Fighting Domestic Violence - Kenya

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# 1. Legal provisions

## 1.1 What are the relevant statutes and codes?

There are various sources of law in Kenya, with the Constitution of Kenya 2010 ("**Constitution**") being the supreme law of the land. The Constitution is underpinned by other legislative measures, namely acts of the Parliament of Kenya and, in certain instances, customary laws. As referred to below, case law may be used to interpret the underlying legislative provisions.[1]

Kenya has ratified various international instruments that seek to protect and support the empowerment of women. It is understood that international conventions that are ratified by Kenya do not automatically become part of Kenyan law that can be relied upon by citizens. A further step is required by the legislature to transpose the international norms into domestic law.

The principal sources are as follows.

**The Constitution**

The supremacy of the Constitution means that certain harmful cultural practices are unlawful, e.g., female genital mutilation.

All citizens have the right to life, liberty, security of the person and their protection from the law.

Article 28 affords all citizens the right to dignity.

Article 29 affords all citizens the right to certain freedoms, including the right not to be treated in a cruel, degrading or inhuman manner.

**Acts of the Parliament of Kenya**

Sexual Offenses Act 2006 ("**Sexual Offenses Act**"):[2] This act seeks to afford protection against sexual violence and contains a range of offenses, but it is generally considered to provide inadequate protection against sexual violence, which is now supplemented by the Protection Against Domestic Violence Act 2015.

Protection Against Domestic Violence Act 2015 ("**Domestic Violence Act**"):[3] For a number of years, it was well documented that Kenya did not have a comprehensive legislative measure addressing domestic violence. Passing the Domestic Violence Act was intended to change this and it has introduced additional protections for women against violence in intimate relationships. The definition of violence in the Domestic Violence Act is quite extensive and it includes marital sexual abuse, emotional abuse and harassment. This is a welcome development.

Penal Code of Kenya ("**Penal Code**"): The Penal Code provides the general criminal law framework in Kenya dealing with offenses (misdemeanors or felonies) and prescribes the penalties for them. The various offenses under the Penal Code that impact women can be divided into two main categories: (i) sexual offenses; and (ii) offenses against the person. Sexual offenses are addressed more directly in the Sexual Offenses Act.

## 1.2 What is the controlling case law?

The legal system in Kenya is based upon English common law. The supreme law is the Constitution, and any other law that is inconsistent with the Constitution is invalid to the extent of the inconsistency. Case law may be used to interpret legislation. The highest court in Kenya is the Supreme Court, the decisions of which are binding on the Court of Appeal of Kenya, the High Court of Kenya, the magistrates' courts, and specialized courts and tribunals.

With regard to domestic violence, it appears that there are no particular "controlling" cases. However, several cases provide examples of how the courts interpret the underlying legislative framework. These cases (examples of which are summarized below) demonstrate the court's inherent discretion in applying the laws:

*Republic Prosecutor v. Johana Munyau Mweni*:[4] In this case, the defendant was found guilty of murdering his wife, contrary to Section 204 of the Penal Code, which provides for a mandatory death sentence. However, the court considered the case of *Francis Karioko Muruatetu & Another V. Republic*,[5] which provided that Section 204 of the Penal Code is inconsistent and invalid to the extent that it provides for a mandatory death sentence, notwithstanding that the death sentence is applicable as a discretionary maximum punishment.

In *Republic Prosecutor v. Johana Munyau Mweni*: The court concluded that, in light of the defendant's age (48 years old) and mitigation (he had never met his father, his mother had committed suicide when he was young and he was reported as having been a pastor in his cell), he should be sentenced to 35 years in jail.

*Geoffrey Yegon v. Republic*:[6] The case concerned an appeal from the judgment, conviction and sentencing in the chief magistrate's court of five years of imprisonment in respect of grievous harm contrary to Section 234 of the Penal Code. The appellant, who had repeatedly hit the victim on the head and inflicted a fracture on her finger, urged the appeal court to reconsider a noncustodial sentence, stating that it was his first offense, that he had family responsibilities and that he was remorseful. While appeals can generally grant the court wide discretion, in this case, the court dismissed the appeal stating, "to discourage the potential offenders a custodial sentence is deserved."

*FK v. CMM*:[7] This case concerned an appeal by a husband whose wife had lodged before the court a motion under Sections 8, 13 and 24 of the Domestic Violence Act. The wife (now the respondent) had been granted an interim order of exclusive possession against the appellant (her husband) to be enforced by the police. The appellant appealed on the basis that the grounds against him were not proven and, therefore, the respondent should not be entitled to exclusive possession of the land. The court allowed the appeal, noting that the orders, though interim, were final in nature and that no prejudice would have been suffered had the court waited for a short period to hear the appellant before granting the orders.

## 1.3 What are the specific parts of the court system that address domestic violence?

Under the Domestic Violence Act, jurisdiction for proceedings is vested in the resident magistrates' courts.

## 1.4 What are potential causes of action?

N/A

# 2. Introduction: framework guiding domestic violence law

## 2.1 Are there civil and criminal legal remedies for domestic violence victims?

Under the legislative framework, several remedies are available, which depend upon the precise cause of action.

While remedies are available under the legislative framework, the courts have demonstrated greater leniency than the statutory remedies when the respondents appeal domestic violence cases. The following examples illustrate this leniency.

*Hamisi Karisa Rua v. Republic*:[8] In this appeal, a man charged with unlawfully assaulting and causing grievous bodily harm to his wife contrary to Section 234 of the Penal Code was appealing his initial sentence. On appeal, the court considered the sentencing principles set out in *D M v. Republic*,[9] which are as follows:

to ensure that the offender is adequately punished

to prevent crime by deterring the offender and other persons from committing similar offenses

to protect the community from the offender

to promote the rehabilitation of the offender

to make the offender accountable for their actions

to denounce the conduct of the offender

to recognize the harm done to the victim of the crime and the community

Based on the above, the court allowed the appeal, reducing the appellant's sentence from 10 to seven years of imprisonment.

Another example of the impact of an appeal on remedies for domestic violence victims is Section 30 of the Domestic Violence Act, which allows for an appeal against an order for exclusive possession granted pursuant to Section 19 of the Domestic Violence Act. In *FK v. CMM*,[10] the respondent (the appellant's wife) claimed that she had to leave her matrimonial home due to domestic violence and, in the initial judgment, she had been granted an order for exclusive occupation of the matrimonial home. On appeal, the appellant claimed that the order for exclusive occupation did not specify the premises that he was to give vacant occupation of and, therefore, the order amounted to summary eviction from his residence. The court noted the cardinal principle of pleadings that a court order must be specific, clear in its terms and unequivocal, and it was satisfied that the appellant had demonstrated that the orders granted would cause him to suffer substantial loss. In light of these factors, the court allowed the appeal and granted a stay on the order for exclusive possession.

## 2.2 Is domestic violence identified in national law as a human right (noting that at a European level protection from domestic violence has not been explicitly identified as a human right but is indirectly captured by the other provisions)?

Yes. The Constitution provides certain protections for women against violence. In addition to the provisions mentioned in Section 1, examples include the following:

Article 21 imposes a duty on state organs and public officers to address the needs of vulnerable groups within society, including women.

Article 29 provides every person with the right to freedom and security of the person, which includes a right to not be subjected to any form of violence, including from private sources.

Article 48 imposes a duty on the Kenyan state to ensure access to justice for all persons.

Article 50 provides a right to a fair hearing.

## 2.3 Has your country signed and ratified the conventions?

Kenya ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("**Maputo Protocol**") in 2010 and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women ("**1979 Convention**") in 1984.

## 2.4 If it has ratified the Maputo Protocol, how has it been implemented into national law (African Union member states only)?

Kenya ratified the Maputo Protocol in 2010. The various articles of the Maputo Protocol that seek to protect women from physical violence and harm are to some degree embodied in Kenyan domestic law, albeit not in a uniform way.

## 2.5 If it has ratified the 1979 Convention (CEDAW), how has the recommendations part of General Comment No. 35 been implemented into national law?

Kenya ratified the 1979 Convention on 9 March 1984. Most recently in connection with this convention, Kenya submitted a report in 2017 on the implementation of the 1979 Convention in Kenya. The report detailed a number of positive measures that had been carried out by the government of Kenya to implement the Committee on the Elimination of Discrimination Against Women's recommendations. The measures included the enactment of the following:

National Gender and Equality Commission Act 2011

Matrimonial Property Act 2013

Domestic Violence Act

Land Act 2012

Counter-Trafficking Act No. 8 2010

Prohibition of Female Genital Mutilation Act 2011

Amendment to the Sexual Offenses Act

Adoption of National Human Rights Act in 2012

The most significant step was the enactment of the Domestic Violence Act. The provisions of this act address several of the issues adopted in the Committee on the Elimination of Discrimination Against Women's General Recommendation No. 35. For example, the Domestic Violence Act expands the understanding of violence to include violations of sexual rights and by including sexual abuse in the meaning of violence for the purposes of the domestic violence provisions.[11]

## 2.6 If the 1979 Convention has not been ratified or signed, is it envisaged that your country will do so?

N/A

# 3. Similarities and differences in terminology

## 3.1 Domestic violence

This is violence against a person, or the threat of violence or imminent danger to that person, by any other person with whom that person is or has been in a domestic relationship.[12] "Violence" includes a large number of behaviors, including sexual, physical and emotional abuse, damage to property, harassment and stalking.[13]

A person is deemed to be in a domestic relationship with another person if, for example, the person is or was previously married to that person, is living in the same household with that person or is a family member of that person.[14]

## 3.2 Stalking

This includes pursuing or accosting a person.[15]

## 3.3 Harassment

This means engaging in a pattern of conduct that induces fear of imminent harm, including the following:

watching or loitering outside or near the building or place where the applicant resides, works, carries on business, studies or happens to be

repeated contact or attempts to contact the applicant by telephone, electronic means, post or otherwise, whether or not a conversation ensues

sending, delivering or causing the delivery of offensive or abusive documents or offensive objects to the applicant[16]

## 3.4 Victim

This means a victim of domestic violence.[17] The Domestic Violence Act also defines an "applicant" as a person who applies for a protection order under the act or a person on whose behalf the application is made.

## 3.5 Abuser

This term is not specifically defined in the legislation, but a "respondent" is defined as the person against whom an application for a protection order is made under the Domestic Violence Act. It includes a person against whom an order under that act is made.

## 3.6 Civil protection order

This is an order made by the court pending the full hearing of a matter and making a final order.[18]

## 3.7 Causes of action

N/A

## 3.8 Marital rape

This term is not specifically defined in the legislation, but sexual abuse is included within the meaning of violence for the purposes of the domestic violence provisions.[19] "Sexual abuse" has the meaning given to it in the Sexual Offenses Act and it can be assumed that the phrase refers to any of the offenses prescribed in that act, including rape.

## 3.9 Are there any other important domestic violence terms defined in relevant domestic violence statutes and codes?

**Economic abuse**

This includes the following:

the unreasonable deprivation of economic or financial resources to which an applicant is entitled or which the application requires, including household necessities, medical expenses, school fees, rent, mortgage expenses or other similar expenses

the denial to the applicant of the right to seek employment or engage in any income-generating activity[20]

**Emotional, verbal or psychological abuse**

This means a pattern of degrading or humiliating conduct toward the applicant, including but not limited to the following:

repeated insults, ridicule or name-calling

repeated threats to cause emotional pain[21]

**Intimidation**

This includes uttering or conveying a threat, or causing an applicant to receive a threat that includes a fear of imminent harm to the applicant.[22]

**Physical abuse**

This includes any act or threatened act of physical violence toward the applicant.[23]

**Protection order**

This means the final order made by the court in a matter concerning domestic violence.[24]

**Virginity testing**

This means the practice and process or examination of a female's genitals for tears of the hymen.[25]

# 4. Protection for domestic violence victims and relief granted

## 4.1 Civil protection orders

## 4.1.1 Are there civil protection orders available to victims of domestic abuse?

Protection orders are available under the Domestic Violence Act. They give the court the power to make a protection order if it is satisfied that the respondent is using or has used domestic violence against the applicant or a child of the applicant's family, or both, and that making the order is necessary for protecting the applicant or a child of the applicant's family, or both.[26]

## 4.1.2 Who can petition for civil protection orders?

The following people are listed as eligible to apply for a protection order:[27]

a person who is in a domestic relationship with another person[28]

a representative on behalf of a child,[29] for example, a parent, guardian or other relative, a police or probation officer, or any other person with the leave of the court[30]

a representative on behalf of an eligible person who lacks the capacity to apply on their own behalf (and is not a child)[31]

An applicant's representative may make an application with or without the applicant's consent, as long as they have the leave of the court.[32] An applicant's representative includes (but is not limited to) a police officer, social welfare officer, employer of the applicant, guardian of a child, a relative, neighbor or fellow employee of the applicant, a medical practitioner, a nongovernmental organization concerned with the welfare of victims of domestic violence, a religious leader, or any other person or class of persons as may be specified by the law.[33]

## 4.1.3 Are there temporary custody of a child or child support orders?

Where an order has been made, the court may award temporary custody of any child or dependent of the respondent to any person or institution, and regulate access.[34]

## 4.1.4 Is there a provision to order the abuser to move out or stay away from places that the victims frequent?

Every protection order must contain a provision that at any time other than when the protected person and the respondent are living in the same dwelling house (which can only happen with the express consent of the protected person), the respondent is not permitted to do the following, among other things:

watch, loiter near, or prevent or hinder access to or from the protected person's place of residence or another place they visit often

stalk the protected person, or stop or accost them anywhere

trespass anywhere the protected person is present

make any other contact with the protected person except with very limited exceptions[35]

## 4.1.5 Are there any other types of emergency, preventive and civil protection orders?

According to the Sexual Offenses Act, where any male person is convicted of incest or attempted incest, the court has the power to issue any order contained in the Children's Act 2012 ("**Children's Act**"), as well as to divest the offender of any authority they have over the victim. This includes removing any guardianship rights they have and appointing a replacement guardian of the victim while they remain a minor.

The following are particularly relevant orders under the Children's Act:

An exclusion order:[36] This requires a person who has used or threatened to use violence against a child to leave the home where the child lives entirely, and/or to refrain from entering the home or a specified part of the home where the child lives. It also prevents others from taking the child to visit the offender.

A wardship order:[37] This requires that a child be placed under the custody and protection of the court.

A production order:[38] This requires anyone who is harboring, concealing or otherwise unlawfully detaining a child, or who intends to remove them from Kenya or from the limits of the court's jurisdiction, to disclose any information they have regarding the child's whereabouts and/or to produce the child before the court.

Other orders include the following:

A supervision order: This places the child under the supervision of a children's officer or authorized officer while they remain in the possession and care of the person with which they are residing.[39]

A care order: This entrusts the care, control and possession of the child to someone who is not their parent, guardian or custodian, or to a local authority or institution appointed by the court.[40]

An interim supervision order[41] or interim care order[42] also exists.

## 4.1.6 Can these orders be requested by direct or indirect victims or legal representatives in children's cases?

In the case of orders made under Section 114 of the Children's Act, the child in question, their parent, guardian or custodian, their relative, the director of Children's Services or an authorized office may apply for any of these.[43] The Children's Act is less clear on who may apply for orders outside of the options outlined above.

## 4.1.7 Are there different types of civil protection orders, e.g., for a short- term period?

Interim protection orders may be made upon an application without notice outside of ordinary court opening hours. They can remain in force until they are replaced by a full protection order, or until they are varied or revoked by the court.[44]

## 4.1.8 Are ex parte orders permitted without the aggressor being present?

The list of people who may be present during the proceedings includes the parties and their advocates, but the court retains the power to hear proceedings in private or to exclude any person from the court.[45]

## 4.1.9 Do emergency orders also extend protection for abuse and intimidation to family members of the victim?

No.

## 4.1.10 How long do the orders last?

Protection orders remain in force for as long as the court deems necessary, depending on the circumstances.[46]

## 4.1.11 Please provide any data or hyperlinks to government or NGO websites that include information on how often civil protection orders are issued, and any relevant demographics information, e.g., police reports, convictions, etc.

No information is available.

## 4.2 Steps for receiving a protective order

## 4.2.1 What documentation is needed to obtain a civil protection order?

The documentation required includes the following:[47]

the application itself, to be lodged with the court

where directed by the court, the affidavit of anyone who can speak to matters that are relevant to the application

where directed by the court, the results of any investigations conducted by the police, a social worker, a probation officer or another authority

## 4.2.2 Does the victim need to attend a hearing?

It is unclear whether the victim is obliged to attend a hearing against their will. It would appear not because the court has the power to hear proceedings in private or to exclude people from the court.

## 4.2.3 Can you request remedies?

No.

## 4.2.4 Are there time limits?

There appears to be no time limit on when an order can be applied for. However, if the respondent wishes to appeal the protection order or any term contained within the order, they must do so within 30 days of the order being made.[48]

## 4.2.5 Are there different rules in emergencies?

A court may make an interim order upon an application without notice if it is satisfied that any delay might entail a risk of harm or undue hardship to the applicant or a child of the applicant's family.[49] In making this decision, it will consider (among other matters) the perception of the applicant or child, the nature and seriousness of the respondent's behavior, and the effects of that behavior on the applicant or child.[50]

## 4.3 Judicial discretion

## 4.3.1 What discretion does a judge have in granting a civil protection order or other protective orders?

A court may make a protection order if it is satisfied of the following:

that the respondent is using or has used domestic violence against the applicant or a child of the applicant's family, or both

that making the order is necessary to protect the applicant or a child of the applicant's family, or both[51]

The court may also consider whether the behavior forms part of a pattern of behavior in respect of which the applicant or a child of the applicant's family, or both, need protection.[52]

The court may consider the following additional matters:

the perception of the applicant or a child of the applicant's family, or both, of the nature and seriousness of the behavior in respect of which the application is made

the effect of that behavior on the applicant or a child of the applicant's family, or both[53]

## 4.3.2 Are there age limits on who can obtain orders?

There are no age limits on who can obtain orders in the legislation.

## 4.4 Restitution and remedies available to victims

## 4.4.1 Can victims obtain reimbursement for costs and restitution paid?

Yes, applicants can ask for costs and restitution from respondents. Where a victim of domestic violence suffers personal injuries, damage to property or financial loss as a result of the domestic violence, the court hearing a claim for compensation may award compensation in respect of the injury, damage or loss as it deems just and reasonable.[54]

A court hearing a claim for compensation may consider the following factors:[55]

the pain and suffering of the victim, and the nature and extent of the physical or mental injury suffered

the cost of medical treatment for the injuries

any loss of earnings arising from the injuries

the value of the property taken or destroyed or damaged

necessary and reasonable expenses incurred by the victim when the victim is compelled to separate from the respondent, including lodging, transport and moving expenses

the financial position of the victim and the respondent

the relationship between the parties and the reasonableness of requiring the respondent to make any payments

the possibility of other proceedings being taken between the parties under the laws relating to the financial provision for spouses and dependents

In addition, where an exclusion order has been made (i.e., an order granting the applicant exclusive occupation of the shared residence by excluding the respondent), the court may direct the respondent to pay all expenses or emergency monetary relief in respect of the applicant's needs and those of any child or dependent of the respondent.[56]

## 4.4.2 Can they recover wages and profits lost?

Yes, a court hearing a claim for compensation may consider any loss of earnings arising from domestic violence.[57]

## 4.4.3 Is a separate civil process required?

This is not clear from the legislation.

# 5. Prosecutorial considerations

## 5.1 Police procedures

## 5.1.1 When do the police get involved in domestic disputes or legal actions?

The Domestic Violence Act was enacted into law in 2015.[58] As part of the reforms, it is intended that all police officers should be trained to deal with family-related matters, including domestic violence, and complainants should be able to report to the police without fear.[59] However, in practice, it is not always straightforward to involve the police. In particular, during the COVID-19 pandemic, restrictions have made it harder for victims to report abuse.[60]

Once a victim has alerted the police that they have been a victim of domestic violence, the police have a duty to advise the victim of their rights (including providing access to shelter, medical assistance, etc.) and how they can apply for relief or lodge a criminal complaint.[61]

**How do the police get involved?**

**First step**:The victim reports to the police station and they are then referred to a medical facility for examination. Here the victim is examined and a medical report or, in the case of rape, a post-rape care (PRC) form is created.

**Second** **step**: There are two routes, as follows:

The medical report or the PRC form is sent to the police station to initiate the investigation by issuing a P3 form.

The victim reports at a medical facility for medical treatment. They are then referred for re-examination at a police station to report the matter and to be issued with a P3 form.

**Third step**:Once the P3 form is issued, the victim must visit a government-designated medical facility for re-examination and for the P3 form to be filled out. This can take days or weeks because the victim may have to wait for a specific day when the medical practitioner is available.

**Fourth step**:When the P3 form is completed, it is returned to the police station. The P3 form serves as an exhibit in the sexual/physical assault allegation.

**Fifth step**:All forensic evidence is then sent to the Government Chemist Department's laboratory in the Forensic Biology Unit.

**Sixth step**:Suspects may be examined or they may undergo reference sample collection at the police station. It is less common for biological reference samples to be collected from victims.

**Seventh step**:All the information collected is placed in the police file until it is submitted to the court for prosecution.[62]The attorney general decides whether a police investigation should be discontinued.[63]

Critics of the existing legal procedures have expressed concern that these procedures are barriers for victims because, if a victim goes to a health center, a clinical officer who cannot legally give evidence in court will examine her. Only a medical officer of health, who must be a doctor, can sign the P3 and PRC forms in which evidence is generated. This is a challenge for many rural health facilities and those in poor neighborhoods, which are often run by clinical officers who are not qualified doctors and who are therefore not able to give evidence.[64]

## 5.1.2 What circumstances effect law firm involvement?

In the Domestic Violence Act, various types of people can represent the victim as the "applicant's representative." However, a lawyer or law firm is not included on this list.

There is no automatic right to legal representation. Therefore, if you require legal representation, you should consider seeking legal aid or assistance. The Legal Aid Act 2016 established the National Legal Aid Service.[65]

## 5.2 Standard of proof

## 5.2.1 Is proof required by any legal means?

In Kenya,[66] generally, the burden of proof is borne by the plaintiff or claimant (the victim bringing a claim) in civil cases and by the prosecution (those pressing charges on behalf of the state) in criminal cases.[67]

Normally, evidence would need to be corroborated in criminal cases; however, in criminal cases involving a sexual offense, evidence does not need to be corroborated as long as the court is satisfied that the alleged victim is telling the truth.[68]

## 5.2.2 Are there any requirements regarding evidence and documents?

In any proceedings brought under the Domestic Violence Act, the court may receive any evidence it thinks fit to be able to determine the case.[69]

## 5.2.3 Is proof "beyond a reasonable doubt" required?

Under the Sexual Offenses Act, the complainant is considered to have consented to the act unless sufficient evidence is adduced to raise an issue regarding whether she consented. [70]

## 5.2.4 Is the standard of proof different for ex parte orders?

An *ex parte* order takes place where one party brings legal proceedings in the absence of the other party, i.e., the accused is not notified and is not present at the hearing.

There is nothing in the Domestic Violence Act, the Evidence Act 2012 ("**Evidence Act**") or the Sexual Offenses Act that requires a different standard of proof for *ex parte* orders; therefore, the standard of proof remains (beyond a reasonable doubt).

## 5.3 Affirmative defenses

## 5.3.1 Are affirmative defenses available to the accused?

Yes. Under the Sexual Offenses Act, several affirmative defenses are available. For example, the following are defenses to the offense of defilement (penetration of a child):

if it is proved that the child victim deceived the accused person into believing that they were over 18 years old at the time of the offense

if the accused reasonably believed that the child was over 18 years old[71]

Similarly, the same defense is available against the charge of committing an indecent act with a child.

## 5.3.2 Is willful intent required?

Yes. Under the Sexual Offenses Act, to commit an offense, the accused must have committed the act intentionally.

## 5.3.3 Are false accusations punishable for the victim?

False accusations are punishable. Under the Sexual Offenses Act, it is an offense to make false allegations against another person that they have committed an offense under that act. In the case of a false allegation, the accuser can be punished in the same way as the punishment for the offense complained of.[72]

However, in the Domestic Violence Act, witnesses (any person who reasonably suspects that an offense of domestic violence is being or has been committed) that provide information to the police or any other person of authority cannot be disciplined unless they provided that information falsely or maliciously and with the intent to injure the other person.[73]

## 5.3.4 How is consent discussed in the law?

In the Sexual Offenses Act, a person is deemed to give consent if they agree by choice and have the freedom and capacity to make that choice.[74]

## 5.3.5 Is self-defense or insanity a defense?

Self-defense is not a defense for domestic violence or sexual assault crimes.

Insanity is a defense under the Penal Code. An accused person is not criminally responsible for an act or omission if, at the time of committing the act, it is through a "disease of the mind" and the person is incapable of understanding what they are doing.[75] However, a "disease of the mind" will not be a defense if the illness does not cause the accused to be incapable of understanding what they are doing or of knowing that they ought not to do the act. In other words, the insanity must cause the inability to understand specifically in relation to the crime to be a defense.

## 5.4 Witness status

## 5.4.1 What is a witness's duty to testify honestly and completely?

There is nothing explicit under Kenyan domestic violence legislation that requires a standard of honesty. However, false accusations are punishable for the victim.

## 5.4.2 Who may abstain from testifying in certain situations?

Under the Evidence Act, a witness will not be excused from answering any questions on the ground that the answer to these questions will incriminate that witness or expose the witness to a penalty or forfeiture of any kind. No answer that a witness is compelled to give will subject them to any arrest or persecution or be proved against them in any criminal proceedings, except a prosecution for giving false evidence by the answer.[76]

Under the Domestic Violence Act, no witness will be required to identify or provide information that might lead to the identification of a person who assisted or disclosed information about domestic violence. Therefore, a witness can abstain from testifying if it will lead to the identification of another witness.[77]

## 5.4.3 What potential "excuses" can a witness raise to refuse to testify in a domestic violence action?

A witness can refuse to testify if it will lead to the identification of another witness.[78] As explained below, vulnerable witnesses can refuse to testify. A vulnerable witness can be the victim, a child or a person with a mental illness.[79]

In addition, a witness can rely on two key "excuses," as follows:

**Communication with a spouse**: A person cannot be compelled to disclose communication made to them during a marriage by the other spouse. To disclose any communication during a marriage, the person needs to obtain permission from their spouse.[80]

**Communication with an advocate**: A person cannot be compelled to disclose any confidential communication that has taken place between them and their advocate unless they offer themselves as a witness, in which case they may be compelled to disclose the communication as the court may think necessary to explain any evidence that they have given, but no others.[81]

## 5.4.4 What is the impact of domestic violence on witnesses who are children?

Under the Sexual Offenses Act, a court dealing with criminal proceedings involving allegations of a sexual offense can declare a witness a vulnerable witness if the witness is the accused, a child or a person with a mental illness.

If a child witness is declared a vulnerable witness, the court will direct that the following protect the child:

allowing the child to give evidence under the protective cover of a witness protection box

directing that the witness give evidence through an intermediary

directing that the proceedings may not take place in open court

prohibiting the publication of the identity of the complainant or the complainant's family, including any information that may lead to their identity

any other measure that the court deems just and appropriate[82]

## 5.4.5 Can children be called upon to testify?

Yes, children can be called to testify.[83]

## 5.4.6 What is the effect of a child victim on the charges against the offender?

If a child is the victim of an indecent act, the person that commits the indecent act is guilty of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than 10 years.[84]

A person who commits an act that causes the penetration of a child is guilty of an offense termed defilement.[85] The sentence term depends on the age of the child, as set out below:

**11 years old or younger**

Imprisonment for life

**Between 12 and 15 years old**

Imprisonment for at least 20 years

**Between 16 and 18 years old**

Imprisonment for at least 15 years

However, there is a defense to the charge of defilement if it is proved that the child deceived the accused into thinking that they were over 18 years old or if the accused reasonably believed that the child was over 18 years old.[86] When determining if the accused held a reasonable belief regarding the victim's age, the court will consider all circumstances, including any steps the accused person took to ascertain the age of the victim.[87]

If a child is a witness to a rape or indecent act, the accused is guilty of an offense and is liable to imprisonment for a term not less than 10 years.[88]

## 5.5 Penalties and sentencing; penalty enhancements

## 5.5.1 What are the penalties and sentencing laws for first-time domestic violence offenses?

The Domestic Violence Act states the following:

Where any offence, other than one referred to in this Act, is committed by a respondent upon an applicant during or in furtherance of the commission of any act of domestic violence, the court convicting the respondent thereof shall have regard to such circumstances as aggravating the offence committed, when assessing the sentence to be imposed.[89]

There is no further information available in the Domestic Violence Act regarding the nature and scope of penalties applicable for first-time domestic violence offenses.

## 5.5.2 Are there criminal penalties?

Yes, see above and below.

## 5.5.3 What is the result of a violation of an existing order for protection?

Under the Domestic Violence Act, a respondent who has been served with a copy of a protection order and who contravenes the order in any respect commits an offense and is liable to a fine not exceeding KES 100,000 or to imprisonment for a period not exceeding 12 months, or to both.[90]

In addition, if a police officer believes on reasonable grounds that any person has committed an offense under this same act, the police officer may arrest and detain the person without a warrant. In doing so, the police officer should consider the following:

the risk to the safety of the protected person or property

the seriousness of the act that constitutes a breach

the time that has lapsed since the alleged breach was committed[91]

## 5.5.4 What fines and other penalties are imposed besides incarceration and liberty restriction?

See above in respect of fines and penalties under the Domestic Violence Act.

Furthermore, under the Domestic Violence Act, where a victim of domestic violence suffers personal injury, damage to property or financial loss as a result of the domestic violence, the court hearing a claim for compensation may award compensation in respect of the injury, damage or loss as it deems just and reasonable, taking into account the following factors, among others:

the pain and suffering of the victim

the cost of medical treatment

any loss of earnings[92]

## 5.6 Post-release restrictions

## 5.6.1 Does the law notify the victim of the offender's release from custody?

There is no clear provision under Kenyan domestic violence legislation.

However, where a convicted and dangerous sexual offender has been released after serving part of a term of imprisonment imposed by the court, the court will order that the prisons department must ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.[93] Under this order, an offender may be required to refrain from visiting a specified location; refrain from seeking employment of a specified nature; and subject themselves to a specified form of monitoring.[94] A long-term supervision order made by a court will be reviewed by that court within three years from the date on which the order was made or within a shorter period as the court may direct upon a referral by the commissioner of prisons of an order to that court for review.[95] The court will explain to the victim, including the next of kin of a deceased victim, that they have the right to be present at the review proceedings and may make representations.[96]

# 6. Special issues

## 6.1 Battered woman syndrome

## 6.1.1 Can lawyers present evidence of battered woman syndrome or other domestic abuse as an affirmative defense to crimes that the battered woman has committed? (Note: Battered Woman Syndrome is accepted by courts in certain jurisdictions to show that battered women can use force to defend themselves and sometimes kill their abusers due to abusive and life-threatening situations.)

There are no provisions under Kenyan domestic violence legislation.

## 6.2 Domestic violence in the workplace

## 6.2.1 Can courts issue orders to protect employees suffering from domestic violence?

There are no provisions under Kenyan domestic violence legislation.

## 6.2.2 Can departure be deemed "for good cause" if related to domestic violence?

There are no provisions under Kenyan domestic violence legislation.

## 6.2.3 Can family members of domestic violence victims take reasonable leave to help the victim seek treatment or obtain help and services?

There are no provisions under Kenyan domestic violence legislation.

## 6.3 Immigration

## 6.3.1 Does the law include provisions that are intended to prevent abusers who are citizens or permanent residents from using immigration laws to perpetrate domestic violence against their spouse?

There are no provisions under Kenyan domestic violence legislation.

## 6.3.2 If battered immigrants cooperate with law enforcement in domestic violence, can they obtain immigration remedies?

There are no provisions under Kenyan domestic violence legislation.

## 6.3.3 Does domestic violence law discuss asylum accessibility?

There are no provisions under Kenyan domestic violence legislation.

## 6.4 Armed forces

## 6.4.1 Can a victim seek a military protective order if the abuser is in active military?

There are no specific military protective orders in the Domestic Violence Act. Instead, victims will need to rely on the general protection orders described in the response to Section 4.1, to the extent that they can.

## 6.5 Child custody and child/spousal support

## 6.5.1 Do judges follow special rules to determine custody or visitation of children in domestic violence cases?

Custody or visitation rights in domestic violence cases will be determined by the terms of the relevant protection order granted by a court, as follows:

A person who is in a domestic relationship with a child (e.g., living with that child, a family member of some other close relationship) may apply to the court for a protection order in respect of that child.[97]

A child may apply to the court for a protection order via a friend, guardian, parent or welfare officer.[98]

A court[99] will not decline to make a protection order merely because there exists proceedings relating to the custody of or access to a minor.[100]

We were unable to locate any special rules on custody and visitation outside the context of the Domestic Violence Act.

## 6.5.2 Can the judge consider the testimonies of the other spouse and the children when determining custody?

Yes, for protection orders. When making a protection order, the court will consider the following:[101]

the perception of the applicant or a child of the applicant's family, or both, of the nature and seriousness of the behavior in respect of which the application is made

the effect of that behavior on the applicant or a child of the applicant's family, or both

We were unable to locate any special rules on testimonies for custody outside the context of the Domestic Violence Act.

## 6.6 Housing rights of domestic violence victims

## 6.6.1 Does the law include any barriers to prevent landlords from forcing a tenant to move out because they are victims of domestic violence?

We were unable to find specific rules on evictions by landlords. We searched in the Domestic Violence Act.

However, where a victim of domestic violence suffers financial loss as a result of the domestic violence, the court may award compensation for the loss as it deems just and reasonable.[102] This may potentially compensate a victim tenant who is forced to move out of a residence as a result of domestic violence.

When determining compensation, courts will consider a range of factors, including the following:

necessary and reasonable expenses incurred by or on behalf of the victim, such as the following:

lodging expenses to be contributed to a safe place or shelter

transport and moving expenses

the expenses required to set up a separate household, which may include housing loan payments or rental payments, in respect of the shared residence or alternative residence, as the case may be, for the period that the court considers just and reasonably necessary

the financial position of the victim, as well as that of the abuser

the relationship that exists between the parties and the reasonableness of requiring the abuser to make or contribute toward these payments

the possibility of other proceedings being taken between the parties and the matter being more appropriately dealt with under the relevant laws relating to the financial provision of spouses or former spouses and other dependents

## 6.6.2 Does the law allow a tenant to terminate his/her lease early due to domestic violence?

We were unable to find specific rules on the early termination of a lease by a tenant who is a victim of domestic violence.

However, please see the above on compensation payments by abusers. This may still help compensate victims if they do have to terminate a lease early.

## 6.6.3 Can an order exclude the abuser from the residence?

Yes. Every protection order must set out certain conditions (the "noncontact condition"), which means that an abuser must not (without the victim's express consent) enter or remain on any land or building occupied by the protected person. This includes a prohibition on an abuser remaining in the same residence as a victim, unless the victim provides their express and voluntary consent to this.[103]

Courts may also include restrictions in protection orders that grant any protected person the right of exclusive occupation of a shared residence or a specified part of a residence. This is achieved by the protection order excluding the abuser from the shared residence or the specified part of the residence:

This may apply regardless of whether the shared residence is solely owned or leased by the abuser, or jointly owned or leased by the abuser and victim.[104]

However, a court will not make an order excluding the abuser from the whole of a shared residence if the abuser solely owns, leases or jointly owns the residence, unless the court is satisfied that there is no other way to secure the personal safety of any protected person for the time being. Where an order is made (and a shared residence is jointly owned or leased by the victim and the abuser), this order may be revoked if one of the following occurs:

a suitable alternative residence is found for the protected person or persons

if the order is no longer necessary to secure the personal safety of the protected person[105]

## 6.6.4 Can abusers be forbidden by court orders to alienate or mortgage the property in his/her name if it is the family domicile?

Yes, if a protection order expressly addresses this.

Protection orders may direct the abuser to do or omit to do any act or thing that the court considers necessary or desirable for the well-being of the applicant or a dependent of the applicant. We anticipate that this could potentially include prohibiting an abuser from alienating or mortgaging a property in their name.[106] However, we were unable to locate any examples in practice of these terms being agreed to by a court in a protection order.

Therefore, if a victim is concerned about alienation or mortgaging, this should be raised expressly with the court so that it can address this as part of the terms of any potential protection order.

# 7. Endnotes

[1]   [Situation of Violence Against Women and Children in Kenya: Implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.](https://www.omct.org/files/2005/09/3070/alt_report_on_violence_against_women_children_kenya.pdf)

[2]   [Sexual Offenses Act](https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/sexual%20offences%20act%202006.pdf?vs=701).

[3]  [Protection Against Domestic Violence Act (2015).pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf).

[4]   High Court of Kenya Criminal Case No. 40 of 2015 [2018]. Available at: <http://kenyalaw.org/caselaw/cases/view/153938>.

[5]   Supreme Court Petition Nos. 15 and 16 of 2015 [2017]. Available at: <http://kenyalaw.org/caselaw/cases/view/145193/>.

[6]   Criminal Appeal No. 9 of 2018.

[7]    High Court of Kenya Civil Appeal No. 111 of 2019 [2020]. Available at: <http://kenyalaw.org/caselaw/cases/view/195132>.

[8]    High Court of Kenya Criminal Appeal No. 38 of 2016 [2019]. Available at: <http://kenyalaw.org/caselaw/cases/view/176411/>.

[9]    Criminal Appeal No. 140 of 2012 [2015]. Available at: <http://kenyalaw.org/caselaw/cases/view/111987>.

[10]   High Court of Kenya Civil Appeal No. 111 of 2019 [2019]. Available at: <http://kenyalaw.org/caselaw/cases/view/189195/>.

[11]    Section 3(1) of the Domestic Violence Act.

[12]    Section 3(2) of the Domestic Violence Act.

[13]    Section 3(1) of the Domestic Violence Act.

[14]  Full list in Section 4(1) of the Domestic Violence Act. Section 4(2) clarifies that a person will not be regarded as sharing a household with another person if they only have a landlord-tenant relationship, an employer-employee relationship or they occupy a common dwelling house. Section 4(3) further clarifies that a person will not be regarded as having a close personal relationship with another person if they only have an employer-employee relationship. Section 4(4) provides a non-exhaustive list of factors that the court may consider when determining whether a close personal relationship exists, including the nature of the relationship, the amount of time the persons spend together, the place where that time is ordinarily spent, the manner in which that time is ordinarily spent and the duration of the relationship.

[15]    Section 2 of the Domestic Violence Act. Stalking is also included within the definition of "violence" in Section 3.

[16]   Section 2 of the Domestic Violence Act. Harassment is also included within the definition of "violence" in Section 3.

[17]    Section 2 of the Domestic Violence Act.

[18]   Section 2 of the Domestic Violence Act.

[19]  Section 3(1) of the Domestic Violence Act.

[20]   Section 2 of the Domestic Violence Act.

[21]   Section 2 of the Domestic Violence Act.

[22]    Section 2 of the Domestic Violence Act.

[23]   Section 2 of the Domestic Violence Act.

[24]   Section 2 of the Domestic Violence Act.

[25]   Section 2 of the Domestic Violence Act.

[26]    Section 13(1)(b) of the Domestic Violence Act.

[27]   Section 8(1) of the Domestic Violence Act.

[28]    Section 9(1) of the Domestic Violence Act.

[29] Sections 8(2) and 9(1) of the Domestic Violence Act.

[30]    Full list in Section 9(2) of the Domestic Violence Act.

[31]    Sections 8(3) and 10(1) of the Domestic Violence Act. Full list of potential representatives in Section 10(2).

[32]   Section 8(4) of the Domestic Violence Act.

[33]  Section 2 of the Domestic Violence Act.

[34]   Section 19(5)(b) of the Domestic Violence Act. This section refers to an "exclusion order" but, as this is not defined within the act, we can assume this means either a protection order or an order under Section 114(c) of the Children's Act.

[35]    Full list in Section 19(2) of the Domestic Violence Act.

[36]   Section 114(c) of the Children's Act.

[37]    Section 114(f) of the Children's Act.

[38]   Section 114(g) of the Children's Act.

[39]    Section 130 of the Children's Act.

[40]   Section 132(1) of the Children's Act.

[41]   Section 131(3) of the Children's Act.

[42]    Section 132(10) of the Children's Act.

[43]   Section 113 of the Children's Act.

[44]    Section 12(1)(5) of the Domestic Violence Act.

[45]  Section 28(1)(3) of the Domestic Violence Act.

[46]    Section 21 of the Domestic Violence Act.

[47]    Section 24(2) of the Domestic Violence Act.

[48]   Section 30(1) of the Domestic Violence Act.

[49]    Section 12(1) of the Domestic Violence Act.

[50]    Section 12(2) of the Domestic Violence Act.

[51]   Section 13(1) of the Domestic Violence Act.

[52]    Section 13(3) of the Domestic Violence Act.

[53]   Section 13(5) of the Domestic Violence Act.

[54]    Section 32(1) of the Domestic Violence Act.

[55]    Section 32(2) of the Domestic Violence Act.

[56]    Section 19(5)(a) of the Domestic Violence Act.

[57]    Section 32(2)(c) of the Domestic Violence Act.

[58]    <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf>.

[59]   <https://www.nation.co.ke/news/Inefficiency-at-police-stations-impedes-justice/1056-5233268-iwfkuoz/index.html>; Section 6(4) of the Domestic Violence Act.

[60]    <https://www.hrw.org/news/2020/04/08/tackling-kenyas-domestic-violence-amid-covid-19-crisis>.

[61]   Section 6(1) of the Domestic Violence Act.

[62]   <https://www.sciencedirect.com/science/article/pii/S2589871X19300841>.

[63]    Section 40 of the Sexual Offenses Act.

[64]    <https://reliefweb.int/sites/reliefweb.int/files/resources/pursuing-justice-for-sexual-and-gender-based-violence-in-kenya.pdf>.

[65]    <https://namati.org/network/organization/national-lega-aid-service/>; <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LegalAidAct_No._6_of_2016.pdf>.

[66]    <https://klrc.go.ke/index.php/media-center/638-the-review-of-the-civil-procedure-act-the-evidence-act-and-the-interpretation-and-general-provisions-act>.

[67]    [https://ogekazacharia.blogspot.com/2018/07/burden-of-proof-in kenya.html?\_sm\_au\_=iVVVTzRNrzjFDSVrKkM6NKsW8f6TG](https://ogekazacharia.blogspot.com/2018/07/burden-of-proof-in-kenya.html?_sm_au_=iVVVTzRNrzjFDSVrKkM6NKsW8f6TG).

[68]    Section 124 of the [Evidence Act](http://www.vertic.org/media/National%20Legislation/Kenya/KE_Evidence_Act.pdf).

[69]   Section 29 of the Domestic Violence Act.

[70]  Section 44 of [the Sexual Offenses Act.](https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/sexual%20offences%20act%202006.pdf?vs=701)

[71]  Section 8(5) [of the Sexual Offenses Act.](https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/sexual%20offences%20act%202006.pdf?vs=701)

[72]    Section 38 [of the Sexual Offenses Act](https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/sexual%20offences%20act%202006.pdf?vs=701).

[73]    Sections 7(3) and (4) of the Domestic Violence Act.

[74]   Section 42 of the Sexual Offenses Act.

[75]   Paragraph 12 of the Penal Code: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf>.

[76]   Section 128 of the Evidence Act.

[77]   Section 7 of the Domestic Violence Act.

[78]  Section 7 of the Domestic Violence Act.

[79]    Section 31(1) of the Domestic Violence Act.

[80]   Section 130 of the Evidence Act.

[81]   Section 137 of the Evidence Act.

[82]    Section 31(3) of the Sexual Offenses Act.

[83]    Sections 31 and 32 of [the Sexual Offenses Act.](https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/full%20text/africa/sexual%20offences%20act%202006.pdf?vs=701)

[84]  Section 11 of the Sexual Offenses Act.

[85]    Section 8(1) of the Sexual Offenses Act.

[86]   Section 8(5) of the Sexual Offenses Act.

[87]   Section 8(6) of the Sexual Offenses Act.

[88]   Section 7 of the Sexual Offenses Act.

[89]  Section 33(1) of the Domestic Violence Act.

[90]    Section 22 of the Domestic Violence Act.

[91]    Section 23(2) of the Domestic Violence Act.

[92]    Section 32 of the Domestic Violence Act.

[93]    Section 39(2) of the Sexual Offenses Act.

[94]    Section 39(6) of the Sexual Offenses Act.

[95]    Section 39(7) of the Sexual Offenses Act.

[96]   Section 39(8) of the Sexual Offenses Act.

[97]    Section 8 of the Domestic Violence Act.

[98]   Section 9 of the Domestic Violence Act.

[99]   Section 16(1) of the Domestic Violence Act.

[100]   Section 19(5) of the Domestic Violence Act.

[101]    Section 13(5) of the Domestic Violence Act.

[102]    Section 32 of the Domestic Violence Act.

[103]    Sections 19(2) and 20(2) Domestic Violence Act.

[104]    Section 19(3) of the Domestic Violence Act.

[105]    Section 19(7) of the Domestic Violence Act.

[106]    Section 19(5) of the Domestic Violence Act.

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