

Best Practices on FGM Reporting in Kenya

Winnie Syombua
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Legal Frameworks on FGM/C

Domestic Law

- The Constitution of Kenya 2010
- The Prohibition of Female Genital Mutilation Act 2011
- Children's Act 2001/2016
- Protection against Domestic Violence 2015
- Penal Code – amendment of Article 4 in 2014
- National Policy on Ending Female



The Constitution

- It explicitly prohibits violence against girls and harmful practices
- **Article 29(c)** provides the right not to be subjected to any form of violence
- **Article 29(f)** right not to be treated or punished in a cruel, inhuman or degrading manner
- **Article 44(3)** states that a person shall not compel another person to perform, observe or undergo any cultural practice or rite
- **Article 53(d)** protects every child from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment



Penal Code - 2014 amendment

- **Article 4** outlaws the deliberate infliction of ‘grievous harm’, which includes ‘any permanent or serious injury to any external or internal organ, membrane or sense’.



The Prohibition of FGM Act (2011)

- It is the principal law on FGM; criminalises it regardless the age or status of the girl/woman.
- **Article 2 of the FGM Act 2011** clearly defines FGM
- **Article 19** – the performance of FGM, including by medical practitioners;
- **Article 20** – procuring, aiding and abetting the practice of FGM;
- **Article 21** – procuring a person to perform FGM in another country;
- **Article 22** – allowing the use of premises for FGM;
- **Article 23** – the possession of tools and equipment for the purposes of FGM;
- **Article 24** – failure to report awareness of FGM to a law enforcement officer, whether the procedure is in progress, has already occurred or is planned; and
- **Article 25** – the use of derogatory or abusive language against a woman for having not undergone FGM (or against a man for marrying or supporting that woman)



Children's Act 2001 Revised 2006

- **Article 14** protects children from FGM
 - It states that, “*No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development*”.
- **Article 119(1)(h) of the Children Act** also provides for a Children’s Court to issue a protection order if the child ‘being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child’s life, education and health.’



Protection Against Domestic Violence Act 2015

- Defines domestic violence under **Article 3(a)(ii)** to include ‘female genital mutilation’ and under **Article 19(1)(g)** it provides the facility to set up protection orders covering potential victims against engagement, or threats to engage, ‘in cultural or customary rites or practices that abuse the protected person’.



International Law

- UDHR
- CEDAW
- Maputo Protocol





Human Rights and FGM

Overview

- The presentation will attempt to answer the following questions;
 - How does FGM/C violate human rights?
 - What does the law say about voluntary FGM/C from consenting adult?
 - Provide examples in case law on FGM/C



How does FGM/C violate rights

- HR- Basic principles and standards without which one cannot live in dignity.
- It's harmful- interferes with bodily integrity of the victim and causes a loss of dignity
 - It interferes with the health of the recipient/ implicates right to life
 - FGM/C leads to low self-esteem, a feeling of worthlessness, reduced social functioning, suicidal ideation, suicide and psychological lifelong consequences which call for lifelong psychological or psychiatric care.
 - implicates the right to practice cultural life
 - The initial purpose of FGM/C was to enforce “a pre-conceived code against women by men; to enforce matrimonial fidelity against women by men. FGM was a tool of oppression by men over women.



FGM and a Consenting Adult

- It is a criminal offence according to the Prohibition of FGM Act (2011) and the EAC Prohibition of FGM Act (2016).
- Consent is not a defence to the crime of performing FGM in Kenya; nor is it a defence to argue that the person charged thought such consent had been given (**Article 19 [6]**).
- Article 55 (d) of CoK- Protects the youth from harmful cultural practices.
- Tatu Kamau vs the AG and others. The recent petition that challenged the constitutionality of the FGM. <http://kenyalaw.org/caselaw/cases/view/209223/>
 - She contended that Section 19(1) of the Act expressly forbids a qualified medical practitioner from performing female circumcision, thereby denying adult women access to the highest attainable standard of health, including the right to healthcare enshrined under **Article 43 (1)(a)** of the **Constitution**.
 - The court in its ruling dismissed the petition stating, among other factors that, *“From the medical and anecdotal evidence presented by the respondents, we find that limiting this right is reasonable in an open and democratic society based on the dignity of women”*.
The right in question is right to a culture (Article 44 (2) (b)).



Case Law on FGM

Magerer Vs Republic

- The appellant was convicted of (i) aiding the commission of female genital mutilation (“FGM”) on several girls, (ii) failing to report the commission of FGM, and (iii) allowing her premises to be used to perform FGM.
- She pled guilty to the crimes and was sentenced to pay a fine of Kshs. 200,000 (or 3 years of imprisonment if she defaulted on the payment). On appeal, she argued that the sentence was overly harsh and oppressive because she was a single mother of three children. Her sentence was upheld as it was the minimum allowed under the FGM Act. The Justice in this case noted that within this case “lies the clash between traditional values and the law of the land.” Even though the appellant was abiding by a customary practice, it was in violation of Kenyan criminal law, and thus the appellate court upheld her sentence.

<http://kenyalaw.org/caselaw/cases/view/155022>



Case Law on FGM

- In 2014, PRN was prosecuted for performing FGM on two girls. She was acquitted of one count (on a girl of 16 years of age), but sentenced to seven years' imprisonment on the second count, which was on a girl of 11 or 12 years of age. Her appeal was dismissed on the grounds that FGM on this second girl was involuntary. <http://kenyalaw.org/caselaw/cases/view/101111/>
- In 2012/13, SMG and RAM were found guilty of failing to report FGM and being involved in the practice on their 16-year-old daughter. They were sentenced to four years' imprisonment. <http://kenyalaw.org/caselaw/cases/view/106505/>
- In 2013, LCN was found guilty of being aware of the offence of FGM being committed on her daughter. She was sentenced to a fine, in default of which she would serve three years' imprisonment. On appeal, the court held that the prosecution's evidence against the appellant was not satisfactory to meet the threshold required in establishing beyond reasonable doubt that an offence had been committed, and the conviction was quashed. <http://kenyalaw.org/caselaw/cases/view/101360/>



End

