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Sexual Violence in Kenya

Sexual violence is a serious public health and human rights concern in Kenya.ⁱ It is deeply rooted in gender inequalities and Kenyan women and girls are disproportionately affected by sexual violence. Reporting cases of rape remains a difficult task, as many survivors do not have the knowledge or resources to navigate the legal system.ⁱⁱ Societal pressures – which stress the importance of chastity and honorⁱⁱⁱ – as well as stigma and fear of retaliation are contributing factors which explain why many survivors do not report cases of sexual violence. Despite acknowledgement of sexual violence as a human right violation in different laws and policies enacted in Kenya, survivors of sexual violence face myriad barriers in accessing justice.

In Kenya, sexual violence has also been a recurrent feature of elections, which have been marred by deadly violence, unrest, and serious human rights violations and abuses.^{iv} The perpetrators of electoral-related sexual violence in Kenya are both state and non-state actors. The 2007-2008 post-election violence was marked by widespread sexual and gender-based violence (SGBV); the Commission of Inquiry into the Post-Election Violence (CIPEV), known as the “Waki Commission,” documented 900 cases of sexual violence perpetrated by security agents, militia groups, and civilians against women, girls, men, and boys in a context of large-scale violence and mass displacement, as well as more than 1,000 deaths. In 2017, the Kenya National Commission on Human Rights documented 201 cases of SGBV. However, these figures almost certainly underrepresent the magnitude of the problem of sexual violence in Kenya.

In response to these violations, a number of transitional justice mechanisms, including the Waki Commission and the Truth, Justice, and Reconciliation Commission, were established. Despite the reports from these mechanisms recognizing the prevalence of SGBV during the post-election violence, however, the Kenyan government’s response both during and after the crisis has been underwhelming. Most survivors have yet to access any form of justice or receive reparations.

While SGBV tends to spike around elections, Kenya suffers from high levels of SGBV even outside election periods.^v According to the Kenya Demographic and Health Survey Report 2014, 45 percent of women 15-49 years of age have experienced physical violence, while 39 percent of married women have experienced physical or sexual violence.^{vi} In times of conflict, humanitarian emergencies, or health crises like the ongoing COVID-19 pandemic, cases of sexual violence

Through evidence, change is possible.



increase due to lawlessness, impunity, and lack of effective response mechanisms. Since the onset of the pandemic and the subsequent restrictions and lockdowns that were put in place by the government of Kenya, cases of intimate partner violence have significantly increased.^{vii} In the month of September 2020, cases of SGBV increased by 25 percent in comparison to cases in August.^{viii} Overall, SGBV cases increased by 92.2 percent between January and June 2020; 71 percent of the survivors were women and girls.^{ix}

In response to these dismal statistics, the United Nations Special Rapporteur on violence against women has requested that civil society organizations, national human rights bodies, and state agencies share information on criminalization and prosecution of rape in their respective countries.

Physicians for Human Rights' Expertise

Physicians for Human Rights (PHR) has worked in Kenya since 2007 to end impunity for sexual violence in the region. Recognizing medical professionals as powerful change agents, PHR enhances local collaboration between medical, legal, and law enforcement professionals to collect, document, and analyze forensic evidence in order to increase the likelihood of effective investigations and prosecutions of sexual violence crimes, while improving access to medical care and justice prospects for survivors.

Since PHR established its Program on Sexual Violence in Conflict Zones in 2011, it has trained more than 700 Kenyan medical, legal, and law enforcement professionals, who form high-functioning networks that work together using common forensic techniques and methods to document and investigate sexual violence and to support survivors.

Based on this expertise, PHR submits this analysis to the UN Special Rapporteur, highlighting the laws criminalizing rape in Kenya, key challenges in reporting and prosecution, and gaps in access to justice for survivors of sexual violence.

Laws that Address Sexual Violence in Kenya.

The Kenyan government has enacted a number of laws and policies aimed at addressing sexual and gender-based violence. These include the Constitution of Kenya 2010, which has an expansive Bill of Rights that protects the fundamental rights and freedoms of all citizens. Articles 27 and 28 on equality and non-discrimination and the right to dignity are crucial provisions in the Bill of Rights with respect to sexual violence; sexual violence is a form of discrimination. Article 29 provides for freedom and security of the person, including the right not to be subjected to any form of violence in either public or private spaces, including gender-based violence.

The Sexual Offences Act No. 3 of 2006 is another statute that addresses sexual violence in Kenya. It was enacted to respond to the rising cases of sexual violence and to provide stiffer penalties for sexual violence and assault.

The Sexual Offences Act defines rape as follows:

3.(1) A person commits the offence termed rape if (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; (b) the other person



does not consent to the penetration; or (c) the consent is obtained by force or by means of threats or intimidation of any kind.

It is important to distinguish the offences of rape and defilement – defilement is defined as sexual violence targeting minors – as provided for in the Kenyan statutes. Section 8 of the Sexual Offences Act provides for the offence of defilement as follows: 1) *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.* The younger the minor, the higher the penalty that the offence of defilement dictates.

In the offence of rape targeting adults, one of the key elements is consent. The legal age for consent in Kenya is 18 years, therefore sexual conduct with a minor is defined as defilement in the Sexual Offences Act. This clause has been problematic, especially in instances where there is consensual sexual conduct among older adolescents.

The Sexual Offences Act is the most comprehensive Kenyan statute regarding sexual offences, their definition, prevention, and protection. The Act protects all persons from unlawful sexual acts. The establishment of this Act brought about numerous changes with respect to the prosecution of cases of sexual violence, creating minimum sentences and providing more stringent penalties for all sexual violence offences, including rape.

Kenya is also a State party to the Rome Statute of the International Criminal Court (ICC), having ratified the statute in 2005.^x To domesticate the provisions of the statute, Kenya enacted the International Crimes Act No.16 of 2008. The Rome Statute, which is applicable in Kenya, recognizes rape among the enumerated forms of crimes against humanity. It is worthwhile to note other efforts by the Kenyan government to address SGBV, including the order by the president for a probe into all cases of gender-based violence as a result of an increase in the number of SGBV cases, especially during the COVID-19 pandemic^{xi}

Whereas enacting laws and policies is an indication of a government's commitment to protect against, prevent, and prosecute cases of sexual violence, this report underscores that in order for survivors to derive benefit, the government must implement the laws in their totality. Failure to implement these laws has led to numerous gaps and challenges in accessing justice for SGBV survivors in Kenya.

Prosecution of Sexual Violence Cases in Kenya

Rape is a criminal offence in Kenya, yet the process of reporting cases of rape is quite protracted, and many survivors feel and bear the burden of accessing the necessary services in their pursuit of justice. Moreover, there are multiple actors involved in this process, which places further physical, psychological, and economic burdens on the survivor.

Ideally, survivors are encouraged to report cases of sexual violence to a health facility within 72 to 96 hours. Reporting within this period facilitates not only proper medical help but also the collection and storage of evidence that is critical for prosecution. At the hospital, the examining medical officer fills in the nationally gazetted Post Rape Care Form and records their observations. Survivors equally need to report the case to the police, who record the report in the Occurrence Book and also fill in the P3 Form. Survivors are also required to make a statement concerning the violation that occurred. The police then undertake their investigation and forward the file to the Office of the Director of Public Prosecution for prosecution.



In reality, however, most survivors of SGBV do not report these cases either to the police or at health care facilities, due to stigma and to the lack of support services. According to a survey by the National Crime Research Centre, only 15.2 percent of female respondents who had been sexually violated reported these cases.^{xiii} There are also instances where survivors' families and the perpetrators seek to settle matters out of court, with families opting to receive some form of monetary “compensation” for the violation that their survivor family member experienced.

Even when sexual violence cases are reported, a staggering number fail in court due to lack of evidence and/or low-quality evidence. The obstacles to obtaining and using evidence effectively in court include: the lack of forensic examinations of survivors and thorough documentation of those examinations; the risk of evidence tampering, loss, or theft when there is no secure storage for confidential medical files; regular stock outs of the standardized documentation forms; and significant challenges in transmitting the evidence between the medical and law enforcement sectors while preserving the chain of custody.

Conflict-Related Sexual Violence in Kenya

The post-election violence that swept Kenya following the contested presidential election in 2007 led to looting, destruction of property, and death. Sexual and gender-based violence was committed in six out of eight provinces in the country where the post-election violence occurred. At least 900 people suffered sexual or gender-based violence, which was largely perpetrated by Kenyan security forces as well as by gangs. Women and girls were disproportionately affected, but men and boys were also attacked in incidents of individual and gang rape, forced circumcision, and other forms of sexual violence, which resulted in severe physical injuries, psychological and socio-economic suffering, and other serious health complications. In many instances, people were raped and abused in the presence of their children and spouses. Many survivors of violence were afraid to report violations to the authorities due to stigma and fear of retaliation; others who tried to report these crimes were turned away.

The 2017 elections were also notoriously marred by serious human rights violations, including cases of sexual violence. PHR, in collaboration with UN Women and the Office of the United Nations High Commissioner for Human Rights, published the report [“Breaking Cycles of Violence.”](#) which identified gaps, documented good practices, and recommended survivor-centered measures to be prioritized by duty bearers in the health, security, and legal sectors to ensure prevention of and response to election-related sexual violence.

In 2013, PHR joined eight survivors of sexual violence committed in the context of the 2007-2008 post-election violence and three Kenyan civil society organizations in filing [Constitutional Petition No. 122 of 2013](#). This case argued that the state failed to take adequate measures to prevent election-related sexual violence and to protect the survivors in the aftermath, including carrying out effective investigations leading to justice and the provision of reparations. This first-of-its kind civil lawsuit against six state actors was the last remaining effort to hold the Kenyan government responsible for its failure to provide meaningful protections, investigations, prosecutions, and reparations for survivors; numerous criminal cases – including at the ICC – had failed. On December 10, 2020, after seven years of bureaucratic delays, the High Court in Nairobi ruled in favor of four of the survivors, finding that the government of Kenya was responsible for a “failure



to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence.”

This landmark judgement marked the first time ever in Kenya that post-election sexual violence was legitimately recognized by the government and survivors were offered compensation for harm suffered. While the victory was marred by the fact that the court recognized only those survivors who were violated by state actors, or who reported the assault to the police, the judgement marks a milestone for justice and accountability for crimes of sexual violence as Kenya heads into a new general election in 2022.

Obstacles to Securing Justice for SGBV Survivors in Kenya

Numerous barriers exist to access to justice for survivors of SGBV. These include:

Stigma associated with cases of SGBV. As noted above, shame prevents most survivors from reporting these cases; this is compounded by the burden of reporting and seeking medical and legal aid, which is largely borne by the survivor.

A lack of sufficient safe spaces/shelters. There are few shelters in Kenya for people fleeing sexual violence, and most are run by private entities. In instances where these shelters exist, they are not well-equipped to address survivors’ needs and most can only host survivors for a period of two weeks. Most survivors are therefore forced to continue living in the same environment as the perpetrators of sexual violence, who can tamper with evidence by coercing or threatening the survivors not to testify against them. More often than not, survivors end up failing to report and to adduce evidence in court due to threats or intimidation.

Lack of effective collection and documentation of evidence. Some health facilities and police stations are not well equipped to collect and store evidence. PHR has been at the forefront in training service providers in forensic documentation and storage of evidence.

Lack of requisite knowledge and skills to handle cases of sexual violence by law enforcement agents, health care practitioners, lawyers, and the judiciary. Capacity development is critical to changing attitudes and ensuring that service providers are properly equipped to respond to survivors of sexual violence. Addressing SGBV requires a multisectoral approach that ensures coordination among all the relevant actors.

Failure by the government to adequately resource initiatives that address SGBV. Most of the programs that address SGBV in Kenya are donor funded; once these projects come to an end, survivors can no longer access services. There is therefore a pressing need for the government and other actors to work closely to coordinate survivor services.

Impunity. The systemic failure to hold perpetrators to account has allowed SGBV in Kenya to continue unchecked; in its analysis of sexual violence during and after the 2017 presidential elections, the Kenya National Commission on Human Rights attributed the high number of cases of SGBV to the climate of impunity that followed the 2007-2008 post-election violence.^{xiii}

Conclusion



Sexual violence is not only a human rights violation but also a critical public health issue. Sexual violence accounted for 25 percent of the human rights violations that occurred during the 2017 elections in Kenya.^{xiv} The enactment of laws and policies by the Kenyan government is a first step in preventing and ensuring accountability for sexual violence crimes, but these mechanisms must be implemented to ensure that survivors access justice. Services such as shelters and legal aid should be reinforced to accord survivors the requisite support. This is particularly important amidst the ongoing COVID-19 pandemic, which is accentuating existing inequalities which themselves exacerbate sexual violence.

Prosecution of SGBV cases remains relatively low in Kenya.^{xv} One of the key obstacles to successful prosecution of these cases is the failure to present sufficient substantiating evidence in court and improving the collection and preservation of forensic evidence is key to increasing access to justice for survivors. As Kenya gears up for the 2022 general elections, it is imperative that the government prioritize measures that will prevent and protect women and girls, as well as men and boys, from all forms of sexual violence. Kenya has a duty to live up to its domestic and international obligations regarding protection from and prevention and prosecution of sexual violence crimes.

Recommendations

The government of Kenya has the due diligence obligation to prevent, protect from, and prosecute cases of sexual violence. It is therefore paramount that the government put in place measures that not only afford protection to survivors but also offer prompt and effective access to justice. Physicians for Human Rights is of the view that the following recommendations are integral in ensuring that Kenya meets its due diligence obligations:

- The government of Kenya should prioritize the prevention of gender-based violence both in practice and policy. The laws that have been enacted should be implemented in their entirety by ensuring that there are sufficient budgetary allocations for services such as legal aid and comprehensive medical care, including psychosocial support for survivors.
 - The national government and the 47 county governments should adopt trauma-informed, survivor-centered approaches in responding to cases of SGBV. This includes the establishment of safe shelters that are easily accessible to all survivors of SGBV. The Office of the Inspector General, in partnership with other actors, should ensure specialized and standardized training to guarantee that police officers have the requisite skills on how to respond to and support survivors of sexual violence; and
 - The government of Kenya should strengthen and enhance coordination among all sectors that address and respond to gender-based violence. This multisectoral collaboration should also include coordination between the government investigative agencies and oversight mechanisms such as the Kenya National Commission on Human Rights and the National Gender and Equality Commission.
 - The government, through its investigative and prosecution agencies, should enhance accountability for all perpetrators of gender-based violence, including state actors. This includes ensuring all police officers deployed can be easily identified.
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