Fighting Domestic Violence - Kenya

2. Introduction: framework guiding domestic violence law

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# 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

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