EAST AFRICAN LAW JOURNAL

Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya

2025

FACULTY OF LAW, UNIVERSITY OF NAIROBI

KENYA'S LEGAL RESPONSES TO GENDER-BASED VIOLENCE: IMPLICATIONS FOR WOMEN IN THE CONTEXT OF FAMILY

Agnes Meroka-Mutua*

Abstract

Since the promulgation of Kenya's Constitution in 2010, the country has made progress towards addressing gender-based violence (GBV) and has passed legislation to address various forms of family violence. This paper however argues that while Kenya's anti-GBV legal framework has been progressive in its recognition of and responses to family violence, it still has limitations which affect women specifically and the family in general. Using a textual and socio-legal analysis of statutes and case law to assess how Kenya's legal responses to GBV have evolved since 2010, this paper demonstrates how the weaknesses Kenya's anti-GBV framework affects women in the context of the family.

* PhD University of Warwick Law School; Senior Lecturer, University of Nairobi Faculty of Law
agi.meroka@uonbi.ac.ke

I. Introduction

Gender based violence is a broad term, which, as defined by Carol Smart[1] includes acts of violence that can be perpetrated against men or women. While both women and men may be victims of GBV, data shows that most victims of GBV are women and girls.[2] Thus, GBV is often used inter-changeably with violence against women. While these terms generally refer to a situation where violence occurs as a result of power imbalances between people of different genders, conceptually, they are distinct. In 1992, the Committee on the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted General Recommendation 19 on Violence Against Women (the Recommendation). The CEDAW Committee noted that "*GBV is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men*."[3] GBV is, therefore, a form of discrimination against women and one of the causes of gender inequality. The Recommendation goes on to illustrate how GBV limits women's enjoyment of fundamental rights and freedoms, noting for instance, that GBV limits the extent to which women are able to participate in public life through employment.[4] Further, the Recommendation recognizes family violence and how it impacts the ability of women to participate in all aspects of life.[5]

General Recommendation 19 led to the adoption of the United Nations Declaration on Elimination of all forms of Violence Against Women (DEVAW). Article 1 of DEVAW defines violence against women as "*any act of gender-based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, arbitrary deprivation of liberty, whether occurring in public or private life*." Thus, while GBV refers to acts of violence that are embedded in gender discrimination and can affect both males and females, violence against women specifically refers to forms of violence experienced by women and girls, and this is informed by statistics that show that a majority of those who experience violence as a result of gender power imbalances and discrimination are women and girls.[6]

DEVAW goes further to list specific forms of violence against women, as follows:

> *(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional*

1 Carol Smart, *Feminism and the Power of Law* (Routledge 1989).
2 World Bank. *Gender Based Violence (Violence Against Women and Girls* (World Bank 2019). https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls accessed 11 June 2025.
3 CEDAW, 'General Recommendation 19: Violence Against Women' (adopted at the 11th Session of the Committee on the Elimination of Discrimination against Women, 1992, A/47/38) (hereinafter CEDAW General Recommendation 19) [1].
4 Ibid [7,11].
5 CEDAW General Recommendation 19 (n 3) [23].
6 Ibid.

practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere,trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

From the definition provided by DEVAW, it is notable that violence against women is categorized according to the context in which it occurs. The first context is the family, the second is the community and the third is where the state is the perpetrator or is culpable is condoning the violence. DEVAW therefore recognizes that the context in which gender-based violence is experienced is important and can affect responses to such violence. This is because, historically, the public-private distinction has meant that women's experiences, occurring primarily in the private sphere of life, have not always been seen and recognized under the law.

In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[7] (Maputo Protocol) prohibits discrimination on the basis of gender and requires states to take measures, including enactment of legislation, to promote equality between men and women. The Protocol addresses GBV under article 4(2), referring to violence against women in both the public and private sphere. In addition, other articles address the diverse contexts in which gender inequality and discrimination against women occur. These include marriage,[8] divorce,[9] widowhood,[10] inheritance,[11] negative cultural practices[12] and in relation to reproductive health rights.[13] We have seen already that the family is the space where many women experience GBV. Thus, by recognizing the rights of women in various stages of family life- whether as married women, divorced women and widows- the Maputo Protocol provides a framework for addressing GBV through the life

7 https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf> accessed 21 June 2025 (hereinafter Maputo Protocol).
8 Ibid art 6.
9 Maputo Protocol art 7.
10 Ibid art 20.
11 Maputo Protocol art 21.
12 Ibid art 5.
13 Maputo Protocol art 14.

cycle approach.[14] Indeed, the Maputo Protocol is viewed as having played a critical role in promoting the enactment of anti-GBV legislation in a number of countries on the continent.[15] In Kenya specifically, Article 5 of the Maputo Protocol on the elimination of harmful cultural practices is seen as having informed the enactment of the Prohibition of Female Genital Mutilation Act, 2011 and the Protection Against Domestic Violence Act, 2015.[16]

In 2025, the African Union adopted the Convention on Ending Violence Against Women and Girls. This Convention recognizes the right of all women and girls to be free from all forms of violence, at all times, whether in the public or private spheres or in cyberspace. The Convention requires states to take preventive and protective measures against GBV. Preventive measures include enactment of legislation for prevention of GBV while protective measures include providing support and assistance to women and girls who experience GBV. This Convention is therefore innovative to the extent that it addresses critical issues, such as GBV in the cyberspace and the need to have laws that prevent GBV from occurring in the first place.

In light of this international and regional legal framework on GBV, this paper uses a textual analysis of statutes and case law to assess how Kenya's legal responses to GBV have evolved since 2010 when the Constitution was promulgated. The central argument presented in this paper is this: while Kenya's anti-GBV legal framework has been progressive in its recognition and response to family violence, there are still limitations within the legal framework, which affect women specifically and the family in general. These weaknesses are demonstrated using a socio-legal analysis of the anti-GBV statutes passed since 2010. These laws are the Prohibition of Female Genital Mutilation Act, 2011, the Victim Protection Act, 2014, the Protection Against Domestic Violence Act, 2015 and the Children Act, 2022.

Conceptually, the paper uses a feminist and women's rights approach to assess how Kenya's legal framework on the prevention of GBV impacts women within the context of the family. It demonstrates that Kenya's legal framework on GBV has been progressive, evolving over time to provide greater protection for survivors of GBV. It highlights that the Constitution, which was promulgated in 2010 is the foundation upon which the progressive legislation on prevention of GBV has been enacted. In the first section, the paper has addressed definitional and conceptual

14 Lillian Artz, Talia Meer and Alex Müller,'Women's Exposure to Sexual Violence Across the Life Cycle: An African Perspective.' in: S Choudhury., J Erausquin.and M Withers(eds) *Global Perspectives on Women's Sexual and Reproductive Health Across the Lifecourse*. (Springer 2018) https://doi.org/10.1007/978-3-319-60417-6_16. Accessed on 11 June 2025.

15 African Union. *Report on the State of Ratification of the Maputo Protocol, (*AU Ministerial Consultation Meeting on the margins of the 60th Session of the United Nations Commission on the Status of Women, 2016) (hereinafter Maputo Ratification Report.).

16 Africa Population Health and Research Center, 'Taking Stock: Maputo Protocol in Advancing Women's Rights' Africa Population Health and Research Center. https://aphrc.org/blogarticle/taking-stock-maputo-protocol-in-advancing-womens-rights/ accessed 11th June 2025.

issues, highlighting how international and African regional frameworks have defined GBV. In the second section, the paper discusses the feminist women's rights approaches to anti-GBV law. It examines the way in which law, being a masculine paradigm, has historically been unresponsive to issues of GBV and highlights how law has been blind to the experiences of women, who are the majority of the victims of GBV. It further illustrates the specific ways in which African feminist analyses on GBV differ from mainstream feminist analyses of GBV. Thereafter, the paper discusses the development of Kenya's legal framework on the prevention of GBV, starting from the independence period until the post-2010 period. This third section demonstrates that much of the progressive legal provisions on anti-GBV were passed after 2010 and credits the Constitution with creating the space within which these legal provisions were passed. In the fourth section, the paper discusses in chronological order the four main anti-GBV laws that were passed post-2010. The section analyses the text of the laws, judicial pronouncements, and implications on the family, illustrating the specific ways in which each law affects women in particular and the family in general. Finally, the paper makes recommendations for legal and policy reforms.

II. Conceptual Grounding: Feminism, Women's Rights, GBV and the Law

Violence against women is a concept that aims to place focus and emphasis on women's experiences. This is informed by the fact that law has generally been problematized as being exclusionary of women because women and girls have not always been considered as legal subjects. Article 15 of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) specifically addresses this issue, and it provides that women should be accorded equality with men before the law. Article 15 of CEDAW is a specific response to the universal historical reality that women were denied standing before the law. The term "*women's rights are human rights*"[17] is one that illustrates and problematizes the exclusion of women from the corpus of human rights law. Thus, there are specific forms of discrimination, exclusion, violence and disadvantage that women faced simply because they are women, and which were never recognized under the law.[18] For example, with regard to rape, the first time that it was recognized as a war crime and prosecuted as such was in relation to the Rwanda genocide by the International Criminal Tribunal for Rwanda in 1998.[19] While many countries have now put in place legal provisions to protect the human rights of women and girls by specifically

17 Charlotte Bunch, 'Women's Rights as Human Rights: Towards a Re-Vision of Human Rights' (1990) 12(4) *Human Rights Quarterly* 486.

18 World Bank. *Gender Based Violence (Violence Against Women and Girls* (World Bank 2019). https://www.worldbank.org/en/topic/socialsustainability/brief/violence-against-women-and-girls Accessed 11 June 2025.

19 Mark Ellis, 'Breaking the Silence: Rape as an International Crime' (2007) 38(2) *Case Western Reserve Journal of International Law* 225-247.

criminalizing acts of violence against women, this has not always been the case, and where such laws have been passed, it has still taken many years for most countries to implement such provisions.[20] In Kenya for example, it was not until 2015 that the Protection Against Domestic Violence Act (PADVA) was enacted, thereby specifically recognizing various acts that constitute domestic violence and making provision for the protection of survivors of such violence. With regard to harmful cultural practices such as female genital mutilation (FGM), there are 29 countries in Africa where it is practiced. Of these, 26 have passed laws that prohibit the practice, and most only prohibit the practice on girls below the age of 18.[21] Around the world, only 59 countries have criminalized FGM.[22]

Feminist scholarship and advocacy have been largely responsible for the recognition of various forms of violence against women under the law. Early mainstream feminist scholarship highlighted patriarchy as the root cause of violence against women.[23] For instance, Angela Harris has argued that Catherine MacKinnon's conceptualization of rape focused only on the experiences of White women.[24] Harris illustrates that by focusing on patriarchy as the main cause of violence against women, mainstream feminist thought fails to consider how issues such as poverty, racism, ageism and ableism also contribute towards violence against women. The emphasis on patriarchy also creates unnecessary and problematic stereotypes. Thus, in the context of slavery in the United States of America, rape was understood as a crime perpetrated by Black men against White women.[25] The rape of Black women, whether by White men or Black men was unseen.[26] The idea that White men could also be rapists was also unappreciated.[27]

Global South feminism, including African feminism highlighted other key factors such as colonialism, capitalism, economic inequality, racism, ageism and ableism as fuelling violence against women. African feminists in particular have highlighted how colonialism economically and politically disenfranchised women on the continent and how this in turn contributes to violence against women.[28] For instance, in Kenya, the creation of private land ownership resulted in the exclusion of women

20 Jeni Klugman, 'Gender Based Violence and the Law' (Background Paper, World Development Report, World Bank 2017). https://thedocs.worldbank.org/en/doc/232551485539744935-0050022017/original/WDR17BPGenderbasedviolenceandthelaw.pdf accessed 11 June 2025.

21 Equality Now '*FGM and the Law Around the World'(*(Equality Now 2019) https://www.equalitynow.org/the_law_and_fgm accessed 11 June 2025.

22 Ibid.

23 Rebecca Jane Hall 'Feminist Strategies to End Violence Against Women' (2015) Oxford Handbooks Online. https://gbvaor.net/sites/default/files/201907/Feminist%20Strategies%20to%20End%20VAW%20OXFORD%20Handbook%202015.pdf accessed 11 June 2025.

24 Angela P. Harris 'Race and Essentialism in Feminist Legal Theory'(1990) 42(3) Stanford Law Review, 581-616.

25 Ibid.

26 Angela Harris (n 24).

27 Ibid.

28 Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).

from such ownership.[29] This is because colonial rulers used the concept of household heads to determine who would be registered as a land owner, but at the same time women were excluded as household heads. [30] This economically disenfranchised women.[31] Flowing from this, it is generally acknowledged that a woman who does not have access to economic resources is more likely to stay in a violent relationship.[32] She is also less likely to have control and autonomy over her body, thus limiting key choices such as whether to have children, how many children to have and when to have them.[33] This would in turn have negative implications on her reproductive health, further limiting her ability to participate in income generating activities.[34]

In the context of politics, African feminists demonstrate how perceptions of leadership on the continent were re-interpreted by colonialism, to the detriment of women.[35] Thus, colonial rulers assumed that only men could hold leadership positions, thereby disregarding the leadership roles played by women. In post-independence Africa, this meant that few women were held political positions, resulting in the under-representation of women's issues.[36] In turn, women's under-representation in politics is seen as one of the key reasons for the failure by African states to pass and implement comprehensive legislation on issues that affect women, including GBV.[37] An example in the Kenyan context can be drawn from the 2007/2008 post-election violence in the country. The wide scale violence that was experienced following the elections in December 2007 led to the establishment of the Commission of Inquiry into the Post-election violence (CIPEV).[38] The Commission was mandated to investigate the factors that contributed to the post-election violence. In its report, the Commission highlighted the ways in which sexual violence is closely connected to landlessness, land hunger, poverty, and the unequal nature of Kenya's land distribution pattern. The report gave examples of women in inter-ethnic marriages who, upon the announcement of the election results, were raped by their husbands and their husband's kin because of their ethnicities.[39] By highlighting these stories, the CIPEV report demonstrated the existence of a causal link between land clashes,

29 Patirica Kameri-Mbote. 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourse' [2013 online]. University of Nairobi. Available at:http://erepository.uonbi.ac.ke/handle/11295/10057 accessed 11 June 2025.

30 Ibid.

31 Akinyi Nzioki 'Effects of Land Tenure on Women's Access and Control of Land in Kenya' in Abdullahi An'Naim, (ed) *Cultural Transformation and Human Rights in Africa*, (Zed Books, 2002).

32 UNFPA, 'Linking Women's Economic Empowerment, Eliminating Gender Based Violence and Enabling Sexual and Reproductive Health Rights' (UNFPA, 2020).

33 Ibid.

34 UNFPA, 2020 (n 31).

35 Ifi Amadiume. *Male Daughters, Female Husbands: Gender and Sex in an African Society*, (Zed Books, London 1987).

36 Nyokabi Kamau, *Women and Political Leadership in Kenya*, (Heinrich Boll Foundation, Nairobi 2010).

37 Verónica Frisancho, Evi Pappa, and Chiara Santantonio, 'When Women Win: Can Female Representation Decrease Gender-Based Violence?' (Inter-American Development Bank 2022). https://doi.org/10.18235/0004513 accessed 11 June 2025.

38 Commission of Inquiry into Post-Election Violence (CIPEV), '*Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*' (Government of Kenya, 2008) http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf accessed 18th June 2025.

39 Ibid 246.

political violence and GBV within the family. As a result of the findings of the CIPEV report, the National Cohesion and Integration Act, 2008 was enacted. The objective of that Act is to promote national cohesion and integration by outlawing ethnic discrimination. It is however disheartening to note that the Act does not address intersectional forms of discrimination, occurring both on the basis of gender and ethnicity. Indeed, discrimination within the meaning of the Act is limited only to discrimination occurring in the public sphere. The Act completely ignores forms of ethnic discrimination occurring within the family, yet the report which informed the passing of the Act explicitly highlights these forms of discrimination.

From these feminist analyses of GBV, we see that it is important to appreciate the social, economic, political and cultural contexts in which GBV occurs. Further, GBV is not only informed by gender, but by other markers of identity such as race, ethnicity, disability, and age, among others. We have however seen that under international and regional legal frameworks, GBV is understood as a form of violence experienced as a result of one's gender. From an African feminist perspective, this is very limiting- African women face various forms of violence not only on the basis of gender, but also on the basis of how gender intersects with other structural factors and categories of identity.

Law is therefore often limited in how it addresses GBV for a number of reasons. First, as we have seen from the example of Kenya's National Cohesion and Integration Act, 2008, law may not fully take into account the complex factors that inform GBV. Thus, law is not always responsive to the contextual realities in which GBV occurs, and this would limit its effectiveness in addressing GBV. Additionally, law has traditionally operated primarily in the public sphere, regulating relationships in the public sphere. Consequently, many aspects of life in the private sphere have not been subject to legal regulation until fairly recently. In her account of the power of law in discounting women's accounts of rape, Carol Smart,[40] demonstrates the way in which law as a system is designed in a manner that does not allow it to really appreciate women's accounts of their experience of rape. In doing this, Smart further reiterates the gendered nature of law. This means that law is not a gender neutral space, but has rather been developed through a masculine lens, what Naffine Ngaire,[41] refers to as "*the man of law*." Thus, the standard for the rules which become law has been the experiences of men, and it is also men who have mostly occupied the spaces in which law is made. The masculine experiences that are used to develop legal rules and legal systems are not capable of appreciating female experiences of violence.[42]

40 Carol Smart, (n 1).

41 Ngaire Naffine, 'The Man of Law' in Ngaire Naffine (ed), *Law and the Sexes: Explorations in Feminist Jurisprudence, (*Allen and Unwin 1990).

42 Carol Smart (n 1).

The way in which cases of rape and other forms of GBV are treated under the law may result in traumatizing the victims by failing to appreciate their experiences. For example, a victim of domestic violence may face trauma when they report the violence to the police and are asked questions such as "what did you do to provoke the violence?" or other questions that suggest the victim was to blame or somehow contributed to the violence she faced. Further, in the criminal justice system, a survivor may have to give evidence in court and may also have to face the perpetrator while doing so.[43] In divorce cases where cruelty is the ground upon which divorce is sought, the petitioner would have to engage with the respondent, who is the same person accused of perpetrating acts of cruelty against the petitioner. The justice system is therefore designed in a manner that subjects survivors of violence to the additional trauma of having to face the perpetrators while trying to seek justice for the violence they suffered. In a legal system that is designed with reference to masculine experiences, female experiences do not fit in neatly, and this results in the legal system being hostile or indifferent to women and girls who try to seek justice for the violence they suffer.[44] Thus, while law is an important vehicle for the safety and protection of survivors of GBV, it has historically been a space in which women and girls have faced discrimination. By failing to recognize acts of violence that mostly affect women, law created vulnerability for women and girls.

While Kenya has made progress towards addressing GBV, particularly through the enactment of several pieces of legislation, the issues raised by feminist analyses of GBV have not been fully resolved. Thus, the pieces of legislation highlighted in this paper are used to illustrate the progress made as well as some of the existing gaps. Feminist advocacy continues to highlight these gaps, while feminist scholarship plays a significant role in developing strategies for addressing those gaps.

III. Development of Kenya's Legal Framework for Responding to GBV

From the time Kenya gained independence in 1963, various forms of GBV, including sexual and physical violence were provided for under the Penal Code.[45] However, the provisions of the Penal Code did not sufficiently address sexual and gender-based violence.[46] Since 1963 the development of Kenya's anti-GBV legal framework has been gradual and has occurred fairly recently. In 2001, the Children Act prohibited harmful cultural practices including FGM and early and forced marriage. The Sexual Offences Act (SOA) was enacted in 2006 and it provides a comprehensive framework for addressing sexual violence. While the SOA is a more comprehensive law, it does not address the specific ways in which GBV occurs within the family set up as it takes a generalized approach to all cases of sexual violence. Some of

43 Ibid.
44 Ngaire Naffine (n 40).
45 Penal Code (Chapter 63, of the Laws of Kenya).
46 National Gender and Equality Commission, *The Status of Sexual and Gender Based Policies and Law in Kenya* (National Gender and Equality Commission 2016). https://www.ngeckenya.org/Downloads/Status%20of%20SGBV%20Legislations%20in%20Kenya.pdf accessed 11 June 2025.

the original provisions of the SOA were problematic. For instance, the now deleted section 38 provided that *"any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of."* This was a harsh section and one that had the effect of deterring victims from reporting. While section 38 has been repealed, The SOA still has other limitations, for instance, it does not recognize marital rape as an offence.[47]

In 2010, the Constitution of Kenya was promulgated, providing for a broad framework for the protection of human rights. It is the Constitution which now provides the anchoring for legislative efforts on the prevention of GBV and is the basis for the development of the legal framework on GBV. Given that GBV is rooted in gender inequality and discrimination, article 27(4) which prohibits discrimination on the basis of gender is important in framing Kenya's anti-GBV legal framework. Article 43 provides for socio-economic rights, including the right to reproductive health. Article 45 recognizes the right to family and provides that marriage shall be between adults of opposite sex, based on their full consent. These constitutional provisions have informed the development of the Kenya's anti-GBV legal framework.

Chronologically, the following developments have occurred since 2010: In 2011, the Prohibition of FGM Act was passed, giving life to a number of constitutional provisions, such as article 43 (1)(a) on the right to reproductive health, particularly because it is established that FGM has negative impacts on sexual health and can also lead to maternal and child morbidity. Until 2011, FGM was only criminalized with respect to children. Post-2011, the law prohibits FGM across the board, so that it is now also illegal to perform FGM on adult women.

In 2014, the Victim Protection Act (VPA) was passed, with the objective of giving effect to article 50(9) of the Constitution, which requires that parliament shall pass legislation that provides for the protection, rights and welfare of victims of offences. Given that the various forms of GBV that are recognized under Kenya's legal system are considered criminal offences, the VPA is relevant in this context.

With regard to domestic and physical violence, including assault and battery, PADVA was enacted in 2015 with the objective of strengthening the legal provisions on GBV, which had hitherto been dealt with under the Penal Code. The PADVA seeks to promote gender equality by addressing GBV which, as stated above, is rooted in gender discrimination. At the time the PADVA was passed, it was recognized that dealing with gender-based violence under the Penal Code was limiting because the gender dynamics informing GBV, intimate partner violence or domestic violence were not considered, and thus justice for survivors was elusive.

47 See Sexual Offences Act, s. 43(5).

The 2022 Children Act which repealed the Children Act of 2001 provides for further protection of children by enhancing penalties for harmful practices and recognizing additional harmful practices such as girl-child beading.[48]

The post-2010 anti-GBV laws are further informed by the family law reforms of 2013 and 2014. Section 4 of the Marriage Act expressly provides that the age of consent for marriage is 18 years, therefore providing a legislative basis for the prohibition of child marriage. In addition, section 3 of the Marriage Act provides that marriage is a voluntary union, thus prohibiting forced marriage. The Marriage Act therefore provides a basis for addressing some forms of GBV, which are then further elaborated in other laws such as the PADVA and the Children Act, 2022. Section 65(b) of the Marriage Act also recognizes cruelty, whether physical or mental as a ground for dissolution of a Christian marriage. Sections 66(2)(b) also recognizes cruelty as a ground for dissolution of a civil marriage, while section 69(1)(b) provides for cruelty as a ground for dissolution of a customary marriage. Section 70(c) lists rape as a ground for dissolution of a Hindu marriage, while section 70(e) also recognizes cruelty as a ground for dissolution of a Hindu marriage. While the Marriage Act does not define the type of conduct that would constitute cruelty, courts generally accept evidence of various forms of violence to prove cruel conduct.[49] We see therefore that a key development in Kenya's anti-GBV laws is the recognition of the fact that GBV often occurs within the family set up and hence the need for the law to provide greater protection for vulnerable parties within the family.

While there has been incremental progress in strengthening the legal framework on GBV, there are several limitations within this framework which affect families as discussed in the sections that follow.

IV. The Impacts of Kenya's Anti-GBV Laws on Women in the Context of the Family

A. The Prohibition of FGM Act, 2011

As already noted, this Act criminalizes FGM, regardless of whether it is performed on children or adult women. It also creates associated offences which include: aiding and abetting;[50] cross-border FGM;[51] use of one's premises for purposes of FGM;[52] being in possession of tools and equipment for purposes connected with FGM;[53] failure to report the commission of FGM;[54] and the use abusive or derogatory

48 Children Act 2022, s 23(1)(e).
49 Sussie Wairimu Mutahi & Elvira Akech, 'Insights From A Decade of Divorce Cases in Kenya: An Invitation Toward Multidisciplinary Collaboration for Marriage Enhancement,' (2025) 66(3) *Family Transitions* 137, 153. DOI: 10.1080/28375300.2025.2457173.
50 The Prohibition of Female Genital Mutilation Act 2011 s 20.
51 S 21 Ibid.
52 The Prohibition of Female Genital Mutilation Act 2011 s 22.
53 S23 Ibid.
54 The Prohibition of Female Genital Mutilation Act 2011 s 24.

language that is intended to ridicule and embarrass a woman who has not undergone FGM, or a man who marries or supports a woman who has not undergone FGM.[55]

This section demonstrates that while Kenya passed the Prohibition of FGM Act in order to align with international and regional women's rights provisions, cultural acceptability of the practice limits the implementation of the Act. As will become evident from this discussion, even courts do not fully enforce the Act. This is partly due to the fact that sometimes FGM is viewed as a cultural practice, which can be distinguished from other forms of GBV, which are often viewed as predatory and abusive.[56]

An assessment of the prosecuted cases under the Act reveals two key issues of concern. First, most of the accused persons under the Prohibition of FGM Act are women. While FGM under the traditional context is performed by women, medicalized FGM can also be performed by male healthcare professionals in the clinical set up. However, in all the reported cases, only women have been charged with the offence of performing FGM. Additionally, analysis of the reported cases shows that it is mostly women who are charged with associated offences under the Act. The most common offences with which they are charged are as follows: aiding and abetting for giving consent for their daughters to undergo FGM; consenting as adult women to undergo FGM; failing to report the commission of FGM where, as mothers they are aware that their daughters have undergone FGM, but fail to report the offence; and finally, using one's premises for purposes of FGM, where it is female relatives who would give consent for FGM to be performed in their homes or for women and girls who have undergone the cut to recover in their homes. This means that it is women within families- mothers, in particular, who are likely to be charged with associated offences. This therefore means that there is a gender dimension to prosecutions under the Act.

Second, the decisions by the courts in cases of FGM or associated offences are disparate. Courts routinely impose different sentences for offences where the facts are generally similar. This might indicate that sometimes, courts are conflicted as to how best to uphold the anti-FGM law, while also making decisions that will be in the best interests of the child and the family. While it is not in all the cases that the courts explicitly state that family interests have informed their decisions, this can be inferred, and it resonates with the other studies on the role of law in promoting the abandonment of FGM.[57]

55 S 25 Ibid.

56 *Agnes Meroka-Mutua, Daniel Mwanga and Charles Olunga, Assessing When and How Law is Effective in Reducing the Practice of FGM/C in Kenya. Evidence to End FGM/C: Research to Help Girls and Women Thrive* (Population Council, New York, 2020).

57 Ibid.

1. *Analysis of cases under the Prohibition of FGM Act*

1.1 Cases relating to section 19 which prohibits any person, including health care providers, from performing FGM

In *Pauline Robi Ngariba v Republic,*[58] the accused person was convicted of performing FGM and sentenced to a fine of Kshs. 200,000 (US $ 1,550) or imprisonment for a term of three years. Her appeal against the sentence was dismissed and the court held that the sentence was lawful because it was in line with the minimum sentence provided for under the Act. However, in *Chumo v Republic,*[59] the accused person was convicted of performing FGM on six adult women, who had all consented to the procedure. She was convicted on four out of the six counts, and for each count, she was sentenced to the minimum sentence of Kshs. 200,000 (US $1,550) or imprisonment for three years, which made a total of Kshs. 800,000 (US $6,200) or imprisonment for twelve years. She appealed against the conviction and the sentence. The court upheld the conviction but held that the sentence was excessive, taking into account that the accused person was an elderly woman who was also in poor health. The sentence was substituted for 12 months imprisonment on each of the four counts, to run concurrently. Taking into account time already served, the accused was released immediately.

In *Mohamed & another v Republic*,[60] the second appellant, who was working as a doctor in Mandera county, had been convicted of performing FGM on a girl aged 17 years in a clinical setting and was sentenced to five years imprisonment without the option of a fine. She appealed against both the conviction and the sentence. The court upheld the conviction, but set aside the sentence, holding that it was manifestly harsh and excessive to sentence the accused person to five years' imprisonment, with no option for a fine, while she was a first offender. Thus, although the Prohibition of FGM Act allows courts to award sentences higher than three years' imprisonment, in this case, the court found five years to be too high and substituted the same with the minimum three years or fine of Kshs. 200,000 (US $ 1,550).

1.2 Cases relating to section 20, which prohibits any person from aiding and abetting a person to perform FGM

In *Republic v Esther Rioba Makori,*[61] the accused was charged with aiding and abetting the commission of FGM under section 20 and failing to report the commission of FGM under section 24. The facts of the case were that the accused had consented to have her daughter undergo FGM, thus aiding the cutter to perform FGM. She had then failed to report to law enforcement that her daughter had undergone FGM. The accused was convicted on all counts on her own plea of guilty. A week later, the court

58 *Pauline Robi Ngariba v Republic* [2014] KEHC 3237 (KLR).
59 *Chumo v Republic* [2020] KEHC 3804 (KLR).
60 *Mohamed & another v Republic* (Criminal Appeal E056 & E057 of 2022 (Consolidated)) [2023] KEHC 18710 (KLR).
61 *Republic v Esther Rioba Makori* [2019] eKLR.

sentenced the accused person to a fine of Kshs. 200,000/= (US $1,550) and in default to serve one year in prison. The prosecution, dissatisfied with the sentence, sought a review of the same. The prosecution's grounds for review were that the Act provides for mandatory minimum sentences (Kshs. 200,000 fine and/or imprisonment for a term not less than 3 years). The court had given a custodial sentence of one year, which is less than the required mandatory minimum of three years. However, on review the court took issue with the two charges that the accused had been convicted of and found that an accused person cannot be rightly charged with aiding and abetting as well as failing to report. That is because one cannot be accused of aiding and abetting the commission of a crime and at the same time be charged with failing to report the commission of the very crime she is accused of taking part in. The court further noted that if the prosecution was intent on preferring both charges, then at least one of them must have been in the alternative. The charge sheet was therefore incurably defective and the plea ought to have been declined. On the basis of the charge sheet being fatally defective, the court found that the proceedings that followed were also all defective. The conviction was therefore quashed.

In *Tabitha Kathure v Republic,*[62] the accused was charged with the offence of aiding and abetting by allowing her daughter to undergo FGM. She pleaded guilty and was sentenced to a fine of Ksh 200,000/= (US $1,550) in default to serve three years' imprisonment. She appealed on the ground that the plea was not unequivocal and that the sentence meted out was excessive in the circumstances. The court dismissed her appeal and held that the Prohibition of FGM Act provides for mandatory minimum sentences, and thus the sentence was legal. In *TM v Republic*[63] and *Judith Kambura v Republic,*[64] the facts and the decisions of the court were the same as those in *Tabitha Kathure v Republic.*

In *Jessica Magerer v Republic*,[65] the accused had allowed four individuals to stay in her house to recover after undergoing FGM. She was charged with 3 counts of associated offences, including aiding and abetting, failing to report the commission of FGM and using one's premises for purposes connected with FGM. She admitted the offences and was convicted on all three counts and sentenced to 3 years imprisonment. She appealed the sentence, and in dismissing the appeal, the court noted as follows:

> *"Therein lies the clash between traditional values and the law of the land. I sympathize with this 43 year old single mother of three children. I had called for a probation report which I have perused and found favourable. However, S.29 of the prohibition of Female Genital Mutilation Act provides:- "A person who commits an offence under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred*

62 *Tabitha Kathure v Republic* [2019] KEHC 5681 (KLR).
63 *TM v Republic* [2019] KEHC 5393 (KLR).
64 *Judith Kambura v Republic* [2019] KEHC 5646 (KLR).
65 *Jessica Magerer v Republic* [2016] eKLR.

> *thousand shillings or both." The sentence which was meted by the learned trial Magistrate was the minimum one allowable. It cannot therefore be said to be harsh and excessive. The intention of parliament must have been to endeavour to eradicate the culture of genital mutilation. The sentences provided in the Act are towards that goal."*

1.3 Cases relating to section 24 which makes it a criminal offence where one fails to report the commission of FGM

The court's decision in *Jessica Magerer v Republic* can be contrasted with other cases dealing with the charge of failing to report under section 24. In *Republic v Daisy Cherotich*,[66] the accused was convicted of failing to report the offence of FGM and was sentenced to two years' probation, which was later reviewed and substituted with a fine of Kshs. 200,000 (US $1,550). Similarly, in *Republic v Mercy Chelagat*,[67] the accused was convicted of the offence of failing to report. She was sentenced to two years' probation. The prosecution appealed against the sentence, arguing that it was illegal, given that the Act provides for a mandatory minimum sentence. The High Court found that the sentence was illegal, set it aside and substituted with a sentence of Kshs. 200,000 (US $1,550) or imprisonment for a period of one year. Notably, the High Court sentence was also illegal insofar as it did not comply with the mandatory minimum sentence of three years.

In *Miriam Chebet v Republic,*[68] the accused person voluntarily underwent FGM and was charged with the offence of failing to report the commission of FGM. She was convicted on her own plea of guilty and sentenced to the minimum sentence of a fine of Kshs. 200,000 (US $1,550) or three years' imprisonment. She appealed against the sentence and prayed for leniency. She expressed remorse and indicated that she had a child, and her parents were not able to take care of the child. She pleaded with the court to pardon her or reduce her sentence. While the court found that the sentence prescribed was lawful, the court went ahead and held that the accused person was a mother and had been in prison for over year. She was also a first-time offender. Under the circumstances, the custodial sentence was set aside and substituted with a probation term equivalent to the remainder of her custodial sentence.

In *SMG & RAM v Republic,*[69], the accused persons were husband and wife, thus this is one of the few cases where a father has been charged under the Prohibition of FGM Act. The couple were charged with failing to report that their 16-year-old daughter had undergone FGM. They were convicted and sentenced each to a fine of Kshs. 300,000 (US$2,325) or imprisonment for four years. The girl testified that her parents did not know that she had undergone FGM, and that it was her brother who took her to hospital when she experienced excessive bleeding. She further testified

66 *Republic v Daisy Cherotich* [2017] eKLR.
67 *Republic v Mercy Chelangat* [2018] eKLR.
68 *Miriam Chebet v Republic* [2021] KEHC 1327 (KLR).
69 *SMG & RAM v Republic* [2015] KEHC 6377 (KLR).

that her parents were only informed about the incident at the same time as they were informed about her hospitalization. The trial court was nonetheless convinced that her parents were aware and had failed to report. The court of appeal found that there was no evidence to support the charge and the conviction was quashed. In this case, we see that the lower court proceeded on an assumption that the parents were culpable merely because of the existence of a familial relationship between the victim and the accused persons.

The decision in *SMG v RAM*[70] can be contrasted with that in *Mohamed & Another v Republic*[71], which although it does not relate to section 24 on failing to report the commission of FGM, raised important issues about who is responsible for making decisions about FGM. Additionally, this is one of the few cases where a man has been prosecuted for an offence relating to FGM. In that case, the first appellant had been convicted of subjecting a child to a harmful cultural practice contrary to the Children Act of 2001. The facts were that the first appellant had driven a child aged 17 years to a clinic where she was then subjected to FGM. The first appellant argued that he was not related to the child and was not her guardian. He had only taken her to the clinic on the order of her father and maternal uncle. Further, he stated that he did not know what was to happen to the child at the clinic. The lower court convicted him and sentenced him to five years' imprisonment. This conviction was quashed on appeal, with the court holding that the prosecution had not proved that indeed the appellant was the one who had made the decision to subject the girl to FGM. Here, we see the court of appeal finding that in the absence of a familial relationship, it could not be proved that the first appellant had, simply by driving the victim to the place where she underwent FGM, made the decision to have the girl undergo FGM.

1.4 Cases relating to section 22 which prohibits the use of one's premises for purposes of FGM

In *Joan Bett v Republic,*[72] the accused was charged with the offence of allowing FGM to be performed in her house. She was found guilty and sentenced to a fine of Kshs. 200,000 (US $1,550) or three years' imprisonment in default. She appealed against the sentence and one of the grounds was that there was no evidence to prove that she was the owner of the house. The appellate court found that there were witnesses who testified that the accused had keys to the property and was able to access the property. Further, the assistant chief and chief testified that the property belonged to her. Thus, the court was satisfied that ownership of the property had been proven. It should be noted that in this context, the court looked at ownership with regard to having control over property and did not rely strictly on the concept of property rights, which would require the court to ascertain the exact interest that the accused held over the property. From a gender perspective, few women hold property in

70 *SMG v RAM* [2015] KEHC 6377 (KLR).
71 *Mohamed & another v Republic* (Criminal Appeal E056 & E057 of 2022 (Consolidated)) [2023] KEHC 18710 (KLR).
72 *oan Bett v Republic* [2018] KEHC 6032 (KLR).

land in their own names,[73] hence if one were to prosecute the legal owners, women would be few and far between.

In *Muchine v Republic,*[74] the appellant was charged with the offence of using his premises for purposes of FGM. The particulars of the offence were that FGM was performed on four minors and one adult woman in a house which he owned and controlled. The court also noted that cutter in this case was the accused person's wife. The court convicted him on three out of five counts and sentenced him to 3 years imprisonment on each count to run consecutively. He appealed both the conviction and sentence. While the appeal was dismissed, the appellate court held that sentences imposed with respect to the first two counts should run concurrently while the sentence imposed with respect to the third count should run consecutively, effectively adding up to 6 years. In this case, the court relied on the fact that the accused person was married to the cutter and that the premises used for FGM was matrimonial property. This is one of the few cases where we see the courts holding a man directly accountable for an associated offence under the Prohibition of FGM Act.

2. *Commentary of Kenya's FGM Jurisprudence*

In their study, Meroka-Mutua, Mwanga and Olunga[75] found that judicial officers, prosecutors and even the police are often conflicted on matters relating to FGM. Key informants in the study noted that the Prohibition of FGM Act treats parents who consent to their children undergoing FGM in the same way that the SOA treats parents who sexually abuse their children. However, from a moral perspective, a parent who subjects their daughter to FGM is different from one who defiles their child. The former acts out of positive intentions, such as wanting their child to fit in, improving marriage prospects or even religious inclination, while the latter is a predator motivated by ill intentions. The implication here is that while law enforcement authorities are not conflicted about the moral wrong of sexual offences such as defilement, the same cannot be said with regard to FGM. Law enforcement authorities are not always motivated to charge parents with associated offences such as aiding and abetting or failing to report the commission of FGM, because they are not sure that the outcome - where the children are separated from their parents - would in fact be in the best interests of the children. Where mothers are charged, we have seen that the courts do not impose the strict mandatory minimum sentence as provided for under section 29 of the Act.

This moral issue was further canvassed in *Katet Nchoe & Another v Republic,*[76] where the court noted as follows: *"When that rite [of passage] is exercised, neither the parents of the teenage girl nor the circumciser (or if preferred the mutilator) intends any harm beyond the cut which in time heals, and least of all bleeding to the death of the subject. So when circumcision goes wrong (as sometimes things do, even in ultra-modern surgical*

73 Kenya Institute for Public Policy Research and Analysis (KIPPRA), *Promoting Land Ownership Among Women in Kenya* (KIPPRA, Nairobi, 2024).
74 *Muchine v Republic* (Criminal Appeal E061 of 2023) [2024] KEHC 8794 (KLR).
75 Agnes Meroka-Mutua, Daniel Mwanga, and Charles Owuor Olungah (n 58).
76 *Katet Nchoe & Another v Republic* [2011] eKLR.

theatres) it goes very wrong, it could be a surgeon's, or circumciser's bad hand (mkono mbaya), negligence or perhaps bad luck. It is hard to say, unless factors are shown otherwise, that the doctor, or circumciser was negligent."

Marie Benedict-Dembour[77] writing in the context of immigrants living in France, notes similar challenges. She highlights that the courts in France have been conflicted as to whether they ought to deal harshly with parents (who in most cases are mothers) who consent to their daughters undergoing FGM. As in the Kenyan situation, the court decisions were also disparate, and there was no uniform jurisprudence as to how mothers who consent to their daughters undergoing FGM ought to be treated under the law.

FGM, being a harmful practice that is embedded in culture and in family as well, raises critical questions as to how law ought to balance between advocating for abandonment of the practice, while at the same time promoting family interests. It is in this context that the Standard Operating Procedures Manual and Rapid Reference Guide on the Prosecution of FGM Cases[78] provides for alternatives to prosecution where there is sufficient evidence to support a charge under the Act, but it is clear that the prosecution of the case may not be in the public interest. These alternatives include diversion, which entails resolving a criminal case without going through full judicial proceedings. It is an option that promotes restorative justice and conciliation. Ideally, diversion should be considered where the diversion option would still promote the abandonment of FGM. Cases involving parents charged under the Act could be considered for diversion, not just on the basis of public interest, but also on the basis of the best interests of the child principle and also in the best interests of the family. Further, as we have seen, the prosecutions under the Prohibition of FGM Act disproportionately affect women, with the implication that it is mostly women within the family set up who would be culpable for FGM related offences. This does not reflect reality, given that men are also involved in making decisions about FGM and in providing the resources to pay for the practice. They are also the primary owners of property and would therefore be in a position to make decisions about how their property is used. Thus, diversion of cases involving mothers can also be applied as a measure to promote women's rights.

With regard to adult women who consent to undergo FGM, the issue was canvassed in the *Tatu Kamau* case.[79] The High Court held that women who choose to undergo

77 Marie-Benedict Dembour, 'Following the movement of a Pendulum: Between Universalism and Relativism' in Jane K. Cowan, Marie-Benedict Dembour, and Richard A. Wilson, R. A (eds) *Culture and Rights: Anthropological Perspectives.* (Cambridge University Press 2001).

78 Government of Kenya, Standard Operating Procedures Manual and Rapid Reference Guide on the Prosecution of FGM Cases (Office of the Director of Public Prosecutions 2021) <https://odpp.go.ke/wp-content/uploads/2024/08/SOP-Manual-Rapid-Reference-Guide-on-Prosecution-of-FGM-Cases.pdf> accessed 23 June 2025.

79 *Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (Constitutional Petition 244 of 2019)* [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) (Judgment).

FGM often act in response to societal pressure and can therefore not be treated as having given free consent. Often, this pressure to undergo FGM comes from immediate family members, including the husband and the mother-in-law, and hence decisions about FGM are never solely made by the women. Rather, they are made in the context of family relations which are steeped in power imbalances. In this regard, the court noted that these women are themselves victims of culture.

However, the current practice is to charge these women with various associated offences, including failing to report the commission of FGM under section 24, as in the case of *Miriam Chebet v Republic*,[80] and aiding and abetting a person to perform FGM contrary to section 20, as in the case of *Charity Karimi, Winfred Kawira & Florence Kiende v Republic*.[81] Here, we again see the courts awarding disparate sentences. In *Miriam Chebet v Republic*,[82] the court did not determine the legality of charging the accused with aiding and abetting for consenting to undergo FGM, given that this can amount to self-incrimination. However, the appellate court did consider the fact that the accused was a mother and first time-offender, and so the court set aside the three-year custodial sentence awarded by the lower court, replacing it with probation. In *Charity Karimi, Winfred Kawira & Florence Kiende v Republic*,[83] the accused persons pleaded guilty to the offence of aiding and abetting a person to perform FGM by giving their consent to be cut. They were all convicted and sentenced to a fine of Kshs. 200,000/- (US $ 1,550) in default to 3 years imprisonment each. The accused persons appealed the conviction and sentence but the appellate court noted that the sentence was lawfully prescribed under the Act, and that it was the minimum allowable sentence. The appeal was therefore dismissed.

The question therefore is, how ought women who give their consent to undergo FGM be treated under the law? Should they be treated as victims of culture following the reasoning of the High Court or should they be treated as perpetrators of various associated offences under the Prohibition of FGM Act, as is the current prosecution practice? Further, if they are to be charged for specific offences under the Prohibition of FGM Act, which is the most appropriate offence - is it aiding and abetting a person to perform FGM or is it failing to report the commission of FGM?

From the foregoing, we see that courts struggle to determine cases related to FGM and to apply the legal principles provided under the Prohibition of FGM Act in a standardized manner. This tension affects the efficacy of the law in acting as a deterrent. It also illustrates how the Prohibition of FGM Act affects families and the dilemmas that courts face when seeking to balance between the principles of the best interests of the child and the family, and protecting women's rights by promoting the abandonment of FGM.

80 *Miriam Chebet v Republic* [2021] KEHC 1327 (KLR).
81 *Charity Karimi, Winfred Kawira & Florence Kiende v Republic (*Miscellaneous Criminal Application 52 of 2019).
82 *Miriam Chebet v Republic* [2021] KEHC 1327 (KLR).
83 *Charity Karimi, Winfred Kawira & Florence Kiende v Republic* (Miscellaneous Criminal Application 52 of 2019).

B. The Victim Protection Act, 2014

This Act contains important provisions that promote the rights of survivors of GBV. For instance, section 3 provides for the protection of the dignity of victims of crime through the provision of information, support services, reparations and compensation from the offender. The section further provides for assistance programmes for vulnerable victims, programmes to prevent revictimization, as well as the promotion of reconciliation where appropriate, thus aligning with the National Family Protection and Promotion Policy.[84] The Act further establishes the Victim Protection Board, which is mandated to ensure the implementation of the Act. Thus, in cases relating to GBV, the VPA provides a mechanism through which the other laws on GBV can be strengthened.

However, while the VPA is generally progressive, two issues relating to GBV arise. The first is the reference to victims of crime. In the context of GBV, the more appropriate term is "survivor".[85] While "victim" is recognized as a legal term that refers to persons who have suffered injury, loss or damage as a result of crime, in social contexts, the term "victim" has been shown to be disempowering.[86] The term may also have negative connotations, for example, reference to victim may imply that the affected person is weak, lacks agency, unable to take a lead in addressing their circumstances and generally dependent.[87]

The second issue relates to implementation of the Act. In its annual report for the year 2023-2024,[88] the Victim Protection Board highlights that the Act has not been fully operationalized due to the following reasons:

i. The Board is not incorporated in law and therefore lacks the legal power to deliver on its mandate as provided for under the Act;
ii. Subsidiary legislation for the operationalization of the Act has not been passed. This includes the regulations for the operationalization of the Victim Protection Fund. This fund is established under section 27 of the Act and is intended to provide monies for restitution and compensation for, *inter alia*, economic loss, personal injury, and costs of medical or psychological treatment;
iii. Insufficient budgetary allocation by the National Treasury to the Board;

84 Government of Kenya, 'National Family Protection and Promotion Policy' (Ministry of Labour and Social Protection 2023) <https://www.socialprotection.go.ke/sites/default/files/Downloads/National%20Policy%20on%20Family%20Promotion%20and%20protection%20(2)%20(1)%20(1).pdf > accessed 23 June 2025.

85 Goitseone Leburu, 'From 'Victim' to 'Survivor': Deconstructing the Pervasive Notion of Victimhood in Discourses around Programmes Dealing with Gender-Based Violence' (2023) 59(3) Social Work/ Maatskaplike Werk 224. https://doi.org/10.15270/59-3-1140 accessed 11 June 2023.

86 Ibid.

87 Leburu (n 85).

88 Victim Protection Board, 'Annual Report 2023-2024' (Victim Protection Board 2024). https://www.statelaw.go.ke/wp-content/uploads/2024/11/VPB-Annual-Report-2023-2024.pdf accessed 11 June 2025.

iv. Contradicting jurisprudence by the courts on who the victim is and the role of advocates in representation of such a victim during the criminal trial process.

The failure to fully implement the VPA more than ten years after it was passed means that there remain gaps in the legal framework for the protection of the rights of survivors of GBV.

C. The Protection against Domestic Violence Act, 2015 (PADVA)

PADVA defines domestic violence as violence against a person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship.[89] This definition includes a long list of actions that constitute domestic violence: child marriage; female genital mutilation; forced marriage; forced wife inheritance; interference from in-laws; sexual violence within marriage; virginity testing; widow cleansing; damage to property; defilement; depriving a person of or hindering a person from access to or a reasonable share of the facilities associated with that person's place of residence; economic abuse; emotional or psychological abuse; forcible entry into a person's residence where the parties do not share the same residence; harassment; incest; intimidation physical abuse; sexual abuse; stalking (defined under section 2 to include pursuing or accosting a person); verbal abuse; or any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health, or well-being of the person.

The Act further recognises that domestic violence occurs in the context of a domestic relationship. Section 4 provides that a person shall be deemed to be in a domestic relationship with another if the person: is married to that other person; has previously been married to that other person; is living in the same household with that person; has been in a marriage with the other person which has been dissolved or declared null; is a family member of that other person; is or has been engaged to get married to that person; has a child with that other person; or has a close personal relationship with the other person.

The Act is therefore progressive because it recognizes domestic relationships, which are not just limited to marriage, within the meaning of the Marriage Act, 2014. With regard to personal relationships, this would include persons who are living together but are not married. It could also include people who might be engaged in a sexual relationship, but may not be living together or even married. Thus, PADVA protects persons in a variety of domestic arrangements, not just those governed by marriage laws.

The Act further expands the context within which domestic violence can occur. Thus, domestic violence can occur within the context of the family, particularly if there is a

89 The Protection Against Domestic Violence Act 2015, s 3.

subsisting marriage; if there is an impending marriage between the parties; or if the parties involved had been previously married.[90] However, even where parties have not been married, the Act envisions situations where domestic violence can still occur, such as where parties have a child together, but have never been married.[91] Further, domestic violence can be targeted at other family members besides spouses. Section 5 defines family member to include: a spouse; a child including an adopted child, a step-child and a foster child; an adult son or daughter; a parent; a sibling; or any other relative of that person who, in the circumstances of the case should be regarded as a member of the family.

In terms of its approach to protection against domestic violence, the Act uses the mechanism of protection orders. These are orders that are issued by courts and which have the effect of legally restraining respondents from engaging in acts that amount to domestic violence against the applicant. The Act creates duties for police officers who receive complaints relating to domestic violence: advise domestic violence victims of the protections available under the PADVA; investigate cases reported to them either directly or anonymously; advise victims on the procedure of making a complaint; advise the victims on available temporary shelters; advise the victims on access to medical care; advise the victims when reporting on their right to speak with officers of the same gender; arrest without warrant, respondents who violate the protection orders.[92]

In terms of procedure, the party seeking a protection order shall apply to the court for such order. There are two types of protection orders that may be sought: an interim protection order under section 12 of the Act, and a final protection order under section 13. An interim protection order may be sought without notice and outside ordinary court hours or days. An application under section 12 must show that: delay would be caused by proceedings on notice or might entail — (a) a risk of harm; or (b) undue hardship to the applicant or child of the applicant's family. If the court is satisfied *prima facie* that the respondent has committed, is committing or threatening to commit an act of domestic violence but that the circumstances do not justify or require the issue of an interim protection order, the court may issue a notice requiring the respondent to show cause why a protection order should not be made. A final protection order can be sought under section 13, and such an application would be heard *inter partes*, meaning that the respondent must be served with the notice of proceedings. A protection order would direct a respondent not to do anything that would constitute actual or threatened violence within the meaning of the Act. A protection order may also grant an applicant exclusive occupation of shared property, regardless of the respondent's interest in the property. A protection order may also require the respondent to allow the applicant to enter a shared residence or the respondent's residence for purposes of collecting personal items.

90 Ibid, s 4.
91 The Protection Against Domestic Violence Act 2015, s 4.
92 Ibid, s 6.

In terms of its substantive provisions, the PADVA is progressive to the extent that it expands the meaning and scope of domestic violence and recognizes intimate relationships where the parties are not married. In terms of procedure, the Act envisions that protection orders ought to be issued in an expedited manner so as to limit the risk of harm or undue hardship. However, the PADVA still has severe limitations.

Firstly, while section 15 of the PADVA provides that a court shall not decline to issue a protection order merely because of the existence of other proceedings, including proceedings relating to custody. It should be noted that proceedings for protection orders can happen simultaneously with other court proceedings. However, the existence of simultaneous court proceedings can be interpreted in problematic ways by the courts as is highlighted in a report by COVAW.[93] In one scenario, an applicant had instituted proceedings on a child custody criminal proceedings relating to child abuse.[94] The applicant had then sought protection orders under the PADVA, because during the pendency of the child custody and criminal proceedings, the respondent had continued to taunt and threaten her. The civil court declined to grant the protection orders citing lack of evidence. The court further stated that the applicant had not proved that the respondent had abused the child. Additionally, the court stated that the applicant should have gone to the criminal court where the case on child abuse was being heard and instituted an additional matter on assault and battery, instead of seeking a protection order from a civil court. On the other hand, during the hearing of the main suit on child custody, the court held that neither the case on the protection orders nor the criminal proceedings on child abuse had any bearing on child custody, because the protection orders had not been issued and there had been no conviction on the charge of child abuse.

Secondly, while the PADVA is intended to respond to the unique circumstances that victims of domestic violence face in the context of marriage or other family relationship, the standard of proof applied in such cases is often too high and unrealistic.[95] In *NKG v SGB*,[96] the applicant sought protection orders on the basis of actual and threatened violence by the respondent. The court had earlier issued a temporary order against respondent, restraining him from threatening the applicant, entering her premises, engaging in forceful sexual relations or kidnapping the applicant's child, pending the hearing of the case. At the hearing of the case for a permanent restraining order, the court noted that the applicant had stated that when the respondent visited her, he was brutal and abusive and was also a rapist. However, the applicant's case was dismissed for failing to prove her allegations. The court also stated that both parties had shown a lack of seriousness in prosecuting

93 Coalition on Violence Against Women (COVAW), *Handbook on Protection Orders in Kenya* (COVAW 2021).
94 Ibid, 15.
95 Rahab Wakuraya Mureithi, 'Challenges in Litigating under Kenya's Protection Against Domestic Violence Act' (2018) 3 *Journal of Law and Ethics* 87, 105.
96 *N K G v S G B* [2019] eKLR.

the case. Further, the court noted that the applicant had an advocate on record and therefore that should have been sufficient to ensure that she proved her case. Yet, in GBV cases, where there are threats and intimidation, this may affect the extent to which an applicant can pursue a court process and prove her case. The court did not consider how the alleged GBV might have affected NKG's ability to go through the court process.

In this same regard, section 66 of the Marriage Act, 2014 provides for dissolution of marriage and one of the grounds is cruelty. The party seeking to dissolve the marriage on the grounds of cruelty would need to prove the particulars of the ground, which can include various forms of violence.[97] While the interim protection order under the PADVA may be used as a mechanism for protecting spouses who have experienced violence and as a result would like to have the marriage dissolved, the standard of proof that courts require in practice in order to issue such an order are too high. Thus, the potential of the PADVA to protect those seeking divorce on the grounds of cruelty is limited.

Thirdly, the PADVA does not take into consideration the economic circumstances that victims of domestic violence might find themselves in. In particular, the financial and logistical cost of obtaining protection orders can be quite high, thus placing these orders beyond the reach of many who would need them. For example, COVAW[98] reports that in the case of MRR, the applicant was married for a period of 15 years. In 2018, after experiencing domestic violence, she contacted a lawyer who charged her Kshs. 70,000 (US $540) to file an application for an interim protection order. However, the court declined to grant the orders sought stating that MRR had not presented sufficient evidence to warrant the issuance of an interim protection order. This was because MRR alleged that her estranged husband had started visiting her place of business, causing chaos, and making threats of eliminating her, but no witnesses were called and there was no evidence of the respondent's visits to her place of work, such as him signing into her place of work through a visitor's book. At the time of the ruling, her estranged husband had filed a separate application seeking custody of the children. The lawyer advised MRR to have the protection order case put on hold as they defend the custody case, which cost MRR another Kshs. 80,000 (US $615) as legal fees.

The issue of standard of proof was addressed by the CEDAW Committee in *V.K. v Bulgaria*,[99] where the applicant had unsuccessfully sought a permanent protection order to ensure her safety from harm by her abusive husband. The CEDAW Committee found that the state had required too high a level of violence to be proved before issuing an order. The Committee decided that when assessing whether a

97 Sussie Wairimu Mutahi & Elvira Akech (n 49).
98 Coalition on Violence Against Women (COVAW) (n 93).
99 *V.K. v Bulgaria* (Committee on the Elimination of Discrimination against Women Communication No. 20/2008 2011) CEDAW/C/49/D/20/2008.

protection order should be granted, national courts should take account of all forms of gender-based violence affecting an applicant, not just life-threatening violence. Courts should also be aware that many forms of violence, particularly domestic violence, are courses of conduct which take place over time. Failure to take this into account violates women's rights not to be subjected to gender stereotyping.

D. The Children Act, 2022

The Children Act provides for two categories of actions that constitute offences against children. The first category is psychological abuse of children and other forms of child abuse.[100] Section 2 defines psychological abuse of children as follows is as follows:

> "…the regular and deliberate use of a range of words and non-physical actions used with the purpose to manipulate, hurt, weaken or frighten a person mentally and emotionally; and/or distort, confuse or influence a person's thoughts and actions within their everyday lives, changing their sense of self and harming their wellbeing."

Child abuse is defined to include: the infliction of physical harm by any person on a child; the infliction or inducement of physical harm by any person on a child by acts intended to cause harm or negligent acts or omissions that cause harm; the failure by any person to protect a child from physical harm or to report a case of child abuse; acts or omissions that affect a child's healthy social and emotional development and, functioning including (i) rejection; (ii) isolation, including depriving the child of normal social interaction with others; (iii) deprivation of affection or cognitive stimulation; or (iv) inappropriate criticism or comparison with other children, discrimination, humiliation, threats, or malicious accusations, directed at a child.

The penalty for this first category of offences is imprisonment for a term not exceeding five years or a fine not exceeding Kshs. 2 million (US $15,500), or to both. Where the abuse occurs online, the sentence is imprisonment for a term not exceeding 10 years or a fine of Kshs. 2 million (US $15,500).

The second category of offences is provided for under section 23, and it relates to harmful cultural practices. The section prohibits: forced circumcision in the case of male children; female genital mutilation; child marriage; virginity testing; girl child beading; organ change or removal in case of an intersex child, except with the advice of a medical geneticist; or any other cultural or religious rite, custom or practice that is likely to negatively affect the child's life, health, social wellbeing, dignity, physical, emotional or psychological development. The penalty is imprisonment for a minimum term of three years or to a fine of not less than Kshs. 500,000 (US$ 3,870) or to both. However, should the child die as a result of any of these harmful cultural practices, the penalty is imprisonment for life. This section is important because it

100 The Children Act, 2022, s 22.

includes practices such as beading, which had not previously been recognized as criminal offences.

It should be noted that psychological abuse of children as well as other forms of child abuse can occur within the home or outside the home. The forms of abuse which are explicitly prohibited under section 22 are often motivated by predatory behaviour and ill-intentions against the child. The actions prohibited under section 23 (harmful cultural practices) are almost always undertaken at the behest of or with the consent of the parent or guardian. The sentences stipulated for child psychological abuse and other forms of child abuse allow a broad scope for judicial discretion, despite the moral depravity it takes to carry out these forms of abuse. The sentences for harmful cultural practices are mandatory and minimum, thus raising the same concerns as those noted with regard to the Prohibition of FGM Act. These being practices that are motivated by social drivers, such as culture and religion, parents often make the decisions to subject children to these actions as a result of the influence of these social drivers and not because they are morally depraved. However, the mandatory minimum sentences can have more adverse consequences when compared with the discretionary sentences, and might operate contrary to the best interests of the child principle. This has been highlighted in the previous discussion of the sentences under the Prohibition of FGM Act.

V. Conclusion and Policy Recommendations

Kenya's legal framework on the prevention of GBV has significantly developed since the country gained independence. Much progress has been made towards the protection and promotion of the rights of women and girls. However, the current legal framework still has significant limitations, and the result is that the laws are not sufficiently responsive to women and girls who experience GBV in the context of the family. Some of the policy recommendations that could help strengthen Kenya's anti-GBV laws include:

i. With regard to the Prohibition of FGM Act, revising the law to remove the mandatory minimum sentence of three years which, in any case, courts have applied very inconsistently. In FGM cases, where it is mostly mothers who are likely to be charged for associated offences, it would be prudent to allow judicial officers discretion in sentencing. This will allow judicial officers to take account of a variety of mitigating factors so as to achieve substantive justice in sentencing. These would include factors such as the impact of custodial sentences on children.

ii. The VPA should be fully operationalized and in its implementation, the Victim Protection Board should work collaboratively with other agencies working on GBV cases, such as the Anti-FGM Board and the ODPP.

iii. The mandatory minimum sentences relating to harmful cultural practices under section 23 of the Children Act, 2022 raise similar concerns. It is therefore recommended that the sentences under section 23 be reviewed and made discretionary rather than mandatory and minimum.

iv. The process for obtaining protection orders under the Protection Against Domestic Violence Act should be made easier and the costs reduced. We have seen that there are many strictures within the PADVA which make it difficult for applicants to obtain protection orders when they need them. In particular, courts should be enabled to issue interim protection orders without requiring a very high standard of proof of a *prima facie* case. Further, the costs of filing applications under the Act should be reduced or removed altogether so that applicants are able to file for protection orders at no cost. Judicial officers should also be trained so that their capacity to address issues of GBV, and how it operates within a family context is enhanced.

School of Law, University of Nairobi
P. O. Box 30197-00100, Nairobi, Kenya

East African Law Journal