



# IDENTIFYING, DOCUMENTING, INVESTIGATING AND PROSECUTING CRIMES OF SEXUAL TORTURE COMMITTED DURING WAR AND ARMED CONFLICTS, AND REHABILITATION FOR VICTIMS AND SURVIVORS

Submission to the Office of the UN Special Rapporteur on Torture

Prepared by Utu Wetu Trust

## TITLE: CHALLENGES FACING INVESTIGATION AND PROSECUTION OF ELECTION RELATED (SEXUAL) VIOLENCE IN KENYA.

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### 1. INTRODUCTION

Election related sexual violence (ERSV) cases remain prevalent in Africa's political history. In Kenya, the 2007/2008 election period resulted in gross human rights violations.<sup>1</sup> The said period is infamous for widespread spontaneous and orchestrated violence and various crimes against humanity including murder, rape, and torture. According to the International Criminal Court, crimes against humanity such as murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts took place in the country. During the ensuing [violence](#), hundreds of men and women were sexually abused, castrated, harassed, and killed on the basis of ethnic identity.<sup>2</sup>

Following the human rights abuses witnessed during the 2007-2008 elections, 8 survivors alongside Physicians for Human Rights, the Coalition on Violence Against Women (COVAW), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), and the Independent Medico-Legal Unit (IMLU), filed a petition against the government of Kenya for failing to prevent, protect and respond to conflict related sexual violence.<sup>3</sup> Notably, the Constitution of Kenya under the bill of rights, provides for the security of the person and protection against all forms of violence. Articles 25(a), 29(d) and (f) and 50 prohibit any form of torture or treatment that is cruel, inhuman, and degrading from either public or private entities. This means that the Constitution safeguards any person against sexual violence.<sup>4</sup>

In 2020, the court granted judgement in favor of 4 out of the 8 individual petitioners. The court held that the State has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order.<sup>5</sup> On the issue of sexual violence, the court recognized sexual

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<sup>1</sup> Truth, Justice, and Reconciliation Commission, "Commissions of Inquiry - CIPEV Report (Waki Report)" (2008). IX. Government Documents and Regulations.

<sup>2</sup>Kenya National Commission on Human Rights, "Reflections in the Mirror an Introspection of the KNCHR 2007-2008 experience Reflections 10 Years After The 2007 Post Election Violence," (2017) available at [https://www.knchr.org/Portals/0/CivilAndPoliticalReports/2017 Reflections%20in%20The%20Mirror An%20Introspection%20of%20the%20KNCHR%202007-2008%20Experience.pdf?ver=2018-06-06-161737-963](https://www.knchr.org/Portals/0/CivilAndPoliticalReports/2017%20Reflections%20in%20The%20Mirror%20An%20Introspection%20of%20the%20KNCHR%202007-2008%20Experience.pdf?ver=2018-06-06-161737-963).

<sup>3</sup> Petition 122 of 2013; Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae) [2020] eKLR.

<sup>4</sup> Further, the doors of the courts were opened for any person acting on their own behalf or on behalf of others including a group of persons, or in the interest of the public, to institute court proceedings claiming that a right or fundamental freedom in the bill rights has been denied, violated, infringed, or is threatened. This is in accordance with Article 22 of the Constitution, thus increasing access to the courts for anyone seeking remedies for any violation of human rights.

<sup>5</sup> Human Rights Committee's General Comment No. 31 on the ICCPR at para82 and *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR.

violence as a gross infringement on the right to life<sup>6</sup> and that rape violates this right.<sup>7</sup> The court found that the state could not escape liability because the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup>, petitioners testified to having been raped by GSU officers (state police officers) and 8th having reported her case to the police station to no avail. The testimonies given demonstrated that State actors were involved in acts of sexual violence, and were directly responsible for the violations of their rights. The court concluded that there was a violation of the right to life, protection from torture.

The 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> petitioners were each awarded Kshs. 4 million as general damages for the violation of their constitutional rights and cost of the suit. The court awarded the four survivor-petitioners reparations due to the harms caused by State's failure to investigate, prosecute, and end impunity for the sexual violence they experienced. The court's decision and the compensation marked a major milestone for survivors in accessing justice and redress, providing hope to survivor-petitioners that they would finally receive relief after over a decade of suffering and government inaction.

The 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> petitioners were found to not have reported their cases to warrant investigation and prosecution of the perpetrators. Therefore, the state was deemed not liable for violating their right to appropriate remedy which in such cases would include compensation. Still, the court observed that they did not receive equal protection before the law because despite the security agencies receiving credible information of an imminent violence eruption after the elections they failed to set up the appropriate structures to ensure that the petitioners were not harmed.

Consequently, the Petitioners 7, 10, 11 and 12, alongside the 4 institutional petitioners filed a partial appeal at the Court of Appeal in Nairobi. The grounded their quest on the basis that the High Court:

- i. Only considered state obligations to investigate sexual violence, failing to consider state obligations to prevent sexual violence or provide protection and reparation to survivors.
- ii. Erred by only providing redress to the survivors who experienced SGBV perpetrated by a state actor (police or security forces).
- iii. Failed to consider the many structural barriers that survivors of SGBV face in reporting their experiences, only ruling in favor of the survivor-petitioners who made reports to the police at the time.
- iv. Failed to determine the state's legal obligations to investigate and prosecute SGBV committed by non-state actors, such as the ethnic militia or civilians who perpetrated forced circumcisions and rapes during the 2007-2008 post-election violence.
- v. Failed to consider the state's obligation to put measures in place to protect people from SGBV by third parties, and, when it occurs, to conduct prompt, credible, and thorough investigations, and award reparations to survivors.
- vi. Failed to consider the widespread and systematic nature of the post-election violence. The High Court could have ordered structural measures that could help lead to broader reparations for the thousands of other survivors of the 2007-2008 post-election violence.
- vii. Failed to consider that Kenya's Independent Policing Oversight Authority has failed to carry out any investigations into SGBV perpetrated by police officers during the post-election violence.

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<sup>6</sup> Article 4 of the Maputo Protocol.

<sup>7</sup> This was affirmed in *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty* 1996 AIR 922.

Email: [info@utuwetu.org](mailto:info@utuwetu.org)  
Website: <https://www.utuwetustrust.org>  
X: @utu\_wetu  
LinkedIn: Utu Wetu

Unfortunately, subsequent elections have continued to record varying degrees of violence including sexual violence. For instance, in 2017, Kenya's presidential election also was marred by serious human rights violations, including gang rapes, unlawful killings and beatings by police during protests and house-to-house operations in western Kenya, which was aligned to the opposition. At least 12 people were reportedly killed and over 100 badly injured. The Kenya National Commission on Human Rights also reported that the police had killed at least 24 people nationwide, including one in Kisumu and 17 in Nairobi.<sup>8</sup> The numbers reported are most likely much higher, as the Kenyan media were slow in reporting on the violence and families were afraid to speak out.<sup>9</sup> Amongst the casualties included six-month-old Samantha Pendo who died after police officers reportedly smashed her head while in the arms of her mother, in Nyalenda, an informal settlement in Kisumu. After nationwide and public outcry, the matter dubbed 'Baby Pendo case'<sup>10</sup> was escalated through the justice system in an inquest and a subsequent decision to charge by the Office of the Director of Prosecutions (ODPP).

To date, the accused are yet to take plea in this matter. According to the ODPP, the delay is caused by the complexity of the offences, investigations, and the vulnerability of witnesses and victims of the offences. Further, they could not ascertain the suspects' identities at first. This was later resolved by charging the superior officers and some of the junior police officers who acted on orders to contain the tense situation in Kisumu but ended up infringing on the rights of area residents.<sup>11</sup>

## **2. CHALLENGES, IMPEDIMENTS AND OBSTACLES TO EFFECTIVE IDENTIFICATION, DOCUMENTATION, INVESTIGATION, AND PROSECUTION OF CRIMES OF SEXUAL TORTURE AND RELATED ILL-TREATMENT.**

### **2.1. Delays in investigating and prosecution of Election related sexual violence (ERSV) cases.**

Kenya has witnessed significant delay when it comes to investigating and prosecuting ERSV cases. This is largely due to poor documentation processes, preservation of evidence and political interference when powerful leaders are implicated. For instance, five years after the Baby Pendo case happened, the ODPP reached a decision to charge the suspects. Despite this progressive step, the case is yet to fully begin as a trial due to multiple court applications and delays experienced on the prosecution's side. The circumstances under which ERSV occurs makes it daunting to collect, document and store crucial evidence that would be important in proving once's case. Having said this, the Baby Pendo case is heavily hinged on the doctrine of "command responsibility" which implicates the officers who oversaw the atrocious

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<sup>8</sup> Kenya National Commission on Human Rights Report, A Human Rights Monitoring Report on the 2017 Repeat Presidential Elections, 2017.

<sup>9</sup> Human Rights Watch Report, 2017

<sup>10</sup> HCCR E 73 of 2021 *R v Titus Yoma and 11 others*

<sup>11</sup> Please see <https://partnersinjustice.org/resources/stories/baby-pendo/#:~:text=The%20%E2%80%9CBaby%20Pendo%E2%80%9D%20case%20alleges,her%20mother%20at%20the%20time> for further information.

Email: [info@utuwetu.org](mailto:info@utuwetu.org)  
Website: <https://www.utuwetutrust.org>  
X: @utu\_wetu  
LinkedIn: Utu Wetu

operation that resulted to gross human rights violations in Kisumu.<sup>12</sup> 12 police bosses who served in areas that were affected by electoral violence in 2017, were arrested and arraigned for the death of Baby Pendo in Kisumu County and other serious offences that occurred there, following an investigation by the ODPP and the Independent Policing Oversight Authority. Unfortunately, the delay in the commencement of the trial case has been attributed to political interference and multiple applications by the suspects to further hold off plea taking. This remains to be a trend for human rights violations cases that occur during periods of unrest in Kenya.

## **2.2. Delays in accountability through formal justice mechanisms.**

Since the filing of the partial appeal from the COVAW Case<sup>13</sup> and several follow-up requests for a date, the appellant survivors are yet to have their day in court. Despite the existing court of appeal rules and practice directions in place to facilitate the expedient disposal of matters, the hurdles that survivors continue to face in pursuit of justice point to the challenges litigants encounter in seeking remedies from the courts when their rights are under threat or are violated. It is becoming more evident that the justice delivery mechanism for these survivors has hit a stalemate. This situation requires urgent attention and effective solutions considering the nature of crimes and abuse suffered by not only these survivors but also several others not in the case. It portends a double injustice and psychological distress to the survivors and their families who do not understand how despite progressive protection of rights under Chapter 4 of Constitution, the wheels of justice are barely moving in their direction. In this case, an 11-year delay is anything but fair for the survivors. It also sets a poor precedence not to be emulated in future cases involving conflict related sexual violence.

The effects of a failure to realize justice on time have deleterious impacts on the lives of the survivors. This also leads to further violations of fundamental rights related to fair hearing. Any continued delay of justice constitutes a further breach and discourages other existing survivors of sexual violence from seeking redress from the courts resulting from the weight of fatigue associated with lengthy court cases. The net effect of this is to place the state in a bad light in relation to its commitments to international law obligations amongst its peers, that is to guarantee effective remedies for any human rights violations.

## **2.3. Survivor fatigue**

Many of the survivors who have been part of the process are frustrated due to the delays in their compensation and hearing of the appeal case. From 2007/2008 to 2017, they have waited more than a decade for justice to be served to no avail. Some of the survivors have subsequently fallen ill and are in need of urgent medical attention with no money for treatment. Others have tried unsuccessfully to fend for themselves and their families while some continue to suffer shame and stigma from the society. For instance, it is common for the women who were abused to be chased away from their homesteads by their husbands family. With no where to go, they are subjected to an undignified life of poverty. Survivors also

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<sup>12</sup> Please see for further information <https://www.legal-tools.org/doc/cc8be4/pdf/#:~:text=The%20theory%20in%20a%20codified,others%2C%20that%20those%20paramilitary%20personnel.>

<sup>13</sup> This is in reference to Petition 122 of 2013.

continue to suffer from psychosocial challenges that lead to stress and depression. For them the quest for justice is elusive and might as well be a lost cause.

#### **2.4. Lack of proper documentation**

Problems regarding reporting and the unwillingness of authorities to initiate genuine, credible and fair investigations and prosecutions to punish perpetrators were key challenges after the 2007-2008 election-related rapes. The government's overall failure to investigate and prosecute the range of crimes committed then remains a key concern.

During the high court case submissions in Petition 122 of 2013, it was evident that the documentation processes when it comes to ERSV still remain wanting. In fact many more survivors were left out of the litigation process as some of the severe abuses were not properly documented hence evidence could not be presented in court. Thorough investigation and subsequent prosecution of such cases are a huge gap in the Kenyan jurisdiction especially as pertains elections. This because of heavy political influence that may mar the process and intimidate the survivors and their families. It will be difficult to end the cycles of election-related sexual abuses and more generally rape and other gender-based violence until the government creates an environment in which survivors are willing to come forward and it properly investigates and prosecutes complaints.

### **3. CONCLUSION**

*Ultimately, it is this history of impunity that continues to empower the organisers and perpetrators of violence during election periods to commit atrocities with the confidence that they will never be investigated, prosecuted or made accountable for their crimes.*

From Kenya's experience, it is critical for the criminal justice system to streamline pathways for investigating and prosecuting ERSV as and when it occurs in order to ensure that there is proper accountability. This will have the effect of serving the ends of justice, and deterring future acts of such violence and remedying and offering reparations for those that were affected by this form of violence. To this end we recommend that:

- i. The ODPP of the Republic of Kenya should expedite investigations and prosecution processes in ERSV cases to ensure justice for the survivors of gross human rights violations.
- ii. The Judiciary should deepen and widen the capacity of justice sector actors to address impunity for sexual violence and other serious human rights violations committed in the context of Post-Election Violence (PEV). This includes fasttracking cases involving gross human rights violations to prevent retraumatization of the survivors who have to endure the lengthy prosecution processes.
- iii. The Office of the Attorney General and Department of Justice should address impunity by putting in place the relevant law and policy framework and relevant supporting regulations for the proper investigation and prosecution of ERSV committed during periods of unrest in the country.
- iv. The Office of the Attorney General and the National Treasury should liaise to adopt a State-led national reparation programme including compensation and other forms of

Email: [info@utuwetu.org](mailto:info@utuwetu.org)  
Website: <https://www.utuwetustrust.org>  
X: [@utu\\_wetu](#)  
LinkedIn: Utu Wetu

reparation for any awards by the court and other designated bodies to victims and survivors of sexual violence especially during periods of unrest.

**About Utu Wetu Trust:**

Utu Wetu is a think-tank and collective of human rights experts working in collaboration towards enriching the landscape of advocacy and other strategies geared at advancing gender equality in Kenya, Africa and globally.

Our mission is to advance gender equality in Kenya, the larger Africa Region and beyond, especially for women and girls, through leveraging expertise, collective action, employing inclusive, human rights based, intersectional and victim-/survivor-centered approaches, and strengthening the application and implementation of international human rights norms, standards, and obligations at the national, regional, and international levels.

**Contacts:**

Website: <https://www.utuwetustrust.org>  
X: [@utu\\_wetu](#)  
LinkedIn: Utu Wetu  
Email: [info@utuwetu.org](mailto:info@utuwetu.org)