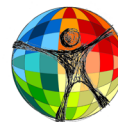


# Legislative Barriers to Security and Dignity of Women in Kenya

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# ABSTRACT

The right to equality, dignity and security of women and girls worldwide has been widely legislated both on international and local arenas. In Kenya, in addition to international protections and guarantees that are recognized as being part of domestic laws, women and girls are also afforded the constitutionally entrenched right to equality and access to justice. Nonetheless, Kenyan women and girls are subject to rampant sexual violence on the ground and have to face numerous systemic barriers when they seek justice. In order to bring the matter to court, survivors of sexual violence are required to submit a completed medical form (the P3 form), which is a central piece of evidence. This paper zeros in on a concrete example of a legislative barrier – section 77(3) of the Evidence Act that allows only medical doctors to testify as expert witnesses in court. This narrow definition, combined with a dire shortage of doctors in Kenya, can have a vast range of desolating consequences on the rates of prosecution and success in sexual violence cases. Specifically, I argue that section 77(3) discriminates against rural women, contributes to a compromised chain of evidence, erroneous and inconsistent explanation of contents of the P3 form, and inadmissibility thereof. I subsequently propose a number of possible solutions to address the apparent legislative deficiency. I also discuss solutions that foster women's self-mobilization and solidarity while reducing violence against them: the self-help group project in India and the 160 Girls project in Kenya, that are both inspired by social change and are not bound to action by the legislators.

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## Introduction

A lot of ink has been spilled over the issue of sexual violence and it attracts more and more attention every year as different actors, particularly women, come up with various initiatives to combat it. Like any human rights violations, sexual violence does not have the same scope and impact across the globe. In summer 2018, I had the opportunity to work with Ripples International, a Kenyan NGO in partnership with a Canadian organization called The Equality Effect. The former works with girls who were victims of any form of sexual violence in Kenya. The latter collaborates with organizations similar to Ripples International to defend the rights of women and girls in Kenya, Ghana and Malawi.

Throughout my internship, I worked closely with survivors of defilement (defined as an offence perpetrated by “a person who commits an act which causes penetration with a child”<sup>1</sup>) and was able to learn about its root causes. However, the purpose of this paper is not to address all sources of sexual violence in Kenya that can be explained by political, societal, cultural, religious factors, among others. Rather, this paper focuses on a specific example of a legislative barrier, that infringes on rights that are guaranteed by both the Kenyan constitution and the Kenyan government’s international commitments. Specifically, I will address a provision of the *Evidence Act* (s. 77(3)) that has a very narrow definition of an expert witness and allows only doctors to testify in court. I will address the practical implications of this restrictive designation in cases where the doctor did not examine the survivor of sexual violence herself and argue that this requirement constitutes a violation of the survivors’ right to dignity, equality and access to justice.

When referring to sexual violence, I adopt the following definition of the World Health Organization that can be extended to both rape and defilement:

Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or

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<sup>1</sup> *Sexual Offences Act* (Kenya), No 3 of 2006, s 8(1) [SOA].

otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.<sup>2</sup>

Furthermore, when talking about survivors of sexual violence, I will be referring to women and girls, as they constitute an overwhelming majority of survivors (90.8%), of whom 61.9% are girls under the age of 18, as per the data available from Kenyan health facilities in 2014.<sup>3</sup> In my personal experience, the youngest girls I had the privilege to work with were only 4 years of age. I chose to limit my discussion to areas of sexual violence that I was able to gain a better understanding of, through my work at Ripples International. Therefore, I consciously do not elaborate on male survivors of sexual violence in this paper. With that being said, the practical implications of section 77(3) of the *Evidence Act* equally affect the treatment of all cases of sexual violence, irrespective of the sex of the survivor.

## **Legal Tools that have the Potential to Tackle Sexual Violence**

### *The New 2010 Constitution of Kenya*

The new 2010 Constitution is undoubtedly a revolutionary document that represents a major step toward a more decentralized and democratic state, away from nearly seven decades of colonialism.<sup>4</sup> The movement leading to the drafting of the 2010 Constitution was originated by ordinary Kenyans striving for an accountable state with strong independent institutions that serves its people.<sup>5</sup> In fact, the document was

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<sup>2</sup> See Etienne G. Krug et al, "World Report on Violence and Health" (2002) at 149, online (pdf): *World Health Organization* <[www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap6.pdf](http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf)>.

<sup>3</sup> See National Gender and Equality Commission, "National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya" (2014) at 12, online (pdf): *NGEC Kenya* <[www.ngeckkenya.org/Downloads/National-ME-Framework-towards-the-Prevention-Response-to-SGBV-in-Kenya.pdf](http://www.ngeckkenya.org/Downloads/National-ME-Framework-towards-the-Prevention-Response-to-SGBV-in-Kenya.pdf)> [NGEC].

<sup>4</sup> See Willy Mutunga, "Human Rights States and Societies: A Reflection from Kenya" (2015) 2 *Transnational Human Rights LR* 63 at 77-78.

<sup>5</sup> *Ibid* at 79.

endorsed in a nation-wide referendum<sup>6</sup> and was created with the intention of belonging and being closer to the people.<sup>7</sup>

One of the most significant elements of the new Constitution is the Bill of Rights that provides broader protection to ambitiously extended political, social and cultural rights in Kenya. Specifically with regards to security and dignity of women, the new 2010 Constitution has an extensive equality provision that guarantees the same “right to equal opportunities in political, economic, cultural and social spheres” and “the right to equal treatment” to women as to men.<sup>8</sup> Moreover, it protects the right to security of the person, which extends to being free from “any form of violence, from either public or private sources.”<sup>9</sup> Finally, the new Constitution instills the duty to address the needs of women, children, youth and other vulnerable groups to “all state organs and all public officers.”<sup>10</sup> These constitutionally guaranteed rights are available to women and girls who are survivors of sexual violence.

Another unique tool that should facilitate the realization of the aforementioned rights is the constitutionally entrenched access to justice and the right to a fair hearing.<sup>11</sup> In other words, when women’s rights to equality and security are violated, they should be able to seek restitution and break the circle of perpetual violence. Furthermore, the 2010 Constitution explicitly recognizes that any international treaty or convention ratified becomes part of the law of Kenya.<sup>12</sup> Therefore, women dispose of additional protections and guarantees, some of which are described in the following sub-section, that the State has committed to provide to them.

Some scholars argue that the new Kenyan constitution is “transformative”, which means that its structure presupposes that “it will be an instrument for the transformation of society rather

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<sup>6</sup> See Cornelia Glinz, “Kenya’s New Constitution: A Transforming Document or Less than Meets the Eye?” (2001) 44:1 L and Politics in Africa, Asia and Latin America 60 at 63.

<sup>7</sup> *Ibid* at 64; see *Constitution of Kenya, 2010*, preamble [Constitution].

<sup>8</sup> *Constitution supra* note 7 s 27(3).

<sup>9</sup> *Ibid* s 29(c).

<sup>10</sup> *Ibid* s 21(3).

<sup>11</sup> *Ibid* ss 48, 50.

<sup>12</sup> *Ibid* s 2(6).



than a historical, economic and socio-political pact to preserve the *status quo*.”<sup>13</sup> Thus, the new Constitution has the potential to be at the source of reforms or a “revolution of states and societies.”<sup>14</sup>

### *International Treaties and Conventions*

#### Universal Declaration of Human Rights (UDHR)

More than 70 years ago, the international community has collectively adopted the UDHR. The groundbreaking document established that everyone is equally entitled to the right to dignity<sup>15</sup>, equality and non-discrimination<sup>16</sup>, life, liberty and security of person<sup>17</sup>, to live free of degrading treatment<sup>18</sup>, and equality before the law<sup>19</sup>. Importantly, article 8 guarantees “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law”, while article 10 ensures that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of [their] rights and obligations.”<sup>20</sup>

Despite its non-binding nature, the UDHR generated action and inspired a number of human rights protections on national and regional levels. In fact, the Kenyan Bill of Rights’ protection of traditional civil and political rights, even prior to the 2010 constitutional amendment, was inspired by the UDHR framework.<sup>21</sup>

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<sup>13</sup> Mutunga, *supra* note 4 at 91.

<sup>14</sup> *Ibid* at 101.

<sup>15</sup> *Universal Declaration of Human Rights*, 10 December 1948, art 1 [UDHR].

<sup>16</sup> *Ibid*, art 2.

<sup>17</sup> *Ibid*, art 3.

<sup>18</sup> *Ibid*, art 5.

<sup>19</sup> *Ibid*, art 7.

<sup>20</sup> *Ibid*, arts 8, 10.

<sup>21</sup> See Anthony Wambugu Munene, “The Bill of Rights and Constitutional Order: A Kenyan Perspective” (2002) 2 *African Human Rights LJ* 135 at 142.

International Covenant on Civil and Political Rights (ICCPR)

Kenya formally ratified ICCPR in 1972.<sup>22</sup> As a result, it became formally recognized and binding<sup>23</sup> on the State, making the latter accountable to Human Rights Commission composed of Party States.<sup>24</sup> Article 2(1) creates an absolute obligation on each member State to guarantee the substantive rights at the local level to all individuals and without discrimination. As such, it makes the obligations of the States justiciable.<sup>25</sup>

As stated in its preamble, the Covenant recognizes “the inherent dignity” of every individual and other rights that derive from it.<sup>26</sup> Furthermore, ICCPR guarantees equal enjoyment of civil and political rights to men and women and grants equal protection of the law.<sup>27</sup> In the event the right to equality is violated, the Covenant provides remedies to victims of discrimination. Specifically, it puts the burden on the State to ensure that victims have an effective and enforceable remedy, “determined by competent judicial, administrative or legislative authorities.”<sup>28</sup> As such, ICCPR guarantees the right to a fair trial to ensure the proper administration of justice.<sup>29</sup>

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW is particularly important to reclaim women’s inherent dignity, worth and right to equality. This landmark treaty plays a fundamental role in raising awareness of systemic inequality and promote women’s rights worldwide. In fact, it is the

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<sup>22</sup> See Davis Malombe et al, “Kenya’s Regional and International Human Rights Obligations” (23 August 2016), online: *Kenya National Human Rights Commission* <[www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html](http://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html)>.

<sup>23</sup> *Constitution*, *supra* note 7 ss 2(1, 6).

<sup>24</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 40 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

<sup>25</sup> See Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed (New York: Oxford University Press) at 1.17-1.19.

<sup>26</sup> ICCPR, *supra* note 24 preamble.

<sup>27</sup> *Ibid* arts 3, 26.

<sup>28</sup> *Ibid* art 2(3).

<sup>29</sup> *Ibid* art 14.

first international document that expressly brings women into international human rights.<sup>30</sup> The Convention defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment of exercise by women.” Importantly, CEDAW prohibits discrimination in a wide range of fields, including “political, economic, social, cultural, civil” and other fields.<sup>31</sup> This led many to argue that CEDAW has inspired a global feminist movement.<sup>32</sup>

The Convention recognizes and mandates the States Parties to ensure the evolution of social and cultural patterns of conduct of men and women, such that prejudices, “practices which are based on the idea of the inferiority or the superiority of either of the sexes” and stereotypes are eliminated.<sup>33</sup> Importantly, CEDAW provides a mechanism for oversight of its implementation by putting in place a Committee on the Elimination of Discrimination against Women (the Committee) that States Parties will report their progress to.<sup>34</sup>

In 1984, Kenya became one of the 186 Member States<sup>35</sup> that ratified CEDAW, without reservation,<sup>36</sup> and thus condemned “discrimination against women in all its forms” and committed to pursue policies to eliminate it.<sup>37</sup> The rights guaranteed as well as

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<sup>30</sup> Joseph, *supra* note 25 at 23.107; see also Lisa R. Pruitt, “Deconstructing CEDAW’s Article 14: Naming and Explaining Rural Difference” (2011) 17 William & Mary J of Women & L 347 at 349.

<sup>31</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, art 1 (entered into force 3 September 1981) [CEDAW].

<sup>32</sup> Marta R Vanegas & Lisa R. Pruitt, “CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activist from the Bottom up” (2012) 41 Baltimore LR 263 at 267.

<sup>33</sup> CEDAW, *supra* note 31 art 5(a).

<sup>34</sup> *Ibid* arts 17(1), 18(1).

<sup>35</sup> Pruitt, *supra* note 30 at 348.

<sup>36</sup> See United Nations Human Rights Office of the High Commissioner, “Ratification Status for Kenya”, online (pdf): OHCHR <[www.tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN](http://www.tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN)>; see also Andrew Byrnes & Marsha Freeman, “The Impact of the CEDAW Convention: Paths to Equality” (2011), online : World Bank <[www.siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Byrnes-and-Freeman-FINAL-18-May-2011-with-acknowledgements.pdf](http://www.siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Byrnes-and-Freeman-FINAL-18-May-2011-with-acknowledgements.pdf)> at 23.

<sup>37</sup> CEDAW, *supra* note 31 art 2.

developments that were influenced by CEDAW are incorporated in the new 2010 Constitution and can be interpreted as the state's heightened awareness of its human rights obligations.<sup>38</sup> Notably, Kenyan courts started referring to CEDAW as of 2005 in cases of female heirs' right to succession.<sup>39</sup>

## The Reality of Women in Kenya and Barriers to Achieving Gender Equality

### *Reality of Women in Kenya on the Ground*

Unfortunately, despite the work done by many grassroots organizations whose very purpose is to empower women and ensure that their rights are upheld, despite the ratification of several seemingly progressive legal tools that guaranty the right to equality and dignity of women, Kenya is ranked 135<sup>th</sup> – using the gender equality index – worldwide.<sup>40</sup> The prevalence rates of sexual violence in Kenya cannot be understated: every 30 minutes a Kenyan girl or woman is raped.<sup>41</sup> In fact, 32% of females (and 18% of males) report to have experienced such violence before the age of 18.<sup>42</sup> Studies have also shown that the perpetrators are mainly, though not exclusively, male.<sup>43</sup> However, contrary to common belief, sexual violence and the violation of the rights of girls and women prevails not only in conflict and post-conflict situations but also when fully operational laws and institutions are in place.<sup>44</sup> Most of the sexual violence cases that are in Kenyan courts are rape and defilement cases, which constitute the most

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<sup>38</sup> Byrnes, *supra* note 36 at 24.

<sup>39</sup> See *Rono v Rono et al*, [2005] No 66 of 2002 (CA at Eldoret, Kenya) [Rono].

<sup>40</sup> See "Global Database on Violence against Women", online : UN Women <[www.evaw-global-database.unwomen.org/fr/countries/africa/kenya#5](http://www.evaw-global-database.unwomen.org/fr/countries/africa/kenya#5)> [Violence against Women in Kenya].

<sup>41</sup> Sally Armstrong, "In Kenya, a Victory for Girls and Rights" *New York Times* (4 June 2013), online: <[www.nytimes.com/2013/06/05/opinion/global/in-kenya-a-victory-for-girls-and-rights.html?smid=tw-share&\\_r=0](http://www.nytimes.com/2013/06/05/opinion/global/in-kenya-a-victory-for-girls-and-rights.html?smid=tw-share&_r=0)>.

<sup>42</sup> See "Violence against Children in Kenya: Findings from a 2010 National Survey" (2012) at "Executive Summary", online (pdf): UNICEF <[www.unicef.org/esaro/VAC\\_in\\_Kenya.pdf](http://www.unicef.org/esaro/VAC_in_Kenya.pdf)> [2010 National Survey].

<sup>43</sup> Agency for Cooperation and Research in Development, "Kenya: An Audit of Legal Practice on Sexual Violence," (2009) at 21, online (pdf): ACORD <[www.acordinternational.org/silo/files/kenya-an-audit-of-legal-practice-on-sexual-violence.pdf](http://www.acordinternational.org/silo/files/kenya-an-audit-of-legal-practice-on-sexual-violence.pdf)>.

<sup>44</sup> *Ibid.*

prosecuted offences in Tanzania, Burundi, the Democratic Republic of Congo, and Uganda as well.<sup>45</sup>

The most recent response of the Committee to the report on the progress Kenya made under CEDAW raises a number of points of concern. For instance, the Committee points out that raping girls is not only prevalent but is considered to be a cultural practice for Samburu people in north-central Kenya.<sup>46</sup> Furthermore, the Committee raises an alarm about “low prosecution rate” in cases of sexual violence against women, despite the “high level” of violence and the “widespread incidence” of rape in private and public spheres.<sup>47</sup> Thus, there is no doubt that the mere existence of human rights instruments does not guarantee the rights and equality of women, which can be partly explained by the legislative barriers surrounding medical forms.

### *The Role of Medical P3 Forms in Cases of Sexual Violence*

Once a rape or defilement case is reported to the police, the Kenya Police Medical Examination Report<sup>48</sup>, commonly known as the P3 form, has to be filled out by a doctor. This form bridges the health and judiciary systems. Studies have shown that the success of cases is highly reliant on the quality of corroborative evidence, most commonly – medical reports. Yet, nearly 40% of medical reports produced in court were not presented by the original doctors, often resulting in the acquittal of cases.<sup>49</sup>

Despite the enactment of the very progressive *Sexual Offences Act (SOA)* in 2006 that replaced the inadequate sexual offence provisions of the *Penal Code*, the judicial process is not made gender and survivor friendly. The issue of such a high percentage of cases where medical evidence is lacking is

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<sup>45</sup> *Ibid.*

<sup>46</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Kenya*, CEDAW/C/KEN/CO/8 at para 18.

<sup>47</sup> *Ibid* at para 22.

<sup>48</sup> See Appendix A.

<sup>49</sup> Mike K. Muia, “Determinants of Delivery of Justice in Sexual Offence Cases Prosecuted in Naivasha Law Courts in Nakuru County” (2010) University of Nairobi C50/61660/2010 at 36.

exacerbated by the “ideal victim syndrome”. It describes how society, the law, and the criminal justice system expect a rape or defilement survivor to act following an experience of sexual violence and depicts the kinds of actions which makes them appear more believable.<sup>50</sup> Unfortunately, even the medical P3 form itself seems to follow this erroneous stereotype, presupposing resistance to abuse by survivors and putting an emphasis on the “attire at the point of abuse.”<sup>51</sup> The reality is that it is incredibly difficult to convict a perpetrator without medical evidence which supports the survivor’s testimony, particularly if they does not match what an “ideal victim” should look like. Furthermore, the situation is even more dire for children (who have one in three chances of being defiled before reaching the age of majority) because, under section 124 of the *Evidence Act*, a child’s testimony requires corroboration by material evidence in order to result in a conviction.<sup>52</sup> Given these obstacles, medical forms are crucial to supporting the case against the perpetrator and, if compromised, may deny justice to the survivor and affect the integrity of the justice system.

In addition to the P3 form, the Post Rape Care form<sup>53</sup> (PRC 1) is used to record all details on the history, documentation and examination at the first contact with survivors at the health facility.<sup>54</sup> The PRC 1 is also used as medical evidence in court, as it is attached to the P3 form.<sup>55</sup> Unlike the P3 Form, the PRC 1 was specifically designed to document cases of sexual violence and

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<sup>50</sup> Ruth Nekura Lekakeny, “The Elusive Justice for Women: A Critical Analysis of Rape Law and Practice in Kenya” (2015) University of Cape Town LKKRUT001 at 4.

<sup>51</sup> Carol Ajema et al, “Standards Required in Maintaining the Chain of Evidence in the Context of Post Rape Care Services: Findings of Study Conducted in Kenya” (2009) at 3, online (pdf) *Sexual Violence Research Initiative* <[www.svri.org/sites/default/files/attachments/2016-07-18/Chain%20of%20evidence%20-%20post%20rape%20care%20services%20Kenya\\_0.pdf](http://www.svri.org/sites/default/files/attachments/2016-07-18/Chain%20of%20evidence%20-%20post%20rape%20care%20services%20Kenya_0.pdf)>.

<sup>52</sup> 2010 *National Survey*, *supra* note 42 at 2.

<sup>53</sup> See Appendix B.

<sup>54</sup> See Kenya, Ministry of Health, “National Guidelines on Management of Sexual Violence in Kenya” 3rd ed (2014) at 35 [*National Guidelines*].

<sup>55</sup> See Carol Ajema et al, “Improving the Collection, Documentation and Utilisation of Medico-Legal Evidence in Kenya” (2012) at 28, online (pdf): *Berkeley Law* <[www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya\\_Chain-of-Med-Legal-Evidence-Rept\\_LVCT\\_2012.pdf](http://www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya_Chain-of-Med-Legal-Evidence-Rept_LVCT_2012.pdf)>.

contains questions that are narrowed to elements of forensic evidence, genital and physical examinations, and chain of evidence. Thus, if filled properly, it documents more crucial details than the generic P3 form that is used in all cases of assault. Nonetheless, the latter still has more weight and is more widely used by medical practitioners and in court.<sup>56</sup>

### *Section 77(3) of the Evidence Act*

Low prosecution and success rates in rape and defilement cases are partly caused by section 77(3) of the *Kenya Evidence Act* (2014) which allows the court to summon a “medical practitioner” to present their report at trial.<sup>57</sup> Under the *Medical Practitioners and Dentists Act* (2012), a medical practitioner is defined as a doctor of good moral character with both a degree and the required level of training, knowledge and experience.<sup>58</sup> Due to this distinction, only doctors are able to appear as expert witnesses and therefore, only doctors are allowed to complete and sign P3 forms.<sup>59</sup> Unfortunately, many hospitals are constrained by the limited number of medical doctors on staff.<sup>60</sup> This strict criterion does not take into account the fact that many of the initial examinations are conducted by clinical officers due to the shortage of doctors, particularly in rural areas. To adapt to these pressures, many hospitals have allowed clinical officers to examine complainants and write their own report on the findings. Then, a medical doctor transfers the clinical officer’s observations onto the P3 form, without ever examining the complainant themselves.

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<sup>56</sup> Ajema, *supra* note 51 at 23.

<sup>57</sup> *Evidence Act* (Kenya), 1963, c 80, s 77(3) [*Evidence Act*].

<sup>58</sup> *Medical Practitioners and Dentists Act* (Kenya), 1983, c 253, s 11.

<sup>59</sup> See Nduku Kilonzo, “Post Rape Services Report: A Situation Analysis” (2003) s 1.4, online (pdf): *Sexual Violence Research Initiative* <[www.svri.org/sites/default/files/attachments/2016-07-18/postrapeserviceskenya\\_0.pdf](http://www.svri.org/sites/default/files/attachments/2016-07-18/postrapeserviceskenya_0.pdf)>; see also Nduku Kilonzo et al, “Sexual Violence Legislation in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages” (2009) 17:34 *Reproductive Health Matters* 10 at 15.

<sup>60</sup> Carol Ajema et al, “Challenges Experienced by Service Providers in the Delivery of Medico-Legal Services to Survivors of Sexual Violence in Kenya” (2011) 18 *Journal of Forensic and Legal Medicine* 162 at 163, 165.

It is important to highlight that, unlike the P3 form that is automatically inadmissible if filled by a nurse<sup>61</sup>, the SOA specifically mentions that the PRC 1 can be filled by “the medical practitioner or designated person.”<sup>62</sup> In addition, *Kenyan National Guidelines on the Management of Rape* further elaborate that the PRC 1 “can be filled by a doctor, a clinical officer or a nurse.”<sup>63</sup>

*Practical Implications: Barriers to Access to Justice and Equality*

Being an expert witness often implies both a significant time commitment and expenses, which makes doctors reluctant to go to court and testify.<sup>64</sup> This could be explained by the fact that doctors are expected to use their own funds to pay for transportation to court. Furthermore, given the frequent delays, doctors would often spend an entire morning in court before they could testify, if at all, forcing them to miss work and appointments with patients back at the hospital. For these reasons, many doctors refuse to sign P3 forms for fear of the obligations that will follow, which automatically makes this crucial piece of evidence inadmissible.<sup>65</sup>

While the Ministry of Health has directed doctors to sign these forms, the problem calls for more concrete measures.<sup>66</sup> In the Parliamentary Debates on Free P3 Forms, the Honourable Chea noted that there “is a growing apathy among medical doctors when it comes to filling this form. In most hospitals, they set a particular day and allocate a specific doctor the mandate to fill in a P3 Form. ... So, we have heard of cases where people go to hospital and they are asked to wait for a particular doctor who is in charge of filling in the P3 Forms. This is too sad, because at the end of the day some of these matters require fresh

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<sup>61</sup> *Julius Kipchoge Korir v Republic*, [2017] CR 65 of 2015 (HC at Eldoret, Kenya) [Korir].

<sup>62</sup> SOA, *supra* note 1 s 6(c).

<sup>63</sup> *National Guidelines*, *supra* note 54 at 35.

<sup>64</sup> “Doctors in Public Hospitals Can Sign P3 Forms” *Daily Nation* (December 9, 2009) online: <[www.nation.co.ke/news/1056-820314-ikp13rz/index.html](http://www.nation.co.ke/news/1056-820314-ikp13rz/index.html)>.

<sup>65</sup> Ajema, *supra* note at 32.

<sup>66</sup> Nasibo Kabale, “Medical Officers Treating Victims Now Required to Sign P3 Forms” *Business Daily Africa* (May 25, 2018) online: <[www.businessdailyafrica.com/news/Medical-officers-treating-victims-now-required-to-sign-P3-forms/539546-4579796-4p4kcvz/index.html](http://www.businessdailyafrica.com/news/Medical-officers-treating-victims-now-required-to-sign-P3-forms/539546-4579796-4p4kcvz/index.html)>.



evidence.”<sup>67</sup> He went on to note that this apathy came from the reluctance of being witnesses, given the number of adjournments they would likely have to experience before they were able to testify. The legal restriction and lack of cooperation by doctors have severe negative repercussions on the survivors’ right to access to justice and right to equality.

The consequences of section 77(3) of the *Evidence Act* failing to take into account the context that puts a disproportionate pressure on doctors are twofold. When testifying in their capacity of an expert witness, they either present a P3 form that they filled based on the observations of another medical professional or provide their expertise on a P3 form that they have not filled altogether. Both scenarios can lead to desolating consequences for survivors because practical barriers emerge from the moment the need to consult a doctor arises to the moment the medical form is presented in court. This section specifically focuses on how section 77(3) discriminates against rural women, contributes to a compromised chain of evidence, erroneous and inconsistent explanation of contents of the P3 form, and inadmissibility thereof.

#### Discrimination Based Upon Economic Status and Locality

At the very preliminary level, strictly limiting the definition of expert witnesses to doctors directly affects survivors in rural and less developed regions. While rape and other forms of sexual violence affect women and girls across Kenya, health and medical facilities are not equally available in rural and urban regions. Not only is the number of hospitals limited in rural areas, but the medical practitioners whose qualifications are recognized under the *Evidence Act*, enabling them to assume the role of expert witnesses in court, are even less common. In other words, victims of rape and defilement have to wait for days to be examined by a recognized medical practitioner. Considering that bodily samples have to be collected and the medical report that is required to bring a case to court has to be written within a 72-hour window (before the yields are drastically reduced),<sup>68</sup> the unavailability of doctors can jeopardize the survivor’s chances to even initiate their recourse. This reality is contrary to the

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<sup>67</sup> Kenya, National Assembly, *Parliamentary Debates* (19 October 2016) at 6-7 (Hon. Chea).

<sup>68</sup> *National Guidelines*, *supra* 54 at 32.

constitutionally entrenched access to justice,<sup>69</sup> the internationally recognized right to an effective remedy,<sup>70</sup> as well as locally and internationally legislated right to equality.<sup>71</sup>

Interestingly, the precarious situation of women and girls in rural communities is explicitly brought to the State Parties attention in article 14 of CEDAW. The recognition of particular needs of rural women was another revolutionary aspect of CEDAW.<sup>72</sup> Thus, in addition to trying to level the playing field between men and women, the Convention strives to achieve equality between rural and urban women.<sup>73</sup> By ratifying this *Convention*, Kenyan state undertook the obligation to “take into account the particular problems faced by rural women ... and ... take all appropriate measures to ensure the application of the provisions of the ... Convention to all women in rural areas.”<sup>74</sup> Though the language of the *Evidence Act* does not explicitly encourage or allow discrimination of women in court, its application under this set of circumstances significantly undermines the equality of rural women. Similarly, the *Children Act* also guarantees the right to non-discrimination on the ground of “residence or local connection.”<sup>75</sup> Although women and girls in urban areas face these challenges as well, they are much more pronounced in the rural sector. It is recognized that, ideally, doctors should be the ones treating and examining victims of rape and defilement, which is often not possible “at the district and sub-district hospitals who often have to deal with other pressing emergencies and lifesaving situations.” Rape victims do not have first priority.<sup>76</sup> As a result, the consequences of the unavailability of doctors are even more severe for defilement victims in rural regions, which is an important aspect of the legal barrier that section 77(3) of the *Evidence Act* imposes in practice.

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<sup>69</sup> Constitution, *supra* note 7 art 48.

<sup>70</sup> UDHR, *supra* note 15 art 8.

<sup>71</sup> *Ibid* art 2; Constitution, *supra* note 7 art 27.

<sup>72</sup> Pruitt, *supra* note 30 at 352.

<sup>73</sup> *Ibid* at 359.

<sup>74</sup> CEDAW, *supra* note 31 art 2(f).

<sup>75</sup> *Children Act* (Kenya), 2001, c 8, s 5.

<sup>76</sup> Kilonzo (2003), *supra* note 59 s 5.3.

### Compromised Chain of Evidence

Once survivors do access a healthcare professional, they play an important role in the collection of evidence for defilement cases. Without following proper procedures and protocols, any evidence that is collected may be inadmissible in court. There are several criminal cases where the admissibility of P3 forms is challenged on the basis that the doctor did not have any grounds to complete it. In such instances, these allegations are dismissed when the P3 form is prepared and signed by the doctor who conducted the examination.<sup>77</sup> Unfortunately, studies have shown that the maintenance of the chain of evidence – among medical practitioners and between hospitals and the police – is often neglected, as health care providers regularly deviate from the standardized service delivery depending on the individual case.<sup>78</sup> This is significant because the police rely almost exclusively on the evidence collected in hospitals for their investigative purposes and do not collect any evidence themselves.<sup>79</sup>

These problems are worsened by the legal requirement that only doctors can testify in court as expert witnesses. As described earlier in this paper, out of several medical professionals who are authorized to fill out the PRC 1, only medical doctors can fill out the P3 form. In other words, the PRC 1 is not necessarily filled by the medical doctor who will later fill the P3 form. In fact, when medical staff and police officers were surveyed, it was revealed that all bodily samples (high vaginal swabs, urine, clothes/pants, blood) except for blood are collected by nurses, clinical officers and sometimes doctors.<sup>80</sup> Therefore, there is often a disconnect in the chain of evidence that may affect its admissibility or the testimony itself.

### Difficulties Explaining the Terminology Used in the P3 Form

Many doctors, nurses, and clinical officers who are in charge of examining the complainant and filling out medical forms do not have a thorough understanding of the SOA, the precise legal definitions of terms used, or the extent of medico-legal

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<sup>77</sup> *Boaz Kipleting Kemboi v Republic*, [2016] CR 209 of 2013 (CA at Eldoret, Kenya) [Kemboi].

<sup>78</sup> Ajema, *supra* note 60 at 162.

<sup>79</sup> Ajema, *supra* note 51 at 14.

<sup>80</sup> *Ibid.*

implications of the documentation.<sup>81</sup> This can be particularly problematic if the examining medical practitioner who fill out the PRC 1 and/or the P3 form uses unique terminology that may be difficult for their colleagues to elaborate on in court. If the terms that the examining health care worker uses do not match the terms in the SOA, “this can result in the dismissal of cases due to variations in the survivor’s testimony and the clinician’s documentation; doubts about the credibility of the medical doctor; and lack of trust in the medico-legal system among the public which could affect victim’s willingness to report sexual abuse.”<sup>82</sup> This disconnect is worsened if the health care worker that examines the complainant is not the same as the doctor who testifies. They will not be able to explain their observations, and, if necessary, explain the meaning behind the phrases and terminology used on the medical forms.

#### Admissibility of Hearsay Evidence

Ultimately, when the doctor testifying as an expert witness has not conducted the preliminary examination of the survivor or is not even the author of the P3 form, the value of their testimony amounts to that of hearsay evidence. The *Evidence Act* requires that all oral evidence must be direct<sup>83</sup>, which is defined as “with reference to a fact which could be seen, the evidence of a witness who says he saw it.”<sup>84</sup> The only exception to the statements, written or oral, being admissible without the maker of the statement being present in court is when they “cannot be found”, or when their “attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”<sup>85</sup> This exception is applicable when the statement is made in the ordinary course of business or “in discharge of professional duty.”<sup>86</sup> When this requirement is not respected, there can be tangible negative consequences on the outcome of the case, thus denying survivors of defilement or rape their right to an effective remedy and access to justice.

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<sup>81</sup> *Ajema*, *supra* note 60 at 164.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Evidence Act*, *supra* note 57 s 63(1).

<sup>84</sup> *Ibid*, s 63(2)(a).

<sup>85</sup> *Ibid*, s 33.

<sup>86</sup> *Ibid*, s 33(b)).

It is helpful to look at how this phenomenon has been documented in South Africa, whose legislation has inspired many of Kenyan laws, including the 2010 Constitution.<sup>87</sup> South African decisions have moreover been cited and referred to by Kenyan courts on several occasions. In some cases, South African decisions are useful when the provisions of both countries on a given matter are similar.<sup>88</sup> In other cases, South African jurisprudence is attributed “useful comparative” value, even in the absence of equivalent legislation in Kenya.<sup>89</sup>

The *Criminal Procedure Act* of South Africa incorporates provisions relating to documentary evidence from the *Civil Proceedings Evidence Act*.<sup>90</sup> The latter indicates that oral evidence is direct, “provided the person who made the statement had personal knowledge of the matters dealt with in the statement.”<sup>91</sup> It further establishes that “the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.”<sup>92</sup> Finally, the South African *Law of Evidence Amendment Act* has a section that expressly mentions that “hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless the party against whom the evidence is adduced agrees,<sup>93</sup> or it is in the interests of justice.”<sup>94</sup>

As the review of jurisprudence from both jurisdictions outlines below, South African courts are less lenient than their Kenyan counterparts toward admitting medical forms that are presented through hearsay testimonies. Thus, if Kenyan judges decide to follow in South African judges’ footsteps, the right to an effective remedy of survivors of sexual violence will be further

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<sup>87</sup> Glinz, *supra* note 6 at 68.

<sup>88</sup> *Kenya Human Rights Commission v Communications Authority of Kenya*, [2018] CP 86 of 2017 (HC at Nairobi, Kenya) at para 119 [KHRC].

<sup>89</sup> *Teresa Carlo Omondi v Transparency International*, [2017] 863 of 2015 (ELR Court at Mombasa, Kenya) at para 96 [Omondi].

<sup>90</sup> *Criminal Procedure Act* (S Afr), No. 51 of 1977, s 222 [*Criminal Procedure Act*].

<sup>91</sup> *Civil Proceedings Evidence Act* (S Afr), No. 25 of 1965, s 34(1) [*Civil Evidence Act*].

<sup>92</sup> *Ibid.*

<sup>93</sup> *Law of Evidence Amendment Act* (S Afr), No. 45 of 1988, s 3(1)(a).

<sup>94</sup> *Ibid.*, s 3(1)(c).

undermined, despite the existence of convincing medical evidence in their favour.

### Kenyan Jurisprudence

Kenyan courts seem to generally accept hearsay evidence when a doctor who has not examined the defilement or rape survivor presents medical forms in court. However, evidence is admitted under the condition that the accused “ha[s] no objections”<sup>95</sup> and if it does not prejudice the accused.<sup>96</sup> For instance, in *DWM v Republic*, the Court of Appeal at Nyeri accepted the evidence presented by another doctor because the maker of the form was “away on study leave.” Therefore, a colleague “who was familiar with her handwriting” testified in court on her behalf. The judge did not see it as problematic, “considering that [the accused] had not insisted at the trial that the maker of the document be called, neither was any complaint made by the appellant at the trial that the witness was unable to respond to his questions on the P3.”<sup>97</sup> Similarly, in a case before the High Court at Lodwar, *EE v Republic*, the maker of the document was unavailable on several occasions, which lead the prosecution to propose “that another clinical officer produce the document.” The appellant said he had no problems with this approach. As a result, the court found that “this was in compliance with sections 33(b) [statement by deceased person made in the discharge of professional duty] and 77 of the *Evidence Act*” and that “the production of the P3 form by a person other than the maker” was not unlawful.<sup>98</sup>

However, while some judges are of the opinion that hearsay evidence does not amount to prejudice to the accused, others are willing to go as far as acquit them. In *James Muriuki v Republic*, the fact that the P3 form was not presented by the doctor who had produced it resulted in the release of the accused on appeal. In this case, the witness who presented the form not only did not fill it out, but he was not even a doctor, but rather, a police officer. The court concluded that “it is thus imperative that

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<sup>95</sup> *Martin Charo v Republic*, [2016] CR 32 of 2015 (HC at Malindi, Kenya) [Charo].

<sup>96</sup> *Fredrick Oyoo Odhiambo v Republic*, [2017] CR 34 of 2016 (HC at Siaya, Kenya) [Odhiambo].

<sup>97</sup> *DWM v Republic*, [2017] CR 12 of 2014 (CA at Nyeri, Kenya) [DMW].

<sup>98</sup> *EE v Republic*, [2016] CR 9 of 2015 (CA at Lodwar, Kenya) [EE].

the makers of the P3 form are called to give evidence on their report.”<sup>99</sup> Finally, in *Naomi Bonarei Angasa v Republic*, the court did not admit medical evidence because the prosecution “did not lay any basis for the admission of the document.” The examining doctor had left public service, which is the only thing the testifying doctor stated in court. Therefore, though the accused was convicted of another offence, she was acquitted of the principal charge of defilement.<sup>100</sup>

Though, in most cases, hearsay evidence did not pose any challenges as per the admissibility of medical forms in rape cases, it is undisputed that some courts do find it problematic, do not admit P3 forms and, as a result, set the accused free. Even in cases where the evidence was admitted, the outcome could have resulted in an acquittal had the accused objected at the trial level. Simply put, when medical forms are introduced in court via hearsay evidence in Kenya, their admissibility is frail and conditional at best.

#### South African Jurisprudence

South African courts have been very explicit as to the admissibility of hearsay evidence. It was established that “an expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact.”<sup>101</sup> In *Nkululeko Freegate Phakathi v State*, the High Court of South Africa expressed that even when admitted, the value of hearsay evidence “depends on inter alia, the nature of the proceedings and the evidence, the purpose for which it is tendered and importantly, the prejudice to the accused.”<sup>102</sup>

In many previously decided cases on hearsay evidence in rape and other cases of sexual violence, judges underscored the importance of having the examining medical experts to testify in court. Pertinently, *Mzwanele Lubando v State* case from the

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<sup>99</sup> *James Muriuki v Republic*, [1993] CR 206 of 1993 (HC at Nyeri, Kenya) [Muriuki].

<sup>100</sup> *Naomi Bonarei v Republic*, [2017] CR 95 of 2017 (HC at Kiambu, Kenya) [Bonarei].

<sup>101</sup> *Kate Mathebula v Road Accident Fund*, [2006] ZAGPHC 05967 [Mathebula].

<sup>102</sup> *Nkululeko Freegate Phakathi v State*, [2016] ZAKZPHC 195 at para 29 [Phakathi].

Supreme Court of Appeal highlighted the importance of medical evidence in defilement cases, where children's testimony has to be corroborated. In that case, prosecutors failed to call the medical expert who examined the victim and compiled a medical report, which contributed to the State's failure to prove the guilt of the accused. As a result, the case was sent to trial.<sup>103</sup> In another case, *Maposa Frans Madiba v State*, the Supreme Court of Appeal expressed its concern about not having the examining medical expert at trial:

There appears to be a disturbing tendency on the part of the representatives of the State not to call the doctor who [...] performed an examination and completed the report, to testify. However, there are many cases where this evidence is essential to the just determination of a case and in many cases is of great value in assessing guilt.<sup>104</sup>

Similarly, In *Sibulali v Minister of Police*, the J88 medical form (the South African equivalent of the P3 form) that was admitted provisionally at first, was rejected because doctor's testimony was not secured. The doctor was located in an area relatively nearby and, according to the court, could have been brought to court had the claimant's lawyer made the effort.<sup>105</sup> Finally, in the *Phakathi v State* decision referenced earlier, the medical form was admitted by the court because it was "sufficiently clear and detailed, [such that] it is possible for another doctor to draw inferences from the examining and report doctor's observations."<sup>106</sup> Nevertheless, because the trial court did not engage with the issue of hearsay, the appellant's right to a fair trial was impaired. Therefore, the J88 could not be admitted as evidence. This, together with other factors in this case, hindered the prosecution's attempt to establish that the accused raped the complainant beyond reasonable doubt.

This series of cases demonstrates that South African courts are very reluctant to accept hearsay evidence, particularly in cases where the maker of the form can be found and summoned

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<sup>103</sup> *Mzwanele Lubando v State*, [2016] ZASCA 4 [Lubando].

<sup>104</sup> *Maposa Frans Madiba v State*, [2014] ZASCA 13, at para 8 [Madiba].

<sup>105</sup> *Nothemba Pretty Sibulali v Minister of Police*, [2016] ZAECMHC 31 [Sibulali].

<sup>106</sup> *Phakathi*, *supra* note 102 para 38.



to testify in court. It bears noting that the courts' disinclination is consistent with the accused's right regarding witness attendance and examination guaranteed under article 14(3)(e) of the ICCPR. The threshold for the admission of hearsay evidence is very elevated and is only satisfied in exceptional cases, like death of the examining doctor.<sup>107</sup> In conclusion, given the shortage of doctors in Kenya, the requirement imposed by section 77(3) of the *Evidence Act* leaves no choice but to present the P3 form as hearsay evidence in certain cases, thus jeopardizing the admissibility of evidence pivotal for the conviction.

#### Inconsistency between Medical Forms and Testimony

Even when the case falls within Kenyan exceptions for admitting hearsay evidence, there are instances where convictions are set aside on appeal and the accused is set at liberty because of inconsistencies between the content of the medical form and the testimony provided by the doctor who had never examined the complainant.

In 2014, the High Court at Nyeri had acquitted a man who had been accused of defiling his 14-year-old daughter for this very reason.<sup>108</sup> The father denied all charges, claiming that they were fabricated. While he was sentenced to life imprisonment by the lower court, he appealed on the ground that prosecution failed to call crucial witnesses, among other reasons. More specifically, there was a significant discrepancy between the doctor's testimony and the content of the P3 form. It was impossible to cross-examine the doctor who filled in the P3 form, as she was not present at court, and another doctor, without a prior application by the prosecution, appeared on the examining doctor's behalf. The testifying doctor mentioned that the victim was examined two weeks after the assault, whereas the medical form indicated that it was filled more than three months later. Furthermore, from the testimony of the doctor who presented the P3 form in court, there was "no suggestion ... that the complainant was sexually assaulted as alleged; however, the doctor's findings in the P3 form show that the complainant's hymen was broken."

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<sup>107</sup> *Civil Evidence Act*, *supra* note 91 s 34(b).

<sup>108</sup> *JMK v Republic*, [2014] CA 83 of 2014 (HC at Nyeri, Kenya) [JMK].

The court could not overlook these inconsistencies and decided that “there is no basis to conclude that this offence has been proved beyond reasonable doubt.” Additionally, there was no basis for the testifying doctor to appear in court on behalf of the examining doctor and no application was made by the prosecution for that matter. Thus, section 63(1) of the *Evidence Act* was violated because oral evidence was not direct. Since the accused was unrepresented and the trial court did not point out the issue, the former was “unduly denied the opportunity to cross-examine [the examining doctor] on her opinion,” denying him his right to fair trial. As a result, the appeal was allowed, and the accused was acquitted.

This section illustrates how a narrow and uncontextualized definition of an expert witness, combined with a dire shortage of doctors, negatively affects survivors of sexual violence in Kenya. As such, it denies them their constitutionally recognized access to justice, right to an effective remedy and right to equality.

## **Moving Forward**

### *Legislative Solutions for Kenya*

There are a multiplicity of challenges that can arise out of the mere fact that the testifying doctor often does not examine survivors of sexual violence herself. However, it should not be forgotten that they are largely due to one legislative provision, namely section 77(3) of the *Evidence Act*. Thus, there is a number of solutions that Parliament can put forth to address the issues discussed earlier.

Firstly, the legislator can broaden the definition of an “expert witness” in cases of sexual violence. If clinical officers and other medical staff with sufficient training and expertise to conduct the initial examination of the complainant are recognized as experts, they will be able to testify in court. This would allow for an increased access to medico-legal services, particularly in rural areas, while painting a far more complete picture at trial for the judges.

Secondly, Parliament should allow P3 forms to be issued at the hospital – not only at police stations – so that the initial health care worker can fill them out following the first examination, rather than requiring a second visit to the hospital

after visiting the police station. Under the current process, the complainant will often be examined by a different health care worker on the second visit who is unfamiliar with the results of the first examination.

Thirdly, courts could limit testimony by doctors to one or two pre-assigned days per week. That way, doctors would be able to accommodate court appearances into their schedule of clinic work. In fact, this solution was proposed by doctors themselves.<sup>109</sup>

Finally, Parliament should introduce a scheme for reimbursing doctors who have to travel long distances in order to testify in defilement and rape cases. This will remove many of the obstacles which prevent the examining doctor from testifying in court, and consequently increase access to justice for survivors. For instance, the *Criminal Procedure Act* of South Africa has introduced a similar system. Section 191(1) states that “any person who attends criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed under subsection (3).”<sup>110</sup>

These potential solutions could be a step toward achieving the ultimate goal of avoiding inconsistencies between the medical forms and the testimony, ensuring that hearsay is not introduced into the record, and allowing the examiner to explain any unique terms that were used on the medical forms.

### *Solutions Inspired by Social Change*

#### Best Practices within the International Arena

While many solutions are in the hands of Parliament, they are definitely not limited to the legislative route. For instance, to address the issue of sexual violence that undermines their security and dignity, Kenyan women can find inspiration in successes of women in other countries who similarly face rampant sexual violence and often lack autonomy and agency. India, where violence against women is tackled through self-help groups (SHGs), can be of particular interest. However, it should be noted

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<sup>109</sup> Telephone interview with Samuel Mutegi, Doctor at the Githongo Hospital, conducted July 3<sup>rd</sup>, 2018. Mr. Mutegi’s contact information is on file with the author.

<sup>110</sup> *Criminal Procedure Act*, *supra* note 90 at s 191.

that while India and Kenya are closely ranked on gender inequality index<sup>111</sup> and have comparable measurements of prevalence of violence against women<sup>112</sup>, there are differences in demographics of survivors of sexual violence. In India, the demographic that the SHGs study focused on was married women – in the state where more than half of married men and women found marital violence justifiable – due to a 35% prevalence of sexual and physical violence in this group.<sup>113</sup> This paper, as mentioned previously, focuses on the survivor demographic of both women and girls in Kenya. Notwithstanding those differences, the findings of the study presented below can still be considered and implemented in the Kenyan context.

In order to address the issue of gender based marital violence that is deeply rooted in Indian culture, the Do Khadam program was introduced in 2014 in one of the least developed states in the country.<sup>114</sup> Simply put, half of women who were members of 140 local SHGs from 28 villages and some women from the community not part SHGs received the treatment.<sup>115</sup> The treatment consisted of bi-weekly meetings where women discussed financial matters, such as microfinance, credit and savings, or social issues related to early marriage and violence, among others.<sup>116</sup> When the results of the intervention among SHG members were compared to those among non-SHG members 15 months later, it was concluded that SHGs can be effectively used to change traditional norms, build agency and skills among women.<sup>117</sup> Moreover, it was found that SHGs are foundational to reducing violence against women.<sup>118</sup> It bears noting that women's

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<sup>111</sup> *Violence against Women in Kenya*, *supra* note 40; see also “Global Database on Violence against Women”, online : UN Women <<http://evaw-global-database.unwomen.org/en/countries/asia/india?formofviolence=c6ff23e9fc6e4f0aa974d0da1611b98f>>.

<sup>112</sup> *Ibid.*

<sup>113</sup> Shireen J. Jejeebhoy et al, “Empowering Women and Addressing Violence Against Them Through Self-Help Groups (SHGs)” (2017) at 1, online (pdf): Research Gate <[www.researchgate.net/publication/317344633\\_Empowering\\_women\\_and\\_addressing\\_violence\\_against\\_them\\_through\\_self-help\\_groups\\_SHGs](http://www.researchgate.net/publication/317344633_Empowering_women_and_addressing_violence_against_them_through_self-help_groups_SHGs)>.

<sup>114</sup> *Ibid* at 1, 3.

<sup>115</sup> *Ibid* at 4-5.

<sup>116</sup> *Ibid* at 4.

<sup>117</sup> *Ibid* at 33, 92.

<sup>118</sup> *Ibid* at 92.

husbands that were reached by researchers received similar intervention the effects of which were also measured.

Specifically, the results indicated that the intervention was successful at shifting SHG members' attitudes towards gender roles and masculinity away from the idea that women are subservient to their husbands or that husbands are entitled to control their wives.<sup>119</sup> There was an increased support for women subject to gender-based violence to get support, particularly among those who regularly attended intervention sessions.<sup>120</sup> It was observed, moreover, that SHGs members who received the intervention were subsequently subject to lesser instances of physical violence, though there was no change in occurrence of sexual violence.<sup>121</sup>

That said, when it comes to restoring women's dignity, their autonomy and solidarity among women is equally important. Following the completion of the program, SHG members in the treatment group had significantly higher levels of mobility, financial literacy, and ability to make their own decisions.<sup>122</sup> Another crucial finding was that SHG members felt confidently about having social support and standing up to violence observed or witnessed.<sup>123</sup> Notably, husbands of SHG treatment members reported to be more knowledgeable about practices of marital violence.<sup>124</sup>

The idea of using SHGs with the aim of reducing violence against women is particularly interesting, given that the primary function of these programs is typically to empower women economically or politically.<sup>125</sup> In fact, the right of rural women "to organize self-help groups [...] in order to obtain equal access to economic opportunities" is expressly recognized in CEDAW, as SHGs were understood as being instrumental to their social and economic empowerment by the drafters.<sup>126</sup> Kenyan legislation adopts a similar view to this effect. In fact, *The Self-Help*

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<sup>119</sup> *Ibid* at 61.

<sup>120</sup> *Ibid* at 61, 63.

<sup>121</sup> *Ibid* at 63.

<sup>122</sup> *Ibid* at 65, 66.

<sup>123</sup> *Ibid* at 67, 87.

<sup>124</sup> *Ibid* at 87.

<sup>125</sup> Vanegas, *supra* note 32 at 311-312.

<sup>126</sup> CEDAW, *supra* note 31 art 14(2)(e); see also Pruitt, *supra* note 30 at 375.

*Associations* Senate Bill specifies that in order to qualify as a self-help association, members must have a “common socio-economic agenda.”<sup>127</sup> However, though it seems like the Bill did not get past its first read<sup>128</sup>, it also specified that one of its purposes is to “create an environment that promotes self-reliance and self-sufficiency” and defines the purpose of self-help associations as “pooling resources, gathering information and offering mutual support, services or care.”<sup>129</sup> This seemingly open legislative intention, combined with an overwhelmingly positive<sup>130</sup> reaction of women in SHGs treatment groups and even their husbands, could be indicative of the likely success of a program similar to Do Khadam in Kenya. If implemented and adapted to the local context, SHGs could serve as an additional avenue towards restoring women’s autonomy and dignity.

#### Best Practices within the Local Arena

To come full circle relative to the source of inspiration for this paper, I want to offer a brief description of a local success in Kenya driven by community members, independently from Parliament: *160 Girls Project*. In order to address the long-standing and widespread issue of defilement in Kenya that was worsened by the failure of the police to enforce defilement laws, equality effect partnered with Ripples International to bring the matter to court. Police responses to defilement cases that were documented and presented as evidence in court included “requests for money, interrogating the victims in a humiliating manner, refusing to investigate, refusing to gather and bring physical evidence to court, refusing to make arrests, and in some cases, even refusing to record the complaints at all.”<sup>131</sup> In May of 2013, the High Court at Meru sided with the petitioners and found that police treatment of defilement cases is unconstitutional and

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<sup>127</sup> *Self-Help Associations Bill* (Kenya), No. 2 of 2015, s 6(b).

<sup>128</sup> “Senate Bills” online: Kenya Law  
<[www.kenyalaw.org/kl/index.php?id=5190](http://www.kenyalaw.org/kl/index.php?id=5190)>.

<sup>129</sup> *Self-Help Associations Bill*, *supra* note 127 ss 2, 3(e).

<sup>130</sup> Jejeebhoy, *supra* note 113 at 59.

<sup>131</sup> Fiona Sampson & Sasha Hart, “‘160 Girls’ Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya” (2013) at 3, online (pdf): Kenya Law  
<[www.kenyalaw.org/kl/fileadmin/pdfdownloads/160\\_Girls\\_Making\\_Legal\\_History\\_-\\_Sampson\\_Hart.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/160_Girls_Making_Legal_History_-_Sampson_Hart.pdf)>.

“infringes on the petitioners fundamental rights and freedoms” (160 Girls decision).<sup>132</sup> Consequently, the Court ordered that the police investigation of defilement cases has to be “prompt, effective, proper and professional.”<sup>133</sup>

Following the historical court victory, The Equality Effect continues to work toward the implementation of the decision. For instance, the organization worked in collaboration with the Kenyan National Police Service to train police officers, while Ripples International continuously monitors police treatment and the development of cases in court. In addition, equality effect has been putting a significant emphasis on public legal education by working with primary schools and involving the wider community.<sup>134</sup> While a lot of work remains to be done, Ripples International’s internal records display an increase of prosecution and conviction rates in defilement cases over the past five years. It also bears noting that the 160 Girls project received recognition by the United Nations as the “best practice relating to advancing women’s rights and women’s empowerment.”<sup>135</sup> Thus, this project is a perfect depiction of how the law is not always the driver of social change and often follows it.

## Conclusion

This paper illustrates how sometimes the very laws that are essential to vindicate rights (or to ensure their enforcement) can have the opposite effect. Section 77(3) of the *Evidence Act* is a small yet non-negligible example of such laws. However, it is worth noting that the text of the provision itself is not discriminatory or does not encourage harm or discrimination against women. In other words, it demonstrates that even the most neutral provisions can have negative effects, following their implementation. This paper has argued that the strict definition of an “expert witness” acts as a legislative barrier to female survivors at all stages of obtaining a medical P3 form that has the potential of being used in court as forensic evidence. Specifically,

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<sup>132</sup> *Ripples International & 11 others v Commissioner of Police*, [2013] 8 of 2012 (HC at Meru, Kenya) at 15 [160 Girls decision].

<sup>133</sup> *Ibid* at 16.

<sup>134</sup> “Background” online: 160 Girls <[www.160girls.org/about/](http://www.160girls.org/about/)>.

<sup>135</sup> “What We Do” online: equality effect <[www.theequalityeffect.org/what-we-do/](http://www.theequalityeffect.org/what-we-do/)>.

the barrier persists from the moment the survivor has to find and access a qualified doctor to the moment the P3 form is presented in court as an expert report.

Nonetheless, to conclude on a more optimistic note, it bears mentioning that these barriers are not insurmountable. There are solutions both within and outside the legislative scope to restore and protect the survivors' right to security and access to justice in Kenya. In fact, Kenyan women and girls not only have effective initiatives that are already in place, such as the *160 Girls Project*, but they can also find inspiration in other examples on the global arena, such as the Indian *Do Khadam* project that aims to tackle marital violence through SHGs.

In conclusion, new transformative constitutions, human rights declarations, international covenants and conventions and other human rights instruments, whether binding or aspirational, have tremendous potential to make a difference in the lives of women and girls worldwide. In fact, these tools can fulfil their role when used effectively, even in countries where the rule of law indices leave a lot to be desired.<sup>136</sup> It is interesting to note that several provisions from the *United Nations Convention on Rights of Child*, the *African Charter on Human and People's Rights*, *CEDAW*, and *ICCPR* were explicitly recognized as "applicable to the petitioners cases" in the *160 Girls decision*, in addition to articles of the 2010 Constitution.<sup>137</sup> This is reminder that these local and international documents are *instruments* that have to be skillfully used to be serve their purpose.

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<sup>136</sup> "Kenya" online: *Rule of Law Index*  
<[www.data.worldjusticeproject.org/#/groups/KEN](http://www.data.worldjusticeproject.org/#/groups/KEN)>.

<sup>137</sup> *160 Girls decision*, *supra* note 132 at 9.



## Appendices

### Appendix A: P3 Form



#### THE KENYA POLICE MEDICAL EXAMINATION REPORT

P3

##### PART 1-(To be completed by the Police Officer Requesting Examination)

From.....Ref.....  
.....Date.....  
To the.....Hospital/Dispensary  
I have to request the favour of your examination of:-  
Name.....Age.....(If known)  
Address.....Date and Time of the alleged offence.....  
.....  
Sent to you/Hospital on the.....20.....under escort of.....  
.....and of your furnishing me with a report of the nature and  
extent of bodily injury sustained by him/her.  
Date and time report to police.....  
Brief details of the alleged offence.....  
.....  
Name of Officer Commanding Station.....Signature of the Officer Commanding Station

##### PART II-MEDICAL DETAILS - (To be completed by Medical Officer or Practitioner carrying out examination)

(Please type four copies from the original manuscript)

##### SECTION "A"-THIS SECTION MUST BE COMPLETED IN ALL EXAMINATIONS

Medical Officer's Ref.NO.....  
1. State of clothing including presence of tears, stains (wet or dry) blood, etc.  
.....  
.....  
2. General medical history (including details relevant to offence).....  
.....  
3. General physical examination (including general appearance, use of drugs or  
Alcohol and demeanour)  
.....

This P3 Form is free of charge

**SECTION "B"- TO BE COMPLETED IN ALL CASES OF ASSAULT,  
INCLUDING SEXUAL ASSAULTS, AFTER THE  
COMPLETION OF SECTION "A"**

1. Details of site, situation, shape and depth of injuries sustained:-
  - a) Head and neck.....
  - b) Thorax and Abdomen.....
  - c) Upper limbs.....
  - d) Lower limbs .....
2. Approximate age of injuries (hours, days, weeks).....
3. Probable type of weapon(s) causing injury.....
4. Treatment, if any, received prior to examination.....
5. What were the immediate clinical results of the injury sustained and the assessed degree, i.e. "harm", or 'grievous harm'".\*

**DEFINITIONS:-**

"Harm" Means any bodily hurt, disease or disorder whether permanent or temporary.

"Maim" means the destruction or permanent disabling of any external or organ, member or sense

"Grievous Harm" Means any harm which amounts to maim, or endangers life, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent, or serious injury to external or organ.

.....  
Name & Signature of Medical Officer/Practitioner

Date.....

This P3 Form is free of charge

**SECTION "C"-TO BE COMPLETED IN ALLEGED SEXUAL OFFENCES  
AFTER THE COMPLETION OF SECTIONS "A" AND "B"**

1. Nature of offence.....Estimated age of person  
examined.....

**2. FEMALE COMPLAINANT**

a) Describe in detail the physical state of and any injuries to genitalia with  
special reference to labia majora, labia minora, vagina, cervix and  
conclusion.....

b) Note presence of discharge, blood or venereal infection, from genitalia or  
on body externally.....

**3. MALE COMPLAINANT**

b) Describe in detail the physical state of and any injuries to  
genitalia.....

c) Describe in detail injuries to anus.....

d) Note presence of discharge around anus, or/ on thighs, etc.; whether recent  
or of long standing.....

This P3 Form is free of charge

**SECTION "D"**

**4. MALE ACCUSED OF ANY SEXUAL OFFENCE**

a) Describe in detail the physical state of and any injuries to genitalia especially penis.....  
.....  
.....

b) Describe in detail any injuries around anus and whether recent or of long standing.....  
.....  
.....

5. Details of specimens or smears collected in examinations 2,3 or 4 of section "C" including pubic hairs and vaginal hairs.....  
.....  
.....

6. Any additional remarks by the doctor.....  
.....  
.....

.....  
**Name & Signature of Medical Officer/Practitioner**

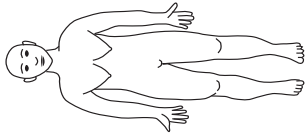
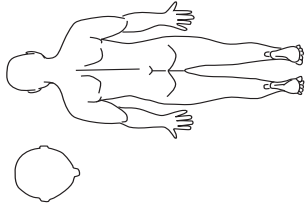
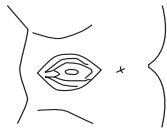

**Date**.....

This P3 Form is free of charge

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## MOH 363

**Physical examination** [indicates sites and nature of injuries, bruises and marks outside the genitalia]  
Please use the sketches below to indicate injuries, inflammations, marks on various body parts of **the survivor**

<p><b>Sketch of person</b></p> <p>Anterior view</p>  <p>Posterior view</p>  <p>Comments</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>		<p><b>Female Genitalia</b></p>  <p><b>Male Genitalia</b></p> 
---	--	--

## MOH 363

Any other treatment / Medication given /management?									
Referrals to									
<input type="checkbox"/> Police Station		<input type="checkbox"/> HIV Test		<input type="checkbox"/> Laboratory					
<input type="checkbox"/> Legal		<input type="checkbox"/> Trauma Counseling		<input type="checkbox"/> Safe Shelter					
<input type="checkbox"/> OPD/CCC/HIV Clinic		<input type="checkbox"/> Other (specify)							
Name of Examining Medical/Clinical/Nursing Officer									
Signature of Examining Medical/Clinical/Nursing Officer									
L	Sample Type	Test	Please tick as is applicable		Comments				
A			National	Health Facility					
B	Outer Genital swab	Wet Prep Microscopy	government	Lab					
O	Anal swab	DNA							
R	Skin swab	Culture and							
A	Oral swab	sensitivity							
T	Specify								
O	High vaginal swab	Wet Prep Microscopy							
R	Urine	Pregnancy Test							
Y		Microscopy							
		Drugs and alcohol							
		Other							
S	Blood	Haemoglobin							
A		HIV Test							
M		SGPT/GOT							
P		VDRL							
L		DNA							
E	Pubic Hair	DNA							
	Nail clippings	DNA							
S	Foreign bodies	DNA							
	Other (specify)								
<b>Chain of custody</b>									
These /All/ Some of the samples packed and issued (please specify)									
To	Police Officer's Name		Signature		Day	Month	Year		
By	Medical/Clinical/Nursing Officer's Name		Signature		Day	Month	Year		

## Bibliography

### LEGISLATION

Children Act (Kenya), 2001, c 8.

Civil Proceedings Evidence Act (S Afr), No. 25 of 1965.

Constitution of Kenya, 2010.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, (entered into force 3 September 1981).

Criminal Procedure Act (S Afr), No. 51 of 1977.

Evidence Act (Kenya), 1963, c 80.

*International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

Law of Evidence Amendment Act (S Afr), No. 45 of 1988.

Medical Practitioners and Dentists Act (Kenya), 1983, c 253.

Self-Help Associations Bill (Kenya), No. 2 of 2015.

Sexual Offences Act (Kenya), No 3 of 2006.

Universal Declaration of Human Rights, 10 December 1948.

### JURISPRUDENCE

*Boaz Kipleting Kemboi v Republic*, [2016] CR 209 of 2013 (CA at Eldoret, Kenya).

*DWM v Republic*, [2017] CR 12 of 2014 (CA at Nyeri, Kenya).

*EE v Republic*, [2016] CR 9 of 2015 (CA at Lodwar, Kenya).

*Fredrick Oyoo Odhiambo v Republic*, [2017] CR 34 of 2016 (HC at Siaya, Kenya).

*James Muriuki v Republic*, [1993] CR 206 of 1993 (HC at Nyeri, Kenya).

*JMK v Republic*, [2014] CA 83 of 2014 (HC at Nyeri, Kenya).

*Julius Kipchoge Korir v Republic*, [2017] CR 65 of 2015 (HC at Eldoret, Kenya).

*Kate Mathebula v Road Accident Fund*, [2006] ZAGPHC 05967.

*Kenya Human Rights Commission v Communications Authority of Kenya*, [2018] CP 86 of 2017 (HC at Nairobi, Kenya).

*Maposa Frans Madiba v State*, [2014] ZASCA 13.

*Martin Charo v Republic*, [2016] CR 32 of 2015 (HC at Malindi, Kenya).

*Mzwanele Lubando v State*, [2016] ZASCA 4.

*Naomi Bonareai v Republic*, [2017] CR 95 of 2017 (HC at Kiambu, Kenya).

*Nkululeko Freegate Phakathi v State*, [2016] ZAKZPHC 195.

*Nothemba Pretty Sibulali v Minister of Police*, [2016] ZAECMHC 31.

*Ripples International & 11 others v Commissioner of Police*, [2013] 8 of 2012 (HC at Meru, Kenya).

*Rono v Rono et al*, [2005] No 66 of 2002 (CA at Eldoret, Kenya).

*Teresa Carlo Omondi v Transparency International*, [2017] 863 of 2015 (ELR Court at Mombasa, Kenya).



## SECONDARY MATERIAL

"Background" online: 160 Girls  
<[www.160girls.org/about/](http://www.160girls.org/about/)>.

"Doctors in Public Hospitals Can Sign P3 Forms" *Daily Nation* (December 9, 2009) online:  
<[www.nation.co.ke/news/1056-820314-ikp13rz/index.html](http://www.nation.co.ke/news/1056-820314-ikp13rz/index.html)>.

"Global Database on Violence against Women", online :  
UN Women <<http://evaw-global-database.unwomen.org/en/countries/asia/india?formofviolence=c6ff23e9fc6e4f0aa974d0da1611b98f>>.

"Global Database on Violence against Women", online :  
UN Women <[www.evaw-global-database.unwomen.org/fr/countries/africa/kenya#5](http://www.evaw-global-database.unwomen.org/fr/countries/africa/kenya#5)>.

"Kenya" online: Rule of Law Index  
<[www.data.worldjusticeproject.org/#/groups/KEN](http://www.data.worldjusticeproject.org/#/groups/KEN)>.

"Senate Bills" online: Kenya Law  
<[www.kenyalaw.org/kl/index.php?id=5190](http://www.kenyalaw.org/kl/index.php?id=5190)>.

"Violence against Children in Kenya: Findings from a 2010 National Survey" (2012), online (pdf): UNICEF  
<[www.unicef.org/esaro/VAC\\_in\\_Kenya.pdf](http://www.unicef.org/esaro/VAC_in_Kenya.pdf)>.

"What We Do" online: equality effect  
<[www.theequalityeffect.org/what-we-do/](http://www.theequalityeffect.org/what-we-do/)>.

Agency for Cooperation and Research in Development,  
"Kenya: An Audit of Legal Practice on Sexual Violence," (2009),  
online (pdf): ACORD  
<[www.acordininternational.org/silo/files/kenya-an-audit-of-legal-practice-on-sexual-violence.pdf](http://www.acordininternational.org/silo/files/kenya-an-audit-of-legal-practice-on-sexual-violence.pdf)>.

Andrew Byrnes & Marsha Freeman, "The Impact of the CEDAW Convention: Paths to Equality" (2011), online : *World Bank*  
<[www.siteresources.worldbank.org/INTWDR2012/Resources/77781051299699968583/77862101322671773271/Byrnes-and-Freeman-FINAL-18-May-2011-with-acknowledgements.pdf](http://www.siteresources.worldbank.org/INTWDR2012/Resources/77781051299699968583/77862101322671773271/Byrnes-and-Freeman-FINAL-18-May-2011-with-acknowledgements.pdf)>.

Anthony Wambugu Munene, "The Bill of Rights and Constitutional Order: A Kenyan Perspective" (2002) 2 African Human Rights LJ 135.

Carol Ajema et al, "Improving the Collection, Documentation and Utilisation of Medico-Legal Evidence in Kenya" (2012), online (pdf): *Berkeley Law* <[www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya\\_Chain-of-Med-Legal-Evidence-Rept\\_LVCT\\_2012.pdf](http://www.law.berkeley.edu/wp-content/uploads/2015/10/Kenya_Chain-of-Med-Legal-Evidence-Rept_LVCT_2012.pdf)>.

Carol Ajema et al, "Challenges Experienced by Service Providers in the Delivery of Medico-Legal Services to Survivors of Sexual Violence in Kenya" (2011) 18 *Journal of Forensic and Legal Medicine* 162.

Carol Ajema et al, "Standards Required in Maintaining the Chain of Evidence in the Context of Post Rape Care Services: Findings of Study Conducted in Kenya" (2009), online (pdf) *Sexual Violence Research Initiative* <[www.svri.org/sites/default/files/attachments/2016-07-18/Chain%20of%20evidence%20-%20post%20rape%20care%20services%20Kenya\\_0.pdf](http://www.svri.org/sites/default/files/attachments/2016-07-18/Chain%20of%20evidence%20-%20post%20rape%20care%20services%20Kenya_0.pdf)>

Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Kenya*, CEDAW/C/KEN/CO/8.

Cornelia Glinz, "Kenya's New Constitution: A Transforming Document or Less than Meets the Eye?" (2001) 44:1 *L and Politics in Africa, Asia and Latin America* 60.

Davis Malombe et al, "Kenya's Regional and International Human Rights Obligations" (23 August 2016), online: *Kenya National Human Rights Commission* <[www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html](http://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html)>.

Etienne G. Krug et al, "World Report on Violence and Health" (2002), online (pdf): *World Health Organization* <[www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/en/chap6.pdf](http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf)>.

Fiona Sampson & Sasha Hart, "'160 Girls' Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya" (2013), online (pdf): Kenya Law <[www.kenyalaw.org/kl/fileadmin/pdfdownloads/160\\_Girls\\_Making\\_Legal\\_History\\_-\\_Sampson\\_\\_\\_Hart.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/160_Girls_Making_Legal_History_-_Sampson___Hart.pdf)>.

Kenya, Ministry of Health, "National Guidelines on Management of Sexual Violence in Kenya" 3rd ed (2014).

Kenya, National Assembly, *Parliamentary Debates* (19 October 2016).

Lisa R. Pruitt, "Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference" (2011) 17 William & Mary J of Women & L 347.

Marta R Vanegas & Lisa R. Pruitt, "CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activist from the Bottom up" (2012) 41 Baltimore LR 263.

Mike K. Muia, "Determinants of Delivery of Justice in Sexual Offence Cases Prosecuted in Naivasha Law Courts in Nakuru County" (2010) University of Nairobi C50/61660/2010.

Nasibo Kabale, "Medical Officers Treating Victims Now Required to Sign P3 Forms" *Business Daily Africa* (May 25, 2018) online: <[www.businessdailyafrica.com/news/Medical-officers-treating-victims-now-required-to-sign-P3-forms/539546-4579796-4p4kcvz/index.html](http://www.businessdailyafrica.com/news/Medical-officers-treating-victims-now-required-to-sign-P3-forms/539546-4579796-4p4kcvz/index.html)>.

National Gender and Equality Commission, "National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya" (2014), online (pdf): NGEC Kenya <[www.ngeckkenya.org/Downloads/National-ME-Framework-towards-the-Prevention-Response-to-SGBV-in-Kenya.pdf](http://www.ngeckkenya.org/Downloads/National-ME-Framework-towards-the-Prevention-Response-to-SGBV-in-Kenya.pdf)>.

Nduku Kilonzo et al, "Sexual Violence Legislation in Sub-Saharan Africa: The Need for Strengthened Medico-Legal Linkages" (2009) 17:34 Reproductive Health Matters 10.

Nduku Kilonzo, "Post Rape Services Report: A Situation Analysis" (2003), online (pdf): *Sexual Violence Research*

*Initiative* <[www.svri.org/sites/default/files/attachments/2016-07-18/postrapeserviceskenya\\_0.pdf](http://www.svri.org/sites/default/files/attachments/2016-07-18/postrapeserviceskenya_0.pdf)>.

Ruth Nekura Lekakeny, "The Elusive Justice for Women: A Critical Analysis of Rape Law and Practice in Kenya" (2015) University of Cape Town LKKRUT001.

Sally Armstrong, "In Kenya, a Victory for Girls and Rights" *New York Times* (4 June 2013), online: <[www.nytimes.com/2013/06/05/opinion/global/in-kenya-a-victory-for-girls-and-rights.html?smid=tw-share&r=0](http://www.nytimes.com/2013/06/05/opinion/global/in-kenya-a-victory-for-girls-and-rights.html?smid=tw-share&r=0)>.

Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd rd (New York: Oxford University Press).

Services to Survivors of Sexual Violence in Kenya" (2011) 18 *Journal of Forensic and Legal Medicine* 162.

Shireen J. Jejeebhoy et al, "Empowering Women and Addressing Violence Against Them Through Self-Help Groups (SHGs)" (2017), online (pdf): *Research Gate* <[www.researchgate.net/publication/317344633\\_Empowering\\_women\\_and\\_addressing\\_violence\\_against\\_them\\_through\\_self-help\\_groups\\_SHGs](http://www.researchgate.net/publication/317344633_Empowering_women_and_addressing_violence_against_them_through_self-help_groups_SHGs)>.

Telephone interview with Samuel Mutegi, Doctor at the Githongo Hospital, conducted July 3<sup>rd</sup>, 2018. Mr. Mutegi's contact information is on file with the author.

United Nations Human Rights Office of the High Commissioner, "Ratification Status for Kenya", online (pdf): *OHCHR* <[www.tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN](http://www.tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN)>.

Willy Mutunga, "Human Rights States and Societies: A Reflection from Kenya" (2015) 2 *Transnational Human Rights LR* 63.