

**FEMALE GENITAL MUTILATION IN KENYA-REALISING CONSTITUTIONAL
AND LEGISLATIVE PROTECTION**

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Master's degree LLM in Sexual & Reproduction Rights in Africa**

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DEDICATION

This work is dedicated to my father, John Yator and my late mother, Dinah Yator for investing in my education and giving me unfailing support. I am what I am today, all because you believed in me.

I also dedicate this work to my siblings Francis, Joy, Tabitha, Hellen, Sharon, Marylyn, Hillary, Beverlyn, Danis and Mark for your love and support.

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LIST OF ACRONYMS & ABBREVIATIONS

ADR- Alternative Dispute Resolution

ADRA- Adventist Development and Relief Agency

ARP-Alternative Rite of Passage

CEDAW-Convention of the Elimination of All Forms of Discrimination against Women

CRC- Convention of the Rights of the Child

CSW- Convention on Status of Women

FGM- Female Genital Mutilation/Cutting

FIDA- Federation of Women Lawyers

FPAK-Family Planning Association of Kenya

GBV- Gender Based Violence

ICCPR- International Covenant on Cultural and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

KDHS- Kenya Demographic Health Survey

KEFEADO-Kenya Female Advisory Organisation

KEWOPA- Kenya Women Parliamentary Association

KNCHR- Kenya National Commission of Human Rights

MYWO- Maendeleo ya Wanawake Organisation

NGEC- National Gender & Equality Commission

ODPP- Office of Director of Prosecution

PATH- Program of Appropriate Technology in Health

SGBV- Sexual & Gender Based Violence

SRHR-Sexual & Reproductive Health & Rights

SRR- Sexual & Reproductive Rights

UDHR- Universal Declaration of Human Rights

UNFPA- United Nations Population Fund

UNICEF- United Nations International Children's Fund

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Executive Summary

Female Genital Mutilation (FGM) is widely practised among Kenyan communities. Though there is an indication that the prevalence of the practice has reduced, there are emerging trends such as cross-border circumcision and medicalised circumcision. In a bid to end FGM, Kenya passed the Prohibition of FGM Act in 2011, which is the governing law on FGM. Kenya also passed the new Constitution in 2010, which gave life a new breath to new dispensation of governance and rule of law. This study sought to explore the extent at which the Act and the Kenyan Constitution have protected women and girls from the harmful practice of FGM. The study also responds to the fundamental questions on the extent of FGM in Kenya, and linking to how the Kenyan government has protected women and girls from the harmful practice.

The study found out that the Kenyan Constitution and the Anti-FGM Act provides for an opportunity to end FGM. The Constitution is instrumental not only in addressing harmful practices, but also in advancing women's rights and promoting gender equality. The Act has registered some success scores in the protection of rights of women and girls from FGM. However, the study found out that the Kenyan Act on FGM is also insufficient in some aspects including the fact that it does not address emerging trends such as medicalisation of FGM. The Act does not also protect women and girls who have not undergone FGM, making them susceptible to ridicule and seclusion from participating in some community activities. There is the need to amend the Act to make it more comprehensive so as to effectively contribute to ending FGM in Kenya.

1 CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1 Background

Female genital mutilation (FGM) is widely practised among many Kenyan communities. The recent Kenya Demographic Health Survey reported that 21 percent of Kenyan women have gone through FGM.¹ Similarly, the 2013 UNICEF report indicated that 27 percent of Kenyan women have undergone FGM.² The proportion of women who have undergone FGM varies by ethnic group, with the highest percent being amongst the Somali (94 percent), Samburu (86 percent), Kisii (84 percent) and Maasai (78 percent).³

The terminology 'FGM' has been conceptualised and referred to in different ways over time. FGM can be used to refer to 'female circumcision', as parallel to 'male circumcision'. Critics postulate that 'female circumcision' mislabels extreme forms of female genital procedures such as infibulation, which involves narrowing of vaginal opening through cutting and repositioning of labia minora and majora. In the 1970s, female circumcision was commonly referred to as female genital mutilation (FGM). The World Health Organisation later adopted the term in the 1990s and in the 1997 interagency statement by UN agencies.⁴ Boulware Miller criticises the use of the term 'FGM', citing that regarding an African cultural practice as 'mutilative' is offensive and disrespectful.⁵ The term 'FGM' was introduced in 2008 in the interagency statement on elimination of the

¹ Kenya Demographic and Health Survey (KDHS) 'Kenya demographic and health survey' (2014) <https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf> (accessed 18 June 2018).

²United Nations Children's Fund 'Female genital mutilation/cutting: a statistical overview and exploration of the dynamics of change' (2013) https://data.unicef.org/wp-content/uploads/2015/12/FGMC_Brochure_Lo_res_1613.pdf (accessed 8 June 2018).

³ KDHS (n 1 above) 334.

⁴WHO et al 'Eliminating female genital mutilation: an interagency statement' (2008) https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf?sequence=1&isAllowed=y (accessed 12 June 2018).

⁵ K Boulware-Miller 'Female circumcision: challenges to the practice as a human rights violation' (1985) 8 *Harvard Women's Law Journal* 155-164.

harmful traditional practices,⁶ and since that time it has been used in both academia and practice.

The World Health Organisation (WHO) defines FGM as any procedure that involves the partial or total removal of the external genital of females or any other injuries subjected to the female genital organs for non-medical reasons.⁷ WHO has grouped the types of FGM into four broad categories.

- Type 1 (commonly referred as clitoridectomy), and involves the removal of the prepuce with or without excision of part or the entire clitoris.
- Type II (referred as excision), involves the partial and total removal of the clitoral hood and the labia minora, with or without the excision of the labia majora (labia are the 'lips' surrounding the vagina).
- Type III (referred infibulation) involves narrowing of the vaginal opening through cutting and repositioning the labia minora and majora, with or without removal of the clitoris. Infibulation is the extreme form of FGM as procedures are performed on the two sides of vagina vulva, leaving a small opening for passage of urine and menstrual blood.⁸
- Type IV involves all harmful procedures subjected to the external female genitalia for non-medical reasons including pricking, incising, scraping, cauterising and piercing.⁹

⁶ WHO et al (n 4 above).

⁷ WHO 'Understanding and addressing violence against women' (2012) https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf?sequence=1&isAllowed=y (accessed on 18 June 2018).

⁸ Minority Rights Group 'Female circumcision, excision, and infibulation: The facts and proposals for change' (1980) 47.

⁹ WHO et al (n 4 above).

The Prohibition of FGM Act, which is the main law on FGM in Kenya, enacted in 2011 adopts the above definition of World Health Organisation, but does not take into consideration any form of sexual reassignment procedure or medical procedures that have therapeutic purpose, i.e. the fourth type of FGM.¹⁰

This study adopts the term FGM, also uses the term ‘circumcision’ interchangeably. The practice of FGM in Kenya is a highly sensitive, cultural and sometimes politicised issue that is in the heart of gender relations and identities. The Girl Generation¹¹ introduced the concept of ‘Do No Harm’ approach as a way of mitigating unintended negative effects and risks while advocating for social change in communities.¹² While it is important to observe the ‘Do No Harm’ principle, it is essential to take into consideration the gravity of the practice, rather than just terming it as a ‘cut’. Further, this study recognises that the term FGM has been used by reputable international organisations such as WHO, and connotes the dreadful physical and psychological consequences of the practice on women and girls.

The practice of FGM varies a great deal among different ethnic groups. There are communities in Kenya where FGM is non-existent, while it is common and deeply engrained in others. For example, among the Somalis, the Maasai and the Kisii the practice is common, whereas the Luo, Luhya, Kamba and the Agikuyu communities, rarely practise it.¹³ Clitoridectomy is common among the Kisii, excision is more pronounced among the Maasai, Kalenjin, Meru and Kuria and infibulation (type III) is common among the Somali women of Kenya.¹⁴ This

¹⁰ Prohibition of FGM Act ‘preliminary’ (2011).

¹¹ The Girl Generation, an Africa-led global collective of members and partners brought together by a shared vision that FGM can – and must – end in this generation.

¹² The Girl Generation ‘Do no harm publication- the talking trees project’ (2016) https://mesh.tghn.org/site_media/media/articles/Do_No_Harm_Publication_The_Talking_Tree_s_Project_2016_2017_EkPZruw.pdf (accessed 10 June 2018).

¹³ The 2014 KDHS study (n 1 above).

¹⁴ WHO ‘Study group on female genital mutilation and obstetric outcome. Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African countries’ (2006) 367 *Lancet* 1835-1841.

research focus on the three types of FGM (type I, II, III), which are common among Kenyan communities.

The reasons why FGM remains persistent in some Kenyan communities is that it is deeply ingrained in traditional cultures and is driven by an amalgamation of social reasons that are passed from generation to generation.¹⁵ Religion and social culture are cited as the driving factors.¹⁶ The practice of FGM in some Kenyan communities is also perceived as a rite of passage of a girl into womanhood, ready to be assigned such roles and responsibilities as motherhood and child-bearing/child-rearing.¹⁷

Traditionally, among Kenyan ethnic groups practising FGM, the practice is performed by traditional birth attendants, who have no background in the medical profession. In a 2010 case study documented by Suardi and his colleagues, on a young refugee victim of FGM, it is suggested that the practice is performed by laypersons, often without any sterile instruments, anaesthesia or antibiotics.¹⁸ However, in recent times, some medical professionals, such as nurses have reportedly taken part in the practice, which was noted by a 2013 study¹⁹ conducted by an organisation called 28 Too Many.²⁰

The age at which FGM is performed also varies, with some Kenyan communities mutilating immediately after birth, and others conducting the procedure from

¹⁵ J Mutesh & J Sass 'Female Genital mutilation in Africa: an analysis of current abandonment approaches' (2005).

¹⁶ A Mohamud & N Yinger 'FGM programmes to date: What works and what doesn't work' (1999).

¹⁷ Mutesh & Yinger (n 15 above).

¹⁸ E Suardi et al' 'Female genital mutilation in a young refugee: A case report and review' (2010) 3(3) *Journal of Child & Adolescent Trauma* 234-242.

¹⁹ 28 Too May 'Country profile, FGM in Kenya' (2016)

[https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Kenya/kenya_country_profile_update_v3_\(july_2017\).pdf](https://www.28toomany.org/static/media/uploads/Country%20Research%20and%20Resources/Kenya/kenya_country_profile_update_v3_(july_2017).pdf) (accessed 26 June 2018).

²⁰ 28 Too Many is an anti-female genital mutilation (FGM) charity, created to end FGM in the 28 African countries where it is practiced and in other countries across the world where members of those communities have migrated.

seven years of age to adolescence and even at adult age (eighteen years).²¹ When women undergo FGM at tender ages, their recollection of the experience at the time may be imperfect. According to the 2014 KDHS report, two percent of Kenyan women were circumcised when they were 5 years of age, 27 percent were between the ages of 5 to 9, 43 percent were between the ages of 10 and 17, and 27 percent were circumcised when they were 15 years or older.²² The KDHS findings of age of circumcision are similar to the 2013 UNICEF report, which indicates that 46 percent of Kenyan women were circumcised after the age of nine years.²³ Over time, evidence shows a trend of circumcising girls at younger ages. Forty-six percent of circumcised women were circumcised between the ages of five to nine. Notably, the report indicates that Muslim women (65 percent) are more likely to be circumcised at younger ages (five to nine) compared to women from other religious backgrounds. Urban women are more likely to be circumcised at younger ages compared to rural women. About 78 percent of urban women were circumcised before the age of 14, compared to 14 percent of those in the rural areas.²⁴ Additionally Kenyan girls of ages 0 to 14 years are likely to be circumcised if their mother was circumcised.²⁵

Globally, campaigns aimed at ending FGM initially focused on the health consequences of the practice. This resulted in the practice being increasingly performed by medical professionals.²⁶ It was during this period that the need for a reconceptualisation of FGM was realised by global actors. During the 1993 Vienna World Women Conference on Human Rights,²⁷ FGM was classified as a form of violence and thus constituted a violation of human rights.²⁸ FGM is a

²¹ UNICEF (n 2 above).

²² KDHS (n 1 above).

²³ UNICEF (n 2 above) 47.

²⁴ KDHS (n 1 above).

²⁵ Key findings on FGM of the 2014 KDHS report.

²⁶ C Njue & I Askew 'Medicalisation of female genital cutting among the Abagusii in Nyanza Province' (2004) *Population Council/Frontiers in Reproductive Health Program* 27.

²⁷ B Shell-Duncan 'From Health to Human Rights: Female genital cutting and the politics of intervention' (2008) 110 *American Anthropologist* 225-236.

²⁸ Boulware-Miller (n 5 above) 164.

violation of the right to be free from all forms of violence as stipulated by the United Nation Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁹ The Convention on the Rights of the Child stipulates states' obligation to protect children from all forms of violence³⁰, and General Comment No. 18 had determined that FGM is a harmful practice.³¹ Regionally, treaties that address FGM include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (the Maputo Protocol), which Kenya adopted in 2005 and the African Children's Charter, adopted in 2000. The Maputo Protocol in article 2 prohibits all forms of discrimination, particularly harmful practices.³² Other relevant provision includes article 3 which stipulates the right to dignity and article 4 on the right to life, integrity and security of a person.³³

The promulgation of the 2010 Kenyan Constitution was an historic event after a long struggle to change the system of governance that was defined by massive human rights violations, such as violence against women and girls. There was also the outcry to have a new system of governance as institutions such as the Judiciary and Legislature had failed.

Though the Kenyan Constitution does not explicitly prohibit FGM, it outlaws violence against women and harmful traditional practices. In sections 44(1), 44(3), 53(1) and 55(d), protection of the rights of women and girls and affirmative

²⁹ United Nations General Assembly 'Convention on the Elimination of Discrimination against Women (CEDAW)' (1979) 18 December 1979, A/RES/34/180.

³⁰ United Nations General Assembly 'Convention on the Rights of the Child' (1989) A/RES/44/25.

³¹ CRC Committee 'General Comment No. 18 of the Committee on the Rights of the Child' (2018) UNDOC/GEN/N14/627/78/PDF/N146277.

³² Article 2 of the African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <https://www.refworld.org/docid/3f4b139d4.html> (accessed 20 February 2019).

³³ See *Maputo Protocol* (n 32 above) arts 3 & 4.

action³⁴ is spelled out. For instance, section 44(1) states: ‘Every person has the right to use the language and to participate in the cultural life, of the person’s choice’.³⁵ However, it is unlawful to compel an individual to go through the practice.³⁶ It is stated in section 53(1) ‘that every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor’.³⁷ The Kenyan Constitution also compels the State to put in place measures including affirmative action to protect youth from harmful cultural practices.³⁸

A year after the passing of the 2010 Kenyan Constitution, the Parliament enacted the Prohibition of Female Genital Mutilation Act which prohibits the practice of FGM and safeguards against the violation of a person’s dignity and mental and physical integrity through the practice of FGM.³⁹ The Act spells out different types of offences such as aiding and abetting FGM, procuring a person to perform FGM, use of premises for FGM purposes and possession of tools and equipment used to carry out the practice. After enactment of the Act, an anti-FGM Board was established as provided by the Act, which has the objective of eradicating FGM through coordinating anti-FGM initiatives, awareness creation and advocacy against the practice.⁴⁰ The Board has also developed a strategic plan (2014-2018) that highlights strategies, monitoring and evaluation, and reporting mechanism of FGM in Kenya.

The Constitution of Kenya is the supreme law of the land, and the Act is subordinate and in compliance with the Constitutional norms and imperatives. In fulfilling this obligation, the Prohibition of FGM Act was enacted just after the

³⁴ Affirmative action is an active effort that seeks to achieve goals such as to bridge inequalities through awareness creation or any other interventions.

³⁵ Sec 44(1) of the 2010 Constitution of Kenya.

³⁶ Sec 44(3) of the Constitution of Kenya.

³⁷ Sec 53(1) of the 2010 Constitution of Kenya.

³⁸ Sec 55(d) of the 2010 Constitution of Kenya.

³⁹ Prohibition of FGM Act No. 32 of 2011 (2011).

⁴⁰ Prohibition of FGM Act ‘Part 11-the Anti-FGM Board’ (2011).

2010 Kenyan Constitution was promulgated. The Kenyan state is tasked by the Constitution to put in place measures to protect youth from harmful traditional practices. The Act is a principal legislation governing FGM in Kenya. It is a state act that criminalises all forms of FGM regardless of the age or the status of a girl or woman.

1.2 Problem statement

Although the Constitution of Kenya and the Prohibition of FGM Act have provided for the protection of women and girl's rights by prohibiting the practice of FGM, the harmful practice persists, with emerging trends such as medicalisation,⁴¹ women and girls crossing borders to undergo the practice⁴² and married women willingly undergoing FGM.⁴³ FGM is persistent in some Kenyan communities, despite collaborative efforts by the government and non-governmental agencies.

Further, a few cases have been brought to court for prosecution since the passing of anti-FGM law. Though there are no national data on the number of prosecuted FGM cases since the passing of the Act, it is evident that there is a lack of the enforcement of the Act. Recently however, a Kenyan doctor filed a petition at Machakos Law Court in Eastern Kenya, asking the Court to declare the Prohibition of FGM Act unconstitutional and to legalise FGM.⁴⁴ She said that FGM is practised differently from one community to another, but it can be made safe. It is a minor surgical procedure that does not require anesthesia or being put into a theatre. Once you reach adulthood there is no reason why you should not make that decision".⁴⁵ This latest development shows that there are

⁴¹ World Health Organisation 'Eliminating female genital mutilation: an interagency statement' (2008).

⁴² Standard Digital 'Girls cross border to undergo female genital mutilation' (2013).

⁴³ Standard Digital 'Concern over married women undergoing Female genital mutilation' (2015).

⁴⁴ Daily Nation 'Legalise Female Genital Mutilation, says doctor in court' (2018).

⁴⁵ Bhalla N 'Kenyan doctor goes to court to legalise female genital mutilation' (2018) *Reuters*.

loopholes within the legal framework that can easily be bent, making it difficult to protect women and girls from the harmful practice of FGM. The situation in Kenya is reminiscent of many other African countries. In fact, an examination of 27 African countries, it was noted that though these countries (except Uganda⁴⁶) passed anti-FGM legislation, they are yet to realise rapid monitoring of FGM practices at the community level.⁴⁷

The problem at the centre of this study is to unearth how the Constitution of Kenya and the Prohibition of FGM Act have addressed FGM in relation to protecting women and girls from the harmful practice.

1.3 Research questions

The main research question is: To what extent have the Kenyan Constitution of 2010 and the Prohibition of FGM Act protected the human rights of women and girls from FGM? The other sub-questions are (a) What is the extent and nature of FGM in Kenya? (b) Are the provisions stipulated by the Prohibition of FGM Act sufficient to eradicate FGM? (c) What can Kenya learn/borrow from Ugandan and Eritrean domestic laws on addressing FGM?

1.4 Methodology

This study employs desk research and content analysis to examine existing data such as departmental reports, policies, journals, articles, case law, international instruments, journalist accounts and other writings on FGM in Kenya. In the present day, technological advances have made it possible for a vast amount of

⁴⁶ Chapter four of this study examines how the two countries have been able to register some scores of success by examining the provisions in the legislations and also the enforcement of the domestic laws on ending FGM.

⁴⁷ J Muthumbi 'Female Genital Mutilation: A literature review of the current status of legislation and policies in 27 African countries and Yemen' (2015) 19(3) *African Journal of Reproductive Health* 32-40.

data to collected, analysed and archived and can be easily accessible for research.⁴⁸ Thus, the need for utilising existing data is becoming prevalent in research in the secondary data analysis research design, such as the current study.

Throughout the literature review, other researcher's works are identified as well as the work done by agencies and research centres on the subject matter. Of importance to this study are those by agencies such as the World Health Organisation, the United Nations and the Kenya National Bureau of Statistics. This is based on the credibility of data and substantial coverage of the data collected on FGM by these agencies.

For this study, the researcher utilises online databases such as google, amazon, Kenya Law (for case law), by searching key words; FGM, FGM in Kenya, FGM and the Kenyan Constitution, human rights law and FGM, efforts of ending FGM in Kenya, sexual and reproductive rights and challenges associated with the implementation of the Kenyan Constitution in ending FGM. Thus, a search strategy is applied to access data and the researcher includes articles, formal policy documents and reports published in the English language between the years of 2010 and 2018. The data selected from these years are relevant to the study subject and gives a clearer picture of the phenomenon being investigated. These articles and reports are screened as per their titles, abstract and their full text. The articles and reports that the researcher finds relevant to the subject matter are those that can only help answer the study questions and will be included as part of the data sources for the study.

Relevant legislation and judicial decisions in Kenyan Courts relating to FGM are also considered for this study. The first case is *Pauline Robi Ngariba v Republic*,⁴⁹

⁴⁸ E Smith 'Using secondary data in educational and social research' (2008) 58 *British Journal of Educational Studies* 117-11.

⁴⁹ *Pauline Robi Ngariba v Republic*, Criminal Appeal 6 of 2014.

in which the appellant faced charges of performing FGM contrary to section 29 of the Prohibition of FGM Act. The second case is *M G & R A M v Republic*,⁵⁰ in which the appellants (husband and wife), were charged with failing to report the practice of FGM contrary to section of the Act. These ground-breaking cases have potential impact on how cases of FGM have been addressed in the Kenyan courts in the post enactment of the Kenyan Constitution and the Prohibition of FGM Act.

1.5 Significance of the research

The findings from this study are of benefit to a variety of stakeholders. First, the findings provide insightful information to policy analysts and anti-FGM activists involved in the protection of human rights of women and girls. This study evaluates Kenya's Constitution and its mandate in protecting women and girls from traditional harmful practices, and its findings will be insightful in explaining how the legal framework has addressed FGM in Kenya.

Secondly, the findings will provide awareness to the government, policymakers and citizenry necessary to address the practice as a violation of human rights. Most past studies have concentrated on the health consequences of FGM, and less attention has been directed towards women's and girls' sexual and reproductive rights, as enshrined by the regional and international human rights instruments and the Kenyan Constitution in relation to protecting them from FGM. Also, the author hopes that this study will contribute to conversations revolving around the extent to which the Kenyan Constitution and Prohibition of FGM Act protects the reproductive rights of women and girls, and to suggest policy

⁵⁰ *M G & R A M v Republic*, Criminal Appeal of 2014.

alternatives that can be adopted and implemented in a bid to realise protection of reproductive rights of women and girls from FGM.

Thirdly, the researcher hopes that the study will also benefit women and girls as the findings will shed light on how the Constitution and the Anti-FGM Act protects them from FGM. Women and girls need to be enlightened on the provisions in the Kenyan legal framework that protect them from all forms of violence including FGM.

Lastly, the findings will provide up-to-date literature that can be utilised by researchers and policy analysts alike who may wish to carry out further studies on the subject matter.

1.6 Literature review

The practice of FGM is old and widespread. The practice has been used in many societies to establish control over the sexual behaviour of women. Earliest accounts of FGM do not explain where the practice originated. There are various traditional practices that exist meant for controlling women's sexuality.⁵¹ For example, El Sadaawi notes that the Romans slipped a ring on female slaves to prevent them from conceiving.⁵² Further, Peters and Wolper notes clitoridectomy was used to cure masturbation, depression and epilepsy in Western countries.⁵³

⁵¹L Kouba & J Muasher 'Female circumcision in Africa: An overview' (1985) 28 *African Studies Review* 95-110.

⁵² N El Sadaawi *The hidden face of Eve: Women in the Arab World* (2016).

⁵³ N Peters & A Wolper *Female genital mutilation. In women's rights, human rights: international feminist perspectives* (New York: Routledge 1995).

1.6.1 Rationale for persistence of FGM in Kenya

Several studies on the reasons for practising FGM have been conducted in Kenya.⁵⁴ These studies reveal that girls who underwent FGM are not involved in the decision-making because their aunts, mothers, grandmothers and other relatives make decisions on their behalf. In the 1991 study by the Maendeleo Ya Wanawake Organisation, it was found that 80 percent of circumcised girls had undergone FGM because other people (parents or relatives) made the decision for them to be circumcised.⁵⁵

As mentioned earlier, there is no religion that supports the practice of FGM, yet it is practised among Christians and Muslims. Among some Muslim communities, those who believe that the practice is demanded by the Islamic faith carry out FGM. However, there is no strong evidence that FGM is a requirement of Islam. In Christianity, male circumcision is given emphasis in the bible and there is no reference to female circumcision. In some communities, FGM is associated with cultural heritage, initiation from childhood to adulthood and maintenance of social integration, cohesion, and recognition in the community.⁵⁶ In some communities, the female external genitalia are regarded as dirty and its removal is considered as a way of promoting hygiene and aesthetic appeal.⁵⁷

FGM has also been regarded as a source of income for practitioners, who receive some money or material incentives including clothes, shoes, money and other gifts for rendering their services. The 1997 Family Planning Association of Kenya

⁵⁴ Family Planning Association of Kenya 'Prevalence & Practice of Female Circumcision in Kenya' (1997) *Nairobi: Family Planning Association of Kenya (FPAK)*; Maendeleo Ya Wanawake Organisation 'Harmful Traditional Practices that affect the health of women in Kenya' (1991) *Nairobi: Maendeleo Ya Wanawake*; Maendeleo Ya Wanawake Organisation 'Traditional Practices that Affect the Health of women and Children' (1992).

⁵⁵ The 1991 MYWO study (n 54 above).

⁵⁶ The 1992 MYWO study (n 54 above).

⁵⁷ K Fisaha 'Female genital mutilation: A violation of human rights' (2016) 4 *Journal of Political Sciences & Public Affairs* 2.

study showed that fees charged for carrying out the female circumcision were as high as USD 50 per girl or woman. The practitioners charge higher fees for carrying out the practice for women or girls who are pregnant, as it is believed that being an uncircumcised pregnant woman is 'unclean' and is a bad omen in some communities.⁵⁸ The financial implications of FGM in Kenya is a reality that needs to be addressed as those who render FGM services are key to ending the practice, yet little attention is given to this aspect.

Studies by the Maendeleo Ya Wanawake Organisation and the Family Planning Association of Kenya reveal social and cultural importance attached to FGM, characterised by social values imparted to girls during circumcision. These studies highlight the importance of socialisation and the teaching aspect associated with FGM. In many Kenyan communities, girls who undergo FGM are secluded and taught cultural norms and values that play a significant role in preparing them to be responsible women and wives. The woman's eligibility for marriage is dependent on an initiation process, and FGM is practised among some Kenyan communities as a way of preparing young girls for marriage.⁵⁹ Another factor associated with the persistence of FGM in Kenya is that the ceremonies held are considered opportunities to display wealth, prestige and social status of the initiate's family to the rest of the community. The practice of FGM in some Kenyan communities has been associated with the political landscape. For example, during the Mau war of independence,⁶⁰ the Agikuyu used FGM as a means of rallying the community to come together and fight against colonialism.⁶¹

⁵⁸ FPAK study (n 54 above).

⁵⁹ The 1992 MYWO study (n 54 above) 84.

⁶⁰ The Mau war of independence took place in Kenya in (1952-64), when the Kikuyu, Meru, Embu, Kamba and Maasai communities came together to fight against British colonialism.

⁶¹ J Kenyatta *Facing Mount Kenya* (1978).

1.6.2 Effects of FGM

Some of the long-term effects of FGM include scarring, childbirth-related complications and infertility.⁶² It also causes psychological or mental trauma, painful sexual intercourse, and the inability to feel sexual pleasure.⁶³ High mortality and infant mortality rates have also been reported among FGM practising communities. The harmful practice causes irreversible risks for women and girls during menstruation, marriage, consummation and childbirth. The World Health Organisation indicates that most women who have undergone FGM are at the risk of suffering from obstructed labour.⁶⁴ Other short-term complications of FGM include severe pain, excessive bleeding, pain and difficulty in passing urine and faeces because of swelling and infection. Severe bleeding and infections can also result in death.⁶⁵

The practice of FGM has a direct impact on the performance of girls in education. Mbugua observes that girls who have undergone FGM show a considerable drop in performance and school attendance.⁶⁶ A 2001 Kenya Female Advisory Organisation study revealed that the drop in performance among girls who have just undergone FGM is associated with reduced interest in schoolwork. Further, the long preparation for the FGM ceremonies causes girls to miss valuable learning hours, coupled with a prolonged recovery period that further results in absenteeism.⁶⁷ This concern is further echoed by a Berg and Denison study that indicates that the time for preparation began long before schools were closed and

⁶² The 1992 MYWO study (n 54 above) 90.

⁶³ The 1992 MYWO study (n 54 above) 89.

⁶⁴ WHO 'Study group on female genital mutilation and obstetric outcome. Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African countries' (2006) 367 *Lancet* 1835-1841.

⁶⁵ WHO 'An update on WHO's work on female genital mutilation (FGM) Progress report' (2011) Geneva.

⁶⁶ I Mbugua 'Women Aid International Kenya. Ending the mutilation, people and planet' (1997) 6(10) Nairobi, Kenya.

⁶⁷ Kenya Female Advisory Organisation 'FGM, analysis and dialogue for change Programme' (2001).

girls were expected to take part in the process; hence, depriving girls of attending full learning hours.⁶⁸

Also, FGM has been associated with girls not completing their education and this can consequently lead to poor literacy. This is evident with girls who have undergone FGM and are then considered ready for marriage; thus, making education their least priority. Population Reference Bureau study also noted that circumcised girls found it difficult to focus on their education, but rather occupied their minds with their next phase of life, which is marriage.⁶⁹

1.7 Chapter outlines

This is structured in five chapters as outlined. The first chapter introduces the scope of the study. It captures the background by shedding light on the definition, extent and nature of FGM. Briefly, the chapter introduces the Kenyan legal system concerning FGM. In addition, the study objectives and research questions are discussed in this chapter. The study adopts a desktop research design, and the procedure involved in data collection and analysis is discussed in this chapter. This chapter also gives an overview of review of literature on the topic.

Chapter two of the study looks at the nature and prevalence of FGM in Kenya. Key to this discussion is to unearth the severity of the practice in Kenya, and the emerging trends regarding FGM. Before discussing the main theme of this study in the next chapter, the author highlights the prevalence and socio-demographic characteristics of the practice in Kenya. This justifies the need to understand how the Kenyan legal system addresses FGM, which is discussed in the chapter

⁶⁸ R Berg & E Denison 'Does female genital mutilation/ cutting: affects women's sexual functioning, a systematic review of the sexual consequences of FGM' (2001) 9 *Sexuality Research and Social Policy* 41-56.

⁶⁹ Population Reference Bureau 'Abandoning female genital cutting: prevalence, attitudes and efforts to end the practice' (2001) <https://www.popline.org/node/232823> (accessed 26 September 2018).

four. Chapter three focuses on the constitutional and legislative protection of women and girls from the harmful practice of FGM. This mainly seeks to answer the main research question of the study.

The fourth chapter is dedicated to a discussion on the implementation of the laws on FGM. Mainly, it highlights the status of FGM cases in Court. This discussion also notes the challenges associated with the implementation of these laws. The subsequent section offers a discussion on inspiration drawing from the Eritrean and Ugandan laws on FGM, with a view of enhancing the effectiveness of the Kenyan federal law on FGM. This section acts as a build up to the author's recommendation, listed in the following chapter.

The last chapter provides conclusion and recommendations on how best to realise Constitutional and legislative protection from FGM, and contain views on the way forward on protection of rights of women and girls from FGM

2 CHAPTER TWO: THE NATURE AND EXTENT OF FGM IN KENYA

2.1 Introduction

This chapter discusses the prevalence of the practice of FGM in the African context, and more specifically examines emerging trends associated with the practise of FGM in Kenya, as well as socio-demographic issues associated with the practice of FGM among Kenyan communities. The chapter also discusses what the Kenyan government and other agencies have done in ending FGM in the country. Further, it sheds light on the extent and prevalence of FGM in Kenya, which is important to this study as it brings out a clear picture of the severity of FGM in Kenya, and the need to focus on examining the legislative and constitutional protection of women and girls from FGM.

2.2 FGM in the African context

The practice of FGM has been documented throughout countries from East to West Africa, throughout the Horn of Africa, Middle East and parts of Southern Africa. It is estimated that more than 200 million women and girls alive today have undergone some type of FGM in 30 countries, and approximately 3.6 million girls are cut each year.⁷⁰ An estimate of 125 million girls and women alive today have been circumcised in 29 countries in Africa and the Middle East.⁷¹ The practice is almost universal in Somalia, Guinea, Djibouti, and Egypt, with national prevalence rates above 90 percent. Other countries with relatively high prevalence include Eritrea (89 percent), Mali (89 percent), Sierra Leone (88 percent) and Sudan (88 percent).⁷² This contrast with prevalence in Uganda where the practice affects only one percent of women and girls.

⁷⁰ UNICEF 'Female Genital Mutilation/Cutting: What might the future hold?' (2014) https://www.unicef.org/media/files/FGM-C_Report_7_15_Final_LR.pdf (accessed 20 July 2018).

⁷¹ UNICEF (n 2 above) 21.

⁷² UNICEF (n 2 above) 22.

Examining data published by UNICEF in 2018 on the prevalence of FGM in African countries reveals major patterns. First, there are countries where national prevalence is less than four percent: Ghana (4 percent), Niger (2 percent) and Uganda (1 percent). In these countries, the prevalence across age cohorts (15 to 19 years) had reduced by two percent, indicating that the practice is on the verge of elimination. Secondly, in countries where the national prevalence is above five percent (5 percent in Togo to 97 percent in Guinea), only five countries (Gambia, Guinea Bissau, Mali, Djibouti, and Somalia) registered no reduction in the national prevalence. There is a steady decline of five percent or more in national prevalence in six countries namely Kenya, Nigeria, Cote d'Ivoire, Central African Republic, Burkina Faso and Liberia. The trends on the decline in national prevalence support a conclusion that the practice of FGM is decreasing though the abandonment rates are not high enough.⁷³ This is a similar inference to that posted by Muteshi and colleagues who determine that the practice of FGM is slowly decreasing, though the change is not as rapid as necessary.⁷⁴

In most African countries, type 1 of FGM is practised where the external genitalia are cut and removed. One in five women in Somalia, Niger, Eritrea, Djibouti, and Senegal have undergone the most invasive and severe form of FGM, which involves sewing of genitalia.⁷⁵ The ages at which women and girls undergo FGM vary substantially across African countries. In Egypt, Chad, Somalia and the Central African Republic, a significant 80 percent of girls are cut between the ages of 5 and 14 years, while in countries such as Mauritania, Nigeria, Eritrea, Mali and Ghana, girls are cut at the age of five years and below. In Kenya, 46 percent of girls undergo the cut at the age of nine years while in Guinea Bissau, girls are circumcised after their fifteenth birthday.⁷⁶

⁷³ UNICEF (n 2 above) 93.

⁷⁴ S Muteshi et al 'Health Impacts of FGM: A Synthesis of the Evidence. Evidence to End FGM Programme: Research to Help Girls and Women Thrive' New York: Population Council.

⁷⁵ UNICEF (n 2 above) 64

⁷⁶ UNICEF (n 2 above) 46.

Further, UNICEF data reveals that 74 percent of women and girls aged 15 to 49 years report having been cut by a traditional practitioner,⁷⁷ who use crude methods and tools to perform FGM. There is also a trend towards medicalised cutting in Africa, as 26 percent of women and girls report having been cut by a healthcare professional. Medicalisation of FGM is highly common in Sudan, Egypt, and Nigeria, as 93 percent of women and girls from these countries report being circumcised by a healthcare professional. More than 50 percent of these women live in Egypt alone.⁷⁸ In Kenya, 15 percent of women and girls were circumcised by a medical practitioner, indicating an emerging trend.⁷⁹

2.3 Issues and trends of FGM in Kenya

Direct comparison of national data on the prevalence of FGM in Kenya since 1998 to 2014 reveals a steady decline from 38 to 21 percent. This decline in national prevalence is even larger because in the 1998 statistics, women in the North Eastern parts were not included in the survey. Compared to other African countries, Kenya has had a moderately low prevalence of FGM. The 2013 UNICEF report estimates the percentage of Kenyan women and girls who have been circumcised at 27 percent⁸⁰ (relatively similar to the KDHS survey).

The prevalence also varies by provinces, with the highest prevalence in the North-eastern Province (98%) and lowest in the Western Province (one percent). Nyanza Province is second in the list with 32 percent, followed by Rift Valley Province with 27 percent, then Eastern with 26 percent, and Nairobi with eight percent.⁸¹

⁷⁷ UNICEF (n 2 above) 114.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ UNICEF (n 65 above) 27.

⁸¹ The 2014 KDHS report (n 1 above) 333.

Further, 83 percent of women reported that FGM was performed on them by a traditional practitioner, while 15 percent by a medical practitioner.⁸² Traditional practitioner use crude methods and tools to perform FGM while medical practitioners use medicalised methods such as using anaesthesia. This indicates a trend of the practice being increasingly medicalised in the recent times. Further, the data from the 2014 KDHS survey indicates that 93 percent of women and 89 percent of men are opposed to the continuation of the practice.⁸³

An estimated three percent of Kenyan girls under the age of 15 have undergone FGM.⁸⁴ Notably, some girls who have not reached the age of circumcision are at risk of being circumcised in the future. The rates of circumcision are higher among girls in the rural areas, those from the poor household and those whose mothers have no education. Further, rates of circumcision are high among girls whose mothers are of Somali and Kisii ethnic communities. In North-Eastern Province, 65 percent of girls aged 0-14 have been circumcised and 20 percent in Nyanza Province.⁸⁵ Girls who are circumcised at younger ages are likely going to be circumcised by medical practitioners. Medicalisation of FGM is common in Nyanza and Rift Valley Provinces.

Besides the first three common types of FGM being practised in Kenya, there is also another types of FGM that is becoming common in Kenya termed as circumcision by words,⁸⁶ also referred to as a counselling-based rite of passage or Alternative Rite of Passage (ARP).⁸⁷ This alternative practice grew from the collaborative efforts of two organisations, namely the Maendeleo ya Wanawake Organisation (MYWO), and the Program for Appropriate Technology in Health

⁸² KDHS (n 1 above) 338.

⁸³ KDHS (n 1 above) 340.

⁸⁴ KDHS (n 1 above) 335.

⁸⁵ KDHS (n 1 above) 333.

⁸⁶ C Chelala 'An alternative way to stop female genital mutilation' (1998) 352 *The Lancet Journal* 126.

⁸⁷ Jerobon GK 'A knifeless rite: influence of selected characteristics on the Marakwet of Kenya's perception of the counselling-based alternative rite of passage and levels of awareness of effects of FGM' Unpublished Doctoral thesis, Egerton University, 2008.

(PATH) in an attempt to prevent the health implications associated with the practice. This alternative practice is premised on the belief that FGM is spiritual and not physical. The girls congregate at a boarding school, mainly during December holidays. It involves a weeklong programme of counselling and mentoring young girls. Some of the topics that the girls are taught include basic concepts of anatomy, sexual and reproductive health, menstrual hygiene, and life skills among others. On the final day, a ceremony is organised and is attended by members of the community and marks girl's passage into womanhood.⁸⁸ The alternative rite of passage offers a substitute to FGM, but can only apply to communities where FGM is carried out as a symbol of passage from childhood to adulthood. With emerging trends such as married women voluntarily undergoing through FGM, ARP become inapplicable.

There are reports of girls who have gone through ARP, and undergone FGM immediately after their release. In her doctoral thesis on the perception of alternative rite of passage among the Marakwet community, Jerobon Gladys found that the community perceives external genitalia of a woman as dangerous to the community as it can cause impotence. She also found that the community does not value training or empowering their women, and are sceptical about the content of the training curriculum their girls receive during the weak long program. Further, girls who went through the counselling-based rite of passage reported being mocked and teased by their peers who tell them they would never have husbands or children, and some would opt to be circumcised.⁸⁹ Such consequences could account as to why some girls may undergo the 'second' form of female circumcision after they 'graduate' from the counselling-based rite of passage.

⁸⁸ Chelala (n 86 above).

⁸⁹ Jerobon (n 87 above) 115.

2.4 FGM in Kenya and other socio-demographic characteristics

In Kenya, some Christian and Muslim religious groups practice FGM. According to the 2014 KDHS report, the highest prevalence of FGM in Kenya is among Muslim women (51 percent).⁹⁰ The practice is also common among Roman Catholic women (21 percent) and among Protestant women (18 percent). Gruenbaum indicates that the practice of FGM among Christians, Muslims and Judaists has been at times considered sanctioned or not prohibited by God.⁹¹ There have been instances where religious leaders have campaigned against the practice. The variations in these statistics demonstrate the importance of engaging the religious leadership in ending the practice through awareness creation and sensitisation. From the report, five percent of women and six percent of men believed that FGM is a religious obligation.⁹²

The level of women's education also has a correlation to the rates of FGM, especially in areas where the practice occurs before a girl completes her education. The KDHS report indicated that the highest rates of FGM (58 percent) are among women with no education.⁹³ The percentage reduces with women gaining education (some primary education-34 percent), completed primary education- 18 percent) and with more than secondary education -6 percent)⁹⁴. In the past, a number of campaigns have focused on ending child marriage and keeping girls in schools in order to curb FGM.⁹⁵

In Kenya, FGM is largely linked to ethnic identities, and thus the deep resistance to the change efforts. Gruenbaum emphasises that "for most people, ethnic

⁹⁰ KDHS (n 1 above) 333.

⁹¹ E Gruenbaum 'The female circumcision controversy: An anthropological perspective' (2001) Philadelphia: University of Pennsylvania Press.

⁹² As above.

⁹³ As above.

⁹⁴ As above.

⁹⁵ B Shell-Duncan 'From health to human rights: Female genital cutting and the politics of intervention' (2008) 110 *American Anthropologist* 225-236.

identity is carefully guarded and markers of it are changed only when there are persuasive incentives".⁹⁶ Ethnicity perpetuates shared norms such as marriageability, restraint sexuality among women and other values. By this, FGM is believed to suppress of female sexuality. This revolves around issues of control and exerting power on women in patriarchal systems, and perpetuates the stereotypes such as women are not supposed to have sexual feelings or enjoy sexual pleasure.

Cross-border practice of the FGM especially with the practising communities that live at the border points is also becoming a challenge to prosecution of FGM cases. Unfortunately, there is no law that has been embraced across the East Africa Region to counter this trend.⁹⁷

Following monitoring visits conducted in 2017 by the ODPP in four regions considered to be FGM 'hotspots'-Rift Valley, Nyanza, North Eastern and Eastern, several findings were recorded with regards to prosecution of cases. In the North Eastern region, it was noted that FGM cases come into light only when the victims suffer complications and are subsequently rushed to the hospital, where again victims are forewarned when they learn they could be reported.⁹⁸ In Tharaka Nithi of Eastern region, only five cases had been registered at Chuka Law Court since 2014. Evidently, FGM is highly practised in Tharaka Nithi and in very secretive manner; hence, it is difficult to find perpetrators in action. Similarly, it was observed that the practice had the blessing of the local elders hence little or no reporting.⁹⁹ Council of elders are highly regarded in these communities and their word is binding.

⁹⁶ B Shell-Duncan 'The medicalisation of female "circumcision": Harm reduction or promotion of a dangerous practice?' (2001) 52 *Social Science and Medicine* 1013-1028.

⁹⁷ Office of the Director of Public Prosecutions 'Annual report' 2015.

⁹⁸ As above.

⁹⁹ As above.

Among the West Pokot of the Rift Valley region, girls undergo traumatic, frightening and life-threatening FGM procedure, and if it is not performed, girls are considered impure. The uncircumcised women are considered dirty and promiscuous.¹⁰⁰ FGM is believed to ensure the young girls never stray and that their sexual urge is reduced. The report further documented findings among the Kuria community of Nyanza province including cultural resistance that hinders reporting of FGM cases, lack of will to arrest perpetrators especially by enforcement officers from FGM practising communities and cross-border practice, where girls are taken to Tanzania for purposes of carrying out the practice on them. Also, the use of Alternative Dispute Resolution¹⁰¹ (ADR) is common among the Kuria community and most of FGM cases are settled by the Kuria council of elders making it difficult for the cases to be reported to police.¹⁰²

The findings from the monitoring report in the four regions reveal a startling situation of how the practice of FGM in hotspot regions continues to pose a challenge to the efforts that Kenya has taken in promoting gender equality, women empowerment and inclusion. Most FGM practising communities are re-inventing ways to avoid being arrested such as circumcising girls when the authorities least expect e.g. during April holidays, instead of the December holidays, when it used to be done. This continues to hinder efforts that that ODPP and other partners such as Anti-FGM Board are making towards ending the practice.

¹⁰⁰ J Kibor 'Christian response to female circumcision: A case study of the Marakwet of Kenya' (2007) *Evangel Publishing House, Nairobi*.

¹⁰¹ ADR is use of alternative methods of resolving disputes without litigation such as mediation or arbitration. Kenya is in the process of institutionalising the ADR systems.

¹⁰² ODPP (n 97 above) 12.

2.5 State and interagency efforts to end FGM in Kenya

More recently, Kenya has made major strides in the quest to end the practice of FGM. Ground-breaking efforts date back to 2008, when the United Nations Population Fund (UNFPA) and the United Nations Children’s Fund (UNICEF) implemented a joint programme. This played a catalytic role in policy formulation, advocacy and formulation of strategic partnerships that targets eradication of FGM in Kenya.

The joint programme attracted support from various groups including parliamentarians who played a huge role in the enactment of the Prohibition of FGM Act in 2011, and subsequent establishment of the Anti-FGM board two years later. Further, the office of the Director of Public Prosecutions also established the Anti-FGM and Child Marriage Prosecution Unit in a bid to enhance prosecution of FGM and child marriage matters. The prosecution officers working in the special unit were also trained on prevention and response to FGM cases.¹⁰³

Key to the joint programme has been the use of advocacy as a tool to rally for public support and influence decisions within the political and social realms. High government officials, advocate for the abandonment of FGM. For instance, in 2015 the First Lady, speaking in reference to her Beyond Zero campaign, said

“I urge communities still practising Female Genital Mutilation (FGM) to discard the outdated cultures that deny girls equal opportunities in education which will enable girls to exploit their full potential to be healthier mothers capable of raising stronger and loving families. With practices such as FGM still prevalent in this region, more needs

¹⁰³ UNFPA & UNICEF ‘UNFPA/UNICEF Joint Programme on FGM’ (2015) <https://www.unfpa.org/publications/2015-annual-report-unfpa-unicef-joint-programme-female-genital-mutilationcutting> (accessed 25 July 2018).

to be done to ensure the girl child enjoys equal education opportunities as boys.”¹⁰⁴

In July 2015 during his visit to Kenya, the former US President, Barack Obama said

“Treating women as second class citizens is a bad tradition: it holds you back. There’s no excuse for sexual assault or domestic violence, there’s no reason that young girls should suffer genital mutilation, there’s no place in a civilised society for the early or forced marriage of children.”¹⁰⁵

Such sentiments from influential people have helped amplify the anti-FGM campaign in Kenya, and this level of advocacy has influenced subsequent work of ending FGM. For example, response to FGM has been strengthened with activation of an FGM Hotline-0770610505, which marks a good progress of the implementation of the Prohibition of FGM Act.

Further, the UNFPA-UNICEF joint programme has implemented various approaches to end the practice of FGM. The programme has endorsed the Alternative Rites of Passage. This consists of a wide range of activities that replaces harmful FGM with non-harmful rituals that highlight girls’ transition to adulthood.¹⁰⁶ The ARPs encourages maintenance of cultural ceremonies whilst getting rid of FGM in nomadic communities. The activities such as seclusion, training and a public ceremony offer an opportunity for girls to transit to adulthood. Notably critics note that ARPs only address the underlining causes of FGM, and does not work towards eradicating FGM. However, examining the pros of ARPs including reduced barriers of social disapproval and increased

¹⁰⁴ UNFPA & UNICEF (n 103 above) 2.

¹⁰⁵ As above.

¹⁰⁶ Daily Nation ‘Kenya has made huge strides in anti-FGM fight’, 19 December 2016.

public acceptance of girls who have not gone through FGM, it is the author's view that ARPs remain a substitute option for eradicating FGM.

Kenya has also made strides in building the capacities of health care providers, especially on the prevention of medicalised circumcision. This has been done in the expectation that anti-FGM issues are incorporated in reproductive health policies, planning, and programming. At the community level, the joint programme has facilitated dialogues with elders and religious leaders in some FGM practising communities. In these communities, the elders and religious leaders who are focal in the quest of ending FGM in their communities have established networks and continue to advocate for the abandonment of FGM.¹⁰⁷ These elders are custodians of culture and working with them help gain approval to also reach other members of the community. Since FGM is linked to marriageability, elders also play a crucial part in encouraging young men to willingly marry girls who have not gone through FGM. For example, elders from the Samburu community, commonly called *launoni* are the gate keepers and any access to young men (morans) is dependent on their approval; thus, the Programme has in the past sought to work with elders as agents of change.

Programmes to mentor young girls have also been integrated in the anti-FGM campaigns. Through the mentorship programme, girls can be empowered to make informed decisions concerning their lives, including refusing to go through FGM. Mentoring girls by pairing them with role models helps build self-esteem and self-confidence. Further, a clearly structured mentorship programme involves periodic interactions between mentees and mentors, where they get to discuss issues affecting them such as peer pressure, child abuse, FGM, among others. The mentorship programme also works with role models in communities who help in amplifying the anti-FGM campaign in Kenya. For example, in 59th Convention of Status on Women (CSW), the joint programme supported Betty

¹⁰⁷ UNFPA & UNICEF (n 103 above).

Naisenya, who spoke in the meeting about engaging both boys and girls in ending FGM. There have been efforts to engage young activists in ending FGM, and in April 2017, the first Pan African youth summit was held in Nairobi. The summit brought together young activists from Africa, with a common goal of discussing how to end the harmful practice of FGM in one generation.¹⁰⁸

Media advocacy has also played a crucial role in the quest of ending FGM in Kenya. With the influx of digital technology, the media campaign has heightened the work on ending FGM. The key focus in engaging the media fraternity has been to convey the human rights perspectives of FGM including the side effects of child marriage. The local vernacular stations in Kenya have also provided platforms for dialogue on FGM, and its wide coverage in rural areas continue to be beneficial to the anti-FGM campaign.

2.6 Chapter summary

The prevalence of FGM in Kenya shows a steady decline from 1998 to 2014. The decline can be attributed to ban of the harmful practice and enactment of the Prohibition of FGM Act in 2011 and on-going anti-FGM campaigns. However, this study notes resistance in some practising communities and also emerging trends such as cross-border cutting and medicalisation. Compared to other African countries, Kenya has a relatively low prevalence of FGM with the highest percentage among the Somali women and lowest among Ugandan women.

Importantly, the current anti-FGM interventions need to take into consideration some of these trends and issues for effective impact to be realised. ARP is increasingly becoming common in Kenya. However, there is the need to measure the direct impact that it has on ending FGM in Kenya.

¹⁰⁸The Girl Generation 'First Pan-African Youth Summit', April, 2018. <https://www.thegirlgeneration.org/blog/girl-generation-hold-first-ever-pan-african-youth-summit-april-2018> (accessed 17 July 2018).

It is also evident that there have been remarkable strides of ending FGM in Kenya. The joint programme by UNFPA and UNICEF laid the foundation to subsequent work on ending the practice. Strategies such as working with religious leaders such as pastors and Imams through awareness creation and sensitisation has been used. Others include engaging the media, endorsing ARPs and strategic partnerships have contributed to awareness creation on FGM in Kenya. Partnerships in ending FGM have been between state and non-state actors, and despite the successes registered there are challenges. These includes stiff bureaucracies especially with working with huge NGOs and relevant government institutions, hefty spending on seminars in the cities rather than channelling funding to grassroots' related intervention and even lack of motivation or recognition to grassroots activists and community based organisations.

3 CHAPTER THREE: FGM IN THE CONTEXT OF DOMESTIC LAW

3.1 Introduction

In Kenya, there are two main legal instruments that address the practice of FGM and protect women and girls from the harmful practice. These are the 2010 Kenyan Constitution and the 2011 Prohibition of FGM Act. This chapter is dedicated to an in-depth discussion of the provisions in the two instruments, with focus on how these provisions have been applied in some selected court judgments. With this chapter, the author brings to light what the domestic laws in Kenya have provided for with regards to protecting women and girls from FGM.

3.2 Constitutional protection

After a successful referendum, a new Constitution was passed in Kenya in August 2010. This marked a new dispensation that aimed at improving transparency and accountability within the government and creation of an independent judicial system. The 2010 Constitution outlaws the practice of FGM in Kenya. The preamble of the new Constitution spells out a commitment to equality, and recognises ‘the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law’.¹⁰⁹ It also stipulates the government’s commitment to measures that will enhance the respect, protection, and fulfilment of the right to equality and freedom from all forms of discrimination. With this, it is evident that the spirit therein can be characterised as providing a conducive environment for the realisation of human rights for women and girls.

¹⁰⁹ The preamble of the 2010 Kenyan Constitution.

3.2.1 The ‘spirit’ of the Constitution in relation to FGM

It should be noted that the Kenyan Constitution does not explicitly mention FGM, but it does refer to the elimination of harmful cultural practices. All forms of gender-based violence such as FGM and child marriage fall into this category. Traditional harmful practices that cause pain and humiliation for women and girls are attributed to deeply entrenched traditions and beliefs about the role and position of females in many communities. These practices perpetuate the belief that women are subordinate members of the society. FGM is closely interlinked with gender discrimination and violence against women. The Constitution of Kenya 2010 addresses FGM as part of a deep-rooted problem of gender inequalities in the society. It has put deliberate measures to ensure that women are protected from all forms of discrimination and violence and possibly ensure all barriers to gender equality are addressed. The Constitution spells out an institutional framework of checks and balances, strengthens the legislative arm, and incorporates accountability and oversight mechanisms as discussed below.

The 2010 Constitution introduces devolution of executive and legislature structures and the main intent is to bring government services closer to the citizens in terms of accountability and delivery. However, there are concerns about slow implementation about setting up Courts in all the counties. There are counties that still rely on mobile Courts and some people have to walk long distances to access judicial services. There is the need to set up courts in all the 47 counties to ensure that citizens can effectively access judicial services as mandated by the Kenyan Constitution. The judiciary has been restructured in the aspiration to enhance independence, incorporate better checks mechanism and strengthen the powers of judicial oversight. This also included the creation of a Supreme Court, which is the highest court in Kenya, established in article 163 of the Constitution.¹¹⁰ This Court’s decisions are final and binding and set

¹¹⁰ Art 163(1) of the Kenyan Constitution.

a precedent of all other courts in the Country. Notably, there has not been an FGM- related case that has been brought to the Supreme Court.

The oversight mechanisms established under the Kenyan Constitution led to the establishment of watchdog bodies. One of the most relevant government institutions in addressing the practice of FGM in Kenya is the Kenya National Human Rights and Equality Commission (KNHRC), which was restructured following into two paramount commissions, the Kenya National Commission on Human Rights (KNHRC), and the National Gender and Equality Commission (NGEC).¹¹¹ As discussed below, these institutions have played key roles in addressing FGM in Kenya.

3.2.2 Government's oversight mechanisms in addressing FGM

The Kenyan Constitution under article 59(2) spells out the functions of the KNHRC, which includes promoting respect of human rights in the Republic, promoting gender equality and facilitating gender mainstreaming in development, receiving and investigating complaints of alleged violation of human rights and securing appropriate redress mechanism and to ensure the State complies to obligations under treaties and conventions relating to human rights among other functions.¹¹² The Commission has an integral mandate of protecting women and girls from all forms of violence including FGM.

The Kenyan National Commission on Human Rights (KNCHR) has been instrumental in the establishment of the legal and policy framework that governs the implementation of the sexual and reproductive rights (SRR) enshrined in the Constitution, assessing states' compliance with SRR and documenting cases of violation of Sexual and Reproductive Health Rights (SRHR) in Kenya. In the post promulgation of the 2010 Constitution, the KNCHR actively prepared and shared

¹¹¹ Art 59(4) of the Constitution.

¹¹² Art 59(2) of the Constitution.

reports on the status of FGM practice in Kenya. The first report was released in 2012, which was mainly a report of findings of the public inquiry into violations of SRHR in 2010 after civil society organisations filed complaints of eminent violations of SRR in the County. Conducting investigations into any complaint on violations of human rights is the mandate of the Commission as stipulated by the Constitution and also the KNCHR Act. The report documented cases of increased maternal deaths that are attributed to negative socio-cultural practices such as FGM.¹¹³ It also noted that the reproductive health problems experienced by female adolescents are associated with the consequences of undergoing FGM.¹¹⁴ Despite KNCHR been actively engaged in documentation of FGM cases, actual action is yet to be witnessed. Documenting these cases is not enough as there is the need to implement some of the recommendations. For example, in the human rights report on the 2017 presidential repeat elections, the KNCHR recommended that the Kenyan government ‘investigate the increased cases of SGBV and guide the relevant stakeholders in tackling the reported cases so far’.¹¹⁵ This is yet to be implemented, yet cases of SGBV including FGM continue to occur in Kenya.

In 2014, the Commission also presented a report on the state of human rights in the Country. It echoed the strides the country had made including the enactment of Prohibition of FGM Act in 2010 and the Vision 2030, which aligned itself to the commitment of gender equality and non-discrimination enshrined in the Constitution. The report also pointed out various challenges to achieving SRR in the country, which included the lack of political will and shrinking civil society space.¹¹⁶ The fourth state of human rights report by the Commission was the first under the new constitutional dispensation and basically analysed the

¹¹³ Kenyan National Commission on Human Rights (KNCHR) ‘Realising sexual and reproductive health rights in Kenya: A myth or reality’ (2012).

¹¹⁴ KNCHR (n 113 above) 109.

¹¹⁵ KNCHR ‘Human rights monitoring report on the 2017 repeat presidential elections’ (2018).

¹¹⁶ The Kenya National Commission on Human Rights (KNCHR) ‘The fourth state of human rights report post promulgation 2010 – 2014’ (2014).

implementation of the Constitution and the impact on the lives of the citizens, while also analysing successes and shortcomings. In 2015, the Commission in conjunction with the United States Department of State compiled reports from civil society organisations and the media on violations of SRR of women and girls, and these include the practice of FGM cases in refugee settings, such as Daadab. The report also observed that there had been strides in engaging community religious leaders in protecting girls from the practice as there were instances where churches had been used as safe havens for the girls fleeing from being forced to be circumcised.¹¹⁷

The National Equality Gender Commission (NGEC) plays an important role in oversight of the implementation of the Constitution. The mandate of the commission is derived from equality and freedom from discrimination, economic and social rights and the commission and independent offices of the Constitution.¹¹⁸ In 2016, the NGEC conducted research on the economic burden of gender-based violence to survivors and the country. It was found that Kenya spends over \$50,000 on productivity loss and mortality from GBV. With regards to the cost of FGM, the report found out that in FGM hotspot County such as Migori County in the Nyanza region of Kenya, a circumciser charged \$5 for each girl and could cut over 100 girls per day.¹¹⁹ Highlighting the cost of FGM in this community helps in designing interventions that aim at encouraging social change among circumcisers, who benefits economically from the harmful practice.

¹¹⁷ The Kenya National Commission on Human Rights (KNCHR) 'Kenya 2015 human rights report' (2015) Bureau of Democracy, Human Rights and Labor.

¹¹⁸ Arts 27 & 43 & chapter 15 of the Kenyan Constitution.

¹¹⁹ National Gender & Equality Commission 'Gender-based violence in Kenya: the economic burden on survivors' (2016). The circumciser who gave this information had been jailed for seven years for committing the offence, and she indicated that she chose this line of work because of the demand of circumcisers in the County and also because her meagre cereal business was not as lucrative as the circumcision trade.

The Commission has also been actively engaged in several projects that aim at building systems at the county level that would effectively respond to Sexual & Gender Based Violence (SGBV) issues. For example, in 2017 the Commission released a model policy framework for county governments on SGBV that can be customised to suit county needs with regards to addressing SGBV.¹²⁰ The Commission developed a model legislative framework on SGBV for county governments, which are steered towards focusing efforts towards supporting county structures to address SGBV issues.¹²¹ The Kenyan Constitution paved way for a new system of governance- devolved system, and it has been only six years since the commencement of governance model, and efforts towards adopting the legislative framework as gradual. For example, the Baringo County is yet to pass the SGBV legal framework in the assembly, despite being drafted and taken through legislative process few years back.

The Commission has also developed and disseminated that National Monitoring and Evaluation Framework towards the prevention of and response to Sexual and Gender-Based Violence in Kenya. Pursuant to the mandate stipulated in the 2010 Constitution, NGECE developed a multi-sectorial approach to monitoring and evaluation of SGBV in Kenya, which take into consideration several aspects such as service provision, prevention, coordination of interventions and building partnerships.¹²²

¹²⁰ National Gender & Equality Commission 'Model Legislative Framework on SGBV for County Governments' (2017).

<https://www.ngeckkenya.org/Downloads/NGECE%20Model%20Legislative%20Framework%20on%20SGBV%20for%20County%20Govts.pdf> (accessed 20 September 2018).

¹²¹ National Gender & Equality Commission 'Sexual and gender based violence working group guidelines' (2017) <https://www.ngeckkenya.org/Downloads/SGBV%E2%80%93WG-BOOKLET.pdf> (accessed 20 September 2018).

¹²² The National Gender & Equality Commission 'National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya' (2014). <http://www.ngeckkenya.org/Downloads/National-ME-Framework-towards-the-Prevention-Response-to-SGBV-in-Kenya.pdf> (accessed 20 September 2018).

The subsequent discussion elaborates specific provisions within the Kenyan Constitution that address FGM in Kenya. In discussing these provisions, this section also establishes relevant human rights instruments that Kenya has ratified, and prohibits the practice of FGM. The international law is deemed part of the Kenyan legal system under the Kenyan Constitution, which is an indication of a shift towards domestication of regional and international treaties. However, problematic issues such as low implementation and the extent of applicability of these treaties continue to hinder smooth domestication in the Kenyan context. The Kenyan Constitution of 2010 is pegged on belief in fundamental human rights, respect for dignity and affirmation of equal rights of men and women. Further, the Constitution also protects her citizens from all forms of discrimination and similar to the Universal Declaration of Human Rights (UDHR) it recognises that all human beings are born free and equal in rights.

3.2.3 Specific provisions and FGM

In article 2(4), it is stipulated that any law including the customary law, which is inconsistent to the Constitution is void. This provision is crucial for the protection of women and girls from harmful cultural practices such as FGM. Thus, culture or traditions are not a justification for FGM, though many Kenyan communities would still cite culture as a motivating factor for the practice of FGM as earlier discussed.

Further the Constitution prohibits any form of discrimination based on age and sex.¹²³ The CEDAW, which Kenya ratified in 1984 defines discrimination 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 or exercise by women, irrespective of their

¹²³ Art 27(4) of the Kenyan Constitution, 2010.

marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.¹²⁴

The practice of FGM is a form of discrimination directed towards women and girls as it hinders them from enjoying fundamental rights. In its concluding observations dated 2 November 2017, the CEDAW committee reiterated their concern over the continued prevalence of FGM in some Kenyan communities, terming it as a grave violation of fundamental rights of women and girls.¹²⁵ The Committee recommended that Kenya take measures to eradicate FGM, and other harmful practices such as child marriages.

Freedom from all forms of discrimination is also a right enshrined by African Charter on Human and Peoples' Rights and Maputo Protocol. Further, article 2 of Maputo Protocol obliges the Kenyan state to put in appropriate measures (legislative and institutional) to eliminate all forms of discrimination against women.¹²⁶

The Bill of Rights under article 53(1) d stipulates that every child has the right to be protected from harmful cultural practices and all forms of violence. Harmful cultural practices are forms of violence, which are primarily meted against women and girls and are considered as part of accepted cultural practice. It is the author's view that this is the most important provision in relation to ending FGM in Kenya. It categorically prohibits all harmful cultural practices, and being the supreme law of the land, then there is no doubt that the practice is outlawed. The Constitution also stipulates that every person has the right to freedom and security. This includes the right not to be subjected to any form of violence and

¹²⁴ See *CEDAW* (n 29 above) art 1.

¹²⁵ CEDAW Committee 'Concluding observations on the eighth periodic report of Kenya' (2017) CEDAW/C/KEN/CO/8.

¹²⁶ See *Maputo Protocol* (n 32 above) art 2.

or to torture in any manner, whether psychological or physical.¹²⁷ Confining girls to secluded areas in order to circumcise them is a violation of their right to freedom and security.

The Constitution under article 28 stipulates that every person has inherent dignity, which must be respected and protected. This category of right is also stipulated in articles 1 and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹²⁸ the Preamble and article 9 (1) of the Convention on the Rights of the Child (CRC)¹²⁹ and Preamble of the International Covenant on Civil and Political Rights (ICCPR).¹³⁰

In article 55 of the Constitution, the government identifies the youth as a priority of the state. Because FGM predominantly affects girls under the age of 18 years in Kenya, it constitutes a violation of the rights of children. Also, the CRC and the African Charter on the Rights and Welfare of the Child¹³¹ establishes the 'best interest of the child' principle,¹³² and article 3 stipulates that FGM is a violation of this standard; hence, a violation of children's rights.¹³³ With this, the Kenyan Constitution under section (d) of article 55 obligates the government to put in measures that can protect youth from harmful cultural practices.

In addition, the Constitution under article 43(1) stipulates that every person has the right to the 'highest attainable standard of health, which includes the right

¹²⁷ Art 29 of the Kenyan Constitution.

¹²⁸ Art 1 & 3 of the International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16 52, UN Doc A/6316 (1966, 999 UNTS 3 (entered into force 23 March 1976).

¹²⁹ The Preamble & article 9(1) of the Convention on the Rights of the Child, A/RES/44/25 entered into force on 20 November 1989.

¹³⁰ The Preamble of the International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16 52, UN Doc A/6316 (1966, 999 UNTS 3 (entered into force 23 March 1976)

¹³¹ Art 4 of the African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

¹³² See CRC (n 129 above) art 5.

¹³³ See CRC (n 129 above) art 3.

to health care services, including reproductive health care'.¹³⁴ FGM has severe physical and psychological consequences, and because it is an invasive procedure on a perfect healthy tissue it then constitutes a violation of the right to health.

The World Health Organisation defines health as 'not merely absence of disease or infirmity' but also includes physical, mental and social well-being.¹³⁵ Also its discussions, the 1994 International Conference on Population and Development in Cairo Egypt included sexual health as an important aspect enhancement of life. The ICESCR also recognises the right to the highest attainable physical and mental health while the CEDAW Committee in General Comment No. 24 recommended that governments that takes into account the needs of adolescent and girls who are vulnerable to FGM.¹³⁶

3.3 Legislative measures

The Prohibition of Female Genital Mutilation Act is the principal legislation that governs FGM in Kenya. It is the federal law that outlaws all forms of FGM, regardless of the age or status of the woman or girl. The Act came into effect on October 2011. The Kenya Women's Parliamentary Association (KEWOPA), with the help of the Parliamentary Council, UNFPA/UNICEF joint programme and the National FGM Secretariat, drafted the Act. The Act mainly set out the offences and punishments for FGM in Kenya. It also set out the establishment of an Anti-FGM board. This discussion focuses on the provisions of the Act and also examine how these provisions have been used to prosecute FGM case in Kenyan

¹³⁴ Art 43(1) of the Constitution.

¹³⁵ The Constitution of the WHO.

¹³⁶ See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I: <https://www.refworld.org/docid/453882a73.html> (accessed 20 February 2019).

Courts. It also analyses the mandate of the Anti-FGM board in relation to what has been achieved in the post-enactment of the Act.

3.3.1 Defining FGM by the Act

The Act uses the phrase female genital mutilation throughout its text, omitting the cutting. The Act recognises three types of FGM, which are the first three types, leaving out the type IV, which involves any medical procedure for the therapeutic or aesthetic purpose.¹³⁷ It is clear that the omitting of ‘cutting’ is strategic as it helps to set out a clear message about the severe nature of the cultural practice. With the Act, one can deduce that the practice of FGM in Kenya is a violation of the rights of women and girls, and there is no way ‘sugar-coating’ this can assist in amplifying the anti-FGM campaigns in Kenya.

3.3.2 The Anti-FGM Board

The part II of the Act sets out the establishment of the Anti-FGM board, which is integral in the enforcement of the Act. Some of the functions of the board include; designing, supervision, and coordination of awareness programmes, advising the government on matters of FGM, designing and formulating policy on the planning, financing and coordination of anti-FGM campaigns, providing technical support to organisations working in ending FGM, and conducting resource mobilisation towards the anti-FGM campaign.¹³⁸

Since the establishment of the Board in 2013, the Board has used various interventions to create public awareness on FGM. The anti-FGM campaigns have been integrated with existing government programs such as annual teachers’ conferences. Other platforms that the Board has used include the annual exhibitions in different Counties. The Board has also used road shows in FGM

¹³⁷ The preliminary of the Prohibition of FGM Act.

¹³⁸ Sec 5 of the Prohibition of FGM Act.

hotspot Counties such as Migori, Taita Taveta and Elgeyo Marakwet. The Board has been in the forefront in endorsing the ARPs, especially in areas where the practice of FGM is mainly carried out as a rite of passage. In delivering its mandate, the Board works with various partners such as the UNFPA/UNICEF joint programme, AMREF Kenya, the Girl Generation among others.

Notably, the Prohibition of FGM Act spells out the operations of the Board including composition, financing and even staffing. However, the Board continues to face challenges such as understaffing and underfinancing, and this continues to cripple the Board's operations. For example, in the year 2017, the Board's operations were curtailed by the fact that the position of the chairperson (appointed by the president) was vacant, and thus not so much in terms of anti-FGM campaigns were done in that particular year. The chairperson is mainly charged with overall strategic leadership to the Board. Further, the Board has its offices in the capital city, and with the current devolved system of governance, it would be better if the Board can improve its presence in the counties, especially at the FGM hotspot areas.

3.3.3 Offences

Part IV of the Act (sections 19-25) outlines the criminal offences related to FGM. There are seven offences identified by the Act in Kenya. Section 19 criminalises The performance of FGM, including by medical professionals is criminalised under section 19. The subsequent section 20 enumerates procuring, aiding and abetting the practice of FGM. In 2015, HM was sentenced to three years' imprisonment after being found guilty of abetting FGM carried on a 12-year old-girl. The accused appealed and the sentence was reduced to one-year imprisonment, citing this was reasonable since it was the first offence.¹³⁹

¹³⁹ *Halima Mohamed v Republic* Criminal Appeal 15 of 2016.

The recent baseline survey by UNICEF indicated how cross-border FGM is becoming common in Kenya. According to the surveyed women, 77 percent of women from Uganda, 50 percent from Somalia, 46 percent from Ethiopia and 100 percent from Tanzania had visited Kenya more than once in search of FGM services.¹⁴⁰ The Act also prohibits cross-border practice of FGM.¹⁴¹ However, there is no available data to prove that cross-border practice of FGM has been prosecuted in the Kenyan Court.

In sections 22 and 23, the use of premises for FGM and possession of tools and equipment for purposes of FGM respectively is criminalised. The last two sections criminalises failure to report an incident of FGM to a law enforcement officer and the use of derogatory or abusive against a woman who has not undergone FGM.¹⁴² In 2012/13, SMG and RAM were sentenced for four years' imprisonment when they were found guilty for failing to report FGM practice on their daughter. They were charged with an offence of failing to report FGM contrary to section 24 of the Act.¹⁴³

It should be noted that the Act criminalises those who are found guilty of performing FGM. In most cases close family members such as aunts and mothers are convicted. These are close family members whom the girls depend on for provision of basic needs and sometimes when they are locked in prisons, these girls lack parental care and even someone to provide for them. They may end up dropping out from school to fend for themselves and even their siblings and some opt to get married. There is the need to rethink the issue of punishing those found guilty of performing FGM so as to not cause more harm to girls. It is the author's view that probationary form of punishment is introduced, where the perpetrators are assigned some community work while under supervision

¹⁴⁰ UNICEF 'Baseline study report: Female genital mutilation/cutting among Rendile, Maasai, Pokot, Samburu and Somali communities in Kenya' (2017).

¹⁴¹ Sec 21 of the Prohibition of FGM Act.

¹⁴² Sec 19-25 of the Prohibition of FGM Act.

¹⁴³ *S M G & R A M v Republic* Criminal Appeal 66 of 2014.

instead of serving time in prison. The form of work assigned can also act as a source of income for the offender to support his or her family.

3.3.4 Penalty

The Act stipulates that a person who commits offences discussed above is liable upon conviction to imprisonment of not less than three years or a fine of not less than two hundred thousand shillings, or both.¹⁴⁴ In the *Pauline Robi Ngariba v Republic* case of 2014,¹⁴⁵ the appellant was found guilty of performing FGM on SGC and ECM. She was convicted and sentenced to seven years in prison. Upon appeal, the magistrate affirmed the conviction, indicating that section 29 of the Prohibition of FGM Act provided for a minimum of three years' imprisonment. The magistrate further added that there was the need to take stern actions on perpetrators of the crime in order to teach others the lesson and protect girls from the harmful practice.¹⁴⁶

Under section 27, the 2011 FGM Act requires that the Government of Kenya put necessary measures to (a) protect women and girls from the practice of FGM, (b) provide support services to victims of FGM, and (c) undertake public education and sensitise the citizens on the adverse effects of FGM.¹⁴⁷ Kenya through the Board has undertaken different strategies to tackle FGM Kenya, including developing a strategic plan (2014-2018), setting up a telephone helpline number by the FGM prosecution unit within the Office of the Director of Public Prosecution.

¹⁴⁴ Sec 29 of the Prohibition of FGM Act.

¹⁴⁵ *Pauline Robi Ngariba v Republic* Criminal Appeal No. 6 of 2014.

¹⁴⁶ As above.

¹⁴⁷ Sec 27 of the 2011 FGM Act.

3.4 Summary of chapter

This chapter discussed the constitutional and legislative protection of women and girls from the harmful practice of FGM. The new Constitution of Kenya has offered a conducive environment for progressive advancements aimed at protecting the rights of women and girls from FGM.

This chapter also examines how the provisions in these legal texts have been applied to selected cases help shed light on the implementation of these laws, while also highlighting challenges. In the next chapter, the author discusses the implementation of the Constitution and anti-FGM Act, by examining data on FGM-related cases in Court for the year 2017-2018 as provided by the Office of the Director Prosecution. A discussion that draws inspiration from the Ugandan and Eritrean legislation on FGM is provided, with a view of highlighting some lessons that can be borrowed and adopted in the Kenyan Act on FGM.

4 CHAPTER FOUR: IMPLEMENTATION OF LAWS ON FGM IN KENYA

4.1 Introduction

This chapter sheds light on the implementation/application of laws of FGM on cases in the Kenyan Courts. With this, the author hopes to highlight the successes and loopholes in the Kenyan legislatures. The author ends the chapter with inspiration from Eritrea's and Uganda's FGM legislative systems. Uganda passed its Prohibition of FGM Act in 2010 while in 2007, Eritrea passed its Proclamation to Abolish Female Circumcision. Eritrea is the fifth African country with the highest percentage of FGM practice of 89 percent, while Uganda records the lowest of one percent.¹⁴⁸ It is important to note that the author acknowledges the glaring contrast of referencing a country with the high percentage of women and girls who have undergone FGM. Nevertheless, a glimpse at the Proclamation reveals its pros that can be borrowed and applied in the Kenyan case as discussed below. While Kenya has registered decline in FGM prevalence rate, it still has much learn from Uganda that has the lowest prevalence rate out of the 29 African countries, where FGM is prevalent.¹⁴⁹

In the foregoing chapter, the Kenyan legal framework on FGM was discussed, and some shortcomings were highlighted. This chapter highlights the lessons that Kenya can borrow from Eritrea and Uganda legal framework on FGM.

4.2 Overview of FGM cases in Kenya

The year 2014 registered the highest number of reported cases of FGM, which can be attributed to spirited public awareness in that particular year (see Diagram 1 below).¹⁵⁰ In 2015 and 2016, a decline was noted, yet there was a

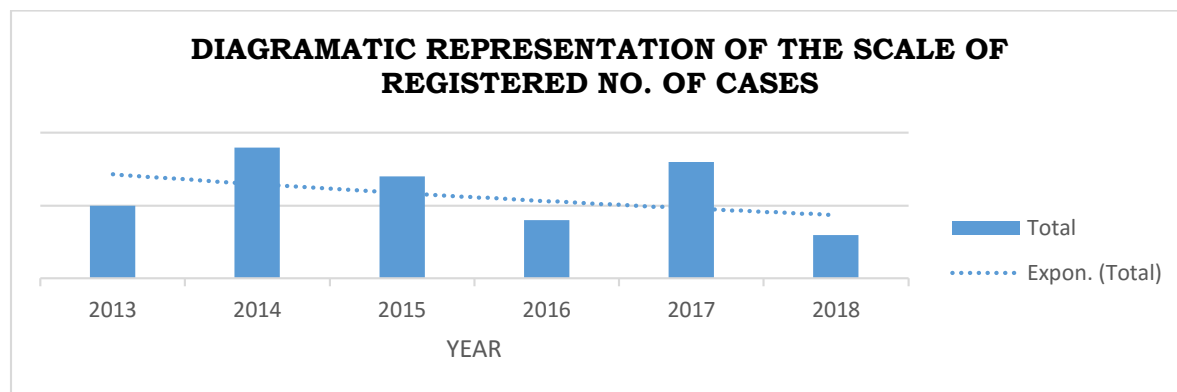
¹⁴⁸ UNICEF (n 2 above) 5.

¹⁴⁹ UNICEF (n 2 above) 73.

¹⁵⁰ Office of the Director of Public Prosecutions 'Annual report' 2018

subsequent increase in 2017. The fluctuations have been associated with challenges related to limited or no reporting. For example, despite Garissa County being an FGM hotspot, no single case has been reported.¹⁵¹ This can be attributed to the cultural setting of the residents which is very exclusive and secretive.¹⁵² The communities respect traditional dispute mechanisms and also fiercely protect their culture. Most disputes including gender violence cases such as defilement are decided by the elders, who in most cases are community gatekeepers. Refusal to comply with the elder’s advice can result in violence and victims can even be excommunicated.

Diagram 1: Representation of the scale of registered number of cases



Source- Office of the Director of Public Prosecution annual report-2018

With regards to the status of FGM cases in Kenyan Courts, a significant percentage (55 percent) of cases are pending while 25 percent have been withdrawn.¹⁵³ There were 12 percent convictions and four percent of cases have resulted in acquittal.¹⁵⁴

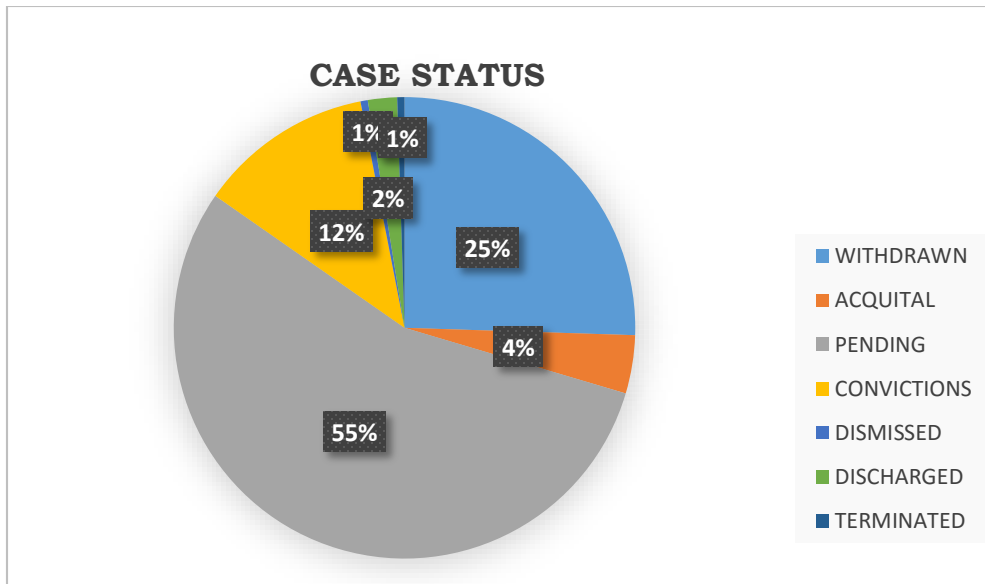
¹⁵¹ ODPP and UNFPA ‘Monitoring and evaluation annual report’ 2017.

¹⁵² As above.

¹⁵³ As above.

¹⁵⁴ ODPP (n 97 above) 5.

Diagram 2: Case status



Source: ODPP annual report- 2018

The data above shows that few cases on FGM have reached conclusion, and also that a high number of cases are withdrawn. Deep-rooted cultures remain a significant impediment to campaigns against FGM. This has led to certain emerging trends to ensure that culture is preserved such as the circumcision of married women and lowering the age of cutting in some communities.

Also, to date, there have been few prosecutions as the Office of the Public Prosecution has little capacity to investigate and prosecute FGM cases. There are many communities that are still practising FGM in secret and cannot be easily detected because there are few or no law enforcement officers near them, especially those in the rural and underserved communities. There is also the conflict of interest among duty bearers such as the law enforcement, teachers, judges who come from FGM-practising communities and believe that the practice is sanctioned by their traditions and religion. The witness protection systems in Kenya are weak and thus deterring women and girls from seeking subsequent medical care for fear of detection or also giving testimonies in the Court.

4.3 Specific interest FGM cases

In the current Constitutional Petition No. 8 of 2017 filed at the Machakos High Court by Dr. Tatu Kamau, seeking legalisation of FGM in Kenya, NGEAC has enjoined as an interested party. The NGEAC opposes the petition indicating that FGM is ‘harmful cultural practice that violates women’s and girl’s human rights including equality, life, security of the person, dignity, freedom from torture, cruel and inhuman or degrading treatment, health including reproductive health’.¹⁵⁵ Having such an oversight government institution enjoin in this matter is very important and by extension affirms the Republic’s position on the outlawed harmful practice of FGM in the country.

The Kenyan Act fails to address those women who undergo circumcision due to societal pressure. In instances where uncircumcised women have been ostracised from the community, and agree to go through the circumcision out of desperation in order to gain acceptance and a sense of belonging, they are at risk of being arrested under the Kenyan Act. At the time of writing, an argument has been presented in Court by a Kenyan doctor, challenging the constitutionality of the 2011 FGM Act, and praying the Court to give women the right to choose whether to go through circumcision or not. According to the doctor, women should be left to make their own reproductive choices, including deciding whether to undergo FGM or not.¹⁵⁶ Such actions by the doctor demonstrate the degree of polarity of Act, as it fails to be stern on protecting uncircumcised women from stigma and discrimination. Interestingly, the doctor uses feminist critiques of bodily autonomy and agency to argue against the Act. This approach is readily applicable to voluntary sex work, but does not apply to FGM.

¹⁵⁵ National Gender & Equality Commission ‘press statement-prohibition of female genital mutilation’ (2018).

¹⁵⁶ Nita Bhalla ‘Kenyan doctor goes to court to legalize female genital mutilation’ *Reuters*, 20 January 2018.

Women and girls who have not gone through circumcision are prone to verbal abuse, and exclusion from participating in community and family activities or even shunned by the society. This is a major hindrance to the implementation of the law on FGM since most women and girls have opted to go through the cut for them to feel wanted and belong to the community. For example, in a case reported by the media, which involved three adult women who were arrested having gone through FGM in December 2017 in Nakuru County, the three women claimed that they decided to go through circumcision since they were often ridiculed and isolated by other women in the community. They added that they went through the circumcision in order to fit into the society. The three were charged with practising, aiding and abetting FGM, alongside one of the women's husband.¹⁵⁷ There is the need for the Kenyan Act to be revised to reflect protection of uncircumcised women and girls from ridicule in the society.

The issue of discrimination also affects girls who have been circumcised. In 2014, a case was brought to the Kajiado Law Court.¹⁵⁸ The petitioner was Soila Maasai Centre, which is an organisation that rescues girls who face the risk of FGM. One of the criteria for accepting girls is that they must not have gone through FGM. In April 2013, the Centre allowed girls to visit their families and when they returned, one girl was reported sick and it was discovered that she has contracted an infection as a result of undergoing FGM. Other girls were screened and it was discovered that 49 girls had undergone FGM. These girls were then expelled from the Centre, and the Children's department applied for the Court to compel the Centre to accept the girls back. The Centre filed a petition to quash the case, and on hearing the petition, the magistrate noted that the Centre had breached its charitable objects when they expelled the girls who had been circumcised. Also, the Kenyan government had failed to support the girls to continue with their studies after the expulsion. The magistrate ordered the

¹⁵⁷ Joseph Openda 'Police hold 3 women for undergoing the "cut" in Njoro, Nakuru' *Daily Nation*, 5 December 2007.

¹⁵⁸ *Agnes Wanjiru Kiraithe & another v Attorney General & 2 others* petition No. 536 of 2013.

Centre and the Children's department to work on agreeable arrangements to enable the girls to continue with their education. One of the agreed settlements was that the girls be re-integrated back to their families for them arrange to take them back to school, except for the standard eight girls, who could remain at the Centre until the complete their national examinations. This case is an example of how girls who have undergone the FGM suffer from discrimination in the society. Unfortunately, the Act has not provided for measures to address such discrimination, and perhaps this is the reason the magistrate ordered for an out of Court settlement among the parties involved. The Kenyan Act on FGM under section 25 only protect women and girls from who have not undergone FGM from ridicule and use of abusive language on them.

As a criminal offence, FGM cases should be proved beyond reasonable doubt in Court. This makes the collection of evidence and investigations crucial to ensuring the rights of women and girls are protected. The practice of FGM is often carried out in secrecy which makes it difficult for law enforcers to gather evidence. Also, accessing remote areas where the practice is carried out is often difficult for the law enforcement. It is even worse in communities where the residents act as gatekeepers and informants to the circumcisers. Despite the criminal sanctions and programme interventions such as having a helpline for people to report incidences of FGM, the practice still persists.

In 2013, LCN was sentenced to serve a three-year imprisonment when she was found guilty of being aware of the offence of FGM meted on her daughter. When she appealed, the judge noting that the prosecution's evidence failed to meet the threshold of proof beyond a reasonable doubt squashed the conviction.¹⁵⁹ Also, in the *SMG & RAM v Republic*¹⁶⁰ case, the magistrate squashed the conviction, citing a procedural error in the investigation's evidence submitted in court. The prosecutor did not submit relevant evidence to the Court, though the witness

¹⁵⁹ *L.C.N v Republic* Criminal Appeal 92 of 2013.

¹⁶⁰ *SMG & RAM v Republic* (n above 143) 4.

had given their statement. This ended up contradicting evidence in court on basic information such as the date the victim had been circumcised. These two examples of cases brought to the Kenyan Courts are somewhat lost opportunities as the legal prosecutions failed to submit ‘waterproof’ evidence to ensure the accused were not acquitted.

4.4 Drawing inspiration from Eritrea and Ugandan laws on FGM

Eritrea has a significantly high prevalence of FGM; however, their laws on FGM are stringent and more comprehensive, especially on the types of FGM. It is the author’s view that a more comprehensive model on existing types of FGM can be adopted as discussed further in chapter four of this study. Uganda has registered some successes, especially noting from the lowest prevalence of FGM that can be attributed to the laws on FGM, and the author highlight some of the best practices that have been adopted in Uganda with a view of borrowing some of these into the Kenyan law on FGM.

There are several factors that should be considered when a state chooses to use criminal sanctions to prohibit the practice of FGM. There is the need to have a clear definition of FGM and by extension outline the different types of FGM.¹⁶¹ Though the Kenyan law defines FGM and lists three types of FGM, this by extension is reductionist in nature. The Eritrean law on FGM offers a more comprehensive approach by not only defining FGM, but also in outlining the different types of FGM and in section 3, it reiterates that all forms of FGM are abolished.¹⁶²

In outlining the types of FGM, the 2011 Kenyan FGM Act makes one reservation, ‘but does not include a sexual reassignment procedure or a medical procedure

¹⁶¹UNICEF ‘Legislative reform to support the abandonment of female genital mutilation/cutting’ (2010).

¹⁶² Sec 3 of the Proclamation to Abolish Female Circumcision.

that has a genuine therapeutic purpose'.¹⁶³ However, the Act does not articulate exactly what constitutes a genuine therapeutic procedure. The Kenyan Act does not list these procedures, and the lack of clarity in the Kenyan Act can be misconstrued. The FGM law in Eritrea recognises other forms of female circumcision such as stitching with thorns, narrowing of vagina using corrosive substances and symbolic practices that leads to bleeding from the clitoris. More importantly is that the Act has provision that abolishes any other form of FGM, besides the ones the Act lists¹⁶⁴. This cushioning strategy can cover other unlikely forms of FGM such as carrying out the practice on self. However, the Kenyan Act only list three first three types of FGM thus, is not exhaustive, as it does not include type 1V as provided by the WHO.

In this section, the author compares the offences and punishment enshrined in the Kenyan and Ugandan law on FGM. The Kenyan law on FGM enumerates seven offences and a penalty upon conviction of not less than three years imprisonment or a fine of two thousand dollars or both.¹⁶⁵ The Ugandan law has a more detailed approach to the offences of FGM. First, the penalty attached to an offence depends on the severity of the practice. The Ugandan law under section 2 stipulates that any person found to have committed an offence of FGM is liable on conviction to over ten years' imprisonment.¹⁶⁶ Also, the Ugandan law on FGM introduces aggravated FGM, which occurs when the practice results in death, when the perpetrator is a parent or guardian or a person having authority, when the victim suffers disability, when the victim is infected with HIV, and when a medical professional performs the practice.¹⁶⁷ A person found to have committed aggravated FGM is liable to life imprisonment. In the Kenyan law on FGM, the only instance when a punishment of life imprisonment is invoked, is when the practice of FGM results in death. In a nutshell, the Ugandan law on

¹⁶³ Sec 2 of the 2011 FGM Act.

¹⁶⁴ Sec 2 of the Proclamation to Abolish Female Circumcision.

¹⁶⁵ Sec 29 of the 2011 FGM Act.

¹⁶⁶ Sec 2 of Prohibition of FGM Act, 2010.

¹⁶⁷ Sec 3 of Prohibition of FGM Act, 2010.

FGM takes a more comprehensive approach in the way the offences are enumerated and the subsequent punishment they attract, and Kenya can adapt this in its Act. It is also of the author's thought that there is rethought into the punitive approach to ending FGM in Kenya as discussed earlier.

While the Ugandan FGM law protects women who have not gone through the harmful practice, the Kenyan law does not. The Ugandan FGM law under section 11 protects females who have not undergone FGM. A person found discriminating or stigmatising a female who has not gone through FGM from participating in any community activity is liable on conviction to not more than five years imprisonment.¹⁶⁸ Further, the Ugandan law on FGM extends the same protection to persons whose females around them (wives, daughters or relatives) have not gone through FGM.¹⁶⁹ The Kenyan Act should be revised to protect women and girls who have not undergone FGM.

A law that seeks to end FGM through criminal sanctions should be clear on who should be held criminally liable.¹⁷⁰ The Kenyan law that prohibits the practice of FGM puts the criminal liability to any person committing the offences that the Act stipulates. In Uganda and Eritrea, the criminal liability is placed on any person regardless of the relationship the person has with the victim of FGM.¹⁷¹ Notably, the Ugandan law is more detailed and stipulates severe punishment for parents, guardians or persons with authority over the victim¹⁷² and medical practitioners performing FGM on women and girls.¹⁷³ This is very important in bringing close relatives to the victims to face the law and possibly teaching hard lessons to caregivers who turn to be perpetrators of violence against women and

¹⁶⁸ Sec 11 of Prohibition of FGM Act, Uganda.

¹⁶⁹ Sec 12 of Prohibition of FGM Act, Uganda.

¹⁷⁰ Centre for Reproductive Health Rights 'Female genital mutilation a matter of human rights: An advocate's guide to action' (2006).

¹⁷¹ Art 2 of the Proclamation to Abolish Female Circumcision; art 2 of Prohibition of FGM Act, Uganda.

¹⁷² Art 8 of Prohibition of FGM Act, Uganda.

¹⁷³ Art 3(e) of Prohibition of Act, Uganda.

girls. Most female circumcision in Kenya is carried by traditional circumcisers and traditional birth attendants, and there is the need to adopt more stringent punishment for them in a bid to be more effective in protecting women and girls from FGM. It also important to be cautious while prosecuting close relatives to children victims of FGM. Imposing criminal liability on parents or guardians might mean that the child may suffer hardships such as neglect and having no one to gather for their basic needs.¹⁷⁴ The best interest of the child principle¹⁷⁵ should always be observed even when suspending parental authority on conviction for having committed an offence of FGM.¹⁷⁶ With this principle, the Court can offer a ruling that does not cause more harm to the girls who have undergone FGM; for example, ordering the state to offer shelter services to these girls.

The increased medicalisation of FGM in some parts of Kenya is a glaring impediment to effective implementation of the law on FGM. This is also common in Uganda; however, the law on FGM is stringent and helps curb medicalised FGM. Medicalised FGM is dangerous because it legitimises the practice of FGM and devalues the work that activists are doing in ending the practice. Activists continue to put a lot of focus on creating awareness on the health consequences of FGM, and it becomes difficult when the practice is done by medical professionals; hence, justifying the practice indicating it is safe. Further, lack of monitoring and accountability mechanisms to identify medical professionals who are committing the crime and bringing them to face the justice system makes it difficult to bring them liable for their actions. Thus, there is the need for the Kenyan Act to be revised to reflect a non-tolerant 'spirit' towards medicalised FGM. It can be argued that the current petition discussed earlier to squash the

¹⁷⁴ Centre for Reproductive Health Rights (n 170 above) 22.

¹⁷⁵ The best interest of the child principle is enshrined by the UN Convention on the Rights of the Child, and says that in all aspects concerning children, the best interests of the child shall be a primary consideration.

¹⁷⁶ D Mukama 'Female genital mutilation in Tanzania: A legal appraisal of the Sexual Offences Special Provisions Act 1998' LLM thesis, University of Dar es Salaam, 2002 27.

FGM Act is as a result of a less stringent Act on the issue of medicalisation of FGM. The petitioner is a doctor and one would expect that she understands well the health consequences of FGM on women and girls, and should be at the forefront in eradicating all forms of FGM, including medicalised circumcision.

There have been concerns by various non- state actors over the slow implementation of the laws and policies on FGM in Kenya. First awareness on the content and the interpretation of the Act remains low in rural communities, where the practice of FGM is rampant. Also, the law has not been translated into local languages. Thus, as people are not aware that FGM is a crime,¹⁷⁷ reporting cases of FGM to the police in the community becomes difficult. Evidently, the language used in laws and policies remain not easy to comprehend by citizens with low literacy levels.

In Uganda, concerted efforts among stakeholders have been reported, where it started with training stakeholders on the existing law on FGM and creating monitoring teams in the villages. Evidence has indicated a greater awareness of the Prohibition of FGM Act in the Eastern parts of Uganda.¹⁷⁸ These are the areas where the local police have been hugely involved in the awareness creation. This is an intervention that can be replicated in Kenya, where the local police are involved in the awareness forums in the communities. The success rates in Kenya are even expected to be greater with the recently established community policing structures, called Nyumba Kumi (ten houses) initiative.¹⁷⁹

In contrast to the criminal justice process in Kenya, a robust community monitoring model is evident in Eritrea and to some extent in Uganda. The Eritrean government and partners are engaged in intensive mapping activities in

¹⁷⁷ The KDHS study (n 1 above) 331.

¹⁷⁸ UNFPA-UNICEF 'Joint Programme on female genital mutilation/cutting. Accelerating change'. Annual report (2011).

¹⁷⁹ Nyumba Kumi initiative is a neighborhood watch implemented since 2014 that seeks to reduce crime rates in Kenyan communities.

the communities towards the abandonment of FGM.¹⁸⁰ In Uganda, stakeholders including the parliamentarians, magistrates, lawyers, and representatives of community organisations have been trained on the provisions of Prohibition of FGM Act as well as African Union and United Nations' legal instruments. This team has been involved in tracking cases in court and gathering information to help in monitoring and deterring the practice of FGM. The police also travel to villages to raise awareness on the law prohibiting FGM.¹⁸¹

4.5 Chapter summary

From the discussion, it is evident that there is slow implementation of laws on FGM in Kenya. The mere fact that there are some Courts in FGM hotspot counties that have not filed a single case on FGM is a clear indication of the laxity in the application of anti-FGM Act and the Constitution.

Drawing inspiration from other legislation in African countries (Eritrea and Uganda) reveals that the Kenyan Act is insufficient in several aspects. These include the definition of FGM (the Kenyan Act omits type four as per the WHO definition) offences and penalties (the Kenyan Act has few offences and less stringent punishment compared to the Ugandan Act). In terms of criminal liability, the Kenyan Act provides for 'blanket' punishment for any person committing offence contrary to the provisions whereas the Ugandan Act is more comprehensive and severe with perpetrators of FGM who are closely related to the victim such as parents, guardians and even medical professionals. The Ugandan Act is also elaborate on protecting women and girls who have not been circumcised from discrimination whereas the Kenyan Act does not provide for such provisions. It is the author's view that the Kenyan anti-FGM Act be revised

¹⁸⁰ Centre for Reproductive Health Rights (n170 above).

¹⁸¹ UNFPA-UNICEF' Joint Programme on female genital mutilation/cutting. Accelerating change' (2013).

to reflect a more comprehensive and stringent law that can effectively help in ending FGM.

5 CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The foregoing discussion determines that the legal system on FGM offers a conducive environment for the protection of the rights of women and girls from FGM. The Constitution and the Prohibition of FGM Act provides for an opportunity to end FGM. The establishment of accountability and oversight measures is instrumental not only in addressing FGM, but also advancing women's rights and promoting gender equality. However, despite the fact that FGM prevalence in Kenya is declining, challenges such as slow implementation of laws on FGM, prolonged prosecutions and low reporting of FGM cases continue to impede efforts to end FGM.

The Prohibition of FGM Act has registered some success scores in the protection of rights of women and girls from FGM. The establishment of the anti-FGM board has been made is possible for effective coordination of awareness programmes and formation of strategic partnerships and alliances. This has strengthened anti-FGM campaigns as innovative interventions continue to be witnessed such as working with widely-spread youth networks in ending the harmful practice. It is the author's view that attention is directed towards emerging trends such as cross-border cutting, married women getting circumcised and medicalisation, which continue to curtail efforts of ending the practice.

This study has also found out that the Kenyan Act on FGM is insufficient in several aspects. The loopholes discussed in chapter three and four makes the Act ineffective, hampering its implementation. This Act needs to be revised to make it more comprehensive and clear so as to effectively contribute to ending FGM in Kenya.

This study concludes that the Kenyan Constitution passed in 2010 marked a new beginning for the protection of the rights of women and girls from all forms violence. Simply, the Constitution gave to life a new era of protecting the rights of women and girls from harmful practices and all forms of violence, which was also made better by the enactment of a legislature on FGM. Despite the shortcomings of the Act, the author is of the view that the Act has to a large extent contributed to the protection of the sexual and reproductive rights of women and girls from FGM. Further, as highlighted briefly in this study, Kenya has ratified regional and international human rights instruments that prohibit all forms of FGM; hence, strengthening the legal framework on ending FGM. It is only unfortunate that Kenya experience slow implementation of these laws, curtailing efforts of ending the practice.

5.2 Recommendation

The operationalisation and implementation of the Constitution in relation to FGM and the Prohibition of FGM Act requires a considerable amount of time, effort and resources. This study recommends the following.

- i. There is the need for the anti-FGM Board and other stakeholders such as UNICEF and UNFPA to explore future interventions that can support the process of abandoning the practice. By this, the Constitution and the Act can be used as an education and advocacy tool both at national and community levels. This will also contribute to the dissemination and implementation of the Act; hence, promoting awareness creation on the constitutional and legislative protection. The author's view is that the law on FGM in Kenya is 'somewhat beautiful' in writing but the challenge has been the implementation of the same law. There is the need to focus more efforts in the operationalisation and implementation of the laws on FGM in the country.

- ii. To ensure that the rights of women and girls are better protected from FGM, the federal law on FGM needs to be further strengthened. As discussed in chapter four, the spirit enshrined by the Ugandan Act is so stringent, especially to close relatives who perform FGM on women and girls, and this can be applied to the Kenyan context. Also, the Act needs to be revised to reflect all forms of FGM as stipulated by the World Health Organisation. This can also be done by clearly defining what is meant by a 'genuine therapeutic purpose' so as to ensure all forms of FGM are criminalised; hence, reducing any loopholes within the legislature. Further, the Act should also be revised to reflect a stringent punishment to medical professionals who perform or attempt to perform FGM on women and girls. This would help curb medicalised FGM in the country. Further, there is the need to rethink the punitive approach towards FGM offenders. The author recommends probationary systems to be put in place as discussed in earlier.
- iii. The Act also needs to protect women and girls who are pressured by the society into agreeing to undergo FGM. They should not be subjected to criminalisation or punishment under the law. The current law only protects uncircumcised women from abusive language, but does not protect them from being excluded from family or community events. The law should be revised to ensure that women and girls are not shunned away from participating in community events because they are not circumcised.
- iv. The laws on FGM should also be made accessible to all members of the society and be translated to local languages. There is the need to translate the law on FGM into a national language (Kiswahili) and local languages. This is because most people from FGM practising find it difficult for them to understand what is enshrined in the text in this legal document. Having the law in local languages in resisting communities will be instrumental in assisting communities to understand the provisions of the Act and subsequent abandonment.

- v. As noted in chapter four, prolonged prosecutions hinders protection of the rights of women and girls from FGM. There is the need to expedite prosecution of these cases. There is also the need to ensure political will, whereby politicians do not interfere with prosecutions by bailing out the alleged perpetrators. Witness protection mechanism should also be strengthened.
- vi. FGM in Kenya cannot be solely addressed through laws. There is the need for a multifaceted approach. The Constitutional and legislative protection is essential in providing an enabling environment for change in the FGM practising communities. By extension, legal sanctions encourage the abandonment of the practice, but the effect is minimal in communities that strongly support the practice of FGM. Thus, besides the laws, other interventions such as awareness creation in communities can be instrumental in promoting the abandonment of the practice of FGM.

It is the author's view that when these recommendations are implemented, this will have a potential to shift Kenya's approach to FGM eradication. Kenya will be an FGM zero-tolerant country. These recommendations are in-line with the current anti-FGM campaigns that seeks to end FGM in one generation. It is the author's desire that these recommendations are put into consideration, so as to not only protect women and girls from FGM, but also end the harmful practice.

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