



Kutetea usawa wa jinsia na haki za waliobaguliwa na kupuuzwa

The Status of Sexual and Gender Based Violence (SGBV) Policies and Laws in Kenya



NGEC
National Gender and
Equality Commission

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Glossary/Abbreviations

	EXPLANATION/IN FULL
AACs	Area Advisory Councils
CCGD	Collaborative Centre for Gender and Development
CPPMU	Central Project Planning and Monitoring Units
CUC	Court Users Committee
FGM	Female Genital Mutilation
FIDA	Federation of International Women Lawyers
GBV	Gender Based Violence
ICRH	International Centre for Reproductive Health
IG	Inspector General of Police
JAMII THABITI	Project for “Improving Community Security” in 8 counties 2015-2017 (Coffey)
KWJA	Kenya Women Judges Association
NaCAF	National Committee for the Abandonment of FGM/C
National Administration	Former Provincial Administration
NCCS	National Council for Children’s Services
NGEC	The National Gender and Equality Commission
NGO	Non-Governmental Organization
ODPP	Office of the Director of Public Prosecutions
PADV	Protection Against Domestic Violence (Act)
SGBV	Sexual and Gender Based Violence
SIG	Special Interest Groups
SOA	Sexual Offences Act
SOPs	Standard Operating Procedures
STI	Sexually Transmitted Infection

Acknowledgement

The Coffey led¹ *Jamii Thabiti* program seeks to lead to a measureable improvement in the ability of National and County level institutions to tackle violence against women and girls, crime and inter-communal conflict, which in turn will lead to improved safety and security at the National level and in eight selected counties namely; Kwale, Kilifi, Nakuru, Baringo, Kisumu, Bungoma, Wajir and Mandera. *Jamii Thabiti* is working to increase the reporting of violence against women and girls with an emphasis on increasing women's participation at community security forums. The program is enhancing the capacity of police to provide timely response to violence against women and girls. The National Gender and Equality Commission (NGEC), is one of the key *Jamii Thabiti* programme partners.

NGEC is a constitutional Commission with the mandate to promote gender equality and freedom from discrimination among all Kenyans and, in particular women, the youth, children, persons with disability, the elderly, minorities and marginalized groups. The Commission coordinates and facilitates the mainstreaming of gender equality and inclusion, with particular focus of special interest groups (SIGs), in county and national development. NGEC coordinates the National GBV cluster working group consisting of state and non state actors whose main aim is to develop strategies towards prevention and response to Gender Based Violence (GBV) in Kenya. The National GBV cluster working group has since 2014 spearheaded the National Keeping the Promise to End Gender Based Violence Campaign that seeks to reduce GBV through developing and implementing effective and efficient prevention and response strategies.

This publication is meant to provide an overview and mapping of laws, policies and institutional frameworks related to Sexual and Gender Based Violence (SGBV) in Kenya. It is designed to assess the status of implementation of SGBV related laws and policies and underlying government structures. This is in line with the "NGEC campaign" objectives namely to: strengthen implementation of various policies and legislation on GBV in Kenya through dissemination and awareness creation; identify and strengthen opportunities for cross- sectoral synergies in the prevention and response to GBV and to assess and strengthen existing policy, legal and service delivery infrastructure for the prevention and response to GBV in emergencies.

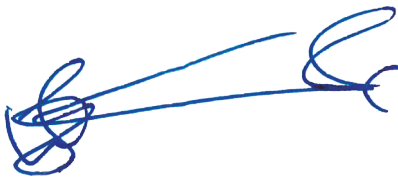
1 UK Department for International Development (DFID)

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Jaki Mbogo
Chief of Party- Coffey



Paul Kuria
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Preface

This Kenya Sexual and Gender Based Violence (SGBV) policy/legal mapping study has been undertaken by Collaborative Centre for Gender and Development (CCGD) on behalf of *Jamii Thabiti* Project in Kenya and National Gender and Equality Commission (NGEC). The *Jamii Thabiti* program objective is to lead to a measureable improvement in the ability of national and county level institutions to tackle violence against women and girls, crime and inter-communal conflict, to improved safety and security at the national and county level. NGEC, which is steering the “Keeping the promise to end GBV campaign”, is one of the key partners under the *Jamii Thabiti* programme.

The UK Department for International Development (DFID) has been supporting Kenya to reform the police, develop robust conflict management structures, and build capacities of institutions working around these issues. The *Jamii Thabiti* project will build on the achievements recorded in regard to improved legislation, police accountability, and new conflict and security architecture at the county level, to provide a more people-centered, long-term approach to peace building, police reform and community security. The project intends to reduce levels of criminal violence, inter-communal violence, and violence against women and girls, by working with state authorities, service providers and civil society organizations at the national and county levels. The project will measure the impact of this intervention and disseminate the lessons learned.

To produce this publication, the *Jamii Thabiti* team worked closely with the Government of Kenya institutions at the national and county levels as well as NGOs led by CCGD². The *Jamii Thabiti* project objective is to lead to a measureable improvement in the ability of national and county level institutions to tackle violence against women and girls, crime and inter-communal conflict, resulting in improved safety and security institutions at the national level and in 8 counties. These institutions will provide more effective, accountable and responsive services to a public that is actively engaged in improving safety and security. Among outputs to be achieved through partnership with “NGEC campaign” are; enhanced capacity of policing, peace building and improved Gender Based Violence (GBV) institutions and mechanisms at the community level within the selected counties. The *Jamii Thabiti* program will ensure improved data collection, operational research, increased public awareness of rights; and improved responsiveness by police stations. This should result in increased reporting of violence against women and girls (VAWG) and participation of women in community security forums.



Winifred Osimbo Lichuma, EBS

Chairperson - NGEC

² -NGO member of the NGEC coordinated National GBV Working Group

The National Gender and Equality Commission (NGEC)

This is a Constitutional Commission with the mandate to promote gender equality and freedom from discrimination among all Kenyans and, in particular, Special Interest Groups (SIGs) notably, women, the youth, children, persons with disability, the elderly, minorities and marginalized groups. The Commission coordinates and facilitates the mainstreaming of gender equality and inclusion, with particular focus of SIGs, in national development. NGEC coordinates the National gender based violence (GBV) cluster working group consisting of state and non state actors whose main aim is to develop strategies for prevention and response to Gender Based Violence in Kenya.

On 10th December 2014, NGEC launched the three year “Keeping the promise to end GBV campaign” with the theme “Prevent and Respond to GBV and Protect Survivors”. The campaign is premised on the need to accelerate prevention and response measures to sexual and gender based violence (SGBV) by the various state and non-state actors, particularly around advocacy, service provision, and centralized data collection and management. Further, the campaign seeks to provoke and shift from the current normalization of GBV and culture of tolerance to a new orientation that affirms accountability of responsible institutions appropriate remedies for the aggrieved. The specific objectives of the campaign are to;

- To strengthen action and accountability by state and non-state actors on their mandate in relation to GBV work;
- To profile achievements, opportunities, challenges, emerging trends, and gaps pertaining to GBV work in Kenya;
- To strengthen implementation of various policies and legislation on GBV in Kenya through dissemination and awareness creation (the premise for which this study was conducted);
- To identify and strengthen opportunities for cross- sectoral synergies in the prevention and response to GBV;
- To assess and strengthen existing policy, legal and service delivery infrastructure for the prevention and response to GBV in emergencies;
- To engage communities, with a focus on men, boys, women and girls in negating the culture of normalization and acceptance of GBV.

The campaign is being implemented in three phases. Phase one will focus on holding duty bearers to account; Phase two on survivors; and Phase three on SGBV in emergencies (as it will be implemented during an election year-2017).

Pursuant to its Constitutional mandate NGEC³ facilitated the development process for the advisory on the use of formal justice system on SGBV and spot checks to audit and monitor County Governments compliance with national and international legislative provisions on SGBV. A publication⁴ documenting compliance level of county governments of Meru, Kwale, Kisumu and Migori was published in 2015. The report summarizes views

3 In collaboration with UN-Women

4 *Audit of County Governments Compliance with National and International Legislative Provisions on Gender Based Violence* With an advisory on use of formal justice systems, NGEC 2015

of Council of Elders and leaders from respective counties on use of formal justice systems in GBV cases and proposes a way forward towards National and County governments approach to the implementation of laws, policies and regulations on the prevention, response and management of GBV. NGEC provides transparency on the progress of government compliance with gender responsive laws through the publication.

Collaborative Centre for Gender and Development (CCGD)

Collaborative Centre for Gender and Development (CCGD) is an NGO that was registered in Kenya in 1996. Its mission is to serve as a resource base for programs that focus on mainstreaming gender in the development processes as well as contribute to gender responsive transformations of society. CCGD is the Coffey implementation partner on the policy, legal mapping research undertaken as part of the inception phase of the *Jamii Thabiti* project SGBV interventions and NGEC Keeping the Promise to End GBV Campaign.

Within the last five years CCGD has worked among marginalized communities in the counties of Baringo, Kajiado, Samburu, Laikipia and Migori. The focus of interventions were around institutional capacity building of umbrella Community Based Organizations (CBOs), Civic education on women's political participation; representation and empowerment; community activism on SGBV, and legal education including training of paralegals and supporting them with the implementation on laws around SGBV. In the period between 2013 and 2014 CCGD conducted a two year research on '*Reducing Vulnerability to Sexual and Gender Based Violence in Kenya*', in sampled "locations" in four counties: Kisumu, Nairobi, Nakuru (Naivasha) and Mombasa.

The purpose of the study was to strengthen linkages between national policy framework and local level interventions to help prevent and mitigate violence during political transitions (such as those that happens after a General Election). The findings of the study confirmed that effectiveness of relatively good legal policy framework is compromised by weak coordination and implementation mechanisms at local levels. This finding among others provides strong evidence for the *Jamii Thabiti* project and the NGEC campaign.

1.0 Executive Summary

This Kenya SGBV policy/legal mapping study was undertaken by Collaborative Centre for Gender and Development in partnership with the Improving Community Security Project in Kenya, known as Jamii Thabiti, and National Gender and Equality Commission (NGEC). The Jamii Thabiti project objective is to lead to a measureable improvement in the ability of national and county level institutions to tackle violence against women and girls, crime and inter-communal conflict. This is expected to lead to improved safety and security at the national level and in eight counties (Bungoma, Kisumu, Baringo, Nakuru, Mandera, Kwale and Kilifi) . NGEC, which is spearheading the “Keeping the promise to end GBV campaign”, is a partner under the Jamii Thabiti project whose role is to advance and strengthen the campaign around ending SGBV in the eight selected counties. Thus the two initiatives will be positioned to complement each other.

The overall objective of this study was to provide an overview of and map the existing laws, policies and institutional frameworks related to SGBV in Kenya. The study was designed to specifically identify existing policies and assess their level of implementation as well as providing a summary of existing structures and services available to survivors of SGBV. Previous studies show big gaps in response to SGBV with key duty bearers yet to implement the supportive legal and policy frameworks that address this issue. One of the reasons for this failure is they are not held to account for their actions. This calls for urgent mechanisms that will hold legally designated duty-bearers accountable while at the same time systematically involving non-state actors to achieve the desired results. Nevertheless, it is instructive to note that the existing policy and legal framework, while not being perfect, provide a sufficient basis from which prevention, incidence reporting, response and realization of justice for survivors of SGBV can be realised.

The Bill of Rights in Chapter four of the Constitution of Kenya, 2010 safeguards the rights of women, men, boys and girls and empowers Kenyans whose freedoms have been infringed upon to go to court. It recognizes inherent dignity of every person and right to have the dignity respected. It recognizes equal rights in marriage, before, during and on dissolution of the union and guarantees the right of children to be protected. This chapter affirms the right for all persons not to be subjected to any form of violence from either public or private sources and provides for protection from torture in any manner whether physical or psychological. Parliament has enacted a number of laws to operationalize the Constitution of Kenya 2010.

The analysis below focuses on these specific laws and policies, and how they have been applied by state organs to realize various constitutional rights. The scope of the study is on specific laws dealing with SGBV related offences as well as laws that address issues and situations in which SGBV incidences occur. Among these laws are those relating to marriage, divorce, succession, welfare and protection of children and relationships at the workplace. Laws enacted to curb specific forms of SGBV include: the Sexual Offences Act 2006 (SOA), The Protection Against Domestic Violence Act 2015 (PADV), The Prohibition of Female Genital Mutilation Act 2011, and Counter-Trafficking in Persons Act 2011.

The SOA expanded the definition of rape to include new crimes and made provision for definitions, prevention and the protection of all persons from unlawful sexual acts. It for the first time provided for minimum sentences, removing such determination from discretion of the judiciary. This law provides strict guidelines to police on the handling of sexual offences and provides for the establishment of the National Policy and Guidelines on the Administration of Sexual offences Act. But the implementation of this law has

faced challenges which include non- specialization of prosecutors, workload of cases, and lack of essential facilities such as forensic laboratories.

The Protection Against Domestic Violence Act 2015 (PADV 2015) is the first law in Kenya that expressly criminalizes and outlaws domestic violence. It also recognizes that domestic violence can be committed by women and men jointly or individually. It enables third parties including Civil Society Organizations (CSOs) to intervene in the private domestic sphere to report violence. It enhances victim protection by obligating police officers to whom domestic violence is reported to advise the complainant on all available measures of relief, their rights to apply for such relief, to make an arrest and prefer charges, without a warrant, on suspects believed to have violated the Act. The Act enforces the responsibility of care of victims of domestic violence on the state. But the PADV has been criticized for failing to state a specific penalty for those found to have engaged in it.

The Prohibition of Female Genital Mutilation Act (FGM Act 2011) expressly makes it illegal to perform or practice all forms of FGM on anyone, regardless of age or status. It bans the stigmatizing of a woman who has not undergone FGM and those aiding performance of the practice including medical personnel. But one of the biggest challenges is despite the existence of this law, communities and families have devised ways to continue with the practice.

Counter-Trafficking in Persons Act (2012) is comprehensive in defining and curbing various forms of offenses that occur in regard to human trafficking- recruiting, transporting, transferring, harboring and receiving persons for the purpose of exploitation. It recognizes the offence occurring both internally within the borders of Kenya and internationally. Harsh penalties that range from life imprisonment, on sentences, and heavy fines or both are prescribed in the Act. Victims are entitled to support and protection and are exempted from criminal liability for any offence related to any criminal act that was a direct result of being trafficked. In 2014, the government set up an Advisory Committee to coordinate its campaign against human trafficking as provided for in the Act. However its efforts have been slow and uncoordinated.

The laws governing institutional administration arrangements, procedures and protection of individual and group rights within institutions and relationships are critical to dealing with SGBV. These laws include; marriage Act 2014, matrimonial property Act 2013, Law of succession Act, Employment Act (2015), Children's Act (2014) and Education Act (2013). The Marriage Act promotes equitable treatment of marital arrangements regardless of the type of marriage. It proclaims marriage as a voluntary decision by adults and allows individuals to choose which marital arrangement they prefer with full knowledge that customary and Islamic marriages are potentially polygamous, while Christian, Hindu and Civil marriages are monogamous. In terms of duration, marriage lasts until death or court declares the presumption of death of a spouse or annulment or divorce. Upon death, the widow or widower may elect to marry or stay un-married (Section 15). The legal status of unregistered marriages poses a major challenge since without a certificate, it may appear that there is no marriage.

The Matrimonial Property Act, 2013 operationalizes Constitutional provisions on gender equality and non-discrimination (art (45/3) by explicitly stating that married women have the same property rights as married men. The Act allows spouses to exclusively register property under their names and retain ownership even upon dissolution of marriage. It also presumes equality of interests in property held jointly within marriage. Upon divorce, matrimonial property is divided among spouses according to the monetary and

non-monetary contributions. The biggest challenge in the distribution of matrimonial property in the past has been the varying and often contradictory interpretations of various provisions of the law regarding the different provisions. This is particularly in regard to spousal contribution, joint ownership and conditions in polygamous marriages – which the Act has attempted to clarify.

The Law of Succession Act, 2012 provides for both situations where there is a will and where there is no will. A surviving spouse is entitled to personal and household effects, and retains a life interest in the residual estate. A widow loses the life interest on remarriage, (Art. 35(i) b) which is passed on to children. The provision is discriminatory since the widower's life interest is not affected by his remarriage. The Succession Act specifies 12 districts (12 out of 47 counties) located in the Rift Valley, Eastern and Coastal Kenya where it exempts agricultural land and livestock and prescribes that succession is to be determined by the laws and customs of the deceased's community (Law of Succession Act. 33). Past determinations by that the Kenyan courts show that they were more likely to rule on matters involving customary law without regard to the principle of gender equality, to the disadvantage of women and girls.

The Employment Act, 2007 declares and defines the fundamental rights of employees and protection of children. The Act defines and criminalizes sexual harassment at work places. It also obligates employers of more than 20 staff to formulate a sexual harassment policy. The mandatory policy section for companies with over 20 employees has been ignored by employers so it is largely not enforced.

The Children's Act, 2010 makes provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children. Section 13(1) entitles children "to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person". Section 14 protects the female child from harmful cultural practices such as FGM and early marriage that are likely to negatively affect the child's life, health, social welfare, dignity, physical or psychological development. Equally important is section 18(1) which protects children from torture or cruel treatment or punishment, unlawful arrest or, deprivation of liberty. Children are also protected from sexual exploitation, prostitution and exposure to obscene materials. Full implementation of the Act remains hampered by serious limitations in infrastructure such as facilities for detention, protection, care and rehabilitation of children to the standards specified in the Act.

Procedural Laws impacting on cases of SGBV include the Evidence Act Cap 80; Criminal Procedure Code Chapter 75, and Civil Procedure Act Ch. 21. The biggest challenge with these laws is the technicalities that make it difficult to present evidence to prove beyond reasonable doubt that an offence has been committed and punished or/and restitution is in order. Most SGBV offences happen in private spaces, where in most cases, there are no human witnesses. This is complicated by cost of procedures and lack of forensic facilities and personnel that are required to produce evidence which meet the standards of proof. Failure to address deficiencies in the penal code and treatment of sexual offences as moral rather than criminal issue by the police, national administrators, and to lesser extent judicial officials, remains a major problem. While Kenya's legal framework is progressive in its support to women's rights under marriage, succession and even sexual offences laws; poor enforcement and patriarchal social and customary norms continue to limit women's ability to exercise and enforce their rights.

1.1 Policy Framework and duty bearers

There are two main policy frameworks for implementations of SGBV initiatives: National Policy on Gender and Development (Gender Policy-2000) and Vision 2030. The Gender Policy recognizes that GBV is a serious problem, with domestic violence, FGM and widow inheritance remaining widespread. The National Plan of Action to Implement the Gender Policy (2008 – 2012) and National Plan of Action for the Abandonment of FGM (2008-2012), have been formulated. Other measures to implement the policies' SGBV objectives include appointment of the National Committee for the Abandonment of FGM/C and the development and updating of the Kenya Gender Data sheet. Vision 2030's has three strategic objectives that speak to SGBV.

- Objective 3 promotes and protects the rights of the girl-child;
- objective 6 aims to eliminate the economic exploitation of child labour and protect young girls at work; and
- objective 7 aims to eradicate violence against girls. Implementation of the policies continues to be slowed down by weak monitoring and inadequate allocation of resources.

Government institutional mechanisms for implementation of SGBV laws and policies may be divided into three broad categories: Oversight Institutions, SGBV Policy thematic ministries and Operationalization of SGBV services, logistics, and justice ministries. The former are in charge of global gender (SGBV) policy formulation and coordination across government and other agencies on matters SGBV, while the latter mostly operate at the service procedures and delivery level ensuring that the services meet the laid out SGBV thematic objectives and standards. The former (thematic oversight) include Ministry of Public Service, Youth and Children Affairs and the National Gender and Equality Commission (- NGENC), and Ministry of Labour Social Security and EAC Affairs. The Directorate of Gender are charged with the responsibility of coordination and implementation of gender provisions in the constitution and other laws in all Government ministries. The NGENC is mandated to monitor, audit and evaluate progress of all government and private sector, they are mandated to mainstream issues of gender, equality and inclusion of all special interest groups in all spheres. Further, NGENC houses and coordinates the National Gender Based Violence Working Group and has launched the three year "Keeping the promise to end GBV campaign" with the theme "Prevent and Respond to GBV and Protect Survivors".

The Ministry of Labour social services and EAC affairs, currently plays the policy oversight role for children including on SGBV.

Ministries and agencies tasked with operationalization of SGBV preventive and response services include: The Ministry of Interior and Coordination of National Government; Office of the Attorney General and the Department of Justice; Office of the Director of Public Prosecutions (ODPP); The Judiciary, Ministry of Health, Ministry of Education, Science & Technology, and County Governments. The Ministry of Interior is critical to SGBV because it is directly in charge of institutions such as police and national (formerly provincial) administration that administer and ensure law enforcement. They are a major stakeholder in SGBV prevention, mitigation, and realization of justice for survivors. But there are concerns in regard to police awareness, responsiveness, and professional commitment to fighting SGBV. Notable gains such as police Gender Desks have however attracted criticism that they are not effective in changing the culture of the police behavior towards survivors of SGBV and that they are often manned by untrained personnel.

The AG established the Task Force on the Implementation of the Sexual Offence Act 2006 that has so far undertaken initiatives towards effective implementation of the Act. These include: development of multi-sectoral Standard Operating Procedures (SOPs) and setting out the roles and responsibilities of each stakeholder in the prevention and response to SGBV. Office of the Director of Public Prosecutions (ODPP) has been training special prosecutors to handle SGBV cases and minimizing the use of police officers as prosecutors.

The judiciary has been responsive to gender issues in general and those related to SGBV in particular. The Judiciary Training Institute has collaborated with various NGOs and government agencies, to conduct trainings for judges and magistrates on the SOA, violence against women and human rights. A notable fruitful collaboration by members of the judiciary is that of the Kenya Women Judges Association (KWJA). KWJA has been conducting Court Users Committee (CUC) meetings that are an inter-agency coordination mechanism for all stakeholders.

The Ministry of Health has established Gender Based Violence Recovery centers in selected public hospitals and developed National Guidelines for the Management of the Sexual Violence and provides Post Exposure Prophylaxis and Emergency contraception to survivors of sexual violence.

The 47 County Governments present an opportunity to look at issues of SGBV afresh and ensure local accountability. This is to be achieved through a forum that brings on board all stakeholders- at the national and county based; state and non- state actors. Most of these counties have resources and executive officers in charge gender that can be rallied upon to set up coordination mechanisms to fast track implementation of SGBV action plans at this level. The challenge is identifying entry points for coordination and dealing with the differences among counties with regard to prevalent SGBV forms and prioritization of interventions.

The gaps, opportunities, and successes captured in the foregoing discussion raise fundamental issues that need to be addressed among them:

Developing clear accountability measures and mechanisms for the administrators, police, prosecutors and judiciary within respective county contexts and institutionalizing collaborative forums of SGBV stakeholders including CSOs to ensure counties are accountable for their prevention and management initiatives around SGBV including development of effective coordination mechanisms, complete with a monitoring and evaluation frameworks. Such initiatives have began in selected counties including Migori, Meru, Kisumu and Kwale.⁵

The NGEC developed the National Monitoring and Evaluation framework towards the prevention and response to sexual and gender based violence in Kenya. The framework provides a mechanism for monitoring progress of response and prevention management programmes. It is also a systematic mechanism for coordination. The framework will enable the availability of credible and reliable data to inform policy development. In tandem with this is the development of the Sexual Gender based Violence Information System (SGBVIS), the system addresses challenges and gaps in frequency of reporting and availability of essential data for evidence-based programming. The system will be hosted at NGEC, the national body mandated to collect and disseminate data on SGBV issues.

⁵ NGEC audit report of GBV legislation.

2.0 Introduction

2.1 Conceptual Context of the Study

The study is conceived from the understanding that to mount successful interventions on SGBV, there is need to understand who the critical duty bearers and the policies and laws that give them the mandate to play different roles, and which are to be used as a basis to hold them accountable.

Research findings by different organizations shows clearly that there are big gaps in response to SGBV. The key duty bearers are yet to exercise their full mandates as prescribed in laws and policies on SGBV, these findings indicate. Data collected by FIDA⁶ and CCGD study⁷ established that there was minimal reporting of SGBV cases to designated duty bearers as shown in the Tables 1 and 2.

Table 1: Statistical Summary of Cases Reported to Duty Bearers (in FIDA, CCGD Study Areas)

Name of org.	Police	Chief/Village elder	Hospital	CBOs	Children's office	Church	School	Parents Relatives	Human rights org	Separated	Did not report
FIDA	11.7%	6.6%	0.4%					3.5%	1.9%	0.8%	68.1%
CCGD	14.5%	7.4%	45.8%	23.6%	3.6%	3.2%	1.2%	-	-	-	-
ICRH	47.4%	2.3%	1.9%					1.9%			15%

Source: FIDA survey 2012, ICRH 2013, CCGD study 2013/2014

The information in Table 1 seems to confirm low reporting level of cases to police, chiefs and children's officers who are key duty bearers. There is relatively high reporting to CBOs (23.6%).

6 Federation of International Women Lawyers- Kenya

7 *Reducing Vulnerability to Sexual and Gender Based Violence in Kenya* (2014).

County specific analysis also showed poor reporting of cases to the duty bearers as presented in Table 2.

Table 2: County Reporting of SGBV Cases

County	% did not report Response of the duty bearers				Response
	Police	Family	Village Elders / Chief	No action	
Kisii	16.7%			83.3%	Out of 18 cases action taken on 11% of the cases
Kakamega	15%	15%	5%	65%	Action taken on 25% of the reported cases
Kisumu	5.1%				Public institutions pose a challenge in response to GBV. Perpetrators conspire with doctors and the police. Police officers work closely with CBOs to assist victims of violence
Nairobi	0%	-	-	100%	Chiefs though helpful were prone to corruption. Police prioritized other criminal cases over SGBV
Isiolo	-	-	66.7%		No action taken
Baringo	0%	-			No action taken
West Pokot	-	-	22.2%		Action taken on one of the cases
Kwale	33.3%				
Kilifi	-	-	25%		Action taken on all reported cases
Mombasa	0%	-	-		

Source: FIDA Kenya, 2012 Baseline Survey

Among reasons given for failure of or minimal reporting of SGBV cases to designated duty bearers were: fear of repercussions from perpetrators; apathy towards law enforcement due to their perceived inability to act appropriately; impunity by perpetrators who are released and do not honour court summons thereafter leaving survivors exposed to repeat violence; high cost of litigation partly occasioned by unexplained delays, postponements and difficult procedures (without expected support to comply from respective institutions) and perceived bribery of duty bearers and collusion with perpetrators. Conversely survivors of SGBV tended to report most of the cases to non-state actors such as NGOs, CBOs, faith based organizations and relatives most of whom did not refer the cases to law enforcement, favouring reconciliation without perpetrator accountability. There is therefore urgent need to establish mechanisms that will help to hold legally designated stakeholders accountable for these failures; while at the same time compelling them to systematically involve non state actors, in a coordinated manner, for the achievement of the desired results.

2.2 Rationale for mapping exercise

This mapping exercise is designed to identify and elucidate on the laws, policies and institutional mechanisms that provide the framework for duty bearers to be held accountable for their actions in the prevention and response to SGBV. Based on the evidence of previous studies, there is reason to believe that while the existing policy and legal framework might not be perfect; it nevertheless offers a firm basis to contribute to the prevention, reducing incidences of SGBV, better reporting of and response to the cases, and realization of justice for survivors of SGBV.

The Constitution of Kenya (2010) provides the framework for the analysis. Chapter 4 of the Constitution of Kenya speaks to the Bill of Rights that safeguards rights of women, men, boys and girls. It proclaims the right to life, liberty and security and empowers Kenyans whose freedoms have been infringed upon to go to court. It recognizes inherent dignity of every person and right to have that dignity respected. It recognizes equal rights in marriage, before, during and on dissolution. The right of children to be protected from abuse, neglect, harmful cultural practices, and all forms of violence, hazardous or exploitative labour is guaranteed. It affirms the right for all persons not to be subjected to any form of violence from either public or private sources and provides for protection from torture in any manner whether physical or psychological.

Kenya is a signatory to international treaties impacting on SGBV that among others include: Declaration of Human Rights (UDH), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the United Nations Convention on the Rights of Child (CRC), the Beijing Platform for Action (BPFA), UN Resolution 1325, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, The ILO Convention 182 on the Worst Forms of Child Labor; and The Optional Protocol on the Convention of the Rights of the Child on Child Trafficking, Child Prostitution and Child Pornography and regional treaties: the Protocol to the Africa Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPRW-Maputo Protocol), the Solemn Declaration on Gender Equality in Africa (2004), the International Conference of the Great Lakes Region Protocol; and The African Charter on the Rights and Welfare of the Child (ACRWC). These treaties have effectively become part of Kenyan law by virtue of Article 2(6) of the constitution provision that any treaty or convention ratified by Kenya should automatically form part of the laws of Kenya- the act of ratification renders such treaties as national laws.

The analysis that follows focuses on these specific laws and policies, and how they have been applied by state organs to realize various constitutional rights through state structures and institutions. The scope of the study is on specific laws dealing with SGBV related offences as well as laws that address issues and situations in which SGBV incidences occur. Among these laws are those relating to marriage, divorce, succession, welfare and protection of children and relationships at the workplace.

There is no denying that SGBV occurs beyond these areas of focus but available data in Kenya shows the highest percentage of forms of violence occurs in homes, educational and work institutions and environments.

2.3.Objectives

The overall objective is to provide an overview and mapping of existing laws, policies and institutional frameworks related to SGBV. The specific objectives are:

2.3.1 Identify existing policies in Kenya that address SGBV and assess their level of implementation;

2.3.2 Provide a summary of existing structures and services available to survivors of SGBV and the community context (including perceptions, norms, and attitudes) within which these structures operate in;

2.3.3 Highlight promising and suggested interventions for both the prevention of and response to GBV in Kenya for all sectors, including health, legal, justice, and education.

2.3.4 Highlight specific loopholes and problems existing in the existing policy instruments and structure

2.3.5 Provide recommendations on how the project should work with existing policies and laws as well as possible areas of policy and programme reforms

2.4 The study design and methodology

The methodology entailed comprehensive desk review and analysis of text of laws and policies on SGBV and implementation efforts as well as commitment to their implementation. A review of existing study findings on the related issues was done. A sharing and validation workshop was held with the NGEK GBV working Group to look at the study findings. The revised report from the NGEK GBV working group was further validated by a county GBV/Violence Against Women and Girls (VAWG) Nakuru and Baringo county stakeholders workshop.

3.0. Mapping of Laws enacted to curb specific forms of Sexual and Gender Based Violence

The laws in this category include the sexual offences Act (2006), The Protection Against Domestic Violence Act 2015, The Prohibition of Female Genital Mutilation Act 2011, and Counter-Trafficking in Persons Act 2011.

3.1 Sexual Offences Act 2006: Key highlights

The Sexual Offences Act 2006 provides for the prevention and protection of all persons (women, men, boys and girls) from harmful and unlawful sexual acts. The Act expanded the definition of rape to comply with jurisprudence emerging from the international arena and introduces new crimes that did not exist in previous legal framework. The Act makes provision about sexual offences, their definitions, prevention and the protection of all persons from unlawful sexual acts, and for connected purposes.

Box 1 is a summary of offenses and sentences under this Act:

Section 24 of the Act prohibits law enforcement officers extracting sexual favors from people who seek their services, but there is no enforcing and monitoring mechanism in place to ensure compliance. There have been reported cases of women who seek services at the police station being sexually attacked/ harassed or forced to give bribes in order to receive services. Section 46 Provides for the establishment of the National Policy and

Guidelines on the Administration of Sexual offences Act. The task force to develop the National Policy on implementation of SOA finalized its first task of making the policy on 2nd September, 2008 and the document has since been launched. The policy is to facilitate a coordinated resource intensive approach in addressing sexual offences. The Inter-Sectoral National Action Plan and Matrix is being developed alongside the national policy.

The Office of the Attorney General formulated a Reference Manual on the Sexual Offences Act, 2006 for Prosecutors. The manual expounds the Act as well as setting standards and recommendations on best practices to various key service providers⁸. The target is not only the police investigator and prosecutor, but also medical practitioners, civil society, gender activists and general consumers of criminal justice services. The manual is an important tool in achieving the objectives set out in the preamble of the Act as well as sensitizing communities on sexual offenses through outreach programs.

3.1.1 Challenges in the implementation of SOA

One of the challenges is that the police investigators and prosecutors, particularly in the subordinate courts where most sexual offences are prosecuted; are not specialized in the nuances of the crimes and are often not sensitized or sensitive to victim needs and handling. Additionally, heavy workloads on the part of prosecutors often lead to shoddy prosecutions because of fatigue and inability to give focused attention to particular cases. Prosecution research support is wanting, which puts them at a disadvantage against defense lawyers who prepare well for their cases. The heavy workload diminishes opportunity for holding pre-trial interviews with witnesses or even visiting the scene of crime in preparation for the hearing. This makes it difficult for them to comply with the good practices recommended to services providers.

The second challenge is lack of regulations to operationalize the current legal framework. This has compromised implementation of the SOA, for instance, section 39 which requires the registrar of the High Court to keep a register and a data bank of convicted sexual offenders which is yet to be done. Similarly, Section 47 gives the implementing minister power to prescribe regulations on what is to be contained in this data bank – it has not been implemented.

Generally, the slow pace of putting in place institutional mechanisms to support full implementation of the Act makes it difficult for survivors to benefit fully from its provisions. Compounding the situation is the weak collaboration between different institutions and unstructured referral mechanisms between different critical actors in the investigations and prosecution of sexual offences. For example, failures by the health facilities that describe and determine the extent of injury and collect forensic evidence for the prosecution have contributed to poor handling of the cases. This situation continues to make it difficult to retrieve evidence to the satisfaction of rules of “proof beyond reasonable doubt” in criminal cases due to the inaction or delays by one institution on the chain of providers that attend to SGBV survivor. Since different government institutions are not held to account in regard to the prosecution of perpetrators of SGBV, majority of the offenders go unpunished. For instance, it is not the core business of the

⁸ which was a product of joint collaboration between the Office of the Attorney General, in particular the Department of Public Prosecutions and Women in Law and Development in Africa (WILDAF).

Ministry of Health to support Director of Public Prosecution on such cases, resulting in a lapse on how evidence is collected, preserved, and forwarded to the relevant authorities.

Section 3	Rape	Imprisonment for not less than 10 years and may be enhanced to Imprisonment for Life.
Section 4	Attempted Rape	Imprisonment for not less than 5 years and may be enhanced to Imprisonment for Life.
Section 5	Sexual Assault	Imprisonment for not less than 10 years and may be enhanced to Imprisonment for Life.
Section 6	Compelled Or Induced Sexual Acts	Imprisonment for not less than 5 years
Section 7	Acts that Cause Penetration or Indecent acts done within the view of a Child or a Mentally Disabled person	Imprisonment for not less than 10 years
Section 8	Defilement	<ul style="list-style-type: none"> ▪ Of a child of 11 years or less imprisonment for life ▪ Of a child of 12-15 years imprisonment of not less than 20 years ▪ Of a child of 16 —18 years imprisonment of not less than 15 years
Section 9	Attempted Defilement	Imprisonment of not less than 10 years
Section 10	Gang Rape	Imprisonment for not less than 15 years and may be enhanced to years and may be enhanced to Imprisonment for Life
Section 11	Indecent Act with a Child	Imprisonment for not less than 10 years
Section 11(a)	Indecent Act with an Adult	Imprisonment of two years or fine of Kshs 50,000/
Section 12	Sexual Offences with a Child	Imprisonment for not less than 5 years or a fine of not less than 500,000 Kenyan Shillings.
Section 14	Child Sex Tourism	Imprisonment for not less than 10 years, and if a Juristic person a fine of not less than 2 Million Kenyan Shillings.
Section 15	Child Prostitution	mprisonment for not less than 10 years.
Section 16	Child Pornography	Imprisonment for not less than 6 years, or to a fine of not less than 500,000 Kenyan Shillings, or both.
Section 17	Exploitation of Prostitution	Imprisonment for not less than 5 years, or to a fine of not less than 500,000 Kenyan Shillings, or both.

3.2 The Protection Against Domestic Violence Act 2015 (PADV) Highlights

PADV is the first law in Kenya that expressly criminalizes and outlaws domestic violence. It also recognizes that domestic violence can be committed by women and men jointly or individually. PADV defines violence (beyond physical assault) as well as relationships and situations under which domestic violence may occur. Domestic violence includes violence, or threat of violence against a person, or imminent danger to this person by someone

with whom they are, or have been in a domestic relationship with. It expands the forms of violence, to include abuse related to: child marriage; FGM; forced marriage; forced wife inheritance; interference from in-laws; sexual violence within marriage; virginity testing; widow cleansing; damage to property; defilement; depriving the applicant of or hindering the applicant from access to or a reasonable share of the facilities associated with the applicant's place of residence; economic abuse; emotional or psychological abuse; forcible entry into the applicant's residence where the parties do not share the same residence; harassment; incest; intimidation, physical abuse; sexual abuse; stalking; verbal abuse; or any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health, or well-being of the person.

It also clarifies that a single act may amount to abuse, as well as a number of acts that form a pattern of behavior. Domestic relationships include marriage (ongoing or previous), sharing a house, family relationships, engagement (ongoing or previous), co-parenting, as well as close personal relationships.

The PADV endeavors to protect potential and actual victims. It provides that a person under the threat of violence or a representative, such as one's employer, relative, fellow employee, neighbor, guardian of a child or a guardian appointed by the court, a religious leader, a medical practitioner, counselor, police officer, an NGO for victims of domestic violence, among others may make an application for a protection order. Courts may issue a protection order in a matter concerning domestic violence that applies to the person for whom it is made and their children. The order may stay in force for up to five years, after which it can be renewed.

A fine of up to Sh. 100,000 or imprisonment applies in breach. An interim protection order may also be made on application without notice, outside ordinary court hours if a delay would result in the risk of harm or undue hardship to the applicant or his/her children. The order restrains the person against whom it is taken from following, watching, loitering near or preventing access from places, occupying the same land/building as the protected person without express consent or making any other contact unless it is an emergency, relating to custody of a minor or under any special conditions which enhances physical safety for victims of domestic violence.

Further, it empowers and obligates police officers to whom domestic violence is reported to advise the complainant on all available measures of relief as well as their rights to apply for such relief and to make an arrest and prefer charges without a warrant on suspects believed to have violated the Act. The Act provides that the complainant may request an officer of the same gender. The IG is also tasked with ensuring that police are well-trained on domestic violence matters, that they respond fast and efficiently and without causing fear. The PADV Act thus addresses gender specific concerns in the past about police inertia as well as insensitivity to victims and gives them express authority to act without fear of possibly powerful perpetrators of violence.

The PADV act recognizes that children are also victims of domestic violence and protects them from psychological abuse. An abuser is one who exposes the child to physical, sexual or psychological abuse while in a domestic relationship with him/her. A child may make an application through a guardian, children's officer or a police officer. A court can direct the involved parties to participate in counseling and conciliation programmes including those provided by religious institutions and any suitable cultural programme. This strengthens similar legislation in the Children's Act regarding parental/guardian responsibility over children. It also empowers any person that has reason to believe that

domestic violence is being/has been committed, to report it, without fear of intimidation or possible disciplinary action for doing so, unless it is proven that the information is false.

The Act enforces the responsibility of care of victims of domestic violence on the state by mandating the Cabinet Secretary for health, in partnership with county executives to make policy to provide temporary emergency shelters for victims of domestic violence. Such policy shall also address public education and awareness, research and development on domestic violence, availability of psychological support and legal aid.

According to the PADV, the offender will be required to support and compensate victims of domestic violence who suffer injuries or damage to their property at court determined rates taking into account the pain and suffering of the victim, the nature of the injury, cost of treatment, any loss of earnings and the value of the property destroyed or damaged and the financial position of the victim and the abuser. Victims will also be entitled to payment for their expenses for their rent, transport and costs of moving house. To deter abuse of PADV Act, people who make false applications or sworn affidavits will be liable to a fine of not more than KES 200,000 or a term of not more than three years, or both.

3.2.1 Challenges in the implementation of PADV Act

Despite expanding list of people protected from violence within a household, the PADV Act does not include house helps and other domestic workers. It is assumed this is an employer-employee relationship supposedly covered by laws on labour relations. The fact of the matter is that possibly most domestic workers and in particular women in Kenya operate outside of the formal labour laws and remain largely unrecognized in official documentation such as contracts. A significant proportion may be relatives of the employer which may complicate matters when they have to resort to a legal employment process. They have been rampant cases of criminal abuse of domestic workers by their employers or family members of employers that should have been considered. These domestic workers should, at the very least, have been enabled them to choose if they want to apply the Act to protect themselves.

The other gap is that the Act does not state a specific penalty for those found to have engaged in domestic violence. It assumes that perpetrators will be prosecuted under the various laws that cover assault, rape and other crimes. The danger of this is that it opens up victims to existing loopholes in the penal code and other laws that penalize violence offenders.

It may have been more prudent to isolate specific crimes relatively unique to domestic relations such as forced widow inheritance, widow cleansing, forced marriage, and deprivation of reasonable access to facilities that may not be adequately covered by existing penalties. This may require providing optional sentences to fill the gap. The fact that domestic relations in Kenya are mostly governed by socio-cultural norms and belief systems, customs and behavior based on common sense rather than awareness of requirements of the law; it is important to punish what has been normalized to erase ambiguities and send a strong message to the offenders.

A major challenge to the enforcement of PADV has to do with socio-gender beliefs and behavior of law enforcement officers and that of the communities where these vices take place. The domestic sphere is considered private, even sacred, and one that should

be respected and left to the family and community self-regulation mechanisms. The danger is such arrangements are heavily influenced by gender and power dynamics that often privilege men over women and adults over children. Having been socialized in such environments, law enforcers are on many occasions reluctant to arrest a man involved in domestic violence as they consider such acts normal and culturally acceptable.

For the PADV to succeed, it means retraining and re-orienting law enforcement agents to disabuse their cultural and personal notions around violence against women and girls, and to act without fear or favour as expected under the law. In addition to this, there is need to institute disciplinary measures against officers who do not comply with the law. The only challenge, as past experience shows, the oversight law enforcement bodies sometimes fail to ensure compliance with provisions in the law that touch on disciplinary matters especially where a police officer is involved in domestic violence.

3.3 The Prohibition of Female Genital Mutilation Act 2011: Highlights

The Act expressly makes it illegal to perform or practice all forms of FGM on anyone, regardless of age or status. This is important because before this Act, FGM was only criminalized by the Children's Act-. According to the latter, FGM was illegal if performed on a person below the age of 18 or forcefully to an adult woman against her will, causing grievous bodily harm that was punishable under the penal code. The FGM Act is more elaborate. This Act goes further to tackle the social pressure on uncircumcised girls and women by banning the stigmatizing of a woman who has not undergone FGM. It takes on community support for FGM head-on by criminalizing several things: aiding someone to perform FGM, taking them abroad to have the procedure done, failing to report to the authorities if the individual was aware it had taken place or carrying out FGM on a Kenyan abroad. Considering that members of some communities living close to international borders have been known to send their daughters to be circumcised by relatives across the border; these measures make it more risky to relatives to who support or aid such actions

This law closes possible loopholes by making it illegal to receive training in modern health facilities on how to perform FGM. Those found to do so; the persons responsible will be liable to be convicted of the offence of FGM. Clinicians may also not perform it under the pretense of medical necessity using psycho-social excuses. To this, the law provides that: "a person's culture, religion or other custom or practice shall be of no effect" in determining whether an operation on the genitals was legal (Sect IV 19(5)). Neither is it a defense that the victim gave her consent. The Act also criminalizes use of premises as well as being in possession of tools to perform FGM.

It is also notable that the law reduces ambiguity and possibility of buck passing by identifying "law enforcement officers" in the first line of implementation as including a police officer, a member of the provincial administration (now National Government/

county administrators), a children's officer, a probation officer, a gender and social development officer, and a cultural officer. Further it empowers a law enforcement officer to enter any premises without a warrant for the purposes of ascertaining whether there is a crime under the Act being committed. This is particularly important in rescue missions. In Part V (27), the government is obligated to take necessary steps within its available resources to:

- (a) Protect women and girls from female genital mutilation;
- (b) Provide support services to victims of female genital mutilation; and
- (c) Undertake public education and sensitize the people of Kenya on the dangers and adverse effects of female genital mutilation.

The Act obligates the government to set up the Anti-Female Genital Mutilation Board, whose Chair is appointed by the President. The Board has representation from the highest levels of the implementing Ministry. The Board's mandate is to co-ordinate public awareness programmes around FGM, advise the Government on matters relating to FGM, formulate a policy, provide technical and other support to institutions, and facilitate resource mobilization. The board has since been constituted according to the law.

Another important highlight of the Act are the penalties for offences. These include a life imprisonment for causing death while circumcising, imprisonment for a term of not less than three years (up to 7 years) or to a fine of not less than two hundred thousand shillings, or both.

3.3.1 Challenges to Implementation of the Prohibition of Female Genital Mutilation Act

The major challenge remains the socio-cultural nature of the practice of FGM and practicing communities' support for its continuation. This is further aided by weak justice mechanisms such as courts and police inertia in some of the practicing communities in the marginalized Arid and semi-arid areas. Government duty bearers such as local administrators either fear to act or are yet to be ideologically convinced about the validity of the law, and hence their inaction aides the continuation of the practice.

It does not help that past efforts by government and politicians to fight FGM have been lackluster at best. Politicians from region that practice the vice have been less committal to supporting interventions to end FGM for fear of losing political support. As result, anti FGM advocacy has traditionally been led by Civil Society Organizations (CSOs). This therefore means that for interventions against the vice to have impact, the government and politicians have to commit to the anti-FGM campaign. Indeed, the failure by government to be seen to play a greater a role in ending FGM the way it throws its wait around issues of cattle rustling has left communities to think that the vice is not a serious crime. This has left a void for the practice to go on.

There is also a problem with regard to the evolution of the practice. Research shows that FGM is performed mostly on girls aged between 12 and 18. What is however worrying is that most recent studies show girls aged between 7 and 12 being subjected to the cut. This new trend is designed to avoid law enforcers from noticing and arresting the perpetrators as well as resistance from the girls who are too young to have been exposed to information on the legal and health implications of the practice

Also presenting challenge to anti-FGM campaigners and government is the shift by families to health facilities or medical practitioners to conduct the cut. The perception is that health facilities or/and personnel remove the health concerns making it a safe

practice. Medicalization of FGM makes it harder for law enforcement since it privatizes the practice even more under the so called “doctor patient confidentiality”. It also makes family members privy to the act less likely to report as they may erroneously believe that it is safe.

3.4 Counter-Trafficking in Persons Act 2011: Highlights

Counter-Trafficking in Persons Act seeks to domesticate Kenya’s obligations under the United Nations Convention Against Transnational Organized Crime particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons- in particular women and Children and to provide for the offences relating to trafficking in persons and for connected purposes. The Act is comprehensive in defining and providing for punishment for various forms of offenses committed along the chain of human trafficking that includes: recruiting, transporting, transferring, harboring and receiving persons for the purpose of exploitation. The acts criminalized under the Act include: threat or use of force or coercion; abduction; fraud; deception; abuse of power or position of vulnerability; giving payments or benefits to obtain the consent of the victim of trafficking in persons; or giving or receiving payments or benefits to obtain the consent of a person having control over another person.

The Act protects the victims by invalidating use of alleged consent as a line of defense by the offender, particularly in regard to children. It also recognizes the offence occurring even internally within the borders of Kenya or internationally.

The Act provides the following penalties for various offenses:

Offence	Penalty
Trafficking another person, for the purpose of exploitation	Imprisonment for not less than 30 years or a fine of not less than KES 30 million or to both and upon subsequent conviction, to imprisonment for life
Financing, controlling, aiding or abetting the commission of trafficking	Imprisonment for a term of not less than 30 years or fine of not less than KES 30 million or to both and upon subsequent conviction, to imprisonment for life.
Promotion of trafficking by providing premises, publishes, exports or imports, any material runs or finances any job recruitment agency,	Imprisonment for not less than 20 years or to a fine of not less than KES 20 million or to both and upon subsequent conviction, to imprisonment for life
Acquisition of travel documents by fraud or misrepresentation	Imprisonment for a term of not less than 10 years or to a fine of not less than KES 10 million or to both and upon subsequent conviction, to imprisonment for a term of not less than ten years without the option of a fine.
Facilitating entry into or exit out of the country	Imprisonment for not less than 30 years or to a fine of not less than KES 30 million or to both and upon repeat to a term of not less than 30 years without the option of a fine.
Interfering with travel documents & personal effects : confiscates, conceals, alters, destroys	Imprisonment for not less than 10 years or to a fine of not less than KES 10 million shillings or to both and upon repeat , for a term of not less than ten years without the option of a fine
Life threatening circumstances or death suffered by victim	Imprisonment for life.
Trafficking in persons for organized crime	Imprisonment for life
Breaching of confidentiality by law enforcement agents and other parties	Imprisonment for not less than 5 years or to a fine of not less than KES 5 million or to both, and in the case of a body corporate, a fine of not less than KES 10 million.
Issuance s or approval of travel documents or other documents to any person or who fails to observe the prescribed procedures and the requirement as provided for in any law, with the intention of assisting in the commission of an offence	Imprisonment for a term of not less than - shillings or to both.

Other penalties include deportation of non- citizens after serving the sentence and barred permanently from re-entering Kenya.

In addition to the above penalties, the court may make restitution or compensate the victim for costs related to; medical or psychological treatment; of necessary transportation, accommodation and other living expenses; or any other relief that the court may consider just.

Victims are exempted from criminal liability for any offence related to any criminal act that was a direct result of being trafficked. They are entitled to support and protection, provision of appropriate services and children accompanying them. This includes return to and from Kenya; resettlement; re-integration; appropriate shelter and other basic needs; psychosocial support; and appropriate medical assistance. Others include legal assistance or legal information, including information on the relevant judicial and administrative proceedings; or any other necessary assistance that a victim may require-considering the age, gender, and the special needs of children and persons with disabilities. It further provides that the personal circumstances of each victim of trafficking in persons need to be considered. Under the Act, trafficked person are exempt from paying fees in civil suits.

The Act provides for establishment of the Advisory Committee that shall consist of high level government officials with representation from non- state actors that shall among other things make and implement policy as well as take charge of coordination of implementation.

3.4.1 Challenges in the implementation of the Act

Since the Act came into force in 2012, the government has not demonstrated enough evidence of increased efforts to combat human trafficking. Its efforts have been slow, uncoordinated, and lacked oversight, leading to a situation where it has been accused of abetting trafficking by commission or omission⁹. The government set up an advisory committee to coordinate its campaign against human trafficking in 2014. The main function of the Counter Trafficking Advisory Committee is to advise the government on inter-agency activities to combat trafficking and implement prevention, protection and rehabilitation programmes for trafficked persons. The committee is also expected to develop regulations and guidelines to implement the Act, launch a national plan of action, and set up a victim assistance fund. However, the government is yet to launch and implement its national plan of action, provide shelter and other protective services for adult victims. Or provide anti-trafficking training to its officials, including police, labor inspectors, and children’s officers¹⁰.

With regard to women and children, a major challenge is the failure to harmonize Trafficking Act with provisions in the following laws and policies: The Immigration Act, 1984; Penal Code, 1985; Employment Act, 2007; Sexual Offences Act, 2006; Children’s Act, 2001; Education Policy; Adoption guidelines; Vision 2030; Children’s Policy; and Draft National Policy on Orphans and Vulnerable children.

9 “The government made minimal efforts to prevent human trafficking,” the *U.S. State Department 2014 Trafficking in Persons report*. “Law enforcement efforts and government funding remained inadequate in light of Kenya’s significant trafficking problem.” <http://www.state.gov/tip/r/s/tiprpt/2014>

10 Kenya was placed on Tier 2 Watch List for the 3 consecutive year because of not moving enough to implement the Act.

The need for harmonization is going to help when it comes to charging offenders under the most appropriate statute that provide punitive sentences. For instance, there have been cases where people who have trafficked children from Kenyan rural areas or neighboring countries to be used as domestic workers or to beg on urban streets have been charged with lesser offences that attract fines. Yet this would have been different were they charged under counter trafficking Act.

3.5. Laws governing institutional administration and protection of individual as well as group rights within institutions and relationships

This following section covers laws focusing on institutional arrangements and procedures for administration of formal relationships as well as personal conduct in areas that are prone to SGBV. The laws include; marriage Act 2014, matrimonial property Act 2013, Law of succession Act, Employment Act, Children's Act and Education Act.

3.5.1 Marriage Act 2014 highlights with implications on SGBV

The Act has thirteen parts, but the substantive ones are three, four, five, six and seven that deal with Christian, Civil, Customary, Hindu and Islamic Marriages respectively. Appointments of Registrar's and Registration of Marriages are the object of Parts eight and nine; while Parts ten to twelve focus on Matrimonial Disputes and Proceedings, Rights of Action and Maintenance of Spouses. Part thirteen is on Offences and Penalties, while Part fourteen is on miscellaneous provisions.

The Act promotes equitable treatment regardless of type of marriage by consolidating all the seven marriage laws into a single Act. It proclaims marriage as a voluntary union of a man and a woman (Sec 3(1)) and both parties to marriage as having equal rights Section 3(2). It also sets up a uniform minimum age for marriage at 18 regardless of religion and cultural background (sec 4).

Further, Christian, civil, customary, Hindu, Islamic marriages are recognized and must be registered (Sec 6(1)). It mandates Christian, Hindu or civil marriages to be monogamous (Sec 6(2), Sec 9(a)) and allows a presumption of polygamy for Islamic and customary marriages (Sec 6(3)). It forbids a person in a monogamous marriage to contract another (Sec 9(b) but allows conversion from potentially polygamous (such as when the marriage was registered as a customary marriage) to monogamous (either civil or Christian marriage) if both spouses voluntarily agree (Sec 8(1)). Marriages celebrated outside Kenya may be recognized as a Christian marriage in Kenya if it was contracted according to the laws of the country of celebration and is consistent with provisions on Christian marriages under the Act. Customary Marriages must be conducted according to customs such as payment of dowry by one or both communities parties (Sec 43). Those involved must notify the Registrar specifying customary law applied and provide signatures of two adult witnesses. This should happen within 3 months of completing steps required to complete marriage as per the community (Sec 44). Islamic Marriages (Sec 48 to 49) are for persons who profess Islamic faith and have to be officiated by a Kadhi, sheikh or Imam authorized by the Registrar to do so.

The Act elaborates (in Sec 59) evidences of marriage that includes; a certificate of marriage; a certified copy of a certificate of marriage; an entry in a register of marriages; and a certified copy of an entry in a register of marriages.

The Act (Sec 11(1)) *prohibits* marriage relationship to aunts, cousins, nephews, uncles, parents, sisters, brothers; grandparent, child, or grandchild of spouses or former spouse. The law however grants exception to those who profess Islamic faith, allowing for marriages among cousins, section 10(4). It specifically voids marriages to forbidden relations; where either party is already married, or is underage, or has not obtained consent of the other party; or relationships entered into for fraudulent purposes, among others. Courts may void marriages on the grounds that include; inability to consummate the marriage by either party, recurrent attacks of insanity, no notice was given or notice of objection not yet withdrawn, unlicensed person officiated; and failure to register the marriage.

The Act further elaborates spouses' liability under the law of tort (civil wrongs). A spouse is not ordinarily liable for the tort of the other spouse; and each spouse bears same liability in tort to the other spouse as if they were not married. Spouses may claim for support or compensation on the basis of negligent acts or omissions as well as breach of duty which causes loss of companionship.

In terms of *duration*, marriage lasts until death or if court declares the presumption of death of a spouse or annuls the marriage, or under divorce. Parties to civil marriages (only under Sec 14) can agree to live apart for one year (Sec 14(1)). But this agreement is only valid and enforceable if filed in court. The Court can vary or set aside the agreement where circumstances have changed materially since signing. Parties may apply for court to determine status of the marriage at expiry of the year. Upon death and by implication- dissolution of marriage, widow or widower may elect to marry or stay unmarried (Section 15).

Regarding Matrimonial Disputes and Proceedings, dissolution of Christian marriages, Sec (64,65) provides that parties may first seek reconciliation from available church bodies where marriage was celebrated. Otherwise they may petition court for a dissolution of marriage on the following grounds: one or more acts of adultery; cruelty, whether mental or physical on the petitioner or children; or desertion for at least three years exceptional depravity or irretrievable breakdown of the marriage (e.g. insanity, imprisonment for life or 7 years and above) has been committed. Reasons for dissolving civil marriage are similar to the Christian divorce but Parties to civil marriage may not petition the court before the lapse of 3 years after the celebration of marriage (Sec 66(1)).

Reasons for Dissolution of customary marriages are similar to those for Christian and civil marriages but parties under section 68 may undergo conciliation or traditional dispute resolution in a process that must conform to the constitution. The person who leads the two parties in this process is obliged to file a report in court. Additional grounds for customary marriage dissolution include any valid ground under the customary law of the petitioner or Regulations made by the Cabinet Secretary for implementation of provision on dissolution of customary marriage. Dissolution of Islamic marriages governed by Islamic law requires a-copy of decree indicating such by Kadhi, sheikh or imam to be delivered to Registrar.

The Act gives exceptional circumstances for annulment of Marriage - where parties may be treated as if they had never been married (Sec 73) when a party to a marriage may

petition the court to annul the marriage. The grounds for such an action include; the marriage has not been consummated since its celebration; parties were unknowingly in a prohibited relationship; in the case of a monogamous marriage, one of the parties was married to another person at the time of the marriage; consent was not freely given; and a party to the marriage was absent at the time of the celebration of the marriage. Other grounds are: pregnancy at the time of the marriage without the knowledge of the husband where the husband is not responsible for the pregnancy; or the other party suffers recurrent bouts of insanity at the time of the marriage and without the knowledge of the petitioner.

There are also conditions when the court grant a decree of annulment as provided for under sec. 73(2). These include: if the petition is made within 1 year of the marriage, the petitioner was ignorant of the facts at inception, and the marriage has not been consummated since the petition was made to the court. Sec 74 only allows one party to ask the court to annul a marriage and only the party ignorant of the facts to be present (where annulment is sought on the basis of ignorance of facts). On issuing a decree of annulment (Sec 75) Parties are treated as if they had never got married and does not render illegal anything done legally during the marriage and vice versa. Similarly, it does not affect competence of either party as a witness to communications during the marriage or relieve any party of any debts incurred during the marriage on behalf of the other.

The Act also issues guidance on when a court may order Maintenance of a former Spouse (Sec 77). The conditions under which this will happen include: refusal or neglect to provide for the spouse or former spouse, in case of desertion of the other spouse or former spouse during the course of any matrimonial proceedings; when granting or after granting a decree of separation or divorce; or if, after presuming a spouse dead, the person is found alive. Order of Maintenance (unless revoked) to last until (Sec 78) death of the spouse (unsecured); death of the spouse in whose favor it was made (secured); or the person being maintained is subsequently able to support himself or herself or shall automatically lapse on remarriage (Sec 79). The court may vary terms where there's a material change of circumstances despite any provision in the maintenance order itself. Other relief measures include: court may order a party to refrain from molesting a spouse or former spouse; no proceedings may be brought to compel one spouse to cohabit with the other (Sec 84(2); and spouse alleging desertion may refer matter to reconciliatory body. It furth states that the court may order restitution of conjugal rights where it's satisfied of the truth of statements in support and there are no legal grounds why the application should not be granted Sec 84(3).

The Criminal Offences and their corresponding sentences as outlined in the Act are captured thus:

Offence	Sentence
False statement in the notice of intention to marry or notice of objection	Jail for max 2 years or fine max 2 million shillings or to both Sec 86
Marriage to a person under 18 years	Jail for max 5 years or fine max 1 million shillings or to both Sec 87
Marriage of persons within prohibited marriage relationship. <u>Witnesses</u> to such marriages liable to be charged.	jail for max 5 years or fine max 300,000 Sec 88
Marrying someone without the person's consent	Jail for max 3 years or fine of 300,000 or both Sec 89
Unauthorized persons celebrating marriage relationship	Jail for max 3 years or fine of 300,000
Celebrating marriage without witnesses	jail for max 3 months or fine max 10,000
Celebrating marriage where one party is below 18 years; a notice of intention to marry has not been given; or a notice of objection to the intended marriage has been given and the objection has not been withdrawn, dismissed or determined	Jail for max 6 months or fine max 50,000

The Act makes concessions for Registration/Validity of Existing Marriages as follows: customary marriage – within 3 years (starting 20th May, 2014) (Sec 96(3)), cabinet Secretary may extend the period for registration. The subsisting valid marriages under written or customary law are valid marriages under Sec 98(1) of this Act.

3.5.1.1 Challenges in the implementation of the Marriage Act

The Marriage Act forbids people with mental disabilities from wedding at all. It will deny marriage to people with “any mental disorder or mental disability whether permanent or temporary... so as not to (depreciate) the nature or purport of the ceremony.” This clause may violate several international human rights treaties to which Kenya is a signatory¹¹.

The first issue that arises from the implementation of the Act is the legal status of unregistered marriages that are deemed to fall under this Act. Since these marriages are not registered and there is no certificate to this effect, it may be deemed to be no marriage. Customary marriages recognized under the old laws and courts, and which are the most prevalent forms of marriages in most parts of Kenya are unregistered and are likely to remain so. In the past legal regime “presumption of marriage” applied where there was no registration but a couple had been living together for a period of time and even had children. This protected in particular women who risked being thrown out of a marriage relationship by the man or his relatives.

Equally important are issues to do with the conduct of customary marriages such as payment of bride price and the practice of polygamy that still entrench discriminatory practices within marriage. Both are legitimized in the new marriage Act, the former is recognized as proof of marriage while the latter is left to exist under customary marriage. There are however muted attempts to mitigate negative effects of such unions. But there are also existing forms of marriage, for instance, woman-to-woman marriages that are practiced among some communities such as the Kalenjin, Kuria, and Kamba. This is where an older woman who has been unable to have children takes the role of ‘husband’ to a younger woman to have children who are then regarded as the offspring of the marriage¹². This are potentially sources of conflict and violence if not clearly tackled within a legal framework.

At the core of Kenya’s marriage debate is the question of individual rights and equality of the parties before, during and after dissolution. This raises fundamental questions: Is it a man’s right to take a second wife against the will of his first wife? Should cultural norms be used to refuse women to enjoy the same privileges as men? Does this refusal amount to an illegality as it advances discrimination, which is prohibited in the Constitution of Kenya?

In recent times, church leaders have raised concerns over the cost of the new marriage certificates, which they say is higher than previous charges. Despite their cries, the new certificates are being used in registration. The other challenge is that women’s enjoyment of the rights provided under the marriage Act is dependent upon other related Acts, key among them the Matrimonial Property Act 2013 and the Law of Succession Act (revised) 2008. Although these Acts compliment the enjoyment of these rights, they present additional challenges, particularly in respect to customary law practices as explained below.

11 According to the Mental Disability Advocacy Center

12 [Muliro Telewa, Kenya’s legal same-sex marriage, BBC \(15 Feb. 2012\)](#)

3.5.2 Matrimonial Property Act 2013: Highlights

The Matrimonial Property Act, 2013 operationalizes constitutional provisions of gender equality and non-discrimination under Article 45 (3) by explicitly stating that married women have the same property rights as married men. Marital property considered to belong to both spouses is defined as the marital home(s), household effects and goods inside the marital home(s), and "any other immovable and movable property jointly owned and acquired during the subsistence of the marriage". It accords each spouse rights to property held before marriage and entitlement to marital property in accordance with contribution of each as provided for in Articles 6 and 7.

The Act further allows for spouses to exclusively register property under their names and retain ownership even upon dissolution of marriage. It also presumes equality of interests in property held jointly within marriage.

It provides that in polygamous marriages, marital property acquired before subsequent marriages is held equitably as above but that in subsequent marriages is owned by the husband and both wives subject to the contribution of each party (Law of Succession Act 58, at 8).

Upon divorce matrimonial property is divided among spouses according to the contribution (both monetary and non-monetary contributions, including domestic work, child care and companionship Art-7).

3.5.2.1 Challenges to the implementation of Matrimonial Property Act

The biggest challenge in the distribution of matrimonial property in the past has been the varying and often contradictory interpretations of various provisions of the law. This is in regard to the different provisions and in particular; spousal contribution, joint ownership and conditions in polygamous marriages – which the Act has attempted to clarify. It is unlikely that the new Act will not face serious challenges from case law as well as the standards of proof of ownership or/and contribution.

Challenges highlighted above on the status of certain forms of marriage under the current law may also complicate disputes that arise when using the matrimonial property Act. People in a relationship that they understand as a marriage but that may not fall under the categories of marriage in law may not be able to benefit from what is contained in the matrimonial property Act.

3.5.3 The Law of succession 2012 - Highlights

The Law of Succession Act provides for situations where there is a will and where there is no will. It enables dependants such as wives, former wives, children of the deceased, and other family members and household members who had been financially maintained by the deceased immediately prior to his death - to apply for an additional portion of the estate if what they receive is unreasonable (Art. 29). Surviving husbands financially maintained by wife immediately prior to her death are entitled to apply for an additional portion of the estate. The Act provides that a surviving spouse is entitled to personal and household effects, and retains a life interest in the residual estate.

A widow loses the life interest on remarriage, (Art. 35(i) b) which is passed on to children. The provision is however discriminatory since the widower's life interest is not affected by his remarriage. The life interest binds the surviving spouse to seek consent of the court in case of intention to dispose immovable property (Art. 37).

In case a surviving spouse is without children, he or she is entitled to the personal and household effects of the deceased and the first ten thousand shillings out of the estate, or twenty per cent, whichever is the greater; and a life interest in the whole of the remainder. Likewise, the life interest of a widow terminates upon her remarriage. In the absence of a surviving spouse, the estate devolves to the children, in equal shares regardless of marital status (Art. 38). Where the deceased had multiple spouses, his estate is to be divided among the wives' households according to the number of children in each (Art. 40). Widows without children are also included in the household count and are entitled to a proportionate portion of the estate. In case of disagreements, disputes involving amounts over 100,000 are heard by High Court- the same applies to Appeals of orders and decrees by resident magistrates or, the Kadhis' Court.

3.5.3.1 Challenges and gaps in regard to the Law of Succession

It is regrettable that the Succession Act specifies 12 districts (12 out of 47 counties) located in the Rift Valley, Eastern and Coastal Kenya where it exempts agricultural land and livestock, and prescribes that succession be determined by the laws and customs of the deceased's community (Law of Succession Art. 33). What this may mean in practical terms is that women and girls will continue to suffer discrimination despite customary tenure and community rights to land being legally recognized in the 2010 Constitution (Art. 63).. Currently the nature and scope of customary (land tenure and community land) rights has not yet been defined in formal law- efforts on the part of the Judiciary to document customary laws and rules for individual communities are still in early stages¹³.

But the Kenyan courts have had wide discretion in determining division of property in divorce and succession cases. In these cases, Judges have demonstrated different understandings of customary law, with which they are likely to be less familiar¹⁴. Past trends show that Kenyan courts were more likely to rule on matters involving customary law without regard to the principle of gender equality, to the disadvantage of women and girls. Customary practices at their best only grant women and girls secondary rights to inheritance depending on their relationships with men, such as their fathers, husbands, or brothers. Another loophole for discrimination is in the Succession Act and Matrimonial Property Act, which allow the exclusion of inherited customary or ancestral land from matrimonial property. This inadvertently perpetuates male-dominated land ownership.

In practice, many women are unable to inherit property from their spouses, fathers, and other relatives. The area in which most customary laws disadvantage women is in respect to property rights and inheritance. This is because under the customary law of most ethnic groups in Kenya, a woman cannot inherit land and must live on the land as

¹³ Women's Land and Property Rights in Kenya by Reem Gaafar , Centre for Women Land Rights, 2014

¹⁴ FIDA Kenya, Women's Land and Property Rights in Kenya (2009)

a guest of male relatives¹⁵.

In most rural communities, property rights reside in men, which makes it difficult for wives to gain property rights within customary marriage contexts. Even after the death of the husband, the presumption that property held in the name of one spouse is in trust for the other does hold. The legal effect of this trusteeship upon the death of the owner-spouse is unclear, as the Law of Succession Act limits the property rights of surviving spouses and opens possible claims to other dependants not party to the marriage.

3.5.4 Employment Act 2007 - highlights of sections with implications on SGBV

Employment Act defines the fundamental rights of employees with the intention to: provide basic conditions of employment of employees, regulate employment of children, and any other matters connected with employment.

The Act highlights sexual harassment at work places. It states that an Employee is deemed sexually harassed if the Employer of that employee or a representative of that employer or co-worker:

- (a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express:
 - i) promise of preferential treatment in employment
 - ii) threat of detrimental treatment in employment, or
 - iii) threat about the present or future employment status of the Employee
- (b) Uses language, whether written or spoken, of a sexual nature;
- (c) Uses visual material of a sexual nature;
- (d) Shows physical behaviour of a sexual nature which directly or indirectly subjects the Employee to behaviour that is unwelcome or offensive to that Employee, and that by its nature has detrimental effect on that Employee's employment, job performance or job

According to the Act in Section 6(2), an employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment. Section 6 (3) goes further to describe the mandatory contents of the policy statement. It states that the policy shall contain (a) the definition of sexual harassment as specified in subsection (1); (b) a statement:

- i) that every employee is entitled to employment that is free of sexual harassment;
- ii) that the employer shall take steps to ensure that no employee is subjected to sexual harassment;
- iii) that the employer shall take such disciplinary measures as the employer deems appropriate against any person under the employer's direction, who subjects any employee to sexual harassment;
- iv) explaining how complaints of sexual harassment may be brought to the

¹⁵ A research report by Federation of Women Lawyers (FIDA) in Kenya in partnership with United States' Georgetown University Law Centre entitled "*Empowering Women with rights to Inheritance – A Report on Amendments to The Law of Succession Act Necessary to Ensure Women's Human Rights*" has revealed that women in Kenya who make 70 percent of the population own only one percent (1%) of the land and control very little of the income produced by their labour.

attention of the employer; and that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.

Section 6(4) goes further to require the employer to bring to the attention of each person under the employer's direction the policy statement.

The Act also provides for general penalties for given offences. Section 88(1) states that any person, other than a child, who commits an offence under this Act, or contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided, shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both.

3.5.4.1 Challenges to the implementation of of the employment Act

The Act stipulates that any employee or person who is aggrieved shall lodge a complaint or suit in the Industrial Court and that no court other than the Industrial Court shall determine any complaint. Section 15 of the Industrial Court Act gives the court the powers to award damages as well as compensation. These powers have resulted in victories for several victims of sexual offenses. For instance, in the case of *P O v Board of Trustees, A F & 2 others* [2014]eKLR, the court awarded Kshs. 3,000,000 as general damages for sexual harassment. While in a more recent case of *N M L v Peter Petrausch* [2015] eKLR, the court awarded Kshs.1,200,000 as general damages for sexual harassment.

However, these penalties under the Act are may be deemed too lenient to sexual offenders. Further, section 88 gives the prosecutor liberty to choose whether to prosecute under this Act or under Sexual Offences Act. This means that if the prosecutor chooses to prosecute under this Act, then the penalties may not be punitive enough to deter future crime. This means the perpetrators are likely to evade the punitive sentences provided under the sexual offences Act.

The other gap is the Act has no implementation plan. Neither does it have a monitoring and evaluation plan. This makes it difficult to take stock of the progress made in the implementation of the Act, particularly in regard to the sexual harassment cases. The lack of plan may explain why employers in the private sector have largely ignored the Act and are yet to comply with the provision that requires them to develop sexual harassment policies.

3.5.5 Children's Act (2010) Kenya-Highlights

The Children's Act makes provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children. The Act also makes provision for administration of children's institutions. Part two of the Act addresses the issue of safe guarding the rights and Welfare of the child. This includes the right to non-discrimination, right to parental care, education and health care among others. Part II Section 3 and 4 of the Children's Act requires the *government* to take steps, using maximum of its resources, to progressively lead to the full realization of the rights of the child. The law clearly states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Section 4(1) of the Act reaffirms every child shall have an inherent right to life and it shall be the responsibility of the government and the family to ensure the survival and development of the child. Section 7(1) gives the right to education and places the responsibility of achieving this government and parents. Section 7(2) affirms the right and entitlement for every child to free basic education which shall be compulsory. To ensure this happens, the Act protects them from Child Labor and "economic exploitation and any work that is likely to be hazardous or to interfere with the children's education, or to be harmful to the child's health, physical, mental, spiritual, moral or social development (Section 10(1)). This law protects children from taking part in armed conflict, and provides that where armed conflict occurs, children have to be respected and protected in accordance with the law. Government has the responsibility to provide protection, rehabilitation care, recovery and re-integration into normal social life for any child who may become a victim of armed conflict or natural disaster.

Section 12 of The Children's Act safeguards the disabled child and affirms his other right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible. Section 13(1) entitles children "to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person". Section 14 protects the female child from harmful cultural practices such as FGM, early marriage that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. When it comes to direct physical harm, section 18(1) protects children from torture or cruel treatment or punishment, unlawful arrest or deprivation of liberty. Children are also protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials (15). It is instructive to note that the Children's Act clearly pronounces its supremacy with regard to children matters when it proclaims "that (1) notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment; (2) A child offender shall be separated from adults in custody; and (3) A child who is arrested and detained shall be accorded legal and other assistance by the Government as well as contact with his family". This makes it clear that the best interest of the child shall prevail even when he or she is being held as a crime suspect or in prison after conviction.

Penalties under the Act

Offence	Penalty
Infringement on any of the rights of a child as specified in sections 5 to 19	Imprisonment not exceeding 12 months, or a fine not exceeding KES 50,000 or to both.

3.5.5.1 Challenges in the implementation of the Children’s Act

The implementing the Act to prevent SGBV against children has to do with the limitation that children are minors usually under the authority and control of parents or guardians if not in a foster institution or on the street. All these conditions make their liberty subject to varied conditions of adult gatekeepers. A big part of children’s lives is in the private sphere of the home shielded from public scrutiny.

Limitations children have in law because they are treated as minors whose evidence is subject to extra caution unless corroborated by an adult is another challenges. In the end, the best interest of the child is mitigated by so many factors- some of which may not be in their best interests.

Although the government has addressed some of the issues in law such as protection of “children in crime” (both referring to child offenders and children accompanying parents to prison); structural limitations to do with inadequacy of facilities such as well equipped children’s courts remain a major concern. There have been cases where starving and sick children have been brought to court by policemen, who legally they know what to do, they have no resources to treat them. Children in need of special attention such as those on streets, of sick and extremely poor parents- usually in urban slums lead lives of neglect and abuse contrary to the Act. Yet the government always says the resources to implement the Act are inadequate.

3.5.6 Education Act 2012 and Basic Education Act 2013– Highlights with Implications on SGBV

Education Act 2012 is an Act of Parliament which aims to provide for the regulation and progressive development of education. However, there is a gap in the Act as it has not given provision for SGBV. Yet children in and out of schools are victims/survivors of SGBV.

Basic Education Act 2013 on the other hand has thirteen parts. Part four (IV) of the Act focuses on free and compulsory primary and secondary education and has Sections which highlight issues related to SGBV. These are Sections 30 on Free and compulsory primary and secondary education;34 that provides for No denial of admission; 36 which prohibits against physical punishment and mental harassment, and Section 38 that prohibits against employment of a child of compulsory school age.

Every child has a right to free and compulsory education. Section 30 (1) Every parent whose child is – (a) Kenyan; or b) resides in Kenya shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of physical, mental, intellectual or social development of the child. In section 28(1), the Cabinet Secretary is required to ensure that the right of every child to free and compulsory basic education is attained.

On the other hand, the parents and guardians have a duty under section 31(1) of the Act to present for admission or cause to be admitted his or her child, as the case may be, to a basic education institution. Schools or persons responsible for admission shall not discriminate any child seeking admission on any ground including ethnicity, gender, sex, religion, race, colour or social origin, age, disability, language or culture, as provided for in section 34 (1)

The Act's Section 36 (1) prohibits against physical punishment and mental harassment to the child. It says that no pupil shall be subjected to torture and cruel in human or degrading treatment or punishment in any manner, whether physical or psychological.

Mechanisms in place to deal with violation of the laws

Offence	Penalty/Action
A parent/guardian failing to take his or her child to school	Liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year, or both.
A parent/guardian failing to present his or her child for admission	Liable on conviction to fine not exceeding one hundred thousand or to a period not exceeding two years or to both.
A parent of a child who has been denied admission to a public school	<ul style="list-style-type: none"> ➤ May notify the County <ul style="list-style-type: none"> ○ Education Board of the decision. ➤ The County Education Board shall review the decision of a school that denies a child admission. ➤ The Cabinet Secretary may by regulation prescribe criteria for the admission to a public school
Any person who punishes or mentally harasses a child	Is liable on conviction to fine not exceeding a hundred thousand shillings or to imprisonment not exceeding six months or both.
Any person who employs or prevents a child who is subject to compulsory attendance from attending school is guilty	Is liable to fine not exceeding five million or to a period not exceeding five years or to both.

3.5.6.1 Challenges to implementing Education Act/Basic Education Act

Enforcement of the education laws remains weak and children continue to be exposed to various forms of SGBV including physical, sexual and emotional abuse. There is no legal mandate for schools to ensure the safety of their students and the policies need to be strengthened- the marginally applicable safety standards manual for schools (2008) is weak on SGBV and very few managers and teachers demonstrate awareness of it¹⁶. There are also no provisions for an ICT and e-safety in schools even though more and more children are exposed to related risks.

3.5.7 Teachers Service Commission Code of Ethics

The Teachers Service Commission-an independent government commission whose roles, among other things, are to exercise disciplinary control over teachers and terminate the employment of teachers. Based on the foregoing, it developed a code of ethics which has, among other things, provisions for SGBV and penalties for the perpetrators. Section 9 (1) prohibits a public officer¹⁷ from engaging in sexual activity with a student regardless of whether the student consents, while subsection 2 provides that a public officer shall not make a request to, or exert pressure on a student for sexual activity or favours.

Section 10 deals with issues of pornography, with subsection (1) prohibiting a public officer from supplying pornography to a student, exposing a student to pornography, sexual toys or assisting in obtaining access to the same. Subsection (2) calls for a public officer to use his best efforts to ensure that any school or office he works in is free of pornography and sexual toys.

The Act in Section 20 (1) prohibits a public officer from sexually harassing a member of the public or a fellow public officer. In the event of contravention of the code the TSC shall take appropriate action in accordance with the Act and other applicable laws.

3.5.7.1 Challenges to the implementation of TSC code

The main challenge to the TSC code has been limited reporting of cases of abuse by teachers mainly because the perpetrators enter into private settlements with survivors parents/guardians/families that involves exchange of goods, services and money. Customary requirements often lead to some teachers being forced to marry survivors or/and forced to take care of offspring. There have been complaints that the process of investigations is sometimes too long leading to complainants abandoning complaints. TSC has also been accused of laxity at punishing offending teachers or giving them penalties (such as transferring offenders to new schools) that are too lenient and may not deter a repeat of the same offence in future. There has also been concern that TSC does not keep accurate record of offenders which may lead to the same teachers re-joining the workforce and repeating the offence. Closely related is the lack of a mechanism for protecting survivors from the offenders and sometimes their parents and communities who may prefer private settlement that may not argue well for the rights and well being of the survivor. Awareness of the code by children in school is very limited and even less of what steps to take when in need of protection.

16 *Schools need policy to protect our children* article by Muigai Muruiki, in Daily Nation kenya 6.6.2016

17 A person to whom the code applies

3.6 Procedural Laws impacting on cases of SGBV

These laws set out standards, procedures and measures that have to be followed by designated personnel when dealing with investigations, preparations and administration/presentation and determination of cases. Procedural laws are relatively “technical” and gender neutral in content and application and tend to emphasize objectivity to establish facts with regard to the case. These include:

3.6.1 The evidence Act Cap 80

The Act applies to all court proceedings except Kadhis’ courts, and sets out rules and procedures for establishing evidence and its admissibility. Generally, aspects that are of concern to SGBV cases include admissibility of confessions, opinions, oral evidence as opposed to documentary and electronic evidence. Yet, in most cases, documentary evidence is more easily verifiable and admissible. Guidelines on the burden of proof is often based on the weighting of different categories of witnesses and examination of the same. Children for instance are given a low weight in criminal cases

3.6.2 Criminal Procedure Code Cap 75

This code largely deals with procedure for conducting trial of offences including: setting out powers of the court; general provisions on arrest, escape and retaking; provisions relating to all criminal investigations and place of trial; mode of taking and recording evidence in trials; procedure in trials before subordinate courts, and provisions relating to the committal of the accused.

3.6.3 Civil Procedure Act Cap 21

The Act applies to proceedings in: the High Court, Magistrates Courts Act (Cap 10) and subordinate courts. Its objective is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. It prescribes the place of suing or how to institute a suit; procedure in suits including service and summons to witnesses; judgement and decree and matters to do with how to factor in interest accrued and costs. It sets procedure for execution of decrees and when and how arrests detention may be applicable.

3.6.3.1 Challenges to implementation Civil Procedure Act

The impact of the above procedural laws on SGBV cases has been wanting. This is because of the technicalities that make it difficult to present evidence to prove beyond reasonable doubt that an offence has been committed and punishment or/and restitution is in order. This is indeed worrying since most SGBV offences happen in private spaces with little possibility of objective human witnesses. While forensic evidence can help to meet the standards of proof, lack of facilities and personnel makes it difficult to achieve this. The procedures also tend to have cost implications that complainants may not meet. Compounding the situation is that most of the cases are lost on technical grounds due to poor documentation by poorly prepared and unmotivated prosecution who have to face-off with well prepared defense teams of motivated Attorneys.

3.6.4 Penal Code under which “offences against morality” are contained, tackles issues of sexual and gender based offences under sections 139-169. Chapter 24 provides compensation as one of the forms of punishment that can be imposed by a court in

crimes mentioned in the penal code. Section 31 further provides that any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence and the compensation may be either in addition to or in substitution for any other punishment.

3.6.4.1 Challenges and gaps in regard to the penal code

Deficiencies under the archaic Penal code were meant to have been addressed, in specific legislation such as the sexual offences Act. But this has not been the case. Attitudes and the consideration of sexual offences as moral rather than criminal still inform how law enforcement officers, national administrators and to a lesser extent judicial officials that handle these matters.

We have established that although Kenya’s legal framework is progressive in its support of women’s rights in marriage, succession and even sexual offences laws; patriarchal, social, and customary norms continue to limit women’s ability to exercise and enforce these rights. But the good thing is that the Constitution of Kenya, 2010 provides a legal framework and basis for individuals and organizations to challenge gender-discrimination including those reflected in various laws.

4.0 National Policies Related to SGBV

Policy	Highlights	Actionable gaps
National Policy on Gender and Development-	<p>Recognizes that GBV is a serious problem. Domestic violence, FGM and widow inheritance are still rife.</p> <p>National Plan of Action to Implement the Gender Policy formulated (2008 – 2012);</p> <p>National Plan of Action for the Abandonment of FGM (2008-2012),</p> <p>National Committee for the Abandonment of FGM/C (NaCAF) established</p> <p>Development and updating of the Kenya Gender Data sheet</p>	<p>The policy needs revision to conform to the Constitution of Kenya 2010 and a new set of targets needs to be completed</p> <p>Implementation of Action plans hampered by resource limitations and poor coordination</p>
Vision 2030	<p>Strategic objective 3: Promote and protect the rights of the girl-child</p> <p>Strategic objective 6: Eliminate the economic exploitation of child labour and protect young girls at work</p> <p>Strategic objective 7: Eradicate violence against the girl-child</p> <p>Legal and administrative measures against violence against the girl child and FGM/C</p>	<p>Weak monitoring of implementation of these objectives</p> <p>Inadequate resources allocated to implementation</p> <p>No clear formula/ procedure for implementation at county level</p>

<p>National Guidelines on Management of Sexual Violence in Kenya (2009)</p>	<p>The guidelines give general information about management of sexual violence in Kenya and focus on the necessity to avail services that address all the needs of a sexual violence survivor including; medical, psycho-social, humanitarian and/or legal. They also:</p> <p>Establish government standards of service provision to do with; treatment, counselling/ psycho-social support, management of injuries, STIs, PEP, HIV Care and pregnancy prevention. Guide</p> <p>Guide on management of sexual violence by different stakeholders involved at different stages and include information on steps to be taken when treating a survivor like preservation of evidence and ethical issues.</p>	<p>Weak medico-legal linkages in care and treatment of survivors as well as survivors access to justice. Kenya lacks a harmonized chain of custody of evidence across the medical, police and legal levels that ensures consistent support to cases in court¹</p>
<p>The National Policy on Prevention and Response to Gender Based Violence(2014)</p>	<p>The policy seeks to accelerate efforts towards elimination of all forms of GBV by among others things:</p> <p>Enhancing women’s access to basic services Providing social protection, health care and security as enshrined in the Constitution and our development blue print, Vision 2030.</p> <p>Enhancing enforcement of laws and polices to prevent and respond to GBV</p> <p>Improving sustainably of GBV prevention and response mechanisms.</p>	<p>It was launched recently and is yet to be disseminated to stakeholders. It needs a coordinated multi-stakeholder approach with a national and county plans of action that are yet to be articulated .</p>

5.0 Government institutional Mechanisms for Implementation of SGBV laws and Policies (Duty Bearers)

We shall divide SGBV duty bearers into three broad categories that roughly conform to the role they execute; (1) Oversight Bodies (2)SGBV Policy bodies and (3) Delivery of social and legal servicesV bodies. The former are in charge of global gender (SGBV) policy formulation and thematic coordination across government and other agencies, while the latter focuses on service procedures and delivery level ensuring that the services meet the laid out SGBV thematic objectives and standards.

5.1 Oversight bodies monitor implementation of the constitution and in the case of SGBV- gender provions.

5.1.1 The National Gender and Equality Commission (NGEC)

This is an independent Constitutional Commission under Chapter 15 of the Constitution. The National Gender and Equality Commission are charged with the responsibility of monitoring the implementation of gender provisions in the Constitution and other laws in the country. The roles include:

- ❖ Monitoring, facilitating and advising on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in public and private institutions;
- ❖ Acting as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children;
- ❖ Co-coordinating and facilitating mainstreaming of other marginalized groups in national development and to advise the Government on all aspects thereof
- ❖ Monitoring, facilitating and advising on the development of affirmative action and implementation of policies as contemplated in the Constitution.
- ❖ To protect and promote respect for human rights, gender equality and equity and develop a culture of human rights in Kenya.
- ❖ To investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct, and report on complaints investigated and take corrective action.
- ❖ NGENC convenes and coordinates the National Gender Based Violence Working Group and has launched the three year “Keeping the promise to end GBV campaign” with the theme “Prevent and Respond to GBV and Protect Survivors” NGENC is also involved in Legal investigations and redress for victims/survivors of SGBV.

5.2 SGBV Policy Bodies

These include Ministry of Public Service, Youth and Gender and the , and Ministry of East African Community labour and State Protection

5.2.1 Ministry of Public Service, Youth and Gender Affairs

The goal of the Ministry is in the management of the public Services, youth empowerment and in advancing gender equality and the empowerment of women. The ministry deals with coordination of targeted Policy priority areas and initiatives among them:

- ❖ Gender policy and mainstreaming,
- ❖ Youth policy and mainstreaming,

5.2.2 *The State Department of Gender Affairs is responsible for:*

- Overall coordination of gender mainstreaming in national development,
- Formulation, review and management of gender related policies,
- Negotiations, domestication, and reporting on gender related international and regional treaties
- Promotion of equitable socio-economic development between men and women.

The Department has deployed Gender Officers to every Ministry’s Central Project Planning and Monitoring Unit (CPPMU) to provide technical guidance on gender mainstreaming in all sectors and to ensure that this is done in a harmonized,co-ordinated, and organized

reporting. At the devolved level, Youth Officers at the County and sub-county levels are responsible for coordinating gender mainstreaming and women's empowerment.

5.2.3 Ministry of East African Community labour and State Protection

The Labour Ministry took on functions formerly under the former Gender, Children and Social Development ministry. Only the gender function was taken to the Devolution ministry. The Ministry of Labour is tasked with formulating policies that facilitate the development of an adequate and well-motivated Kenyan workforce,; and ensure the operation of an effective and smooth functioning labour market. Such an environment is expected to ensure the workforce enjoys an appropriate social security, welfare and inclusion for vulnerable groups. Key to SGBV is the function of addressing child welfare policies and family protection since all data shows that most cases of SGBV in peace time take place in homes and family settings.

The Ministry of Labour currently holds the policy oversight for children including on SGBV. It houses the **National Council for Children's Services (NCCS)** - a Semi-Autonomous Government Agency (SAGA) established under Section 30 of the Children Act, 2001. It is mandated to safeguard the rights and welfare of all children in Kenya and to advise the government on the same. Specific objectives of the Council include to: Provide enabling policy and conducive legislative framework; Promote and participate in enforcement of existing legislation and policies on children; advocate for child rights and welfare; and coordinate the implementation of the National Child Protection framework.

The NCCS oversees activities of , Area Advisory Councils (AACs) that mainly take place at the frontline service delivery (community) level. These activities include: Protection of the rights and welfare of children in their jurisdictions; supervision and regulation planning, financing and coordination of children's welfare programmes; mobilization of resources and facilitation of funding, promotion and creation of public awareness on child rights; and child protection and facilitation of partnerships, linkages and networking.

in addition to this, The Children's Department in the Ministry of Labour has designed programmes to address issues of child labour and exploitation.

5.3 Delivery of social and legal services

The ministries in this regard include: The Ministry of Interior and Coordination of National Government, Office of the Attorney General and the Department of Justice, Office of the Director of Public Prosecutions (ODPP), The Judiciary, Ministry of Health, Ministry of Education, Science & Technology, and County Governments.

5.3.1 The Ministry of Interior and Coordination of National Government

The Ministry of Interior and Coordination of National Government is charged with keeping Kenya safe and secure and coordinating national government functions. Functions under "interior" include internal security involving the Police, Immigration, Prisons and Correctional services. The Ministry is tasked with ensuring effective coordination of National Government functions and services at the county and sub-county levels. When it comes to SGBV this Ministry is very critical as it is directly in charge of institutions such

as police and national (formerly provincial) administration that administer and enforce the law. They are a major stakeholder in SGBV prevention and mitigation as well as the path to justice for survivors of this form of violence. But for them to deliver these functions effectively, they need to be responsive, aware of the laws and their role, and professional commitment in regard to SGBV.

The good news is that some progress has been made towards making police more responsive to SGBV. This includes awareness raising and sensitization of the police on SGBV and setting up of Gender Desks within police stations. The Desks have however attracted criticism for being ineffective in changing the culture and attitudes of the police towards survivors of SGBV. They are also often manned by untrained officers¹⁸.

5.3.2 Office of the Attorney General (AG) and the Department of Justice

The Office of AG aims to facilitate the realization of good governance and respect for the rule of law through the provision of public legal services, protection and promotion of human rights, and upholding of ethics and integrity. The AG is the principal legal advisor to the Government in the following functions: policy on administration of Justice; legal policy management; political parties policy management; elections policy management; constitutional affairs; anti-corruption strategies, integrity and ethics; constitutional implementation; public trustee; legislative drafting; policy on administration of justice; and national registries.

The AG is key to the implementation of laws passed by parliament in so far as development of implementation guidelines (without which some laws may not be implementable) is concerned. It is in this regard that the AG established the Task Force on the Implementation of the Sexual Offence Act 2006 that has so far undertaken the following initiatives towards effective implementation of the Act:

- Development of multi-sectoral Standard Operating Procedures (SOPs)
- Setting out the roles and responsibilities of each stakeholder in the prevention and response to sexual and gender based violence.
- Conducted an audit of laws, policies and practices relating to sexual violence in order to inform amendments, modifications or repeal of provisions of the Act . Development of a draft National Policy and Framework for implementation of the SOA.
- In collaboration with the Rules Committee of the Judiciary, the Task Force developed rules and procedures to guide judges and magistrates in implementing the protective provisions of the Act.
- Developed a manual for the treatment and rehabilitation of sex offenders.
- Conducted countrywide public awareness campaigns on the SOA.
- Conducted multi-sectoral training for different stakeholders on the SOA.

5.3.3 Office of the Director of Public Prosecutions (ODPP)

The Office of the Director of Public Prosecutions (ODPP) is headed by the Director of Public Prosecutions, assisted by the Secretary, Public Prosecutions and three Deputy Directors of Public Prosecutions. It is established as an independent constitutional office under Article 157 of the Constitution. ODPP's responsibility is to ensure a revamped, professional, and accountable prosecution service.

The mandate of ODPP as derived from Article 157 of the Constitution is to institute and undertake prosecution of criminal matters and all other related incidents. These include:

- Instituting and undertaking criminal proceedings against any person before any court of law except the court martial;
- Taking over and continuing with any criminal proceedings commenced in any court by any person or authority with the permission of the person or authority; and Discontinuing at any stage, before judgment is delivered, of any criminal proceedings with the permission of the court.
- Directing the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct.

The ODPP has established the SGBV Offences Division to process and prosecute cases of SGBV. The office advises government departments on SGBV and treaties/ instruments that affect the prevention, control, and prosecution of SGBV cases. In addition, the division carries out research to support recommendations by the Kenyan Law Reform Commission on the status and quality of the policy and laws on SGBV and advises on victim protection, compensation, and restitution.

As the office that deals with all public prosecutions, the ODPP has been under focus on ensuring justice for victims and survivors of SGBV. Several concerns have been raised how SGBV cases are handled by this office. These include: the perceived slow speed at which cases are processed; poor collection and preservation of evidence; unprofessional conduct of prosecutors; and inadequate skills by some prosecutors to handle SGBV cases, especially those working in the lower courts where most of these cases are filed. But not all is gloomy. The ODPP is working on training special prosecutors to handle SGBV cases and minimizing the use of police officers as prosecutors, among other initiatives.

5.3.4 The Judiciary The judiciary is headed by the Chief Justice and is structured hierarchically from the Supreme Court, Court of Appeal, the High Court, and subordinate courts. The Supreme Court Comprises of 7; the chief justice, vice chief justice and 5 other judges. Appeals from the Court of Appeal to the Supreme Court are as a matter of right in any case involving the interpretation or application of the Constitution of Kenya and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.

5.3.4.1 The Supreme Court may review a certification by the Court of Appeal and either affirm, vary or overturn it. The Supreme Court may also give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

5.3.4.2 The Court of Appeal comprises not less than 12 judges that include a President of the Court of Appeal who is elected by the judges of the Court of Appeal from among themselves. The Court of Appeal is a superior court of record, and hence it sets precedents. It has limited original jurisdiction. It was created to hear appeals from the High court. The only moment the Court Appeal can have original jurisdiction is in punishment for contempt of court, and when stating execution of orders of the High Court. The practice and procedure of the court of appeal are regulated by the rules of court made by the Rules Committee. At least three judges shall sit for the determination of any matter by the court. The decision of the court is arrived at based on the opinion of a majority of the judges who sat for the purposes of determining that matter. The court has powers to: provide final determination of a case; order for a trial or re-trial; frame issues for the determination of the High Court; receive additional evidence or order that it be taken up by another court.

5.3.4.3 The High Court is headed by a principal Judge elected by peers. Ordinarily, the High Court is duly constituted by one Judge sitting alone. However, there are instances where two or more High Court Judges may be required to determine certain kinds of cases. The High Court has unlimited original jurisdiction in criminal and civil matters. The High Court has also jurisdiction to: determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; hear an appeal from a decision of a tribunal (other than a tribunal appointed under Article 144); hear any question respecting the interpretation of the Constitution and supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Other matters of direct interest to SGBV that the High court presides over include: Succession, matrimonial jurisdiction, and powers to protect and enforce fundamental rights and freedoms under the Bill of Rights.

5.3.4.4 The subordinate courts

These include the Magistrates courts; Kadhis' courts; the Courts Martial; and any other court or local tribunal as may be established by an Act of Parliament. Majority of the SGBV cases are heard by magistrate courts presided by Chief Magistrate, Senior Principal Magistrate, Senior Resident Magistrate, Resident Magistrate or Principle Magistrate. Their authorities vary in administrative responsibility and fines and sentencing they deliver. Kadhis courts are headed by a Chief Kadhi, who hears matters relating to Islamic law -the parties involved must all be followers of Islam and all must agree to the matter to be decided under Islamic law such as divorce, succession etc. The judiciary has been responsive to gender issues in general and those related to SGBV in particular. The Judiciary Training Institute has collaborated with various NGOs to conduct trainings for judges and magistrates on the SOA, violence against women and human rights. A notable partnership is that between members of the judiciary and Kenya Women Judges Association (KWJA). The latter has been conducting Court Users Committee (CUC) meetings that are an inter-agency coordination mechanism for all stakeholders – Magistrates, Advocates, Medical Practitioners, Police Officers, Probation Officers, Children Officers and Gender Officers – involved in the administration of justice. Since 2011, the CUC meetings have been focused on the implementation of the Sexual Offences Act in four areas: Nairobi West, Naivasha, Migori and Kilifi. One of the objectives of the CUC meetings is to enhance understanding of various legislations with a view to promoting equality.

5.3.5 Ministry of Health

The Ministry of Health is responsible for the development of policies aimed at providing high quality and affordable health care. It is also charged with, among other functions, the development of a well-trained and motivated workforce of health professionals; adequately respond to any public health related issues & emergencies; and preventive healthcare. With respect to SGBV, the Ministry of Health is a frontline service provider in the provision of clinical and psychological care of survivors. The Ministry is also an important link in law enforcement and administration of justice since it is charged with collecting and preserving critical evidence for crimes related to SGBV as well as availing professionals who testify in court when required to. The training of health professionals is very important to ensure that SGBV cases are managed sensitively and professionally, and they are able to link up with the law and justice sectors to ensure justice is realized. These professionals also have a responsibility to support awareness raising and prevention of SGBV as a public health concern.

Other importance initiative the Ministry is leading include: The establishment of the Gender Based Violence Recovery Centers in the largest public hospitals: Kenyatta National Hospital, Mombasa, Nakuru, Kisumu and Eldoret. Development of National Guidelines for the Management of the Sexual Violence by the Ministry of Health and relevant stakeholders. And provision of Post Exposure Prophylaxis and Emergency contraception to victims of sexual violence who report to health facilities.

5.3.6 Ministry of Education, Science & Technology

The Ministry has two State Departments: State Department of Education that is charged with developing and managing policies and programs on education; and State Department of Science & Technology charged with amongst other functions, policy formulation on Science & Technology.

The Ministry, and in particular the State Department of Education, is key to the implementation of the gender policy in general, and related policy actions on SGBV. The Ministry is very important as the socialization of many children and their welfare happens and is taken care of in institutions of learning.

In its delivery of education services, the ministry has to deal with issues of SGBV in these institutions, ensuring the learning environment is conducive for learners.

The Ministry has a large body of employees key among them being teachers and instructors, who are key socializing agents and opinion leaders in communities. As a result, they are critical actors in SGBV programs particularly in awareness raising, counseling, reporting, referrals and ensuring adherence to policy requirements. They are key stakeholders when it comes to control of SGBV in institutions of learning such as schools, colleges, and unions, both at management and student welfare levels.

5.3.7 The 47 County Governments

The County system of devolved government is being implemented in accordance with constitutional provisions that provide how it should function. County governments are expected to take charge of most sectors of county development including implementation of national development policy. They also have an opportunity to enact laws and make policy that speaks to the needs of each county.

So far, each county differs from the other in the way they are implementing various functions and programmes depending on the interests and management style of the Governor and the Executive. The reason for this is because systems in many county governments are still evolving. While county governments have done away with what used to exist before they came into being; they present an opportunity of a fresh beginning that would focus on local accountability when dealing with SGBV. This especially in regard to the participation of all stakeholders- state and non- state actors- in more coordinated manner.

Counties have executive officers in charge of gender, who can be rallied upon to set up coordination mechanisms and systems to fast track implementation of SGBV action plans. They are also well positioned to push for resource allocation towards SGBV programmes.

The main challenge when it comes to dealing with counties on SGBV is identifying entry points for coordination and how best to deal with various counties differentials in SGBV prevalence.

5.3.7.1. Implications of County Community SGBV Systems

The shift to using county based community driven systems to fast track handling of SGBV and to hold National and County duty bearers accountable for their actions requires a change in strategy in the preventative and management responses on SGBV. The following are some of the strategic interventions that are needed to prevent and manage violence against women.

- ❖ Provision of legal aid services to victims of VAW.
- ❖ Provision of psychosocial services to victims of VAW.
- ❖ Public awareness campaigns on violence against women.
- ❖ Training of police officers, magistrates and judges on Gender Based Violence.
- ❖ Provision of shelters for victims of Sexual and Gender Based Violence.
- ❖ Conducting research on GBV trends.
- ❖ Monitoring the implementation of the Sexual Offences Act, Regional and international treaties on VAW.
- ❖ Aggressive advocacy on the full implementation of policy and legislative frameworks around VAW
- ❖ Collaboration with Council of Elders in cases involving violence against women, particularly in relation to harmful traditional practices like FGM.

5.3.7.2 The implementation of these interventions is likely to encounter the following challenges

- ❖ Insufficient resources to address GBV.
- ❖ Persistence of harmful traditional practices.
- ❖ Lack of adequate sex-disaggregated data on GBV.
- ❖ Inadequate infrastructure for addressing GBV, for example, forensic laboratories, and Gender Violence Recovery Centers.
- ❖ Prosecution of cases involving Trafficking in Persons, Sexual Offences and offences relating to FGM are likely to pose difficulties since they often involve close relatives.
- ❖ Some communities may take the devolved system of governance as an indicator of autonomy and license to continue harmful cultural practices that hurt women and girls.

5.3.7.3 Handling County Challenges

- ❖ Available data on counties should be used to set priorities for the SGBV program and identification of appropriate county coordination mechanisms
- ❖ Existing GBV National coordination mechanism be strengthened and used to replicate similar coordination at county levels
- ❖ Harness existing capacity for gender mainstreaming at County level by using officers from the National Ministries of labour to strengthen the SGBV coordination and response work of county officials.
- ❖ Target the highest levels of accountability-the Governors and their Executive teams and the Speakers and their legislative team - at the Counties to drive and ensure program success.
- ❖ Support the formation of a gender committee at the office of the public prosecutor to ensure better handling and fast track prosecution of SGBV related offences.
- ❖ Support advocacy and practical initiatives working towards full implementation of laws and policies that support the fight against FGM.
- ❖ Put in place a monitoring system for SGBV program implementation.

6. Recommendations

6.1 Recommendations on specific interventions that need to be addressed by the Jamii Thabiti project in collaboration with NGEK include:

6.1.1 On Laws

Law	Interventions
Sexual offences Act (2006),	<ul style="list-style-type: none"> ❖ Support putting in place enforcement and monitoring mechanism to ensure compliance with Section 24 – that prohibits law enforcement officers extracting sexual favors from survivors of SGBV who seek their services. ❖ Support formulation of regulations to operationalize section 39 of Sexual Offences Act that requires the registrar of the High Court to keep a register and a data bank of convicted sexual offenders & Section 47 that gives the implementing minister power to prescribe regulations on what is to be contained in this data bank ❖ Support training of prosecutors to enhance capacity on handling sexual offences ❖ Support putting in place measures to collect evidence to standards required by SOA
The Protection Against Domestic Violence ACT 2015,	<ul style="list-style-type: none"> ❖ Support identification of specific crimes to the domestic environment under the Act and lobby for specific sentences/penalties that may be included in judiciary guidelines ❖ Consider situations when domestic workers may be covered by the Act and lobby for their recognition in the law or guidelines ❖ Support purposive action plan to raise awareness on the Act and support its implementation and monitoring
The Prohibition of FGM Act 2011,	<ul style="list-style-type: none"> ❖ Community (county) specific initiatives to change mindsets on continuation of FGM ❖ Support youth and school based programs aimed at enabling girls to resist FGM and protection of such girls from violence perpetrated by relatives'
Counter-Trafficking in Persons Act 2011.	<ul style="list-style-type: none"> ❖ Support government to launch and implement the national plan of action on implementation of the Act ❖ Lobby and support government to provide shelter and other protective services to victims of trafficking Support government to provide wide scale anti-trafficking training to its officials, including police, labor inspectors, and children's officers on stopping internal trafficking of girls for purposes of early marriage, child prostitution and child labour.

Marriage ACT 2014	<ul style="list-style-type: none"> ❖ Support advocacy by people with mental disabilities to develop and get government to adopt guidelines on enjoyment of their rights in marriage (avoid discrimination against them). ❖ Support development of guidelines on “people presumed to be married” under the old marriage jurisprudence who may not register their marriages and thus fail to enjoy accompanying rights ❖ Support development of guidelines/advisory on other traditional/cultural marriage practices still common among some Kenyan communities such as woman to women marriages (not lesbian) Revisit the principle of gender equality in marriage in regard to polygamous and aspects of customary marriages.
Matrimonial Property Act 2013 & Law of succession Act	<ul style="list-style-type: none"> ❖ Support general awareness raising on the implications of matrimonial property and succession Acts ❖ Support paralegal work at assisting women in need of advice and services (such as documentation) on the requirements of the Acts ❖ Support advocacy and public interest litigation against exemption of agricultural land and livestock in 11 counties from succession Act in preference to laws and customs of the deceased’s community. The exemption perpetuates discrimination against women and girls and members of the community that are already discriminated by customs and traditions contrary to the constitution.
Employment Act 2007	<ul style="list-style-type: none"> ❖ Support development and implementation of action plan to give effect to the provisions on sexual harassment in the Act and the formulation of the mandatory sexual harassment policies by organizations with over 20 employees. ❖ Support awareness raising on sexual harassment at workplaces and put in place initiatives to support victims.
Children’s Act 2010	Support duty bearers to realize the standards required for protection of children in police/prison custody or those who are in conflict with the law or whose parents/guardians are facing criminal charges.
Education Act 2012 and Basic Education Act 2013	<ul style="list-style-type: none"> ❖ Support review of education Acts to fully address issues of SGBV within the education sector based on identified needs and experiences of all stakeholders. ❖ Support review of policies of staff oversight bodies and trade unions such as Teachers Service Commission and Kenya National Union of Teachers to comprehensively address issues of SGBV in institutions of learning
Procedural Laws	Support institutionalization of legal support to women and girls seeking redress for rights violations.

6.1.2 On Policies

Policy	Recommended Interventions
National Policy on Gender and Development-2000	<ul style="list-style-type: none"> ❖ Support completion of the ongoing policy review to conform to the Constitution of Kenya, 2010 constitution and setting of new targets for SGBV ❖ Support implementation of action plans through technical assistance to improving sector/county coordination and resource allocation
Vision 2030	<ul style="list-style-type: none"> ❖ Support advocacy efforts to get the government to increase resource allocation to sectors implementing the vision and more specifically on areas that speak to SGBV ❖ Offer technical assistance to devolve governments on the implementation of the Vision at the county level.

6.1.3 On Duty Bearers

Duty Bearer	Interventions
Ministry of Public Service, Youth and Gender Affairs	<ul style="list-style-type: none"> ❖ Through directorate of gender- work with sector based Gender Officers to exert more influence on CPPMU to develop better program initiatives for SGBV as well as implement respective existing laws and policies ❖ Work with county based youth officers to support implementation of laws and policies at the counties as well as the National policy agenda ❖ Lobby for completion of national gender policy review and support formulation and implementation of county gender policies
National Gender & Equality Commission	<ul style="list-style-type: none"> ❖ Partner with NGEN “Keeping the promise to end GBV campaign” to harness synergy towards implementing JAMII THABITI objectives ❖ Review implementation of national policy ❖ Coordinate development of National Guidelines on Protection of Survivors of SGBV including “safe houses” and coordination with supportive legislation such as “Witness Protection Act” ❖ Develop SGBV model policy and law (cascaded from national policies and laws) for counties that will enable them address SGBV issues specific to them ❖ Support capacity building on Gender Responsive Budgeting (GRB) in counties including mainstreaming of county specific gender concerns in County Intergrated Development Plans (CIDP) to leverage implementation of SGBV initiatives among others that enhance equality and non discrimination of women, people living with disabilities and marginalized populations

Ministry of labour Social Services and EAC Affairs	<ul style="list-style-type: none"> ❖ Support implementation of the law on mandatory workplace sexual harassment policies
The Ministry of Interior and Coordination of National Government	<ul style="list-style-type: none"> ❖ Support capacity building of police to understand SGBV and respond appropriately to violations against women and girls ❖ Support capacity building of the National Administration structures/ officers to take measures to enforce the laws, implement policies, and work in a complimentary manner with police to reduce SGBV and facilitate services to survivors ❖ Support the chief's office to work together in more effective manner with County SGBV grassroots mechanisms
Office of the Attorney General and the Department of Justice	<ul style="list-style-type: none"> ❖ Support AG to build capacity of relevant stakeholders on guidelines for implementing the various SGBV laws and to complete formulation and revision of any pending guidelines
Office of the Director of Public Prosecutions (ODPP)	<ul style="list-style-type: none"> ❖ Support ODPP to train enough special prosecutors to handle SGBV cases so as to minimize the use of police officers as prosecutors. ❖ Support the SGBV Offences Division within the ODPP and devolve its functions to the counties
The Judiciary	Support Judiciary to train all judicial staff on the implementation of SGBV laws and on their oversight role in the administration of justice with particular reference to SGBV cases
Ministry of Health	<ul style="list-style-type: none"> ❖ Support the Ministry of Health to raise the profile of SGBV prevention as a public health concern. ❖ Support county governments to establish gender violence recovery centers in all the target counties
County Governments	<ul style="list-style-type: none"> ❖ Support capacity and institutional building of county grassroots structures that tackle SGBV ❖ Support multi-sectoral coordination mechanisms at county level, and link it to the NGEC national coordination structure ❖ Support SGBV data collection at county level and its utilization in planning and review of ongoing programs

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Kutetea usawa wa jinsia na haki za waliobaguliwa na kupuuzwa

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