other feminists point to the persistent economic inequality between men and women, with resulting dependence that makes it harder for women to leave abusive relationships or to resist harassment.

Dominance feminists on the other hand would say that the law reflects a way of thinking in which masculinity means strength, forcefulness, aggressiveness and domination and femininity means delicacy, resistance and subordination. Additionally, men and boys who fail to conform to socially acceptable notions of what it means to be a man are vulnerable to physical, emotional and sexual abuse.²⁷ Most recently, some feminists have explored the role of structural injustice in maintaining gender oppression.²⁸

What solutions do feminists offer? Legislative and trial practices that would treat domestic violence and gender based violence as a part of the systematic cultural environment that discriminates against women. Medical alternatives such as therapy minimize these issues as personal issues, diseases of the mind and family dysfunction. The male perpetrator is not regarded as a responsible human agent acting out of anger and causing serious harm.²⁹

A different perspective with which feminists view the question of the ineffectiveness of law to meet its intended purpose is through a criticism of the social contract theory on which society is founded. Feminists argue that the characteristics of the legal person seem to connect with the experiences of many men but far fewer women. It would seem to be a function of a positive and genuine commitment on the part of the law and its agents to a traditional view of the sexes. Susan Okin³⁰ analyses the writings of Hobbes and Locke and concludes that the sort of person they had in mind all along in developing their notions of citizenship and civic personhood, is not an abstract ungendered individual but a man acting on behalf of a family. Locke, for instance, reneges on his commitment to the equal rights of women by maintaining that there is indeed a foundation in nature for the subordination of wives by husbands. Other feminists have stated that classical theorists of the social

²⁷ Restless Development, Men and Boys and Sexual Gender Based Violence, October 2014, 2.

²⁸ Parekh S, Getting to the Root of Gender Inequality: Structural Injustice and Political Responsibility, Vol. 26, No. 4, Responsibility and Identity in Global Justice, 2011, 672-689.

²⁹ Stanford Encyclopaedia of Philosophy; Feminist Philosophy of Law, <https://plato.stanford.edu/entries/feminism-law/>, on 01 February 2018.

³⁰ Okin S, Western Political Thought, Princeton University Press, 1979.

contract assumed that male dominance achieved through marriage was part of the natural condition. The fetters imposed on women upon marriage were therefore both built into and sanctioned by the story of the social contract. This reasoning thus begs the question, if the legal subject of the laws enacted to protect women against gendered offences is a man how is the law supposed expected to succeed in its endeavours?³¹

Because of the social constructions of masculinity that state that men are strong, tough and fighters and therefore cannot be vulnerable to abuse, men and boys too are vulnerable to SGBV. Common forms experienced include male on male rape, domestic violence from their partners and physical, emotional and sexual abuse during rituals of circumcision. Abuse of men is generally not talked about and this makes it very difficult to seek help.³²

³¹ Ngairé N, 'The Man of Law', *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen and Unwin, 1990, 100-123

³² Restless Development, *Men and Boys and Sexual and Gender Based Violence*, 2014, 3.

CHAPTER THREE

LEGISLATIVE FRAMEWORK

This chapter shall review the legislative framework governing SGBV in Kenya.

3.1. National Instruments

3.1.1. *The Constitution of Kenya 2010*

In addition to the bill of rights which guarantees a wide variety of rights and freedoms, the Constitution contains provisions that speak to the importance of gender equality and that have a bearing on gender based violence in the country. The national values and principles of governance are set out in Article 10 (2) (b) and they include social justice, human dignity, social justice, equality, human rights, inclusiveness, non-discrimination and protection of the marginalised. In that regard, article 19 (2) provides the purpose of recognising and protecting human rights and fundamental freedoms as being the preservation of the dignity of individuals and communities and the promotion of social justice and the realisation of the potential of all human beings. In meeting this objective, article 21 (1) imposes on the state and all state organs a positive duty to observe, respect, protect, promote and fulfil the rights and freedoms enshrined in the Bill of Rights.

What provisions speak to SGBV within the Bill of Rights? Article 25 guarantees the fundamental freedom from cruel or degrading treatment. SGBV takes on a sexual, physical, emotional or psychological nature that at times can be either degrading or cruel. Article 27 contains a detailed clause on equality and freedom from discrimination. This clause is commendable because first it states that men and women have the equal right to treatment and equal opportunities in the political, economic and social sphere.³³ Second, the grounds under which the state is not to discriminate are broader when compared to the previous constitution. Grounds that have been added as points of non-discrimination include health status, pregnancy, marital status, disability and dress.³⁴ Third, the provision of non-discrimination applies horizontally among all persons in Kenya and does not only apply to the state and its organs.³⁵ Finally, there is a constitutional provision for the principle of affirmative action so as to give full effect to the realization of the rights guaranteed under

³³ Article 27(3) Constitution of Kenya, 2010.

³⁴ Article 27(4) Constitution of Kenya, 2010.

³⁵ Article 27(5) Constitution of Kenya, 2010.

the article.³⁶ This is a recognition that in order to give full realization to the clause on equality before the law there is a need to enact legislation to correct the current hurdles preventing its realisation. There is also a need to take measures to redress past patterns of discrimination such as those relative to gender relations.

Article 28 states that every person has inherent dignity and the right to have that dignity respected. Article 29 guarantees the right to freedom of security of the person which includes the right not to be subjected to any form of violence from either public or private resources and treated in a cruel, inhuman and degrading manner. This right means that the constitution safeguards women against SGBV.

3.1.2. *The Sexual Offences Act of 2006*

This Act that makes provisions on sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts and for other connected purposes. The Act defines different sexual offences such as the offences of rape, sexual assault, defilement and attempted defilement, gang rape and indecent act with child or adult among others. Regardless of all the offences contained in the Act, there are still more offences that happen on a day to day basis and are yet to be included such as marital and date rape. The CIPEV report on sexual violence during post-election violence reveals that there were victims of genital mutilation and forced circumcision which are not included in the Act.³⁷

The Act does however contain provisions on adducing evidence of surrounding circumstances and the impact of sexual offence on the victim³⁸ as well as a provision stating that evidence as to character and previous sexual history shall not be adduced unless so required.³⁹

The Act also has subsidiary legislation⁴⁰ which contains provisions on among others.⁴¹ Medical treatment regulations 2012. A relevant provision is section 3 which guarantees the

³⁶ Article 27(6) Constitution of Kenya, 2010.

³⁷ CIPEV report, Chapter Six, 2008, 252.

³⁸ Section 33, Sexual Offences Act, No 3 of 2006.

³⁹ Section 34, Sexual Offences Act, No 3 of 2006.

⁴⁰ Sexual Offences Rules of Court, 2014.

⁴¹ Sexual Offences Regulations, 2008.

right to medical treatment of a victim, suspect, a person convicted or witness of a sexual assault in a public hospital, private hospital or any other medical facility.

3.1.3. *The Penal Code*⁴²

The Penal Code prohibits all forms of violence but does not sufficiently address SGBV which can only be inferred by virtue of interpreting the vice as an assault as provided for under unlawful assault and assault occasioning actual bodily harm as contained in section 250 and 251. Section 151 deals with the detention of females for immoral purposes. There is no specific provision addressing domestic violence. The lack of provisions dealing with specific instances of SGBV poses a challenge in the fight against these offences.

3.1.4. *The Children's Act, 2001*

The Act contains provisions on the rights that a child has and the duties and obligations of the government, parents and others in relation to the child. The rights apply to all children without discrimination. Section 13 specifically guarantees children the right to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking and abduction. Section 14 protects children from female circumcision, early marriage or other cultural rites, customs or traditional practices which are harmful to the child's development.

3.1.5. *The Criminal Procedure Code 2012*

The Code sets out the process to be followed in criminal cases from the point of reporting a charge to sentencing and appeals of the charge. These criminal cases include the gender based and sexual offences. More specifically, section 3 of the code requires that offences under any law which includes the sexual offences act shall be investigated, tried and dealt with in accordance with the process set out within the criminal procedure code.

3.1.6. *The Prohibition of Female Genital Mutilation Act 2011*

This is an act of parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes. The act creates the offence of female genital mutilation, aiding and abetting female genital mutilation, procuring a person to perform the

⁴² The Penal Code, Cap 63.

act, using of premises to perform the act, possession of tools or equipment, failure to report commission of offence and use of derogatory or abusive language.⁴³

Other laws include the National Police Service Act, 2011 which lists the functions of police officers.⁴⁴

3.2. National Policies

*3.2.1. National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya, 2014.*⁴⁵

The Framework is a publication by the National Gender and Equality Commission as a fulfilment of its functions.⁴⁶ The Framework establishes one integrated and functional/ing SGBV multi-sectorial monitoring and evaluation system by coordinating efforts of stakeholders; provides for the monitoring and evaluation of national efforts in the prevention of and response to SGBV and contributes to evidence-informed funding, advocacy, decision making and programming. The Framework focuses on sexual violence as a form of GBV. The framework lays out the roles and responsibilities of stakeholders in SGBV prevention and response to SGBV. These stakeholders include the National Police Service and the prosecution.⁴⁷

3.2.2. Education Gender Policy, 2007

The prevention of and response to school related gender based violence is addressed within this policy. The policy gives the recommendations of mainstreaming of policies addressing SGBV at all education levels; establishing modalities for dealing with SGBV; developing a framework for coordination of stakeholders involved in efforts of providing a safe learning environment and developing and implementing clear anti-sexual harassment and anti-gender based violence policies at all levels in the Ministry of Education and all Education Institutions.

⁴³ Part IV, The Prohibition of Female Genital Mutilation Act, 2011.

⁴⁴ Section 24, National Police Service Act, 2011.

⁴⁵ National Gender and Equality Commission (NGEC), National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya, December 2014.

⁴⁶ Section 3, National Gender and Equality Commission Act, 2011.

Section 8, National Gender and Equality Commission Act, 2011.

⁴⁷ NGEC, National Monitoring and Evaluation Framework towards the prevention of and Response to Sexual and Gender Based Violence in Kenya, 2014.

3.2.3. *Adolescent and Reproductive Health Development Policy 2003*

The policy was developed by the Ministry of Health as a response to concerns about adolescents raised in the National Population Policy for Sustainable Development. The policy examines the prevailing social, economic, cultural and demographic context of adolescent sexual and reproductive health, its implications and consequences to their health and development.⁴⁸

The policy brings to light adolescent health issues. The policy identifies harmful practices as early marriage, female genital cutting, sexual abuse and violence and drug and substance abuse. It includes combative strategies for the practices such as providing appropriate health information and establishing support services at all levels.⁴⁹ The policy recognizes that while both boys and girls are prone to being victims of sexual abuse, girls are three times more likely to be sexually abused than boys. The policy states that girls that suffer sexual abuse are more probable to being sexual intercourse on average one year earlier and are also more likely to become pregnant before the age of seventeen.⁵⁰ The policy thus recommends development of safety nets and rescue mechanisms for victims of sexual abuse and violence and enhancing measures to protect young people in penal institutions from sexual abuse.⁵¹ The policy is currently under review.

Other policies include the Multi-Sectorial Standard Operating Procedures for Prevention and Response to Sexual Violence in Kenya 2013 as developed by the Task force on the Implementation of the Sexual Offences Act which provide for the minimum package care to be accorded to survivors across sectors and further outlines referral pathways in cross sectorial management of survivors.⁵² Finally, the policy framework for the Implementation of Post-Rape Care Services 2005, ensures the inclusion of sexual violence as a key issue within the Reproductive Health Strategy 2009 and sets out the development standards for service delivery post rape.

⁴⁸ Ministry of Health, MOH, Adolescent and Reproductive Health Development Policy, 2003, 5.

⁴⁹ MOH, Adolescent and Reproductive Health Development Policy, 2003, 12.

⁵⁰ MOH, Adolescent and Reproductive Health Development Policy, 2003, 11.

⁵¹ MOH, Adolescent and Reproductive Health Development Policy, 2003, 13.

⁵² Task Force on Implementation of the Sexual Offences Act, Kenya, Multi-Sectorial Standard Operating Procedures for Prevention and Response to Sexual Violence in Kenya 2013, 7.

Another document of importance in relation to SGBV in Kenya are the National Guidelines on the Management of Sexual Violence.⁵³ The guidelines give information about management of sexual violence in Kenya and focus on the necessity to avail services that address all the needs of a sexual violence survivor.⁵⁴

3.3. Regional and International Instruments

These instruments recognise the fact that violence against women is an impediment to the right to peace and development enjoyed by women. They encourage the elimination of all forms of violence against women and oblige states to take measures that are appropriate so as to end violence against women and girls. Some instruments that specifically address GBV include the Convention on Elimination of All Forms of Discrimination against Women.⁵⁵ The Convention establishes international standards for ensuring equality between men and women within the family as well as between the family and state. The United Nations Declaration on the Elimination of Violence against Women⁵⁶ (DEVAW) includes instructions in article 4 to states to not invoke any custom, tradition, or religious consideration to avoid their obligations with respect to its elimination. DEVAW was important in the fight against SGBV because it framed violence against women within the framework of human rights, it identified being female as the primary risk factor for violence and broadened the definition of gender based violence to include all aspects of women and girls' lives.⁵⁷ While DEVAW contains very specific and relevant provisions on strategies to combat violence against women, it is a declaration which is a mere statement of aspirations that states have. The declaration is not binding in the same way a convention is and as such does not form part of the laws of Kenya as envisioned in Article 2 of the constitution.

The African Charter on the Rights and Welfare of the Child⁵⁸ requires states to take all measures necessary to protect the child from abuse and torture and cruel treatment. There have been other regional instruments sanctioned by the African Union and regional bodies

⁵³ Ministry of Health, MOH, National Guidelines on Management of Sexual Violence in Kenya, 3rd Edition, 2014.

⁵⁴ MOH, National Guidelines on Management of Sexual Violence in Kenya, 2nd Edition, 2009.

⁵⁵ Convention on Elimination of All Forms of Discrimination against Women, 19 February 1979, treaty Series vol. 1249, 13.

⁵⁶ The United Nations Declaration on the Elimination of Violence Against Women, 20th December 1993,

⁵⁷ Dr Jolanta R, Historical and Theoretical Discourse Surrounding Gender Based Violence Research, www.lsc.vu.lt, on 01 February 2010.

⁵⁸ The African Charter on the Rights and Welfare of the Child, 2009, CAB/LEG/24.9/49 Vol 1249.

like the International Conference on Great Lakes Region and the Intergovernmental Authority on Development that are relevant and applicable to gender based interventions such as the Maputo Protocol 2003.⁵⁹

The laws and policies in this chapter are a reflection of the steps Kenya has taken to recognise and respond to the issue of violence against women. There is need for review of outdated policies. Current laws also need to be reviewed so as to include other SGBV crimes such as forced circumcision. Nonetheless, good progress is being made in the enactment of legislation to combat and govern SGBV in Kenya.

⁵⁹ Aura R, Situational Analysis and Legal Framework on Sexual and Gender Based Violence in Kenya, Challenges and Opportunities, Kenya Law Resource Centre, 2014.
Biko A, Legal Framework on Sexual Gender Based Violence in Kenya.
National Gender and Equality Commission, National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya, December 2014.

CHAPTER 4

THE INVESTIGATION AND PROSECUTION PROCESS: PARTICIPANTS

This chapter takes a look at the participants directly involved in the investigation and prosecution of SGBV, their legal basis and extent of their involvement. The aim is to outline an existing system working to combat SGBV in Kenya. The main participants are the victim (reporting party), police officers (investigating party), medical officers (examining party) and public prosecutors.

To avoid any confusion, sexual violence as a domestic crime differs from sexual violence as an international crime in a number of ways. First, the legal requirements for prosecution are different. In a domestic setting, the prosecutor only needs to prove the *actus reus* as provided for in the law and *mens rea* beyond reasonable doubt. As an international crime, in addition to proving the intention and the acts done, the prosecutor must additionally apply the findings in a particular context so as to establish the crime.⁶⁰

The second difference is in the nature of criminal responsibility. The accused in a case in a domestic setting is usually the physical perpetrator of the crime. In an international setting on the other hand, criminal responsibility lies in leaders and influential persons that encouraged the physical perpetration of sexual violence and or failed to punish the crime intentionally. Lastly, the social significance of sexual violence differentiates the two. In a domestic context, the effect of sexual crime is felt by the individual and their family while in an international context, the effect of sexual crimes is felt by whole communities because of the larger scale of impact. Some of the examples used in the paper occurred during times of civil unrest within the country and should therefore have been prosecuted domestically and not internationally.⁶¹

There is a general format that is followed in domestic criminal cases. The case officially enters the legal system when the crime is reported. Next, there is an investigation into the facts alleged so as to build a case. Thereafter, the case is prepared for prosecution by framing charges in relation to the evidence available. Then, plea is taken by the accused as the case enters into the trial stages where examination of evidence and witnesses occurs.

⁶⁰ Seelinger K, Silverberg H, Mejia R, *The Investigation and Prosecution of Sexual Violence*, Berkeley Law, 2011, 7.

⁶¹ Seelinger K, Silverberg H, Mejia R, *The Investigation and Prosecution of Sexual Violence*, Berkeley Law, 2011, 8.

Finally, comes the judgment, sentencing and appeal.⁶² This format may vary from cases to case depending on circumstances and facts available.

4.1. Victim

The victim has a right to medical treatment in a public hospital, private hospital or any other relevant facility. The expenses incurred by the victim for medical treatment in a public hospital shall be borne by the government. They are entitled to this whether or not they have reported the matter to the police.⁶³

WanguKanja Foundation is a non-governmental, non-political and not for profit organisation based in Nairobi, Kenya whose vision is a society free from sexual violence. The foundation was born from the challenges that the founder went through after she was raped in a carjacking incident in 2002. The foundation offers awareness creation, legal aid, access to comprehensive care and support, restorative justice, advocacy and income generating activities for survivors.⁶⁴ According to the foundation's website, when sexual assault occurs the victim or survivor has at least six options at any given time. The options are:

1. To not report the assault and not to get any medical attention.

This option does not enable the victim to seek justice for the crimes perpetrated. Additionally, failure to visit a hospital could result in illness, unplanned pregnancies and mental and physical trauma that will affect the livelihood of the victim.

2. To report sexual assault within 72 hours and undergo the process of the Sexual Assault Evidence (SAE) kit.

The procedure should be that after reporting the incident, the victim will be referred to a medical centre where they can seek the appropriate medical services necessary for them.

3. To receive medical attention without reporting to the police.

⁶² Seelinger K, Silverberg H, Mejia R, *The Investigation and Prosecution of Sexual Violence*, Berkeley Law, 2011, 9.

⁶³ Section 3, *Sexual Offences Medical Treatment Regulations*, 2012.

⁶⁴ WanguKanja Foundation, about WKF, www.wangukanjafoundation.org/about/, on 16th February 2017

While this option enables one to take care of their health, it robs the victim of the chance to seek justice for the heinous crimes perpetrated against them.

4. To receive medical attention without the Sexual Assault Evidence kit and report the assault at a later date.
5. Undergo Sexual Assault Evidence kit and have it stored for up to six months.

The quality of the evidence might diminish over time for different reasons which will hinder the access to justice when sought for by the victim.

6. Have a third-party report submitted to the police such as by a medical worker.⁶⁵

The option chosen by the victim has implications on the manner that investigation and prosecution of their case is handled. This is especially so because of the different roles that police and medical officers play in investigation and prosecution. There are however low levels of SGBV reporting which agrees with other anecdotal evidence.⁶⁶ More male than female respondents to a study conducted stated that they reported SGBV to the police.⁶⁷

4.2. Police Services

The functions of the Kenya Police service include the investigation of crimes, prevention and detection of crime, apprehension of offenders and the enforcement of all laws and regulations with which it is charged.⁶⁸ The police and provincial administrators are the main persons to whom victims turn to when SGBV occurs. The functions of the police in investigating crime are furthered by the Criminal Procedure Code. The code contains provisions on conducting arrest warrants⁶⁹ and the rules for framing charges as well.⁷⁰ What role should police officers play in the investigation of SGBV? Collection of evidence from the survivor and the government chemist, availing evidence to the prosecution, giving evidence in court, ensuring the safety of a survivor and their family, arresting the suspect and lastly, providing a P3 form to the survivor.⁷¹ A police officer who is in duty who

⁶⁵ WanguKanja Foundation, Reporting Sexual Assault, www.wangukanjafoundation.org/, on 20th January.

⁶⁶ National Crime Research Centre, Gender Based Violence in Kenya, Nairobi, 60.

⁶⁷ NCRC, Gender Based Violence in Kenya, Nairobi, 63.

⁶⁸ Section 24, National Police Service Act No. 11 of 2011.

⁶⁹ Section 29, Criminal Procedure Code, Cap 75 of the Laws of Kenya.

⁷⁰ Section 137, Criminal Procedure Code, Cap 75 of the Laws of Kenya.

⁷¹ NGEC, Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence, 20.

receives a complaint that a sexual offence has been committed shall notify a medical practitioner or a designated person at any health facility and refer the victim to them.⁷²

In Kenya, the victim does not press charges, they report. The state through the Office of the Director of Public Prosecution presses charges against the accused. The victim acts as a witness⁷³ for the prosecution's case. Therefore, for the investigation process to be commenced, a survivor has to report the crime to the police. The statement recorded by the victim should be recorded in the occurrence book available in each station. Once the report is recorded, the victim is given a Police Medical Examination (P3) form, free of charge. The P3 form should be completed by an authorised health care provider based on clinical notes found in the PRC form.⁷⁴ The form requires details on the state of clothing, general medical history and general appearance which includes the use of alcohol or drugs demeanour. It further requires details on the male or female complainant and the perpetrator accused of the sexual offence.⁷⁵

There are also additional facilities in some stations such as the gender desks. These desks were as a result of the Poverty Reduction Strategy Paper (PRSP) and development plan 2004.⁷⁶ It is the role of police officers to establish functional gender desks at police stations or posts.⁷⁷ These desks were established for the benefit of victims so as to reduce the stigma in reporting SGBV as well as to enable reporting to officers trained to interview survivors and investigate the offence in a sensitive and sympathetic manner.⁷⁸ A study done on the status of gender desks in Nyandarua County revealed that a majority of the respondents were female which correlates with the national prevalence of SGBV. Most of the female respondents were aged between 25-40 years. The study concluded that the gender desk environment was not conducive for GBV survivors. The victim's privacy is not observed and the infrastructure is quite wanting. Additionally, the officers in charge of the desks had not been trained on gender related issues and the legal instruments combating SGBV. Most of the victims were assisted by male officers because there were few or no female officers

⁷² Section 4, Sexual Offences Medical Treatment Regulations, 2012.

⁷³ WanguKanja Foundation, Reporting Sexual Assault, www.wangukanjafoundation.org, on 20th January.

⁷⁴ MOH, National Guidelines on Management of Sexual Violence in Kenya, 3rd Edition, 2014, 26.

⁷⁵ The Kenya Police, Medical Examination Report, P3.

⁷⁶ Ndungu A, The effectiveness of Police Gender Desks in addressing Gender Based Violence: A Case of Nyandarua County Kenya, November 2016, 4.

⁷⁷ NGECC, Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence, 20

⁷⁸ Agency for Cooperation and Research in Development, ACORD, an Audit of Legal Practice on Sexual Violence in Kenya, Nairobi, 2009, 25.

available at the gender desks. There were no safe spaces available and some victims had to be placed in police cells as safe space was sought out. The services of response were however effective in some areas with the desks acting as a focal point for reporting, investigating and referral to court or other agencies. The gender desk officers, where present, also referred the victims for medical examination and support services such as counselling.⁷⁹

According to civil society organisations, if a woman complains of rape by a police officer it is extremely rare for an investigation or prosecution to occur.⁸⁰ The offence should be reported to a police station which is already intimidating enough for the victim and where their colleagues are implicated police officers are reluctant to initiate proceedings. In a majority of the cases reported, the accused is often transferred as opposed to being investigated.⁸¹ A study done on SGBV in Kenya revealed that 2.2% of the women and 4.8% of the men had experienced sexual violence from police officers.⁸²

IPOA performance report highlights the fact that police stations are understaffed and do not meet the two thirds gender rule.⁸³ This is an indication of the reason for hesitation and reluctance to report by female victims. It is highly questionable if the understaffed stations have male police officers trained in the sensitization of handling SGBV survivors.

Women's rights organisations play a big role in the means of accessing justice and medical support for SGBV survivors. FIDA Kenya has legal aid centres in cities in the country and it aims to provide a conducive environment for victims to share their experiences. The organisation supports the survivor and prepares the victim to testify against the accused through its self-representation skills building and counselling. It also aims to sensitise the first persons of contact with victims of SGBV when handling them as they approach.⁸⁴

⁷⁹ Ndungu A, The effectiveness of Police Gender Desks in addressing Gender Based Violence: A Case of Nyandarua County Kenya, November 2016, 63.

⁸⁰ Vice News, They Always Protect One of their Own: Police and Rape in Kenya, May 2016, <https://news.vice.com/article/they-always-protect-one-of-their-own-police-and-rape-in-kenya>, accessed 25/03/2017.

⁸¹ ACORD, An Audit of Legal Practice on Sexual Violence in Kenya, Nairobi, 2009, 25.

⁸² NCRC, Gender Based Violence in Kenya, Nairobi, 2014, 40, table 3.8.

⁸³ IPOA, Performance report July-December 2016, appendix 1, issue 7.

⁸⁴ NCRC, Gender Based Violence in Kenya, Nairobi, 2014, 27

4.3. Medical Personnel

What is their role in the investigation and prosecution of SGBV? Providing treatment and psychological care to survivors, collecting and giving evidence in court and referral and linkage of survivors to police and community interventions.⁸⁵

The management of any life threatening injuries and extreme distress should take precedence over all other aspects of post-rape care.⁸⁶ Medical services should be freely available to survivors of sexual violence as well as suspects, witnesses and convicts with no differentiation of services.⁸⁷ Medical management includes history taking and examination, management of physical injuries, Post Exposure Prophylaxis (PEP), pregnancy prevention, management of Sexually Transmitted Infections, Hepatitis B, the medical management of perpetrators of sexual violence and follow up services with survivors of sexual violence.⁸⁸ PEP is the administration of a combination of antiretroviral (ARV)⁸⁹ drugs for 28 days after the exposure to HIV, and should be started within 72 hours of sexual violence if a survivor tests HIV negative. In cases of rape, it is necessary to fill a Post Rape Care (PRC) form. The form is used as clinical notes to guide filling of the P3 form. Part one of the PRC form addresses physical examinations while part two addresses the psychological examination.⁹⁰

Medical services are necessary for survivors of sexual violence and are comprehensively available in the Nairobi Area. There are also some facilities outside of Nairobi. Most of the centres however are not known to the public. There is a standardized rape kit that is used for examination but it does not come with accompanying medicine. The rape kit is important to prove the prosecution's case because there are items within it that collect and store evidence. These items include seal lock bags, brown bags for collecting samples and urine bottles among others.⁹¹ The rape kit and Sexual Assault Evidence Kit apply to rape

⁸⁵ NGEV, Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence, 20.

⁸⁶ MOH, National Guidelines on Management of Sexual Violence in Kenya, 3rd Edition, 2014, 2.

⁸⁷ Section 3, Sexual Offences (Medical Treatment) Regulations, 2012.

⁸⁸ MOH, National Guidelines on Management of Sexual Violence in Kenya, 3rd Edition, 2014, 1.

⁸⁹ MOH, National Guidelines on Management of Sexual Violence in Kenya, 3rd Edition, 2014, 12.

⁹⁰ Ministry of Health, Post Rape Care Form (PRC), MOH 363, Part A and B.

⁹¹ MOH, National Guidelines on Management of Sexual Violence in Kenya, 3rd Edition, 2014, annex 4: rape kit.

and sexual assault respectively. The clinics partner with NGOs that offer legal services to victims seeking justice for services such as legal aid and financial services.

Female victims of sexual violence from an intimate partner of a study conducted stated that the main services received include psycho-social counselling and HIV counselling. In regards to victims of sexual violence from a non-intimate partner, women report receiving the services of emergency contraception, HIV counselling and testing and STI screening and counselling. Men on the other hand reported HIV counselling and testing only. There is a lack of standard procedure go the point of differentiation of services based on victimisation.

Interventions by the medical personnel are for reasons such as Sexually Transmitted Infections, Post Exposure Prophylaxis PEP, emergency contraception pills, information dissemination, conducting physical examinations, facilitate acquisition of P3 forms, psycho-social support, referrals and linkages with relevant authorities for further assistance.

92

While the study indicates that victims do receive medical treatment, they do not undergo some of the minimum standards highlighted on the medical management of survivors.

A study was conducted of 14 different levels of medical institutions on their preparedness to provide comprehensive care for Gender Based Violence survivors. Data was collected between March and November 2009. The study concluded that there was a generalized lack of preparedness in comprehensive management of survivors. This was because, infrastructure offering privacy and space was lacking; all the audited institutions needed to improve on their record-keeping; only a few institutions completed the PRC form for each survivor and the forms were not standard with different institutions filling different forms and qualified staff in adequate numbers were found in only one referral hospital. All other institutions including provincial institutions did not have the full complement of staff. Forensic evidence if at all collected, was not properly stored. The final conclusion was that the guidelines in the management of Sexual violence were not being implemented.⁹³

⁹² NCRC, Gender Based Violence in Kenya, Nairobi, 62.

⁹³ Wakahe J, Hospitals Preparedness to Provide Comprehensive Care for Gender Based Violence Survivors in Kenya, University of Nairobi, 2010, 60.

4.4. Prosecution

The Office of the Director of Public Prosecutions (ODPP) is established under the Constitution of Kenya.⁹⁴ The Director of Public Prosecutions has power to appoint any qualified person to prosecute on his behalf. This person is known as a public prosecutor and is bound to comply with the guidelines and instructions issued by the Director in respect of Prosecution.⁹⁵ The functions of the prosecution are to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence to have been committed by that person, to direct investigation and supervise the conduct of criminal investigation and to facilitate the victims of crime and witnesses during prosecution among others.⁹⁶ What is the expected role of the prosecution in SGBV? They should supervise the police in the investigation of sexual offences, ensure correct charges are drafted, meet and prepare survivors and witnesses, present evidence in court, examine and cross examine witnesses and making relevant applications in court such as for the protection of survivors.⁹⁷

A plea of guilty moves the trial to the sentencing part of the trial while a plea of not-guilty invites the prosecution to make their case against the accused.⁹⁸ Making the case for prosecution includes the calling of witnesses and adducing evidence in support of the charge.⁹⁹ The prosecution depends on the services that have been availed to the victim by the police and medical centres. The prosecution uses the evidence collected and forms filled by the police and medical practitioners to help meet the threshold of proof that is set in the act so as to confirm the charge beyond reasonable doubt.

The practice in Kenya is to have an alternative lesser charge in the sheet so as to increase the chance of a likelihood of conviction on the same set of facts if the first charge fails.¹⁰⁰ In criminal case number 512 of 2006, the accused was charged with a main charge of rape and an alternative charge of indecent assault with an adult. He was convicted on both

⁹⁴ Article 157, Constitution of Kenya, 2010.

⁹⁵ Section 29, The Office of the Director of Public Prosecutions Act, 2013.

⁹⁶ Office of the Director of Public Prosecutions (ODPP), Strategic Plan 2016-2021, February 2017, 2. NGEC, Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence, 20.

⁹⁷ NGEC, Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence, 21.

⁹⁸ Section 207, Criminal Procedure Code, Cap 75 of the Laws of Kenya.

⁹⁹ Section 300, Criminal Procedure Code, Cap 75 of the Laws of Kenya.

¹⁰⁰ NCRC, Gender Based Violence in Kenya, Nairobi, 2014, 30.

charges. An issue was raised on the standard of threshold of proof proven by the prosecution in relation to the two charges. The court held that the prosecution had already proven the main count beyond reasonable doubt and there was thus no need to prove the alternative count.¹⁰¹ On appeal, the conviction on the alternative charge was quashed by the court. The judge stated that when raping the complainant as charged, the Appellant's penis must of necessity have intentionally touched the vagina of the victim against her will. The indecent act was thus committed in the course of execution of rape, an offence that the appellant was already charged with and convicted for.¹⁰²

The prosecution further faces difficulties with the threshold of proof required in courts because of the manner in which some of the provisions of the sexual offences Act are worded. In *Jacob Odhiambo v R*, the accused person was charged and convicted of defilement. On appeal, the Court of Appeal stated that because of the way the Act was worded,¹⁰³ the vital act of penetration by the offender is a vital ingredient which must be proven by the prosecution. The medical report stated that penetration had occurred and when that finding was considered together with the straightforward testimony of the survivor it was found to be sufficient to discharge the threshold of burden of proof as stated in the Act.¹⁰⁴ While in that instance the burden of proof was discharged, in others it was placed too high. In *Republic v Samuel Wanjala*, the court acquitted the accused who had been charged with the defilement of a child. The only evidence available was a medical report indicating a torn hymen and the word of the child to his mother. The court stated that the important element of penetration by the accused person was not proven by the prosecution.¹⁰⁵

Conviction or acquittal is dependent on the facts of the case, the manner in which the case is presented and the evidence available to support the claim. The prosecution cannot secure convictions if the evidence presented to them is not well handled or well gathered. It is therefore necessary for the prosecution to work closely with the police. The police work with the victims and medical officers as well. It is therefore very necessary that they receive proper training on the roles they are expected to play. Medical officers and facilities should also be prepared and well trained to give comprehensive care to SGBV victims. Victims

¹⁰¹ Republic v Anthony Mutua Mutinda, [2008] KWJA 1 at 24.

¹⁰² Julius Mwangi Kinyanganya v Republic, [2015] eKLR.

¹⁰³ Section 8(1), Sexual Offences Act, 2006.

¹⁰⁴ Jacob Odhiambo v R, [2008], eKLR.

¹⁰⁵ Republic v Samuel Wanjala Njongirire, [2008], KWJA 1 at 76.

and the public also need to be sensitised as to the options available to them once the crimes are committed. Nonetheless, there is clearly an existing system that is enabled in the Investigation and Prosecution of SGBV in Kenya. The next chapter will attempt to answer why the existing system has not been successful in reducing the prevalence of SGBV.

CHAPTER FIVE

STATISTICS IN THE CRIMINAL JUSTICE SYSTEM AND POST ELECTION VIOLENCE (PEV)

Chapter four takes a look at the main participants directly involved in the investigation and prosecution process and concludes that there is an existing and functional system responding to SGBV in Kenya. The present chapter attempts to outline the success of the existing system in combating SGBV in the Criminal Justice System. Additionally, the chapter will highlight the investigation and prosecution of SGBV in Kenya through the lens of the PEV.

5.1. Statistics on Sexual Offences in the Criminal Justice System

An audit was conducted by the National Council on the Administration of Justice and Legal Resources Foundation Trust. The audit targeted 18 countries which were purposefully sampled. From each data source, a sample of one hundred observations was drawn between the years 2013 and 2014. However, data from the high court stations was drawn between the years of 2010 and 2014 because records were not well kept.¹⁰⁶

It should be noted that comparative crime figures from the police service for the years 2013 and 2014 recorded an 8% increase in crime offences against morality. The offences listed include rape, defilement, incest, indecent assault, abduction and bigamy. Of even greater interest is that in a 2014 report, crimes recognised as sexual offences in the Sexual Offences Act 2006 are still referred to and statistically grouped together as offences against morality.

¹⁰⁷ This is perhaps an indication of the continued perception of sexual offences as moral offences only and not crimes also perpetrated on the individual as discussed in theoretical framework. This would perhaps explain the lax attitude of police officers when investigating these offences.

5.1.1. *Subordinate courts*

Court registers of fourteen magistrate courts out of one hundred and sixteen were used to explore various areas.¹⁰⁸ In subordinate courts, sexual offence charges only comprise about

¹⁰⁶ National Council on the Administration of Justice, NCAJ, Criminal Justice System in Kenya: An Audit, 2017, xxxi.

¹⁰⁷ The Kenya Police Service, Annual Crime Report, 2014, Appendix 9: Comparative Crime Figures.

¹⁰⁸ NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 110.

3% of the cases heard. The charges mainly heard are those of defilement, indecent assault and rape.¹⁰⁹ Of the three per cent of cases heard, only 5% of cases resulted in a conviction largely due to the high withdrawal rate of sexual offences which is at 65%. Acquittals account for 30%.¹¹⁰ Although there were 1404 sexual offences in over two years, only 70 cases resulted in a guilty verdict. This translates to about 35 convictions per year.¹¹¹

5.1.2. *High Court: Criminal Appeals*

On criminal appeals, data was drawn from ten appeal courts over a period of five years between the years of 2010-2014.¹¹² The most common type of offence for which a criminal appeal was lodged was defilement at 22%. All sexual offences for which an appeal was lodged totalled to 28%. It should be kept in mind that sexual offence crimes in the subordinate courts were only 3%.

31% of sexual offences appeals are dismissed or rejected, 25% of the appeals result in an acquittal, and 13% manage to have their sentence reduced. In 5% of the cases, a retrial is ordered and 24% are abandoned in the course of proceedings and less than 1% result in an increase in sentencing.¹¹³

When considered altogether, all sexual offences cases in criminal appeal courts are slightly more likely than other cases to result in the case being a dismissal or rejected and also more likely to be retired. They are also less likely to be abandoned or withdrawn. Acquittal is not as common as dismissal but in the courts sampled and for over five years, at least 174 people who had previously been convicted for sexual offences were acquitted by the High Court. This translates to about 35 acquittals per year over the five years.¹¹⁴

5.1.3. *Remand admissions*

From the remand submission dates sampled, more than 4000 men are admitted on remand for sexual offences. These numbers are not reflected in the criminal justice system as the cases progress. This is evident by the fact that sexual offences account for 3% of the cases

¹⁰⁹ NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 114.

¹¹⁰ NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 117.

¹¹¹ NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 161.

¹¹² NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 158.

¹¹³ NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 160.

¹¹⁴ NCAJ, Criminal Justice System in Kenya: An Audit, 2017, 161.

heard in subordinate courts. It would thus appear that for persons accused of sexual offences, the process from arrest to trial is the punishment.

From this data, we find that there are questions raised as to the quality of the original prosecutions of sexual offences, the suitability of sentences given by the courts, the disparity between the number of accused persons in remand and the number of cases that make it to trial and the number of perpetrators that walk free due to non-reporting. Additionally, the convictions and entry into the legal process of sexual offences is not a true representation of the prevalence of SGBV in the country.¹¹⁵ The question raised on the quality of original prosecutions of sexual offences also raises a question on the quality of investigations carried out for these prosecutions. Chapter four lays out the roles of the police, medical personnel and the prosecution in responding to SGBV all of who contribute to the process. These roles clearly indicate the necessity for cooperation and coordination amongst the participants.

5.2. Post-Election Violence 2007: Sexual Violence

Human Rights Watch conducted research between February and November 2011 into the status of national investigations and prosecutions for the 2007-2008 Post Election Violence in Nairobi, Rift Valley, Western, Nyanza and Coastal provinces. The researchers interviewed 172 people, including 75 victims, police officers, prosecutors, defence lawyers, magistrates, judicial officials and local society actors.¹¹⁶

Numerous women have filed complaints with the police about sexual crimes perpetrated on them during post-election violence but investigations have not been commenced by the police. After the CIPEV report, the police formed a task force in a bid to inquire into and possibly charge the perpetration of sexual violence during that period. FIDA Kenya had been enjoined in the task force by the police but later withdrew themselves because of what they termed to be a lack of commitment and enthusiasm to work on the task at hand. Numerous requests to meet and plan were not responded to by the police. Another women's rights activist in Kenya similarly interviewed for the report echoed the same sentiments as FIDA Kenya. The police made attempts to go and look for victims but the exercise was futile. A health worker interviewed echoed similar sentiments to the activist. The police

¹¹⁵ NCAJ, *Criminal Justice System in Kenya: An Audit*, 2017, 162.

¹¹⁶ Human Rights Watch, HRW, *Turning Pebbles, Evading Accountability for Post-Election Violence in Kenya*, December 2011, 9.

wrote to them asking for a list of the victims that had been treated which would have been a gross violation of their privacy. The health worker did however write back to the police to inform them they could meet and brainstorm on ways to get victims to come forward and testify but no responses were received from the police thereafter.¹¹⁷

The reluctance and disregard of the police to investigate sexual violence during PEV was again evidenced in 2009 when the police submitted a report to the office of the Director of Public Prosecutions with a list of sixty-six complaints on sexual violence. The 66 complaints submitted should be analysed in the context of the CIPEV report of 2008 that documented about 900 cases of sexual violence¹¹⁸ and which were the inspiration for the formation of the taskforce in the first place. The director stated that a majority of the cases were recommended for closure by the police because of a lack of sufficient evidence as well as the long duration of time it took to make the complaints by the victims. Additionally, identification of suspects was difficult because some of the perpetrators were only identified by the victims as men in uniform which could be any police officer or police impersonator. Furthermore, the case files did not have much evidence and merely had the complaints filed by the victims despite the other factors of forensic evidence considerable, the fact of perpetrators stealing victims' phones and victims contracting sexually transmitted diseases from their perpetrators. The Director of Public Prosecutions sent back the cases to the police for further inquiry as they did not agree that the cases ought to have been closed. It is still difficult however to trace any convictions that may have been as a result of the task force.¹¹⁹

It is clear from this report that the attitude of police officers in investigation was the biggest barrier to the investigation of these crimes. This attitude is furthered by the nature of SGBV and the training and sensitivity required when dealing with victims which police officers do not receive. The barrier was furthered by the fact that victims merely made complaints which were not accompanied by evidence. The bigger question is whether upon recording a complaint, the police issued the complainants with a P3 form and referred them to a medical facility. The report published by CIPEV recorded instances in which women were

¹¹⁷ HRW, Turning Pebbles, 2011, 20.

¹¹⁸ CIPEV report, Chapter 6, 242.

¹¹⁹ HRW, Turning Pebbles, 2011, 21.

turned away from police stations when making complaints. One victim even identified her perpetrators but they were set free with no explanation whatsoever.¹²⁰

The Police play a crucial role in investigation and prosecution and they are required to interact with the victim, medical personnel and the prosecution in the achievement of this role. Poor training and sensitization and lack of awareness of their duties are some of the evident factors in these reports that hindered investigation of the crimes. This is in addition to the lack of gender balance in police stations, ineffective gender desks and perpetration of SGBV by police officers as discussed in the previous chapter.

5.3. Post-Election Violence 2017: Sexual Violence

Between September 25th and November 24th 2017, Human Rights Watch interviewed 71 people, 3 of whom were girls and 3 of whom were men. Most of the cases of SGBV captured in the report occurred after the first declaration of the president in August 2017.¹²¹ Some of the cases were documented in October 2017 after the second-round elections in Kenya. Most of the victims stated that they did not know their attackers who were hiding their identity with masks. They do however state that their perpetrators were mostly men in uniform who often carried weapons such as batons and guns or wore helmets and anti-riot gear. The militia groups and civilians are also included in this mix of perpetrators.¹²² From the witness statements collected, there were definitely male victims of sexual violence and the sexual violence meted out on women and girls was mostly done by gangs¹²³ and in front of other people including family members.¹²⁴ Many attacks documented were accompanied by additional acts of torture, physical violence and humiliation. Several women were also threatened by their attackers and told that they would return in the night.¹²⁵

The threats could be the first phase in the repeated legal cycle of sexual violence. Failure to promptly report diminishes the quality of evidence available and thus opens the case up to weaknesses that result in the acquittal of criminals or withdrawal of cases. Furthermore,

¹²⁰ CIPEV report, Chapter six, 256.

¹²¹ Human Rights Watch, HRW, They Were Men in Uniform, Sexual Violence against Women and Girls in Kenya's 2017 Elections, 2017, 9.

¹²² HRW, They Were Men in Uniform, 2017, 14.

¹²³ HRW, They Were Men in Uniform, 2017, 15.

¹²⁴ HRW, They Were Men in Uniform, 2017, 16.

¹²⁵ HRW, They Were Men in Uniform, 2017, 17.

if the perpetrators were men in uniform, and it has already been established that the police are reluctant to investigate of their own will, how are the victims of sexual violence ever expected to come forward? To add salt to injury, the Inspector-General of the Police Service at the time, Joseph Boinnet, rejected the report by Human Right Watch and challenged the group to bring forward evidence to prove their claims.¹²⁶

Most women interviewed said they did not report the crimes to the police because they had little faith that the police would investigate their colleagues, they feared retaliation, or thought that the police would ask for bribes and not help them.¹²⁷ In cases where the women did try and report, some officers sent women back to their homes without taking statements, ridiculed them, verbally abused them or failed to follow up on complaints. Several victims believed that they could not file a complaint because their aggressors were unknown to them. The research documented three cases in which the police questioned survivors as to why they went to hospitals prior to making a complaint¹²⁸ and refused to take their statements. In other cases the police did not refer the victims for medical treatment.¹²⁹

About half of the women interviewed had not received any medical treatment and psychological support, and few got timely post-rape care treatment. Some survivors did not seek health care because they believed it would cost money. Other reasons include the lack of information on the importance of getting medical treatment or that it is free.¹³⁰ Some victims sought treatment from local clinics but the services offered were not comprehensive. In a few cases in Kisumu and Bungoma, victims were asked to pay for the completion of PRC and P3 forms.¹³¹

Both medical and police officers directly participated in hindering investigation and prosecution by their inaction or by taking poor action. Victims often are unaware or unsure of what action they are expected to take. Medical personnel and Police Officers are thus supposed to aid them in making complaints, seeking treatment and accessing justice.

¹²⁶ Odongo D, Boinnet 'rejects' Human Rights Watch report on sex crimes by police, December 14th 2017, <https://www.capitalfm.co.ke/news/2017/12/boinnet-rejects-human-rights-watch-report-sex-crimes-police/> , on 22th/01/2017

¹²⁷ HRW, *They Were Men in Uniform*, 2017, 25.

¹²⁸ HRW, *They Were Men in Uniform*, 2017, 26.

¹²⁹ HRW, *They Were Men in Uniform*, 2017, 27.

¹³⁰ HRW, *They Were Men in Uniform*, 2017, 28.

¹³¹ HRW, *They Were Men in Uniform*, 2017, 27.

Additionally, as discussed in the previous chapter, medical facilities are not prepared to give comprehensive care to SGBV survivors.

It shall be of keen interest to observe the manner in which this matter shall be handled. Will another commission of inquiry be formed to confirm or reject the report? Will the National Police Service and the Independent Police Oversight Authority inquire into the allegations of sex crimes and prosecute police offenders as opposed to transferring them? The action or lack thereof on SGBV cases taken after PEV in 2007 could arguably be credited to politics but ten years later the same argument should not suffice for SGBV cases after PEV in 2017. The course of action taken will mirror this report. The investigation and prosecution of SGBV in Kenya has not been successful in its response to SGBV. There is a reluctance to take SGBV in Kenya with the seriousness it requires and the prevalence it has acquired.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1. Conclusion

The CIPEV report published in 2008 clearly established through witness and expert statements that sexual and gendered violence crimes occurred during the period of Post-Election Violence. The report provided a sound basis for the investigation and prosecution of SGBV in Kenya. In 2013, a judgment¹³² was delivered that clearly stated that the police had failed to conduct prompt and effective, proper, and professional investigations into the complaints of the petitioners who were survivors of sexual offences. The judgement found the failure to conduct investigations to be a miscarriage of justice especially when the fact of numerous reports filed that were never investigated by the police. Kenya has enacted a number of laws intended to directly combat SGBV in Kenya and that guide its investigation and prosecution. The laws include the Sexual Offences Act which lists a number of offences while providing maximum penalties for sentencing purposes. While the law in place is commendable, these laws do not recognise crimes such as marital and date rape. The international instruments that Kenya is a signatory to as well as the Constitution of Kenya have provisions that require the passing of legislation that will adequately address SGBV as well as historical and cultural injustices that lower the dignity of survivors and women. However, irrespective of the different laws enacted, they have not translated into adequate investigation and prosecution.

Participants directly involved in the investigation and prosecution of SGBV in Kenya have a legal basis for their inclusion. The victim reports triggers the participation of the police, medical personnel and the prosecution who each have specific roles to play in this process. Their poor performance in these roles has caused investigations and prosecution to be of poor quality.

The practice by participants in the investigation and prosecution of SGBV is not as effective as required by laws and policies. Investigations are launched upon reporting the crime, which considering the nature of these crimes is a daunting task for a lot of survivors. There are no sufficient mechanisms that have been put in place to ease the process of reporting

¹³² CK (a child) through ripples international as her guardian & next friend & 11 others v Commissioner of Police, the Inspector General of the National Police Service & 3 others [2013] eKLR.

which is crucial. Police officers lack the training and sensitivity require to handle victims of SGBV. Additionally, survivors and the public alike are not aware of the medical and legal requirements of evidence when it comes to sexual crimes. Most people are also not aware that there are free medical services available to the public when they are in need of treatment as victims. Criminal prosecution is dependent on the success of the investigations launched by the police. Furthermore, the prosecution has a difficult time with the burden of proof required in some cases so as to secure a conviction.

The resultant minimal success of the investigation and prosecution process is evident. Sexual offences cases account for three per cent of the cases heard in magistrates courts with only five percent of the cases resulting in a conviction. Withdrawal of criminal charges are very high presumably because of the poor quality of investigations. Withdrawals are done by the prosecution often because there lacks sufficient evidence to prove the charge beyond reasonable doubt. When considered altogether, all sexual offences cases in criminal appeal courts are slightly more likely than other cases to result in the case being a dismissal or rejected and also more likely to be retried. Beyond that, the police are very reluctant to launch investigations where their fellow officers are implicated while hospitals are less likely to refer such crimes to the police for investigations. Generally, there is a need for more training of all persons that deal with the issue of SGBV from the point of legislation to the point of reporting counselling, medical examinations and investigations by the police.

This paper proves its hypothesis, there is insufficient application and implementation of the laws and policies that exist to combat SGBV by the participants directly involved in the investigation and prosecution of the same which is due to lack of enforcement mechanisms, coordination efforts and training. The theoretical framework is highlighted as the research questions are progressively answered. There are laws and policies enacted to combat SGBV which create obligations and responsibilities for the state through the participants of the process. The state should meet the responsibilities it has imposed on itself and as due to the citizens, specifically, the victims of SGBV. The paper also furthers that SGBV is not just a legal issue but a social issue as well. SGBV affects women and vulnerable men because of the perception of men as dominant and aggressors and women as submissive and weak. If the very concept of masculinity is not just strength but domination as well, then resorting

to violence to enforce female subordination is a clear correlate of the model. As such, tackling of SGBV should go beyond the law and include the society as a whole.

6.2. Recommendations

1. Enforcement and implementation mechanisms should be put in place to ensure that the numerous laws and comprehensive policies in place are uniformly observed at all times and with the best interest of the victim at the forefront.
2. There should be gender desks in each and every police station in Kenya. Gender desks should further have standard operating procedures or uniform policy so as to ensure uniform service is delivered in the interest of the victims approaching the desks. This should include the addition of female officers to sit at the desks.
3. Police officers and the Office of the Director of Prosecutions need to establish training programmes that enable the skills of police officers in investigation and collection of evidence so as to build airtight cases for the prosecution. These training programmes should be part of the curriculum in police training academies and in the continued training of police officers.
4. The National Police Service and the Office of the Director of Public Prosecutions should each establish a separate division that will address SGBV offences with the detail and attentiveness it requires.
5. The Ministry of Health should provide hospitals and medical centres the necessary drugs, kits, medical forms and equipment needed by medical officers to comprehensively care for survivors of SGBV. This should also include the training of medical officers before and during employment, to approach SGBV matters with sensitivity.
6. Medical facilities should be audited regularly by the Ministry of Health on their preparedness to provide comprehensive care to SGBV victims including assessing their record-keeping methods, rape and SAE kits, medication and examination facilities are present at least to a certain minimum.

BIBLIOGRAPHY

BOOKS

Scales A, *Legal Feminism, Activism, Lawyering and Legal Theory*, New York University Press, 2006.

Ngaire N, 'The Man of Law', *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen and Unwin, 1990.

Okin S, *Western Political Thought*, Princeton University Press, 1979.

Hobbes T *Leviathan*, England, Oxford University Press, Oxford 1651.

Locke J, *Second Treatise of Government*, London, 1689.

Rousseau J, *The Social Contract*, E. P. Dutton & Co., New York 1913.

PAPERS

Aura R, *Situational Analysis and Legal Framework on Sexual and Gender Based Violence in Kenya, challenges and opportunities*, Kenya Law Resource centre, 2014.

Seelinger K, Silverberg H, Meja R, *The Investigation and Prosecution of Sexual Violence*, Berkeley Law, 2011.

Freccero J, Harris L, *Responding to Sexual Violence; Community Approach*, Berkeley Law, 2011.

Baldasare A, *Gender Based Violence; Focus on Africa*, 2012.

Biko A, *Legal Framework on Sexual Gender Based Violence in Kenya*.

Parekh S, *Getting to the Root of Gender Inequality: Structural Injustice and Political Responsibility*, (2011).

JOURNAL ARTICLES

Fineman M, *Feminist Legal Theory*, *Journal of gender, social policy and the law*, Vol 1:13 (2005).

INSTITUTIONAL AUTHORS

Commission of Inquiry into Post-Election Violence (CIPEV) Report, Chapter Six.

National Gender and Equality Commission, *National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya*, December 2014.

National Crime Research Centre, *Gender Based Violence in Kenya*, Nairobi, 2014.

Ministry of Health, *Adolescent and Reproductive Health Development Policy* 2003.

Ministry of Health, *National Guidelines on Management of Sexual Violence in Kenya*, 3rd Edition, 2014.

Independent Police Authority Oversight (IPOA), Performance report July-December 2016.
Agency for Cooperation and Research in Development, ACORD, An Audit of Legal Practice on Sexual Violence in Kenya, Nairobi, 2009

Amnesty International and Human Rights Watch, Kill Those Criminals, 2013

Human Rights Watch, Turning Pebbles, Evading Accountability for Post-Election Violence in Kenya, December 2011, 20.

Human Rights Watch, They Were Men in Uniform, Sexual Violence against Women and Girls in Kenya's 2017 Elections, December 2017.

National Council on the Administration of Justice, Criminal Justice System in Kenya: An Audit, 2017.

Restless Development, Men and Boys and Sexual and Gender Based Violence, 2014.

International Criminal Court, Office of the Prosecutor, Policy Paper on Sexual and Gender Based Crimes, June 2014.

National Gender and Equality Commission, County Government Policy on Sexual and Gender Based Violence, 2017.

THESIS

Ndungu A, 'The effectiveness of Police Gender Desks in addressing Gender Based Violence: A Case of Nyandarua County Kenya', Kenyatta University, November 2016.

Wakhe J, 'Hospitals Preparedness to Provide Comprehensive Care for Gender Based Violence Survivors in Kenya', University of Nairobi, 2010, 60.

INTERNET RESOURCES

Internet Encyclopaedia of Philosophy, Social Contract Theory, <http://www.iep.utm.edu/soc-cont/> on 28th January 2017.

Constitution Society, The Social Contract and Constitutional Republics, <http://www.constitution.org/soc1cont.htm> on 28th January.

United Nations High Commissioner for Refugees, UNHCR, Sexual and Gender Based Violence, <http://www.unhcr.org/sexual-and-gender-based-violence.html>, on 28 January 2017.

UNHCR, Sexual and Gender Based Violence, <http://www.unhcr.org/sexual-and-gender-based-violence.html> on 08 February 2017.

Conflict Theory, https://lumen.instructure.com/courses/199939/pages/Section1-14?module_item_id=4575144 on 8 February 2017.

The Bridge: Critical Theory, Feminist Legal Theories, <https://cyber.harvard.edu/criticaltheory/critical3.htm>, on 01 February 2018.

Stanford Encyclopaedia of Philosophy; Feminist Philosophy of Law, <https://plato.stanford.edu/entries/feminism-law/>, on 01 February 2018.

Internet Encyclopaedia of Philosophy, Social Contract Theory, <http://www.iep.utm.edu/soc-cont/> on 28th January 2017.

John Locke Social Contract Theory, www.studylecturenotes.com, on 20th January 2018.

Classical Theory of Government and the Social Contract, www1.udel.edu, on 20th January 2018.

John Locke Social Contract Theory, www.studylecturenotes.com, on 20th January 2018.

Odongo D, Boinnet 'rejects' Human Rights Watch report on sex crimes by police, December 14th 2017, <https://www.capitalfm.co.ke/news/2017/12/boinnet-rejects-human-rights-watch-report-sex-crimes-police/>, on 22th/01/2017

Dr Jolanta R, Historical and Theoretical Discourse Surrounding Gender Based Violence Research, www.lsc.vu.lt, on 01 February 2010.

WanguKanja Foundation, Reporting Sexual Assault, www.wangukanjafoundation.org, on 20th January.