

Case Law Handbook on Violence Against Women and Girls in Commonwealth East Africa

Kenya, Rwanda, Tanzania, Uganda

Commonwealth Secretariat



The Commonwealth

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Foreword

Violence Against Women and Girls (VAWG) remains disturbingly persistent and pervasive across the Commonwealth and worldwide, and important strands of Commonwealth Secretariat work are directed towards eradicating this scourge. In these, we act in accordance with mandates handed to us by Commonwealth Heads of Government and priorities agreed by our member countries at Commonwealth Ministerial Meetings.

Notable among our contributions is the development of tools to strengthen the capacity of rule-of-law officials in Commonwealth countries. We are greatly assisted in doing so by Commonwealth advantage, which is the product of our shared Common Law inheritances, our shared language, and similar systems of governance and administration.

In June 2016, the *Judicial Bench Book on Violence against Women in Commonwealth East Africa* was launched in Nairobi, Kenya. Among recommendations made by the Judicial Bench Book Technical Working Group of justices and gender experts was that illustrative examples of case law on VAWG should be collated and reviewed. Accordingly, this Case Law Handbook has been developed by judges in East Africa as a contribution towards the development of the jurisprudence of equality.

The aim is to aid propagation and implementation of procedural recommendations and good practices set out in the Judicial Bench Book, and to provide judicial officers and other rule-of-law practitioners with a comprehensive and up-to-date resource on adjudicating matters of VAWG in East African jurisdictions. This publication therefore presents leading cases of relevance to these jurisdictions, and is intended to add to local manuals, guidelines or handbooks that reflect local processes.

We offer this handbook as an encouragement to reflect and learn more about how national and international law can be applied by studying revealing examples of VAWG case law, and by understanding in greater depth procedure, recommended court practice, sentencing and remedies.

**The Rt Hon Patricia Scotland QC
Secretary-General of the Commonwealth**

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In the event we have omitted any individual or organisation that contributed to the project, we offer our sincere apologies and thanks.

Katalaina Sapolu
Senior Director, Governance and Peace Directorate

Members of the Technical Working Group

Country	Judicial official	Thematic area
Kenya	Justice Martha Koome Justice of the Court of Appeal of Kenya	Violence against women and girls case law of appellate courts in Kenya, Rwanda, Tanzania and Uganda
Kenya	Justice Grace Mumbi Ngugi Judge of the High Court of Kenya	Economic abuse and other GBV
Tanzania	Hon. Justice Winifrida Korosso High Court, Judiciary of Tanzania	Forced marriage and psychological abuse
Uganda	Hon. Justice Henrietta Wolayo Judge of the High Court of Uganda	Rape, defilement and FGM
Uganda	Justice Elizabeth Ibanda-Nahamya Judge of the International Criminal Division of the High Court of Uganda (Rtd)	Forced marriage and other GBV
Rwanda/ Commonwealth Judicial Education Institute	Hon. Justice Angeline Rutazana Judge of the High Court, Rwanda	Sexual assault and physical assault

Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CA	Court of Appeal
CC	Constitutional Court
CEHURD	Centre for Health Human Rights and Development (Uganda)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CEFM	Child Early and Forced Marriage
DEVAW	Declaration on the Elimination of the Violence Against Women
DPP	Director of Public Prosecution (Kenya)
ECtHR	European Court for Human Rights
eKLR	Electronic Kenyan Law Review
ESCR	Economic, Social and Cultural Rights
FGM	Female Genital Mutilation
FRw	Rwandan Franc
GBV	Gender-Based Violence
HC	High Court
IC	Industrial Court
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
IOM	International Organization for Migration
JJA	Justice(s) of the Court of Appeal
JJCC	Justice(s) of the Constitutional Court
JJSC	Justice(s) of the Supreme Court

KSh	Kenyan Shilling
LSA	Law of Succession Act (Kenya)
OLPC	Organic Law No. 01/2012/OL Instituting the Penal Code (Rwanda)
PCA	Penal Code Act (Uganda)
SADC	Southern Africa Development Community
SC	Supreme Court
SCSL	Special Court for Sierra Leone
SOA	Sexual Offences Act (Kenya)
SOSPA	Sexual Offences Special Provisions Act (Tanzania)
TIA	Trial Indictments Act (Uganda)
TSh	Tanzanian Shilling
TLR	Tanzania Law Reports
TSC	Teacher's Service Commission (Kenya)
UDHR	Universal Declaration on Human Rights
USh	Ugandan Shilling
UK	United Kingdom
UN	United Nations
USA	United States of America
VAWG	Violence against Women and Girls

List of Cases

International Courts

Prosecutor v Alex Tamba Brima, Bazzy Kamara and Santigie Borbor Kanu [2004] SCSL 16-T

Prosecutor v Jean Paul Akayesu (Judgement) ICTY-94-4 of 2 September 1998

Kenya

C.K.W. v Attorney General & another [2014] eKLR (Ochieng HC)
Council of Imams and Preachers of Kenya, Malindi & 4 others v The Attorney General & 5 others [2015] eKLR (Chitembwe HC)

Dennis Osoro Obiri v Republic [2014] eKLR (Kariuki, M'noti, Mohammed CA)

David Mwangi Njoroge v Republic [2013] eKLR (G.W. Ngenye-Macharia CA)

FIDA v The Attorney General & another [2018] eKLR (Mativo HC)
Esther Nangwanaa Nandi v Jones Chewe Bobo [2006] eKLR (Rawal HC)

Esther Wanjiru Kiarie v Mary Wanjiru Githatu [2016] eKLR (Kimondo HC)

GMV v Bank of Africa Kenya Limited [2013] eKLR (Rika IC)

George Hezron Mwakio v Republic [2010] eKLR (Odero HC)

In the Matter of the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR (Ngugi HC)

Joan Bett v Republic [2017] eKLR (Mumbi Ngugi HC)

John Irungu v Republic [2016] eKLR (Asike-Makhandia, W. Ouko, K. M'noti CA)

J.O.O. (also known as J.M.) v The Attorney General & 6 others [2018] eKLR of 2014 (Ali-Aroni HC)

Joseph Lotoyo v Republic [2011] eKLR

Katet Nchoe & another v Republic [2011] eKLR (M.J. Anyara Emukule HC)

Pauline Robi Ngariba v Republic [2014] eKLR (D.S. Majanja HC)

Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguithi & 6 others [2014] eKLR (Kimaru HC)

Peter Mburu Echaria v Priscilla Njeri Echaria [2007]¹ eKLR (Tunoi, O’Kubasu, Githinji, Waki, Deverell CA)
P K M v R P M [2017] eKLR (Okwengu, Musinga, Gatembu-Kairu CA)
MBO v Republic [2010] eKLR (Omolo, Waki, Visram CA)
M G N K v A M G [2016] eKLR (Karanja, Warsame, Azangalala CA)
MAO & another v AG & others [2015] eKLR (Ngugi HC)
Ngoka v Madzomba [2002] eKLR (Waki HC)
NML v Peter Petrusch [2015] eKLR (Rika IC)
P N N v Z W N [2017] eKLR (Waki, Kiage, Azangalala CA)
P.O. v Board of Trustees, AF & 2 others [2014] eKLR (Rika IC)
P.O.O. (A Minor) v DPP & another [2017] eKLR (Omondi HC)
Republic v Jackline Kwamboka Omboji [2018] eKLR (Okwany HC)
Robert Mutungi Muumbi v Republic [2015] eKLR
R P M v P K M [2015] eKLR (Kimaru HC)
Sheikh Ali Samoja v Republic [2016] eKLR (Odero HC)
W.J. and L.N. v Astarikoh & 9 others [2011] eKLR (Ngugi HC)
C.K. (A Child) through Ripples International as her guardian and next friend & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others [2012] eKLR (Makau HC)

Rwanda

Mukamusoni Catherine v Mukagasana Domitilla [2013] RWSC 0087 of 2012 (Francine SC)
Mujawimana et al. v Bank of Kigali Ltd (BK) [2016] RWSC 0008 of 2014 (Kayitesi, Kayitesi, Nyirandabaruta SC)
Prosecution v Cyuma Miruho [0142/10/CS] RWSC (Rugege, Mukanyundo, Rugabirwa SC)
Prosecution v Fatirakumutima [2013] RWSC (Nyirinkwaya, Havugiyarmye, Mukamulisa SC)
Prosecution v Gatare [2014] RWSC 0317 (Immaculee, Fabien, Innocent SC)
Prosecution v Habimana [2010] RWSC 0321 [2016] (Mugenzi, Nyirinkwaya, Rugabirwa SC)
Prosecution v Maniragaba [2015] RWSC 0257 (Hatangimbabazi, Kalimunda, Munyangeri SC)
Prosecution v Mpitabakana [2014] RWSC 0129 (Nyirinkwaya, Havugiyaremye, Mukamulisa SC)
Prosecution v Naramabuye [2014] RWSC 0071 (Mutashya, Hitiyaremye, Kanyange SC)

Prosecution v Ngurinzira [2015] RWSC (Mutashya, Munyangeri, Hitiyaremye SC)

Prosecution v Nkinamubanzi [2016] RWSC 0067 (Nyirinkwaya, Munyangeri, Hitiyaremye SC)

Prosecution v Nshimiyimana [2016] RWSC 00332 (Claire SC)

Prosecution v Nshutirakiza [2015] RWSC 0047 of 2011 (Mutashya, Gakwaya, Hitiyaremye SC)

Prosecution v Uwiringiyimana [2017] RWSC 0067/13 (Mutashya, Rugabirwa, Kalimunda SC)

Prosecution v Uwizeye Eustache [2017] RWSC 0225 of 2013 (Mutashya, Rugabirwa, Karimunda SC)

RE v N.J [2015] RWHC 0787 (Kaliwabo, Mukakalisa, Kabagambe HC)

Rutabayiru v Batamuliza [2016] RWSC 0013 (Mugenzi, Gakwaya, Munyangeri SC)

Tanzania

Agnes Doris Liundi v Republic [1980] TZCA 46 (Mustafa, Mwakasendo, Kisanga, CA)

Bashford v Tuli [1971] TZHC 76 (Hamlyn HC)

Chalimba Chimbalemba v Republic [2011] Criminal Appeal No. 368 of 2008

Diha Matofali v Republic [2015] TZCA 245 (Kimaro, Mugasha, Mziray CA)

DPP v Jamal Waziri [2001] TZHC 324 (Munuo HC)

Edson Simon Mwombeki v Republic [2016] TZCA 94 (Rutakangwa, Massati, Mugasha CA)

Jenesia Philemon v Republic [2011] TZCA 179 of 2009 (Munuo, Nsekela, Mandia CA)

John Martin alias Marwa v Republic [2017] Criminal Application No. 20 of 2014 (Mmilla and Mkuye CA)

Lawama Dedu v Republic [2016] Criminal Appeal No. 318 of 2015 (Mjasiri, Juma, Mugasha CA)

Leonard Jonathan v Republic [2007] TZCA 225 (CA)

Mwita Masabo v Republic [2002] TZCA 56 (Lubuwa, Mroso, Kaji CA)

Nyakanga v Mehego [1971] TZHC 270 (El Kindy HC)

Rebeca Z. Gyumi v The Attorney General [2016] TZHC 5 (Munisi, Lila, Kihio HC)

Republic v Modest & another [1968] TZHC 26 (Seaton HC)

Thomas Adam v Republic [2012] TZCA 134 of 2010 (Kimaro, Mandia and Kaijage CA)

Uganda

Adoli Dickens v Uganda [2017] COA Criminal Appeal No. 41 of 2010 (Kakuru, Egonda Ntende, Obura CA)

Bizimana Jean Claude v Uganda [2014] COA Criminal Appeal No. 143 of 2010 (Kasule, Mwangusya, Egonda Ntende CA)

Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi [2007] UGHC 52 of 2006 (Kasule HC)

Candia Akim v Uganda [2016] COA Criminal Appeal No. 181 of 2009 (Kasule, Obura, Byabakama-Mugenyi CA)

CEHURD & 3 others v The Attorney General [2011] UGCC 16 (Mpagi-Bahigeine, Byamugisha, Kavuma, Nshimye, Kasule CC)

CEHURD & 3 others v The Attorney General [2013] UGSC 16 (Katureebe, Esther, Tumwesigye, Odoki, Tsekooko, Okello, Kitumba SC)

Diku Francisko v Uganda [2010] UGCA 304 (Kasule, Obura, Mugenyi CA)

Law and Advocacy for Women in Uganda v The Attorney General [2010] UGCC 8 of 2007 (Mukasa-Kikonyogo, Mpagi-Bahigeine, Twinomujuni, Byamugisha, Kavuma CC)

Livingstone Ssewanyana v Uganda [2010] UGSC 19 of 2006 (Tsekooko, Katureebe, Kitumba, Tumwesigye, Kisaakye SC)

Juuko Musa v Uganda [2010] UGCA 180 (Kavuma, Buteera, Ntende CA)

Kaserebanyi James v Uganda [2018] UGSC 10 of 2014 (Katureebe, Tumwesigye, Arach-Amoko, Mwangusya, Ekirikubinza SC)

Kooky Sharma and Anor v Uganda [2011] UGSC 44 (Odoki, Oder, Tsekooko, Karokora, Kanyeihamba SC)

Mifumi and Ors v The Attorney General and Kenneth Kakuru [2014] UGSC 2 (B.M. Katureebe, Kisaakye, Tumwesigye, Odoki, Tsekooko, Okello, Kitumba SC)

Mureeba Janet & 2 others v Uganda [2002] UGSC 007 (Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba SC)

- Muhwezi Alex and Hassan Bainomugisha v Uganda* [2010] UGSC of 2005 (Tsekooko, Katureebe, Kitumba, Tumwesigye, Kisaakye, Ekirikubinza SC)
- Nfutimukiza Isaya v Uganda* [2000] UGCA 41 of 1999 (Kato, Okello, Kitumba CA)
- Ntambala Fred v Uganda* [2018] UGSC 34 of 2015 (Tumwesigye, Mwangusya, Opio-Aweri, Mwendha, Ekirikubinza SC)
- Otema David v Uganda* [2015] UGCA 155 of 2008 (Mwangusya, Butera, Ntende CA)
- Opira Mathew v Uganda* [2000] UGCA 114 of 1999 (Kato, Okello, Engwau CA)
- Kato Sula v Uganda* [2000] UGCA 30 of 1999 (Kato, Okello, Kitumba CA)
- Senyondo Wilson v Uganda* [2003] UGCA 40 (Mukasa-Kikonyogo, A. Twinomujuni, C.K. Byamugisha CA)
- Ssendyose Joseph v Uganda* [2010] UGSC 150 (Kasule, Aweri, Kakuru SC)
- Uganda v Abiriga Michael alias Mayia & another* [2016] UGHC 0094 (Mubiru HC)
- Uganda v Akandinda Jackson* [2014] UGHC 69 (Aweri-Opio HC)
- Uganda v Amoko* [2014] UGHC 69 (Nahamya HC)
- Uganda v Anyolitho Denis* [2016] UGHC 0182 (Mubiru HC)
- Uganda v Balikamanya* [2014] UGHC 25 of 2016 (Masalu HC)
- Uganda v Dimba Pascal* [2017] UGHC 89 of 2014 (Mubiru HC)
- Uganda v Eriya Paul* [2009] UGHC 0010 (Nahamya HC)
- Uganda v Kakaire & others* [2015] UGHC (Nahamya HC)
- Uganda v Kasujja Ivan* [2014] UGHC 0004 (Wolayo HC)
- Uganda v Kiryagana Emmanuel* [2011] UGHC (Anglin HC)
- Uganda v Kusemererwa Julius* [2015] UGHC 15 of 2014 (Batema HC)
- Uganda v Muhwezi Lamuel* [2012] UGHC 292 of 2010 (Kwesiga HC)
- Uganda v Mukiibi Godfrey* [2014] UGHC 0008 (Wolayo HC)
- Uganda v Mujuuzi Kalooli* [2009] UGHC 116 (Nahamya HC)
- Uganda v Muwanga Sepuya James* [2016] UGHC 0108 (Mubiru HC)
- Uganda v Mwanje Aggrey* [2015] UGHC 03 (Luswata HC)
- Uganda v Najja Sebango* [2012] UGHC 65 (Nahamya HC)
- Uganda v Natukunda Faith* [2012] UGHC 001 (Nahamya HC)
- Uganda v Nyanzi David* [2016] UGHC 116 (Nahamya HC)
- Uganda v Okello Steven* [2015] UGHC 093 (Kazibwe HC)
- Uganda v Okuni Dennis* [2012] UGHC 0025 (Nahamya HC)

Uganda v Okwera James [2016] UGHC 0004 (Nahamya C)

Uganda v Olega Muhamad [2016] UGHC 33 (Mubiru HC)

Uganda v Tumwesigye Zirabwa alias Sigwa [2013] UGHC 92 of 2011 (Namundi HC)

Uganda v Yiga Hamidu [2004] UGHC 5 of 2002 (Musoke HC)

Note

- 1 The wife, Priscilla Njeri Echaria, presented a complaint to the African Commission on Human and Peoples' Rights via Communication 375/09 (represented by Federation of Women Lawyers, Kenya and the International Centre for the Legal Protection of Human Rights). This was declared inadmissible for failure to comply with Article 56(6) of the ACHPR.

Chapter 1

Introduction

Chapter 1

Introduction

Violence against women and girls (VAWG) is prevalent in the Commonwealth countries covered in the Case Law Handbook – namely Kenya, Rwanda, Tanzania and Uganda. The most prevalent and notable cases involving VAWG in the countries listed pertain to sexual offences including defilement, rape (whether marital or otherwise) and sexual assault; physical assault, in particular domestic violence; and other gender-based violence (GBV), for example sexual harassment and the trafficking of women for the purposes of prostitution or sexual exploitation and sexual slavery. The main thematic areas in this Handbook have been premised upon the eight incident types of VAWG set out in the Commonwealth Judicial Bench Book on Violence against Women in East Africa.

The four countries under review have all signed and ratified various human rights instruments that call for the protection of women from violence. These include the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Declaration on the Elimination of the Violence Against Women (DEVAW), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child. Many of the provisions contained in these instruments find expression in the Constitutions and legislation in the countries from which the cases in this Handbook are drawn. The Constitutions of each country underscore the essential values of human rights, equity, inclusiveness, non-discrimination, protection of marginalised groups and equality. It is incumbent upon each state to protect its citizens, and vulnerable citizens in particular, who comprise, *inter alia*, women and girls. The state acts through institutions such as the judiciary, which is given the primary responsibility of interpreting laws and rules relevant to the fight against VAWG and which is enjoined to uphold the guarantees for the protection of fundamental freedoms and rights.

The judiciary is an arm of Government that is vested with judicial authority, thus it is the lead agency in the development and implementation of formal legal responses that uphold the rule of law, human rights and all the values enshrined in the country's Constitution and statutes. As the administrator of justice, the judiciary is uniquely positioned to take the lead by interpreting

the Constitution and statutes to define citizenship obligations and to set standards for a value-based society that respects constitutional rights and freedoms. In the course of interpreting the laws, the judiciary also performs the role of lawmaker by legislating from the Bench. In the process of addressing ambiguity and conflicts existing between legislative provisions, “judge-made” laws are developed. These are further propagated through the doctrine of *stare decisis*, as precedents are handed down to lower courts.

Within the hierarchy of courts, the various courts of appeal are among the superior courts. These apex appellate courts are presided over by their respective chief justices. These courts have unlimited civil and criminal jurisdiction and hear appeals arising substantially from the lower courts, with exceptions as stipulated by the Constitution of each state. These appellate courts are usually the forum for secondary appeals, except for in Uganda, which has a Court of Appeal in between the Supreme Court and the High Court. These superior courts of record have set precedents by deciding landmark cases, which are summarised below.

The Case Law Handbook propagates the procedural recommendations and good practices set out in the Commonwealth Judicial Bench Book on Violence against Women in East Africa, January 2017. The main purpose of this Handbook is to provide judicial officers and other practitioners with a comprehensive and updated resource on adjudication of matters of VAWG in East African jurisdictions. The intention is to add to available resources on the subject in East Africa and to provide contextualised information, reflecting local processes. Cases that predate the Judicial Bench Book have been analysed in such a way as to take into account the good practices recommended therein.

Courts have, to a great extent, contributed to the development of legal frameworks for the protection of women and girls from violence. There are highly notable contemporary decisions, such as the constitutional case of *Rebecca Gyumi v The Attorney General* in Tanzania,¹ where the Court sent a clear message that neither religion nor custom could be used as an excuse to violate children’s rights.

These developments are particularly evident in the sentencing process. The sentencing regime in Kenya and Uganda is founded on constitutional and statutory provisions in addition to guidelines. Rwanda relies heavily on the Penal Code to guide sentencing, whereas courts in Tanzania apply laws or general principles, with guidance through circulars from the chief justice and the chief judge. Decisions of the superior courts of record essentially guide the sentencing in subordinate jurisdictions and provide requisite interpretation with regard to provisions on sentencing. For example, in *Kaserebanyi James v Uganda*,² the Supreme Court took the opportunity to

clarify its decision in *Tigo v Uganda*³ on the meaning of life imprisonment. Their Lordships observed that:

Section 86(3) of the Prisons Act which deems life imprisonment to be 20 years' imprisonment should not be left to remain on our statute books. We think Parliament should as a matter of urgency amend this law to bring it in conformity with the new trend of sentencing.

While their Lordships did not directly refer to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, their reasoning is consistent with Guideline 23, which stipulates that imprisonment for life is the second gravest punishment after sentencing to death, which should be imposed only rarely. This precedent gives clear guidance to trial judges that life imprisonment means the remainder of a person's natural life and therefore they need not necessarily impose lengthy sentences to circumvent Section 86(3) of the Prisons Act.

The need to address VAWG, child marriage and other harmful practices against women and children cannot be overemphasised. Every day that VAWG continues, it becomes more and more vital to combat it. It is apparent that the law by itself cannot redress the situation – but it does have an essential role in creating an impact. For example, there has been a marked decrease in the practice of female genital mutilation (FGM) since FGM laws were introduced, and a number of prosecutions of persons practising this custom have been successful.⁴

The other point worthy of observation is that the Case Law Handbook highlights notable cases in the fight against VAWG. The cautionary rule in cases involving sexual offences in Uganda was finally buried by the decision in *Ntambala v Uganda*,⁵ in which the Supreme Court held that the rule discriminated against women and that evidence in sexual offences cases must be evaluated in the same way as in other criminal cases. With respect to rape, the case that stands out is the UN Tribunal for Rwanda case of *Prosecutor v Jean Paul Akayesu*,⁶ which extended the horizons of feminist jurisprudence when it held that the accused person was guilty of rape even though he did not personally rape any women. His instigation and directions to others to commit rape made him culpable and guilty of rape.

Uganda does not have any specific and separate law on child marriage, but under Article 31 of the Constitution of the Republic of Uganda (1995), the minimum age of marriage is set at 18 years. Formal and informal marriage below this legal age is common practice across the country. In incidents that consist of informal arrangements, *ex post facto* payment of a “dowry” may follow to ratify the action. In order to tackle this form of VAWG, cases involving sexual intercourse in the context of “child marriage” have been successfully prosecuted as “aggravated defilement”.⁷

Judges grapple with reluctant witnesses, especially where the victims feel they are married or love the perpetrator. This is particularly prevalent where the perpetrator is also below 18 or where parents have received bride wealth. In the FGM cases discussed in the Case Law Handbook, we see instances of victims voluntarily subjecting themselves to circumcision. Therefore, victims may find themselves in conflict with the law. The experience by courts of not having the victim present at trial is an issue dealt with in *Bassita Hussein v Uganda*,⁸ which is cited authoritatively in almost every defilement case in Uganda. It enables courts to be flexible in adjudicating cases in the absence of a victim provided that the prosecution adduce other cogent evidence.

One of the recurring challenges in administering justice lies in achieving consistency. In considering different factors and unique facts, sentences may be perceived to lack uniformity. Consequently, the validity of decision-making may be brought into question. While the Rwandan Penal Code provides for minimum and maximum sentence (imprisonment and fine) and sets out aggravating and mitigating factors, there are no sentencing guidelines, and this can lead to lack of consistency for courts in the sentencing of offenders. In Uganda, the guidelines suggest a starting point but do not dictate to the judicial officer which sentence to impose. The requisite consistency does not require that exactly the same sentence be imposed in similar cases. Rather, the objectives of the guidelines include provision of a mechanism that will promote uniformity, consistency and transparency in sentencing. This particular component necessitates that the judge explain how and why the decision was made, as is the practice in Ugandan courts. The decisions discussed herein provide such explanations and would guide a judicial officer when making his or her decision on sentencing.

Judicial discretion is a fundamental aspect of the independence of the judiciary and is provided for in the respective national Constitutions. Judicial discretion requires that limits be placed on the ability of the appellate courts to interference with sentences. In Kenya, the Sexual Offences Act (SOA) prescribes minimum sentences, and, where the sentencing court has complied with the law, the Court of Appeal cannot interfere with sentencing. In the case of *Lotoyo v Republic*,⁹ the Court of Appeal dismissed an appeal against a minimum sentence of 20 years for the offence of defilement contrary to the SOA. The Court of Appeal considered whether it had the jurisdiction to interfere with the sentence and declined to do so on the grounds that severity of sentence was a matter of fact that it was precluded from determining by virtue of Section 361(1)(a) of the Criminal Procedure Act.

More often than not, courts have found accused persons guilty of minor and cognate offences to meet the ends of justice where the evidence has fallen short of the standard of proof. Black's Law Dictionary defines a cognate offence as "*a lesser offence that is related to the greater offence because it*

shares several of the elements of the greater offence and is of the same class or category”.¹⁰ Considerations of what constitutes a minor and cognate offence were set out in *Ali Mohamed Hassani Mpanda v Republic*.¹¹ The High Court of Tanganyika held that:

S. 181 of The Criminal Procedure Code (similar to section 87 of The Trial on Indictments Act, Cap 16) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

Conviction and subsequent sentencing on a cognate offence allows the judge to deter the accused and the community from committing all related offences where there could have been an acquittal founded on technicalities.

Limited access to justice is a major roadblock to addressing VAWG. For example, there would be significantly difficult involved in a girl child from rural parts of East Africa or even an urban slum navigating her way to court, filing a case and prosecuting it to its logical conclusion. Laws protect the rights of women and girls but they may not know the legal provisions. Even where these females are aware of their rights, social pressure remains that forces them not to report and to accept the mistreatment. This shows the need to make ongoing sensitisation campaigns more in depth.

The other challenge relates to the reporting of cases of violations, especially early child marriages that are organised with the consent of the family. Many such cases do not come to light and therefore remain unprosecuted. In the field of sexual assault, Rwanda has made considerable headway with extensive mechanisms to report sexual assault. These include Gender Desks (a policy requirement for public and private institutions), Community Policing Committees (from grassroots to national level), Human Rights Clubs and Never Again Clubs, and the Isange One Stop Centre, a specialised (and free) referral centre. There are also free hotline telephones linked to the police, the Ministry of Health, the Ministry of Defence and the Prosecution Office.

Kenya’s anti-FGM prosecution unit has deployed teams across the country in an attempt to prosecute more cases and the Director of Public Prosecutions (DPP) is using different strategies that ensure effective dispensation of justice to both the accused and the victim through the use of mobile courts.

This Handbook seeks to address the interaction of children with the public administration of justice system, whether as victims, witnesses or convicts. For Rwanda, the applicable laws are comprehensive and protect the rights of the child. Sentencing of children is an issue when contemplating VAWG

where the victim and the offender are children of similar age and it appeared there was consent. In Kenya, the Children Act provides for judicial discretion by stipulating that the court deal with the child offender through various mechanisms (Section 191). However, a lack of discretion in sentencing under the SOA leads to particularly unjust outcomes for children found guilty of defilement. There is also the injustice suffered by children who come into conflict with the law and are sentenced to rehabilitation centres before the age of 18 but are then transferred to adult prisons.

As demonstrated by the judgements in the Handbook, it was common for the boy child to be charged in instances where teenagers engaged in consensual sex. The High Court in Homa Bay in Kenya settled that anybody below the age of 18 years should be tried, according to the Children Act, which also provides that incarceration should be invoked as a matter of last resort.¹² The maximum sentence under the Children Act is three years in a borstal institution or a rehabilitation school, for all offences involving children. The court is, however, given the discretion to impose any other lawful sentence and, in some rare cases, a custodial sentence is given. This is ordinarily reserved for capital offenders with aggravating circumstances where the young offender is beyond the age of 18 years by the time of sentencing and may not be admitted to a borstal institution.

There are many forms of VAWG. The Judicial Bench Book advocates for a reversion to “other types of GBV” as a category to include VAWG abuses that may not easily fit into the seven VAWG incident types. With regard to sexual harassment, the reported case in this Handbook comes from Kenya,¹³ but the other three countries also have laws pertaining to sexual harassment. In Rwanda, sexual harassment is addressed and punished in the Penal Code. Similarly, the four countries prohibit abortion, with varying modifications. In 2012, Rwanda amended its criminal law to allow terminations in cases of rape, incest and forced marriage or where there is risk to the pregnant woman’s health or that of the baby. The other three countries make similar exceptions. However, the procedure is still out of reach for many women who wish to procure abortions legally. These laws create a great deal of work for judicial officers. Examples include the Kenyan case on denial of access to maternal health services, the Tanzanian case on abortion¹⁴ and the Ugandan cases on trafficking in persons¹⁵ and intra-clan (culturally incestuous) marriages.¹⁶

These decisions suggest there is the means to enable behavioural change and deterrence through judicial determinations. Although some examples of VAWG are deeply ingrained in society, reports indicate a marked decrease in acts such as domestic violence and FGM, attributed in part to the involvement of those involved in the public administration of justice. In the case of *Katet Nchoe & another v Republic*,¹⁷ the High Court of Kenya found

it appropriate to include within the sentence a period of probation, during which the appellants were to attend seminars on the eradication of FGM. Such a decision ensured that, apart from the punitive and deterrent custodial sentence, there would be a measure to ensure a meaningful experience by which the convicts would be set on a path not to reoffend.

In administering justice, the wellbeing and rights of the convicts are taken into consideration during trial and when sentencing. In *Prosecution v Mutabazi*,¹⁸ the Supreme Court of Rwanda reduced the appellant's sentence from 10 years of imprisonment (decided by the High Court) to 7 years of imprisonment because he had committed the offence while he was young and because he was a first-time offender. The Court decided that he should be given the chance to be reintegrated in ordinary life very early so he could develop as a person. The Handbook seeks to guide judicial officers on how to arrive at such a decision.

The Handbook is a tool designed to assist judicial officers to proactively protect the rights of women and girls and to send a positive message on how to counter VAWG in East Africa. The Kenyan courts have ingeniously developed the law regarding the division of matrimonial property by applying Section 17 of the 1882 Married Women's Property Act of England. Judicial officers are expected to be professional, knowledgeable and skilled to exercise such pro-activeness as an advocacy and awareness-raising mechanism.

Notes

- 1 Civil Cause No. 5 of 2016.
- 2 SC Criminal Appeal No. 10 of 2014.
- 3 SC Criminal Appeal No. 8 of 2008.
- 4 See p. 6 of judgement *Uganda v Dimba Pascal* [2017] UGHC 89 of 2014 (Mubiru HC).
- 5 SC Criminal Appeal No. 34 of 2015.
- 6 ICTR-94-4-T of 1998.
- 7 *Uganda v Akandinda Jackson* [2014] HC Criminal Case No. 69.
- 8 SC Criminal Appeal No. 35 of 1995.
- 9 Criminal Appeal No. 135 of 2011.
- 10 9th edition p. 1186.
- 11 [1963] Case No. 1 EA 294.
- 12 *P.O.O. (A Minor) v DPP & another* [2017] eKLR.
- 13 *N.M.L. v Peter Petrausch* [2013] eKLR.
- 14 *J.O.O. (also known as J.M.) v The Attorney General & 6 others* [2014] eKLR.
- 15 *Uganda v Natukunda Faith* [2012] UGHC 001.
- 16 *Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi* [2007] UGHC 52 of 2006.
- 17 HC Criminal Appeal No. 115 and No. 117 of 2010.
- 18 Judgement RPAA 0227/10/CS delivered on 11 April 2014.

Chapter 2

Defilement

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Defilement

Rape/Defilement: “Any form of non-consensual sexual intercourse. This can include the invasion of any part of the body with a sexual organ and/or the invasion of the genital or anal opening with any object or body part.”



C.K. (A Child) through Ripples International as her guardian and next friend & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others [2013] HC

Principle or Rule Established by the Court's Decision

Failure by police to investigate cases of defilement is a breach of fundamental human rights. This includes the general rights to human dignity and access to justice. It also breaches rights specifically intended to protect vulnerable persons, who are owed special constitutional protections. These include the right to protection from abuse, neglect and all forms of violence and inhuman treatment. A failure to investigate violence against female children as a specific group also amounted to a breach of the right to equality and freedom from non-discrimination.

Judge: J.A. Makau | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Failure by police to investigate cases of defilement a breach of fundamental human rights	High Court, Meru (Kenya)	Petition No. 8 of 2012; judgement delivered on 27 May 2013	Defilement

Case Summary

The first 11 petitioners (girls aged between 5 and 15 years) were all victims of defilement. They had experienced sexual abuse at the hands of family members, caregivers, neighbours, employers and, in one case, a police officer. Although each of the girls had reported or attempted to report the defilement to the police, the response in all cases was inadequate. There were failures in the recording of complaints in the Police Occurrence Book, in the arrest of perpetrators and in the interviewing of witnesses. In addition, victims were interrogated in a humiliating manner and demands were made for money

and travel reimbursement. The police further failed to collect and preserve evidence, to bring evidence to court or to visit the crime scenes. This resulted in further psychological and physical harm to the girls, including delays in receiving medical treatment.

The constitutional petition claimed that failure on the part of the police to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence infringed the petitioners' fundamental rights and freedoms under the Constitution of Kenya (2010).

Justice Makau found the respondents responsible for the "horrible, unspeakable and immeasurable" physical, emotional and psychological harm caused to the petitioners by reason of their failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement inaction.

The Court issued a declaration that the petitioners' fundamental rights and freedoms under the Constitution had been violated, in particular those relating to special protection as members of a vulnerable group (Article 21(3)), equality and freedom from non-discrimination (Article 27), human dignity (Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (Article 53(1) (d) and (2)). The Court also held that the respondents were in breach of provisions of international conventions that Kenya had ratified, including the ACHPR, CEDAW, CRC and ICCPR.

The Court held that the police had a constitutional duty to protect the petitioners' rights, which were breached by their failure to conduct adequate investigations. The standard of investigation was also in breach of the principle of "the best interest of the child" under Article 53(2) of the Constitution. The investigation failed to meet local and international policing standards and was held to be in violation of the constitutional obligations of the National Police Service Act under Article 244. These include specific obligations to 'strive for the highest standards of professionalism', to 'comply with constitutional standards of human rights and fundamental freedoms', to train staff to this end and to 'promote and foster relationships within broader society'.

The Court further granted an order of mandamus directing the first respondent together with his agents, delegates and/or subordinates "*to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' complaints of defilement and other forms of sexual violence*" and a second order of mandamus directing the first respondent together with his agents, delegates and/or subordinates "*to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this petition*".

Obiter Dictum

The Court made it clear it was the constitutional duty of the DPP to institute and undertake criminal proceedings against any person before any court; in doing so, it shall have regard to the public interest, the administration of justice and the need to prevent and avoid abuse of legal process.

Points to Note

- This was a landmark constitutional decision in which the Constitutional Court accepted the government's culpability for systemic violence and that failure to ensure proper and effective investigation and prosecution of sexual offences had created a "climate of impunity" for the commission of such offences.
- The Court determined that failure by police to investigate cases of defilement was a breach of fundamental human rights, including the rights to human dignity and access to justice; the rights of vulnerable persons to be protected from abuse, neglect and all forms of violence and inhuman treatment; and the right to equality and freedom from non-discrimination in the criminal justice process.
- The decision made legal history in Kenya as it recognised the obligation of the Kenyan police to conduct proper investigations in cases of sexual abuse and held the police accountable for their treatment of defilement victims. This has important implications for future police handling of sexual violence cases.
- This case has had very significant implications for the future handling of sexual violence cases by all law enforcement agencies. The police (prosecutors) were ordered to ensure that complaints of sexual violence received were promptly, effectively and professionally investigated with due diligence.
- The Court's judgement breathes life into the Constitution of Kenya 2010 by purposively interpreting the bill of rights for the protection of a vulnerable group of people – namely, girl victims of sexual violence. The judgement cites numerous provisions of the Constitution and international law. The case has received international praise for its unapologetic stance on protecting women and girls from sexual abuse. There remains the challenge of ensuring the gains made in this decision are implemented – that is, through the prompt, adequate and effective investigations by police in cases of sexual violence.

Other cases/decisions referred to	
Country/jurisdiction	Decision
ECtHR <i>MC Bulgaria v Bulgaria</i> [2003] 39272/98	The ECtHR held, <i>The investigation of the applicant's case, and in particular the approach taken by the investigators and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations-viewed in the light of the relevant modern standards in comparative and international law-to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse... The court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3(on torture and inhuman/degrading treatment) and 8(on protection of the law) of the Convention.</i>
Inter-American Commission on Human Rights <i>Jessica Lenahan (Gonzales) et al. v United States</i>	On 17 August 2011, the Inter-American Commission on Human Rights considered police obligations to enforce a restraining order in circumstances where a father took his children from their mother's custody without permission and killed them. The Commission found that there was <i>broad International consensus that states may incur... responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women.</i>
South Africa <i>Carmichele v Minister of Safety and Security & another</i>	The Court held, <i>The courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime... Thus one finds positive obligations on members of the Police force both in the IC [Industrial Court] and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women (and children) than freedom from the threat of sexual violence.</i>

C.K.W. v The Attorney General & another [2014] HC

Principle or Rule Established by the Court's Decision

- Statutory provisions criminalising consensual sexual conduct below a prescribed age are not discriminatory. Minors require protection from early engagement in sexual activity.
- A law that permits both the girl and the boy participant to be charged with engaging in sexual conduct below a prescribed age is not discriminatory per se against a particular gender, even if the evidence leads to a particular gender being charged more regularly.

Judge: Fred Ochieng | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
No discrimination	High Court, Eldoret (Kenya)	Constitutional Petition No. 6 of 2013; judgement delivered on 25 July 2014	Defilement Unconstitutionality of prohibited consensual sex between adolescent minors

Case Summary

The petitioner, a minor aged 16, was charged with the offence of defilement of a child aged 16–18, contrary to Section 8(1) as read with Section 8(4) of the SOA. The complainant was a girl aged 16. The petitioner contended that the complainant was his girlfriend, that the sexual act between them was consensual and that the complainant had willingly gone to the petitioner’s house.

The petitioner contended that Section 8(1) of the SOA was inconsistent with the rights of children under the Constitution, to the extent that it criminalises consensual sexual relationships between adolescents. The petitioner also contended that Section 11(1) of the SOA, which created a lesser offence of commission of an indecent act with a child, was similarly inconsistent with the Constitution. The petitioner’s main grounds were that:

- i. The provisions, in practice, promoted disproportionate prosecution of the male child in incidences of consensual sexual acts between minors, even when it was clear that the female child was a willing participant in the sexual act. This constituted the violation of the rights of the male child to equal protection and benefit of the law as it amounted to indirect discrimination against the male child, contrary to Article 27(5) of the Constitution.
- ii. The provisions also discriminated against minors on the grounds of their age, given that adults are not subjected to criminal prosecution for similar activities.
- iii. The stigma attached to the word “defiler” was degrading to a minor. The petitioner also claimed to have been negatively affected by the investigation into the incident.

The petitioner did not seek to challenge the constitutional validity of Sections 8(1) and 11(1) of the SOA insofar as those provisions criminalise *adults* who engage in acts of sexual penetration or in indecent acts with children. Nor was he challenging the constitutional validity of the two provisions in circumstances where children engage in sexual acts that are non-consensual, forceful, violent or exploitative.

The judge found that:

- i. The relevant provisions of the SOA do not *per se* discriminate against the boy because they do not distinguish between the girl and the boy. Both are committing an offence on engagement in a sexual act and there is no statutory bar to charging both the girl and the boy. Consent to sexual activity is not a factor in determining whether the offence had been committed.
- ii. The petitioner had not provided any evidence that the provisions of the SOA *as applied* discriminated against the male. On the facts of the case, only the boy had been prosecuted for reasons related to evidence. While theoretically it would have been possible to charge the girl, there was a paucity of evidence against her. The boy had made no complaints sufficient to sustain a charge. Furthermore, the petitioner had not demonstrated any past patterns of disadvantage in relation to other incidents of consensual sexual activities between minors. Therefore, the Court was not persuaded to make a generalised finding about whether the law *as applied* to “incidences of consensual sexual acts between minors” discriminates against male children more generally. The law does not discriminate against adolescents by criminalising their sexual conduct. The provisions of the law are aimed at a worthy or important societal goal – namely, protecting children from engaging in sexual conduct prematurely.
- iii. The law appropriately attaches the label “defiler” to a person who causes sexual penetration of a child, regardless of the age of the offender. The law distinguishes between wrongs and developmentally normal behaviour. The law treats sexual penetration of a child as a wrong and it serves an important purpose in guiding and protecting adolescents, who if “*left to their own devices... tend to engage in more risky behaviour*”. Furthermore, the fact that the behaviour constituting the offence took place in private does not mean the offender ought to escape public censure.

Points to Note

- This decision brings into sharp focus the problem of the disproportionate prosecution of the male child in incidents where the female child is a willing participant of the sexual acts.
- On the facts, the judge found that the defilement provisions of the SOA did not discriminate against the male child.
- In rejecting the approach of the South African courts (as set out below), the judge found that the provisions did not infringe the dignity of adolescents. Rather, the provisions are necessary to guide

and protect adolescents who would otherwise tend to engage in risky behaviour.

- The case also raises the question as to whether criminalisation is the best way to discourage children and protect them from engaging in sexual activities.
- The law considers children to be particularly vulnerable and therefore affords them protection. While this is a noble aim, it is debatable whether the potential imposition of highly penal sanctions on children who engage in sexual activities is an effective preventative measure. The judge avoided consideration of prevention. Rather, the judge focused on how the law should react to a child who has engaged in sexual activities.
- The judge adopted a positivistic stance that the SOA had been passed by democratically elected leaders who had chosen to criminalise certain activities regardless of whether they were done in public or private.
- The case confirmed that, when dealing with child offenders, especially male, under the SOA, courts should always be guided by the principle of the “best interest of the child”. A child should be tried according to the provisions of the Children Act, which discourage a custodial sentence for a child unless as a matter of last resort. This may include treating both the male and the female child as children in need of care and protection and making orders that they both receive counselling.
- Although the judge was reluctant to declare the unconstitutionality of the defilement provisions in the SOA, the Court acknowledged the need to adopt a more child-friendly response instead of a punitive one.
- A more child-friendly response to this predicament might be to provide for placements or committals that rehabilitate the child and foster restorative justice. In similar cases, the prosecution may desist from prosecuting such cases and instead bring them up as protection and care matters.
- This case signals the need to rethink the law in order to protect and balance the interests of the male and the female child. Other countries have handled this problem in various ways.
 - The law of Canada allows a minor aged 12 or 13 to consent to sexual intercourse with an individual who is fewer than two years older; 14 and 16 year olds can consent to a partner who is fewer than five years older.

- In the UK, a minor can be guilty of sexual contact with another minor but the decision on whether to prosecute is to be determined on a case-by-case basis. According to the UK Crown Prosecution Guidelines: “[I]t is not in the public interest to prosecute children who are of the same or similar age and understanding that engage in sexual activity, where the activity is truly consensual for both parties and there are no aggravating features, such as coercion or corruption.”

Other cases/decisions referred to	
Country/jurisdiction	Decision
South Africa <i>National Coalition for Gay and Lesbian Equality & another v Minister of Justice & 2 others</i> [1998] CCT No. 11 ZACC 15	This case sets out two factors to be considered when determining whether an allegedly discriminatory provision has had an unfair impact on the complainants: <ol style="list-style-type: none"> <i>The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;</i> <i>The nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy or important societal goal, such as for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question.</i>
South Africa <i>Teddy Bear Clinic for Abused Children & another v Minister of Justice and Constitutional Development & another</i> [2013] CCT No. 12/13 ZACC 35	The criminalisation of consensual sexual conduct leads to stigmatisation and infringement on the dignity and self-worth of the adolescent.
South Africa <i>Khumalo v Holomisa</i> [2002] ZACC 12	The Court highlighted the importance of privacy in fostering human dignity and the violations caused by invading deeply personal realms of peoples' lives.

Dennis Osoro Obiri v Republic [2014] CA

Principle or Rule Established by the Court's Decision

Corroboration of a child's evidence is not necessary in cases involving sexual offences as long as the trial court is satisfied that the child was telling the truth.

Judges: Kihara Kariuki, M'Inoti and J. Mohammed | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence upheld	Court of Appeal, Nairobi (Kenya)	Criminal Appeal No. 279 of 2011; judgement delivered on 9 May 2014	Defilement

Case Summary

The appellant was charged with defilement of a child aged 11 or less, contrary to Section 8(2) of the SOA. The particulars of the offence were that he caused penetration of a male organ into the female organ of a nine-year-old girl.

There was adequate evidence to suggest the victim had been defiled. The principal issue was the identity of the defiler. This was derived from the testimony of the victim.

The trial magistrate conducted a *voir dire* examination to ascertain the victim's competency to give evidence. It was ordered that the victim could give unsworn evidence. While giving evidence, the victim identified the appellant as the person who had defiled her, and the record showed that her description of the act of defilement was, notwithstanding her innocent words and language, vivid and particularly graphic.

Section 124 of the Evidence Act, introduced by the Criminal Law (Amendment) Act (2003), and further amended by the SOA, states that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

Pursuant to Section 124, the trial magistrate concluded that she could not find any reason for the girl to frame the appellant, which was as good as stating that she found the girl's evidence trustworthy and her evidence reliable as to the identity of the defiler.

The appellant was convicted and sentenced to life imprisonment. Upon appeal, the High Court rejected the argument that the respondent's evidence was not corroborated as required by law. The Court dismissed the appeal, thereby affirming the conviction and sentence. The appellant launched a second appeal to the Court of Appeal on both conviction and sentence.

The main issue for determination at the Court of Appeal was whether the trial court and High Court had inappropriately relied on the uncorroborated evidence of a minor, whose reliability was being challenged, in convicting the appellant.

The Court of Appeal held that the effect of Section 124 is to create, in cases of sexual offence, an exception to the general rule that an accused cannot be convicted on the uncorroborated evidence of a child of tender years.

The trial magistrate had made specific reference to Section 124 and given an explanation that she could not find any reason for the girl to frame the appellant. Her finding was “as good as stating” that she found the girl’s evidence trustworthy and reliable. The Court of Appeal therefore considered that the trial magistrate was alive to her duty under Section 124 to convict on the uncorroborated evidence in the circumstances.

The Court also affirmed that medical evidence directly linking the accused to the crime was unnecessary as long as the trial court found there was sufficient medical evidence to prove that the victim had been defiled and that the victim’s evidence as to the identity of the person who had defiled her was trustworthy.

The Court therefore held that the appellant had been properly convicted of the offence of defilement contrary to Section 8(2) of the SOA and dismissed the appeal.

Obiter Dictum

The Court rejected the appellant’s argument that the age of the appellant was not proved as an irrelevance. Section 8(2) of the SOA under which the appellant was charged relates to defilement of a child aged 11 years or less. To that extent, it did not matter whether the minor was nine or ten years old. The critical issue is that she was less than 11 years old.

Points to Note

- This is an important precedent that prevents perpetrators of sexual violence from arguing that lack of medical evidence linking the accused to the crime justifies an acquittal. The testimony of a victim alone will suffice if the court is satisfied (and indicates in its judgement) that the victim is a truthful witness.
- Section 124 of the Evidence Act expressly provides that corroboration is no longer necessary in sexual offences if the victim is found to be credible.
- In this case, the trial magistrate had expressly mentioned Section 124, indicating that she was alive to the provision. She had conducted a *voir dire* to ascertain the competence of the victim. Her ruling was akin to a statement that she found the girl’s evidence to be truthful.
- This being a Court of Appeal judgement, it is binding on the High Court and subordinate courts.

- It should be noted that cases where the court required corroboration of the victim's evidence, such as *Nyanamba v Republic* [1983] KLR 599 and *Johnson Muiruri v Republic* [1983] KLR 445, are no longer good law because they were determined prior to the enactment of the Section 124 provision.

Other cases/decisions referred to	
Country/jurisdiction	Decision
Kenya <i>Kassim Ali v Republic</i> [2005] Criminal Appeal No. 84 (Mombasa)	<i>[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.</i>
Kenya <i>Geoffrey Kioji v Republic</i> [2010] Criminal Appeal No. 270 (Nyeri)	<i>Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.</i>

Joseph Lotoyo v Republic [2011] CA

Principle or Rule Established by the Court's Decision

- An appellate court cannot interfere with a sentence unless the sentence is illegal.
- Imposition of the minimum sentence prescribed by statute for defilement is clearly within the range of legal sentences that could be passed upon an offender.

Judges: Onyango Otieno, Karanja and Koome | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal, Eldoret (Kenya)	Criminal Appeal No. 135 of 2011	Defilement

Case Summary

This was a second appeal by the appellant against conviction and sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the SOA. In the trial court, the appellant pleaded guilty to the charge, and was sentenced to the minimum sentence of 20 years. The appeal against

sentence in the High Court was dismissed. A second appeal was made to the Court of Appeal.

The Court of Appeal considered whether it had the jurisdiction to interfere with sentencing and declined to do so on the grounds that the severity of sentence is a matter of fact the Court is precluded from determining by virtue of Section 361(1)(a) of the Criminal Procedure Act, which provides that:

A party to an appeal from a subordinate court may, subject to subsection 8, appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section- (a) on a matter of fact, and severity of sentence is a matter of fact.

Points to Note

- This case is a well-reasoned precedent that establishes that sentencing is a matter of fact and, unless the sentence imposed is illegal, the Court of Appeal has no jurisdiction to interfere with sentences in defilement cases.
- This case provides procedural guidelines on the Court of Appeal's jurisdiction to interfere with sentences in defilement cases.

M.B.O. v Republic [2010] CA

Principle or Rule Established by the Court's Decision

- "Buttocks" should be treated as falling within the legal definition of "private parts", despite not being included expressly in the definition by statute.
- It is permissible to include a count of indecent assault on a charge sheet as an alternative to a main count of defilement. Therefore, conviction on an indecent assault count is sustainable even after dismissal of a defilement count.

Judges: Omolo, Waki and Visram | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal, Nakuru (Kenya)	Criminal Case No. 342 of 2008; judgement delivered on 16 April 2010	Defilement

Case Summary

The appellant, a 63-year old grandfather, was charged with 3 counts of defilement of 3 primary school pupils aged 6, 9 and 11, contrary to Section

145(1) of the Penal Code. Three alternative counts alleged indecent assault through touching of the pupils' buttocks. At trial, the appellant was convicted on each count of defilement. However, on appeal, the High Court ruled that the main counts were defective. The Court found the appellant guilty of the alternative offences, and he was sentenced to serve 10 years for each of the 3 counts of indecent assault, a total of 30 years.

On appeal before the Court of Appeal, the appellant raised two main issues:

- i. Whether touching of the buttocks of a human being constituted indecent assault under Section 144 of the Penal Code.
- ii. Whether an alternative count of indecent assault was sustainable after the dismissal of the main count of defilement.

In dismissing the appeal, the Court of Appeal found that:

- i. Buttocks did constitute private parts. The case of *Gitau v Republic* [1983] KLR 223 defined "indecent assault on females" to include touching:

The touching, for example, of the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse is also indecent assault.

The test is usually whether the assault was intentional and whether it was indecent. A simple assault may constitute indecent assault if it is accompanied by utterances suggestive of sexual intent.

- ii. There was ample evidence that the buttocks of the children were touched by the appellant's male organ. The Court found that, in order for the law to move with the times, "buttocks" should properly be considered part of the private parts of a female sufficient to attract the charge of indecent assault.
- iii. Indecent assault was a sustainable alternative count. The Court of Appeal stated that:

The practice of charging offences in the alternative is one of abundant caution... If the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into thin air! It may be examined to see if it supports a minor and cognate offence and if it does prove such offence beyond doubt, a conviction will follow... Indecent assault is a minor and cognate offence and was for consideration if the main charge was unsustainable.

Although the main charge had been defective, the evidence that was adduced supported the alternative charge.

Obiter Dictum

The Court of Appeal noted that the High Court had reversed the decision of the trial magistrate on the main charge of defilement for being defective, as the particulars of the charge did not state that any carnal knowledge was “unlawful”. While there could be no appeal against that decision, the Court of Appeal affirmed the decision of *J.M.A. v Republic* [2009], reached after the decision of the High Court in the present case, where a similar situation arose. The Court in that decision subjected the charges to the test of “failure of justice” in Section 382 of the Criminal Procedure Code, which is intended to cure such irregularities where prejudice to the appellant is not discernible. In that case, the omission of the term “unlawful” had not prejudiced the appellant in putting forward his defence.

Points to Note

- This case is a good example of how judges using judicial reasoning innovatively or creatively interpreted laws in the absence of statutes, to protect women and girls from sexual abuse or indecent assault.
- By broadening the definition of “private parts”, the Court demonstrated a willingness to take a progressive stance, ensuring the law progresses with the times and “does not stand still”.
- This case was initially heard before the enactment of the SOA. The Court’s position was buttressed by the SOA, which defines “genital organs” to include “the anus”.

P.O.O. (A Minor) v DPP & another [2017] HC

Principle or Rule Established by the Court’s Decision

In a case of defilement involving two minors it is unconstitutional discrimination to take action against the male and not the female.

Judge: H.A. Omondi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Violation of human rights declared; compensation awarded	High Court, Homa Bay (Kenya)	17 August 2017; Constitutional Petition No. 1 of 2017	Defilement

Case Summary

The petitioner was arrested on 14 February 2016 and the following day he was charged before the Senior Resident Magistrates’ Court, Mbita, with the offence of defilement of a child aged 16–18, contrary to Section 8(1) as read with 8(4) of the SOA. He faced an alternative charge of committing an indecent act with

a child contrary to Section 11(1) of the same Act in Criminal Case No. 7 of 2016. The female minor involved was not charged with any offence.

The petitioner was unrepresented. On 15 March 2016, he informed the trial court that he was a minor being held in a prison for adults. Although the trial magistrate directed that he be held at Magunga Police Station so as to be escorted to hospital for age assessment, the order was not complied with and the trial court did follow up on the issue. Despite contending that he was a minor, the trial continued. The petitioner was not provided with copies of all of the witness statements, despite repeated requests and court orders directing their supply.

The petitioner remained unrepresented until the matter was listed during Children's Service Week (14–18 November 2016; this was an initiative of a special Task Force on Children Matters) and an advocate was appointed to represent him in the matter. The petitioner told his advocate that, at the time of the alleged offence, he was 16 years of age, whereupon the advocate made an application for the age assessment report. No age assessment report was ever presented.

The petitioner alleged that his constitutional rights were and continued to be infringed by the respondents. The issues for determination were whether:

- i. The petitioner was a minor.
- ii. Charging the male minor and not the female minor was an infringement of his constitutional right to be treated equally before the law (Article 27 of the Constitution).
- iii. Failing to afford the petitioner the services of an advocate from the outset of his trial and to provide adequate materials to enable him to prepare for his trial, including witness statements, compromised his right to fair trial (Article 50 of the Constitution).
- iv. The constitutional rights afforded to the petitioner as a child had been infringed, in particular the duty to act in a child's best interests (Article 53(2) of the Constitution).

The judge declared the proceedings unconstitutional and awarded the petitioner damages of KSh 200,000.

- i. As to the petitioner being a minor, Section 143 of the Children Act provides that:

Where it appears to the court that a person is under eighteen years of age, the court shall make due enquiry as to the age of that person, and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgement of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

Even in the absence of medical evidence, the magistrate must have presumed that the petitioner was a minor, otherwise there would not have been a listing during Children's Service Week. By analogy with the decision in *Francis Omuroni v Uganda* [2000] C.C. No. 2, in which the Court held that, in the absence of medical evidence, age may be proved using a birth certificate, evidence from a parent or guardian or observation and common sense, the magistrate applied observation and common sense to determine age. The magistrate had the benefit of seeing the petitioner's appearance.

- ii. The petitioner was discriminated against in terms of sex. Being minors, both parties needed protection against harmful sexual activities and should have been dealt with by the authorities, preferably outside of the criminal justice system.
- iii. There was a gross violation of the petitioner's right to a fair trial. He had not been provided with all of the relevant documentation, and he been "*left on his own to conduct a hearing in an offence which was complex and which attracts a minimum sentence of 15 years' imprisonment*".
- iv. The detention of a child for a prolonged period and in an adult remand facility violated the express constitutional right to be detained only for the shortest appropriate period of time, and to be detained separately from adults in conditions that take account of the child's sex and age (Article 53(1)(f) of the Constitution), as well as various international instruments.

Obiter Dictum

"Does a boy under 18 years have the legal capacity to consent to sex? Haven't both children defiled themselves? Shouldn't both then be charged or better still shouldn't the Children's Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counselling rather than criminal penal sanctions. '...I really think in this kind of situation should be re-examined in the criminal justice system....' Mr Oluoch's sentiments are taken in account but I honestly think that in exercising its prosecutorial powers, the DPP ought to pay fidelity to section 4 of the Office of the Director of Public Prosecutions Act (2013) which provides that 'In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles:

- a. *Impartiality and gender equity*
- b. *The rules of natural justice*
- c. *The need to serve the cause of justice, prevent abuse of the legal process and public interest.'*

What transpired in this matter did not, in my opinion, live up to the ideals espoused in the Office of the Director of Public Prosecutions Act. The mere assertion by the petitioner that he was a child ought to have been investigated at the first instance and a children's officer should have been assigned the duty of getting more information about the minor. [I find that the appellant was discriminated against on the basis of sex in that he was charged alone] but in reality they both needed protection against sexual activities."

Points to Note

- This case highlights one of the challenges of implementing the SOA in respect of a male child, where adolescents engage in “mutual” defilement or what appears to be consensual sexual intercourse (also referred to as the Romeo and Juliet scenario).
- The judge found that the prosecution’s decision to charge the male child and not the female child in such a case was discriminatory against the male child.
- While this case does not hold that minors have capacity to consent to sex, it raises questions regarding the suitability of harsh penal sanctions in such situations. Rather than being subjected to the criminal process, the Court opined that adolescents who engage in sex require protection, guidance and counselling.
- Judicial officers are alerted as to the unsuitability and unconstitutionality of harsh penal sanctions in such cases and are encouraged to prefer non-custodial sentence and ensure adolescents who engage in sex receive protection, guidance and counselling, as suggested by the judge in this case.
- The prosecution is advised to proceed with the matter as a care and protection case to enable the children to receive the help they need.
- The case also makes important findings on the treatment of children in the justice system – namely, that the state’s failure to assign an advocate to the accused child was an infringement of the child’s right to a fair trial under Article 50(2) of the Constitution, and the detention of a child in an adult remand facility violated Article 53(1)(f) as well as various international instruments.
- The judge gave directions on how a trial of a minor should be conducted especially in the instant case where the charge indicated both the perpetrator and the victim were more or less aged 16 years. A medical doctor should ascertain the age of the minor, and the children’s officer should be involved in what should be known as a care and protection process. The child should be assigned legal counsel and the trial should be conducted expeditiously. If the child is being held on remand, the case should be dealt with within six months. This will ensure the treatment of the child accords with the provisions of the Children Act.
- The Court made a similar finding in the case of *G.O. v Republic* [2017] eKLR (Criminal Appeal No. 155 of 2016), where the arrest of the male child, instead of both the appellant and the female complainant, amounted to discrimination on the grounds of sex.

Other cases/decisions referred to	
Country/convention	Decision/reference
Uganda <i>Francis Omuroni v Uganda</i> [2000] C.C No. 2	<i>Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.</i>
UK <i>English case of R v G (Appellant) the Baroness Hale of Richmond</i>	<i>As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated may be the offender... Obviously ... there will be wide variations in the blameworthiness of the behaviour... Both prosecutors and those who render sentences will have to make careful judgements about who should be prosecuted and what punishment, if any, is appropriate.</i>
CRC	Article 37

W.J. & L.N. v Astarikoh & 9 others [2015] HC

Principle or Rule Established by the Court's Decision

The state is under a duty to safeguard a child's constitutional rights to dignity, health and education. This includes a duty to safeguard the child against sexual violence by employees such as teachers. Appropriate policies and measures must therefore be adopted to minimise the risk of sexual violence.

Judge: Mumbi Ngugi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
State found vicariously liable for sexual violence committed by its employees	Constitutional and Human Rights Division of High Court, Nairobi (Kenya)	Petition No. 331 of 2011; judgement delivered on 19 May 2015	Defilement

Case Summary

The first and second petitioners, girls aged 12 and 13 years, respectively, were primary school pupils at J Primary School (second respondent) where the first respondent was a teacher as well as deputy head teacher. The first respondent was charged with defilement of the two children contrary to Section 8(1) as read with Section 3 of the SOA. At the time of the hearing of the petition, the criminal case had been concluded and the first respondent acquitted.

The third respondent, the Teacher's Service Commission (TSC), held disciplinary proceedings against the first respondent. The TSC is a constitutional commission established under Article 237 of the Constitution, with the responsibility of, *inter alia*, registering, recruiting, employing and

exercising disciplinary control over teachers. It found the first respondent culpable, dismissed him from employment and struck him off the register of teachers.

The petitioners brought an action seeking declarations that their constitutional rights had been violated and claimed compensation for damages against the first respondent (the teacher). It was also contended that the second, third, and fourth respondents (the school, the TSC and the state, respectively) were jointly liable for compensation as the employer and principal of the first respondent.

The petitioners also sued the state on allegations of failure to put in place measures and implement steps geared towards curbing emerging and continuing cases of sexual abuse against children in schools in Kenya.

The Court found that:

- i. The first respondent (teacher) was indeed guilty of defilement based on the evidence adduced by the petitioners. This was reinforced by the fact that the first respondent had been dismissed from his employment and struck off the register of teachers by the third respondent (the TSC).
- ii. The teacher's conduct caused the petitioners emotional and psychological trauma as well as the risk of contracting sexually transmitted diseases. Thus, the Court found and declared that the teacher's conduct amounted to a violation of the petitioners' constitutional rights to dignity (Article 27), health (Article 29) and education (Article 43).
- iii. The state and any educational or other institution are vicariously liable for the acts of sexual abuse committed by teachers or other caregivers against those who have been placed under their care.
- iv. The third and fourth respondents (the TSC and the state) failed in their duty to safeguard pupils from sexual abuse by their teachers. While there was a circular and a Code of Ethics, there was insufficient enforcement of the same. Further, the TSC had failed to make students aware of the contents of the circular, for instance the prohibition against teachers making contact with students outside what is required of a normal teacher-pupil relationship. There was also insufficient awareness of the TSC website and its reporting and disciplinary mechanisms. The third and fourth respondents were therefore vicariously liable for the unlawful acts of the first respondent.

The first and second petitioners were awarded KSh 2 million and KSh 3 million in damages, respectively, to be deposited in interest-earning accounts in trust for them and for their further education and training.

Points to Note

- The Court found that acts of sexual and gender-based violence committed not only against the first and second petitioners but also against *all students* amount to a violation of their constitutional rights to dignity, health and education.
- This is a groundbreaking decision, because it is the first Kenyan case to consider the vicarious liability of institutions for the unlawful acts of teachers found to have sexually abused pupils. The Court made an important statement of principle that educational institutions and state bodies such as the TSC are under a duty to safeguard pupils from sexual abuse by their teachers. Safeguarding rights not only involves taking remedial action but also requires preventative measures to be put into place, including implementation of appropriate policies and mechanisms. Failure to do so will lead to bodies being held vicariously liable for the unlawful acts of the teacher(s) found to have sexually abused pupils.
- Additionally, the respondents in this case were faulted for failing to provide appropriate psychological support for child victims who were subjected to sexual violence by their teachers.
- The case also encouraged judicial officers to borrow progressive ideas from jurisprudence of other jurisdictions in the Commonwealth.

Obiter Dictum

Judge Ngugi appreciated that, while the majority of sexual abuses are committed by males against female victims, the findings of the Court would apply with equal force to all teachers, regardless of gender, who sexually abuse children under their care.

With respect to the criminal culpability of the accused for defilement, the judge acknowledged that proceedings before the Constitutional Court are not criminal proceedings, and therefore a lower standard of proof is required. Drawing an analogy with non-criminal disciplinary proceedings, the Court quoted the High Court of Kerala in *Spadigam (J.) v State of Kerala* [1970] ILLJ 718 Ker:

"I do not think that judgement of a Criminal Court acquitting an accused on the merits of a case would bar disciplinary proceeding against him on the basis of the same facts, or that the Judgement would operate as conclusive evidence in the disciplinary proceedings. The reason for it is not far to seek. A criminal court requires a high standard of proof for convicting an accused. The case must be proved beyond reasonable doubt. The acquittal of an accused by a Criminal Court only means that the case has not been proved against him beyond reasonable doubt. Such a standard of proof is [not] required for finding a person guilty in a disciplinary proceeding."

Other cases/decisions referred to	
Country/jurisdiction	Decision
England <i>Lister & Ors v Hesley Hall Limited</i> , [2001] 2 All E.R 769	The House of Lords held that the employer of the warden of a residential boarding annex for children with emotional and behavioural difficulties could be held liable for the intentional acts of the warden on the basis of the principle of vicarious liability.
Canada <i>B. (A.) v D. (C.)</i> [2011] B.C.J. No. 1087, 2011 BCSC 775	<i>Board EF owes a duty of care to its students to protect them from unreasonable risk of harm at the hands of other members of the school community... The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful and prudent parent. This was set out by the Supreme Court of Canada in Myers v. Peel County Board of Education, [1981] 2 S.C.R. 21.</i>
Zambia <i>R. M. K. v Edward Hakasenke & others</i> , [2006] 2006/HP/0327	In a case with very similar facts, the plaintiff student brought a claim against a teacher who had raped her at her school, in which the defendant was a teacher, the Ministry of Education and the Attorney General. The Court found in favour of the plaintiff, holding that a teacher is employed, selected and paid by the Ministry, is regulated in the performance of his or her duties by the Ministry and can be suspended or relieved of duty

David Mwangi Njoroge v Republic [2013] HC

Principle or Rule Established by the Court's Decision

A charge of defilement can be brought only where the complainant is under 18 years old. A conviction for rape cannot merely be substituted because it is not a minor and cognate offence of defilement, and the offence of rape raises issues of consent that are unlikely to have been addressed in relation to defilement, an offence in which consent is not a major consideration.

Judge: G. W. Ngenye-Macharia | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed, retrial ordered	High Court (Kenya)	Criminal Appeal No. 193 of 2013	Defilement Rape

Case Summary

The accused was convicted of defilement, contrary to Section 8 of the SOA. However, the complainant was 18 at the time of the offence. She was therefore not a minor at the time of the offence and a conviction on a charge of defilement was not possible as a matter of law. The accused therefore sought to have the conviction quashed.

The High Court found that the accused should have been charged with the offence of rape, contrary to Section 3 of the SOA. The Court considered whether Section 179 of the Criminal Procedure Code could cure the defect by simply allowing the conviction to be substituted for by one of rape. Section 179 permits conviction for an offence other than that charged if the offence is both minor and cognate to the original offence. The Court held that rape

is not minor and cognate to defilement and so to allow the substitution of such a charge would lack “*legal basis and... [go] against the duty of the court to uphold the right to a fair trial*”.

Furthermore, there was a problematic issue of consent that would have stymied substitution of a conviction for rape in any event. On the facts of the case, the complainant attended a school for mentally challenged persons. Section 45 of the SOA creates a rebuttable presumption that a person who is mentally impaired lacks the capacity to consent to sexual intercourse. The issue of consent had not arisen during the trial because consent is not a major element under the offence of defilement. Therefore, no medical records had been produced in relation to the complainant to confirm her actual mental inability, and therefore her incapacity to consent to a sexual act remained unresolved. The accused had therefore been given no opportunity to seek to test the evidence in relation to consent or to rebut the presumption. It would be unjust not to give the accused an opportunity to challenge those issues at trial.

The Court therefore quashed the conviction and set aside the jail term. It was substituted with an order that a retrial be held. It was ordered that a fresh charge sheet be prepared.

Points to Note

- This is a case in which a charge of defilement lacked legal basis. The Court could not simply substitute this for a rape conviction because rape neither is a minor and cognate offence to defilement nor affords the accused an opportunity to address the issue of consent, which is not a major element of the offence of defilement. The courts must uphold the right to a fair trial and ensure balanced justice.
- This case is an important indicator for the proposition that the mere fact that a person has a mental illness does not mean there is incapacity to consent to a sexual act. It also lays a heavier burden on the prosecution to adduce more evidence to show there was lack of consent.
- To prove the absence of consent owing to a mental impairment, it is important to demonstrate the nature and extent of the mental incapability to consent. While the case shows that medical evidence is essential to prove mental incapacity, it also points to the Court’s heavy reliance on said evidence. The evidence adduced reflected that the victim attended a school for mentally challenged persons and that for said victim to attend that school proved that she suffered a form of mental impairment.
- The fact of a complainant being mentally impaired is not conclusive proof of absence of consent; rather, it is a rebuttable presumption that can be dislodged by production of evidence.

Rwanda

Prosecution v Habimana [2016] SC

Principle or Rule Established by the Court's Decision

Although the law provides that an expert's report must be preceded by an oath and failing to do so nullifies the report, nothing prohibits such a procedural error (as distinct from a substantive error) from being rectified. This may be achieved by the expert appearing before the court and swearing an oath before the report is admitted into evidence.

Judges: Mugenzi Louis Marie, Nyirinkwaya Immaculée and Rugabirwa Ruben | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Supreme Court (Rwanda)	Supreme Court Case No. RPAA0321/10/CS of 18 March 2016	Defilement

Case Summary

The accused was prosecuted for having defiled a six-year-old girl. The girl was entrusted to the accused by her grandmother on the way home from church. It was intended that he would bring her to her mother, who was his neighbour. On the way, he prevented the girl from walking with another man, who was also their neighbour. Instead, he defiled her behind a house.

The Intermediate Court convicted the accused and sentenced him to 10 years of imprisonment. He was fined 100,000FRw, his penalty being reduced because he was young (aged 25). Furthermore, the victim's mother was granted moral damages of 500,000FRw.

Following an appeal lodged by the accused, the decision was upheld by the High Court. The High Court relied on the testimony of the victim's mother, the testimony given by the victim's teacher and a medical report. The medical report did not set out the oath of the physician, as required by article 93 of Law No. 15/2004 (relating to evidence and its production). However, the physician swore an oath before the Court prior to the content of the report being admitted into the proceedings.

The accused appealed to the Supreme Court, challenging the evidence on which the earlier decisions were made, in particular the admission of the medical report despite it failing to set out details of the physician's oath.

The Supreme Court upheld the High Court decision. It held that, although the law provides that an expert's report must be preceded by the oath and failing

to do so annuls it, nothing prohibits such a procedural error (as opposed to a substantive error) from being rectified. This could be achieved, for instance, by summoning its issuer before the court and requiring them to take an oath before providing related explanations. This is precisely what happened during this case.

Points to Note

- This case serves as an authority in cases where a medical report is issued without being preceded by the oath, as required by law.
- This case is a demonstration of good analysis by the Supreme Court. It allows value to be given to expert reports affected by procedural rather than substantive errors. Nothing prohibits such a procedural irregularity from being rectified. Failure to preface a medical report with the oath may be remedied by the issuer appearing before the court and swearing prior to the report being admitted into evidence.

Prosecution v Maniragaba [2015] SC

Principle or Rule Established by the Court's Decision

- A court may consider any available supporting evidence in resolving contradictory evidence as to a victim's date of birth.
- The accused cannot rely on alleged consent to sexual intercourse by a victim who is a minor. A minor is incapable of giving such consent.

Judges: Hatangimbabazi Fabien, Kalimunda Aimé and Munyangeri Innocent | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction upheld	Supreme Court (Rwanda)	Case No. RPAA0257/10/CS of 11 September 2015	Defilement

Case Summary

The accused was brought before the Intermediate Court for having defiled a 17-year-old girl. The Court convicted the accused. He was sentenced to 20 years' imprisonment and a fine of 100,000FRw. The sentence had been reduced because he pleaded guilty and sought forgiveness. The accused accepted that he had sought to persuade the victim to have sexual intercourse, thinking that she was 18 years of age.

He appealed to the High Court, which upheld the judgement. It also found partial merit in a civil claim filed by the defiled child's mother, and ordered the accused to pay her 200,000FRw in damages.

The accused lodged a second appeal to the Supreme Court contending that:

- i. There was contradictory evidence as to the victim's date of birth. Although her birth certificate suggested that the victim was born in 1990 (putting her age at below 18), the accused produced a form issued by the local administration that stated that the victim was born in 1988 (putting her age at above 18). He contended that he must benefit from the doubt created by the contradictory documents.
- ii. The victim had in fact consented to sexual intercourse.

Upholding the conviction, the Supreme Court held that:

- i. It is for courts to decide in their sole discretion on the veracity and admissibility of incriminating or exculpatory evidence. The only document with the date of birth of 1988 was procured by the accused himself. The victim was able to produce four separate documents putting her date of birth at 1990. It was beyond doubt that the victim was born in 1990 and therefore below 18 at the date of the offence.
- ii. Any alleged consent of the victim cannot be taken into consideration. Any sexual relation with a child, whatever means or methods are used, is considered to be defilement.

Points to Note

- The case is of interest to the jurisprudence as it clearly states that there is no possibility for a child under the age of 18 years to consent to having sexual intercourse with an accused who is older than him/her. The supposed consent of the victim in this case was therefore irrelevant.
- The case is also of interest with regard to the role of the courts in giving due consideration to other supporting evidence in the file in order to determine the veracity of contradictory or ambiguous evidence. The Court was able to use four different documents to corroborate the victim's date of birth in this case.

Prosecution v Ngurinzira [2015] SC

Principle or Rule Established by the Court's Decision

The court cannot disregard testimony against an accused only because it comes from victim's relatives, or because those relatives have interests in the case. The validity of testimony does not depend on the author but rather on its veracity as determined by the court's assessment.

Justices: Mutashya Jean Baptiste, Hitiyaremye Alphonse and Hitiyaremye Alphonse | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction upheld	Supreme Court (Rwanda)	Case No. RPAA0118/11/CS of 13 November 2015	Defilement

Case Summary

The accused was alleged to have defiled an eight-year-old child when the mother sent the child to bring a hoe from the accused's house. When the victim arrived at the accused's house, the accused immediately held her, took her into the house, removed her clothes and defiled her, leaving serious injuries as indicated in the medical report. The accused pleaded not guilty. The Tribunal of Kigali Ngali Province, having carefully considered the evidence (in particular witness testimony and a medical report), convicted and sentenced him to life imprisonment. The accused appealed to the High Court, which convicted and sentenced him to 15 years' imprisonment and a fine of 100,000FRw. This was a reduced penalty because the accused was a first-time offender. He appealed against the decision to the Supreme Court.

The accused contended that he had been wrongfully convicted:

- i. The medical report was generally unreliable because it was produced two weeks after the incident.
- ii. Even if the report was to be seen as reliable, it indicated that defilement was with a finger.
- iii. Defilement with a finger had been by the victim's mother in order to frame the accused. The accused alleged that he and the victim's mother had disagreed in the past.

The Supreme Court upheld the conviction:

- i. The period within which the medical report was produced was irrelevant. The court is concerned with the evidence contained within it.
- ii. The notion that it was a finger that caused the defilement was a misreading of the medical report. The medical report simply noted that the hymen was broken and "*allows the passage of a finger*" on examination.
- iii. Even if there was an acrimonious history between the accused and the victim's mother, this did not preclude the victim's mother from giving evidence. In any event, witnesses saw the accused at the scene of the crime, coming out of the house and tightening his belt. This suggested he had been the perpetrator.

Points to Note

- The case stands out because it brings out the fact that testimonies including those of the victim's relatives are allowed in court proceedings insofar as the law does not prohibit them.
- Testimonies cannot be disregarded merely because the person may not be entirely impartial. In many cases, evidence will be given by relations of the victim or by people with some prior dealing with the accused. Validity of testimony does not depend on the author, rather on its veracity, which is solely decided by the court following the court's assessment. The accused's mother was therefore permitted to give evidence in the case.

Prosecution v Mutabazi [2014] SC

Principle or Rule Established by the Court's Decision

- A plea of guilty late in the trial will still attract the penalty reduction that comes with a plea of guilt.
- As long as there is sufficient evidence, the court can convict in cases of defilement even without a medical report of the victim.

Judges: Mukanyondo Patricie, Gatete Gakwaya
Benoit and Mukamulisa Marie Thérèse | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence reduced	Supreme Court (Rwanda)	Supreme Court Case No. RPAA 0227/10/CS of 11 April 2014	Defilement

Case Summary

The appellant was prosecuted for having defiled a four-year-old girl. The appellant had confessed to the Judicial Police, and the Intermediate Court convicted him on the basis of his confession. The appellant was sentenced to 10 years' imprisonment and fined 100,000FRw because he was a juvenile offender.

The appellant appealed to the High Court, claiming that:

- The trial judge should not have put any weight on the confession made to the Judicial Police. He contended that he had been beaten and forced to sign the statement.

- ii. The Intermediate Court had wrongfully convicted him because there had been no medical report in connection with the victim.
- iii. The Intermediate Court had ignored the fact that the victim's mother had previously been in conflict with the appellant, which would have provided a motive to lie.

The High Court noted that the appellant had failed to produce any evidence to support his argument about the confession being obtained forcibly. To the contrary, it was evident that he had in fact made the statement willingly, stating how the offence was committed very clearly and in a great deal of detail. The High Court also ruled that medical evidence was unnecessary. The appellant had been seen over the child, which was sufficient evidence to constitute what is stipulated by the law as child abuse. Furthermore, the Court did not consider the alleged conflict with the child's mother because he produced no evidence thereon. Therefore, the High Court upheld the decision of the Intermediate Court.

A second appeal was made to the Supreme Court. During the hearing, the appellant retracted his submissions. He told the Court that he now sincerely pleaded guilty to the offence and sought forgiveness.

The Supreme Court reduced the sentence from 10 to 7 years of imprisonment, in accordance with Articles 82 and 83 of Decree Law No. 21/77 of 18 August 1977 Instituting the Penal Code, providing for mitigating circumstances. The relevant mitigating circumstances included his provision of a detailed explanation of how the offence was committed and his desire to seek forgiveness from the victim's family. The appellant was also entitled to a discount for his guilty plea. The Supreme Court explained that the late guilty plea of the accused could not prevent him from benefiting from a penalty reduction. He was a juvenile and a first-time offender, and therefore he should be given the chance to be reintegrated.

Points to Note

- This case serves as an authority that, in cases where there is no medical report in relation to the victim, the court may still convict the accused person if there is other evidence that is sufficient to prove guilt.
- This case is also an example of a situation in which a juvenile and first-time offender who sincerely pleads guilty and seeks forgiveness benefits from a reduction in sentence, even though the guilty plea was late (second appeal in this case).

Uganda

Uganda v Anyolitho Denis [2016]

Principle or Rule Established by the Court's Decision

Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence.

Judge: Stephen Mubiru | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Acquitted	High Court (Uganda)	Criminal Case No. 0182 of 2016	Aggravated defilement

Case Summary

The accused was indicted on one count of aggravated defilement, contrary to Sections 129(3) and 129(4)(a) of the Penal Code Act (PCA). The accused was alleged to have performed a sexual act on K.P., a girl aged four. The investigating officer checked the accused and found wet semen on his underpants. The victim was examined by the medical officer and found to have stains on her underpants but with no evidence of penetration. The accused pleaded not guilty.

For the accused to be convicted of aggravated defilement, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt:

- i. That the victim was below 14 years of age.
- ii. That a sexual act was performed on the victim.
- iii. That it is the accused who performed the sexual act on the victim.

In relation to each of these essential ingredients of the offence, the Court found that:

- i. Medical examination by a senior medical officer proved beyond reasonable doubt that, as at the date of the offence, K.P. was a girl aged four and therefore under fourteen years of age.
- ii. Under Section 129(7) of the PCA, “sexual act” means penetration of the vagina, mouth or anus, however slight, of any person by a sexual organ. Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence. The prosecution relied only on the admitted evidence of a senior

medical clinical officer who examined the victim and stated that the hymen was not ruptured and there were no injuries seen on the vulva or vagina. The prosecution had not proved sexual penetration beyond reasonable doubt.

- iii. The only evidence purporting to identify the accused as the perpetrator was the circumstantial evidence as to “semen” in the accused’s underpants and the victim’s underpants. However, the prosecution never explored the basis of the investigating officer’s opinion that what he saw on the underpants of the accused was wet semen. The medical examiner did not characterise or classify the nature of the stains he had found in the victim’s underpants as semen. The Court therefore found the evidence as to fluid present in underwear was inconclusive and unreliable, and with it the evidence linking the accused to the offence.

The Court went on to consider whether the available evidence was capable of establishing any of the offences that are minor and cognate to that of aggravated defilement. The usual minor and cognate offences to the offence of aggravated defilement are *simple defilement* (contrary to Section 129(1) of the PCA), *attempted defilement* (contrary to Sections 386 and 129(1) of the PCA) and *indecent assault* (contrary to Section 128(1) of the PCA):

- i. An offence of *simple defilement* could not be sustained because it still required proof of sexual penetration.
- ii. In the instant case, the evidence of an offence of *attempted defilement* or *indecent assault* could potentially have been established by the circumstantial as to “semen” in the accused’s underpants and the victim’s underpants. However, as articulated above, such evidence did not establish that the fluids were semen. There was therefore inadequate evidence to link the accused to the offence.

The judge stated that, before deciding on conviction in a case such as this involving circumstantial evidence, the Court must find the exculpatory facts are:

... incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused’s responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The Court found the circumstantial evidence in the case to be most unsatisfactory.

The prosecution had failed to prove the last two ingredients of the principal offence beyond reasonable doubt, and no other minor or cognate offence could be proved. In agreement with the joint opinion of the assessors, the Court held the accused not guilty. The accused was therefore acquitted and the Court ordered that he be set free forthwith unless held for other lawful reason.

Obiter Dictum

"The most reliable way of proving the age of a child is by the production of her birth certificate, followed by the testimony of the parents. It has however been held that other ways of proving the age of a child can be equally conclusive such as the court's own observation and common sense assessment of the age of the child."

Points to Note

- The court can convict on the basis of a minor and cognate offence only if the evidence is sufficient to support such a conviction.
- In this case, the evidence of two key elements of the offence – namely, performance of a sexual act and the identity of the offender – was wholly inadequate.
- The case provides a good precedent on evaluation of all evidence: circumstantial, witness testimony and state of the victim after the act.
- The Court observed that the most reliable way of proving the age of a child was by the production of his or her birth certificate, followed by the testimony of the parents. The Court's own observation and common sense assessment of age may also suffice.

Uganda v Dimba Pascal [2014] HC

Principle or Rule Established by the Court's Decision

- A person is "in authority" over a child in a sexual case if the relationship between the person and the child is characterised by a one-sided distribution of power, with the person being bound in equity and good conscience to act in good faith with regard to the interests of the child. It therefore includes, among other people, any person acting in *loco parentis*.
- Identification of a perpetrator may be via his voice.

Judge: Stephen Mubiru | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Case No. 89/2014	Aggravated defilement

Case Summary

Section 129(4)(c) of the PCA provides that a person commits aggravated defilement “*where the offender is a parent or guardian of or a person in authority over, the person against whom the offence is committed*”. The accused was charged with aggravated defilement against his granddaughter, who was under his care. He had been looking after her following her mother’s remarriage.

The victim alleged that the accused came into her room in the dark of night and had sexual intercourse with her while threatening to burn down the house if she made any noise. This vocal utterance, the victim stated, is what helped her recognise the perpetrator as her grandfather – an identification that she visually affirmed as he walked out of the door after the act. The accused denied the charges, stating that the victim’s paternal uncle was framing him over a disputed piece of land.

Issues for determination by the Court included:

- i. Whether the accused was a person in authority over the victim.
- ii. Whether the evidence of voice identification evidence was sufficiently cogent to satisfy the Court that the accused was the offender.

The Court found that:

- i. “... a ‘person in authority’ is not defined by the Penal Code Act. Applying the purposive approach to statutory interpretation, for purposes of section 129(4) (c) of the Penal Code Act, a person in authority means any person acting in loco parentis (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child and persons in a fiduciary relationship, with the child i.e. relations characterized by a one-sided distribution of power inherent in the relationship, in which there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith with regard to the interests of the child reposing the confidence...” [emphasis added].

The cultural practice of the grandfather’s tribe was that, if a person has cared for a child, that person may ask for compensation. That person is entitled to retain custody of the child until such compensation is paid. No compensation had been paid to the grandfather. The accused was therefore in *loco parentis* and therefore the “person in authority” for the purpose of Section 129(4)(c) of the PCA.

- ii. The reliability of voice identification evidence required consideration of the following non-exhaustive factors:

- a. Past familiarity with the voice.
- b. Length of exposure to the voice both before and during the incident.
- c. The retention interval between the time when the witness last heard the voice and when recognition of the voice was called into issue.
- d. The degree to which the witness made a conscious effort during the crime to pay attention to the characteristics of the perpetrator's voice.
- e. Whether the perpetrator used unfamiliar language and accent.
- f. The distinctiveness of the perpetrator's voice (or lack thereof).

In the circumstances of the case, there was no possibility of error in the voice identification.

The Court found the accused guilty and sentenced him to imprisonment for 13 years and 10 months.

Points to Note

- This case fills a gap in the PCA by defining “a person in authority”. In so doing, it ensures that potential perpetrators who may not be parents or guardians but who are in positions of influence over a victim, such as teachers, local leaders, religious leaders and sponsors (among others), do not escape justice as aggravated defilers. Parliament must have been aware of the gravity and betrayal attached to using a position of influence to manipulate a girl child when it legislated that abuse of authority must lead to prosecution under the more serious offence of aggravated defilement.
- In this case, a grandfather was found to be in *loco parentis*.
- The case contributes to jurisprudence on equality, especially for blind women and girls insofar as it recognises that identification of a perpetrator may be via his voice, establishing equality insofar as similar (although for practical reasons not strictly identical) criteria apply for visual identification.

Uganda v Okwera James [2016] HC

Principle or Rule Established by the Court's Decision

A person will be treated as having committed a sexual offence in a “position of authority” if the prosecution can establish that, at the time of the act, the person is a parent or is acting in the place of a parent and is charged with any of a parent's rights, duties and responsibilities to a child, no matter how briefly.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction	High Court (Uganda)	Criminal Session No. 144 of 2012	Aggravated defilement

Case Summary

On 8 September 2011, the accused had gone to the victim's mother's house to drink. At one point, the mother left the home and the victim and the accused were alone. The victim was doing housework and bent down to pick up some utensils. The victim realised that the accused was holding her neck strangling her. She wanted to speak but was unable to do so. The accused opened the victim's skirt and had sexual intercourse with her. This took about five minutes. The victim told the Court that the accused was not too drunk to realise what he was doing. After the sexual act, the accused left. The accused denied the charges that were subsequently brought against him.

The Court found that the accused was guilty of performing a sexual act on the victim. However, this was not while he was in a position of authority over the victim. Authority is much more than a relationship between the accused person and the victim. There must be some sort of direct control by the accused person over the victim. In this case, the accused person used to go to the victim's mother's home to drink. The prosecution had not adduced any evidence to show that the accused person had any sort of direct control over the victim or was in any way responsible for the custody or welfare of the victim. It followed that, if the Court were to find that the accused person had control over the victim, it would be out of speculation.

Other cases/decisions referred to	
Country/jurisdiction	Decision
Uganda <i>Uganda v Tangit Martin</i> [2007] UGHC 18	The accused person was a person in authority over a victim when the accused person was responsible for the welfare and custody of the victim and the victim required the permission of the accused to do something.
USA (Minnesota) Statutes 609 341 Subdivision 10	"Position of authority" includes but is not limited to any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties and responsibilities to a child no matter how brief at the time of the act.

Point to Note

For purposes of Section 129(4)(c) of the PCA, a person in authority has been defined as any person acting in *loco parentis* (in place of parent or parents) to the victim, or any person responsible for the education, supervision or welfare of the child. This implies that, on application of the *ejusdem generis*

rule of interpretation, the law applies to all persons who fall within that categorisation.

Uganda v Kasujja Ivan [2014] HC

Principle or Rule Established by the Court's Decision

- National and international laws condemn sexual violence against young girls. Sentencing should reflect such condemnation through the imposition of an appropriate punishment.
- It is an aggravating feature to deliberately target a victim as a form of revenge on the victim's family.

Judge: Henrietta Wolayo | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session No. 0004-2014 (S.129(1)PCA)	Defilement

Case Summary

The accused was indicted for aggravated defilement, contrary to Section 129(3)(4)(a) of the PCA. He was alleged to have performed a sexual act on a child under the age of 14 years.

The accused was indirectly connected to the victim, having previously been in a relationship with, and having had a child with, the victim's older sister. The victim had gone to the accused's house to play with that child. However, she was left alone at the accused's house. The accused held the victim's hand and took her to a coffee grove, where he removed her underpants and performed a sexual act on her. After ordering her not to reveal what had happened to anyone, he let her return home, where she recounted what had happened.

The accused denied that he had committed the offence. It was an accepted fact that, prior to the offence, the accused never supported the child that was born to the victim's sister, and that he was not wanted in the victim's family home. The accused contended that there was therefore ample reason to falsely implicate him. He contended that he was elsewhere at the time that the offence took place.

The Court decided that:

- The victim was a credible witness.
- There was clear evidence that a sexual act had been performed and that the victim was in clear distress on the night of the incident.

- iii. The accused fled and was arrested after four months. This was indicative of a guilty mind.
- iv. The accused's movements, even on his own account, would have placed him close to the scene of the crime.
- v. The offence was a deliberate action, intentionally targeting the victim as a way of "getting back at her parents for rejecting him".

The accused was therefore convicted and sentenced to 23 years and 6 months' imprisonment, with the victim's intention aggravating the offence. The offence was also aggravated by the need to send a strong message that sexual violence against young girls "*will be punished appropriately when proved*".

Points to Note

- While sentencing offenders in cases involving sexual violence against women, the intention of the offender must be considered as an aggravating or mitigating factor.
- This present case was "*aggravated by the deliberate action of the accused to target the victim as a way of getting back at her parents for rejecting him*". The case therefore highlights sexual violence as a form of punishment to a family by the convict.
- Furthermore, "*sexual violence against young girls is condemned by both international and our laws and as such, this court must send the message that it will be punished appropriately when proved...*"

Uganda v Mukiibi Godfrey [2014] HC

Principle or Rule Established by the Court's Decision

When the victim of a sexual offence complained about the offence to a third person, that third person is permitted to give hearsay evidence of that complaint. An accused can therefore be convicted in the absence of live testimony from the victim.

Judge: Henrietta Wolayo | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session No. 0008-2014; S.129(3)(4)(a)(b)PCA	Aggravated defilement

Case Summary

The accused was indicted for the aggravated defilement of his 14-year-old daughter. The victim's mother had died, and so the accused was her sole

parent. The specific factors that aggravated the defilement were the abuse of a position of authority, and the fact that the accused was HIV-positive.

The victim did not testify despite several adjournments on summoning her. Instead, the prosecution relied on the evidence of two teachers, who testified that the victim had complained to them about being defiled by her father. Neither teacher knew the accused. The medical evidence showed that the victim's hymen had been broken.

The accused was convicted and sentenced to 14 years' imprisonment.

Points to Note

- This case demonstrates good practice where a judicial officer can convict a sexual offender despite the victim's failure to testify by invoking the exception to the hearsay rule that applies when a person has complained to another about a sexual offence.
- Moreover, the case stands out because it highlights the reality where the victim has been compromised or made to disappear in order to frustrate the justice process. This case is one of the major challenges faced during trials of sexual offences because in most cases the victim is the only eye-witness and is crucial to the case.
- This case highlights sexual violence through a serious abuse of a position of authority. It also demonstrates the vulnerability of girls who are left in the charge of their father after their mother dies.

Uganda v Muwanga Sepuya James [2016]

Principle or Rule Established by the Court's Decision

- In the absence of a scientific examination, the opinion evidence of a physician as to the age of a victim may be treated as inconclusive.
- Although circumstantial evidence can be used to prove penetration occurred at the time of the offence, that evidence must be sufficiently clear and cogent for the court to be satisfied beyond a reasonable doubt.
- A court may take into account the emotional impact on family members as an aggravating factor in cases of sexual violence.

Judge: Stephen Mubiru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty of attempt	High Court (Uganda)	Criminal Sessions Case No. 0108 of 2016 (s.129(3) and (4)(c) PCA)	Aggravated defilement

Case Summary

The accused was charged with aggravated defilement of his daughter, who was 17 years old and had a mental disability. The girl's mother and wife of the accused (P.W.3) found the accused and the victim lying together half naked, the accused behind the victim, both lying on their side. P.W.3 saw the accused remove his trousers and place his legs over the victim. P.W.3 pushed the door open and rebuked the accused. The accused pleaded not guilty, contending that he had not seen the victim that day. He contended that he was asleep at the time that the alleged offence took place.

For the accused to be convicted of aggravated defilement, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt. That:

- i. The victim was below 18 years of age.
- ii. A sexual act was performed on the victim.
- iii. The accused was a person in authority over the victim at the material time.
- iv. It was the accused who performed the sexual act on the victim.

As to the elements of aggravated defilement, the Court found that:

- i. The most reliable way of proving the age of a child is by production of her birth certificate, followed by the testimony of the parents. No such evidence was forthcoming. Although a doctor examined the victim and concluded that she was 17 years of age, the examination was not scientific. Accordingly, this evidence was inconclusive. Nevertheless, age can also be proved through the Court's own observation and common sense assessment of age. Having seen the victim in court, and in the apparent absence of any contest from the accused that the victim was under 18, the Court concluded that the victim was a girl under 18 years of age at the time of the offence.
- ii. While addressing the issue of whether a sexual act was performed on the victim, the Court referred to Section 197 of the PCA, which defined "sexual act" as including any penetration of the vagina, however slight, by a sexual organ. This ingredient is ordinarily proved by the direct evidence of the victim, but may also be proved by medical evidence (whether direct or circumstantial) or by other circumstantial evidence. Although the victim's hymen had been ruptured, the medical report did not indicate that such rupture was recent. Furthermore, there was no indication of the source of any bleeding that could have been attributable to menstruation. The prosecution therefore rested on other circumstantial evidence. The witness evidence of the girl's mother and a further witness (P.W.4) failed to prove conclusively that sexual intercourse or any

other sexual act as defined by Section 197 of the PCA occurred. The circumstances were suggestive of sexual intercourse having been the intention but did not establish as a fact that there had been contact between the sexual organs of the accused and the victim, let alone penetration.

Disagreeing with the joint opinion of the assessors, the Court found the circumstantial evidence too weak to establish beyond reasonable doubt that the girl was a victim of an unlawful act of sexual intercourse as alleged. Since the prosecution had failed to prove one of the essential ingredients of the offence, it was not necessary to evaluate the evidence relating to the rest of the ingredients. The Court accordingly acquitted the accused of the offence of aggravated defilement.

However, according to Section 87 of the Trial on Indictments Act (TIA), when a person is charged with an offence and facts are proved that reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it. The Court therefore went on to consider the offence of attempted aggravated defilement, contrary to Sections 386, 129(3) and (4)(c) of the PCA:

- i. For a conduct to constitute an attempt, the impugned act had to be more than merely preparatory. The Court found that the conduct observed by the girl's mother constituted an unequivocal step that, but for her interruption or interference, would have resulted in the commission of the offence. The prosecution therefore established beyond reasonable doubt that an attempt was made to perform an unlawful sexual act on the victim.
- ii. The prosecution had to prove that it was the accused who had attempted to perform the unlawful sexual act on the victim. In this regard:
 - a. The Court rejected the accused's denial of having seen the victim on that day after examining closely the identification evidence of the two witnesses and having found it to be free from the possibility of mistake or error because both witnesses knew the accused prior to the incident. They had also seen and spoken to him on the day in question and thus were in close proximity to him.
 - b. The Court further found that the admission of the accused that he was asleep on that day in his house when he was awoken by the police, who told him to get dressed, placed him squarely at the scene of the crime as perpetrator of the offence.

The Court found that the prosecution had proved beyond reasonable doubt that the accused had attempted to commit an unlawful sexual act with the victim.

In sentencing, the Court considered that, on the facts of the case alone, the accused should be sentenced to the maximum punishment of 18 years' imprisonment. The convict was the biological father of the victim and the victim had a mental disability. The offence was also aggravated by the embarrassment, indignity and shock suffered by the mother of the victim, who caught her husband, the convict, in the act. However, the maximum sentence was mitigated by the facts that the convict was a first-time offender at 52 years of age. He suffered from a number of ailments and was to some extent intoxicated at the material time. A sentence of 16 years was therefore imposed.

Points to Note

- This case demonstrates that circumstantial evidence may be used in appropriate cases to prove penetration occurred at the relevant time. However, in this case, the medical evidence failed to address recent penetration and the eye-witness testimony was not sufficiently probative as to relevant physical contact.
- In the absence of a scientific examination, the opinion evidence of a physician as to the age of a victim was treated as inconclusive.
- The Court treated the impact of the offence on family members, in this case the mother of the victim and husband of the convict, as an aggravating factor in sentencing the offender.

Uganda v Najja Sebango [2012] HC

Principle or Rule Established by the Court's Decision

- In assessing the evidence of a witness, his or her consistency or inconsistency is a relevant factor in determining whether such evidence should be relied on.
- Grave or major inconsistencies that go to the root of the matter unless satisfactorily explained may result in rejection of the evidence of that particular witness. However, minor inconsistencies are to be ignored.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	High Court Crim. Session No. 65 of 2012 (S.129 PCA)	Aggravated defilement

Case Summary

The accused was indicted for the offence of aggravated defilement of his granddaughter. The victim complained to her grandmother, who had already

noticed that the granddaughter would cry at night and was walking badly. Upon informal examination, it was discovered that the victim had wounds around the vagina and bruises on her body, including between her thighs and around her vagina. The person conducting the examination slid two fingers into the victim's vagina, and they slid in easily. The grandmother and the lady conducting the examination approached a police officer. The victim told the police that her grandfather had had sexual intercourse with her and that she was afraid to reveal the truth to anyone because he had threatened her. The next day the victim was taken for medical examination and the doctor confirmed that she had had sexual intercourse. The police arrested the accused.

In his defence, the accused denied the charge. He accepted that, during the relevant period, he had been at his house. However, he denied any sexual contact, stating that, although he had sexual intercourse with his wife intermittently, he was frail and he had lost his libido long ago.

Counsel for the accused also argued that there was an inconsistency in the dates indicated on the indictment and in some of the evidence as to the location at which the offence occurred.

The Court noted that grave or major inconsistencies, which go to the root of the matter unless satisfactorily explained, would usually though not necessarily always result in rejection of that particular piece of evidence of a witness. However, minor inconsistencies are to be ignored. Any inconsistencies in the case were minor. The prosecution had proved all the elements of the offence beyond reasonable doubt.

As to the accused's defence, a medical practitioner had found that the accused was not in fact impotent. Both the circumstantial and direct evidence indicated that the accused was capable and strong enough to have sex with his wife and therefore with the victim. The accused was convicted and the judge sentenced him to life imprisonment.

Point to Note

In cases involving sexual assault, the judicial decision-making process requires careful consideration of the consistency of evidence. The law of evidence allows for minor consistencies because human memory is fallible. In this case, the Court ignored the minor inconsistencies in the prosecution evidence and focused on the overall strength of the prosecution evidence, as opposed to the major inconsistencies in the evidence on record and the arguments advanced on behalf of the accused.

Principle or Rule Established by the Court's Decision

Sentencing guidelines cannot wholly displace the traditional role of the trial court in bringing compassion and common sense to the sentencing process in devising sentences that provide individualised justice, so that the punishment fits the crime and the offender.

Judge: Stephen Mubiru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty; sentenced to suspended sentence of imprisonment	High Court (Uganda)	Criminal Session Case No. 33 of 22 August 2016	Defilement

Case Summary

The accused was convicted of aggravated defilement. The nine-year-old victim lived with her grandfather and two other girls. In October 2015, the accused visited the grandfather's home while he was out. The accused offered the girls US\$ 500 to buy exercise books and pencils and, when the older girls went to look for their grandfather, the accused inserted a finger in the victim's sexual organ. The grandfather returned and found the victim crying and the accused still at the scene. Medical evidence confirmed a freshly ruptured hymen.

The Court placed weight on similar fact evidence because the accused had previously been convicted of defilement by the same judge and had faced rape charges in the past. It also rejected the accused's defence that he had been framed by the grandfather to cover up for the grandfather's son's defilement of his relative.

The Court had to consider what the appropriate sentence would be in light of competing considerations:

- i. On the one hand, the convict was a repeat offender. He committed the offence with a degree of pre-meditation and careful planning and deceit. He had knowledge of the tender age of the victim and "*practically defiled his great, great granddaughter*". There was a wide age difference between the convict and the victim, who were three generations apart. The convict was 103 years old at the time of the offence and the victim was only 5½. This amounted to an age difference of almost a century.
- ii. On the other hand, the convict was 105 years old at the time of sentencing. As the Court noted:

Whereas younger offenders may reasonably look forward to release after a long term of imprisonment, a high proportion of persons above seventy years subjected to a long custodial sentence may reasonably expect to die before completing their sentence. A relatively long prison sentence is a more severe punishment for someone who is already in their 60s or 70s than for someone in their 20s or 30s. To a person above 70 years, a long custodial sentence could easily be tantamount to a sentence of death.

The Court held that, although Regulation 9(4) of the sentencing guidelines recommended a non-custodial sentence where the convict is of advanced age (75 or over), the convict was a repeat offender and the offence had clear aggravating features. A period of imprisonment was merited.

The convict was sentenced to a suspended term of imprisonment of three years. The period was kept short because it was clear that a convict of such advanced years might die in prison. Despite the aggravating factors, the sentencing guidelines did not displace the traditional role of the trial court in bringing compassion and common sense to the sentencing process. It was noted that:

... especially in areas where the Sentencing Guidelines are silent, a trial court should not hesitate to use its discretion in devising sentences that provide individualized justice, since it is a cardinal principle of penology that the Punishment should not only fit the crime but also the offender.

The three-year tariff was set with reference to sentences imposed on children accused of criminality:

I am still of the view that in a way, extreme old age is a descent into a 'second childhood'. By analogy, the juvenile penal system does not permit custodial sentences beyond the period of three years, even for capital offences. I have decided to treat the convict, being a person of extreme advanced age, in similar fashion.

Points to Note

- This case is an example of the dilemma judicial officers face in sentencing, where they have to undertake a balancing act between justice for the survivors and society and justice for convicts who are vulnerable. The convict in this case was over 100 years old. Even in cases of serious sexual offending, the court should exercise its sentencing powers “in conformity with the principles of justice, equity and good conscience”.
- In the present case, the convict was sentenced to a suspended term of imprisonment of three years.

Principle or Rule Established by the Court's Decision

The age of the offender at the time when a sexual offence was committed may have a bearing on the nature and duration of the sentence, even in cases with serious aggravating features, such as extreme youth of the victim and potentially long-term physical injury to the victim.

Judges: Kakuru, Egonda Ntende, Obura | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Lesser sentence substituted	Court of Appeal (Uganda)	Criminal Appeal No. 41 of 2010; 28 September 2017	Defilement

Case Summary

The appellant was convicted by the High Court of aggravated defilement of a two-and-a-half-year-old child and sentenced to twenty years' imprisonment. He appealed against his sentence.

On appeal it was agreed by the parties that the judge should have taken the appellant's age into consideration. He had been only 19 years old at the time of the offence. It was also agreed that the High Court had failed to take into consideration the two years and three weeks that the accused had spent in pre-trial detention when passing sentence. The Court of Appeal then had to consider what sentence it would have considered to be appropriate:

- i. By way of mitigating factors, the Court of Appeal observed that had the appellant was "barely an adult" at the time of the offence, and noted that, had he committed the offence just one year earlier, then he would have been sentenced as a child, to a maximum of three years' imprisonment. Furthermore, the appellant was of previous good character and he had been HIV-negative at the time of the offence.
- ii. On the other hand, the victim was only two and a half years old. She sustained serious injuries that might have long-term effects on her anatomy. The Court considered these to be serious aggravating factors.
- iii. The Court of Appeal considered previous case law, which suggested that the appropriate period of imprisonment would have been nearer to 12 years.

It therefore substituted the 20-year sentence for a sentence of 12 years' imprisonment.

Points to Note

- In its determination, the Court took into consideration the sentences that had been passed in previous cases. These suggested that 12 years' imprisonment would be appropriate.
- While the Court of Appeal took into account certain aggravating factors, it failed to pay attention to the criminal intent of the appellant, which can only be explained as an intention to harm and to destroy childhood innocence. In the circumstances, the sentence may be seen as too lenient and may not serve to deter potential offenders.

Candia Akim v Uganda [2016] CA

Principle or Rule Established by the Court's Decision

Sexual acts can be proved by both direct and circumstantial evidence and therefore a victim's evidence and medical evidence are not always critical in proving a sexual act.

Judges: Kasule, Obura and Byabakama-Mugenyi | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence confirmed	Court of Appeal (Uganda)	Criminal Appeal No. 181 of 2009; 6 June 2016	Defilement

Case Summary

The appellant was the stepfather of the eight-year-old victim and two other siblings. On 11 May 2008, the appellant returned home at 9.30 p.m. and found that his wife, who is the biological mother of the victim, had just returned from the market where she sold local brew. He picked an argument with her and, in fear of being beaten, she ran to the home of the appellant's brother, where she stayed until morning. On her return home, she asked her children whether the appellant had beaten them. The victim revealed that the appellant had defiled her. The mother of the victim reported the matter and the appellant was arrested, indicted, tried and convicted of aggravated defilement. He was sentenced to 17 years' imprisonment.

On appeal, the appellant's counsel submitted that the trial judge had wrongly relied on medical evidence when the medical examination of the victim had taken place two weeks after the alleged defilement.

The conviction was upheld and the Court of Appeal confirmed the sentence of 17 years. Both direct and circumstantial evidence can prove sexual acts. As with a victim's testimony, it is not always the case that medical evidence is the

critical piece of evidence to prove a sexual act. “*Whatever the evidence, such evidence must be such that it is sufficient and puts the case beyond reasonable doubt.*” In addition to the medical evidence, the judge had rightly relied on the testimony of the victim, the evidence of the mother, to whom the victim had reported the offence, and the evidence of the appellant himself, who admitted he had slept in the house on the night of the incident.

Points to Note

- Both direct and circumstantial evidence can prove sexual acts, and in proving such an act, it is not always the case that victim’s evidence and medical evidence are critical.
- In the present case, there was a range of testimonial evidence, which, when taken together, satisfied the Court beyond a reasonable doubt.
- This case highlights that sexual violence may be motivated by ill motives rather than sexual desires. The victim was turned into a target for transferred malice after her mother had fled from the house following an argument.
- The case also highlights that sexual violence may be a weapon to punish not just the victim but also those who love her.

Diku Francisko v Uganda [2010] CA

Principle or Rule Established by the Court’s Decision

A medical examination undertaken three weeks after an alleged sexual act may be credible corroborative evidence of that sexual act.

Judges: Remmy Kasule, Hellen Obura and Simon Byabakama Mugenyi, | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal (Uganda)	Criminal Appeal No. 304 of 2010	Defilement

Case Summary

The victim was on her way home when the appellant approached and offered her money. When she declined, he threatened to kill her and pulled her into the bush. He ripped off her underpants, pushed her to the

ground and had penetrative sexual intercourse with her. She bled from her private parts but did not inform her mother on getting home. Some days later she fell ill; only then did she inform her mother about what had happened.

The victim was medically examined and found to have been sexually abused. The accused was convicted and sentenced to 14 years' imprisonment.

On appeal, it was contended that the trial judge erred in failing to properly evaluate the evidence. Among other things, it was argued that the medical evidence could not be treated as corroborating the victim's account. It was said the medical evidence lacked credibility because the victim was examined three weeks after the sexual act.

The Court of Appeal upheld the decision of the trial court. Despite the delay in obtaining the evidence, the clinical officer's report revealed clear evidence of sexual force. The medical report amply corroborated the victim's evidence, despite it having been obtained three weeks after the sexual act. The credibility of the medical findings was not challenged at trial. It should have been challenged at the time if credibility was in dispute.

Points to Note

- This case stands out because it articulates that medical evidence may be admitted into evidence even when the medical examination was carried out some days after the sexual act in question.
- The case is significant in areas where victims of sexual violence may not be in a position to access medical services in a timely manner owing to remoteness or the absence of such services.
- The Court of Appeal and the trial judge took a laudable approach, delivering justice to the victim in a case where criticism was aimed at the delay in carrying out the medical examination, rather than the credibility of the clinical officer *per se*.

Juuko Musa v Uganda [2010]

Principle or Rule Established by the Court's Decision

A person may be convicted of a sexual offence occurring on an unspecified date even if there is no corroboration. The uncorroborated evidence must be sufficiently cogent, truthful or credible. It must also be sufficiently precise to afford an accused person an appropriate opportunity to defend themselves. The tribunal of fact must caution itself as to the danger of conviction without corroboration.

Judges: S. B Kavuma, Richard Buteera and Egonda Ntende | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction overturned	Court of Appeal (Uganda)	Criminal Appeal 180 of 2010 (S. 129(3)&(4) PCA)	Aggravated defilement

Case Summary

The appellant was indicted for aggravated defilement. It was alleged that on 24 March 2008 the appellant had sexual intercourse with a girl aged below 14 years old. He denied having committed any offence. The trial judge found that:

- i. The victim was aged 15 years, not 14 years.
- ii. Although the two had had sex three times prior to 24 March 2008, the victim did not have sex with the appellant on the date alleged.

The appellant was acquitted of aggravated defilement but convicted of the minor or cognate offence of defilement occurring on dates unknown. He was sentenced to 12 years' imprisonment.

He appealed against the conviction and sentencing on the ground (*inter alia*) that the learned trial judge had erred in law when he failed to properly evaluate the evidence.

The Court of Appeal held that the trial judge had appropriately concluded that the victim was 15 years old and not 14 years old. The decision not to convict the appellant for aggravated defilement was therefore correct.

The conviction for simple defilement had to be quashed. There was no evidence of sexual intercourse on the date averred in the charge sheet. In fact, the victim explained in her testimony that she did not have sex on that day but that they had had sex about three times before in his house on unspecified dates. As noted by the Court, the appellant did “*not know on which dates he [was] alleged to have committed the offences. Could he defend himself in respect of those offences that occurred on unknown dates?*”

The only other evidence apart from that of the victim was that of a doctor, who confirmed that the victim's hymen had been ruptured. He could not determine when exactly this had happened. The victim herself had given evidence of having had sexual intercourse with an uncle on a previous occasion. There was therefore no corroborative evidence that the appellant had engaged in sexual intercourse with the victim, or as to the dates on which it was said that such intercourse had taken place.

The Court considered the evidence of the victim. The incidents of alleged sexual intercourse, whether with the appellant or with her uncle, had never

been reported to any person or authority. In her evidence, the victim could not state when such incidents had occurred. The Court could not say with the requisite degree of certainty that her uncorroborated evidence was sufficiently cogent, truthful or credible to be the basis of a conviction. The Court therefore quashed the conviction.

Points to Note

- If a date on which a sexual offence took place is specified, it should be supported by evidence. There is no room for estimates.
- A person may be convicted of a sexual offence occurring on dates unknown. However, the court should be particularly alive to the dangers of conviction without corroboration, and caution itself accordingly. It should convict only if the evidence is sufficiently cogent, truthful or credible, and if it is sufficiently precise to afford an accused person an appropriate opportunity to defend themselves.
- In this case, the combination of imprecise and uncorroborated evidence led to the quashing of the conviction.
- It is submitted that, while the charge sheet should be specific, cases of VAWG should be afforded special consideration, so as to give the victim time to recover from suffering trauma and therefore assist in the recall of relevant evidence.
- Particular attention should be paid to the framing of charges, which should include only information that may be proven.

Nfutimukiza Isaya v Uganda [2000] CA

Principle or Rule Established by the Court's Decision

- Penetrative sex is not essential to prove defilement; slightest penetration will suffice.
- Failure of the victim to testify is not fatal to the conviction. The court must consider the cogency and reliability of all of the other evidence in the case.

Judges: Kato, Okello and Kitumba | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence confirmed	Court of Appeal (Uganda)	Criminal Appeal No. 41 of 1999; 19 May 2000	Defilement

Case Summary

In 1999, the appellant was convicted of defilement of a victim aged 10 contrary to Section 123(1) (now Section 129) of the PCA, who was referred to as an “imbecile girl”. On 11 July 1998, the victim was sent to the home of the appellant to pick sugarcane in the company of her elder sister. At the residence, the appellant and his friends prevented the elder sister from accompanying the victim to pick sugarcane. This meant the appellant went alone with the victim to the garden. On their return, the elder sister noticed that the victim had difficulty walking and that her skirt was wet at the back. The sister suspected that she had been defiled and reported her suspicions to her mother. The medical evidence revealed inflammation around the vulva and the presence of “thick, whitish fluid”. However, the victim’s hymen was intact. Medical examination of the appellant a matter of hours after the incident revealed the presence of sperm under the foreskin of his penis. This suggested recent ejaculation.

On a review of the authorities, the trial judge concluded that rupture of the hymen was unnecessary to prove defilement. The offence is complete on proof of even the slightest degree of penetration. The medical evidence and the circumstantial evidence of the sister was sufficient proof. The appellant was convicted and sentenced to 12 years’ imprisonment.

The Court of Appeal held that the trial judge’s approach could not be faulted. Failure of the victim to testify was not fatal to the conviction.

Points to Note

- In cases of defilement of a child with a mental disability who is not in a position to testify, unless the appellant is caught *in flagrante delicto*, the court must consider the reliability of the circumstantial evidence.
- The conviction is an excellent example of how access to justice will be afforded to persons with a disability who are unable to speak for themselves.
- This case may also be used as an authority on how conviction may be achieved in sexual offences where victims are threatened or hidden by family members.
- It is submitted that it is time that the reference to “imbecile” in Section 130 of the PCA be amended so that such victims are referred to as “persons with mental disability”.

Principle or Rule Established by the Court's Decision

Where the victim has a close relationship with the accused, the likelihood of mistaken identity is greatly diminished.

Judges: Kato, Okello and Engwau | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence confirmed	Court of Appeal (Uganda)	Criminal Appeal No. 114 of 1999; 2 November 2000	Defilement

Case Summary

The accused was convicted of defilement and incest and sentenced to 13 years' imprisonment on each count, to run concurrently. The facts as accepted by the High Court were that, on the night of 28 January 1997, when the accused's wife was away from home, he defiled his 13-year-old daughter. The victim had been awoken by pain in her sexual organ and realised the accused was defiling her. She informed her mother about the incident on her return the next day. On being confronted, the accused fled. The mother reported the matter to the police. Medical examination evidence accepted by the Court showed the victim's hymen had been broken 72 hours earlier and there was semen in her sexual organ.

On appeal, the accused contended, among other things, that the judge had erred in his evaluation of the prosecution evidence.

In upholding the conviction, the Court of Appeal held that:

- i. There was no possibility of mistaken identity because the victim was identifying her father's voice. She therefore easily recognised the accused as the person pleading with her not to reveal what had transpired to the mother.
- ii. The victim's evidence was detailed, including as to an offer of US\$ 1,000 to conceal the incident.
- iii. There was corroboration of the victim's evidence in the accused's conduct in running away when his wife confronted him. There was also medical evidence of a freshly broken hymen.

Points to Note

- This case is an example of sexual violence in the home by a person supposed to be protecting the victim. Young girls may be particularly vulnerable to such an abuse of position.

- Cases involving sexual violence in the home may result in more credible witness testimony as to identification. The victim is more likely to know their attacker and therefore is more likely have clear familiarity with their attacker's voice or appearance.

Otema David v Uganda [2015] CA

Principle or Rule Established by the Court's Decision

Courts must consider carefully the statutory provisions relating to compensation and ensure that any order for compensation is made pursuant to the correct statute.

Judges: Mwangusya, Butera and Ntende | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Sentence reduced; compensation order upheld	Court of Appeal (Uganda)	Criminal Appeal No. 155 of 2008; 15 June 2015	Defilement

Case Summary

The appellant was convicted of rape, contrary to Section 123 of the PCA. He was sentenced to 13 years' imprisonment and ordered to pay compensation of USh 300,000 within six months. The appellant appealed against sentence only.

The Court of Appeal held that an appellate court would interfere with the sentence only if it was evident the trial court had acted on an incorrect principle or overlooked a material factor, or if the sentence were manifestly excessive in light of the circumstances of the case.

As to the sentence of imprisonment, sentences imposed in similar cases afforded material for consideration. In *Kalibolo Jackson v Uganda* [2001] (Criminal Appeal No. 45), the Court of Appeal reduced a 17-year sentence for rape to 7 years where the victim was a 70-year-old woman. In *Naturinda Tamson v Uganda* [2011] (Criminal Appeal No. 13), the Court of Appeal reduced an 18-year sentence for rape to one of 10 years. The Court considered that the appellant had spent seven years on remand and reduced the sentence to seven years from date of conviction.

As to whether the court had the power to order compensation, the Court examined Section 129(b) of the PCA and Section 126 of the TIA, both of which were referred to in the judgement when making the order as to compensation. Section 129(b) prescribes compensation for defilement in these terms:

“[The] Court may in addition to a sentence, order compensation to be paid to the victim for any physical, sexual and psychological harm caused to the victim. The court takes into account extent of harm suffered, degree of force used and medical and other expenses incurred by the victim as a result of the offence...”

The Court of Appeal found that Section 129(b) of the PCA concerned only defilement and therefore the trial court had in fact been reliant on Section 126 of the TIA. Section 126 is a more general provision that empowers the trial court to order compensation in addition to a sentence where it appears any person has suffered material loss or personal injury. The Court of Appeal therefore ruled that the trial court had power to order compensation pursuant to Section 126.

The Court of Appeal expressed reservations about the six-month time period within which the compensation was ordered to be paid in light of the fact that the convict had been on remand for seven years prior to sentence. No inquiry had been made in relation to his circumstances to establish ability to pay the sum in six months. The Court opined that it would have been better to make the order for compensation and leave it to the court that may be called on to order distress in respect of the same to consider all the necessary matters, including the provisions of Section 116 of the TIA (relating to sentencing to imprisonment in lieu of distress).

Points to Note

- In this case, the Court of Appeal upheld an order for compensation after clarifying the statutory framework.
- The sentencing process is as much about punishing the perpetrator as it is about rendering justice to the victim. Therefore, an order for compensation is symbolic and tangible justice for a victim in rape cases.
- The challenge seems to be that most perpetrators do not have the means to pay whereas the victims may not be empowered enough to pursue the compensation demand to its logical conclusion.
- Furthermore, the requirement that compensation be paid after serving the sentence makes it mere rhetoric as the victim may well have moved on by then.
- There is a need to consider if the state can be made liable to pay this compensation for not doing enough to eliminate incidences of sexual violence against women, as an extension of its obligations under international law.

Principle or Rule Established by the Court's Decision

- Where a child is to be dealt with by the criminal justice system, he/she must be charged, tried and sentenced following different procedures.
- In this instance, the child's case should have been remitted to a family and children court for sentencing.

Judges: Remmy Kasule, Ruby Opio Aweri and Kenneth Kakuru | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Sentence overturned	Court of Appeal (Uganda)	Crim. Appeal No. 150/2010	Defilement

Case Summary

The appellant was found guilty of defilement and sentenced to 20 years' imprisonment. It was alleged that the appellant had unlawful sexual intercourse with the victim, who was below the age of 18 years at the time. The alleged incident took place on 15 March 2003, when the appellant was aged 16. The appellant was 23 years old in May 2010 when he testified.

On appeal, it was contended that, among other matters, the trial judge had erred in law and fact when he sentenced the appellant to 20 years' imprisonment.

The Court of Appeal overturned the sentence. The appellant was below the age of 18 at the time of his arrest. He therefore should have been sentenced by a family and children court. Even in relation to an offence as grave as defilement, the accused fell to be sentenced in accordance with the provisions of the Children Act (1997). This prescribes a maximum sentence of three years' imprisonment for any child convicted of an offence punishable by death. The appellant had spent more than seven years in custody. He was therefore released.

Points to Note

- The case, which was decided under the previous Children Act (1997), is an example of children committing violence against other children.
- In ordering a large reduction in sentence, it emphasised that proper procedure should be followed where children are involved.
- The case sets the platform for the observance of "child-friendly justice", which is in line with the amended Children Act (2016) and the CRC. The new Act underscores justice that is accessible, age-appropriate, speedy, diligent and adapted to and focused on the needs and rights of the child.

Kato Sula v Uganda [2000] CA

Principle or Rule Established by the Court's Decision

When a victim gives unsworn testimony, probative corroborative evidence must be adduced before a court can convict the accused. This might include medical evidence, evidence of the accused's actions around the time of the incident and evidence of the victim's distress.

Judges: Kato, Okello, Kitumba | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed conviction and sentence confirmed	Court of Appeal (Uganda)	Criminal Appeal No. 30 of 1999; 22 May 2000	Defilement

Case Summary

The appellant was convicted of defilement of an eight-year-old girl, contrary to Section 123(1) (now Section 129) of the PCA. On 6 August 1995, the appellant, who was her teacher, called her to his residence. She went with other children but the appellant sent the other children away. The appellant also sent the girl's uncle away to collect a Koran. The teacher defiled her and, when she did not go back to school, her grandfather asked her why. She revealed she was afraid of the teacher and that he had defiled her. The victim was examined 11 days later and her hymen was found to be ruptured.

At trial the victim gave unsworn evidence about how she was defiled. Because the evidence was given unsworn, Section 38 of the TIA (1971) (now Section 40 of the TIA as amended 2008) required corroboration of her evidence. This was provided by the doctor's evidence. There was also the evidence of the victim's grandfather, who had observed her distressed condition. The appellant was convicted and sentenced to eight years' imprisonment.

On appeal, it was contended (among other things) that the trial judge had erred in finding that the victim's evidence had been sufficiently corroborated.

The Court of Appeal held that the trial court had cautioned itself as to the dangers of convicting on the basis of uncorroborated evidence of the victim. It had then rightly gone on to find corroboration of the sexual act having taken place in the medical evidence and in the distraught condition of the girl as attested to by her grandfather. A distressed condition of a victim in appropriate cases may serve as corroboration of her evidence, and in this case it did. The conviction was therefore upheld.

Points to Note

- This is a case in which the unsworn testimony of a minor was sufficiently supported by corroborative evidence to satisfy the court beyond a reasonable doubt that the accused was guilty of defilement.
- Section 38 (now Section 40) of the TIA requires corroboration of evidence given by victims who give unsworn testimony because of an inability to understand the importance involved in the taking of an oath. While the provision makes sense, the fact that many girls under the age of eight years do not understand the importance of taking the oath means the cautionary rule still applies. The provision therefore takes away the gains made in whittling down the cautionary rule. However, this may be alleviated through current practice, which is to permit cross-examination of children who give unsworn testimony. This allows the court to assess the credibility of the witness. While the Court of Appeal noted that this was irregular, it chose not to interfere with the conviction as a result of the irregularity. If such practice continues to be used, the strict application of Section 38 may be unnecessary in future.
- It is submitted that proof of pre-planning and clearing the vicinity of any potential witnesses increases the gravity of the sexual violence. Such cases need to be widely publicised so that parents appreciate the vulnerability of potential victims and sensitise them appropriately.

Kaserebanyi James v Uganda [2018] SC

Principle or Rule Established by the Court's Decision

When sentencing an offender for defilement, incest and the use of threats and force are aggravating factors.

Judges: Katureebe, Tumwesigye, Arach-Amoko, Mwangusya and Ekirikubinza | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed; sentence confirmed	Supreme Court (Uganda)	Criminal Appeal No. 10 of 2014; 25 May 2018	Defilement Incest

Case Summary

The appellant was tried and convicted of defilement of his 15-year-old daughter by the High Court. In 2004, the appellant collected the victim from her mother's home and began living with her. He began having forceful sexual activity with her on pain of being thrown out of the house if she resisted. The activity led to pregnancy and that led to her mother reporting the matter. The appellant did not contest the charges. He was sentenced to life imprisonment by the High Court. In determining the appropriate sentence, the High Court considered:

- i. As mitigating factors, that the accused was a first-time offender; that he had pleaded guilty and saved the state's resource; and that he had been on remand for one year and three months.
- ii. As aggravating factors, that the accused was the biological father of the victim; that the victim was 15 years old while he was 45 years old; and that he committed the offence with threats and force.

The Court of Appeal upheld the sentence. A further appeal was made to the Supreme Court.

Section 5(3) of the Judicature Act provides for appeals against sentence only on a matter of law and not against the severity of a sentence *per se*. The Supreme Court will not interfere with the sentence imposed by the trial court unless the sentence was either manifestly excessive or so low as to amount to an injustice, or where the trial court fails to consider an important matter or circumstance that ought to be considered or where the trial court applied the wrong principles.

The Supreme Court took a serious view of the repeated defilement. As rightly identified in the lower courts, the case involved threats and force, thereby causing trauma, as well as incest. A deterrent sentence was therefore appropriate. The Supreme Court would not interfere with the sentence of life imprisonment.

The Court further clarified that the meaning of life imprisonment as articulated in the case of *Tigo v Uganda* [2011] UGSC 7 applies to cases of defilement. In the context of defilement, as with any offence that carries the maximum penalty of death, life imprisonment means the remainder of the natural life of the convict. The provisions relating to remission under the Prisons Act do not apply.

Points to Note

- In confirming the sentence, which is the second most severe (second only to death), the Supreme Court held that the trial court and Court of Appeal had rightly considered as aggravating factors the fact that the appellant was the biological father of the victim

and that incest was an abomination in society; and the fact that the offence was committed under threats and force.

- Force and threats used against the victim are weapons perpetrators use in sexual violence. Bringing out this aspect of sexual violence drives home the vicious nature of defilement and incest. As in this case, such offending should attract harsh penalties.
- The Court of Appeal was bound by doctrine of precedent to follow the decision of the Supreme Court in *Tigo v Uganda* relating to the meaning of imprisonment for life in the context of defilement. This doctrine is constitutionalised in Article 132(4) of the Constitution, which directs all courts to follow decisions of the Supreme Court on questions of law.

Ntambala Fred v Uganda [2018] SC

Principle or Rule Established by the Court's Decision

A court may convict an accused in a sexual case where the sole or decisive evidence is provided by the victim, provided that the court finds the victim's evidence to be of sufficiently good quality in terms of its cogency, reliability and truthfulness.

Judges: Tumwesigye, Mwangusya, Opio-Aweri, Mwendha and Ekirikubinza | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed; conviction and sentence confirmed	Supreme Court (Uganda)	Criminal Appeal No. 34 of 2015; 18 January 2018	Defilement

Case Summary

The appellant was convicted of aggravated defilement, contrary to Section 129(1) of the PCA, and sentenced to 14 years' imprisonment. On 26 March 2006, village children, who believed that the appellant was defiling the victim, were found throwing stones at the house of the appellant. The appellant came out armed with a *panga* (machete) to chase them. The defence secretary of the village noticed the scuffle and the children informed him that the appellant was defiling his 14-year-old daughter. The defence secretary asked the victim if her father had had sexual intercourse with her. She replied, "Yes". The defence secretary also found used condoms.

In convicting the appellant, the High Court relied on the victim's testimony that she and her younger sister had shared a bed with the appellant and that

the appellant had used that opportunity to sexually violate her almost every day for two years. The court further relied on the evidence of a used condom found in the house. The appellant was sentenced to 14 years' imprisonment.

The Court of Appeal confirmed the conviction and sentence. A further appeal was lodged with the Supreme Court. It was contended that the victim's testimony had not been sufficiently corroborated so as to warrant a finding that the appellant committed the offence.

The Supreme Court noted that Section 133 of the Evidence Act provides that, "*Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.*" Consequently, a conviction can be based solely on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. The Court approved the dictum of the Supreme Court in *Sewanyana Livingstone v Uganda* [2006] (SCCA No. 19) that, "*What matters is the quality and not quantity of evidence.*"

Justice Tibatemwa Ekirikubinza reinforced the point, holding that the cautionary rule that required courts to look for corroboration in sexual offences "*discriminates against women who are the majority of victims in sexual offences. Evidence must be evaluated in sexual offences must be evaluated in the same manner as other cases; the test is whether it is cogent evidence; the test is quality of evidence and not quantity.*"

In this case, the Supreme Court was satisfied that the quality of the evidence was sufficient to uphold the conviction. The complainant swore an oath and the trial judge found her to be a truthful witness. Furthermore, the evidence of other witnesses, including medical evidence, indirectly supported the victim's account.

Points to Note

- Corroboration is evidence from other sources that supports the testimony of the complainant and connects or tends to connect the accused person to the commission of the crime. Its value is rooted in the legal standard (proof beyond reasonable doubt) that the prosecution must meet in order to secure a conviction. Consequently, in certain cases, the prosecution may find it necessary to adduce evidence from more than one witness in order to prove their case beyond reasonable doubt.
- This case finally puts to rest the debate on the cautionary rule that requires a judge to warn him or herself that corroboration is essential in sexual offences. It determined that the cautionary rule was not good law. A conviction can be based solely on the testimony of the victim as a single witness provided the court finds her to be truthful and reliable

- The Court found that the cautionary rule discriminated against women, who are the majority of victims in sexual offences.
- It is noteworthy that it was children who secured justice for their fellow children when they drew attention to the plight of the victim, by throwing stones at the appellant's house, which precipitated the report to the police.

Muhwezi Alex and Hassan Bainomugisha v Uganda [2010] SC

Principle or Rule Established by the Court's Decision

- There is no minimum number of adult witnesses whose evidence must be given in order to secure a conviction. The question is one of quality rather than quantity.
- Police statements may be used to discredit evidence given in court only if the police officer who recorded the statement is called for cross-examination.

Judges: Tsekooko, Katureebe, Kitumba, Tumwesigye, Kisaakye and Ekirikubinza | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed; conviction upheld	Supreme Court (Uganda)	Criminal Appeal No. 21 of 2005; 13 April 2010	Defilement

Case Summary

On the night of 10 June 1999, the two appellants broke into the home of man, whom they robbed violently. While the robbery was going on, Muhwezi took the victim, the daughter of the homeowner, from her bedroom to the sitting room, where he defiled her. Muhwezi was convicted of robbery and defilement and sentenced to 12 years' imprisonment. Muhwezi was jointly indicted with Bainomugisha for aggravated robbery. He alone was indicted for defilement. Both appellants were convicted, and the Court of Appeal upheld these convictions.

A further appeal was made to the Supreme Court. Muhwezi contended that the evidence supporting the prosecution's case was insufficient to satisfy the Court beyond reasonable doubt as to guilt.

Upholding the convictions, the Supreme Court ruled that any argument as to corroboration was unfounded. The witnesses were all adult witnesses who gave evidence on oath. There is no minimum number of witnesses required in law to secure a conviction. In any event, the defilement of the victim was

corroborated by her testimony of her mother, who saw Muhwezi take the girl to the sitting room where she was defiled.

There was a discrepancy between the victim's police statement and the evidence on oath of the victim. The police statement omitted that fact that the victim used to see the appellants in town. However, the contents of the police statements were of no value in this case because they had not been proved in court. Before seeking to discredit evidence given on oath on the basis of the contents of a police report, the police officer who recorded the information in court had to be called for cross-examination. This had not been done.

Point to Note

- This case affirms that there is no minimum number of adult witnesses required to secure a conviction. The question is one of quality rather than quantity of evidence.
- This case also clarifies that police statements may be used to contradict the sworn testimony of a witness but the police statement must first be proved by the police officer who recorded it.

Sabwe Abdu v Uganda [2007] SC

Principle or Rule Established by the Court's Decision

Reliability of identification of an accused person by voice may depend on prior familiarity with the voice. Such familiarity need not arise through direct conversation with the accused. It may arise through having heard the accused's voice in a locality.

Judges: Tsekooko, Katureebe, Okello, Tumwesigye and Kisaakye | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed; conviction and sentence confirmed	Supreme Court (Uganda)	Criminal Appeal No. 19 of 2007; 3 February 2010	Defilement

Case Summary

The appellant was convicted of defilement at the High Court. On 14 September 2000, four girls, including the victim and her sister, were returning from a well. They met the appellant, who was disguised in a bark cloth and looked to them like a ghost. The victim and her sister tried to flee but the appellant ordered them to come back. The appellant let the other girls

go. He then ordered the victim and her sister to remove their clothes. He blindfolded them and led them to a swamp, where he sexually assaulted the victim. He left them in the bushes, where they spent a night.

Because their father was searching for the victims, at 8 p.m. that night the appellant went to the home of the father. The appellant told him that, in exchange for two goats and two chickens, he would use his witchcraft powers to find the girls. The following day, the father complied with the appellant's request, and, after conducting some rituals, the appellant went to the swamp and collected the girls. He claimed the girls were possessed by evil spirits and took them to his home for two nights, ostensibly to cleanse them.

The father went to visit the girls and the victim told her father the appellant had defiled her. The appellant was arrested. Medical examination of the victim revealed that her hymen had been broken and that the inner layers of her vagina were red and tender.

At his trial, the appellant denied it was he who had abducted the two girls and had sexual intercourse with the victim. In his unsworn statement, he said he went to see the father and told him a ghost had abducted his two daughters. He then offered to assist the father to get back his daughters if the father gave him two goats and two chickens to sacrifice for the ghosts. He said he used his witchcraft powers to get back the two girls and took the girls to his home for treatment because they were not in a normal state of mind.

The Court accepted the evidence of the two girls as to the identity of the perpetrator. They had identified the appellant by voice and by sight. They had become familiar with his voice because he lived about a quarter of a mile from them, they passed his home as they went to school and they had heard him speak to other people. The appellant also used to come to their home, where they would hear him speak to their father. They could also identify him by sight because, when he came to collect them the next day, he was not disguised and they were not blindfolded. This evidence was supported by the fact that the accused knew where to find the girls.

The Court of Appeal and the Supreme Court could not find fault with the trial judge's reasoning in relation to the identity of the offender and the conviction was upheld.

Points to Note

- In this case, the two girls properly identified the appellant, as they knew him by voice and sight because he lived only a quarter of a mile from their home.
- When combined with the medical evidence and the fact that the accused was able to locate the victim without difficulty the

following day, the evidence that the appellant abducted the girls and defiled the victim was overwhelming.

- The invocation of magical or metaphysical powers to dupe and subdue a victim and then invoking the same powers to locate the victims is a form of manipulation and abuse that targets vulnerable persons, especially young girls.

Uganda v Mujuuzi Kaloli [2009] HC

Principle or Rule Established by the Court's Decision

Evidence to corroborate the unsworn testimony of a witness in a sexual case may include medical evidence and evidence of a complaint to another about the offence.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session No.116-2009	Aggravated defilement

Case Summary

The accused was indicted for aggravated defilement of a seven-year-old girl. While living with her father and stepmother, the victim shared a bedroom with the stepmother's brother, the accused. The victim referred to the accused as "Uncle Kaloli". The accused defiled her three times. Whenever the victim would report the accused's behaviour to the stepmother, she would warn the victim not to implicate the accused, threatening to kill her if she ever revealed what had taken place to anyone.

On the third occasion, the victim woke up in the morning and found that her dress and bedding were covered in blood. As a result of repeated sexual activity, she developed a protruding "mass" in her private parts that she showed to her stepmother. Her stepmother advised her to pull the "mass" anytime she felt it, particularly during urination. The victim testified that, whenever she pulled it, she would feel a lot of pain and, whenever she urinated, blood would ooze from her vagina.

The victim's father telephoned the biological mother to inform her about the victim's condition and the victim went to hospital. The biological mother noticed the victim's distressed condition. The victim's clothes were soaked in blood. The biological mother asked the stepmother why this was so.

The stepmother gave her different explanations, including that the victim was suffering from boils caused by syphilis and also that the victim had started menstruating. When the victim was asked, she told her mother that the accused had defiled her several times. This was corroborated by medical evidence. The doctor's report confirmed the existence of the "mass", which protruded through her vagina with abrasions of the *labia majora*, and noted that, although she had pain in her lower abdomen, there was no active bleeding.

The accused claimed he was not guilty and had been falsely accused because his sister (the stepmother) had a grudge against him. He also alleged that the mother of the victim had a grudge against him.

The defence counsel submitted that his role as an officer of court was to assist it to reach the best decision. He did not dispute the age of the victim or that a sexual act had occurred. In his closing remarks, the defence counsel conceded that the prosecution's evidence was meritorious but argued that the Court should consider the accused's defence. He left it to the Court to weigh the entire evidence in its totality but asked the Court to resolve the case in the favour of the accused.

The Court found the accused guilty. The victim was of tender years and gave evidence unsworn. However, corroboration for her evidence was found in the medical evidence and that of the biological mother, which included evidence of complaint about the sexual offences. As to the accused's defence, the prosecution's case was that the stepmother, far from trying to inculcate the accused (her brother), was in fact helping cover up the crime. The allegation of a grudge with the mother could not be true since she had never met or known the accused. The accused was sentenced to a deterrent sentence of imprisonment of 30 years.

Points to Note

- The case demonstrates the slowly changing typology of perpetrators of VAWG, to include stepmothers. Ordinarily, VAWG is carried out by men. This case exposes "step-mother cruelty" to children of their husband. It also highlights the helplessness of such children and illustrates the need for places of refuge, for example sexual referral centres.
- The victim was eight years old at the time of the defilement and had to contend with a protruding "mass" in her vagina. She underwent physical and psychological torture and had no recourse to any help. Her own father trusted the stepmother to care for her, which she failed to do.

- Section 19 of the PCA, which treats an aider as a principal offender, should have been used to indict the stepmother. The non-prosecution of the stepmother reflects the constraints of police-led investigations as against prosecutorial-led investigations. The prosecution should have amended the indictment to include the stepmother as a co-accused because she tried to conceal her brother's act.
- By virtue of Section 40(3) of the TIA, the unsworn evidence of a child of tender years needs to be corroborated regardless of what crime is committed. Failure to distinguish between the crimes for which corroboration should be needed has the effect of bringing the legal provision in conflict with the Court of Appeal decision in *Basoga Patrick v Uganda* [2001] (Criminal Appeal No. 15), which held that no corroboration is necessary in sexual offences.
- Corroborative evidence of a sexual offence may be a complaint made to the third party.
- The sexual act need not be accompanied by the rupturing of the hymen, ejaculation or visible injuries to the female's private parts. However, the existence of these features may amount to strong corroborative evidence that some act of sexual intercourse has taken place.
- The case demonstrates the professionalism of the defence lawyers in the case. The defence lawyer conceded that he was an officer of the court after realising the unusual circumstances and facts in this case.
- The case indirectly reflects the weakness of the Domestic Violence Act in terms of sentences.

Chapter 3

Rape

Chapter 3

Rape

Kenya 

Esther Nangwanaa Nandi v Jones Chewe Bobo [2006] HC

Principle or Rule Established by the Court's Decision

Non-consensual sex amounts to cruelty and a ground for divorce.

Judge: Kalpana Rawal | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Marriage dissolved; non-consensual marital sex amounts to cruelty	High Court, Nairobi (Kenya)	Judgement delivered on 10 November 2006; Divorce Cause 84 of 2005	Rape

Case Summary

A wife sought dissolution of her marriage on the grounds of cruelty and adultery. Her husband had severely assaulted her. He had also locked her out of their matrimonial home and forced her to have sex with him while he was drunk.

The High Court found that the husband's behaviour constituted cruelty of a serious nature that endangered her life and health. These acts of cruelty could not be accepted as the usual "wear and tear of married life" and of living together in a troubled marriage. The judge found the respondent guilty of acts of cruelty and adultery and ordered the dissolution of the marriage.

Points to Note

- This decision confirms that sexual violence is unacceptable even when committed at home and perpetrated by a spouse. This elevated the protection of the rights of women and girls against violence in the private domain. It is also one of the most vibrant and creative interpretations of the Constitution 2010, which outlaws violence in all its forms.

- This was a progressive precedent and a step in the right direction in the protecting of women from sexual abuse by their husband, albeit through a limited remedy.
- Protection orders can now be sought under the Protection against Domestic Violence Act. Unfortunately, there is a dearth of case law on this very useful statute.
- The Court did not go as far as saying that marital rape is an offence. It should be noted that this was a civil case (divorce) rather than a criminal case. Therefore, the Court was not called upon to decide upon the criminality of the husband's violent actions.

Tanzania

Diha Matofali v Republic [2015] CA

Principle or Rule Established by the Court's Decision

- A person under the age of 18 years has no capacity to consent to sexual intercourse, unless in relation to their spouse.
- The best witness evidence in a case of rape is that of the victim.

Judges: Kimaro, Mugasha and Mziray | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 245 of 2015 (unreported)	Rape

Case Summary

The appellant was charged with rape of a 15-year-old girl, contrary to Sections 130(1) and (2)(e) and 131(1) of the Penal Code. On 4 April 2012, the victim and the appellant's wife went to a spring or river to fetch water. The appellant was in the vicinity, holding a machete and a catapult in his hands. He went to the victim and forcefully grabbed her by the mouth, dragged her into a bush, undressed her and raped her.

Subsequently, he continued to rape her on a daily basis. First, he took the victim to his father's house, then he took her to his sister's house at Mashete. Third, he took the victim to his sister's house in Paramawe village. The appellant then moved the victim again and placed her under strict guard. She

managed to escape at night by hiding in a bush and spent the night in the wilderness. A woman found her the following day and took her to the village chairman and later to her relatives. The victim's father then reported to the police.

On being questioned, the appellant, supported by his wife, stated that the victim was his wife. It was alleged that the appellant had paid bride-wealth to her parents, who had consented to the marriage. The victim's father and the victim refuted this claim and the appellant was arrested. The appellant was convicted and sentenced to imprisonment for six years and to twelve strokes of the cane.

Upon appeal, the appellant contended, among other things, that:

- i. A medical report was improperly relied on because the appellant was not informed of his right to summon the maker for cross-examination (Section 240(3) of the Criminal Procedure Act).
- ii. The Court had erred in its evaluation of the evidence.

In dismissing the appeal, the Court of Appeal held that:

- i. The appellant had not been informed of his right to summon the maker of the medical report for cross-examination. Accordingly, the medical report had to be expunged from the record because it had not been properly admitted into evidence.
- ii. Even in the absence of the medical report, the Court's evaluation of the evidence could not be faulted. "*The best witness*" is the victim because, "*She is the one to express her sufferings during sexual intercourse.*" Her evidence was credible and corroborated. As to the defence of consent by virtue of marriage, the accused's contention that he had married the victim was not substantiated.

Points to Note

- The case involved sexual abuse of a girl below the age of 18 years and reiterated the legal position that a girl under the age of 18 cannot consent to sexual intercourse unless she is married.
- The Court of Appeal addressed the issue of non-application by trial courts of Section 240(3) of the Criminal Procedure Act. The duty of trial courts to inform an accused person of his/her rights to request the court to summon the maker of a medical report for cross-examination was reiterated. This is very important because, in many cases, non-compliance with this provision has led to acquittal of those accused of sexual offences.

- This case highlights the importance of judicial pro-activeness in the administration of justice and emphasises the need for courts to go beyond the technicalities and address substantive issues. The offence of rape is not proved merely by medical evidence. Credible evidence of a victim is often the best evidence in proving charges against an accused.

DPP v Jamal Waziri [2001] HC

Principle or Rule Established by the Court's Decision

A girl aged between 15 and 18 years of age does not have capacity to consent to sexual intercourse, save where she is consenting to sexual intercourse with her spouse.

Judge: Munuo | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction for rape, sentence of 30 years' imprisonment and ordered to pay compensation of TSh 1,500,000	High Court/ Appellate (Tanzania)	TLR 324, delivered on 21 September 2001	Rape

Case Summary

This case involved an appeal against an acquittal. The respondent, Jamal Waziri, was a religious instructor whose pupils included the complainant. While doing some cleaning at the respondent's house, the respondent took advantage of the complainant. He gagged her and raped her then warned her not to tell anyone. The respondent also promised to marry the complainant and asked her not to disclose the relationship. *"Not realizing that the respondent was out to sexually exploit her, the complainant minor gave up her educational pursuits as a secondary and Madras pupil and went along with the respondent."* The complainant did not reveal the relationship until a neighbour alerted the complainant's mother. By this point, the complainant was pregnant and the respondent had not married the complainant as he had promised. Instead, he married another woman. The complainant reported the rape to police and subsequently the respondent was arrested and charged with the offence of rape.

The trial magistrate found that the complainant had consented to sexual intercourse and found the accused not guilty. The DPP appealed against the acquittal.

The issue for determination on appeal was whether the victim, a girl aged 15 years, could consent to sexual intercourse.

The Court held that the complainant did not have capacity to consent to sexual intercourse. Section 130(2)(e) of the Penal Code provides that a female under 18 years of age does not have capacity to consent to sexual intercourse, unless aged 15 or over and married. Section 13 of Law of Marriage Act allows girls to marry at the age of 15 with the consent of parents.

Having considered this section of the Penal Code and the evidence of the complainant as corroborated by the neighbour, the Court found the respondent guilty. The Court also noted that the respondent used his position as religious instructor to sexually exploit the complainant.

Points to Note

- The case addresses issues of sexual extortion otherwise referred to as “*sextortion*”, where a person with power abuses that role. In this case, a religious instructor exploited a young girl under his care by extorting sexual favours under the pretence that he intended to marry her.
- The decision is also important because international instruments on the rights of children were referred to, in effect cementing their application in domestic courts.
- Various studies and anecdotal information reveal that this kind of abuse is prevalent in various places of education or places of learning of religious matters. As such, the case will help expose such occurrences, and actions to improve protection of children wherever they are should be taken.
- Section 130(2)(e) of the Penal Code protects the rights of the female child. These laws are arguably discriminatory and unconstitutional, because the CRC defines a child as those below the age of 18 regardless of their gender.

International decisions referred to	
Convention	Decision/reference
CRC	The Court noted the statutory age for children as 18 years old under Article 1 of the CRC. The Court also cited and recognised Article 19 of the CRC, which protects the rights of children against all forms of physical or mental violence, abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

Edson Simon Mwombeki v Republic [2016] CA

Principle or Rule Established by the Court’s Decision

Where age of a victim is an issue, there being no valid birth certificate, credible evidence of a parent is best placed to prove the age of a victim, then a doctor.

Judge: Rutakangwa, Massati and Mugasha | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 94 of 2016; judgement delivered on 28 October 2016	Rape

Case Summary

The appellant, Bishop Mwombkei, was charged with rape of a girl aged 16, contrary to Sections 130(1) and (2) and 131(1) of the Penal Code.

The victim, a 16-year-old girl, had come to the attention of the appellant when she had been seen to be possessed by demons. The appellant prayed for her in his church and it was alleged she was eventually healed.

At some time in December 2013, when the victim was on school vacation, the appellant agreed that she could reside at his home in Shinyanga until the school reopened on 13 January 2014. During the said vacation, the appellant's daughter tutored the victim.

On 13 January 2014, the appellant called the victim's mother and told her he would take the victim back to school because he would also be taking his boys back to school. The appellant initially dropped the two boys at their school and promised he would take the victim to school on the same day. However, the appellant instead took her to the Sumayi Hotel and left her there. At around 11 p.m. the appellant returned with food. The appellant went to the bathroom, which was in the same room. He came out shortly after, wearing a white singlet and yellow shorts. He proposed that he would make love to the victim, which she declined. Thereafter, the appellant forcefully undressed her. He also undressed himself and had carnal knowledge of her. The victim did not raise any alarm because the appellant had threatened to kill her. The victim and the appellant slept in the same room until the following morning, when the appellant advised her to tell her parents she had slept at Kassa Secondary School.

The victim travelled to Magu, where she told her uncle she had slept at the Sumayi Hotel, where the appellant had raped her. Her uncle directed her to go back to her mother in Shinyanga. The victim went straight to Shinyanga and narrated to her aunt the ordeal of being raped by the appellant. Later, the aunt revealed the episode to the victim's mother and the incident was reported to the police. The victim was taken to the hospital, although no medical evidence was adduced at trial.

In the trial court, the appellant denied having hired a hotel room or having committed the offence. However, the Court found him guilty, citing the

strength of the evidence of the victim. The appellant was sentenced to 30 years' imprisonment. The appellant' subsequent appeal to the High Court was dismissed entirely.

The appellant filed a second appeal at the Court of Appeal. It was contended (among other things) that:

- i. There had been issues as to the credibility of the victim that the High Court had not sufficiently reappraised. In particular, the victim claimed to have bled after the rape and alleged that her clothes were stained with blood. However, there was no mention of either the uncle or the mother reporting or observing the bleeding. Furthermore, there had been a delay in reporting the incident to the police.
- ii. No birth certificate had been produced. The age of the victim, as a fundamental element of the offence, had been proved.

The Court of Appeal reiterated the importance of the role of the first appellate court in re-evaluating all of the evidence, especially where there are alleged inconsistencies and contradictions in witness testimonies and the credibility of witnesses is challenged. The second appellate court should rarely interfere with the concurrent findings of the subordinate courts on the facts unless if there is misapprehension of evidence, miscarriage of justice or violation of any principle of law or procedure. The Court referred to the cases of *Salum Mhando v R.*, *Isaya Mohamed Isack v R.* [2008] (Criminal Appeal No. 38), *DPP v Jaffar Mfaume Kawawa* [1981] (TLR 149) and *Seif Mohamad E.L. Abadan v R.* [2009] (Criminal Appeal No. 320), which all affirmed this position.

The Court of Appeal found that the credibility of the witness can be determined even by the second appellate court when examining the findings of the first appellate court, in two ways, first, when assessing the consistency of the evidence of that witness; and second, when there is contradiction of the testimony of that witness in relation to the testimonies of other witnesses. See *Shaban Daudi v R.* [2001] (Criminal Appeal No. 28).

As to her testimony generally, the victim was a credible witness. Her evidence was generally consistent with that of the other witnesses. Any inconsistencies were minor. Whether there was visible or reported bleeding went to the magnitude of the injury rather than being an essential ingredient of the offence. Furthermore, any delay in reporting the matter to the police was a delay on the part of the witnesses rather than the victim. The victim reported the rape at the earliest opportunity to her uncle. Any delay therefore did not impeach her credibility.

In the absence of a birth certificate, the age of a victim may be established on the basis of testimonial evidence. No medical evidence was given as to the

age of the victim. However, the evidence of the victim and the parents of the victim are sufficient to satisfy a court as to age beyond a reasonable doubt, and such evidence as to age is preferable to medical evidence (see *Edward Joseph v Republic* [2009] (Criminal Appeal No. 19)). In light of the findings in relation to credibility, the age of the victim was proven.

Obiter Dictum

"Since it is settled law that medical evidence does not prove rape, the medical doctor was not a material witness as in the light of credible evidence of PW1 we are satisfied that she was better placed to testify and explain how she was raped by the appellant."

Points to Note

- This is an important decision where the Court found that the evidence of a parent of a victim can override the evidence of a medical doctor in proving the age of a victim where no birth certificate has been tendered. The Court also noted that the evidence of a victim, where it is believed, can override the evidence of a medical doctor in proving there was rape against the victim. The Court was in fact reiterating the fact that medical evidence, despite the fact that it is expert evidence, is still just opinion evidence, thus reiterating an important evidence law position for application in proving cases related to GBV and VAWG.

This case has very significant implications for future handling of sexual violence cases and also highlights the prevalence of sextortion – that is, exploitation of women and girls by people who they have trusted or who are authority figures to them.

Other cases/decisions referred to	
Country/jurisdiction	Decision
Court of Appeal <i>Emmanuel Tienyi Marwa v Republic</i> [2005] Criminal Appeal No. 159, <i>Isaya Mohamed Isack v. R</i> [2008] Criminal Appeal No. 38, <i>DPP v Jaffar Mfaume Kawawa</i> [1981] TLR 149 and <i>Seif Mohamad E.L. Abadan v R.</i> [2009] Criminal Appeal No. 320	On the fact that as a second appellate court should rarely interfere with the concurrent findings of the subordinate courts on the facts unless if there is misapprehension of evidence, miscarriage of justice or violation of principle of law or procedure.
<i>Idd Amani v R.</i> [2013] Criminal Appeal No.184	The age of the victim can be proved by the credible of evidence of a mother notwithstanding the availability of medical evidence of the fact.

Leonard Jonathan v Republic [2007] CA

Principle or Rule established by the Court's Decision

Marriage is a voluntary union between a man and a woman. Any custom that procures a union by force is contrary to this principle and therefore any such union cannot be recognised as a legally valid marriage.

Judge: Mroso, Kaji and Rutakangwa JJ.A

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal (Tanzania)	Criminal Appeal No 225 of 2007	Rape

Case Summary

The appellant was charged with rape, contrary to Sections 130 and 131(1) of the Penal Code. On 16 December 1999, the victim, a 23-year-old woman, was going home from church. A group of about five young men including the appellant abducted her and took her to the home of the appellant, where the appellant raped her. When the father of the woman received the news, he went to the home of the appellant to rescue his daughter. He entered the room where the appellant was with the victim but the father was hit by the third accused and dropped down unconscious. He was later admitted to hospital. The victim succeeded in escaping from the appellant's home and went to hospital; upon examination, a Police Form 3 was completed. This was produced during the trial. This form contained medical details relating to the case. The appellant was arrested and prosecuted for rape.

The appellant admitted that he had abducted the victim and that he had engaged in sexual intercourse with her. However, he contended that she was his girlfriend and they had agreed to marry. Because a church wedding was costly, he had decided to marry her in accordance with Chagga customary laws of marriage by ambush and carrying her to his house to forcefully consummate the marriage. The appellant was convicted and sentenced to 30 years' imprisonment with 10 strokes by way of corporal punishment. He appealed to the High Court.

The issues raised at the High Court were:

- i. Whether there was a marriage under Chagga customary law pursuant to Section 9(1) of the Law of Marriage Act.
- ii. Whether under customary law a marriage may be contracted without the consent of the bride.
- iii. Whether the appellant raped the complainant within the meaning of Sections 130 and 131(1) of the Penal Code.

Dismissing the appeal, the High Court held that:

With regard to (i) and (ii), customary laws of different tribes would be acknowledged by the courts insofar as they capture the essence of, and do not contradict, the laws of the country. The Law of Marriage Act is the law that governs and directs on all matrimonial matters. Section 9 establishes that a marriage is a voluntary union between a man and a woman. Consent is therefore one of the essential ingredients of a valid marriage. There was no dispute that the appellant and his colleagues grabbed the complainant and took her violently. There was no free consent.

With regard to (iii), given that there was no dispute over the forced nature of intercourse, the complainant had been raped.

Points to Note

- The decision sends the message that courts should not tolerate a defence that emanates from an act that contravenes domestic law and the basic principles therein.
- The decision also referred to compliance with international instruments, such as Article 14(2) of the UDHR, which suggest marriages are to be entered into with the free and full consent of the intending spouse.
- The High Court decision is very progressive. While acknowledging the presence of customary laws of different tribes, it clearly states that, for such customs to be acceptable, they should capture the essence of, and not contradict, the laws of the country.
- This decision was confirmed in the Court of Appeal and it is therefore binding.

Other cases/decisions referred to	
Declarations	Reference
DEVAW	<p>Article 4 calls on states to protect and offer adequate relief to women victims of violence and to condemn violence against women and not invoke customs, tradition or religion to avoid their obligations.</p> <p>Article 2 requires states to modify and abolish discriminatory laws, regulations and practices.</p> <p>Article 16 protects the rights of women to freely choose a partner and to marry with their free and full consent</p>
UDHR	<p>The UDHR covers the rights of both men and woman to choose a spouse and to voluntarily consent to marry the spouse. Article 14(2) states that:</p> <p><i>Marriage shall be entered into only with the free and full consent of the intending spouse.</i></p>

Principle or Rule Established by the Court's Decision

- An accused person must know the nature of the case facing him and the charges must disclose the essential elements of an offence.
- It is imperative to specify the nature of the charge to be preferred and the punishment of each category of the offence.

Judges: Luanda, Mmilla and Mkuye | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed; conviction quashed and sentence set aside	Court of Appeal/ Review, Tabora (Tanzania)	Criminal Application No. 20 of 2014; delivered on 18 August 2017	Rape

Case Summary

Paragraphs (a)-(e) of Sections 130(2) and 130(3) of the Penal Code stipulate different ways in which the offence of rape can be committed. In this case, the charge sheet did not specify particular subsections on which the charge was premised, merely stating that the defendant was charged with rape, contrary to Sections 130 and 131 of the Penal Code.

The defendant's appeal was predicated primarily on the procedural propriety of a charge that did not make averment to the specific subsection on which the charge was predicated.

The Court held that it is a statutory requirement that every charge should be sufficiently well particularised to giving reasonable information as to the nature of the offence charged, including the ingredients of the offence. Failure to aver the specific statutory provision under which the defendant was alleged to have committed rape breached this requirement. Accordingly, the conviction was quashed.

Points to Note

- Many convictions of rape have been quashed at the appellate stage because prosecutors were not careful when drafting charges, with charges that fail to specify the nature of the charges and the essential elements of the offence and the requisite punishment. Therefore, the decision is important as a reminder of the need for enhanced professionalism and efficiency among court stakeholders in the administration of criminal justice.
- This case is important because the Court of Appeal decision will assist in ensuring prosecutors are more careful when drafting charges, especially those related to rape or other sexual offences, and in effect when coordinating investigations.

- Adherence to the principles and observations expounded in this case will improve investigations and raise the conviction rate on charges of rape or other sexual offences.
- The language used by the Court of Appeal is very simple and expansive, emphasising the statutory requirements on charges of rape.
- The position is similar in relation to attempted rape, as discussed in *Isidore Patrice v Republic* [2007] (CACA No. 224).

Other cases/decisions referred to	
Country/case	Decision
Uganda <i>Uganda vs Hadi Jamal</i> [1964] EA 294	It was held that a charge that did not disclose any offence in the particulars of offence was manifestly wrong and could not be cured under Section 341 of the Criminal Procedure Code (which is equivalent to Section 388 of the Criminal Procedure Act, Tanzania).

Thomas Adam v Republic [2010] CA

Principle or Rule Established by the Court's Decision

A female below the age of 18 can consent to sexual intercourse only if she is aged 15 or over and lawfully married to the male.

Judges: Kimaro, Mandia and Kaijage | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate, Mbeya (Tanzania)	Criminal Appeal No. 134 of 2010; delivered 27 November 2012	Rape

Case Summary

The victim, who was 13 years of age, was expelled from school because of pregnancy. The appellant, the victim's teacher, who had promised to marry her, was allegedly responsible. It was alleged that the appellant and the victim had been involved in a long affair and that sometimes the victim stayed at the appellant's house, leading to her absconding from home and school. She went to live permanently with the appellant. Her father traced her and found her at the appellant's home after three months' absence from home. The appellant did not dispute the sexual relationship with the victim, insisting she was his wife. The appellant was convicted of rape by the trial court.

On appeal, the appellant contended (among other things) that he was lawfully married to the victim and she consented to sexual intercourse.

Dismissing the appeal, the Court of Appeal held that, under Section 132(2) (e) of the Penal Code, consent could be given to sexual intercourse by women over 18 or women over 15 who are lawfully married. Section 13(1) of the Law of Marriage Act does not allow a girl below the age of 15 years to be married without leave of the court. In this case, no such leave was given and therefore the victim was not lawfully married to the accused.

Points to Note

- This decision addresses the age of consent for marriage of girls in Tanzania and it reveals misconceptions by males on the age of consent for girls.
- The fact that a girl below 18 who is not married to the accused cannot consent to sexual intercourse or marriage is emphasised. It can be used as an advocacy tool for sensitisation of girls and men.
- The decision emphasises the import of the requirements of the law and international instruments in the protection and fulfilment of the rights of all children.
- This decision is important because it can be used in on-going discussions on:
 - i. The appropriate age for girls to marry.
 - ii. Whether 18 years is the appropriate age of consent for African girls living in poverty.
 - iii. Whether this age embraces the customary and some religious practices in Tanzania.

Uganda



Uganda v Balikamanya [2012] HC

Principle or Rule Established by the Court's Decision

The identification of a defendant who was seen by a complainant for a period of 10 minutes during a sexual assault was sufficiently cogent evidence to satisfy a court beyond reasonable doubt that the defendant was the perpetrator.

Judge: Wilson Musene Masalu | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Case No. 25 of 2012	Rape

Case Summary

The defendant was accused of raping a woman contrary to Sections 123 and 124 of the PCA. The victim had been walking back home from a pub at 2 a.m. when the defendant approached her and dragged her to a nearby bush and without her consent had sexual intercourse with her for 10 minutes. A passer-by heard her cries for help and came to her rescue, grabbing the defendant and taking him to a police station. The defendant's trouser zip was still open.

At trial there were three issues for consideration:

- i. Whether there had been sexual intercourse with the complainant.
- ii. Whether the complainant did not consent to that sexual intercourse.
- iii. Whether it was the accused who had the unlawful sexual intercourse with the complainant.

The defendant asserted that he had been framed by the passer-by who had taken him to the police station.

The High Court convicted the defendant and sentenced him to seven years in prison:

- i. Sexual intercourse was proved. The Court accepted the victim's testimony, as well as the testimonies of the medical officer who examined her. The Court also accepted the testimony of the police of the account given by the passer-by. The passer-by had apparently found the defendant having sex with the complainant. The defendant's trouser zip was still open at the time that he was taken to the police station.
- ii. As to lack of consent, the Court accepted the victim's testimony, as well as the testimonies of the medical officer who examined her. The Court found lack of consent in the fact that the victim screamed for help during the sexual intercourse.
- iii. The accused was the perpetrator. He was caught by the passer-by, who immediately dragged him to the police station. The accused's zip was still undone. He was identified by the victim as the perpetrator, as she had seen him for 10 minutes during the act of sexual intercourse.

Points to Note

Although there are dangers in convictions based on identification evidence, the victim had sufficient time to identify the defendant to the satisfaction of the Court because the ordeal lasted 10 minutes.

Uganda v Kusemererwa Julius [2014] HC

Principle or Rule Established by the Court's Decision

The offence of rape may be charged only in cases where the victim is aged 18 or over. When the victim is under 18, defilement is the appropriate charge.

Judge: David Batema | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Indictment unlawful	High Court (Uganda)	Criminal Session Case No. 15/2014	Rape of girls under 18 years

Case Summary

The defendant was indicted with an offence of rape of a girl aged 16, contrary to Sections 123 and 124 of the PCA. He objected to the charge, arguing that he should have been charged with defilement contrary to Section 129(1) because the crime of rape can be committed only against women aged 18 years and above.

The High Court held that rape charges could not be brought where the victim was below the age of 18 years. Prior to the 1990 amendment to the PCA, all sexual intercourse without consent involving women and girls was termed rape. The 1990 amendment deliberately extracted offences involving girls under 18 from Section 123 (Rape) and created offences of defilement as specific protection for girls from sexual abuse. In summary, Section 129 creates offences of simple and aggravated defilement, depending primarily on whether the girl is aged over or under 14 years. Therefore, women subject to such offending are “raped” and girls are “defiled”. The retention of the word “girl” in the definition of rape was a case of poor drafting or poor referencing.

The Court further held that, while consent is a complete defence to rape, it is not a defence to defilement.

The Court ordered the DPP to amend the indictment from rape to defilement, with a further order that the case should serve as a test case for all pending cases framed in a similar manner.

Other cases/decisions referred to	
Country/case	Decision
Uganda <i>Ochit Labwor Patrick v Uganda</i> (Criminal Appeal No. 15 of 1998)	The Supreme Court held that the section on rape in the PCA does not exclude girls but opined that it was more appropriate to charge perpetrators with defilement. The High Court distinguished the case from the present case because the decision was made before the Penal Code Amendment Act 8 of 2007, which prescribed different punishments for defilement depending on the age of the victim (below 14 years, death is the maximum penalty; above 14 years, life imprisonment is the maximum penalty). Therefore, legal circumstances had changed.

Points to Note

- The Court adopted a purposive interpretation of Section 123, in light of Section 129(1) of the PCA. It found that, because Section 129(1) – which specifically targets sexual offences against girls below 18 years – was introduced in 1990, Section 123 can no longer be construed as applying to that same age group. Otherwise, the purpose of Section 129(1) would be defeated.
- The Court highlighted the history and rationale of the two legislative provisions, focusing, in that regard, on the centrality of consent as a distinguishing factor between the offences. While consent is a defence to rape, it is not a defence to defilement, thus the two offences are not mutually compatible for purposes of substituting indictments.
- This case highlights the legislative protection accorded to girls under the age of 18 years, which should not be overlooked by the prosecution and which the Court upheld in this case. The prosecution had opted for rape charges because the defendant had used extreme violence (he allegedly used a *panga* and knife to cut the victim's arm), which the prosecution hoped would be punished more severely under a rape charge. Rape carries the death penalty, whereas defilement entails a maximum sentence of life imprisonment. However, this was very risky, as there is a defence of consent to rape, whereas no such defence exists for defilement. The Court recognised this risk and emphasised the need for the prosecution to uphold the protection of the girl child by bringing the appropriate charges. Parliament had legislated specifically for that purpose.
- This precedent has the unfair consequence of diminishing the gravity of “rape” of girls aged above 14 years by calling it “defilement”, which is punishable by life imprisonment. Rape of an adult woman is punishable by death.
- There is need for further clarity by the appellate courts in light of the *Ochit* precedent and the 2007 amendment to the PCA. This case shows how framing of charges has an impact on the final punishment since a court can convict for a lesser offence but cannot convict for a graver offence

Uganda v Muhwezi Lamuel [2010] HC

Principle or Rule Established by the Court's Decision

The corollary of a delay in reporting a sexual offence is not that the report must be dismissed as a fabrication.

Judge: Wilson Kwesiga | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Case No. 292 of 2010	Rape

Case Summary

The defendant was accused of raping a woman contrary to Sections 123 and 124 of the PCA. The victim alleged she had been walking back home from a trading centre when the defendant intercepted her and had sexual intercourse with her, without her consent. The victim claimed that she tricked the defendant into shifting to a more covert place by the roadside where her children were not likely to find her, to which he obliged. This allowed the victim a small window of opportunity to escape. The victim reported the incident to the local authority chairman and later to the police.

The defendant denied the offence, claiming that he was at his butchery at the time. He also sought to discredit the allegation as a fabrication because the incident was reported to the police a number of days later.

The Court held that:

- i. There was sexual intercourse, as evidenced by the victim's testimony and medical evidence of vaginal inflammation.
- ii. There was no consent to that sexual intercourse, as evidenced through the victim's testimony and the medical evidence of bruises on her neck.
- iii. The defendant committed the offence. The victim's testimony and the testimony of witnesses in the neighbourhood, who had heard the victim raising an alarm while calling out the defendant's name at the time of her escape, evidenced the identity of the offender.

The allegation was therefore not a fabrication. The Court accepted that the delay in reporting the case owed to the victim's illiteracy and the late advice of the local council chairman, who, in any event, did not have jurisdiction over the matter.

Other cases/decisions referred to	
Country/case	Decision
Uganda <i>Uganda v Kyamusunga</i> , HC Criminal Session No. 107 of 1996	Factors to be taken into consideration when considering the correctness of the identification of a rapist are (i) the time taken in commission of the offence; (ii) the time taken while the accused was under observation; (iii) the distance between the accused and the witness; (iv) the time of day; and (v) whether there was enough light to aid identification.

Points to Note

- This case demonstrates that a delay in reporting a sexual offence may be attributable to factors other than fabrication of the allegation.
- This case highlights the complexities attached to reporting sexual offences. In the first place, it is a deeply personal decision for one to subject oneself to the indignity of public knowledge of having been raped. Second, evidence-gathering entails significant erosion of privacy, particularly with medical examinations and police interrogations. This case's undercurrent is in line with that reality and offers protection to victims who take time for personal reflection and/or require convincing to file a complaint.

Obiter Dicta

The Court criticised and, in its *obiter dicta*, gave guidance regarding preservation of evidence and speed of reporting: "... I have considered the defence's criticism of the manner and delayed reporting to the police by the victim. As it were, each case ought to be decided on its own circumstances and facts. The offence was committed in a rural set-up, against an old illiterate woman. The victim was evidently traumatized but she delayed in the hands of the local authority LC1 Chairman who took his time over what he thought would have been settling the matter. This was a capital offence he had no jurisdiction over. He delayed the victim's access to Police and medical attention. In our underdeveloped systems where DNA tests are not yet widely available in the country it is of paramount importance that rape and defilement victims should as much as practically possible be facilitated to access medical examination immediately after the offence and to preserve the necessary evidence for purposes of corroboration. The victim's private parts should not be cleared pending medical examination because this destroys evidence such as body fluids of the suspects capable of being found in the body of the victim which would be corroborative evidence..."

Uganda v Tumwesigye Ziraba alias Sigwa [2013] HC

Principle or Rule Established by the Court's Decision

- Identification evidence from the victim alone may be sufficient to establish the identity of the perpetrator, depending on the quality of the identification. This may require consideration of the extent of any prior contact between the perpetrator and the victim and whether established procedures for identification parades were adhered to.
- In sentencing for rape, the court may take into account that rape is a demeaning act and that the victim is likely to be traumatised for life.

Judge: Godfrey Namundi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case No. 92 of 2011; 3 December 2013	Rape

Case Summary

On 15 October 2010 at about midnight, the victim was asleep in her house when she was awoken by a noise. When she flashed a torch, she saw the defendant, who had forced entry in to the house. She recognised the defendant as a person she had known for three months prior to the incident. The defendant hit the victim with the torch and proceeded to have forceful sexual intercourse with her without her consent. She reported the assault in the morning. The detective sergeant, who recorded the victim's complaint, observed she was distraught. The defendant was arrested.

At trial, the defendant denied that he was the person who committed the offence, relying on an alibi that he was at home in bed with his wife.

The Court found that, although the identification was by a single witness, the conditions favoured correct identification because his face had been lit by the torchlight and the victim had known the convict for three months prior to the incident.

Identification was also corroborated by the positive identification of the defendant at an identification parade. The Court made reference to Kenya Police Order 15/26, which prescribes rules of conduct of an identification parade. These rules had been earlier adopted by the Supreme Court in *Sentale v Uganda* [1968] EA 365, meaning they are part of Ugandan jurisprudence. The police had followed these rules and so the identification parade was satisfactory.

The Court relied on evidence of broken pieces of pot, mirror and bed, which it determined was circumstantial evidence of a scuffle and therefore corroboration of forceful sex.

The defendant was therefore convicted of rape, contrary to Section 123 of the PCA. The judge observed that rape is a demeaning act and the victim is traumatised for life. The defendant was sentenced to 12 years' imprisonment.

Points to Note

- The case is a good precedent on the evaluation of all evidence in a case, including circumstantial evidence, witness testimony and the emotional state of the victim after the act.

- The judge's observations about rape being a demeaning act and the victim being traumatised for life are important, particularly coming from a male judge who understands sexual violence and its purpose and motive.

Uganda v Yiga Hamidu [2004] HC

Principle or Rule Established by the Court's Decision

Even if marriage between a victim and a defendant could be proved, the mere fact of marriage is not a defence to rape. Men and women have equal rights within marriage, include the right to human dignity. This includes a right to withhold consent to sexual intercourse.

Judge: Kibuka Musoke | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case No. 5 of 2002; 9 February 2004	Rape Marital Coercion

Case Summary

The accused persons were indicted and tried for rape, contrary to Section 123 of the PCA. At the end of the trial, A1 Yiga and A4 Kasiita were convicted of rape.

In August 2001, Yiga visited the victim's father and a consensus was reached between the two that Yiga would wed the victim. However, the victim learnt that Yiga's wife had died of AIDS-related complications and the wedding was called off until Yiga had undergone an HIV test. Before this could be done, Yiga demanded that the victim live with him. However, the family refused.

Yiga hired two persons to abduct the victim, which they did. They delivered her to a location where she was locked up. She was later collected and taken to Yiga's home. Once there, the victim declined sexual advances by Yiga, who then secured help from some men. He succeeded in forcefully having sexual intercourse with her as two men held the victim. Medical evidence placed her age at 18 years and noted that her hymen had been recently ruptured. She also suffered injuries in her sexual organ.

At trial, the accused raised the defence that the victim was his wife because he had paid dowry. Further, she had been brought to his home by her father and a Mwalimu/Imam had performed Islamic marriage rites.

The judge disbelieved him and stated:

That strange conduct, on the part of A1, renders it clear to me that A1 did not believe, deep in his heart, that the complainant was his bride. For

after treating her in that savage manner, he could never hope to have any love from her. His having sex with her at such a time of the day in such a fashion, was a mere release of vengeance upon her having refused to get married to him. He did not care what would follow.

The judge went on to find the notion that a man cannot rape his wife did not reflect the law because the Constitution prescribes equality in marriage and equal dignity of men and women and prohibits laws, customs and culture that are against or undermine the status of women. The relevant provisions were reproduced as follows:

31 (1) men and women of the age of eighteen years and above, have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.

(3) Marriage shall be entered with the free consent of the man and woman intending to marry.

33 (1) Women shall be accorded full and equal dignity of the person with men.

(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.

Points to Note

- This decision is a good precedent on how a trial judge can proactively use the equality provision in the Constitution to navigate deeply entrenched patriarchal notions that inform the legal requirement that rape must be unlawful, in the sense that it cannot happen in marriage because sex is legalised within marriage.
- As the judge reasoned, rape or sexual violence cannot by any stretch of imagination be legalised.
- Rather than refer to it as “unlawful sex”, it is better to refer to it as “non-consensual sex”, which would then undermine the notion of “legal rape” in marriage. To reason otherwise would be to discriminate against married women who suffer violence physical, psychological and sexual.
- While manifestation of physical violence is adequately dealt with in the PCA, sexual violence is not.
- The Domestic Violence Act defines domestic violence to include sexual abuse. This is a positive development but it is not sufficient to deal with violent sexual abuse that is in the same category as rape because it is abusive, aggressive and motivated by a will to harm and to destroy a woman’s self-esteem.

- The Domestic Violence Act is a starting point. Greater political will is needed to enforce it.

Bizimana Jean Claude v Uganda [2014] CA

Principle or Rule Established by the Court's Decision

The court may convict a person for a sexual offence even in the absence of evidence corroborating an identification where the court is satisfied that the complainant's evidence was truthful and accurate.

Judges: Kasule, Mwangusya, Egonda Ntende | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal against conviction dismissed; sentence reduced	Court of Appeal	Criminal Appeal No. 143 of 2010; 18 December 2014	Rape

Case Summary

On 2 December 2004 at 8 p.m., the victim was at home with her two children when the appellant, whom she knew, kicked open the door forcefully and entered her house. She had just bathed and was in a nightdress without underpants. The appellant proceeded to rape her while holding a knife. There was light from a *tadoba* (a paraffin-fuelled candle). When her husband returned, he found the door locked from the outside. On entering the house, she immediately reported the rape in a disturbed state while her children were crying. The husband reported the case to police. The appellant raised the defence of alibi, which the trial judge rejected. The appellant was convicted of rape contrary to Section 123 of the PCA and sentenced to 18 years' imprisonment.

On appeal, the appellant contended that the judge had erred in law and fact in finding that the prosecution had proved its case beyond a reasonable doubt. In particular, he averred that:

- i. The circumstances of the alleged incident were insufficient to lead to a reliable identification. The alleged incident took place at night when the victim was bending. Furthermore, the light from the *tadoba* would have been insufficiently bright.
- ii. If any intercourse took place that night with anybody, it was consensual.

He also contended that the sentence imposed was manifestly excessive.

The Court of Appeal found that the original decision as to guilt was correct:

- i. The trial judge correctly warned himself about the dangers of convicting on evidence of a single identifying witness without corroboration when conditions do not favour correct identification. The victim knew the accused well and there was light from the *tadoba*. This was sufficient to identify the perpetrator.
- ii. The victim's testimony of a violent attack with a knife and the evidence of her distraught condition immediately after the rape clearly suggested that any intercourse was not consensual.

However, the sentence should be reduced to 15 years in light of decisions in comparable cases, in particular *Oyeki Charles v Uganda* [1999] (Criminal Appeal No. 126 (unreported)).

Points to Note

- In upholding the conviction, the Court was clear that it is the quality and not the quantity of evidence against a perpetrator of a sexual offence that is key.
- This case brings to light the predatory nature of sexual violence. A perpetrator attacked a defenceless frail woman in the presence of her children.
- The victim was a Rwandese refugee and vulnerable.

International Decisions



Prosecutor v Jean Paul Akayesu (Judgement) [1998] ICTR

Principle or Rule Established by the Court's Decision

Like torture, rape is a violation of personal dignity and it constitutes torture when inflicted by or at the instigation of, or with consent or acquiescence of, a public official or other persons acting in official capacity.

Judges: Laity Kama (Presiding Judge), Lennart Aspegren and Navenethem Pillay

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	International Criminal Tribunal for Rwanda (ICTR)	Case No. ICTR -94-4-T	Rape Crimes against Humanity

Case Summary

This case took place before Trial Chamber I of the ICTR for the prosecution of persons responsible for serious violations of international humanitarian

law in Rwanda. The tribunal was established by UN Security Council Resolution 955 of 8 November 1994.

The accused was charged with several counts, but of relevance to VAWG jurisprudence is the count on crimes against humanity as stipulated in Article 7 of the statute that set up the tribunal. It defines these crimes as acts committed as part of a widespread systematic attack directed against any civilian population and includes torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity.

In defining rape, the Chamber observed there was no commonly accepted definition of rape in international law and therefore defined it as “*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*”. This act must be committed as:

- i. Part of a widespread or systematic attack.
- ii. On a civilian population.
- iii. On certain catalogued discriminatory grounds: national, ethnic, political, racial or religious grounds.

The Chamber in its judgement considered rape to be a form of aggression and that the central elements of the crime cannot be captured in a “*mechanical description of objects and body parts*” as defined in some jurisdictions, which define it as non-consensual sexual acts encompassing the insertion of objects and/or use of bodily orifices not considered to be intrinsically sexual.

The Chamber then went on to use the analogy of the UN Convention against Torture and other cruel and degrading treatment or punishment that does not catalogue specific acts in its definition of torture but focuses on the “*conceptual framework of state sanctioned violence*”.

The Chamber reasoned that, like torture, rape is used for purposes such as:

... intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity and it constitutes torture when inflicted by or at the instigation of or with consent or acquiescence of a public official or other persons acting in official capacity.

In its decision, the Chamber found that, between April and June 1994, hundreds of civilians, the majority of whom were Tutsi, sought refuge at a commune. From there they were regularly taken by armed local militia and communal police and subjected to sexual violence and/or beaten near the premises. Many were subjected to multiple acts of sexual violence by multiple assailants, accompanied with threats of death or bodily harm.

The accused was a mayor who had exclusive control over the communal police as well as any gendarmes put at the disposal of the commune. The Chamber, in its decision, found, “*beyond reasonable doubt the accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal and that women were being taken away from the bureau communal and sexually violated*”.

With respect to admission of evidence on sexual violence, the Chamber had this to say:

Rule 96(i) of the Rules stipulates that no corroboration is required for sexual offences. The rule accords to the testimony of victims of sexual assault the same reliability as the testimony of victims of other crimes, something which had long been denied victims of sexual assaults in common law.

The accused person was found guilty of crimes against humanity, including rape.

Points to Note

- The definition of sexual offence of rape and defilement represents a conceptual issue and one that needs to be further studied so that the *mens rea* is reflected in the definition, as opposed to the current strict liability approach.
- A shift to the *mens rea* will bring out the evil nature of sexual violence and lead to stigmatisation, a form of deterrence.
- A shift to conceive rape as an offence whose purpose is to punish and degrade women (a VAWG approach) is recommended as opposed to the narrow non-consensual approach, which favours the perpetrator.

Chapter 4

Sexual Assault

Chapter 4

Sexual Assault

Sexual Assault: “Any form of unwanted sexual contact/touching that does not result in or include penetration (i.e. attempted rape). This incident type does not include rape, where penetration has occurred.”

Uganda 

Uganda v Eriya Paul [2009] HC

Principle or Rule Established by the Court’s Decision

When considering a charge of defilement, the court may consider indecent assault as a minor and cognate offence in the alternative even in the absence of express averment by the prosecution.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty of indecent assault	High Court (Uganda)	Criminal Case No. HCT 04-0010 of 2009	Indecent assault Aggravated defilement

Case Summary

The victim was six years old. On 17 February 2008, while the mother of the victim was at church, the victim went to the accused’s shop to “borrow” a sweet. While she was there, the accused pulled the victim from the doorway, made her sit on his lap, squeezed her thighs and “urinated white things” on to her dress. The accused then gave her a sweet. The victim told her mother. A local birth attendant who lived in the village examined the victim and found her hymen to be intact and found no evidence of defilement. The matter was reported to the police and a doctor examined the victim. The doctor’s conclusions mirrored those of the birth attendant. In addition, the doctor noted some bruises on the *labia minora* and scratches on the mouth of the vagina. The doctor concluded that the cause of the injuries was “likely indecent assault”. A second doctor examined the victim on 28 February 2008 and concluded that the victim had been defiled with some slight penetration.

The accused person was therefore indicted for the offence of aggravated defilement contrary to Sections 129(3) and (4) of the PCA.

At trial, the defence contended that:

- i. The preponderance of evidence suggested there had not been any defilement.
- ii. In any event, the defendant had not committed any offence.

The Court found that:

- i. The evidence of the victim was that that “something bad happened” to her on 17 February 2008, even though she asserted that the accused’s penis did not touch her vagina. The evidence of the independent doctors was that there had been some sexual interference. While the evidence was not sufficient to satisfy the Court beyond reasonable doubt as to defilement, the prosecution had proved beyond reasonable doubt that the lesser cognate offence of indecent assault had taken place.
- ii. As to the identity of the offender, the victim knew the accused well. Her testimony appeared to be truthful. The accused did not challenge the assertion that he had expressed “white things” over the victim in cross-examination.

The accused was therefore found guilty of indecent assault and sentenced to a term of three years’ imprisonment, excluding the time spent on remand.

Points to Note

- In this case, the judge found that a minor and cognate offence had occurred in spite of the fact that the prosecution did not make any submissions on that issue. This is an important observation coming from a gender-sensitive judge who understands the varied nature of sexual violence and the applicable legal provisos. The case is a good precedent on the proper evaluation of evidence adduced.
- In sentencing, the judge noted that, regardless of the offence being minor and cognate, it was grave and deserving of a deterrent penalty.

Senyondo Wilson v Uganda [2003] CA

Principle or Rule Established by the Court’s Decision

Establishing the qualification and expertise of a medical officer examining a victim in a sexual offence case is very important when considering whether or not such evidence is admissible.

Judges: Mukasa-Kikonyogo, A. Twinomujuni and
C. K. Byamugisha | JJCA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed; conviction quashed and sentence set aside	Court of Appeal (Uganda)	Criminal Appeal No. 40/03	Indecent assault

Case Summary

It was alleged that the appellant unlawfully and carnally knew a girl under the age of 18 years (aged about 3 years). The appellant shared a house with the father of the victim. Upon returning home one evening, the father found the appellant coming out of the bedroom where the young girl was sleeping. He became suspicious. On entering the bedroom, he found the underpants of the victim had been removed and placed beside her bed. He exchanged some words with the appellant, who denied having defiled the victim. At about 2 a.m. the victim was taken to a nurse for examination. She found semen in the victim's private parts. In the morning, she examined her again and found there was no penetration. Later, the victim was taken to Entebbe Hospital for medical examination. The appellant denied committing the offence and pleaded not guilty. At trial, the appellant was acquitted of defilement but convicted of the minor cognate offence of indecent assault.

On appeal, it was contended that the trial judge had erred in law and fact when he failed to adequately evaluate the evidence and thus came to a wrong decision that the evidence could sustain a charge of indecent assault.

The Court of Appeal held that the alleged incident was not witnessed by anybody. The victim did not testify and her father had not asked her any questions. Further, the judge in convicting the appellant based his decision on the testimony of the nurse who was the first to examine the victim. However, the prosecution established her qualification as a nurse. This raised some doubt as to the reliability of her conclusions.

Although the victim was examined at Entebbe Hospital, the prosecution did not produce the report from the hospital. The failure to adduce this piece of evidence left the case against the appellant very weak. This created serious doubts as to whether any assault indecent had taken place as the judge had found. In the circumstances, it was unsafe to allow the conviction to stand. The Court allowed the appeal, quashed the conviction, set aside the sentence and ordered the immediate release of the appellant unless he was otherwise lawfully held.

Points to Note

- In this case the conviction was quashed because the prosecution failed to produce sufficient cogent evidence of indecent assault.
- Establishing the qualification and expertise of a medical officer examining a victim in a sexual offence case is very important when considering whether such evidence is admissible.



John Irungu v Republic [2016] CA

Principle or Rule Established by the Court's Decision

If it is not possible to ascertain the age of the victim, the accused may only be convicted of an offence for which age is not an essential ingredient.

Judges: Asike-Makhandia, W. Ouko and K. M'inoti | JJCA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed, conviction quashed and sentence set aside; conviction of indecent assault with a child entered	Court of Appeal, Mombasa (Kenya)	Criminal Appeal No 20 of 2016	Sexual assault

Case Summary

The appellant had been charged with the offence of defilement, contrary to Section 8(2) of the SOA. The trial court had sentenced him to serve a term of 15 years' imprisonment. The appellant had appealed from this judgement to the High Court.

The High Court found that the age of the victim had not been proved and quashed the appellant's conviction for defilement. However, using its power to impose a conviction for offences that are cognate and minor to the offence on the indictment under Section 179 of the Criminal Procedure Code, it convicted the appellant for the offence of committing an indecent act with a child, contrary to Section 11(1) of the SOA. The same 15-year term of imprisonment was imposed. The appellant filed a second appeal to the Court of Appeal at Mombasa.

The Court of Appeal ruled that the conviction for committing an indecent act was fatally defective. There had been cogent evidence of penetration, and "indecent act" is defined in Section 2 of the SOA as excluding penetrative acts.

The Court then went ahead to consider the ingredients of the offence of defilement *vis-à-vis* those of the offence of sexual assault and ruled itself as follows:

The real question is whether a person charged with the offence of defilement under section 8 (1) can be convicted of the offence of sexual assault contrary to section 5(1) of the Act by virtue of the provisions of section 179 of the Criminal Procedure Code. Defilement is constituted by committing an act which causes penetration with a “child”, defined to mean a person who is less than 18 years old. The Act defines “penetration” to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. Defilement therefore entails penetration of the genitals of a child, genitals qua genitals. The prescribed punishment for defilement is dependent on the age of the child defiled, classified into three clusters, so that the younger the child, the stiffer the sentence. Hence the punishment for defilement of a child who is 11 years or less is life imprisonment; that of a child of between 12 and 15 years is imprisonment for not less than 20 years and defilement of a child between 16 and 18 years is imprisonment for not less than 15 years.

Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against “any person”. That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.

We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault.

The Court of Appeal therefore allowed the appeal, quashed the conviction for the offence of committing an indecent act with a child and substituted it with a conviction for the offence of sexual assault contrary to Section 5(1) of the SOA.

Points to note

- An accused person charged with a major offence may be convicted of a minor cognate offence that flows from the same facts.

- Where an accused person is charged with defilement and there is insufficient evidence to lead to a conviction for defilement, a conviction for sexual assault or another lesser offence may be entered as the facts may prove.
- Where the evidence led does not satisfy the court as to the age of a person who has suffered non-consensual penetration, the court may instead convict for the offence of sexual assault, which is defined without reference to age.

Robert Mutungi Muumbi v Republic [2015] CA

Principle or Rule Established by the Court's Decision

An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate.

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal on sentence allowed; sentence quashed and substituted with lesser sentence	Court of Appeal, Malindi (Kenya)	Criminal Appeal No. 5 of 2013	Indecent act with a child

Case Summary

The appellant had been charged with and convicted of the offence of defilement of a girl aged nine, contrary to Section 8(1) of the SOA. No reference was made in the charge sheet to Section 8(2), which prescribes a sentence of life imprisonment for defilement of a child aged 11 years of less. He was sentenced to serve a term of 20 years' imprisonment. The appellant was aggrieved by his conviction and filed an appeal to the High Court.

In the appeal to the High Court, the prosecution asked that the sentence be enhanced from the term of 20 years to life imprisonment as is provided for in law. The High Court found that the age of the complainant had not been assessed or proved, and it was therefore handicapped for the purpose of sentencing. The High Court relied upon Section 179 of the Criminal Procedure Code, which empowers a court, if a complete minor and cognate offence is proved, to convict an accused person of such minor offence even though he was not charged with it. Using Section 179, it concluded that the evidence could sustain a conviction for the offence of committing an indecent act with a child, contrary to Section 11(1) of the SOA.

The appellant appealed to the Court of Appeal. The appellant complained that:

- i. He had initially been charged with an improperly framed charge, because the charge sheet did not indicate the offence as well as the punishment.
- ii. The High Court had erred in convicting the appellant of indecent assault.
- iii. The sentence imposed was without foundation.

The Court of Appeal agreed with the appellant that the charge ought to include both the section creating the offence and that prescribing the punishment. However, the charge in the present case was clear enough that the appellant was charged with defilement of a girl contrary to Section 8(1) of the SOA and that the failure to refer to the punishment section in the charge sheet did not occasion a miscarriage of justice.

On whether the High Court had erred in determining that the evidence supported the charge of the offence of indecent act with a child, the Court of Appeal held as follows:

An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.

Thus, the appellate court found that committing an indecent act with a child is a minor and cognate offence of defilement. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement, and the former attracts a comparatively lesser sentence than the latter. The Court therefore upheld the conviction of the appellant on the charge of committing an indecent act.

However, in this appeal, the Court found that the court had erred on the issue of sentencing. The Court stated that the High Court did not address itself to the propriety of the sentence, and more specifically whether the sentence of 20 years' imprisonment was appropriate for indecent assault, given that it was the sentence imposed for the major offence of defilement. The Court stated that it was apparent that the High Court had not considered the suitability of retaining the sentence. It therefore set it aside, substituting that sentence with one of 10 years' imprisonment.

Points to Note

- Where a charge of defilement omitted the sentence section, the charge was not defective because the accused person was aware of the charge he was facing and failed to raise the issue during the trial.
- Best practice would be to include an averment of the sentencing provision in the charge.
- An accused person charged with a major offence may be convicted of a lesser and cognate offence.
- Indecent assault is a lesser and cognate offence of defilement.

Chapter 5

Physical Assault and Domestic Violence

Chapter 5

Physical Assault and Domestic Violence

Physical assault: “Physical violence that is not sexual in nature. Examples include hitting, slapping, cutting, shoving, honour crimes of a physical nature (not resulting in death), etc.”

Although homicide does not fall within this definition, cases involving physical assault resulting in death are examples of the most serious consequences of VAWG.

In VAWG cases, many such physical assaults take place in a domestic context. Accordingly, cases of domestic violence are addressed here. Cases of physical violence resulting in death are therefore also addressed here.



Republic v. Jackline Kwamboka Ombongi [2016] HC

Principle or Rule Established by the Court's Decision

Leniency in a murder sentence where provoked by domestic violence.

Judge: Okwany | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Sentenced to 2 years' probation	High Court, Kisii (Kenya)	Criminal Case No. 6 of 2016; judgement delivered on 7 March 2018	Other GBV (domestic violence)

Case Summary

The accused was charged with murder, which was reduced to manslaughter pursuant to a plea-bargaining agreement. The deceased and the accused were husband and wife, respectively. On the material night, the deceased came home drunk and picked an argument with the accused, as was common in their relationship. This degenerated into a physical confrontation during which the accused strangled him to death. The accused then screamed loudly.

This raised the alarm to neighbours and relatives, who converged at the house.

In mitigation, the accused expressed remorse for the act and stated that she had no intention of killing the deceased. She had dodged his blows and got hold of his neck only to realise he had died. A report by the probation officers confirmed that the couple had a troubled marriage and that the deceased was a habitual drunkard who would cause chaos at home. Further, the accused was known to be a responsible woman not previously known for anti-social behaviour. Counsel for the accused urged the Court for a non-custodial sentence to enable the accused to take care of her young five-year-old child who had been placed in the care of an aged grandmother.

Okwany J. considered the circumstances and the mitigating factors of the case – namely, that the accused was a victim of domestic GBV and was susceptible to being maimed or fatally injured by her husband. The judge was persuaded that the accused did not intend to kill her husband but merely fought back against the deceased in self-defence, which was evidenced by her quick action in raise an alarm upon realising that the deceased was dead. In passing sentence, the judge also considered the fact that the accused was a mother of a young child aged five. The accused was therefore sentenced to two years' probation.

Points to Note

- This decision shows the Court's willingness to accept the severity of domestic violence and its impact on women.
- Section 205 of the Penal Code provides that any person who commits the felony of manslaughter is liable to imprisonment for life. However, the judge noted that this is not a mandatory sentence and allows for the Court's discretion not to impose the maximum sentence where the circumstances warrant this.
- Judicial officers have wide discretionary powers in sentencing to bring to bear mitigating factors such as "battered wife" syndrome and implications of the far-reaching effects of GBV.
- The case confirms that the use of plea-bargaining agreements by the prosecution is an important tool to deal with such cases that saves also judicial time and ensures timely dispensation of justice.
- The Court acknowledged the delicate balance to be struck between punishing the offender and the competing interests of an innocent child.

Others cases/decisions referred to	
Country/case	Decision
UK <i>R v Thornton 1</i> <i>WLR 1174</i> ; <i>R v Ahluwalia 4 All ER 889</i> ; <i>R v Duffy [1949] 1 All ER 932</i>	<i>R v Thornton</i> : Battered woman syndrome may be part of provocation if it causes a loss of control. The history of the relationship between the appellant and the deceased could properly be taken into account in deciding whether the final provocation was enough to make the statutory ordinary person act as he did.
	<i>R v Ahluwalia</i> : The appellant, Ahluwalia, suffered abuse and violence from her husband for years. After one violent evening, she went to bed thinking about her husband's behaviour and could not sleep. She finally went downstairs, poured petrol into a bucket, lit a candle, went to her husband's bedroom and set it on fire. Her husband died from his injuries. Ahluwalia pleaded manslaughter on the grounds that she did not intend to kill him, only to inflict pain. She also pleaded the defence of provocation on grounds of her treatment during the marriage. Ahluwalia was convicted of murder and appealed the decision.
	The definition in <i>R v Duffy</i> as "sudden and temporary loss of control" is still good law as it is a readily understandable phrase. However, in cases of abused wives, the harmful act is often a result of a "slow burn" reaction, rather than immediate loss of self-control.
	At the time of the trial, there was a medical report showing that, at the time of the killing, the defendant was suffering from endogenous depression. It was overlooked and the appellant was not consulted as to the possibility of investigating it further. The appeal was therefore allowed and a retrial ordered.



Prosecution v Cyuma Miruho [2010] SC

Principle or Rule Established by the Court's Decision

- A case charged initially as physical assault may be treated as a case of murder if the bodily injuries resulted in death and there was an intent to kill the victim.
- A person may benefit from mitigating circumstances in sentencing only if they are able to prove those mitigating circumstances to the satisfaction of the court.

Judges: Rugege Sam, Mukanyundo Patricie and Rugabirwa Ruben | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence upheld	Supreme Court (Rwanda)	Case No. RPA 0142/10/CS	Physical assault

Case Summary

The accused inflicted multiple blows on his wife with a machete and a large piece of wood, in reaction to a suspicion that she was cheating on him. She was immediately taken to hospital but died on the way. The prosecution charged the husband with assault and with intentionally causing bodily injuries resulting in unintentional killing. The Intermediate Court, which was seized of jurisdiction, ruled that the accused should be prosecuted for murder instead and transferred the case to the High Court. The High Court found the accused guilty of murder and sentenced him to 25 years' imprisonment.

The accused appealed to the Supreme Court. The accused contended that:

- i. His charge should have been the original charge of merely intending some harm, rather than intending to cause death.
- ii. The High Court disregarded the mitigating circumstances in sentencing.

The Supreme Court ruled that:

- i. Considering the nature of weapons that the accused had used – namely, a machete and a large piece of wood – and the number of times he used them to hit the victim, there was sufficient proof that the accused had intent to kill the victim. The accused therefore needed to be punished accordingly, rather than for assault and intentional bodily injuries resulting in unintentional killing.
- ii. The accused failed to prove that his wife had been cheating on him. Therefore, this could not be taken into account as a mitigating circumstance.

Obiter Dictum

The appellant did not challenge the fact that a period of 25 years' imprisonment imposed on him was in contravention of Article 35 of the Decree Law No. 21/77, which prescribed a maximum period of imprisonment of 20 years. However, the Court, *ex proprio motu*, corrected the judgement, substituting a sentence of 20 years' imprisonment.

Points to Note

- The case emphasises that the methods and means used in committing an offence should be taken into consideration when determining the appropriate charge.
- It further demonstrates the power of the appellate court to, *proprio motu*, correct the sentence in accordance with the range of penalties as provided by the law.

- The case also emphasised that, in order to benefit from a mitigating circumstance, such as the conduct of the victim, the accused must prove it.

Prosecution v Fatirakumutima [2013] SC

Principle or Rule Established by the Court's Decision

- An accused may benefit from a guilty plea to accidentally killing his wife only if the court accepts that there was no intention to kill on his part.
- Provocation of the accused by his wife must be proved to the satisfaction of the court before it can be taken into consideration as a mitigating factor.

Judges: Nyirinkwya Immaculée, Havugiyaremye
Julien and Mukamulisa Marie Thérèse | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence upheld	Supreme Court (Rwanda)	Case No. RPA0255/09/CS of April 26 2013	Physical assault

Case Summary

The accused killed his wife, with whom he had four children. The next morning, he informed his neighbour, who advised him to report himself to the authorities. The accused failed to do so and the neighbour reported the matter. The accused went into hiding and was later arrested. The accused pleaded guilty to the accidental killing of his wife. He claimed that his wife had provoked him by squeezing his testicles. The High Court found him guilty of murder and sentenced him to life imprisonment.

The accused lodged an appeal in the Supreme Court, claiming that:

- The High Court disregarded his averment that he had killed his wife by accident.
- The sentence was excessive because it disregarded the fact that he had pleaded guilty, any provocation by his wife and the fact that he had been left with orphans who need to be looked after.

The Supreme Court found that:

- The accused was guilty of the intentional murder of his wife. This was supported by the fact that the accused had strangled and slapped the deceased in the face. Furthermore, he then chose not to take her to the hospital when he noticed that she was unconscious.

- ii. The sentence was appropriate. The guilty plea to the accidental death of his wife was insincere because the accused had intentionally killed her. Furthermore, the accused had failed to prove any provocation of the part of the wife.

Points to Note

- The case merits consideration because it analysed the sincerity of the accused's guilty plea through a thorough assessment of his statements in comparison with other evidence available to the Court.
- The accused's guilty plea that he accidentally killed his wife can be in his favour only when it is found to be sincere.
- In this case, the accused's guilty plea to accidental killing could not be taken into consideration in his favour. The accused had strangled and slapped his wife. He then failed to seek medical treatment for her.
- Although the law provides that provocation is a mitigating factor, the accused must prove it before the accused may benefit.

Prosecution v Gatare [2014] SC

Principle or Rule Established by the Court's Decision

The mitigation of being a first-time offender will be negated if the offence is committed with cruelty and then concealed.

Judges: Nyirinkwya Immaculée, Hatangimbabazi Fabien and Munyangeri Innocent | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Supreme Court (Rwanda)	Case No. RPA 0317/08/CS of 24 October 2014	Physical assault

Case Summary

The accused was convicted of murdering his wife and child, who had been set on fire in a car in Belgium. The accused's jacket was found close to the scene and the day after the fire the accused was found to have burns. He did not report his wife and the child missing and gave contradictory accounts about their location, telling people in Belgium that they were in Rwanda and people in Rwanda that they were in Belgium. When the accused arrived in Rwanda, he filed a divorce petition and revoked his adoption of the wife's children.

Three months after they were killed, the accused was arrested and found to be in possession of identification documents of the deceased.

The accused was convicted at the High Court and was sentenced to life imprisonment with special provisions. He was also ordered to pay damages to the deceased's young sister, who filed a civil action.

The accused appealed to the Supreme Court, alleging that the conviction was against the weight of the evidence. He also argued that the sentence was excessive.

The Supreme Court, after considering all of the evidence, upheld the appealed judgement. Regarding the penalty, the Court ruled that, although the accused was a first-time offender, he should not benefit from mitigating circumstances, taking into account the cruel manner in which he had plotted and killed the deceased, his efforts to conceal the crime and the fact that the deceased's children had lost the only surviving parent and their eldest sister, killed by their adoptive father.

Point to Note

The case stands out because of the Court's firm refusal to consider mitigating circumstances when the crime was committed with unprecedented cruelty and the accused sought to conceal the evidence of the crime.

Prosecution v Mpitabakana [2014] SC

Principle or Rule Established by the Court's Decision

The accused cannot rely on the consequences of his or her offending to benefit from a reduction in penalty.

Judges: Nyirinkwaya Immaculée, Havugiyaremye
Julien and Mukamulisa Marie Thérèse | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence upheld	Supreme Court (Rwanda)	Case No. RPA0129/10/CS of 7 March 2014	Physical assault

Case Summary

The appellant reported himself to the police, confessing to the killing of his wife. An autopsy revealed that the cause of death was blows to the head and the stomach. The victim was seven months pregnant. At first instance, the High Court convicted the appellant of intentionally killing his wife and sentenced him to 20 years' imprisonment. The Court reduced his penalty

because he pleaded guilty and reported himself to the judicial police immediately after the offence.

He appealed to the Supreme Court on the basis that the High Court had erred in finding that that he had deliberately killed his wife. He contended that the death was accidental. He also contended that the sentence was excessive in light of his guilty plea, which facilitated justice. He also had orphan children left by his wife, whom he had to take care of.

The Supreme Court found that the injuries supported the finding that the accused intentionally killed his wife.

The sentence imposed had been appropriate. The appellant's sentence had already been reduced from life imprisonment to a term of 20 years in light of his guilty plea. Furthermore, he was the one who made his children orphans. He could not rely on the horrific consequences of the offence he committed to benefit from a reduction in penalty.

Points to Note

- An accused may benefit from a penalty reduction if they have cooperated and facilitated justice.
- An accused cannot rely on the horrific consequences of their own offending to justify a penalty reduction.

Prosecution v Naramabuye [2014] SC

Principle or Rule Established by the Court's Decision

In assessing whether a husband intended to either assault or kill his wife in the matrimonial home, the court must consider whether there was anything that could have stopped him from killing his wife.

Judges: Mutashya Jean Baptiste, Hitiyaremye Alphonse and Kanyange Fidélité | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction overturned	Supreme Court (Rwanda)	Case No. RPA 0071/10/CS of 10 January 2014	Physical assault

Case Summary

The appellant pleaded guilty without reservations to the attempted murder of his wife. The appellant had strangled her and caused wounds to her neck. In light of his guilty plea, the High Court sentenced the appellant to a reduced sentence of 20 years' imprisonment. He also lost his civil rights.

He appealed to the Supreme Court. The appellant contended that he should have been charged with assault and battery and not attempted murder.

The Court held that an attempt is punishable when it is proved that an offender planned to commit an offence and that such a plan was then not carried out. The plan to commit an offence is proved by observable and unequivocal acts constituting the beginning of the offence meant to enable its commission. The offence must then have been suspended or have failed in its purpose because of circumstances beyond the offender's control.

If the appellant's goal was to murder his wife, nothing intervened to stop him from achieving that aim, for example a person or any other force. The appellant and his wife remained in the house after the fighting had ceased. She had not sought refuge elsewhere. If he had intended to kill her, he had ample opportunity to do so.

The offence committed by the appellant was therefore not attempted murder. Instead, the appellant had committed the offence of assault and battery, punishable by imprisonment of one month to one year and/or a fine of 500FRw to 2,000FRw. The High Court's decision was therefore overturned.

Points to Note

- When there has been fighting causing wounds, this alone cannot justify a charge of attempt to commit murder.
- When assessing the offence of attempted murder, it is important for the Court to consider whether there are other circumstances beyond the accused's control that may have stopped him/her achieving the plot. If there are none, the offence should be assault and battery rather than attempt to commit murder.
- In this case, no evidence was adduced as to what prevented the accused from ending the victim's life.

Prosecution v Nkinamubanzi [2016] SC

Principle or Rule Established by the Court's Decision

A history of violent conduct should be considered an aggravating factor in determining an appropriate sentence for physical violence against a spouse.

Judges: Nyirinkwaya Immaculée, Munyangeri Innocent and Hitiyaremye Alphonse | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Sentence upheld	Supreme Court (Rwanda)	Case No. RPA 0067/13/CS of 16 December 2016	Physical assault

Case Summary

Following a constant pattern of domestic violence, the accused and his wife had separated. One evening, the wife was returning to her parents' home when her husband saw her. He concluded that she had been committing adultery, whereupon he undressed her and raised a machete to hit her. The wife ran to a neighbour's home. The accused followed her to that home and hit her seven times with the machete on various parts of the body, including the head. He then fled. When he was arrested, he confessed to having committed the offence. The High Court convicted him on the basis of his confession and sentenced him to a reduced penalty of 20 years of imprisonment on the grounds that he had pleaded guilty and that he was a first-time offender.

The accused appealed to the Supreme Court. The accused requested a reduction in his sentence to at least a half of the term to which he had been sentenced on the grounds of his guilty plea and a lack of premeditation.

The Court held that the sentence could not be reduced further. The accused had committed a pre-meditated act. He had hit his wife on delicate parts of her body. In his interrogation, he admitted that he had hit her three times on the head, twice on the back, on the neck once and on the hands once. The constant background of domestic violence that had caused the couple to separate was an aggravating feature. No evidence had been adduced to support the contention that the victim had committed adultery and so no consideration could be given to those claims in the sentencing exercise.

Points to Note

- The Court found that suspicion of adultery committed by a wife is not an excuse for a physical assault against her.
- Constant domestic violence may be taken into consideration in determining the appropriate sentence.

Prosecution v Nshutirakiza [2015] SC

Principle or Rule Established by the Court's Decision

The judge may consider mitigating circumstances that preceded, accompanied or followed an offence. However, when the offence involves serious cruelty, it may be aggravated to such an extent that mitigating factors are negated.

Judges: Mutashya Jean Baptiste, Gakwaya Justin and Hitiyaremye Alphonse | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Sentence upheld	Supreme Court (Rwanda)	Case No. RPA0047/11/CS of 27 March 2015	Physical assault

Case Summary

The accused pleaded guilty to murdering his wife by repeatedly stabbing her in the head. He stated that the reason for doing so was that he and his wife had run into constant conflict after he had abandoned her for a concubine. He had killed his wife in order that he and his concubine could live peacefully. The High Court convicted him of murder and sentenced him to 20 years' imprisonment after reducing his penalty because he was a first-time offender and because he had pleaded guilty and sought forgiveness.

The accused appealed to the Supreme Court, arguing that his sentence should be further reduced. He contended that the High Court did not sufficiently take account of his guilty plea. The accused continued to insist that he had admitted the charges and that he sought forgiveness. In particular, he averred that he had repented to his family in-law as well as to Rwandan society. He also asserted that he had four young children and that there was no other person who could look after them.

The Supreme Court found that the requested penalty reduction could not be granted. The High Court had considered the circumstances in which the offence was committed, including the *mens rea* and its gravity. The offence involved serious and intentional cruelty. This outweighed other mitigating factors, such as his young children. There were no other grounds that could lead to further reduction of the penalty imposed on him. Therefore, the penalty imposed by the High Court corresponded to the offence committed.

Points to Note

- This case serves as an authority in cases where murder of a wife by a husband is committed with serious cruelty and the accused pleads mitigating circumstances.
- The Supreme Court held that the judge might consider mitigating circumstances that preceded, accompanied or followed an offence. However, when the offence was committed with serious cruelty, it may be grounds for not reducing the penalty.

Prosecution v Uwiringiyimana [2017] SC

Principle or Rule Established by the Court's Decision

When the court is sentencing an accused for domestic violence, it must consider aggravating factors, including the level of cruelty and violence and a lack of remorse.

Judges: Mutashya Jean Baptiste, Rugabirwa Ruben and Kalimunda Aimé | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction upheld	Supreme Court (Rwanda)	Case No. RPA 0099/13/CS of 17 March 2017	Physical assault

Case Summary

The accused was prosecuted for attempted murder before the High Court. It was alleged that he had hit his wife with a hammer several times on delicate parts of her body before fleeing. The victim was rescued by her neighbours. When arrested, the accused pleaded guilty only to beating his wife, explaining that he had never intended to kill her. Rather, he had beaten her with a stroke to both her stomach and backside. He argued that his intention was to discipline his wife because he found that she had a new cloth (*kitenge*) from an unknown person. He asserted that it was a usual practice between spouses to discipline in such a way. He therefore requested that the offence with which he was charged be reclassified as assault and battery.

He was convicted of attempted murder and sentenced to a reduced penalty of eight years of imprisonment because he was remorseful and a first-time offender.

The accused appealed to the Supreme Court. The accused again contended that he should have been convicted of assault and battery rather than attempted murder. He argued that he had never intended to kill his wife.

The Supreme Court upheld the decision because the accused had committed the offence with clear cruelty. The penalty was also appropriate because the accused was in no way remorseful.

Points to Note

- When the court is sentencing an accused for domestic violence, an accused who still believes he has the right to discipline his wife must face a serious penalty. This represents a failure to appreciate the gravity of the offence and does not demonstrate remorse.
- In this case, the cruelty involved in the commission of an offence prevented any appreciable reduction in penalty.

Prosecution v Uwizeye Eustache [2017] SC

Principle or Rule Established by the Court's Decision

- In sentencing, cruelty used in the commission of an offence may negate any mitigating circumstances.
- Violence against women is serious and requires a serious penalty.

Judges: Mutashya Jean Baptiste, Rugabirwa Ruben and Karimunda Aimé | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Supreme Court (Rwanda)	Supreme Court Case No. RPA 0225/13/CS of 21 April 2017	Physical assault resulting in murder

Case Summary

The accused was charged with murdering his partner, to whom he was not legally married. The accused pleaded guilty. The High Court found that the accused had confessed that he planned to kill her. He was sentenced to life imprisonment and ordered to pay court fees.

The accused appealed to the Supreme Court. He argued that the previous court had misinterpreted the facts, because he never intended to kill her. Rather, he acted under provocation owing to her adultery. He therefore killed her out of anger. He sought a pardon, sentence reduction and sentence suspension to enable him to return home and take care of his mother and his children who had been left abandoned.

The Supreme Court ruled that the defendant should not be pardoned. The accused's failure to appreciate the gravity of the offence and his lack of remorse needed to be taken into account in determining the appropriate penalty. An accused person cannot falsely justify their actions through invented accusations of wrongdoing on the part of the victim. Domestic violence is serious and violence against women should be reflected through the imposition of a serious penalty. Furthermore, the high level of malice shown in the commission of the offence prevented any penalty reduction. The accused's sentence was therefore maintained.

Points to Note

- This case is of note because it considered the impact of domestic violence and other cruelty observed while committing the offence in assessing mitigating circumstances.
- Courts may consider the appropriateness of mitigating circumstances that preceded, accompanied or followed an offence. However, mitigating circumstances must be justified.
- The mere fact that an offence involves domestic violence is serious and may negate any benefit from mitigating circumstances.
- A high level of wickedness and cruelty in the commission of the offence may also negate any benefit from mitigating circumstances.

Obiter Dictum

The Court, with regard to violence exercised against women, observed that the notion that a man has the right to discipline his wife is deeply founded in the history of society. The wife's obligation is to serve her husband, to remain married at all costs until death separated them and to be punished for failing to please her husband. One of the consequences of this attitude is that violence against women is rarely mentioned, rarely reported, rarely prosecuted and even more rarely punished. Although society has official stopped approving domestic violence, tolerance for it remains in some areas. However, the Court noted that this attitude had changed progressively, and that there is now consciousness that no man has, under any circumstances, the right to brutalise his wife.

Other cases/decisions referred to

Country/case	Case
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Canada	<i>Angelique Lyn Lavalle v Prosecution</i> , Supreme Court of Canada, 1 SCR 852, p. 872 [1990]
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Uganda



Mureeba Janet & 2 others v Uganda [2002] SC

Principle or Rule Established by the Court's Decision

Circumstantial evidence may be used to convict an accused person if it is sufficiently corroborated.

Judges: A.H.O Oder, J.W.N. Tsekooko, A.N. Karokora, J.N. Mulenga and G.W Kanyeihamba

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	Supreme Court (Uganda)	Supreme Court Criminal Appeal No. 007 of 2002 (s. 182 & 183 PCA)	Other GBV (murder, domestic violence meted out by rival)

Case Summary

On 6 June 1999, the three appellants together with other persons murdered Namara Norah, alias Peace Kamusiime (first deceased) and her daughter Gabriela Mureeba (second deceased).

There had been a conflict between two women over one man, Charles Mureeba. Charles Mureeba was married to A1, Janet Mureeba. The first deceased was Charles Mureeba's long-term girlfriend (or customary wife).

The second deceased was the daughter of Charles Mureeba and the first deceased. The two deceased persons lived together at the time they were murdered.

In 1996, Charles Mureeba rented a house for the first deceased to live in. At some point in 1997, the first deceased confided in her neighbour, Kato Muhammad, that she was receiving death threats from A1. A1 was regularly in the vicinity of her residence. This prompted the first deceased to relocate to another place, where A1 continued to keep track of her. Because of the continued death threats from A1, the first deceased convinced her cousin, Kasabiti Rosette, to relocate with her in a new residence.

At some point during 1998, the first deceased made various reports regarding the death threats to the head of the population secretariat (where she worked), who advised her to report the matter to the police.

In around late May 1999, A2 and A3 visited a garage in Kisenyi, Kampala, where Bright Mugabi worked as a mechanic. Bright Mugabi and A2 knew each other very well because they had been in the army together. A2 and A3 informed Bright Mugabi that they wanted to hire a self-drive vehicle, having been hired by a rich woman to kill another woman who lived in Ntinda. Bright Mugabi did not provide A2 and A3 with the vehicle.

On 6 June 1999, A2 and A3 returned to the garage at about 4 p.m., driving a white double cabin pick-up that needed repair. Bright Mugabi repaired the car and opened the rear cabin door of the vehicle to clean the inside of the cabin, wherein he found a brown bag containing a blue overcoat and a gun, which he thought was an submachine gun. Bright Mugabi stated that, before A2 left the garage, A2 asked the manager for a gun rivet and a drill, which are used for pulling off or fixing number plates on vehicles. At about 5.30 p.m., A2 and A3 drove away in the white pick-up.

That same evening at about 6.30 p.m., Jolly Kapere, who lived about 100 m from the deceased's residence, saw a white double cabin pick-up drive past her and found the same vehicle parked up on a road, which is normally not busy, with one of its doors open. Jolly Kapere heard gunshots as she was returning home. She saw a man wearing an overcoat carrying an object running from the first deceased's home towards the pick-up and put the object, which could have been a stick or a gun, into the vehicle. The vehicle then sped off. Afterwards, Jolly Kapere went to the scene, where she saw the dead bodies of the two deceased persons.

At about 7:30 p.m. on that same day, A1 received a telephone call. However, A1 had gone "up country" with Charles Mureeba. Bessi Tumusiime, a niece of Charles Mureeba, who lived in the same house as A1, answered the call. A1's house girl, Ayebare Mariam, heard Bessi Tumusiime ask the caller, "Have you finished?"

When A1 returned home, Ayebare Mariam noticed that A1 was in an exhilarated mood and was exceedingly happy after learning of the murder of the deceased from Bessi Tumusiime. A1, Bessi Tumusiime and a friend of A1 who arrived later all indulged in rejoicing and dancing, apparently because what was troubling A1 was over because the *malaya* (prostitute) had been killed. They danced around as they said that A1 was the winner and she would have all the property.

On 7 June 1999, at about 8.30 a.m., A2 and A3 returned to the garage in the same pick-up. As Bright Mugabi was cleaning that vehicle, he heard A2 saying to A3 in Luganda, “*How could you fail to beat a mere woman?*” (apparently meaning “How could you fail ‘to shoot’ a mere woman?”). According to Bright Mugabi, the pick-up had no number plate. Later that day, Bright Mugabi learned of the murders.

On 9 June 1999, a witchdoctor visited A1’s home, where he slaughtered a chicken in what Ayebare Mariam believed to be a ritual, apparently as protection against arrest. Nevertheless, the appellants and two other suspects were arrested and charged with the murder of the two deceased persons. The trial judge and Court of Appeal justices convicted the appellants on the circumstantial evidence.

At the Supreme Court, it was alleged that the previous courts had erred in fact and law by convicting in reliance on circumstantial and uncorroborated evidence.

The Supreme Court held that the evidence articulated above was sufficiently cogent circumstantial evidence to convict the appellants.

Points to Note

- This is a case of murder carried out at the behest of a co-wife within a domestic setting, apparently motivated by the selfish purpose of enhancing her entitlement to the property of the husband.
- The trial judge, Court of Appeal justices and Supreme Court justices held that, with no eye-witness to the murder of the deceased persons, the evidence on record relied on circumstantial evidence.
- The justices of appeal noted that circumstantial evidence could be treated as good evidence if there is other independent evidence corroborating the said circumstantial evidence. This position is especially relevant to prosecuting VAWG offences, because they are often committed in secrecy with no eye-witnesses present. The ability to rely on circumstantial evidence in the prosecution of VAWG cases better enables prosecution.

- Furthermore, it was also noted that, for police statements to be admissible, there should also be independent corroboration. The justices of appeal noted that there was overwhelming evidence to support the police statements on which the appellants were convicted.

Uganda v. Amoko [2014] HC

Principle or Rule Established by the Court's Decision

A child may have to give evidence in cases of VAWG. A *voir dire* may need to be held to determine whether the child has a sufficient appreciation of the particular responsibility to tell the truth involved in taking an oath.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction	High Court (Uganda)	HCT-CR-CN-69/2014 (S.188&189 PCA)	Other GBV (domestic violence, murder)

Case Summary

The accused was convicted of murdering his wife. At around 4 a.m., the accused told his wife to wake up and started to cut her with a *panga*. The accused further hit his wife with a stick and used an axe to cut her. Their child saw what happened through an open door and ran to tell the neighbours, including the mother of the wife.

People came and found the accused still at the house. The accused was asked why he had killed his wife, to which he replied, “*I had no problem with the deceased but I just killed her.*” The police were called, who arrived at approximately 6 a.m. The accused showed the police the *panga* he had used to kill the deceased, which he had hidden in the heap of grass in the compound. The accused was then arrested.

During a trial within a trial, Amoko in his defence told the Court, “*I am now in prison; it means that my wife had died. I heard what prosecution witnesses said but I don't know how my wife died. I had no problem with her in our marriage.*”

Points to Note

- This case was selected owing to its strange facts.
- It is also indicative of the unrecorded effects of children who witness such brutality. The trauma suffered by such children is in

itself another type of violence. In the context of the wider notion of violence against women, the girl child who witnesses such brutality may be affected mentally and psychologically and may form a damaging opinion about men.

- The Nigerian case of *Ngwuta Mbele v The State* [1990], Supreme Court, is very similar to the Amoko case. In Nigeria, a Commonwealth country, unlike in Uganda, the law does not require that children's unsworn testimony be corroborated. The requirement of corroboration for children's unsworn evidence in Uganda is under scrutiny for being discriminative on the basis of age.
- In the UK, the Code for Crown Prosecutors calls on prosecutors to take into account certain factors and guides that, "*the other public interest factor that must be taken into account is whether a prosecution is likely to have a bad effect on the victim's physical or mental health*" (4.17g). This is equally applicable to deciding whether or not a child witness, who is not a victim, should be required to give evidence in court. The more traumatic the offence for the child (being a victim of or a witness to violence or sexual abuse are the most obvious examples), the more likely it is that criminal proceedings may re-traumatise and cause further emotional damage to the child. Yet the most serious cases are usually the ones that will, on the facts, require a prosecution in the public interest, both to secure justice but also to provide protection for the child and the public at large.
- It follows that prosecutors will have to balance the interests of the child with the wider interests of the public at large in reaching a decision on whether or not to prosecute. Some decisions will inevitably be very sensitive and finely balanced. In such cases, prosecutors should ensure the final decision is fully supported by relevant information and reasoning. In many cases, it is possible to adequately mitigate adverse effects of the trial process by applying for appropriate special measures."
- The CRC stipulates that the best interests of the child should always be paramount. In the UK, the Crown Counsel is advised to consider the likely consequences for any children, be they victims or witnesses, of proceeding with a prosecution. Careful consideration must therefore be given to the factors for and against prosecution. The prosecutors are bound to balance the children's interests against that of the public.

Principle or Rule Established by the Court's Decision

Even when an instance of VAWG is dealt with by way of a plea-bargaining agreement, an act may be so heinous that it cannot be tolerated by any society and so a deterrent sentence is necessary.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case NAK-AA-11-2015, 23 June 2015	Other GBV (domestic violence, murder)

Case Summary

The deceased was married to the first accused, Kakaire Kasimu (A1). In November 2014, A1 enlisted the help of A2 (Farouk Walusimbi), A3 (Ivan Namanya) and others to carry out an acid attack on the deceased because he believed she had been unfaithful to him and he was tired of her. In exchange for US\$ 3 million, A2, A3 and another would carry out an acid attack while the deceased was driving. A1 had already withdrawn US\$ 12 million from the bank account of the eldest daughter of the deceased under the pretence that the deceased needed the money.

A1 said that he would tamper with the co-driver's window so it would remain open and the acid could be poured onto the deceased. On 16 November 2014, A1 provided the acid to be used in the attack to A2 in a 5 litre jerry can and also gave them a small blue bucket to use for pouring the acid on the deceased.

In the late evening, while on the Northern Bypass, the plan was executed. Someone knocked on the back of the deceased's car. A1 stopped to check what had caused the knock. A3 and another poured acid onto the deceased twice and, in the process, some spilt over onto A1, A3, another accomplice, two children in the car and A1's sister. The deceased got most of the acid onto her body, as she was the target of the attack, A3's face was also damaged by the acid as it splashed back onto his face and A1 also had acid poured on his face. The rest suffered minor injuries. A1 drove away from the scene of the crime but he quickly felt weak and stopped at a roundabout, where a taxi picked him up, along with all the other occupants of the car, and rushed them to Mulago Referral Hospital for treatment. A police officer who dealt with the deceased also identified A3 in the same ward. He interrogated A3 about his acid burns, to which he gave unsatisfactory answers.

A2 and A3 entered a plea of guilty. While sentencing them, the judge considered their remorsefulness, youth and ability to reform and the

apologies made to the bereaved family and the community. The judge took account of the gravity of the actions and the premeditation involved. In addition, the judge considered the prevalence of the crime of acid throwing and considered that a deterrent sentence was appropriate. The Court sentenced A2 and A3 to 25 years' imprisonment, including the 6 months spent on remand for Count I of Murder. In respect of the attempted murder of the deceased's baby, the accused were sentenced to 20 years' imprisonment, with the 6 months spent on remand to be deducted.

Point to Note

- Where courts are dealing with an instance of VAWG by way of a plea-bargaining agreement, an act may be so heinous that it cannot be tolerated by any society, making a deterrent sentence necessary.
- In this case, the judge took special notice of the gravity of the actions and the premeditation in the commissioning of the offence in passing sentence. Furthermore, given the prevalence of the crime of acid-throwing, a deterrent sentence was appropriate.

Kooky Sharma and Anor v Uganda [2011] SC

Principle or Rule Established by the Court's Decision

- There is no burden on the prosecution to prove the nature of the weapon used in inflicting the harm that caused death, nor is there an obligation to prove how the instrument was obtained or applied in inflicting the harm.
- Quality of voice identification is a crucial issue if the identifying witness was unable to physically see the speaker whose voice he or she claims to identify. It is not necessary for a witness to understand or be literate in a language being spoken in order to identify the speaker; the issue is one of familiarity with the voice.

Judges: Odoki, Oder, Tsekooko, Karokora and Kanyeihamba | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal succeeded in part	Supreme Court (Uganda)	Criminal Appeal No. 44 OF 2000; 15 April 2002	Other GBV (domestic violence, murder)

Case Summary

This was an appeal against the decision of the Court of Appeal, which had confirmed the conviction by the High Court of the appellants for the murder of Renu Joshi, the wife of the first appellant (Kooky Sharma). The second appellant was Kooky Sharma's brother, Davinder Kumar.

It was the case for the prosecution that the two appellants had returned to the residence soon after midnight in the morning of 24 December 1997. A neighbour, Mr Rurebwa Twine, heard quarrels and a female crying and so he woke up his wife, Margaret Twine, saying, “*Your friend is being beaten.*” Margaret Twine woke up and also heard the deceased crying. Margaret Twine heard and recognised the voices of the two appellants from the same house. She also heard banging, followed by cries of the deceased. She went back to sleep after these noises stopped. Margaret Twine later identified both appellants to the police by their voices.

Later that morning, 24 December 1997, Abdi Jamal, a local chairman of the area, learnt of the death of the deceased. He went to Kooky Sharma’s house, where he found Kooky Sharma, who was planning to have the body of the deceased cremated. Kooky Sharma claimed that the deceased had died of malaria. Abdi Jamal looked at the deceased’s body, which was dressed up to the wrists and ankles except for the face. Kooky wanted to take the body of the deceased for cremation. Because Abdi Jamal was not satisfied with the cause of death of the deceased, he prevented Kooky Sharma from taking the body for a hurried cremation. He contacted the police, and police officers examined the body. On noticing bruises, the officers treated the case as murder.

That same day, Dr Martin Kalyemenya, a pathologist at Mulago Hospital, carried out an autopsy on the body of the deceased. Externally, he observed multiple bruises, which he described as burns caused by electrocution or acid. On opening the body, he noticed that the liver and the spleen were slightly abnormal in colour. He removed a piece of the liver, the spleen, a kidney and a piece of brain and sent them to Senior Government Chemist Mr Emmanuel Nsubuga, for chemical analysis. Dr Kalyemenya formed the opinion that the probable cause of death was “*shock due to electrical burns with blunt injury. Poison could not be ruled out.*”

The toxicology analysis carried out by the senior government chemist revealed some quantities of acaricide poison in the organs. He testified at trial that he had not quantified the poison, but that, because of its highly toxic nature, the amount was sufficiently substantial to kill if ingested.

A second autopsy, conducted by Dr Wabinga, Head of the Pathology Department of the Medical School at Mulago, affirmed the opinion of the first pathologist – that death was the result of electric shock.

Kooky Sharma’s statement to the police on charge and caution was that his wife had been suffering from malaria and that she had woken him up at 4 a.m., complaining of pain. He alleged that he then called his brother, Davinder Kumar, and sent him to call a doctor.

At trial and in the Court of Appeal, the appellants contended that the victim had committed suicide by consuming acaricide, relying on the evidence of the senior government chemist. Davinder Kumar also relied on an alibi – namely that, soon after midnight, he and two others retired into their bedroom at the back of a shop. Davinder Kumar stated that he did not go to the scene of crime till about 5 a.m. It was contended that Margaret Twine was not in fact familiar with Davinder Kumar’s voice and had lied about the identification because her family wished to purchase the whole of the plot of land that her family shared with Kooky Sharma’s family.

The trial judge found that, although acaricide poison was traced in the body of the deceased, death was in fact a result of electric shock and that it was the two appellants who had administered the electric shocks. The judge convicted the two appellants of the murder of the deceased and sentenced each of them to death.

The Court of Appeal upheld the findings of the trial judge and therefore dismissed the appeal. The appellants appealed to the Supreme Court. The appellants’ arguments centred on two issues:

- i. The cause of death.
- ii. Identification of Davinder Kumar as having been present at the time.

In the opinion of the justices of the Supreme Court:

- i. As to the cause of death, the evidence of the Senior Government Chemist Mr E. Nsubuga that the acaricide found in the body of the deceased was in substantial quantities was inexplicable. Mr Nsubuga had made no contemporaneous note of either the amount of acaricide poison found in the deceased’s body or the details of his chemical analysis. He did not record any quantity in his report, written in January 1998. To assert that the quantity was substantial for the first time in testimony in court in 1999 from memory created doubt about his conclusions. It followed that Mr Nsubuga’s opinion was based more on speculation than on science. It was therefore unhelpful as to the cause of death. In spite of Dr Wabinga’s ambivalence in his own opinion about the cause of death, Dr Kalyemenya essentially supported Dr Wabinga when he stated in his autopsy report that the cause of death was “*shock due to electrical burns with blunt injury*”. Dr Wabinga’s medical opinion therefore established the cause of death.

In addressing the fact that the road on which the murder took place did not have access to electricity on the night in question, the

Supreme Court cited the reasoning of the East African Court of Appeal in *S. Mungai v Republic* [1965] EA 782, p. 787, to the effect that there was no burden on the prosecution to prove the nature of the weapon used in inflicting the harm that caused death, nor was there an obligation to prove how the instrument was obtained or applied in inflicting the harm.

- ii. As to the identification of Davinder Kumar, unlike Kooky Sharma, he had denied being present at the material time. It therefore became necessary for the trial court to consider the identification of Davinder Kumar by Mrs Twine with greatest care and caution. The quality of the voice identification was a crucial issue, as the identifying witness was unable to physically see the speaker whose voice she claimed to identify.

Although Mrs Twine had admitted that the language being spoken at the time was one that she did not understand, it was not necessary for her to understand or be literate in a language in order to identify the speaker if she was familiar with their voice. However, Mrs Twine did not clearly demonstrate that she had enough familiarity with the voice to make an identification – her evidence failed to disprove the claim by Davinder Kumar that she had never had a face-to-face discussion with him. This raised the possibility of mistaken identity by voice insofar as Davinder Kumar was concerned.

While Davinder Kumar’s “panicky” behaviour could have suggested that he knew what had happened to the deceased, there was no evidence on the record to support a firm conclusion that his conduct could not have had an innocent explanation. Suspicion alone was not enough in a criminal trial to conclude that he was properly identified as having participated in the murder of the deceased.

The Supreme Court decided that the trial judge had correctly appreciated the law on the burden of proof in relation to the alibi but had not adequately evaluated the evidence in relation to it. It was the duty of the prosecution to disprove the alibi. The judge appeared to suggest that Davinder Kumar should have proved the alibi so as to raise a doubt in his mind. Further still, the record indicated that a P. Kumar (DW1) supported Davinder Kumar’s account. The Supreme Court held that the prosecution had failed to discharge the burden of disproving the alibi and Davinder Kumar’s appeal succeeded.

Obiter Dictum

The Supreme Court endorsed the view expressed by the Court of Appeal that, because the appellants had chosen not to give sworn evidence, it was absolutely wrong for the trial judge to allow the appellants to be led by their counsel throughout the making of their unsworn statements. Counsel on both sides is under a duty to ensure proper procedure in conducting a criminal trial is followed in adducing evidence by both sides so that justice is not only done but also seen to be done.

The justices of the Supreme Court also noted that too many objections were raised during the trial. The objections and adjournments contributed greatly to the delay in concluding the trial of this case and such practice must be discouraged by trial judges.

Points to Note

- This case is an example of a murder of a wife by her husband.
- The Supreme Court made the special effort to guide subordinate courts on criminal procedure when it commented on the many miscellaneous applications and the handling of the unsworn testimonies in this case.
- While the Supreme Court noted the subordinate courts' appreciation of the law, it illustrated particular application of the law when it re-evaluated the manner in which the second appellant's alibi was considered.

Other cases/decisions referred to

Country/jurisdiction	Decision
Kenya <i>S. Mungai v Republic</i> [1965] EA 782	The East African Court of Appeal held that there was no burden on the prosecution to prove the nature of the weapon used in inflicting the harm that caused death, nor was there an obligation to prove how the instrument was obtained or applied in inflicting the harm.

Chapter 6

Child Early and Forced Marriage

Chapter 6

Child Early and Forced Marriage

Forced marriage: “The marriage of individuals against their will (includes ‘early marriage’).”



Council of Imams and Preachers of Kenya, Malindi & 4 others v The Attorney General & 5 others [2015] HC

Principle or Rule Established by the Court's Decision

Marriages of persons under the age of 18 years, though permissible under Islamic practice, are impermissible under constitutional provisions, which limit the right to marry to adults (i.e. persons over 18 years of age) and which protect the best interests of a child.

Judge: Said J. Chitembwe | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Preliminary objection allowed; marriage of child not permitted under Constitution of Kenya 2010	High Court, Malindi (Kenya)	Constitutional Petition No. 40 of 201; judgement delivered on 29 October 2015	Child marriage

Case Summary

The third and fourth petitioners were charged with the offence of subjecting a girl aged 16 to harmful cultural rites, contrary to Section 14 as read with Section 20 of the Children Act, when they arranged for her early marriage. The girl (second petitioner) was at the material time a child professing adherence to the Islamic faith and was married off in accordance with Islamic law.

The petitioners filed a petition seeking declarations that the arrest, arraignment and charge of some of the petitioners was unconstitutional, wrong and illegal and that the statutory provisions ordinarily prohibiting child marriage do not apply to marriages conducted under Islamic law. The ultimate issue for determination was whether a child aged 17 years old

professing Islamic faith could enter into a marriage contract under Islamic Law and whether the said marriage was lawful under Kenyan laws.

Judge Chitembwe held that marriages of persons under the age of 18, although permissible under Islamic practice, are not permitted in Kenya. Child marriage cannot be allowed in the name of expressing religious freedom.

Article 24(4) of the Constitution provides that:

The provisions on the Bill of Rights on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

Nevertheless, the right to Islamic marriage is not an absolute, non-derogable right under Article 25.

Article 45(4) of the Constitution provides that the state recognise marriages concluded under any “*tradition, system of religious, personal or family law*” only to the extent that they are consistent with the provisions of the Constitution.

While the Constitution should be interpreted to give effect to Islamic law, constitutional provisions must be interpreted in light of other articles. Article 53(1)(d) provides that:

Every child has the right—(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.”

The judge stated that Article 53(1)(d) of the Constitution ought to be interpreted broadly in a manner that does not derogate from its core essence or bring an absurdity or embarrass the Constitution. Further, “harmful cultural practice” should be broadly interpreted to include religious practices that are not in line with the Constitution. The interpretation of the Bill of Rights is also guided by Article 20(4):

In interpreting the Bill of Rights, a court, tribunal or other authority shall promote – (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

The Constitution imposes a fundamental duty on the state and every state organ to, “*observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights*” (Article 21(1)) and to, “*address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities*” (Article 21(3)).

The state has a constitutional duty to protect a child from child marriage, as this practice is not in the best interest of the child, regardless of the child's creed, sex, intellectual capacity or socio-economic background. Although the Constitution grants the freedom to exercise one's religion, that freedom has to be carried out in line with the other constitutional provisions. At Paragraph 24, the judge stated:

If each religion is given a freehand to exercise its belief without a common ground, then the end result will be disharmony in the Kenyan society.

Article 45(2) of the Constitution provides for the right to marry to adults – that is, persons who are at least 18 years old. Therefore, the Constitution does not permit the purported marriage of a child. A child lacks capacity to enter into a marriage contract.

Further, “early marriage” is also prohibited under Section 14 of the Children Act. The judge found that the petitioners, in allowing or orchestrating the marriage, had perpetrated a crime, and that any purported attempt to consummate the marriage would amount to the offence of defilement. The Court therefore ordered that the respondents face the charges alleged against them before the trial magistrate.

Points to Note

- This case sent a clear message that child marriage is unconstitutional and cannot be condoned or overlooked.
- The Children Act and the Constitution outlaw child marriage. A child is any human being below 18 years. A child cannot consent to marriage or sex.
- This decision should give courage to prosecutors to prosecute child marriage cases in the best interest of the child.
- This is an important precedent as it extends the duty not only to prosecuting those found to have breached the duty of care but also to ensuring the protection and well-being of child victims. The respondents in this case were faulted for failing to provide appropriate psychological support for child victims who were subjected to sexual violence by their teachers.

Obiter Dictum

The judge stated that the Article 32 right to freedom, conscience, religion, thought, belief and opinion should be read in light of every child's right to free and basic compulsory basic education under Article 53(1)(b). However, as stated by the judge, this was not the reason/ratio for finding that Islamic child marriage violates the Constitution, but merely demonstrates the importance of interpreting constitutional provisions against other provisions.

Rwanda



Prosecution v Nshimiyimana [2016] HC

Principle or Rule Established by the Court's Decision

While determining the age of a child, a birth certificate has more probative value than the mere statements of the parent.

Justice: Bukuba Umulisa Claire | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Supreme Court (Rwanda)	Case No. RPA 00332/2016/ HC/KIG of 30 June 2016	Child marriage

Case Summary

The accused was charged with living with a minor as his wife, contrary to the Penal Code. It was alleged that the offence took place in 2015. He was convicted and sentenced to 10 years' imprisonment by The Intermediate Court.

The accused appealed to the High Court. He contended that he had been wrongfully convicted because there was doubt about whether the girl was a minor at the time of the offence in 2015. The girls' birth certificate suggested she was born in 2000. However, the mother of the victim gave a written statement wherein she declared that her daughter was born in 1996. If the statement was accepted as correct, it meant she had attained the age of majority by the time of the offence.

The High Court ruled that the statement of her mother indicating that her daughter was born in 1996 had no value and could not contradict the birth certificate. The birth certificate indicated that the girl was a minor at the time of the offence in 2015. Therefore, the High Court found the accused guilty of the offence of living together with a child as his wife.

The High Court also confirmed the sentence of 10 years' imprisonment. This was the minimum sentence provided for by the law for that offence.

Points to Note

- The case is notable as to the weight to be given to contradicting pieces of evidence provided to the court on the age of a child. When one of the pieces of evidence is a birth certificate, this prevails.

- The accused cannot seek the benefit of doubt because the birth certificate resolves the issue of doubt.
- Cohabitation with a child below the age of 18 implies the offence of living with a child as a husband or wife is committed.
- There could be no more of a reduction of penalty by the appellate court. Life imprisonment with special provisions had been converted into a minimum fixed-term imprisonment of 10 years in light of the mitigating circumstances.

Tanzania

Republic v Modest & another [1968]

Principle or Rule Established by the Court's Decision

The normal understanding of the word "woman" is limited to an adult human female. Unless there is a clear indication to the contrary, legislative provisions referring to a "woman" will be taken as bearing this meaning.

Judge: Seaton | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction quashed and sentence set aside	High Court, Mwanza (Tanzania)	Criminal Revision No. 26 of 1968 delivered 1969	Child marriage

Case Summary

The complainant was a schoolgirl aged between 10 and 12. The complainant's father appeared to be mentally disturbed and therefore she was under the guardianship of the first accused, her brother. She was forced by her brother to marry the second accused because the second accused had already paid a sum by way of bride wealth to marry the complainant's sister. However, the sister married another man. The marriage ceremony was performed and the complainant was taken to the second accused's home where she stayed for four days. The second accused did not have sexual relations with her.

The complainant did not return to school, and her headmaster complained to the village executive officer. Consequently, the accused were arrested and charged with abduction, contrary to Section 133 of the Penal Code. They were convicted as charged and sentenced to five and 2 days' imprisonment, respectively.

The High Court called for the court record because the sentence passed seemed unreasonably light. The High Court found that the offence charged had not in fact been committed. The conviction was therefore quashed and the sentence was set aside.

Section 134 of the Penal Code provides that:

Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour.

This offence was of clear application to a girl under 16 years of age. However, it did not appear to have been committed because the father of the complainant and the guardian had consented to the victim being taken away. For this reason, a charge under Section 133 had been preferred.

Section 133 provides that:

Any person who with intent to marry or have sexual intercourse with a woman of any age, or to cause her to be married or to have sexual intercourse with any other person, takes her away, or detains her, against her will commits an offence.

Although there is no express reference to age, Section 133 requires the complainant to be aged 16 or over because it refers to “her will”. A girl under the age of 16 would be under the custody or the charge of the senior relative and would be too immature to give their own consent.

The accused was thus improperly charged under Section 133 because the complainant was under the age of 16.

Points to Note

- This is a decision related to forced marriage, which emanated from abduction and then marriage. The case also involved removing a young girl from school. It is an important case because it creates a link between offences of abduction and forced marriage. It shows that such incidents occur in our society and the fact that courts are there to protect those who are victimised in such a way.
- However, to do so, a charge must be brought correctly. The decision gave an interpretation of the word “woman” in the offence of abduction and therefore stressed the importance of laying appropriate charges for offences committed.
- From the Court findings, it is clear that the second accused could have been charged for contravening Section 138 if evidence had

been adduced that he molested the complainant during those four days they had spent together. Section 138 provides that:

Any person who being married to a woman under the age of 15 years, has or attempted to have sexual intercourse with her, whether with or without her consent, before she has attained the age of 15 years commits an offence.

Bashford v Tuli [1971] HC

Principle or Rule Established by the Court's Decision

A marriage under Islamic Law is a civil contract. The marriage contract may be declared null and void if it is entered into because of a misrepresentation.

Judge: Hamlyn | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Marriage declared null and void	High Court/Original (Tanzania)	(1971) HCD 76; delivered on 22 February 1971	Child marriage

Case Summary

The petitioner applied for a declaration that the marriage ceremony performed between her and the respondent in 1968 was null and void. The ceremony took place in Ontario, Canada, under Islamic law before a local imam.

The petitioner alleged that, at the time of the ceremony, she was under a misconception that the respondent was unmarried. It was part of the bargain of her marrying the respondent that he was not to marry others. When the parties went to the respondent's house in Tanzania, the respondent introduced the petitioner to two women as his other wives, whom he had married before marrying her. The petitioner left the respondent immediately.

The Court's main issue for consideration was to determine whether there was deliberate misrepresentation on the part of the respondent regarding his marital status at the time of the marriage ceremony and whether the misrepresentation was of a condition precedent to the agreement to marry on the part of the petitioner to render the marriage void *ab initio*.

The Court found that:

The marriage under Mohamedan law is a civil contract and is like a contract of sale. Sale is the transfer of property for a price. In the contract of marriage, the wife is the property, and the dower the price". While this is not flattering to the woman, such contract is subject to normal

considerations which govern such agreements. “There is ample evidence on the record (which is not in issue) that the petitioner would never have entered into the marriage contract with the respondent had she been aware of his marital status.

The Court therefore found that:

The woman, in consenting to the marriage ceremony, gave such consent on a completely erroneous conception to the marriage ceremony and nor was such an error a mere misconception which the petitioner could have, or should have, avoided, for it arose from a deliberate misrepresentation on the part of the respondent.

Points to Note

- In Islamic Law, there should not be misrepresentation of facts that could induce one party to consent to a marriage.
- Consent to marriage should emanate from knowledge of all facts, especially knowledge of conditions precedent that lead one to consent to the marriage.
- The decision supports the protection of women in contracting marriages.

Other cases/decisions referred to

Country/cases

India | *Suburannessa v Sabdu Sheikh & others* [1934] AIR, Calcutta

Abdul Latif Khan & another v Niyaz Ahmed Khan [1909] 31 IL Allahad 343

Bibi Ahmedoun-Niza Begau v Aki Akbar Shah [1942] AIR Peshawar 19

Chalimba Chimbalemba v Republic [2011] CA

Principle or Rule Established by the Court’s Decision

A victim who is a minor of 15 years of age and not a wife of the perpetrator has no capacity in law to consent to having carnal knowledge.

Judges: Munuo, Massati & Mandia | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 368 of 2008; delivered 9 November 2011	Early marriage

Case Summary

The appellant had been found guilty of rape, contrary to Sections 130(1) (e) and 131(1) of the Penal Code. The victim was a 15-year-old primary school student. While going home, the victim met the appellant, who lured her to go to his relative's home, where they cohabited for a number of days. During this time, the appellant and the victim had sexual intercourse. The appellant contended that he wanted to marry the girl, and she consented both to the marriage and to sexual intercourse. However, the father of the victim did not want the marriage to take place, resulting in the charges being instigated.

The High Court upheld the conviction. The appellant challenged the decision of the High Court at the Court of Appeal.

The Court of Appeal dismissed the appellant's contentions. In any event, whether there was an *intention* to marry was irrelevant. The law provided that a 15 year old could consent to sexual intercourse only if she *was* lawfully married.

Points to Note

- This case is one of a very few cases decided by the Court of Appeal, discussing the age of capacity to consent to sexual intercourse and what amounts to statutory rape, addressing whether a 15 year old can consent to sexual intercourse and interpreting the relevant laws, especially Sections 130(2)(e) and 131(1) of the Penal Code.
- It is a case that highlighted the contradictions in the legislation. The Penal Code and the Marriage Act generally provide that a child is a person below 18 years of age and does not permit them in most circumstances to consent either to marriage or to sexual intercourse. This reflects the Law of the Child Act, which states that the age of a child is below 18. Despite young persons below the age of 18 legally being children, they are permitted to marry with the leave of the court at 14 or 15 with the consent of a parent, and may consent to sexual intercourse at age 15 within marriage. This creates negative messages about the level of protection afforded to children by the law.
- This case is important because marriage of young girls is prevalent in the country and a matter that needs concerted efforts to address.

Principle or Rule Established by the Court's Decision

In a relationship where one has no monopoly over the sexual life of another, one is not expected to take offence if other parties are interested, despite the intimacy. Once it is accepted that the area recognises a custom such as *nyumba ntobo* (customary surrogacy) as a valid marriage, the test in determining legal provocation must rely on the principles guiding such relationship.

Judges: Lubuva, Mroso and Kaji | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	Criminal Appeal No. 56 of 2002	Forced marriage Grave abuse

Case Summary

The deceased lady was “married” in 1985 to an older lady, one Nyangoko Mwita according to a custom known as *nyumba ntobo*, which is accepted among the Kurya and Ngoreme tribes in Mara Region. The custom is for the purpose of enabling a childless elderly woman to have children through surrogacy – that is, through the woman she “marries”. The elderly woman/“lady husband” would be entitled to choose a man to have sex with the surrogate/“wife” all with a view of bearing children.

The deceased turned down a young man chosen by the “lady husband” to be the sexual partner; instead, she had sexual relations with the appellant, whom the “lady husband” did not approve of. Nevertheless, the “lady husband” tolerated him. The appellant occasionally spent his nights in the house of the deceased within the compound of the “lady husband” and sometimes the deceased went to spend nights at the appellant’s house.

The appellant admitted to causing the death of the deceased lady. He stated that, on the day of the incident, he had found the deceased talking to a man on a path near his house. After the man had left, the appellant interrogated the deceased about the man but she responded rudely, which infuriated the appellant. He kicked her in the stomach and ribs, resulting in her death. The body, on being examined the next day, was found to have a wound extending from the vagina extending to the anus. The appellant denied being the one to inflict the said wound.

The appellant relied on the defence of provocation. At first, the appellant said in his defence that he considered the deceased to be his wife. However, he conceded that he was a mere paramour of the deceased because she had a “husband” according to their custom. The High Court convicted the appellant.

The appellant appealed to the Court of Appeal. The Court held that there was little doubt that the appellant and the deceased had developed between themselves a certain intimacy. But, once it is accepted that the custom of the area recognises *nyumba ntobo* as a valid marriage, the test in determining legal provocation must rely on the principles guiding such relationship.

In light of the fact that the deceased bore no uxorial responsibilities to the appellant, he had no right to take offence if he found her talking to other men. Furthermore, the words spoken to the appellant by the deceased merely asserted her right to freedom to speak to and associate with whomsoever she wanted to. The deceased had committed no wrongful act or insult against the appellant. She was acting within her lawful right to ward off undue interference with her freedom. While the words may have been unpleasant, they were insufficient to amount to legal provocation.

Points to Note

- The decision is one of a kind in that the Court showed understanding and recognition of customary practices in determination of the defence of provocation raised by an accused person.
- The Court decision is progressive in that it used customary law in refusing to accept the defence of the perpetrator, which would have departed from the accepted customs of a community.
- The Court considered the custom within the confines of known and essential components and requirements of the law on provocation, analysing whether the deceased owed any uxorial responsibility to the accused person. In recognising that the deceased was already married to another according to custom, the Court did not broaden provocation to be used as a shield to enhance abuse against already vulnerable individuals. The decision therefore protected women who comply with accepted and recognised community customary practices.

Rebeca Z. Gyumi v General [2016] HC

Principle or Rule Established by the Court's Decision

- A girl under 18 years is a child in law, and it is undesirable to subject her to complex matrimonial and conjugal obligations that expose her to serious health risks once married at such a young age.
- Legislative provisions that require consent of the parents or court mean girls are not free to make their own decisions. This is an infringement of their constitutional rights to equality and respect for dignity.
- Legislative provisions that differentiate between the ages at which boys and girls may enter into marriage are discriminatory and infringe on the constitutional right to equality.

Judges: S.A. Lila, S.S Kihio and A.A. Munisi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Petitioner's prayers granted	High Court (Tanzania)/ Original Jurisdiction	Misc. Civil Cause No. 5 of 2016; delivered on 3 March 2016	Child marriage

Case Summary

Sections 13 and 17 of the Law of Marriage Act provide different ages of marriage for boys and girls. There is also a difference as to the requirement for parental consent. The petitioner challenged the constitutionality of the provisions, seeking that the provisions of Section 13 and 17 of the Law of Marriage Act be declared unconstitutional for contravening the following provisions of the Constitution, as amended:

- i. Articles 12, 18 and 21(2) (the general right to equality and dignity of a person, the right to freedom of expression and the right and freedom of a person to participate fully in decisions affecting themselves). In particular, the provisions allow someone else to decide on behalf of another, by allowing parents to consent to marriage where the girl is 15 years old.
- ii. Article 13 (the right to equality before the law). In particular, the provisions prescribe different minimum ages for boys and girls in relation to eligibility to marry.
- iii. Article 11 (the right to education). In particular, it was contended that the provision allowing a girl of 14 years to be married with the consent of the court is too vague, can be arbitrarily interpreted and denies children's right to education.

The petitioner therefore sought that the provisions of Section 13 and 17 of the Law of Marriage Act be declared null and void and expunged from the statute book, with the age of 18 years maintained as the minimum age until the government amends the law.

The High Court ruled as follows:

- i. There had been many legislative developments since the enactment of the Law of Marriage Act. These were presumably to ensure *“that the welfare and protection of the girl child is enhanced and the dignity and integrity of women is generally safeguarded”*. For example, the Sexual Offences Special Provisions Act (SOSPA) of 1998 imposes criminal sanctions on people who have sexual relations with children. Allowing child marriage would therefore amount to sanctioning criminal activity.

- ii. In light of the clear steer against child marriage generally, the two provisions under Sections 13 and 17 of the Law of Marriage Act (which provide different definitions of the age of a child as well as giving differential treatment to girls and boys as far as the eligible age for marriage is concerned) had lost their usefulness.
- iii. It was necessary to confirm the definition of the age of a child. An adequate definition of the age of a child is enshrined in Section 4 of the Law of the Child Act, which is “a person below the age of 18 years”.
- iv. It would be appropriate to correct the complained of anomalies within the provisions of Sections 13 and 17 of the Law of Marriage Act and *in lieu* thereof put 18 years as the eligible age for marriage in respect of both boys and girls.
- v. The two provisions enunciated under Sections 13 and 17 of the Law of Marriage Act, which, *inter alia*, require the consent of parents/guardian/the court for girls below 18 years before marriage, contravene the right to equality and right to expression as enshrined in the Constitution as amended.
- vi. A girl under 18 years is a child in law, and it is undesirable to subject her to complex matrimonial and conjugal obligations that expose her to serious health risks once married at such a young age.
- vii. Customary practices that affect children adversely cannot be said to cater to their best interests.

The Attorney General was given one year from the date of the order to correct the anomalies within the provisions of Section 13 and 17 of the Law of Marriage Act and put 18 years as the eligible age for marriage in respect of both boys and girls. The Attorney General has filed an appeal to the Court of Appeal challenging this decision.

Points to Note

- The case highlights international and regional instruments such as the African Charter on Welfare of the Child (1990) which Tanzania ratified on 16 March 2003; and reiterates the Government of Tanzania’s efforts to legislate against sexual offences through the promulgation of the SOSPA in 1998, which amended the Penal Code and introduced a variety of sexual offences with very hefty punishments. The case and the various legislative developments matched public outcry to ensure that the welfare and protection of the girl child is enhanced and the dignity and integrity of women are generally safeguarded.

Other cases/decisions referred to	
Country/regional body	Decision/reference
Zimbabwe <i>Loveness Mudzuru and Ruvimbo Tsopodidz v Minister for Justice, Legal and Parliamentary Affairs & others</i>	<i>In light of the overwhelming empirical evidence on the harmful effects of early marriage on girl children, no law which authorizes such marriage can be said to do so to protect 'the best interests of the child'. The best interests of the child would be served, in the circumstances, by legislation which repealed [the section which allows child marriage]. By exposing girl children to the horrific consequences of early marriage in clear violation of their fundamental rights as children [the Act] is contrary to public interest in the welfare of children. Failure by the State to take such legislative measures to protect the rights of the girl-child when it was under a duty to act, denied the girl children subjected to child marriages the right to equal protection of the law"</i>
SADC Protocol on Gender and Development (2008)	Article 8(2)
African Union The Maputo Protocol	Article 6

Uganda



Uganda v Abiriga Michael alias Mayia & another [2016] HC

Principle or Rule Established by the Court's Decision

An offence will be aggravated for the purposes of sentencing if a child is forced into a relationship as mechanism for coping with its aftermath.

Judge: Stephen Mubiru | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Convicted	High Court (Uganda)	Criminal Case No. 0094 of 2016, s.129 Penal Code Act	Child marriage Aggravated defilement

Case Summary

On 17 April 2012 at around 10 p.m., the victim left her home with a friend to buy paraffin. At one point, they branched off to a bar, where they met both accused persons. The victim's friend gave her two sachets of alcohol, which she drank. The four of them continued to drink. At some point, the victim's friend left. The victim stayed behind with both accused until around 2:30 a.m., after the bar had closed. By that time, the victim was drunk. The two

accused then dragged her into a nearby eucalyptus plantation where they threw her down. A1 held her by the neck while A2 forcefully had sex with her. When he had finished, A2 held her by the neck while A1 forcefully had sex with her. A1 later dragged her to his home, where he sexually molested her again.

The following morning, the victim returned home. She did not immediately inform her mother for fear of being beaten. The mother learnt about the incident from a neighbour and administered corporal punishment on the victim. The victim escaped from home and took refuge at a golf course. Her family searched for her and found her two days later. She narrated what had happened. The two accused were arrested. The victim was taken for medical examination. Although the HIV test of the victim soon after the incident was negative, a later confirmatory test revealed that she was HIV-positive. Her mother was so disappointed with the victim that she shortly thereafter allowed her to drop out of school and cohabit with a man, with whom she had had two children by the time she testified in court.

The High Court had to determine both guilt and any appropriate sentence. As to guilt, the point that somebody had sexually assaulted the defendant was not contested. The Court had to determine:

- i. Whether the accused was under 14 years of age at the time of the offence.
- ii. Whether it was the accused who had carried out the sexual attack.

The High Court found the accused guilty of aggravated defilement:

- i. The evidence of the complainant, her mother and a doctor was all to the effect that the victim was 13 years old at the time of the incident. Using this evidence and the judge's own observation of the victim, the Court was satisfied that the victim was under 14 years of age at the time of the incident.
- ii. Despite assertions to the contrary, both defendants appeared to fully incriminate themselves. The evidence of the complainant and her mother was credible and withstood cross-examination. The Court could therefore be satisfied that the two accused were the perpetrators.

As to sentencing, the Court found it appropriate to order that the accused spend the rest of their natural lives in prison. This was in light of the extreme repercussions caused by the convicts' defilement of the victim. The victim was found to be infected with HIV. She also was forced into homelessness after being rejected by her family. She was then forced into cohabiting with another man and was a child mother of two children.

Points to Note

- The trial judge gave priority to the suffering caused by this defilement while sentencing.
- The Court considered the effects of the sexual assault and found that the victim had been forced into early marriage and childbearing as a consequence of the gang rape. The gravity of the victim's suffering as a child mother and "wife" aggravated the offence and was considered as such during the sentencing. This effect is critical because studies have shown that victims of childhood abuse are three times likely to experience it as adults.¹
- This case also illustrates the need for confirmatory tests to recheck the HIV status of the victim and the accused.

Uganda v Akandinda Jackson [2014] HC

Principle or Rule Established by the Court's Decision

No marriage, whether traditional or civil, may infringe constitutional principles. This includes any constitutional provision as to the minimum age at which a marriage contract can be entered into.

Judge: Rubby Aweri-Opio | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction	High Court (Uganda)	HCT-CR-CN-69/2014 (S.147 PCA)	Child marriage Aggravated defilement

Case Summary

The victim was 15 years old. On the night of the incident, she had gone to contract a traditional Bakiga marriage, escorted by her family and friends. This involves a girl following a prospective husband to their home, after which the girl's family members follow and demand bride price. On arrival, they did not find the promised suitor, who was away on a business trip. As they were returning, the accused pounced on the victim and took her to his house, where he forced her into sexual intercourse throughout the night. The relatives and friends failed to rescue the victim from the accused. They reported the matter to the victim's father who, because of the victim's young age, took up the matter with the local authorities. This led to the arrest of the accused.

The accused's defence was that, in fact, the victim had gone to his home and not to the home of the suitor to initiate a traditional Bakiga marriage

with him. He testified that there was no chance for sexual intercourse because of the presence of the relatives and friends of the girl in the same house.

The High Court found that the medical evidence from three days after the incident clearly indicated signs that there had been sexual activity. The hymen had recently been ruptured, and the victim had traumatic inflammations of the vaginal walls, which were consistent with sexual force.

Even if a Bakiga marriage had been entered into, this provided no defence. The offence of defilement would have been committed by virtue of the victim's age. The marriage would have been illegal in any event, because of the complainant's age. The Constitution of Uganda provides that a person under the age of 18 cannot marry.

The accused was sentenced to three years' imprisonment. The Court noted that the offence was grave and merited the maximum of the death sentence. However, the accused was a first-time offender; he had been in custody for a long time; the victim was fairly close to the age of consent and she had gone to contract an illegal traditional marriage; the accused had committed an offence in forcing her into sexual intercourse; and the accused was a young man who should be given chance to reform and live a useful life.

Points to Note

- This case illustrates the dichotomy and conflict in society in the conduct of traditional and civil marriages.
- The sentence of three years' imprisonment may have been too lenient because the violence involved in the commission of the offence was not appreciated.

Uganda v Kiryagana Emmanuel [2011] HC

Principle or Rule Established by the Court's Decision

Compensation and caution are valid sentencing options in some circumstances of cases of VAWG, particularly where the best interests of the children involved warrant such a sentence.

Judge: Flavia Ssenoga Anglin | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	HCT-03-CR-SC-0053-2011, S.129 PCA	Child marriage Aggravated defilement

Case Summary

The victim, who was 13 years of age, was approached by the accused, who was 17 years of age, for a relationship. The victim accepted. The accused took the victim to his home and introduced her to his parents as his wife. The father of the accused paid USh 150,000 to the victim's father so the victim could remain "married" to the accused. However, the mother of the girl, on learning of the circumstances, reported the matter to the police. The accused was arrested and charged with aggravated defilement.

In determining the appropriate sentence, the state attorney submitted that the country was trying to promote education of girls and boys and that the practice of marrying off underage girls hindered the process. The accused also knew that the victim was a young girl and the parents of the accused were to blame since they encouraged the girl to marry.

The defence counsel, *inter alia*, submitted that the accused was equally young at the time he committed the offence and was trying to form a family of his own. He equally respected the victim by engaging the parents in his plans although he was never properly guided. According to the defence counsel, the ages of the accused and victim, respectively, should be considered proof of evidence of peer pressure and cultural norms.

Prior to sentencing, the judge observed that the parents on both sides had behaved irresponsibly by not advising their children and encouraging them to enter into an illegal relationship.

The convict was cautioned and advised to concentrate on his studies and think of marriage when he is in position to support a family of his own and get a wife who is not underage.

Pursuant to Section 129(b) of the PCA, compensation may be a valid sanction if the factors so warrant. In fact, the victim's father had already received the compensation that ought to have been paid to the victim for the offence, in the sum of USh 150,000, paid by the parents of the accused.

Points to Note

- This case is one in which the Court sentenced with leniency, with the best interests of the children involved in mind.
- The case is an example of how some parents who are ignorant of the law and participate in the arrangement of child marriages contribute to increased occurrences of such VAWG.

Principle or Rule Established by the Court's Decision

The failure of a victim to attend court in answer to a witness summons may lead to the acquittal of an accused person in the event that the remaining evidence is insufficiently reliable or probative to reach the requisite standard of proof.

Judge: Eva Luswata | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Discharge on no case to answer	High Court (Uganda)	HCT/03/CR/ SC/0416/2015, S.129 PCA	Child marriage Aggravated defilement

Case Summary

A 16-year-old girl was enticed by the accused and cohabited with him. When the victim's parents came to know about it, they reported the matter to the police. At the time of his arrest, the 16 year old hid and told the accused to hide from the police. The police convinced her to open the door. The police officer asked the accused what his relationship with the victim was. He told them that he had the intention of marrying the girl. He had had been sexually active with her and the victim was pregnant. The accused was HIV-positive.

In the judgement read out on 26 February 2018, the accused was acquitted following a submission of "no case to answer". The judge ruled that that a *prima facie* case had not been established:

- i. Only two witnesses were called – namely, the arresting officer and the investigating officer. The Court was informed that witnesses were summoned and re-summoned but did not appear. The process server had not given reasons for the non-attendance of witnesses.
- ii. There was therefore nothing to corroborate the evidence of the two witnesses who testified.
- iii. The state must put the accused at the scene of crime before he is called on to put his defence, which the prosecution failed to do.
- iv. The victim had not been called to testify and as such the age of the victim had not been proven beyond reasonable doubt.
- v. No evidence was adduced to show that the accused was HIV-positive.
- vi. The evidence of the two witnesses was neither sufficiently reliable nor probative to require the Court to put the accused to his defence.

The accused was discharged and released accordingly.

Points to Note

- Judges should use their powers to call for additional evidence pursuant to Section 75 of the TIA and should not hesitate to apply the penal provisions for lack of response to the summons. They therefore have varied means to ensure attendance at court. The Court could have accommodated further investigation into the whereabouts of the complainant or the victim's parents.
- It is prudent for judges to have a second look at VAWG cases paying attention to how they were investigated, prosecuted and adjudicated. There may be a need for reform to enable prosecutorial-led investigations for cases of VAWG since they have complexities that require special consideration.
- There are a number of ways to prove a victim's age –by a teacher, close relatives, medical evidence and the victim herself.
- It should also be noted that a conviction might stand without medical evidence where the other evidence is cogent and discharges the standard of proof.

Uganda v Nyanzi David [2016] HC

Principle or Rule Established by the Court's Decision

In every case, including VAWG cases, the court must weigh all of the aggravating and mitigating factors carefully to determine the appropriate sentence

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction on plea of guilty under a plea-bargaining agreement	High Court (Uganda)	S.C. No. 116 of 2016, s.129(3)&(4)(b) PCA	Child marriage Aggravated defilement Incest

Case Summary

The accused pleaded guilty to having had sexual intercourse with his 15-year-old granddaughter. The victim had gone to visit her grandparents. The elderly couple had connived to “marry off” the victim to the accused as part of a customary surrogacy arrangement. The victim and her grandfather had sexual intercourse, with the intention that the victim would carry a child to term on behalf of her grandparents. The Court had to determine the appropriate sentence to impose.

The Court found that these circumstances were grave and therefore a deterrent sentence was required. In mitigation, the Court considered that the accused was a first-time offender; he seemed heavily influenced by his spouse; the accused was elderly; and he was remorseful and had pleaded guilty. However, the aggravating factors outweighed the mitigating ones and the convict was sentenced to 12 years and 8 months of imprisonment, including the period spent on remand.

Point to Note

- Customarily, everyone is expected to bear children and, where one fails to do so, arrangements may be made to enable a couple to have a child. This was a strange arrangement and unthinkable considering that incest is considered an abomination.
- This case is indicative of surrogacy in its most dangerous and crude form within the context of rural communities.

Uganda v Okello Steven [2015] HC

Principle or Rule Established by the Court's Decision

The court must take note of aggravating and mitigating factors and which outweighs the other to arrive at the appropriate sentence.

Judge: Kazibwe | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
5 years' imprisonment	High Court (Uganda)	H.C Crim. Ss. 093/2015, S.129 PCA	Child marriage Aggravated defilement

Case Summary

The accused, at the age of 32, “married” a 17-year-old minor. They lived as husband and wife for three days. On the third day, he forced her out of the house. The victim had barely eaten and had been repeatedly engaged in sexual intercourse for the three days. She therefore passed out. The community members took her to a medical facility and reported the matter to the police. The accused was examined and found to be infected with HIV. The accused was convicted of aggravated defilement.

In sentencing the offender, the Court was asked to take into consideration that the victim had previously consented to the arrangement between her and the accused. The Court imposed a sentence of five years' imprisonment.

Points to Note

- The case illustrates a modicum of absurdity in respect of sentencing; a sentence of five years' imprisonment in view of the aggravating circumstances does not reflect the ideals of deterrence. The sentence should reflect deterrence in the spirit of the law. The accused had repeatedly had sexual intercourse with the victim and held her hostage to do so. He also exposed the victim to the risk of contracting HIV.
- The fact that she had previously consented to the arrangement was of no real consequence, seeing as he held her hostage and deprived her of food for days. All of this merited a stricter sentence.
- This case portrays the court exercising its judicial independence in coming to a decision. However, it shows a need for more authoritative guidelines.

Uganda v Okuni Dennis [2012] HC

Principle or Rule Established by the Court's Decision

Discrepancies in evidence that do not impeach the participation of the accused may be disregarded.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Uganda)	Criminal Session Case No. 0025 of 2012, S.129 PCA	Child marriage Aggravated defilement

Case Summary

On 25 December 2011, the victim went to watch a film with three others, M, P and A. When the film had ended, they prepared to return home. M disappeared and the accused came up to the victim. The accused held her hand and told her M was calling her. He suggested that that they go to M. The accused took the victim some distance away from the video hall and the victim asked the accused where M was. He responded that he did not bring her to see M but wanted the victim as a wife. He proceeded to slap the victim as she resisted his advances. He eventually threw her down and then forcefully had sexual intercourse with her. After the incident, she went home and reported the incident to, among others, her aunt and to the police. The accused was arrested and charged with aggravated defilement.

The Court had to determine:

- i. Whether the victim was of a “tender age”.
- ii. That a sexual act took place.
- iii. That the accused committed the sexual act.
- iv. Whether inconsistencies in the prosecution evidence meant that the Court could not be satisfied beyond reasonable doubt.

The Court ruled that:

- i. Although the law does not define “tender age”, the courts have over time laid down that it means any person below 14 years old. In this case, the evidence of the victim, her mother and a medical professional indicated that she was 12 at the time of the commission of the offence.
- ii. The sexual act need not be accompanied by the tearing (rupture) of the hymen, ejaculation or visible injuries to the female’s private parts. However, the existence of these features strongly suggested that, indeed, an act of sexual intercourse took place. The prosecution evidence proving this element was also not contested and the Court found that the ingredient was proved beyond reasonable doubt.
- iii. In light of the decision in *Patrick Basoga v Uganda* [2002] CACA No. 42, the Court emphasised that a requirement to corroborate the evidence of a single identifying witness for sexual offences is unconstitutional. A court can therefore convict on the uncorroborated evidence of the victim if, after warning itself of the danger of convicting on the uncorroborated evidence, it is satisfied that the victim is truthful and her evidence is reliable. The surrounding circumstances and the familiarity of the victim with the accused in this particular case formed a cogent basis for the Court to rely on her evidence.
- iv. There were some contradictions in the prosecution evidence relating to who may have examined the victim’s private parts and who was told about the offence, and when. However, such contradictions were not related to the elements of the offence, on which the evidence was consistent.

The prosecution had proven its case beyond reasonable doubt and the accused was accordingly found guilty of the offence as charged.

Points to Note

- Uganda has no comprehensive law to address and define child marriages but the short-lived interaction between the accused and the victim bore the hallmarks of a child marriage because the

defiler claimed he had intentions of marriage. The lack of consent from the victim did not negate this intention that lay behind the sexual relationship.

- This is a case portraying the forceful nature that early marriage can take. The facts disclosed that the accused used deception and force to coerce the victim into having sex with him.
- This case is especially relevant because many girls are “married off” against their will. The vulnerability of the girl child makes her especially susceptible to forced marriage because the intersectional dynamics in rural communities dictate so.
- The guardian’s reaction of threatening to beat her is indicative of the further traumatisation that victims encounter on reporting the abuse. The beating may be construed as an instinctive response, but it shows how the family of the victim may react in the circumstances. Social support for a victim is required to enable successful prosecution, reintegration and full recovery.
- More often than not, the evidence collected after such a traumatic incident has contradictions.
- The judge in this case concentrated on the identification of the defiler instead of the technical issues relating to said contradictions in reporting to the police. This is in line with the Article 126(2)(e) of the Constitution, by which judges are not to take undue regard of technicalities.

International Decisions



Prosecutor v Alex Tamba Brima, Bazzy Kamara and Santigie Borbor Kanu [2004] SCSL

Principle or Rule Established by the Court’s Decision

Subjecting women to the full control of paramilitary commanders, where the women suffered complete deprivation of their liberty as their “wives”, effectively created forced marriages.

Judges: Julia Sebutinde, Richard Lussick and Teresa Doherty | SCSL

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	SCSL (Special Court for Sierra Leone)	Case No. SCSL-04-16-T, with reference from the appeal (Case No. SCSL-2004-16-A)	Forced marriage

Case Summary

The accused persons participated in a joint criminal enterprise with the Revolutionary United Front of Sierra Leone, with the objective of taking any action necessary to gain and exercise political power and control over the territory of Sierra Leone, resulting in the commission of crimes against humanity – namely, murder, extermination, rape, sexual slavery and other forms of sexual violence, other inhumane acts (including physical violence) and enslavement, to mention but a few.

The Trial Chamber noted from testimony that women were captured. The young and particularly the beautiful women were placed under the full control of “commanders” and became their “wives”. Many were murdered when trying to escape. In Bombali district, Kanu created a system to control the abducted women and girls. Any soldier who wanted a “wife” would go to Kanu to sign for her. He also enacted disciplinary measures against women who “misbehaved”. In one instance, Kanu ordered a woman be given a dozen lashes and locked in a box for her suspected “misbehaviour”. Once labelled “wives”, the women and girls were ostracised from their communities.

Suffering a complete deprivation of liberty, these “wives” were forced to carry the soldiers’ belongings and to cook for them. Acts of sexual violence were committed against the captured women. Those that became pregnant as a result of their forced marriage faced long-term social stigmatisation. The Trial Chamber inferred from the environment of violence and coercion that the women did not consent to these sexual acts. The Trial Chamber formed the opinion that the *actus reus* and *mens rea* elements of the crime of sexual slavery were satisfied on the basis of this evidence.

Points to Note

- The SCSL’s recognition of forced marriage as a crime under international humanitarian law was an important step in recognising the unique experiences of women and girls during armed conflict. It was also an important step in recognising the gravity of GBV and the multiple forms this can take.
- The Appeal Chamber’s decision broke from earlier interpretations of gender-based crimes as sexual in nature, looking at the crime of forced marriage through a wider lens and considering all implications of the forced conjugal associations.²
- This case stands out because it defined forced marriage, as a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force or coercion to serve as a conjugal partner resulting in severe suffering and physical or psychological injury to the victim.

- The case is a good example of the fact that evidence that may go to the proof of the elements of sexual slavery cannot always be limited to a particular place or a particular instant in time. Rather, given the prolonged nature of the crime alleged, some of the evidence given by a number of witnesses relates to events that take place over time, sometimes running through the indicted period for one district into the indicted period of other districts.

Notes

- 1 “People who were abused as children are more likely to be abused as an adult: Exploring the impact of what can sometimes be hidden crimes”, Office of National Statistics, UK, www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/peoplewhowereabusedaschildrenaremorelikelytobeabusedasanadult/2017-09-27 (accessed 27 July 2018).
- 2 “Brima, Kanu and Kamara case”, LSE Centre for Women’s Security, <http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/brima-et-al-case/> (accessed 27 May 2019).

Chapter 7

Psychological Abuse

Chapter 7

Psychological Abuse

Psychological abuse: “Calling, threats of physical assault, intimidation, humiliation, forced isolation (i.e. by preventing a person from contacting their family or friends). For the purposes of the incident recorder, this category includes all sexual harassment defined as: unwanted attention, remarks, gestures or written words of a sexual and menacing nature (no physical contact).”

Tanzania

Agnes Doris Liundi v Republic [1980] CA

Principle or Rule Established by the Court’s Decision

- Where the accused raises the defence of insanity, it must be shown on all the evidence that insanity is more likely than sanity, even to a minor degree. The burden of proving insanity is on the accused on a balance of probabilities.
- In assessing insanity, a court is not bound to accept medical evidence if there is good reason for rejecting it.

Judges: Mustafa, Mwakasendo and Kisanga | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate (Tanzania)	(1980) TLR 46; delivered on 10 March 1980	Psychological abuse

Case Summary

The accused was charged with three counts of murder. Following grave matrimonial disharmony and threats by the accused’s husband to eject her from the matrimonial home, the accused administered poison, together with some ground pieces of glass, to herself and to her four children. Three of the children died. Doctors saved the accused and one of her children. Before the accused administered the poison, she wrote four letters explaining why she had made the decision, and that her husband was innocent and should not be punished. At trial, the accused raised the defence of insanity. She contended that she was so mentally distressed at the time of the incident that, although

she knew what she was doing, she did not know that what she was doing was wrong. The trial court found the accused guilty. The accused appealed against her conviction.

At the Court of Appeal, the main grounds for appeal was that the trial judge did not give adequate consideration to the contention raised by the defence that the appellant did not know what she was doing was wrong, although she knew what she was doing.

The Court therefore had to adjudicate on whether the defence of insanity could stand, bearing in mind the circumstances of the case, where mental stress was found to be a fact.

The conviction was upheld in spite of the medical evidence that the complainant's judgement was impaired at the time of the incident. Although the appellant was clearly mentally stressed, it was insufficient to reach the threshold of insanity. The Court of Appeal considered the evidence of the psychiatrist who had treated the appellant, Dr Haule. His evidence was that, in modern psychiatry, the distinction between insanity and diminished responsibility is controversial because it is imprecise. The Court stated that Parliament, in its wisdom, may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject as in other jurisdictions, including one in East Africa. However, in light of the law as it stood at the time of the trial, the trial court's decisions were proper.

Points to Note

- This is a well-known case related to matters of psychological abuse and defence of insanity.
- It dealt with a case where a mother had killed three of her children and almost killed another child and herself, owing to a high level of mental stress emanating from misunderstandings with her husband.
- The decision addressed the persuasive nature of expert opinion and the fact that the court is not bound to follow the opinion and that the balance of proving the defence of insanity is considered and determined on the balance of probability and not beyond reasonable doubt.
- It is important that, to date, there has been no change in the law of insanity as suggested or recommended by the Court.

Principle or Rule Established by the Court's Decision

Any defence (even diminished responsibility) must be raised during trial and not during appeal. A new defence may not be raised at the appeal stage.

Judges: Munuo, Nsekela and Mandia | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal/ Appellate, Mwanza (Tanzania)	Criminal Appeal No. 179 of 2009; delivered on 16 November 2011	Psychological abuse

Case Summary

The appellant was convicted of murdering her husband's second wife, contrary to Section 196 of Penal Code, and sentenced to death by hanging. The appellant had a stormy relationship with her husband. She left the matrimonial home for a year, during which time she lived with her parents. In her absence, her husband got married to the deceased. On hearing this, the appellant returned to the matrimonial home. The husband built two separate houses for each of his wives and spent nights with each of them in turn. There were arguments and threats between the wives. On 28 September 2001, the husband left home to deal with other responsibilities and in the night the deceased's house was set alight. The deceased managed to escape from the house alive but burnt. Her property was destroyed by fire. The deceased kept repeating that it was the appellant who had set her house on fire. On the way to the hospital, she died, leading to the arrest of the appellant the next morning.

The appellant admitted to having set fire to the deceased's house but relied on the defence of provocation. The appellant averred that the acts of the husband in depriving her of matrimonial support in the form of the necessities of life put the appellant under extreme pressure, which incited and provoked the appellant. The trial court dismissed this defence, saying it fell short of the legal definition of provocation in view of the acts of the appellant prior to setting the deceased house on fire.

At the Court of Appeal, the issue of diminished responsibility was raised for the first time. Diminished responsibility is not found on the statute books. The Court of Appeal declined to entertain the defence not because it was impossible to argue the defence but because it had not been raised in the lower courts.

Points to Note

- This is a case where the Court considered diminished responsibility raised by the defence and whether it is a defence recognised by law. The gist of the decision is to highlight the appropriate time to raise any defence, even if such a defence is a not well captured in the law. This position cemented an earlier decision that held that diminished responsibility is a defence that the courts may raise and determine despite it not being clearly outlined in the statute books.
- This is a forward-looking decision in not excluding the defence, highlighting judicial pro-activeness in considering matters within a holistic context and learning from other jurisdictions on matters not yet outlined in domestic law.
- Most available defences for accused persons who may commit offences owing to continuous abuse, be it physical or psychological or both, are not well captured by the defences available in statute. For example, the elements that govern the application of the defence of provocation preclude consideration of long-term abuse.
- Courts have been proactive in expanding and arguably introducing defences such as the “last straw doctrine” or diminished responsibility, and thus have invariably acknowledged the fact that the defence of provocation can be given a wider perspective by considering other circumstances that may limit or diminish a person’s reasoning capacity and cause them to go on to commit an offence without malice aforethought.

Other cases/decisions referred to

Country/case

UK | *R vs. Ahluwalia* [1992] 4 AER 889

Chapter 8

Economic Abuse

Chapter 8

Economic Abuse

Economic abuse: “Money withheld by an intimate partner or family member, household resources (to the detriment of the family’s well-being), prevented by one’s intimate partner to pursue livelihood activities, a widow prevented from accessing an inheritance. This category does not include people suffering from general poverty.”

8.1 Right to Matrimonial Property



FIDA Kenya v The Attorney General & another [2018] HC

Principle or Rule Established by the Court’s Decision

Legal provisions relating to matrimonial rights in property, and any concomitant obligations, must take into consideration both monetary and non-monetary contributions provided during the marriage.

Judge: Mativo | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Petition dismissed	High Court, Nairobi (Kenya)	Petition No. 164B of 2016; delivered on 14 May 2018	Economic abuse

Case Summary

Section 7 of the Matrimonial Property Act provides that, “*Matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.*”

Various non-governmental organisations filed suits challenging the constitutionality of Section 7 of the Matrimonial Property Act. They alleged that it unfairly discriminates against the rights of women to share marital property equally. Specifically, it was argued that:

- i. Requiring a wife to prove their contribution towards the acquisition of property infringes the rights of women to own

marital property equally, as specifically averred in Article 45(3) of the Constitution. Article 45(3) of the Constitution provides that, “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

- ii. The inequality is exacerbated when Section 7 of the Matrimonial Property Act is read together with Section 10 of the Matrimonial Property Act. Section 10(2) provides that, “Any liability that was reasonably and justifiably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree.” Section 10(3) provides that parties to a marriage “shall share equally any liability incurred during the subsistence of the marriage and reasonable and justifiable expenses incurred”.

The Court determined that Section 7 was a reflection of the principle of equality in Article 45(3) of the Constitution because the term “contribution” in Section 7 is sufficiently wide to encompass non-monetary contributions (often provided by the wife) as well as monetary contributions. Since non-monetary contributions, traditionally made by women, are clearly provided for in the Act (Section 9), courts would be in a position to properly evaluate the interests of the parties and make a just and equitable distribution of the property.

Thereafter, the Court found that:

The impugned section does not contradict... the Act which provides for liabilities incurred during marriage to be shared equally. The provision was meant to curb situations where one party to a marriage would be left to settle debts incurred during the subsistence of the marriage.

Points to Note

- The Court observed that:

Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be “unduly strained”. It should avoid “excessive peering at the language to be interpreted”.
- Courts have a duty to promote the spirit, intent and objectives of the Constitution, and must prefer a generous construction over a merely textual or legalistic one, so as to afford the fullest possible guarantees.

- The Constitution prohibits unfair discrimination, which means it prohibits differential treatment that is demeaning. The Court was of the view that unfair discrimination happens when:

... a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

Other cases/decisions referred to	
Country/jurisdiction	Case
ECtHR	<i>Willis v The United Kingdom</i> [2002] No. 36042/97, ECHR – IV
UK	<i>White v White</i> [2000] UKHL 54
	<i>Miller v Miller & McFarlane</i> [2006] UKHL 24
	<i>R. v Nor. Elec. Co.</i> [1955] O.R. 431
USA	<i>U.S. v Butler</i> [1936]

M.G.N.K. v A.M.G. [2016] CA

Principle or Rule Established by the Court's Decision

In assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness.

Judges: Karanja, Warsame and Azangalala | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 280 of 2012; delivered on 22 April 2016	Economic abuse

Case Summary

The parties married in August 1987. In 2008, the wife filed an originating summons seeking a division of matrimonial property acquired by the parties in the course of the marriage. The wife appealed against the initial determinations made.

The Court of Appeal was required to determine whether the trial judge was correct to:

- Ascribe beneficial ownership of two properties to the husband.
- Order the sale and division of the proceeds of other jointly owned properties.

The Court of Appeal found that:

- i. In assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances bearing in mind the principles of fairness. Against this background:
 - a. The first property was acquired prior to the marriage and entirely funded by the husband. There was no direct or indirect contribution from the wife.
 - b. The second property had been registered in joint names. In such circumstances, there is normally a rebuttable presumption that each party made equal contribution towards its acquisition and that therefore each has an equal beneficial interest in the property. In this case, there was clear evidence the wife had made neither direct nor indirect contributions towards the purchase of the property. Rather, she had unlimited access to the husband's bank account and used family income and assets to acquire other properties, which were registered in her name only. The presumption of equal contribution to the second property was therefore rebutted. To allow the wife to have a joint equitable interest in this property as well as her solely owned properties would effectively amount to double enrichment.
- ii. In this case, there were competing claims by the husband and wife to specific jointly owned plots of land. Any division of the plots would have meant that one party would have been awarded less than half of the overall value, contrary to the equitable division of the joint ownership. Under Section 7 of the Married Women's Property Act of 1882 (prior to the Matrimonial Property Act of 2013), the Court had the power to make such order or orders as justice may demand when determining any question as to title or possession of property between a husband and a wife. The judge's decision to order in the circumstances that the plots be sold and the funds divided equally was a just approach to take.

Points to Note

- Despite the joint registration of one of the properties, the appellant was not entitled to a share of the same because she had used family income and assets to acquire other properties, which were registered in her name only. On the facts, the respondent clearly rebutted the presumption of equal contribution.
- The Matrimonial Property Act does not have retroactive effect. However, it was enacted to breathe life into Article 45(3) of the Constitution and this should always be taken into consideration when making orders.

Obiter Dictum

"In a marriage set up, it is not realistic to expect partners to keep track of their respective contributions towards the purchase of family property because at the time of such purchase, divorce is not on their minds. It is therefore pretentious to expect any of them to be able to show their exact contributions towards the acquisition of the subject property. Notwithstanding the difficulty in determining the exact contributions of each spouse towards the purchase of family property, the court still has the duty to apportion family property to the best of its ability taking into account not only the personal earnings of each spouse and how it was applied in the family, but also each party's indirect contribution not only to the purchase of the subject property but also to the welfare of the family as a whole".

Peter Mburu Echaria v Priscilla Njeri Echaria [2007] CA

Principle or Rule Established by the Court's Decision

The status of being a "wife" does not, without more, amount to a "contribution" towards property that would entitle the wife to a share of property.

Judges: P. Tunoi, E. O'Kubasu, E. Githinji, P. Waki
and W. Deverell | JJA

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed in part	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 75 of 2001; delivered on 2 February 2007	Economic abuse

Case Summary

This was an appeal from the order of the High Court, where it had found that the parties, a couple who had been previously married, equally shared a farm measuring 118 acres. The High Court made this order on the basis that the wife had made a substantial indirect contribution in kind to the family, including taking on the onerous duties of being an ambassador's wife. These contributions therefore entitled her to receive an equal share of the property in dispute.

The issues that the Court of Appeal had to determine included:

- i. Whether the Court could take into account a spouse's non-monetary contribution, made by way of domestic duties, in the distribution of matrimonial property.
- ii. Whether the Court, making orders under Section 17 of the Married Women's Property Act, could order a transfer of a proprietary interest in land from one spouse to another.

The Court of Appeal ruled that:

- i. Drawing from the findings in *Pettitt v Pettit* [1969] 2 WLR 966, *Burns v Burns* [1984] 1 All ER 244 and *Button v Button* [1968] 1 WLR 457, the trial court erred in accepting the “*status of being an ambassador’s wife as indirect contribution towards the acquisition of the property*”. Accordingly, the status of the marriage alone would not entitle a spouse to an interest in property registered in the name of the other spouse. In addition, the performance of domestic duties, or being economical in spending on the housekeeping, would not amount to a financial contribution.
- ii. Section 17 of the Married Women’s Property Act of 1882 gave the courts discretion to grant appropriate remedies on ascertainment of the respective beneficial interest in a disputed property. The same remedies as are available in law in property disputes in ordinary actions are also available in disputes between husband and wife under Section 17. The Court had jurisdiction to allocate shares of the disputed property as it may deem just and to order the transfer of the share to the rightful beneficial owner to give effect to its decision. In this case, it was just that the respondent should retain her beneficial share of the farm if she so wished.

Points to Note

- The status of the marriage alone would not entitle a spouse to an interest in property registered in the name of the other spouse.
- In addition, the performance of domestic duties, or being economical in spending on the housekeeping, would not amount to a financial contribution.
- Section 2 of the Matrimonial Property Act 2013 now defines contributions to include non-monetary contributions, including domestic work and management of the home, childcare, companionship and management of property.

Other cases/decisions referred to	
Country	Cases
UKUK	<i>Pettitt v Pettitt</i> , 2 WLR 966 [1969]
	<i>Gissing v Gissing</i> , 2 All ER 780 [1970]
	<i>Wachtel v Wachtel</i> , 1 All ER 829 [1973]
	<i>Burns v Burns</i> , 1 All ER 244 [1984]
	<i>Button v Button</i> , 1 WLR 457 [1968]
	<i>Cobb v Cobb</i> , 1 All ER 781 [1955]
	<i>Hine v Hine</i> , 1 WLR 1124 [1962]
	<i>Falconer v Falconer</i> , 1 WLR 1333 [1970]

Principle or Rule Established by the Court's Decision

The recognition of equal rights on the dissolution of marriage does not require automatic equal apportionment of property. Contributions to property must be considered. A wife's indirect contributions to property, whether in monetary or non-monetary form, should be taken into consideration in determining the extent of her interest.

Judges: P. Waki, P. Kiage and J. Azangalala | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 128 of 2014; delivered on 3 March 2017	Economic abuse

Case Summary

PNN and ZWN were husband and wife, married in 1961. During the course of their marriage, they made sizeable investments. In April 2004, the wife sought a declaration, under Section 17 of the repealed Married Women Property Act of 1882, that several properties registered in her husband's name had been bought on trust for her, and another seeking a termination of the trust and apportionment of the property. She claimed that the property had been acquired jointly during coverture and that she had contributed, both directly and indirectly, towards its acquisition. The husband denied the claims, stating that he had solely acquired and developed the property and that he was the registered proprietor.

The High Court allowed her application in part, and found that some of the property acquired during the course of the marriage was matrimonial property. The High Court further held that the wife had made direct and indirect contributions towards the acquisition of the property and awarded her a half share in those properties. The husband appealed, faulting the findings of the High Court.

The issues that the Court of Appeal was called on to determine included (among other things) whether the provision relating to equal rights in marriage and on the dissolution of marriage in Article 45(3) of the Constitution was applicable.

The Court found that the provisions of the Constitution, as well as international covenants on equality of the parties, would apply retrospectively to matters filed before promulgation of the Constitution of Kenya 2010. In promulgating a new Constitution, the people of Kenya intended that there be a fundamental transformation in society. Therefore, while each case must be determined on its own merits, the Constitution

ought to be given a broad and purposive interpretation that enhances the protection of fundamental rights and freedoms. The right to equality, for example, is inherent and inalienable to all human beings. It would therefore matter not that the cause of action accrued before the current constitutional dispensation.

The Constitution declares that marriage is a partnership of equals. No spouse is superior to the other. In those few words, all forms of gender superiority-whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So, in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest-all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law [Justice Kiage].

Marital equality as recognised in the Constitution does not mean that matrimonial property should be divided equally. Neither the Constitution nor general law imposes, compels or lionises the doctrine of 50:50 sharing or division of matrimonial property. The *Echaria* decision was correct in the broad sense that direct or indirect contributions should be considered in weighing up how to apportion assets fairly. However, Section 2 of the Matrimonial Property Act now goes further and recognises that contribution towards acquisition of property takes both monetary and non-monetary forms. It adds little to Section 2 to seek to apply *Echaria* as a separate principle.

In the instant case, the wife properly proved direct and indirect contribution towards the property in dispute.

Points to Note

- The right to equality is inherent and inalienable to all human beings.
- This case is notable because the Court ruled that the recognition of equal rights on the dissolution of marriage does not require automatic equal apportionment of property. Contributions to

property must be considered. A wife's indirect contributions to property, whether in monetary or non-monetary form, should be taken into consideration in determining the extent of her interest.

Obiter Dictum

Justice Kiage: "In view of my stated understanding of what **Section 45(3)** means and what it does not mean, I do not see that taken in context, the analytical approach taken by the five-Judge bench (who determined *Echaria v Echaria*) in deciding that case, together with their appreciation of the law on matrimonial property rights leading to the conclusion that division must be based on actual quantifiable contribution was amiss. Holding as I do that contribution must be proved and assessed, I do not find that the central thrust of **Echaria** is violative of the marital equality principle of **Article 45(3)**. I would therefore eschew any bold pronouncement that it is no longer good law and should be interred. What has changed, from my point of view, is the narrow conception of contribution espoused by **Echaria** in that it went as far only as recognizing indirect contribution which had essentially to be viewed in money or monetary equivalent leaving out such unquantifiable as child care and companionship which fall under non-monetary contribution which is now expressly recognized under the Matrimonial Property Act.

"In sum, I do think that it would be unrealistic to presume that marriage per se always engenders a blissful, convivial and idyllic existence of mutual support and synergistic exploits. I suppose it does in many marriages. It is true, however, that the marital state may sometimes be a trap where creativity is by slow degrees chilled out of existence and parties may feel entombed in sterility. A spouse may be so uncooperative, so wasteful, so distant, so all-over that he or she has hardly provided the warmth of companionship on the basis of which it might be said they made a non-monetary contribution to matrimonial property. In such instance it may well be that the one spouse achieved all they did and acquired not because, but rather in spite of their lazy, selfish, wasteful, wayward, drunken or draining mate. In such circumstances, an assessment of the inauspicious party's non-monetary contribution may well turn out to be in the negative, the account in debit. No fifty-fifty philosophy would grant such a party any right to property acquired without their contribution and notwithstanding their negation or diminution of the efforts towards its acquisition.

"In the end it does work out justly and fairly enough in that assessment may turn out 50:50 or as in the case of *Njoroge v Njoroge* (supra) 70:30 in favour of the man. There is no reason why the math may not be in favour of the wife if that is what the evidence turns up. In many cases in fact, percentages never feature as the Court only ascertains who between the spouses owns which property. It is always a process of determination, not redistribution of property. And each case must ultimately depend on its own peculiar circumstances, arriving at appropriate percentages..."

Other cases/decisions referred to	
Country/case	Decision
UK <i>Fribance v Fribance</i> [1955] 3 ALL ER 789	A court has the power to direct an inquiry under the Married Women's Property Act even during the time that marriage is subsisting.

8.2 Succession



Ngoka v Madzomba [1999] HC

Principle or Rule Established by the Court's Decision

A custom must be properly established through evidence before the court can consider a cause of action based on such a custom.

Judge: Waki, J | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed	High Court, Mombasa (Kenya)	Civil Appeal 49 of 1999; delivered on 15 November 2002	Economic abuse

Case Summary

The respondent had paid a dowry in relation to the marriage of his son. Following the marriage being contracted, the respondent's son died. Another of the respondent's sons had then attempted to inherit the widow, citing Mijikenda customary law. However, the widow refused. Instead, the widow chose to have a relationship with the appellant, whom she married. As a result, the respondent filed suit. The trial magistrate found in favour of the respondent. The appellant sought to contest the ruling.

The issue that the High Court had to consider was whether the custom as claimed by the respondent was properly proved before the Magistrates' Court.

The High Court ruled that:

- i. The Constitution of Kenya recognises customary law and the law has established the manner in which it ought to be applied. A custom would be applicable only if it is not repugnant to justice and morality or inconsistent with any written law. The existence of the custom in question must therefore be proven to exist by way of evidence so as to determine whether it is repugnant or inconsistent with the law.
- ii. While the magistrate may have been familiar with the customs the parties practised, there was no evidence or pleading at all, nor did he cite any authority on customary law on dowry or on inheritance of a wife.
- iii. In the circumstances, no cause of action had been established and therefore the appeal was allowed.

Obiter Dictum

"Whether a woman, a widow, should be inherited by other people without her consent in this day and age are clearly a human rights issue, and specifically a women's rights issue. It is also a health issue considering the worldwide scourge of the AIDS pandemic. "Finally, women, in whatever communities are no longer commercial objects of before, and it is time for customary law diehards to wake up to that reality.

"I applaud the widow in this case for refusing to be inherited. I find any custom that would force her to be inherited against her will would be repugnant to justice and a morality and in a breach of human rights. The only reason why the respondent went to court to claim refund of dowry is because of the widow's refusal to be inherited by his other sons. He felt miffed and slighted. He had tried to claim the dowry earlier when the husband was alive but he failed."

Points to Note

- Although the judgement turned upon proof of custom, the judge made notable comments about the custom of inheriting a woman.
- Women, in whatever community, are no longer the commercial objects of the past.
- Any custom that, in this day and age, requires a widow to be inherited against her will is repugnant to justice and morality and in breach of human rights, specifically women's rights. Such customs should be condemned considering the AIDS pandemic.

In the Matter of the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] HC

Principle or Rule Established by the Court's Decision

There is no distinction between female and male children regardless of their marital status when it comes to inheritance rights.

Judge: Mumbi Ngugi | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
First widow to get her share of estate prior to distribution of estate to rest of beneficiaries; married daughters have right to inherit father's property equally with brothers unless they specifically renounce this right	High Court, Kericho (Kenya)	Succession Cause 16 of 2010; judgement delivered on 28 February 2017	Economic abuse

Case Summary

This case related to a dispute arising out of the distribution of the estate of the deceased, comprising 56 acres of land. The dispute was between his two widows.

The Court appointed the two widows as administrators of the estate of the deceased, but, when the second widow filed affidavits proposing the distribution, she proposed that the “lion’s share” of the property go to herself and to her children. She also omitted to consider the married daughters of the first widow.

The first widow complained that:

- i. The property was jointly acquired with her deceased husband through a loan, which she substantially contributed to paying, and which was paid long before the second widow was married in 1976. Her averments were that she was entitled to at least 10 acres of the land in recognition of her substantial contribution to its acquisition. The remaining 46 acres would then be distributed in accordance with Section 40 of the Law of Succession Act (LSA), relating to the estate of a polygamous deceased person.
- ii. The law does not discriminate between married and unmarried daughters and therefore the omission from the proposed distribution of the estate was contrary to the law.

The High Court ruled that:

- i. On the facts, it accepted that the first widow had contributed to the repayment of a loan taken out to purchase the deceased’s land.
Section 40 of the LSA provides that, “*Where an intestate has married more than once... his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*” Strict application of this provision would not recognise any contribution by one spouse over the other in the distribution of the estate. Any court perpetrating injustice on the basis of Section 40 of the law is abdicating its constitutional responsibility. The unfairness and discrimination brought about by Section 40 to the first widow could only be addressed by considering her contribution before distribution of the remainder of the estate.
- ii. The law of intestacy treats all children equally regardless of gender and marital status, and all are entitled to inherit equally unless they expressly renounce their rights. Looking at it any other way would

amount to discrimination, which is expressly prohibited in the Constitution. The contention by the second widow was therefore unacceptable and had no basis in law.

Consequently, the Court ruled that the first widow was entitled to 10 acres out of the estate of the deceased. The remaining 46 acres were found to constitute the free estate of the deceased, to be distributed in accordance with Section 40 inclusive of the married daughters unless they expressly renounced their interest in writing.

Points to Note

- The provisions of Section 40 of the LSA are not cast in stone and the Court has discretion not to apply these provisions if they will lead to unfairness and inequality to any party.
- There is no distinction between female and male children regardless of their marital status, and all are entitled to inherit equally unless they expressly renounce their rights.

Esther Wanjiru Kiarie v Mary Wanjiru Githatu [2016] HC

Principle or Rule Established by the Court's Decision

Even where a statute articulates expressly how property should be distributed when a deceased dies intestate, the court retains discretion to distribute the estate fairly and equitably.

Judge: G. Kanyi Kimondo | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Resulting trust found in favour of objector	High Court, Eldoret (Kenya)	Probate & Administration Cause 244 of 2002; delivered on 8 March 2016	Economic abuse

Case Summary

This matter involved a dispute between the objector (first widow) and the petitioner (second widow) for the distribution of the property of their late husband, who died intestate. The first widow had seven living children (one had died) and the second widow had three children. An earlier decision of the Court of Appeal had declared both the petitioner and objector widows of the deceased under Kikuyu customary law and by virtue of presumption of marriage, respectively.

The objector's case was that her late husband had married her in 1968, and the majority of the assets that formed the subject matter of this cause

were acquired between 1968 and 1984, long before the petitioner started cohabiting with the deceased. Throughout her marriage to the deceased, she engaged in commercial farming jointly with him. The objector was also running her husband's butchery, which later grew into a hotel. It was during this time that they acquired seven of the immovable properties, all of which were registered in the name of the husband, which according to her was the custom. She alleged that a resulting trust in her favour arose over these properties. She therefore had a right to a half share of them before distribution to the deceased's other beneficiaries. She alleged that only one immovable property and three motor vehicles were acquired after 1985 and after the petitioner came on to the scene.

The petitioner, who started cohabiting with the deceased in 1986, conceded that, when she married him, he already had a majority of the assets. She disputed that the objector had contributed to the acquisition of the property or that she managed the deceased's businesses. She insisted that all the assets be distributed equally between the widows and children in accordance with Section 40 of the LSA.

According to Section 40 of the LSA, where a deceased person has married more than once under any system of law that permits polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. Thereafter, the distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.

In dealing with the question of whether the objector should get half of the assets acquired prior to 1984 or whether the entire estate should be distributed equally to the two houses, the Court adopted a very progressive approach. In its view, even though Section 40 provides for distribution according to the houses where the deceased was polygamous, this provision of the law did not take away the discretion of the Court to distribute the estate fairly and equitably.

Having found that the majority of the immovable assets were acquired between 1968 and 1984 during the marriage of the deceased and the first widow and when the petitioner was not in the picture, the Court observed that it would be gravely unjust to apply Section 40 blindly in a case such as this, where the first widow, who had worked tirelessly, would be relegated to the same position as the last born child of all subsequent widows.

The Court declined to be tied to what it referred to as the archaic provisions of Section 40 and instead applied the more progressive provisions of Article

45(3) of the Constitution of Kenya 2010, which refers to equality of parties to a marriage. It therefore found that there was a resulting trust created in favour of the first widow and concluded that she was entitled to half of the properties acquired before the second widow came to the scene. The other half acquired during this period and all other properties acquired after this date would be distributed in accordance with Section 40 of the LSA, subject to valuation.

Point to Note

In this case, the Court took a progressive approach to the distribution of an estate. Rather than distributing property equally between two widows, it took account of actual contributions to property.

Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguithi & 6 others [2014] HC

Principle or Rule Established by the Court's Decision

- Customary law will not take precedence over a constitutional right for all parties to be treated equally.
- The decision by a child to get married has no bearing as to whether such a child is entitled to inherit the property that comprises the estate of their deceased parents.

Justice: L. Kimaru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
LSA to be applied to distribution of estate	High Court, Nairobi (Kenya)	Probate & Administration Cause No. 1140 of 1990; delivered on 31 July 2014	Economic abuse

Case Summary

This ruling stemmed from an application where the applicants wanted the respondent and her sisters, all of whom were daughters of the deceased, to be excluded from being listed as beneficiaries of the estate of the deceased. The respondents alleged that, under Kikuyu customary law, it is only sons who can inherit; married daughters are supposed to inherit from the families into which they have married, and that, before they can be allowed to inherit from their father, they each have to “*provide full disclosure of the properties that they own or likely to inherit in the clan or family where they are married*”.

The issue that the Court had to determine was whether Kikuyu customary law should be applied as averred by the applicants in the distribution of the properties that comprise the estate of the deceased.

The Court found no merit in the applicants' arguments, and adopted previous findings of the Court that:

The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate.

The Court therefore held that Kikuyu customary law would not apply, and that the LSA was the proper law to apply to distribution of the estate. It pronounced as follows:

Section 29(a) of the Law of Succession Act recognizes "children" of the deceased as dependants. It does not state that such children are sons or daughters, either married or unmarried. The Kikuyu Customary Law, in so far as it discriminates between the male and female children of a deceased person is a retrogressive custom which cannot supersede the Constitution and the Law of Succession Act.

As such, the Court declared that the deceased's daughters were beneficiaries of the estate, in terms of the LSA, and would stand to benefit from the estate.

Obiter Dictum

"The time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women are buried in history."

Points to Note

- Whereas the Constitution of Kenya recognises culture and as the foundation of the nation, it is not to be used as a basis for discrimination.
- Article 11 of the Constitution which recognises culture promotes only the positive aspects of culture, and not practices that are discriminatory, discriminatory or retrogressive.

Kikuyu customary law, in as far as it discriminates between the male and female children of a deceased person is a retrogressive custom which cannot supersede the Constitution of Kenya, 2010 and the Law of Succession Act. Other cases/decision referred to

Country/case

South Africa | *Nonkululeko Letta Bhe & 3 others v Magistrate, Khayelitsha & 4 others* [2003] Case No. CCT 49



Mujawimana et al. v Bank of Kigali Ltd (BK) [2016] SC

Principle or Rule Established by the Court's Decision

The fact that the rights holder on the property that was attached as a mortgage in the mortgage loan contract did not consent to it implies the mortgages were illegally furnished.

Judges: Kayitesi Zainabu, Kayitesi Rusera Emily
and Nyirandaruta Agnès | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Decision overturned	Supreme Court (Rwanda)	Supreme Court Case No. RCOMAA 0008/14/CS of 22 July 2016	Economic abuse

Case Summary

The deceased had obtained a mortgage from the Bank of Kigali Ltd, secured against his house. He died before he had fully repaid the credit. The Bank of Kigali successfully sued his heirs before the Commercial High Court for reimbursement of the mortgage.

The heirs of the deceased and his wife initiated a new lawsuit at the Commercial Court for the annulment of the mortgage contract. It was alleged that the mortgage was void from the outset because they had never been informed about it, nor had the wife signed it. The Commercial Court ruled that the mortgage could not be annulled because it was never registered with the Registrar General. It had therefore never legally existed. The Commercial Court ordered the heirs to pay damages and counsel's fees to the bank. The Commercial High Court upheld the judgement.

They appealed to the Supreme Court. The Supreme Court held that a mortgage contract binds the parties even when the mortgage is not registered. The Supreme Court also held that the fact that the spouse, who had rights in the property, did not consent to the mortgage implied that the mortgage was furnished illegally. Therefore, the mortgage contract between the Bank of Kigali Ltd and the deceased had to be quashed.

Points to Note

- This case stands out because it recognises the right of a spouse to consent to any encumbrance over property in which there are joint interests and the right to request an annulment of a contract creating an encumbrance without the prior consent of both spouses.

- When the bank concludes mortgage loan contracts, it is the duty of the bank to apply for registration of these mortgages, particularly when the beneficiary of the loan has given to the bank the right to apply for mortgage registration.
- Failure to register the mortgage does not invalidate the contract since registration aims only at informing the public that immovable property was furnished in mortgage.
- Transfer of rights in immovable property through sale, donation, exchange, mortgaging, leasing and renting by a representative of the family requires the prior consent of all other rights holders in the family.
- Therefore, the agreement of both spouses shall be required for the acknowledgement of any right attached to the shared property.
- Absence of consent of both spouses in mortgaging the co-owned property invalidates the mortgage contract.

Mukamusoni Catherine v Mukagasana Domitilla [2013] HC

Principle or Rule Established by the Court's Decision

Judicial precedents that require that parties be treated equally regardless of gender should take precedence over discriminatory customs. Men and women therefore have equal rights to succession.

Judge: Murekatete Francine | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Customary position overturned	High Court (Rwanda)	High Court Case No. RCA 0087/12/HC/KIG of 10 May 2013	Economic abuse

Case Summary

In 1994, Kabera Charles and his spouse Usabuwera Jeannette passed away without leaving a child. Initially, 50/50 claims were lodged in relation to the estate. Kabera Charles' sister, Mukagasana Domitilla (the respondent), contended that she should be entitled to her brother's 50% share of any assets. Usabuwera Jeanette's father sought to inherit her share.

Usabuwera Jeannette's father died prior to the adjudication of the case and the respondent inherited the entire estate, relying on custom. The father's heirs, including Usabuwera Jeannette's sister (the applicant) were not summonsed to appear at the adjudication. They only came to know of

the adjudication when the respondent started selling houses. The appellant lodged a third-party opposition to defend her interest.

The appellant contended that the respondent should not exclusively appropriate the assets concerned based on custom. It was averred that to rely on such custom was inconsistent with the Constitution as well as the international conventions ratified by Rwanda, which all provide for equality before the law without any form of discrimination. Therefore, the heirs of Usabuwera Jeannette (including the applicant) are legally entitled to the property.

In the absence of any evidence of intention to the contrary adduced by the respondent, the Court decided that family members of the deceased husband and wife had to be treated equally. The estate should be split 50/50 between the heirs of Kabera Charles and those of Usabuwera Jeannette.

Point to Note

With regard to matrimonial property issues, this case is of a particular interest because it shows that courts should not allow customs to bar women from inheritance. Instead, in the absence of written law regulating the matter, courts will rely on judicial precedents of the same nature in determining whether women and men have equal right to inherit. In such circumstances, they may also consider customs and usages, general principles of law and written legal opinions.

Rutabayiru v Batamuliza [2016] SC

Principle or Rule Established by the Court's Decision

The interest of each cohabiting partner in property cannot be determined solely by using income from employment. Other contributions to the welfare of the household will be taken into consideration.

Judges: Mugenzi Louis Marie, Gakwaya Justin
and Munyangeri Innocent | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Decision upheld	Supreme Court (Rwanda)	Case No. RCAA 0013/13/CS of 3 June 2016	Economic abuse

Case Summary

Ms Batamuriza sued Mr Rutabayiru in the Intermediate Court, requesting an equal share of property comprising two houses, farm land, two vehicles and

home furniture. She contended that they jointly acquired the property in the course of their cohabitation from 1991 to 2003.

Rejecting her claim, the Court explained that Article 39 of the Organic Law No 59/2008 of 10 September 2008 on Prevention and Punishment of Gender-Based Violence (the GBV Law) could not be relied on because the parties ceased to cohabit since 2003, prior to the enactment of that law. Article 39 provided for the equal division of assets. Analysing the contributions to property, the properties were registered in Rutabayiru's sole name. Batamuriza had failed to produce sufficient evidence indicating her financial contribution in acquiring those properties.

Batamuriza appealed to the High Court. The High Court upheld the appeal and apportioned the property equally. Although Article 39 was not applicable, the Court was entitled to reach a similar conclusion as to 50/50 apportionment, taking into account judicial precedents and scholars' opinions about contributions to the household, including non-financial contributions.

Rutabayiru appealed to the Supreme Court. The Supreme Court confirmed the High Court's ruling, affirming that the interest of each cohabiting partner in property cannot be solely determined using income from employment. Other contributions to the welfare of the household will be taken into consideration.

Points to Note

- The case is important because it protects the right to property of cohabiting partners in the event of separation, even when registration of the property was in the name of one partner.
- Partners who are not legally married but have through combined efforts contributed to acquiring property are equally apportioned a share of that property when separating from each other.
- The key element is to prove that both have contributed in different ways to the welfare of the household.
- It is not enough to assert that the property belongs to those whose names appear on the property deed. A party claiming ownership of the property must demonstrate its origin, acquired through either custom or purchase, and that the other partner did not contribute on its origin.
- Because the parties separated before promulgation of the GBV Law, sharing of the property between the two partners had to be based on the pertinent provision of the Constitution relating to rights to property.

Chapter 9

Female Genital Mutilation

Chapter 9

Female Genital Mutilation

Female genital mutilation/cutting: “Cutting healthy genital tissue.”

Kenya 

Joan Bett v Republic [2017] HC

Principle or Rule Established by the Court's Decision

A person who owns premises in which FGM occurs may be guilty of knowingly allowing their premises to be used for FGM even if they are not physically present in the premises when the FGM took place.

Judge: Mumbi Ngugi

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal dismissed; conviction and sentence upheld	High Court (Kenya)	Criminal Appeal No. 10 of 2017	FGM

Case Summary

The appellant was found guilty of knowingly allowing premises to be used for the purpose of performing FGM. She was sentenced to pay a fine of KSh 200,000 and in default to serve three years of imprisonment. Dissatisfied with both the conviction and sentence, she filed an appeal.

The following grounds for appeal arose:

- i. That the trial court failed to confirm that the appellant was in exclusive control of the premises where the FGM took place.
- ii. That there was no evidence that that is where the FGM took place.
- iii. That there were no eye-witnesses who testified to witnessing the FGM take place in the appellant's house.
- iv. That the sentence was excessive, in that the Court did not consider that the appellant was undefended.

The High Court found the evidence sufficiently satisfactory to uphold the conviction.

- i. The evidence of eight prosecution witnesses placed the six victims of FGM in a house that the accused had previously admitted to

owning, as witnessed by the investigating officer. Although in her sworn statement she denied being present at the scene when FGM took place, in cross-examination she accepted that the house was hers. The trial court had therefore rightly found in its judgement that the accused was the owner of the premises and that, from the evidence, FGM had taken place there.

- ii. Five prosecution witnesses all told the court that they went to the said premises, which belonged to the appellant, and were all circumcised there. After they were circumcised, they were locked inside the house, and were let out only two days later when the police came and took them to hospital, where one of them was admitted.
- iii. In light of the evidence of those five prosecution witnesses, who had emphasised that they had been personally subjected to the circumcision in the house of the appellant, it was not elaborated what other kind of eye-witness evidence would have been necessary.

Regarding the sentence, Justice Mumbi noted that the trial court had the discretion to sentence the appellant, on conviction, to a higher penalty. However, it had given her an appropriate sentence. Despite having mitigating circumstances, including a lack of previous convictions, the High Court held that the sentence was both lawful and deterrent.

Points to Note

- This case illustrates a commitment to fighting the deeply ingrained practice of FGM.
- In response to the appellant's claim that the sentence was excessive, the High Court maintained it with the hope that it would act as a deterrent to others, who, regrettably, may offer their premises to facilitate the perpetration of FGM against the express provisions of the law, and to the detriment of those who undergo the rite.
- The case demonstrates the sanctity of FGM in the communities that practise it, given the victims in this case were forced by societal pressure and the fear of being ostracised to undergo the ceremony.
- The case is illustrative of the fact that any law must be understood. If the populace does not appreciate its relevance in their community, it may be disregarded, as this Prohibition of FGM Act seems to be.

Principle or Rule Established by the Court's Decision

- The Constitution and any written law apply in preference to any custom where that custom is repugnant to justice and morality. FGM is one such customary practice.
- The sentence passed for FGM should be deterrent but also rehabilitative. FGM is a vice that is too often revered in practising communities and there is a need for behavioural change to effect real impact.

Judge: M. J. Anyara Emukule

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction upheld; sentence reduced	High Court (Kenya)	Criminal Appeal No. 115 & No. 117 of 2010	FGM

Case Summary

The appellants were members of the Maasai community. The second appellant approached the first appellant to circumcise his daughter. As a result of the circumcision, the victim bled to death. When they were charged before the Court with manslaughter under the Penal Code, they both pleaded guilty and were sentenced to 10 years' imprisonment.

The appellants appealed to the Court to quash their conviction and set aside the sentences, and make such orders as are fair and just in the circumstances. They contended that their guilty pleas were equivocal, that they did not understand the charges against them and that the sentences imposed were harsh and excessive.

The High Court upheld the conviction but reduced the sentences two years' imprisonment in light of their personal circumstances. Furthermore, the reason for the offending was following an outdated custom rather than malice. The Court directed that, on the release of the appellants, they each be under probation for a period of 24 months, during which time they would each be required to attend seminars organised by the district on the eradication of FGM and education on alternative rites of passage to adulthood for young girls.

Obiter Dictum

"Section 3 of the Judicature Act (Cap. 8 Laws of Kenya) enjoins the High Court, the Court of Appeal and all subordinates, to apply by the Constitution, any written law, and to apply customary law where such custom is not repugnant to justice and morality. The repugnancy clause evokes a lot of anger and discussion among students of law, whose justice, and whose morality, I do not think it is the justice of the

colonialist, or the judge or the court. It is the justice of all the surrounding circumstances of the custom in point. There is no more justice in this custom if ever there was any. I doubt there was any morality in it, except perhaps that a girl or boy had no right of marriage until she or he had passed through that rite.

"Female genital mutilation is certainly harmful to the physical and no doubt the psychological and sound wellbeing of the victim. It may lead to child-birth complications; in this case, it led to premature death of a teenager. That kind of custom could truly be well discarded and buried in the annals of history, just as we no longer remove our two, four or six teeth from our lower jaws, or adorn our faces, cheeks with healed blisters."

Points to Note

- The sentence imposed for FGM should be deterrent but also rehabilitative. FGM is a vice that is well revered in practising communities so there is a need for behavioural change to effect real impact.
- In this case, the Court also gave a period of probation during which the appellants were to attend seminars on the eradication of FGM, to inform and inspire them to campaign against the practice.

Pauline Robi Ngariba v Republic [2014] HC

Principle or Rule Established by the Court's Decision

When sentencing a person for practising FGM, the court may consider the convict's propensity to recidivism as warranting the imposition of a deterrent penalty.

Judge: D. S. Majanja

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Guilty	High Court (Kenya)	Criminal Appeal No. 6 of 2014	FGM

Case Summary

The appellant was convicted of performing FGM contrary to Section 19(1) of the Prohibition of FGM Act and sentenced to seven years' imprisonment. A girl aged 16 years attending secondary school went with other girls to be circumcised. The appellant demanded money that she did not have. The girl decided to leave but some boys and elders took her back and stopped her from leaving. The appellant performed the operation and the father of the girl reported the matter to police.

On appeal, the Court was asked to determine whether the appellant was properly convicted. The appellant's defence was that she had been warned by the district commissioner three years earlier not to carry out circumcision,

and that she had stopped. She contended that she had been forced to carry out the operation by the boys and elders, and relied on the fact that local officers had been overpowered in their earlier attempts to stop the circumcision. The Court was also asked to determine whether the sentence was excessive.

The conviction was upheld. There was no evidence that anyone forced the appellant to perform the operation on the date in question. The sentence of seven years was also upheld appropriate. The appellant had previously been warned not to practise FGM. Because of the appellant's old age, she was experienced in performing FGM. She was therefore likely to perform FGM again when released.

Points to Note

- This case brings to light the reality that communities that perform FGM view and consider this as a custom that everyone should adhere to.
- It reveals how far people will go to protect such custom, to the extent that perpetrators may force someone to undergo FGM. It was unfortunate that the boys were not charged alongside the appellant in this case for aiding this crime.
- The case also reveals the need to sensitise communities affected by such customs.

Uganda

Law and Advocacy for Women in Uganda v The Attorney General [2010] CC

Principle or Rule Established by the Court's Decision

- The custom of FGM contravenes fundamental constitutional rights and is therefore void.
- FGM is cruel, inhuman and degrading treatment; it offends the dignity of women; it violates women and girls' right to the highest attainable standard of health.
- FGM is a form of discrimination and inhibits the full enjoyment of rights by women and girls
- FGM is a form of violence against women with physical and psychological consequences.
- Cultural rights cannot be evoked to limit the fundamental rights and freedoms of others.

Judges: Mukasa-Kikonyogo, Mpagi-Bahigeine, Twinomujuni, Byamugisha and Kavuma | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Petition allowed	Constitutional Court (Uganda)	Constitutional Petition No. 8 of 2007; 28 July 2010.	FGM

Case Summary

The petitioners sought declaratory orders from the Constitutional Court that the custom and practice of FGM by several tribes in Uganda is inconsistent with the 1995 Constitution because it violates several articles of the Constitution:

- i. Article 2(2) of the Constitution, which directs that any other law or custom inconsistent with any article in the Constitution is void.
- ii. Article 21(1), which proclaims the principle of equality of all before the law.
- iii. Article 24, which guarantees freedom from torture or cruel, inhuman or degrading treatment or punishment.
- iv. Article 27(2), which proclaims the right to privacy.
- v. Article 32(2), which proclaims that laws, cultures, customs and traditions that are against the dignity, welfare or interest of women or any other marginalised group are prohibited by the Constitution.
- vi. Article 33, which guarantees the right of women to be accorded full dignity with men.

Both parties accepted that the custom and practice of FGM was seen among the Sabiny, in eastern Uganda in Kapchorwa, Bukwa and Bugiri districts; among the Pokot in Nakapiripit district; and in Tepeth in Moroto district.

The Court relied on the unchallenged evidence of a female member of the Sabiny community and made the following findings of fact:

- i. FGM is carried out without anaesthesia, which makes the victim suffer excruciating pain and suffering that may lead to death and trauma, and may permanently maim the person.
- ii. Mutilation of girls' genitalia is carried out crudely by traditional "surgeons" and often causes victims to suffer urinary incontinence and odour, which renders them social outcasts as a result.
- iii. Some girls suffer paralysis and are left with permanent disability.

The Court also recognised that girls and women were known to have died as a result of FGM in contravention of the right to life contained in Article 22 of the Constitution.

The Court cited the UN Interagency Statement on Elimination of FGM, which outlines the long-term consequences of FGM and the specific risks.

The Court agreed with the UN statement that FGM:

Interferes with the healthy genital tissue in the absence medical necessity and can lead to severe consequences for a woman's physical and mental health and therefore a violation of a person's right to the highest attainable standard of health.

According to the UN Statement, it is a form of discrimination:

... based on sex because it is rooted in gender inequalities and power imbalances between men and women and inhibits women's full enjoyment of their human rights. It is a form of violence against girls and women, with physical and psychological consequences.

The UN statement further makes the point that, although international law protects the right to participate in cultural life and freedom of religion, that freedom can be the subject of limitation to protect the fundamental rights of others and therefore social and cultural rights cannot be evoked to justify FGM.

The Court held that FGM is a custom that contravenes Articles 2(1), 22(1), 24, 32 (2) and 33 of the Constitution and is wholly inconsistent with the Constitution and therefore void.

The Court noted with approval that, while the hearing of the petition was pending, a law to prohibit FGM was passed and assented to. This meant that the law would accord with the declaration of the Court in the petition that FGM was inconsistent with the Constitution.

Points to Note

- Although Parliament legislated against FGM while the petition was pending, the Court's judgement is a powerful statement on the status of FGM versus the Constitution, from a judicial perspective.
- The fact that the custom and practice of FGM has been declared void means those who persist in its practice are doing so against the judgement of the court and the Constitution.
- The Prohibition of Female Genital Mutilation Act No. 5 of 2010, the Constitution and the Court's judgement form a formidable front against the custom of FGM, which must be eliminated without any excuses.
- The absence of criminal cases on FGM suggests that either the custom is dying out or law enforcement agencies are not following up on reports of violations of the Prohibition of the FGM Female Genital Mutilation Act.

Chapter 10

Other Gender-Based Violence

Chapter 10

Other Gender-Based Violence

Other GBV: “This category should be used only if any of the above types do not apply. In the context of this bench book, this category includes: exploitation; trafficking in women; forced prostitution; violence perpetrated or condoned by the state, wherever it occurs; sexual slavery; sexual harassment (including sextortion – demands for sex in exchange for job promotion or advancement or higher school marks or grades); trafficking for the purpose of sexual exploitation; forced exposure to pornography; forced pregnancy; forced sterilisation; forced abortion; virginity tests and incest.”

10.1 Sexual Exploitation of Children



George Hezron Mwakio v Republic [2010] HC

Principle or Rule Established by the Court’s Decision

Trafficking a child for the purposes of sexual exploitation can be widely interpreted and may include the purpose of enabling the trafficker continuing to exploit the child himself.

Judge: Maureen Akinyi Odero | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction and sentence upheld	High Court, Mombasa (Kenya)	Criminal Appeal 169 of 2008; judgement delivered on 26 June 2010	Other GBV (Child trafficking for sexual exploitation)

Case Summary

In addition to the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the SOA, the appellant in this case had also been charged with the offence of child trafficking for sexual exploitation contrary to Section 18(1) of the SOA.

On 27 October 2007, the complainant was on her way home when she met the appellant at about 6 p.m. He started professing his love for her but she declined his advances, telling him that she was a student. He pulled her to

his house and later took her to a sisal plantation, where he raped her. He then forced her across the border to Tanzania but she was rescued by police and returned to Kenya. The appellant was arrested and handed over to the Kenyan authorities. He was tried, found guilty of the charges convicted and sentenced to 30 years in prison. He appealed against his conviction and sentence.

The High Court upheld the convictions. The evidence revealed that the appellant had engaged in sexual intercourse with the complainant, a child under 18 years of age. Medical evidence corroborated the complaint's evidence. Further, the Court found that the evidence that the appellant had abducted the complainant and crossed the border to Tanzania with her for purposes of sexual exploitation was undisputed. The appellant was actually pulling the complainant when the police met them. He had attempted to lie to the police that the complainant was his wife, which she vehemently denied. The evidence presented before the trial court was therefore cogent, consistent and reliable.

The harsh sentence of 30 years was justifiable in the circumstances. In particular, the offence was aggravated because the appellant was a repeat offender, having previously been convicted of a charge of attempted rape. The Court was of the view that he was a danger to women and dismissed the appeal in its entirety.

Points to Note

- There was no evidence that the purpose of going to Tanzania was to enable others to sexually exploit the child. However, the offence of child sexual exploitation specifically envisaged that an offender may themselves seek to exploit the child.
- The harsh sentence of 30 years was justifiable in the circumstances, with the offence aggravated particularly because the appellant was a repeat offender, having previously been convicted of a charge of attempted rape.
- The Court took into account the danger to women when reaching its decision.

Sheikh Ali Samoja v Republic [2016] HC

Principle or Rule Established by the Court's Decision

To prove the charge of organising travel to facilitate a sexual offence against a child, it must be shown beyond a reasonable doubt that the underlying motive or intention of the dispatcher of the child was to facilitate a sexual offence. In the absence of such an intention, the fact that a sexual offence ultimately occurred cannot justify charging the dispatcher of the child.

Justice: Justice Maureen Akinyi Odero | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction overturned	High Court, Nakuru (Kenya)	Criminal Appeal No. 170 of 2015 delivered on 1 July 2016	Other GBV (Child trafficking for sexual exploitation, Defilement)

Case Summary

The appellant had been convicted of the offence of child sex tourism. He had been accused of organising the travel of a child 15 years of age from Nakuru to Nairobi, from where the child was to be taken to Lebanon by one Sayid Murtadha. While in Nairobi, Murtadha defiled her.

The appellant had been the child's teacher and the imam of the mosque that the child and her parents attended in Nakuru. He approached the child's parents and told them that their daughter was one of a group of students selected to travel to Lebanon for greater opportunities, and that there was a sponsor in Nairobi who would finance her travel. The parents were agreeable, and the appellant gave the girl KSh 500 to travel to one Sheikh Murtadha, who he said would process her travel documents. He wrote down his name and phone number and the name of Murtadha and his phone number and gave them to the girl.

She travelled to Nairobi and met Murtadha, who took her to his house in Westlands, where she stayed for a week. One evening, Murtadha came to her room and told her he could not stay in a house with a beautiful woman. He then proceeded to tear her clothes and defiled her.

When she told the appellant on phone what Murtadha had done, the appellant told her to stop being rude as he had given her to the Sheikh to *kamliwaza* or "comfort" him.

She stayed at the Murtadha house waiting the processing of her documents but Murtadha's wife chased her away.

She went back to Nakuru and reported to the appellant that the sheikh had defiled her. The appellant retorted that, "*What is done is done.*"

Later, the complainant attempted suicide when she realised that what had happened to her in Nairobi had been revealed to others. She was rushed to hospital and survived.

Murtadha was never arrested, as he fled to the Middle East. However, the appellant was arrested, charged and convicted of organising travel to facilitate a sexual offence against a child. He appealed against his conviction.

The issue before the appellate court was whether the appellant had organised the travel of the complainant to Nairobi, into the hands of "Sheikh

Murtadha”, for the purpose of availing her for sexual tourism or child prostitution.

The appellate court found that the *actus reas* of the offence – namely, organising the travel of the complainant to the home of Murtadha, who had defiled her, was present. It also found as a fact that the complainant had been defiled.

The Court expressed doubts regarding the *mens rea* or the criminal intent on the part of the appellant. It found that the appellant’s intention was to enable the complainant to travel to Lebanon for greater financial opportunities and not to provide a girl for the person who defiled her. The judge therefore found the appellant blameless.

According to the Court, the fact that the child was defiled after the appellant took her to Murtadha, who was meant to facilitate her economic empowerment, was unfortunate. However, it could not be attributed to the appellant. In the opinion of the Court, the appellant was a family man who knew the complainant’s family well and he would not have openly taken the child to Murtadha had he intended to traffic her.

Point to Note

In quashing the conviction in this case, the Court failed to take into account the fact that traffickers rarely inform the family of the person being trafficked that they are being trafficked. Traffickers will usually make the family and the victim believe they are being taken for better economic opportunities.

10.2 Abortion

Rwanda 

RE v N.J. [2015] HC

Principle or Rule Established by the Court’s Decision

A child who has been defiled has the right to abort as long as she was impregnated as a result of that defilement.

Judges: Kaliwabo Charles, Mukakalisa Ruth and Kabagambe Fabienne | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Decision overturned	High Court (Rwanda)	Case No. RPA0787/15/HC/ KIG of 30 October 2015	Other GBV (Denial of right of abortion)

Case Summary

Article 165 of the Organic Law No 01/2012 of 02/05/2012 instituting the Penal Code (OLPC) in Rwanda gives the right to abortion to a woman who was raped.

N.J. filed a case in the Intermediate Court requesting that her daughter of 13 years be entitled to the right to abortion because she was impregnated through defilement after being given alcohol. The Intermediate Court rejected the request because there had been no conviction of a person for rape. The Court also stated that it was possible for someone to be pregnant without having sexual intercourse. In addition, the Court ruled that the mother had not proven that the child had any complications that could seriously jeopardise her health as a result of continued pregnancy.

The mother lodged an appeal to the High Court, stating that any acts related to sexual intercourse in connection with her daughter must qualify as child defilement, which was the equivalent of rape, and that they did not explain how she was impregnated.

The High Court held that the fact that the Penal Code uses the term “child defilement” instead of “rape” does not mean the child was not raped. A child is considered a minor with no capacity to consent to sexual intercourse, and therefore child defilement should be considered rape. A child who has been defiled is entitled to an abortion as long as she was impregnated through that defilement.

Point to Note

A child who has been defiled has a right to procure abortion as long as she was impregnated as a result of defilement.

10.3 Workplace Discrimination and Sexual Violence

Kenya



G.M.V. v Bank of Africa Kenya Limited [2013] HC

Principle or Rule Established by the Court's Decision

Discriminatory treatment of a woman because of pregnancy is contrary both to principles of employment law and to a woman's constitutional rights, including the rights to equality, dignity and a family.

Justice: Rika | IC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Termination of employment unlawful	Industrial Court, Nairobi (Kenya)	Cause 1227 of 2011; delivered on 31 July 2013	Other GBV (Sexual harassment and unlawful termination)

Case Summary

The complainant had been employed by the respondent, the Bank of Africa Kenya Limited, since November 2006. On 4 March 2011, the respondent terminated her contract of employment.

During the time that she worked for the respondent the complainant fell pregnant twice. She took maternity leave for her first baby between January and May 2009. The second pregnancy was not trouble-free and the complainant was on sick leave associated with her pregnancy from 22 February 2011 to 1 March 2011. When she resumed her duties on 2 March 2011, the managing director of the respondent informed her that her contract had been terminated because employing her was expensive given that she was pregnant again and that she would need to take maternity leave. The managing director also informed her that she would need to find the means to meet her mortgage obligations immediately, otherwise her terminal benefits would be applied towards satisfying her mortgage.

The claimant, feeling discriminated against on account of her pregnancy, filed a claim, seeking, *inter alia*, general damages for discrimination on account of pregnancy. The respondent denied terminating her employment or discriminating against the claimant on the grounds of pregnancy, claiming that her termination was justifiable on the grounds of her poor performance.

The Industrial Court held that a woman claiming to have been discriminated against by her employer on account of pregnancy is required only to establish a *prima facie* case demonstrating such discrimination, upon which the burden shifts to the employer to provide clear, specific reasons evidencing a legitimate explanation for termination – namely, that discrimination did not take place. The suggestion that there had been poor performance was “*dissembling to cover up for a discriminatory purpose*”.

The Court found in favour of the claimant and declared that the termination of the claimant’s services was based on her pregnancy and therefore discriminatory, unfair and unlawful. There was a violation not only of the claimant’s contract of employment and her employment law rights but also of the claimant’s constitutional rights to fairness and discrimination-free treatment in the workplace, to dignity and to have a family.

Damages for such a violation of constitutional rights were treated as separate to any compensation for unfair termination. The claimant was awarded a total of KSh 4,473,006 in damages.

Points to Note

- This case reaffirms the internationally recognised position that a woman claiming discrimination by her employer on account of pregnancy is required only to establish a *prima facie* case demonstrating such discrimination, upon which the burden shifts to the employer to provide clear, specific reasons evidencing a legitimate explanation for termination – namely, that discrimination did not take place.
- This is an important application of the Employment Act 2007 that allows the court to infer discrimination upon the evidence unless controverted by evidence of the accused employer. This approach works to the advantage of women, who often have a difficult time proving that they were dismissed on the ground of pregnancy.

Obiter Dictum

Pregnancy is an important component of the basic right of all persons to have a family under Article 45, and, to the extent that the family is the natural and fundamental unit of society, and the necessary basis of social order, an employment decision that denigrates pregnancy is an assault on society as a whole.

Other cases/decisions referred to

Country/case

South Africa | *Constitutional Court of South Africa in the case of SA Naptosa & others v Minister of Education Western Cape & others* [2001] BCLR 338

UK | *Eastwood & another v Magnox Electric PLC; McCabe v Cornwall County Council & others* [2004] UKHL

USA | *Reeves v Sanderson Plumbing Products Inc.* [12 June 2000] 530 US. 138, 141

N.M.L. v Peter Petrausch [2013] IC

Principle or Rule Established by the Court's Decision

- Sexual harassment, including of domestic workers, is a form of GBV.
- Damages for sexual harassment are separate from any compensation for unfair termination.

Justice: J. Rika | IC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Respondent guilty. Damages awarded.	Industrial Court, Mombasa (Kenya)	Cause No 441 of 2013 delivered on 19 June 2015	Other GBV (Sexual harassment and unlawful termination)

Case Summary

NML, the claimant, a Kenyan, had been employed by Peter Petrausch, the respondent, a German national, as a domestic worker in his house in Mombasa. She worked for him from 3 September 2012 to 10 May 2013, when he terminated her contract. At the time of termination, her monthly salary was KSh 10,000. She worked from 7 a.m. to 7 p.m. every day, including public holidays, except for Christmas Day and Boxing Day in 2012. During the time the claimant worked for him, the respondent routinely sexually harassed her. He physically assaulted and insulted her. When the claimant protested, the respondent sacked her and did not pay her terminal benefits.

The claimant sought damages for sexual harassment and unfair and unlawful termination. In response, the respondent denied ever employing the claimant and claimed she was a total stranger. During the trial, however, he admitted employing her but denied all the other allegations. He also admitted to having placed an iPad in the bathroom when the claimant was bathing but claimed the iPad did not have a camera. He asked the Court to reject the claimant's claim and award him the costs of the suit.

The Court rejected his defence and accepted the claimant's evidence of sexual harassment as truthful. The Court further held that the respondent had violated the claimant's rights as a domestic worker. He had objectified her, invaded her body and privacy, injured her inherent dignity and assaulted her modesty through his demands. The court noted that the claimant was all the more vulnerable because of her gender, race and social standing. The respondent took away multiple rights to which she was entitled and which were guaranteed under domestic and international law.

Moreover, the termination of the claimant was unfair, and the respondent did not discharge the burden that fell on him to show that he had procedurally terminated her. The Court therefore found that she had made out her case for an award for damages for unfair termination as well as for sexual harassment.

Points to Note

- The judge observed that the conduct of the respondent constituted GBV, which is the most prevalent human rights violation in the world.

- The Court observed that domestic workers must no longer be undervalued or devalued or remain invisible, and that they too deserve the whole gamut of human rights.

Obiter Dictum

The conduct of the respondent amounted to racial bigotry.

Other cases/decisions referred to

Country/case

India | *Vishaka & others v the State of Rajasthan & others* [1997] [JJ] [7] [SC 384] Supreme Court of India

P.O. v Board of Trustees, AF & 2 others [2010] IC

Principle or Rule Established by the Court's Decision

- National and international law abhors GBV in the workplace, which is prevalent and which consequently has had an adverse impact on the Decent Work agenda.
- GBV reflects and reinforces inequalities between men and women and must be stopped.

Justice: James Rika IC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Damages for unfair termination and sexual harassment	Employment and Labour Relations Court, Nairobi (Kenya)	Cause 927 of 2010; judgement delivered on 28 February 2014	Other GBV (Sexual harassment and unlawful termination)

Case Summary

This was an extreme case of GBV at the workplace, where the claimant was not only sexually harassed and physically violated in the course of her employment but also unfairly and unlawfully terminated.

The claimant was employed by a charitable organisation working with women farmers in Kenya. Her agreed salary was KSh 120,000 per month and her contract was to run for two years with effect from January 2010.

The second respondent was the organisation's executive chairman/manager. In May 2010, the claimant and the second respondent left for Swaziland through South Africa to attend a conference. They stopped in Cape Town

where the second respondent said he wanted them to look at certain seedlings that could be sold in Kenya. While there, the second respondent started to make sexual innuendos to the claimant, saying he found her attractive. She did not respond. The following day he hired a car and drove with her on a journey that lasted from 8 a.m. to 6 p.m. On the way, he angrily told her that he had spent a lot of money on her yet she had rebuffed his proposals for a romantic lunch. He hit her with his clenched fists.

At the end of the journey, he told her he had booked her a room. He had in fact booked only one room for the two of them. She spent the night on the floor and left the bed for him. The following day, she reported the violence to her brother and told him what was happening. The brother sent her an electronic ticket and she travelled back to Kenya while the second respondent went to the conference.

On return from the conference, the second respondent started sending threatening email messages to the claimant. He then sent her an email message terminating her contract, citing her “misconduct” while in South Africa

The claimant brought a claim for terminal benefits for unfair and wrongful termination of her contract of employment and also general damages for sexual harassment. In response, the second respondent denied that he had been sexually or physically violent to her. It was further argued that the allegations by the claimant, if they occurred, did so within a “purely social and private context: and had no relationship with the contract of employment.

In court, the claimant produced emails sent to her by the second respondent, which disclosed not only sexual harassment but also threats. One read:

... From the outset, I thought you special... I told you I wanted a beautiful girl, with a sense of adventure, who wanted to travel. You are beautiful. It seems you did not really want to travel. I told you I wanted a sexy girl who would be able to make emotional investment and want to jump to bed with me... you had the opportunity to lead me and make it all work... yet we tried three times, and all ends in disaster – Malaysia, Whistling Thorns and Republic of South Africa... 3 times is enough times... I wanted someone who wanted to get up and about and do things...

Another read:

... Now I suggest you be very careful, and do what is necessary to bring this matter to a safe and speedy conclusion. You have nothing to gain. You may think you have little to lose, but you can lose more than you think.

A third read:

After 7 days, it will be assumed that there is the probability of fraudulent conversion or other form of criminal misappropriation of funds. Action in this context will be robust...

The Court ruled in the claimant's favour, on the basis of her evidence. The Court awarded her monetary compensation for injury to her feelings, humiliation, insult to human dignity and nullification of equality of opportunity or treatment in employment. In awarding the claimant a total of KSh 3,240,000 payable within 30 days, the Court observed that the claimant had been subjected to inhuman treatment, violently beaten in a foreign land, forced to spend the night on the floor and physically and psychologically assaulted by her employer. Her employment was thereafter derailed when her contract was unlawfully terminated, simply for rebuffing unwanted sexual advances.

Point to Note

The Court found that the facts presented a very depressing case of GBV in the work place. Citing international conventions, the judge indicated that the law abhors this vice that is growing in the world of work, and that consequently has adversely affected the Decent Work agenda. GBV reflects and reinforces inequalities between men and women and must be stopped.

Other cases/decisions referred to	
Country/organisation	Decision/reference
International Labour Organization	Working Paper 3/ 2011 titled 'Gender-based violence in the world of work: Overview and annotated bibliography' by Adrienne Cruz and Sabine Klinger
UDHR (1948)	Article 1
India	<i>Vishaka & Ors v the State of Rajasthan & others</i> [1997] JJ [7] [SC 384], India Supreme Court

10.4 Denial of Maintenance



R.P.M. v P.K.M. [2015] HC

Principle or Rule Established by the Court's Decision

- There is a presumptive duty that the spouse with the higher earning capacity should pay alimony to the other spouse.
- The spouse who is seeking to be maintained should not seek the court's intervention to be granted maintenance without providing evidence that he or she has made an effort or is making an effort to secure a livelihood for herself or himself.
- Even assuming that a party is earning, or will subsequently earn money, that does not exclude him/her from the benefit of the payment of maintenance.
- Courts have wide discretion in determining the maintenance to be paid to a spouse during the divorce proceedings as well as after the granting of the divorce.

Justice: L. Kimaru | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Maintenance payment of KSh 30 million plus house	High Court, Nairobi (Kenya)	Cause No. 154 of 2008; delivered on 10 March 2015	Other GBV (Denial of spousal maintenance)

Case Summary

The petitioner, who was unemployed, and the respondent, a retired soldier, had been married since 1 March 1993. They had been living separately for more than five years, and eventually the petitioner filed for divorce in 2008, alleging adultery and cruelty. The respondent denied the allegations and sought to have the marriage dissolved on the grounds of desertion and adultery.

The Court did not determine the grounds for divorce as averred but relied on the duration of the separation of the parties and their acrimonious conduct during the litigation as clear evidence that the marriage had irretrievably broken down. The principal issue on which it had to rule was that of any financial settlement.

One of the requests made in the petition for divorce was that the respondent pay the amount of US\$6,000 (or its equivalent in KSh) monthly or, alternatively, that the respondent pay into a trust account the sum of US\$1 million for the upkeep and maintenance of the petitioner and the children.

As the Court recognised, this case was “unique” among spousal maintenance cases because:

... the Respondent took the position that under no circumstances was he going to pay maintenance to the Petitioner. In that regard, by hook or crook, he used all legal means to frustrate the Petitioner from being paid any maintenance. He also stubbornly refused to disclose to the court his net worth and the properties he owns... the Respondent is a person who is used to having his way and would go to any lengths to frustrate anyone who would be an impediment to his wishes. Unlike other such cases where the issue that the court is left to grapple with after divorce is division of matrimonial property, in this case the Respondent has frustrated any inquiry being made by the court to determine the extent of the properties that he own.

The issues that the Court was called on to consider included (among other things):

- i. Whether there is an obligation by the party against whom the court rules to pay maintenance to a party in whose favour the court finds.

- ii. Whether the respondent should be compelled to pay maintenance to the petitioner and solely meet the needs of the children by himself in view of Article 45(3) of the Constitution, which prescribes that:
Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
- iii. Whether the respondent should be compelled to pay maintenance to the petitioner in light of Article 53(1)(e), which provides a child with a right to parental care provided equally by both parents, whether or not they are married.
- iv. The factors that the court should take into account when making an order for maintenance.
- v. The quantum maintenance, the duration of time that maintenance should be paid and the suitable mode of payment of maintenance.

The High Court ruled that:

- i. As to the obligation to pay maintenance, there is a presumptive duty on the spouse with a higher earning capacity to pay alimony. However, the spouse seeking to be maintained should not seek the court's intervention to be granted maintenance without providing evidence that he or she has made an effort, or is making an effort, to secure a livelihood for her or himself.
- ii. Article 45(3) of the Constitution ascribes equal *rights* in marriage and on divorce. However, it is often the case that their economic and other circumstances are markedly dissimilar, so the parties are not equal in their *responsibilities* in the marriage. Men are, in most cases, more likely to exercise greater control in the marriage as compared with women. The respondent admitted that he provided on an almost exclusive basis for the petitioner and their children during the subsistence of the marriage. This established that they shouldered unequal responsibilities. In accordance with the decision in *WMM v BML* [2012] eKLR:
No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.
- iii. In light of the comments made in relation to Article 45(3), to find that Article 53(1)(e) always required both parents to contribute equally to a child's upbringing would ignore the fact that the

respondent was and still is the higher earning party, and is likely to remain so in the foreseeable future. The constitutional requirement of equal treatment takes cognisance of the respective earning capacities of the parties to the marriage during the subsistence of the marriage.

- iv. Guided by Section 77 of the Marriage Act (which provides that a court may order a person to pay maintenance to a spouse or former spouse), the Court found that it had wide discretion to determine the amount of maintenance to be paid to a spouse, both during divorce proceedings and after granting the decree of divorce.

In exercising its discretion, the court ought to be guided by the objectives that should be achieved by maintenance orders. These include identification of the economic advantages (or losses) to the spouses that may have subsisted during the marriage or led to its breakdown; apportioning the expenses of maintaining the issues of the marriage; provision of relief to cover the negative consequences for the spouses that may arise from the breakdown of the marriage; and making of sufficient provision to enable the parties to become economically self-sufficient within a reasonable duration of time.

Parties who approach the court for maintenance cannot expect the court to afford them the lifestyle to which they were accustomed during the marriage. However, the court is guided by the principle that the resulting standard of living should be kept as close as practicably possible to that enjoyed during the marriage.

The court was guided by an examination of the circumstances of the case, including the present and future assets, income and earning potential of the parties, taking into account their ages and professional qualifications; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family; and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage.

- v. In all of the circumstances, the High Court ordered that the respondent pay the petitioner the sum of KSh 30 million, as well as provide her with a house in one of the upmarket areas in Nairobi that would accord with the standard of living that the petitioner was used to during the subsistence of the marriage. In the event of a default in payment, the respondent would be required to pay a sum of KSh 60 million to the petitioner.

Points to Note

- While parties have equal rights in a marriage and on dissolution of the marriage, this does not mean the parties must bear equal financial responsibilities. The court must look at where the responsibilities lay during the marriage and make such order as it considers appropriate in light of the objectives of the statutory provisions relating to matrimonial finances articulated above.
- Spousal support cannot therefore be withheld on the basis that to pay such support infringes fundamental rights to equality.
- From a VAWG perspective, the decision safeguards the position of a spouse who may have been in an unequal position in contributing financially to the marriage, at least while the spouse becomes self-sufficient.

Obiter dictum

In this case, it was clear that the respondent had frustrated an inquiry into the extent of the property he owned; however, the Court was of the view that it was clear that he had a substantial income that he did not wish to disclose to the Court.

P.K.M. v R.P. M. [2015] CA

Principle or Rule Established by the Court's Decision

The court must take into account all relevant circumstances in determining an appropriate grant of maintenance and whether it should be paid by way of lump sum or in instalments. The court must therefore conduct a proper inquiry into the financial circumstances of each party.

Judges: H. Okwengu, D. Musinga and S. Gatembu-Kairu | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Case remitted to the High Court	Court of Appeal, Nairobi (Kenya)	Civil Appeal No. 166 of 2015; delivered on 30 June 2017	Other GBV (Denial of spousal maintenance)

Case Summary

This was an appeal on the decision of the High Court in *RPM v PKM* [2015] eKLR (Divorce Cause No. 154 of 2008). The appellant, a retired soldier, and the respondent, who was unemployed, got married on 1 March 1993.

They had been living separately for more than five years, and eventually the respondent filed for divorce in 2008. The High Court had ordered that the appellant pay to the respondent the sum of KSh 30 million as well as providing her with a house in one of the upmarket areas in Nairobi, to accord with the standard of living she was used to during the subsistence of the marriage, or, in default, to pay to her the sum of KSh 60 million. The question before the appellate court was whether it ought to interfere with the exercise of the discretion of the High Court in making the orders of maintenance that it did.

The Court of Appeal noted that orders of maintenance are made by the High Court in the exercise of its discretion, provided under Section 77 of the Marriage Act (as well as Section 25(2) of the repealed Matrimonial Causes Act). Whether a spouse is deserving of spousal support is a matter dependent on the circumstances of each case, based on the evidence presented to the court. The Court of Appeal will intervene when that discretion is not exercised judiciously.

The Court of Appeal found that the High Court had properly summarised the legal principles that should inform the exercise of the discretion when it held that, in seeking to ascertain maintenance, the court should have regard to existing and potential means of the parties, their respective earning capacities, financial needs and obligations, the duration of the marriage, the conduct of the parties prior to divorce and their conduct that led to the breakdown of the marriage. The trial court had also borne in mind that both parties had equal rights under Article 45(3) of the Constitution.

In order to properly and judiciously exercise its discretion when considering whether to grant relief by way of maintenance and the quantum thereof, the court must carefully and proactively examine the financial circumstances of both parties. These proceedings are inquisitorial in nature, and the courts should not engage in pure speculation.

Rule 44 of the Matrimonial Causes Rules required both spouses to file an affidavit of means with the Court, to assist the Court to make an informed decision. Neither party did so. The Court had only a schedule of expenses provided by the respondent and the evidence given in oral testimony.

In the absence of clear evidence as to means, the High Court fell into error. The judge was perfectly entitled to draw an adverse inference against the appellant as he had failed in his duty of candour to furnish the Court with information as to his means and assets. However, the conclusion that the appellant had concealed his income or property was not based on any evidence.

Furthermore, the judge had failed to consider the respondent's capacity to earn before assessing the quantum of relief. The respondent had, prior to

2010, been in gainful employment as a design consultant earning US\$3,500 per month. This failure adversely affected the exercise of his discretion.

The matter was remitted back to the High Court with an order that the parties file comprehensive affidavits of means so that the Court could pronounce itself on the quantum of maintenance.

Point to Note

Whether a spouse merits spousal support depends on the circumstances of each case based on the evidence presented to the court. The court must carefully and proactively examine the financial circumstances of both parties when considering whether to grant relief by way of maintenance and the quantum thereof.

Other cases/decisions referred to
Country/case
India <i>Dr Pradeep Kurmar Sharma v Ratna Sharma</i> [2007] CM(M) 50 and [2008] CM 15892 (High Court New Dehli)
UK <i>Prest v Petrodel Resources Limited and others</i> [2013] UKSC 34
USA Alaska <i>Sharpe v Sharpe</i> 366 P.3d 66

10.5 Human Trafficking

Uganda

Uganda v Natukunda Faith [2012] HC

Principle or Rule Established by the Court's Decision

- "Practices similar to slavery" means the economic exploitation of another person on the basis of a relationship of dependency or coercion, in combination with a serious and far-reaching deprivation of fundamental civil rights, and includes debt bondage, serfdom, forced or servile marriages and exploitation of children and adolescents.
- Pseudonyms can be used to anonymise and protect the identity of witnesses or complainants in cases of human trafficking.

Judge: Elizabeth Ibanda Nahamya | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Conviction	High Court – (ICD) (Uganda)	HCT/ICD/CO-001/2012	Other GBV (Trafficking in persons)

Case Summary

The accused person, Natukunda Faith, also known as Nsasira Karongo and Mulinde, was indicted on two counts of aggravated trafficking in persons and trafficking in persons, contrary to Sections 3(1) and 4(j) of the Prevention of Trafficking in Persons Act No. 7 of 2009 respectively.

The accused recruited victims, including two girls referred to in court only as “Peninah” and “Ritah”, with false promises of good job opportunities and better lives, only for the victims to be exploited and forced to work under brutal conditions. In order to control the victims, the accused used various means of coercion such as beatings, confiscation of travel documents and rituals. Peninah and Ritah were voluntarily trafficked because of their erroneous belief that there was a better life waiting for them in China. They were told by the accused that they would be hired to work for the accused in different capacities. Peninah and Ritah were made to believe that they would take up employment in salons and at the restaurant that the accused purportedly owned in China.

Prior to their travel, each of the victims communicated with the accused on the phone. The accused told the victims that they would enter into a ritual agreement with her. She asked the two to provide their photographs, two razor blades, two mirrors, nails from their fingers and toes, hair from their armpits and pubic hair. These were taken from Peninah on arrival in China by the accused.

The accused received each one on arrival at Guangzhou Airport in China. Each victim was booked in a separate hotel. When they got to Guangzhou, the accused complained that the girls had misused the pocket money given to each of them in Uganda. The money was intended to be used to purchase SIM cards on arrival so that the victims could link up with the accused. The accused announced that they were to engage in prostitution. Having booked them in hotel rooms, the accused did not waste time. She contacted her male customers immediately and the men forced the girls into sex. Each of the victims refused to yield to the men but the men overpowered them claiming that they had pre-paid for their services.

As a result, the victims were forced to engage in prostitution without any pay to them individually. The money was either paid to the accused beforehand or packaged for the girls to carry and deliver to the accused on return from prostitution. Later, the accused sought to relocate the victims to Malaysia, where they were destined to continue to work as prostitutes, although she still disguised this relocation as another opportunity for them to work. Ritah gave the accused the “ritual” items of nails, hair from her private parts, her photos and other items just before she left China for Malaysia.

When the girls arrived at Malaysia Airport, Peninah, being frustrated, intentionally refused to talk to the immigration officers so they would

intervene. As a result, the victims were denied entry, detained for a few days and eventually deported back to China then again back to Malaysia. While at Malaysia Airport, they sought assistance from the Ugandan Embassy. While in custody at the airport, Peninah fell ill, diagnosed with HIV/AIDS and also miscarried. Fortunately, the International Organization for Migration (IOM) intervened and assisted the victims by paying for their travel back to Uganda. IOM also reunited them with their families. They subsequently reported what had happened to the police. The police arrested and charged the accused when she returned to Uganda. The accused denied participation.

Preliminary procedural matters

Two preliminary procedural matters had to be considered. First, a question arose as to whether the matter had been properly laid before the Court because the law stipulates that consent has to be obtained from the Attorney General in cases of extra-territorial jurisdiction. The Court considered whether the lack of consent affected the rights of the accused person and noted that justice should be expended without undue regard to technicalities. The Court resolved that the absence of a provision on the consequences would mean the section is merely directory and not mandatory.

Second, the prosecution also made applications pertaining to witness protection for the protection and modesty of the victims and witnesses in the case. The Court granted an application prohibiting the media from publishing any information regarding the personal circumstances of the victims, pursuant to Section 13(3) of the Prevention of Trafficking in Persons Act. The Court also permitted the use of the pseudonyms “Peninah” and “Ritah” in respect of the two victims who would be testifying at trial.

Decision of the Court

The Court held that “practices similar to slavery: means the economic exploitation of another person on the basis of an actual relationship of dependency or coercion, in combination with a serious and far-reaching deprivation of fundamental civil rights, and shall include debt bondage, serfdom, forced or servile marriages and exploitation of children and adolescents.

Effective control or coercion

The Court held that the accused’s *modus operandi* was to lure victims by promising them legitimate work in a restaurant, shop or salon that did not in fact exist. The accused took away the victims’ passports, specifically for the purposes of denying the victims freedom of movement or access to any public services.

This, together with the lack of legitimate work, provided the accused with an effective means of control and coercion over the victims. The accused ensured the girls were financially indebted to her. Neither victim ever received any payments for their prostitution.

The ensuing mental and physical abuse also further subjugated the victims and the other girls there in China. Peninah testified that the accused would quarrel with them, and that the accused slapped Ritah after telling the accused that Ritah was free to do anything she likes. Peninah also testified that the accused would give her tablets to swallow that would make her unconscious. On another occasion, the accused made Ritah have sexual intercourse during her monthly period.

The Court also held that:

A person can be free to do a multitude of things but if she is not free to cease providing sexual services, or not free to leave the place or area where she provides sexual services, she will... be in sexual servitude.

Debt bondage

The victims were also subjected to debt bondage. Under Section 2(b) of Act No. 7 of 2009, debt bondage is the status or condition arising from a pledge by the debtor of his or her personal services or labour, or those of a person under his or her control, as security for payment of a debt, when the length and nature of services is not clearly defined or the value of the services as reasonably assessed is not applied towards liquidation of the debt.

Both victims told the Court that the accused had told them that this “agreement” was meant to ensure the victims would pay back the accused person all the money she had spent on their tickets, passports and visas. The accused also threatened the victims that, if they did not keep their part of the bargain, their private parts would rot. This was all meant to ensure the victims paid back the US\$7,000 that the girls allegedly owed the accused. For debt bondage to occur, *“There is a pledge by a person of sexual services as security for a debt claimed to be owed and the debt is manifestly excessive.”* In order to prove the condition of sexual servitude, however, it must be shown that the use of force or threats causes a person not to be free to cease providing sexual services or to leave the place or area where the person provides sexual services.

From the facts, it was clear that there was bonding, with the girls having to pay back the debt of US\$7,000, and this was a means of keeping the girls in servitude.

Involuntary servitude

Peninah testified that the accused kept the key to the hotel room most of the time. The accused allowed her to leave the room after two weeks. Servitude means labour conditions and/or an obligation to work or to render services from which the person in question cannot escape and that he or she cannot change. Regarding “involuntary servitude”, the Court cited *United States v Mussry* [1998] 726 F, 2d 1448 to assist in understanding what “coercion”

entails. This raises the question of whether the will of servitude has been subjugated. The Court found that the accused had recruited, transported and transferred the victims by deception, the victims were in a position of vulnerability and there had been the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. As a result of the above, Peninah acquired HIV/AIDS.

Points to Note

- This case was the first international case under the Prevention of Trafficking in Persons Act No. 7 of 2009. It is a novel one in Uganda so contributes to the jurisprudence in Uganda but also internationally as the crime is a global vice.
- The offence is a transnational crime, which means it is committed in more than one state or takes place in one state but is planned or controlled in another. There are challenges pertaining to the prosecution of this offence, such as funding international investigations of uncertain crimes that have to be budgeted for. The crime has grown into a global crime and, as such, is a threat to the rule of law everywhere it surfaces; it does not fall within usual criminal cases and calls for multidisciplinary action and operations.
- Trafficking constitutes a crime against humanity when the trafficking involves sexual slavery and enforced prostitution and enslavement. Enslavement includes trafficking in persons. Sexual slavery and enforced prostitution are categories of enslavement. Slavery is prohibited under customary international law, regardless of the context in which it occurs, whether international or an internal armed conflict.
- Trafficking in persons is a pernicious and brutal abuse of human rights. It is usually done in a clandestine way. Another feature of trafficking in persons is its association with international criminal organisations, which means many perpetrators are highly mobile and difficult to prosecute. The offence itself is a process in that it entails several procedures on the side of the trafficker and on the side of the trafficked person.
- The offence of human trafficking is truly about the vulnerability of women and children, who are more prone to being trafficked as they migrate for “greener” pastures and end up in servitude or bondage.
- This case is indicative of the fact that traffickers include both men and women, which in turn shows that victims may not be wary of or readily notice who a trafficker is.

- Although servitude is prohibited by, *inter alia*, the UDHR and the ICCPR, neither of these international instruments contains an explicit definition of servitude. In its judgement in the case of *Siliadin v France* [26 July 2005] No. 73316/01, the European Court of Human Rights defined servitude as an obligation to provide one's services that is imposed by means of the use of coercion, and is to be linked to the concept of slavery. In this case, the convict used voodoo or witchcraft to bind her wards. This calls for sensitisation of the public and strategic outreach programmes.
- Courts have convicted individuals in similar contexts of transferring victims internationally by deception for the purposes of exploitation. Criminal Case No. 22878 of the Regional Trial Court, Ninta Judicial Region, Branch 12, Zanboanga City (UNODC No. PHL035) involved recruitment, transportation and harbouring of women.
- It is pertinent to note that coercion is explicitly codified as a fundamental legal element in human trafficking crimes. However, the laws addressing human trafficking continue to struggle with delineating the dimensions of coercion. It is conceptually more difficult to define at what point coercion occurs. Additionally, the aspect of coercion does not have to mean literal coercion but could be an effective coercion, which corresponds with other aspects of this element, where in essence the result must have been such that the victim was either physically or mentally subverted or made inferior or physically, emotionally or financially weakened as a result of the tactics, manipulation or subversion of the defendant. The same is true of the other aspects of this element when the victim is under the control or under the abuse of power.

10.6 Incest

Tanzania 

Lawama Dedu v Republic [2016] CA

Principle or Rule Established by the Court's Decision

Whether a person who has sexual intercourse with a niece can be prosecuted for incest will depend on whether sexual intercourse between such relations is proscribed by statute.

Judges: Mjasiri, Juma and Mugasha | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed, proceedings of trial court quashed and sentence set aside	Court of Appeal/ Appellate, Iringa (Tanzania)	Criminal Appeal No. 318 of 2015; delivered on 1 August 2016	Other GBV (Incest, Defilement)

Case Summary

The appellant, Lawama Dedu, had carnal knowledge of L.K., a 14-year-old girl, who to his knowledge was his niece. On 7 February 2014, the complainant went to visit her aunt. On arrival at around 7 p.m., she met her uncle, who invited her to his residence, saying that his wife, her aunt, wanted to meet her there. They walked together and, as they were passing a patch of forest, the appellant forcefully pulled her far away from the pathway into the forest, removed her underpants and proceeded to have sexual intercourse with her. He ignored her cries for help, including calling out her aunt's name. After he had finished, he forced her to follow him into a house whose owner the complainant did not know. The cries for help had led people to gather. She was later assisted and taken to a dispensary and the appellant was arrested. The trial court convicted the appellant and the conviction was upheld in the first appeal at the High Court.

On appeal to the Court of Appeal, the issue for determination was whether sexual intercourse with a niece falls within the ambit of the offence of “incest by a male” under Section 158(1) of the Penal Code.

The Court of Appeal held that Section 158(1) creates the offence of incest by a male and Section 158(1)(a) defines incest by a male as having sex with a granddaughter, daughter, sister or mother. In light of this definition, although an adult man and his niece having sexual intercourse is an act that is contrary to common morality, it cannot sustain a charge of incest by a male. Furthermore, a consenting adult niece could not be charged with incest by a female under Section 160 of the Penal Code, which prohibits sexual activities only if the man is her grandfather, father, brother or son. The conviction had to be quashed and the sentence set aside.

Points to Note

- The decision in this case is very important because it addresses sexual offences within a family by addressing the limitation in the definition of incest by a male in the Penal Code by excluding a niece as a prohibited sexual partner.

- The Court discussed how other jurisdictions have widened this definition. For example, Kenya realised the gaps in the said provisions and changed the law in 2006 on offences related to incest by males and now provides a clear example of legislative intent to include nieces in the group of females with whom sexual intercourse is prohibited in the SOA 2006.
- The Court also noted how this definition is limited in that it is not comparable to the categories of males and females that are grouped as prohibited relations in the Law of Marriage Act. It called for harmonisation of the provisions punishing incest by males under the Penal Code with the prohibited marriage under the Law of Marriage Act.

Uganda

Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi [2007] HC

Principle or Rule Established by the Court's Decision

A custom that is not repugnant and that is in conformity with both written and other laws can constitute a "lawful cause" to successfully challenge an impending marriage.

Judge: Remmy Kasule | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Prospective marriage declared illegal, null and void; permanent injunction issued barring the defendants from contracting a marriage	High Court (Uganda)	Judgement delivered on 5 May 2007, Civil Suit No. 52 of 2006	Other GBV (Incest, Intra-clan marriages)

Case Summary

This case dealt with the customs applicable to intra-clan marriage as practised among the Baganda. The plaintiff, Bruno Kiwuwa, sought to pre-empt the marriage of the two defendants, Ivan Serunkuma and Juliet Namazzi, whose wedding had been scheduled for 24 June 2006. The plaintiff was the second defendant's father.

The plaintiff's case was that the two defendants were Baganda by tribe and both belonged to the *Ndiga* (sheep) clan. It was asserted that a custom among

the Baganda calling for exogamy within marriage relationships meant there could be no valid contract of marriage between the two defendants. It was argued that it was possible to stop the celebration of a marriage under the Marriage Act where one could show “just cause” and that the violating of a custom constituted such just cause. Further, it was argued that the Court was required to enforce the custom by Article 37 of the Constitution, which protects the right to enjoy, practise, profess, maintain and promote any culture, cultural institution and tradition in a community. Sections 14 and 15 of the Judicature Act also require the courts to observe and enforce customs that are not repugnant to natural justice, equity and good conscience and that are not incompatible either directly or by necessary implication with any written law.

The defendants contended that the customs were inapplicable to their marriage, which was to be contracted under the Marriage Act and not the Customary Marriage (Registration) Act. It was argued that, even if it fell under the latter Act, the custom was not part of the prohibited degrees of consanguinity under Section 11(d) of the Second Schedule. Nor was the marriage among the prohibited degrees of consanguinity under Section 149 of the PCA.

The Court established that the defendants were precluded from getting married as a result of existing customary law. In arriving at this conclusion, the Court observed that customary law may exist and operate on its own or may co-exist with a different type of law. It also noted that customary law is “*accepted and binding on a given society or tribe in their social relations and may be uniform to a number of societies or tribes*” or may vary from one to the other and area to area.

The Court established the continued application of customary law to marriage by demonstrating that the enactment of the Marriage Act, the Marriage of Africans Act and the Marriage and Divorce of Mohammedans Act by the colonial administration to cater for marriage between non-African Christians, Christian Africans and Arabs and African Mohammedans, respectively, did not lead to the inapplicability of customary law in marriages but led to the creation of a dual system where native laws were recognised so long as they were not repugnant.

The Court therefore rejected the argument that the custom in question was not applicable.

The Court did not accept that the custom could be enforced against the defendants only if they were customarily contracting a marriage under the Customary Marriage (Registration) Act. The Marriage Act acknowledges

the validity of customary marriage and recognises the operation of customary marriage laws. The Court was therefore of the view that a custom in issue could constitute lawful cause to successfully challenge the marriage of both defendants under the Marriage Act.

Section 4 of the Act calls for the satisfaction of formalities preliminary to marriage and therefore applies the custom in issue to the intended marriage of the defendants. The Court considered that the issue of whether customary law or practices allowed the defendants to get married was a preliminary consideration that had to be resolved prior to contracting a marriage under written laws.

Furthermore, the Court posited that the Marriage Act provided numerous grounds for challenging an intended marriage under the Act independent of the prohibited degrees of consanguinity under Section 149 (1) of the PCA and the Customary Marriage (Registration) Act.

Lastly, the Court found that the particular custom did not violate constitutional rights under Article 31 (the right to marry), Article 32(2) (a prohibition on customs that are against the dignity, welfare or interest of women) and Article 37 (the right to belong to, practise, profess maintain and promote any culture, cultural institution and tradition within a community). The custom was therefore not repugnant to natural justice, equity and good conscience or in conflict with the Marriage Act or any other written law.

Accordingly, the Court issued the following orders, *inter alia*:

- i. A declaration that the first and second defendants' intended marriage was illegal, null and void by reason of the custom that, being Baganda by tribe, both belonging to the same *Ndiga* clan, the defendants could not lawfully contract a marriage as between themselves.
- ii. A declaration that it is a custom of the Baganda as a tribe that, before a marriage is contracted, it is preceded by an introduction ceremony.
- iii. A permanent injunction restraining the first and second defendants from contracting a marriage between them.

Point to Note

This case illustrates that adjudication is reflective of the customs of the general populace as provided for in Article 126(1): it provides that judicial power is derived from the people and shall be exercised in conformity with law and with the values, norms and aspirations of the people.

10.7 Denial of Access to Medical Health Care

Uganda

CEHURD & 3 others v The Attorney General [2011] CC

Principle or Rule Established by the Court's Decision

A declaration about whether the conduct of public business is acceptable is a “political” issue to be determined by the legislature or the executive branch of government and not by the court.

Judges: A.E.N Mpagi-Bahigeine, C.K Byamugisha, S.B.K Kavuma, A. S Nshimye and Remmy Kasule | JCC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Petition struck out	Constitutional Court (Uganda)	Constitutional Petition No. 16 of 2011 (Articles 137(3), (4) and Article 45 of the Constitution and Rule 3, SI No. 91 of 2005	Other GBV (Denial of maternal health rights)

Case Summary

The petitioners filed a constitutional petition on the grounds that the government had violated the rights of women through acts and omissions with regard to maternal health services. The petitioners asserted that the government had failed to provide basic maternal health services and to adequately budget for maternal health. The petition also suggested that the unethical behaviour of health workers had led to the preventable deaths of expectant mothers during childbirth. The petitioners claimed that the aforementioned actions or omissions violated the rights to life and health; women's rights; and the right to be free from torture, cruel, inhuman and degrading treatment or punishment.

Pursuant to Article 137 of the Constitution, the petitioners then sought declarations that the acts/omissions of the respondent's agents violated the stated constitutional rights. They also sought an order that the families of the expectant mothers who had died during childbirth receive compensation for the violation of their rights.

At the start of the hearing, counsel for the respondent raised a preliminary objection based on the legal doctrine known as the “political question” doctrine. The petitioners had sought an interpretation of whether government spending on health care was sufficient to be constitutionally

acceptable. Counsel for the respondent contended that this required the Court to make a judicial decision involving and affecting political questions. In so doing, the Court would in effect be interfering with political discretion, which by law is a preserve of the executive and the legislature. She stated that, for the Court to determine the issues in the petition, it would have to call for a review of all the policies of the entire health sector and the sub-sector of maternal health care services and make findings on them, while implementation of these policies is the sole preserve of the executive and the legislature.

In reply, counsel for the petitioner argued that the preliminary objection was misconceived because the petitioner's prayer to court was to determine whether the acts and omissions are in contravention of the Constitution and not the determination of a political question. He pointed out that the government budget allocation to the health sector had for the previous 10 years been 9.6% of the national budget, lower than the required 15%. He argued that the different conventions to which Uganda is a party spell out the obligations to the parties, which the government must respect.

The Constitutional Court found the Supreme Court of Uganda had adopted the political question doctrine in *Attorney General v Major General David Tinyefuza* in which Kanyeihamba JSC (as he then was) went to great length in explaining the extent to which courts should go in interpreting and concerning themselves with matters that are, under the Constitution and by law, assigned to the jurisdiction and powers of Parliament and the executive.

The Court cited *Coleman v Miller* 307 U.S. 433,454-455 where it was held that, in determining whether a question fell within the doctrine of political question, dominant considerations included the appropriateness under the system of government of attributing finality to the action of the political departments and the lack of satisfactory criteria for judicial determination of such matters. Ultimately, the question is whether the separation of powers is respected in circumstances where a court is being asked to pass judgement on the actions of politicians.

The acts and omissions complained of in the current present petition effectively required the Court to review and implement health policies. A declaration about whether the conduct of public business is acceptable is a "political" issue to be determined by the legislature or the executive branch of government and not by the court. The acts and omissions complained of therefore fell within the doctrine of political question. The justices therefore upheld the respondent's preliminary objection and the petition was struck out accordingly as not raising competent questions for determination.

The Constitutional Court appreciated the concerns of the petitioners that motivated them to lodge this petition with regard to what they perceived to be the unsatisfactory provision of basic health maternal commodities and services towards expectant mothers. However, the Court found that the solution to the problem was not through a constitutional petition framed in this way. There were other legal alternatives that the Constitution and other laws provide for resolution of such matters. For example, the petitioners could apply for redress under Article 50 of the Constitution. Article 50 focuses on redress for alleged constitutional infringements, rather than requiring the court to make declaratory judgement about political decision-making.

Points to Note

- The decision in this case was overturned on appeal but it is of relevance because it provides the background to the decision of the Supreme Court, which is set out separately below.
- The Court held that, in seeking adjudication on cases involving the level of protection afforded by the state to women and girls as a result of the exercise of political discretion, petitioners should avoid making applications for a declaratory judgement. Such a judgement will require the court to make public declarations about how a political question has been determined, for example about how public spending is allocated. This is an impermissible infringement of the separation of powers. A claim for damages arising out of alleged constitutional breaches may be more appropriate.
- This case stands out because it reiterates the political question doctrine in its relevance to the separation of powers. Such a case indicates how problematic it is to hold the state accountable where it has not fulfilled its commitment to protect the rights of its citizens, women and girls; the political question could be used to evade questioning the implementation of policies.

CEHURD & 3 others v The Attorney General [2016] SC

Principle or Rule Established by the Court's Decision

The "political question" doctrine only extends to shield both the executive arm of government as well as Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution.

Judges: B. M Katureebe, Kisaakye Esther, Jotham Tumwesigye, Odoki, Tsekooko, Okello and Kitumba | JJSC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal successful, case remitted to the Constitutional Court	Supreme Court (Uganda)	H.C Crim. Case 1155/2016 (s.129 PCA)	Other GBV (Denial of access to maternal health)

Case Summary

This appeal was brought against the ruling of the Constitutional Court in Constitutional Petition No. 16 of 2011, in which the appellants petitioned the Court to determine whether the Government of Uganda had violated the rights of women to maternal health services by failing to provide basic maternal health services. The Constitutional Court dismissed the petition without hearing its merits because the declarations sought infringed the “political question: doctrine.

The appellants filed an appeal on three grounds – namely, that the Constitutional Court:

- i. Incorrectly applied the doctrine of political question.
- ii. Erred in law in holding that the petition did not raise competent questions requiring constitutional interpretation.
- iii. Erred in law when it decided that the petition called for it to review and implement health policies.

The Supreme Court considered Article 137(1) of the Constitution, which provides that “*any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court*”. It found that Article 137(1) been interpreted by a Ugandan Court in *Paul Semwogerere & 2 others v The Attorney General* (Constitutional Appeal No. 1 of 2002) to mean that the Constitutional Court is mandated to determine on any claim involving constitutional rights violations. Therefore, the Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution simply on the grounds that it infringed the discretionary powers of another organ of the state.

The political question doctrine had limited application in Uganda’s current constitutional order and only extends to shield the executive arm of the government and Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution.

The appellants’ petition fell outside of the political question doctrine. It had referred to specific acts and omissions of the government and prayed for a determination as to whether there had been a proper exercise of mandate in light of specific provisions of the constitution. Contrary to its decision, the Constitutional Court had been competent to make an adjudication

as to whether redress could be granted, pursuant to Article 137(4) of the Constitution.

The Supreme Court reasoned that the Constitutional Court should have heard the parties and made a determination based on the merits of the petitioners' claims and not struck out the petition summarily without hearing them. It ordered that the Constitutional Court proceed and hear Constitutional Petition No. 16 of 2011 on its merits.

Point to Note

This case stands out because it illustrates the manner in which the political question doctrine may operate. It also limits the application of the political question doctrine in the manner by which it excludes the Constitutional Court from inquiring into matters involving the provisions of the Constitution of Uganda. This shows a willingness on the part of the judiciary to hear constitutional matters that would previously be construed as interfering with the separation of powers. This opens up the space within which accountability for rights abuses and public interest litigation for women's rights may flourish and serves to empower adjudications in cases involving issues of VAWG.



J.O.O. (also known as J.M.) v The Attorney General & 6 others [2018] HC

Principle or Rule Established by the Court's Decision

A failure to provide adequate and appropriate maternity care is a violation of a woman's rights to maternal health care and dignity and to not to be subjected to cruel, inhuman and degrading treatment.

Judge: Ali-Aroni | HC

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
Declaration of violation of rights to maternal health care, to dignity and to not be subjected to cruel, inhuman and degrading treatment	High Court, Bungoma (Kenya)	Constitutional Petition No. 5 of 2014; judgement delivered on 22 March 2018;	Other GBV (Denial of access to medical care)

Case Summary

The petitioner was a woman from a low-income background seeking free maternal care at Bungoma County Referral Hospital, a public health care facility that ought to provide free maternal health care following a

presidential directive. On admission, she was asked to purchase cotton wool and the drug used to induce labour. There were insufficient beds available in the labour ward and she was forced to share a bed with another patient.

The nurses on duty instructed the expectant mothers, including the petitioner, that, at the onset of labour pains, they would have to walk to the delivery room. When the inducement drug was administered to the petitioner, the nurses failed to monitor and check on her. On the onset of her labour pains, the nurses did not respond to her calls for help. She then walked to the delivery room and found that the three available beds were occupied by other women in the process of delivery. Left with no choice, she attempted to walk back to the labour ward but lost consciousness along the way and delivered her baby on a concrete floor. She woke up to shouting and abuse from two nurses, who asked her why she had delivered on the floor and therefore soiled it in the process. Without any assistance, she was ordered to carry the placenta and walk to the delivery room to have it removed.

The complainant further alleged that complaint mechanisms were neither displayed nor brought to her attention.

The main issues for determination were:

- i. Whether or not there was a violation of the petitioner's rights under the Constitution of Kenya and international instruments with regard to the right to dignity, information and health care, in particular maternal health care.
- ii. Whether there was failure by the national and county governments to establish necessary policy guidelines and other measures to implement and monitor health care services and to allocate maximum available resources, and if so whether such failure resulted in the infringement of the petitioner's rights.

The judge found the hospital had violated the petitioner's rights to maternal health care, contrary to Article 43(1) of the Constitution, Article 12(1) of the ICESCR and Article 16 of the ACHPR. This was by reason of its failure to provide basic equipment, facilities and medication, including requiring women to purchase basic provisions in a public facility that is required to provide maternal health care in accordance with a presidential directive.

The judge also found that the degrading treatment shown to the petitioner was a violation of her right to dignity under Article 28 of the Constitution, and the right not to be subjected to cruel, inhuman and degrading treatment under Article 29(j) of the Constitution, as well as under the ACHPR.

Although the petitioner alleged that complaint mechanisms were neither displayed nor brought to her attention, the Court found there was no violation to the petitioner's right to information. From the facts

on record, the petitioner did not, during her admission and discharge from hospital, anticipate complaining against anyone. Furthermore, the petitioner had not testified to the fact that necessary information was not disclosed to her.

The Court found that the national and county governments had not devoted adequate resources to health care services, and had failed to put in place effective measures to implement, monitor and provide minimum acceptable standards of health care, thus violating the petitioner's rights under the Constitution and relevant international instruments.

The Court declared that:

- i. The petitioner's right to dignity and to not be subjected to cruel, inhuman and degrading treatment had been violated.
- ii. The neglect suffered by the petitioner was a result of the national and county government's failure to ensure available quality health care services.
- iii. The national government and county government of Bungoma had failed to develop and/or implement policy guidelines on health care, thus denying the petitioner her right to basic health care.
- iv. The national government and county government of Bungoma had failed to implement and/or monitor standards of free maternal health care and services, resulting in the mistreatment of the petitioner and violation of her right to dignity and to treatment that is devoid of cruelty, inhumanity and degradation.

The Court ordered that a formal apology be made to the petitioner by the third respondent (the Bungoma county cabinet secretary for health), the fifth respondent (Bungoma County Referral Hospital) and the three nurses named as having violated the rights of the petitioner.

The Court also ordered that the second respondent (the county government of Bungoma) and the fourth respondent (the cabinet secretary of the Ministry of Health) in equal shares pay an award of damages in the sum of KSh 2.5 million, as well as the costs of the suit.

Points to Note

- This case affirmed the socio-economic right to health and specifically reproductive medical health care services. Further, the state has a duty to provide free maternity services in accordance with constitutional and international law standards.
- The judgement affirms the right of all Kenyans, especially the poor and marginalised (the majority of whom are women), to be treated with dignity while accessing free (maternal) medical care.

- This is an important precedent as it sets down that nurses, as health care providers, owe a duty of care to their patients to treat them with dignity.
- This right is anchored in the Constitution and international instruments, and is a moral obligation on health care professionals (“*Theirs is a calling to serve humanity in vulnerable circumstances*”, at Paragraph 62).
- This case should be treated as an instance of GBV as the petitioner suffered violence that could have been meted out to her only by virtue of her being a woman. Indeed, maternal care differs from general/basic health care as it involves specialised care for women who are pregnant.
- In addition to the Constitution of Kenya 2010, the Court notably grounded its findings of human rights violations in various international instruments, including the ICESCR and the ACHPR.
- While the Court did not specifically define what amounts to “minimum acceptable standards of health care”, providers are required to provide proper treatment, equipment, facilities and medication in conformity with standards set out in international conventions, national laws and policy directives.

Obiter Dictum

In awarding damages, the Court was cognisant of the fact that no amount of monetary compensation can adequately redress the injuries suffered by the petitioner; the award is merely an acknowledgement of the infringement of rights and an attempt to make reparation.

Other cases/decisions referred to	
Country	Decision
South Africa <i>Treatment Action Campaign & others v Minister of Health & others</i>	The Constitutional Court of South Africa held that the refusal by the government of South Africa to provide anti-retroviral drugs to HIV-positive pregnant women was a violation of the right to health under the Constitution. This was a landmark decision protecting the right to maternal, child and reproductive health and the justiciability of economic, social and cultural rights.
South Africa <i>Srs Makwanyane & another</i> [1995] CCT3/94 ZACC 3	<i>The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Constitution.</i>
Kenya <i>Republic v Minister for Home Affairs and 2 others Ex-parte Leonard Sitanize</i> [2005] eKLR	<i>Human dignity is of Fundamental importance to any Society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights.</i>

Principle or Rule Established by the Court's Decision

Violation of human rights declared. Compensation awarded.

Judge: Mumbi Ngugi | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Violation of human rights declared; compensation awarded	Constitution and Human Rights Division, Nairobi High Court (Kenya)	17 September 2015, Case No. 562 of 2012	Other GBV (Denial of access to medical care)

Case Summary

This petition sought redress for the treatment of the two petitioners at Pumwani Maternity Hospital in Nairobi. Both petitioners were mothers who had given birth at Pumwani and subsequently been detained there. On 1 June 2013, the government issued a directive under which it removed all charges in respect of maternity services in public hospitals in Kenya. Prior to this, patients were required to meet the cost of delivery in public hospitals. As a result, the practice of detention of indigent patients for inability to pay hospital charges was widespread.

The first petitioner was a mother of six, who worked as casual labourer, washing clothes and cleaning houses. Her net income was KSh 100 per day. The second petitioner was a mother of five, who worked as a hairdresser. Her income was not fixed and ranged between zero and KSh 500 per day. Because of the irregular nature of her income, she was often unable to meet the cost of necessities for herself or her children.

In September 2010, the first petitioner gave birth at Pumwani Hospital. She was subsequently detained there for a period of 24 days, during which time she suffered trauma. The first petitioner claimed the nurses had treated her rudely, and that she and other detained patients were forced to share beds. During the time of detention, she noted that some of the detained mothers would elect to sleep on the floor and leave the beds for their babies, and she therefore slept on the floor on various occasions. The first petitioner was eventually released from the hospital when the mayor of Nairobi at the time visited Pumwani and the first petitioner's friends reached out to him about her predicament. As a result, the mayor wrote a cheque towards her medical bill.

The second petitioner was first admitted to and detained at Pumwani Hospital in 1991 when she was 15 years old. She was unable to deliver her baby vaginally and therefore had a caesarean section. She regained

consciousness 10 days after the operation, upon which the hospital staff removed her stitches and sought to discharge her. Being only a young girl, she had no money to pay the bill, so the hospital detained her. She slept on the floor for a period of seven days. During that time, the hospital had many patients and the detained patients were always fed last. As such, the second petitioner sometimes missed out on food.

The second petitioner's husband raised the money to have her discharged from the hospital and took her home. She avers that her womb continued to ache and that she felt something pricking her there. Her husband decided to return her to Pumwani Hospital for a check-up. At the hospital, she was rushed to theatre, where it emerged that a pair of scissors had been left in her womb during the caesarean section.

In November 2010, the second petitioner once again experienced Pumwani Hospital. At the time, she was an expectant mother and was receiving antenatal care at a Nairobi City Council clinic. On 9 November 2010, she was on her way to an antenatal appointment with her sister when she started bleeding. A taxi driver drove them to Pumwani Hospital. On arrival, the staff at the hospital instructed her sister and the taxi driver to place her on the floor. The nurses at the hospital later informed her that the hospital beds were fully occupied, and that she would have to wait for other patients to give birth before she could find a bed. She was told to wait on the bench in the reception area. All this time, she was still bleeding.

According to the second petitioner, as she was waiting in the reception area, a female doctor came by and the second petitioner heard the doctor tell the nurses nearby that her case was serious, that the baby she was about to deliver was in breech position and that she could die. The doctor ordered that the second petitioner be taken in for immediate surgery. She therefore underwent surgery on 9 November 2010 at 11 a.m. despite the fact that she had been admitted at 9 a.m. on the same morning.

After the surgery, the second petitioner was taken to a ward bed. She states that the nurses were all very rude to her. For example, when she wanted to urinate, the nurses attending to her told her that if she thought she could stand and go to the toilet on her own then she could do so by herself. Eventually, the nurses came and, when they attempted to move her, they noticed that she was bleeding heavily and therefore called a doctor. On examining her, the doctor informed her that she suspected that her bladder had ruptured. The second petitioner was taken back to theatre, where the doctors put in a catheter, which she had to use for the next ten days. After the surgery, the second petitioner noticed that her wound was infected and that the stitches were badly done.

The second petitioner stated that she was discharged five days later. At this time, her wound still looked septic and she still had the catheter. According to

the second petitioner, the catheter was ultimately removed five days too early. The second petitioner did not have adequate money to pay her entire bill on discharge, and her offer to pay the KSh 6,000 she had with her was rejected. The second petitioner states that she was never shown an itemized bill. She was due to leave the hospital on 13 November 2010 but was detained for failure to pay her medical bill. For the period of her detention, she was relegated to sleeping on the floor. When she complained about being put on the floor, the nurses stopped dressing her wound. She was also not given a blanket, although her newborn child continued to receive treatment as she had swollen limbs.

As was the case during her previous detention, she and other mothers who were detained and sleeping on the floor received food only after other paying patients had received their portions. During the period of detention, she was locked in and would not even be allowed to go outside the ward to bask in the sun because the staff feared that she along with other detained patients would run away. She was eventually released on 19 November 2010 after her relatives managed to raise the KSh 12,300 demanded by the hospital.

The petitioners asked the Court to find that these violations had occurred, and to grant declarations that:

- i. Detention of the first and second petitioners was arbitrary.
- ii. The act of arbitrary detention in a health care facility is a violation of the constitutional and human rights standards to which Kenya prescribes.
- iii. Under its constitutional and human rights obligations, the Kenyan government must take the necessary steps to protect patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations.

The petitions also prayed for an order for general damages for physical and psychological trauma occasioned as a result of the acts or omissions of the hospital's staff and or workers.

After considering the material presented and all the arguments, the judge found the petition was competent and proper. The petitioners had pleaded their case sufficiently and in doing so had filed voluminous pleadings, which clearly set out their factual allegations with respect to their detention by the hospital and the treatment they were subjected to while so detained. The petitioners also gave evidence on oath, and were cross-examined at length on their evidence. The submission that their petition was incompetent therefore had no merit. In any event, a failure to plead with precision would not have been, of itself, sufficient to render the petition incompetent. The duty of the court is to render substantive justice, not to pay talismanic homage to rules and technicalities.

The judge found the petitioners were clearly discriminated against because of their economic status. They were denied access to health care facilities because of their inability to pay. When they were, very grudgingly, given treatment, they were detained because of their inability to pay. While at the hospital, they were denied basic provisions such as beds and bedding, and the food they were given was insufficient. To act in such a way was contrary to the Constitution and to the regional and international conventions to which Kenya was a party.

The judge also found that the detention of the petitioners for non-payment of medical bills was a violation of constitutional rights guaranteed under Articles 28 and 29 of the Constitution (to human dignity and not to be deprived of freedom by way of arbitrary detention). The judge posited that detention of a person must be for just cause; otherwise, it amounts to arbitrary detention, which is contrary to the law. There is nothing in law that allows a medical institution to detain a patient for non-payment of a medical bill, and the judge agreed with the reasoning in previous decided cases, which stated that detention of a person for failure to pay a civil debt amounts to an arbitrary deprivation of liberty and violation of the right to freedom of movement.

The judge issued the following declaratory orders:

- i. *“I declare that the detention of the 1st and 2nd Petitioners by the 5th respondent was arbitrary and unlawful;*
- ii. *“I declare that the act of arbitrary and unlawful detention in a health care facility is a violation of the constitutional and human rights standards under the Constitution, as well as under international conventions and treaties that Kenya subscribes to;*
- iii. *“I declare that the Kenyan Government must take the necessary steps to protect all patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations;*
- iv. *“I declare that the conduct of staff of the 5th Respondent against the petitioners before and during their detention constitutes an infringement of the petitioners’ fundamental rights and freedoms as set out in Articles 27(4), 28, 29 (a-d, f), 39(1, 3), 43(1[a], 2-3), 45(1), and 53(d) of the Constitution;*
- v. *“I direct that the 3rd, 4th and 5th Respondents will develop clear guidelines and procedures for implementing the waiver system in all public hospitals;*
- vi. *“I direct that the 3rd, 4th, and 5th Respondents take the necessary administrative, legislative, and policy measures to eradicate the practice of detaining patients who cannot pay their medical bills.”*

The petitioners were also awarded damages as follows:

- i. To the first petitioner, the sum of KSh 1.5 million.
- ii. To the second petitioner, the sum of KSh 500,000.

Points to Note

- This case clearly indicated that woman and girls have clear constitutional rights to be treated with dignity and respect with regard to the provision of maternity care, regardless of their socio-economic status.
- The judge made reference to state obligations under international law and acknowledged the measures the state had put in place, such as a policy under which maternity services, including antenatal and postnatal care in public hospitals, will be free. If properly implemented, women will not be dependent on the doubtful mercy of those in public hospitals charged with determining whether they qualify for a waiver or not. This is a good thing.
- Courts are expected to take note that the state must, however, go further, to ensure such services are rendered in accordance with constitutional and international law standards and conform to such standards with respect to the right to health.

Obiter dictum

"The rights in the Constitution and the international instruments that were highlighted and which represent the great hope of the poor and marginalized in our society, will remain weak and ineffectual platitudes unless we can unearth, from the recesses of our hearts and minds where they are buried under layers of indifference and lack of concern for the welfare of others, even those whom we have a legal duty to serve, the remnants of values, compassion and empathy that we once had. Without these three, in circumstances such as have been presented before me, all that a Court can do is come in after the fact, after great pain and suffering has been inflicted on the minds, bodies and spirits of our mothers, sisters, daughters and wives, to offer reliefs that may not quite make up for the humiliations and degradation that we subject others to. And that, in the final analysis, degrades and dehumanizes all of us.

"It is, however, not a totally hopeless situation. As the Judge noted that the state has put in place a policy under which maternity services, including ante natal and post-natal care in public hospitals, will be free; if properly implemented, women will not be dependent on the doubtful mercy of those in public hospitals charged with determining whether they qualify for a waiver or not. This is a good thing. The state must, however, go further, to ensure that the services rendered are rendered in accordance with constitutional and international law standards and conform to such standards with respect to the right to health.

"The challenge of ensuring access to health for all, but particularly for women and, by necessary extension, children, must be at the forefront in the minds of policy makers and implementers. This is particularly so in view of the fact that health care is now a devolved function, responsibility for which lies with county governments, under Schedule Four of the Constitution."

Other cases/decisions referred to	
International Commissions/ Committees	Decisions
Economic, Social and Cultural Rights (ESCR) Committee	<p>The ESCR Committee has described discrimination as follows:</p> <p><i>Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.</i></p> <p>The ESCR Committee has also noted that there are non-derogable rights to which a state party cannot justify non-compliance. These rights include <i>the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.</i></p>
ACHPR Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights	<p><i>Some of the obligations imposed on States parties to the Banjul Charter are immediate upon ratification of the Charter. These obligations include but are not limited to... the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights.</i></p>
CEDAW Committee General Recommendation No. 28	<p>The Committee has found that the phrase “without delay” in Article 2 of CEDAW is <i>clear that the obligation of States parties to pursue their policy, by all appropriate means, is of an immediate nature. Thus, CEDAW does not allow for any delayed or purposely chosen incremental implementation of the obligations that States assume upon ratification of or accession to the Convention. It follows that a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations or constraints within the State.</i></p>

10.8 Bride Price

Uganda

Mifumi & others v The Attorney General and Kenneth Kakuru [2014] SC

Principle or Rule Established by the Court's Decision

The custom and practice of demand for refund of bride price after the break down of a customary marriage is unconstitutional as it violates Articles 31(1)(b) of the Constitution, and it should be prohibited.

Judges: B. M Katureebe, Kisaakye, Tumwesigye, Odoki, Tsekooko, Okello and Kitumba | JJSC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal partially succeeded	Supreme Court (Uganda)	Constitutional Appeal No. 2 of 2014	Other GBV

Case Summary

A petition was filed with the Constitutional Court for a declaration that (among other things):

- i. The demand for and payment of bride price fetters the free consent of persons intending to marry or leave a marriage, as guaranteed by Article 31(3) of the Constitution.
- ii. The demand for a refund of bride price as a pre-requisite for the dissolution of marriage is also unconstitutional in that the practice undermines the dignity of women, as guaranteed by Article 33(6) of the Constitution. Also, demanding refunds of bride price may lead to domestic violence.

The Constitutional Court held that:

- i. The Constitution does not prohibit a voluntary, mutual agreement between a bride and a groom to enter into the bride price arrangement. A man and a woman have the constitutional right to so choose the bride price option as the way they wish to get married. Justice Leticia Kikonyogo found that the groom's family was not the only one giving gifts; the bride's family often gave gifts as well.
- ii. Although the demand for a refund of bride price demeans and undermines the dignity of a woman and is in violation of Article 33(6) of the Constitution, no declaration was necessary to this end. Redress could be provided by an application for compensation under Article 50 of the Constitution. There was no evidence. There was no evidence to support any assertion that, as a matter of course, demands for refunds of bride price led to domestic violence. It may play a part in some cases of domestic violence, but this fact alone provided no justification for a blanket prohibition of the practice of bride price.

By a majority of four to one, the petition for declarations was therefore dismissed. Dissatisfied with the decision, the appellants lodged an appeal to the Supreme Court to contest the decision of the justices of the Constitutional Court. The Supreme Court was asked to determine, among other things, whether:

- i. Bride price promotes inequality and violence in marriage (the issue of inequality was raised but not commented upon by the Constitutional Court).
- ii. Bride price fetters the free consent of persons intending to marry.
- iii. The custom and practice of demanding the refund of bride price was unconstitutional.

In the lead judgement, Justice Tumwesigye (JSC) ruled that:

- i. Bride price does not promote inequality and violence in marriage. While bride-price may lead to inequality and suffering in some cases, there are many more husbands who give bride price but who do not use it as a justification for inflicting violence and abuse on their wives. Rather, it is valued by many as a token of gratitude to the bride's family for the girl's nurturing and upbringing. It had also been said to promote stability in marriage.
- ii. Bride price does not fetter the free consent of persons intending to marry. The payment of bride price is a decision relating to form of marriage, rather than whether to marry in the first place.
- iii. The custom and practice of demanding the refund of bride price after the breakdown of a customary marriage is unconstitutional. Article 32(2) of the Constitution provides that laws, cultures, customs and traditions that are against the dignity, welfare or interest of women or that undermine their status, are prohibited. The custom of refund of bride price devalues the worth, respect and dignity of a woman. The custom completely ignores the contribution of the woman to the marriage up to the time of its breakdown. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. This cannot be ameliorated by predicating any refund on a valuation of contribution to marriage, taking into account for example the length of the marriage and the number of children she has produced in the marriage. A woman is not property that should be valued. Furthermore, a man is not subjected to valuation for the refund of bridal gifts on breakdown of the marriage. To hold the refunding of bride price to be constitutionally acceptable would therefore ignore Article 31(1)(b) of the Constitution, which provides for men and women to have equal rights on the dissolution of marriage. In any event, bride price constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being a gift(s) should not be refunded.

Additionally, Justice Tumwesigye was of the view that the refunding of bride price had negative implications with regard to the fact that the bride price was held by a third party (the bride's parents or relatives). It is unfair to the parents and relatives of the woman to be asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund. It may also be unfair to the wife, who may be trapped in a violent relationship. The Court remarked that:

... the effect of the woman's parents not having the property to refund may be to keep the woman in an abusive marital relationship for fear that her parents may be put into trouble if they are unable to refund bride price or that her parents may not welcome her back home as her coming back may have deleterious economic implications for them...

Furthermore, if marriage is a union between a man and a woman, it is not right that legal recognition of the dissolution of a customary marriage should depend on a third party satisfying the condition of refunding bride price.

In the partially dissenting decision of Justice Kisaakye (JSC), she, *inter alia*, considered that, although Article 37 of Uganda's Constitution grants citizens the right to enjoy and practise their culture, the practice of payment of bride price was not such a practice envisaged to be upheld by the Constitution.

Points to Note

- The ruling upheld the dignity of women through its articulation of the definition of bride price and declaring that the woman is not property that should be valued.
- It saved the positive aspects of bride price by those who cherish it but ordered the government, together with local governments, to regulate its use by passing regulations.
- The Court sought to distinguish itself from the colonial tradition that required strict proof of customs to take judicial notice of such practices. It also limits the adverse effects that may be attributed to refund of bride price in the dynamics of marriage dissolution. The case initiated the long-awaited reform of a customary practice that had become so firmly entrenched and so longstanding as to become untouchable, thereby reducing inequality between women and girls on the one hand and men and boys on the other.

Tanzania



Nyakanga v Mehego [1971] HC

Principle or Rule Established by the Court's Decision

Where conditions of a valid marriage are met under customary law, the "husband" is required to pay bride wealth.

Judge: El Kindy | HC

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
Appeal allowed	High Court/Appellate (Tanzania)	HCD 270; delivered on 28 July 1971	Child marriage

Case Summary

The appellant sued the respondent for unpaid bride wealth in respect of his daughter. The respondent and the appellant's daughter were living together, the girl having eloped to live with him. The respondent had first stated that he considered the appellant's daughter his "wife" but later he stated that he did not wish to marry her. The primary court found for the appellant, but the district court reversed the decision, holding that, as the respondent did not wish to marry, he could not be forced to marry. The case was appealed to the High Court.

The issue for determination at the High Court was whether, in light of the facts, circumstances and customary law, the respondent was married to the appellant's daughter.

The High Court found that:

- i. In terms of the facts, *"It may be that not much weight can be put on the contradictory states of mind of the respondent, but it cannot be ignored that he categorically considered the appellant's daughter as his 'wife'."*
- ii. The circumstances suggested that the appellant wanted to avoid the relationship being categorised as a marriage because *"he wants to have the appellant's daughter in his house without paying for it"*.
- iii. *"The respondent eloped or abducted the appellant's daughter and therefore by this process their customary law (Kurya) considered the respondent as having been validly married."*

The respondent was therefore validly married to the daughter. The respondent was ordered to pay the standard bride price of the Kurya tribe (23 heads of cattle).

Points to Note

- The decision is important because it shows the existence of early or forced marriage of young girls under customary laws, in this case under Kurya customs, and exchange of bride wealth. It shows that this is not a matter of the past: it exists in society.

- According to Kurya customs, for a marriage to be recognised, bride wealth must be provided to the bride's family and non-payment renders the marriage void until it is paid. This may explain why the Court seemed more interested in addressing whether this customary rite had been fulfilled, rather than the age of the girl. It should be noted that this case was decided in 1971 before the Law of Marriage Act came in effect.
- Bride wealth sometimes renders a bride more likely to endure violence and abuse for fear that, if she leaves the homestead, demand for return of bride wealth will follow. The bride may not be received back to her family with open arms for fear of a demand for the return of bride wealth.

Chapter 11

The Role of Appellate Courts

Chapter 11

The Role of Appellate Courts

The countries covered in this Handbook – namely, Kenya, Rwanda, Tanzania and Uganda – experience widespread VAWG. The most rampant cases of VAWG among the listed countries pertain to sexual offences, exemplified by rape, defilement and physical abuse, which include marital rape, sexual assault, sexual harassment and trafficking women for the purposes of prostitution or sexual exploitation and sexual slavery.

The four countries under review have all signed and ratified various human rights instruments that call for the protection of women from violence. These include the UDHR, the ICCPR, the ICESCR, CEDAW, DEVAW, the CRC, the ACHPR and the ACRWC.

Many of the provisions contained in these instruments find expression in the national constitutions and legislation in the countries from which the cases in this Handbook are drawn. The constitutions of each country underscore the essential values of human rights, equity, inclusiveness, non-discrimination, protection of marginalised groups and equality. It is incumbent on each state to protect its citizens, particularly vulnerable groups, which comprise, *inter alia*, women and girl children.

The state acts through institutions such as the judiciary. The main thematic areas here have been premised on the eight incident types of VAWG. Judges and judicial officers are given the primary responsibility of interpreting laws and rules that pertain to VAWG and enjoined to ensure the effective implementation of these in order to uphold guarantees for the protection of fundamental freedoms and rights.

As judges undertake this primary responsibility, they will inevitably find gaps in the law, and are therefore called on to address the ambiguities or conflicts that may arise. The judiciary is an arm of government that is vested with judicial authority, thus it is the lead agency in the development and implementation of formal legal responses that uphold the rule of law, human rights and all the values enshrined in the Constitution and statutes. As the principle administrator of justice, the judiciary is uniquely positioned to take leadership by interpreting the Constitution and statutes to define citizenly obligations by setting standards towards a value-based society that respects human rights and freedoms spelt out in the Constitution. In the course of interpreting the laws, the judiciary also performs the role of law-makers by legislating from the Bench. In the process of addressing ambiguity

and conflicts existing between legislative provisions, “judge-made” laws are developed, and these are further propagated through the doctrine of *stare decisis* as precedents are handed down to lower courts.

Within the hierarchy of courts, the various courts of appeal are some of the superior courts. For instance, the Kenya Court of Appeal is established under Article 164 of the Constitution with jurisdiction to hear appeals from the High Courts and other courts or tribunals as prescribed by an Act of Parliament. The Court of Appeal hears first appeals, which comprise decisions determined by the High Court in its original jurisdiction, and second appeals, which emanate from the Magistrates’ Courts, with the first appeal heard by the High Court. As regards first appeals, the Court of Appeal is supposed to consider both matters of law and facts; in second appeals, it considers only matters of law. This is because it is presumed that the Magistrates’ Courts and the High Court will have considered and made conclusions on matters of fact. Most of the appeals that come to the Court of Appeal on sexual and gender-based violence are criminal in nature.

A similar set-up is seen in the other countries, with slight modifications. In Tanzania, the judicial system has the Court of Appeal as the supreme court and the final appellate court. It is a union court in that it has territorial jurisdiction over appeals emanating from both the High Court of Tanzania Mainland and the High Court of Zanzibar. Rwanda’s Supreme Court is regarded as the highest court of the country. In Uganda also, the Supreme Court is the highest court as per the Constitution of Uganda 1995 as amended. This is an appellate court but is empowered to act as such with original jurisdiction in only one type of case: a presidential election petition.

All the four appellate courts are presided over by their respective chief justices. These courts have unlimited civil and criminal jurisdiction and hear appeals arising substantially from the lower courts, with exceptions as stipulated by the Constitution of each state. These appellate courts take mainly second appeals, except for Uganda, which has a Court of Appeal in between the Supreme Court and the High Court. Overall, the appellate courts determine matters on points of law. They entertain, *inter alia*, appeals on VAWG, including all the eight types of incidents. A large number of the appeals emanate from the high courts as first appeals, which are determined on both facts and the law.

The court has a role in ensuring that actors that have constitutional responsibilities perform their roles in ensuring compliance with the Constitution. Indeed, it is part of the mandate of the High Court in Kenya, under Article 165(3) of the Constitution, to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution. The entrenchment

of rights in the Constitution is not sufficient to ensure these are afforded to citizens. In addition to the enactment of provisions that ensure the protection of human rights, the state has to ensure compliance by state organs. Where the state fails to comply, it is the right of citizens to seek the enforcement of these rights by petitioning the court. Therefore, the state bears not only a negative duty to abstain from acts that infringe on fundamental rights and freedoms of its citizens but also a positive duty to take active steps to ensure protection and realisation of these rights. This means that both action and inaction by state organs attract a cause of action. Where the court holds perpetrators to account, it helps reduce cases of GBV. Many victims of GBV report the abuses suffered to actors in the justice system while seeking remedies; through *stare decisis*, superior courts of record inform the process through which these persons may attain justice. The law serves interests, and judges must seek to discover precisely what those interests are in order to inform themselves better about the manner in which effect should be given to the law. The interpretive function should always consider the history of the law, the purposes it served when it was made and the interests it currently serves. If the judiciary is not fully involved in conceptualising and overseeing at least those aspects of the reforms that affect the work of the courts, the reforms will fail or else they will never realise their full potential.

Appellate courts mentor the subordinate judicial officers in dealing with GBV cases. Appellate court decisions that overturn trial judgements should clearly advise the lower court, the litigants and the public of the nature of the perceived error made by the first instance court and the reasons why the judgement of the court below is being reversed. The appellate court's reasoning and decision would be sufficient guidance such that the same mistake is not repeated.

The judiciary builds public trust and confidence in the justice system. Consistency and transparency in the manner in which courts handle matters posit a united front and create legitimacy of decisions. Deciding matters is deeply individualised, to address the peculiar circumstances of each case, but the reasons must be properly founded and explained. Court users perceive the judiciary to be the entirety of the criminal justice system and they even see its decisions as reflective of its efficiency. The more legitimate the court's decisions seem to the public, the better the enforcement efforts in the fight against GBV.

Courts play a key role in advancing the rule of law. The past has illustrated the ways conflict evolves to include sexual violence as a weapon of war. Justice Adrian Dudley Saunders, Justice of the Caribbean Court of Justice, notes that the rule of law in this context includes legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of the powers, equality before the law and

the absence of arbitrariness. Each sentencing is a drop in the ocean from of those that other courts must consider to decide whether a possible penalty is fair and proper; the courts consider previous sentencing patterns for similar offences to fashion the sentencing regime. In the circumstances, a punishment considered too lenient would negatively affect the attitude to deterring potential offenders. It follows that courts must create a sentencing regime that is intolerant of VAWG in any form. The judiciary has the influence to deter perpetrators from daring to inflict violence on vulnerable persons.

In order to perform said roles, the courts have to pay extra attention to the culture and aspirations of the people. Justice Adrian Dudley Saunders has recommended that opportunities be created for a continuing dialogue to take place between social scientists on the one hand and judges on the other; such a dialogue can enable judges to make linkages between their decision-making in general and national development goals. Understanding of society is a critical source of the elements that inform the exercise of judicial discretion; it ensures the interpretations are in sync with evolving standards of humanity and with internationally accepted norms.

Annex 1

Statutory Laws and Cases

Annex 1

Statutory Laws and Cases

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Kenya	SOA: S.3 Rape S.8 Defilement S.10 Gang rape	Minimum sentences imposed to limit judicial discretion to be exercised in favour of lenient sentences	SOA S.3: Rape – imprisonment for a minimum of 10 years, which may be enhanced to life imprisonment S.8: Defilement of a child aged 11 years or less shall on conviction be sentenced to life imprisonment S.8: Defilement of a child aged 12–15 years or less shall on conviction be sentenced to imprisonment for a minimum of 20 years S.8: Defilement of a child aged 16–18 years or less shall on conviction be sentenced to imprisonment for a minimum of 15 years S.10. Gang rape: Imprisonment for a minimum of 15 years, which may be enhanced to life imprisonment *Where the accused is a minor, the court may, on conviction, sentence the minor in accordance with the provisions of the Borstal Institutions Act and the Children Act	C.K. (A Child) through Ripples International as her guardian and next friend & 11 others v Commissioner of Police/ Inspector General of National Police Service & 3 others [2012] eKLR C.K.W. v Attorney General & another [2014] eKLR Dennis Osoro Obiri v Republic [2014] eKLR Esther Nangwana Nandi v Jones Chewe Bobo [2006] eKLR Joseph Lotoyo v Republic [2011] eKLR MBO v Republic [2010] eKLR POO. (A Minor) v DPP & another [2017] eKLR W.J. & L.N. v Astarikoh & 9 others [2011] eKLR

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Rwanda	OLPC Art. 196: Rape Art. 198: Marital rape Art. 200: Marital rape Art. 190: Child defilement Art. 192: Child defilement by a person having authority over the child Art. 193: Child defilement resulting in death or an incurable illness Art. 201: Penalty for rape with intention to infect another person with an infection	Art. 38 GBV Law – right of the victim of GBV to claim damages	OLPC Art. 197: Rape – general penalty, imprisonment of more than 5–7 years • If victim is elderly, a person with disability or a sick person, imprisonment of 7–10 years and fine of 500,000–1,000,000FRw • If rape results in an incurable disease for the victim, imprisonment of 10–15 years. • If rape results in death of victim, life imprisonment Art. 199: <i>Marital rape</i> – imprisonment of at least 2 months but less than 6 months and fine of 100,000–300,000FRw If marital rape results in: • An ordinary disease, imprisonment of 6 months to 2 years • An incurable illness, imprisonment of more than 5–10 years • Death of the victim – life imprisonment Art. 191: <i>Child defilement</i> – life imprisonment with special provisions Art. 192: <i>Child defilement by a person having authority over the child</i> – life imprisonment with special provisions and a fine of 100,000–500,000FRw Art. 193: <i>Child defilement has resulted in death or incurable illness</i> – life imprisonment with special provisions and a fine 500,000–1,000,000FRw Art. 201: <i>Rape with intention to infect another person with an infection</i> – imprisonment of 20–25 years	<i>Prosecution v M</i> [2010] RWSC 0321 <i>Prosecution v Maniragaba</i> [2015] RWSC 0257 <i>Prosecution v Nkurinzira</i> [2015] RWSC 0118 <i>Prosecutor v Jean Paul Akayesu</i> [1998] ICTR -94-4-T

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
Tanzania	<p>Penal Code</p> <p>S.130: Rape</p> <p>S.131A: Gang rape</p> <p>S.158(1): Incest by male</p> <p>S.133: Abduction</p> <p>S.134: Abduction of girls under 16 years</p> <p>S.138: Defilement by husband of wife under 15 years</p>	<p>Rape: Compensation of amount determined by the court to the victim (S.131)</p> <p>Minimum sentences imposed so as to act as deterrent to rape convicts</p> <p>Incest: Incest by male definition limited by excluding victims such as nieces</p> <p>Requirement of conduct of <i>voir dire</i> for a victim/witness under 13, testimony no longer a requirement.</p>	<p>Penal Code S.131(1): Punishment for rape – imprisonment of minimum of 30 years, with corporal punishment and a fine and an order to pay compensation of amount determined by the court to the victim</p> <p>S.131(2): Punishment for rape – where accused is a minor (less than 18 years), he shall:</p> <p>a. If a first-time offender, imprisonment only</p> <p>b. If a second-time offender, be sentenced to imprisonment of 12 months with corporal punishment</p> <p>c. If a third-time and recidivist offender, be sentenced to life imprisonment</p> <p>S.131(3): Punishment for rape – where victim is a girl under 10 years, the offender shall on conviction be sentenced to life imprisonment</p> <p>S.131A2: Gang rape – life imprisonment, regardless of actual role played in the rape</p> <p>S.158(1)(a): Incest to child below 18 years – imprisonment of minimum of 30 years</p> <p>S.158(1)(b): Incest by male – If the female is above 18 years, imprisonment of minimum of 20 years</p> <p>S.133: Abduction of a woman over 16 years – 7 years' imprisonment</p> <p>S.134: Abduction of a woman below 16 years – punishment not specified</p> <p>S.138(1): Defilement of a wife under 15 years – imprisonment of minimum of 10 years</p> <p>S.138(2): Parents/guardian of victim of defilement under 15 years – 10 years' imprisonment</p>	<p><i>Diha Mafali v Republic</i> [2015] TZCA 245</p> <p><i>DPP v Jamal Waziri</i> [2003] TLR 324</p> <p><i>John Martin alias Marwa v Republic</i> [2017] Criminal Application No. 20 of 2014</p> <p><i>Lawama Dedu v Republic</i> [2016] Criminal Appeal No. 318 of 2015</p> <p><i>Leonard Jonathan v Republic</i> [1980] TLR 331</p> <p><i>Thomas Adam v Republic</i> [2012] Criminal Appeal No. 134 of 2010</p>

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Uganda	PCA S.123: Rape S.129: Defilement of girl under 18 years S.130: Defilement of idiots or imbeciles PCA Amendment 2007 S.129: Aggravated defilement		PCA S.124: Rape – death penalty S.130: Defilement of idiots and imbeciles – imprisonment of 14 years	<i>Adoli Dickens v Uganda</i> [2017] COA Criminal Appeal No. 41 of 2010 <i>Bizimana Jean Claude v Uganda</i> [2014] COA Criminal Appeal No. 143 of 2010 <i>Candia Akim v Uganda</i> [2016] COA Criminal Appeal No. 181 of 2009 <i>Diku Francisko v Uganda</i> [2010] UGCA 304 <i>Kaserebanyi James v Uganda</i> SC [2018] Criminal Appeal No. 10 of 2014 <i>Livingstone Ssewanyana v Uganda</i> [2010] Criminal Appeal No. 19 of 2006 <i>Muhezi Alex and Hassan Bainomugisha v Uganda</i> [2010] SC Criminal Appeal No. 21 of 2005 <i>Mureeba Janet and 2 others v Uganda</i> Criminal Appeal No. 007 of 2002 <i>Nfutimukiza Isaya v Uganda</i> COA Criminal Appeal No. 41 of 1999 <i>Ntambala Fred v Uganda</i> [2018] UGSC 34 of 2015 <i>Opira Mathew v Uganda</i> COA Criminal Appeal No. 114 of 1999 <i>Oterna David v Uganda</i> COA Criminal Appeal No. 155 of 2008 <i>Ssendyose Joseph v Uganda</i> [2010] UGSC 150 <i>Kato Sula v Uganda</i> COA Criminal Appeal No. 30 of 1999 <i>Uganda v Atwiine Hamed</i> [2014] HC Criminal Case 236

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
				<p><i>Uganda v Baikamanya</i> [2014] UGHC 25 of 2012</p> <p><i>Uganda v Dimba Pascal</i> [2017] UGHC 89 of 2014</p> <p><i>Uganda v Kasujja Ivan</i> [2014] UGHC 0004</p> <p><i>Uganda v Kusemererwa Julius</i> [2015] UGHC 15 of 2014</p> <p><i>Uganda v Muhwezi Lamuel</i> [2012] UGHC 292 of 2010</p> <p><i>Uganda v Mujuzi Kalooli</i> Criminal Session No. 116- 2009</p> <p><i>Uganda v Mukibi</i> HC Criminal Session No. 0008-2014</p> <p><i>Uganda v Najja Sebango</i> [2012] UGHC 65</p> <p><i>Uganda v Nyanzi David</i> HC Session Case No. 116 of 2016</p> <p><i>Uganda v Okuni Dennis</i> HC Criminal Session Case No. 0025 of 2012</p> <p><i>Uganda v Okwera James</i> [2012] UGHC 144</p> <p><i>Uganda v Olega Muhamad</i> [2016] UGHC 33</p> <p><i>Uganda v Tumwesigye Zirabwa alias Sigwa</i> HC Criminal Session Case No. 92 of 2011</p> <p><i>Uganda v Bukonya Abubakali</i> [2013] UGHC 105</p> <p><i>Yiga Hamidu v Uganda</i> [2004] UGHC 5 of 2002</p>

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Core incident type: Sexual assault				
Kenya	SOA: Sexual assault		Sexual assault: Imprisonment for not less than 10 years and a maximum period of life imprisonment	
Rwanda	OLPC Art. 182: Indecent assault Art. 183: Indecent assault against a child Art. 184: Indecent assault with violence, trickery or threats against a person aged 18 or above Art. 185: Public indecent assault		GBV Law Art. 27: <i>Violence by exercising sexual torture or intending to commit sexual torture</i> : Life imprisonment with special provisions Art. 31: <i>Sexually indecent acts against someone</i> : Imprisonment of between 2 and 5 years and a fine between 100,000 and 200,000RWF Art. 32: <i>Sexual violence against an elderly person or a handicapped person</i> : Imprisonment of 10–15 years and a fine between 500,000 and 1,000,000RWF	
Tanzania	Penal Code S.135: Sexual assault and indecent assaults on women	Miscellaneous Rights of Action Law of Marriage Act S.69: Age of marriage for girls 15 years and need for consent of parents for marriage of girls under 15 years found to be unconstitutional.	Penal Code S.135: Minimum imprisonment of 5 years or fine not exceeding TSh 300,000	

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
		S.70: Right to damages for breach of promise of marriage S.71: Limitation of actions for breach of promise S.72: Right to return of gifts S.73: Right to damages for adultery S.74: Right to damages for enticement Assessment of damages for adultery or enticement		
Uganda	PCA S.125: Attempt to commit rape S.129(2): Attempted defilement S.128(1): Indecent assaults		PCA S.125: <i>Attempted rape</i> – life imprisonment S.128(1): <i>Indecent assaults</i> – 14 years with or without corporal punishment S.129(2): <i>Attempted defilement</i> – 18 years' imprisonment with or without corporal punishment	
Core incident type: Physical assault				
Kenya			Court took into account the impact of the violence that the wife had suffered at the hands of her husband when sentencing her	<i>Republic v Jackline Kwamboka Omboji</i> [2018] eKLR

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Rwanda	OLPC Art. 148: Aggravated assault and battery Art. 149: Battery or bodily injuries resulting in incapacity Art. 150: Battery or bodily injuries resulting in incurable illness or permanent incapacity Art. 152: Battery or causing bodily injuries against a child or a person unable to defend him/herself Art. 154: Administering a substance to a person which may cause illness or death Art. 155: Intentional minor violence Art. 151: Battery or bodily injuries resulting in death Art. 158: Assault and battery resulting from lack of foresight and precaution Art. 159: Causing illness to another person		A judge will have to determine the sentence according to the guilt of the offender, taking into account the motives, previous history, circumstances surrounding the case and personal background of the offender (OLPC Art. 69) The Code of Criminal Procedure offers general provisions on possible penalties, such as imprisonment (Arts 218–220), fines (Arts 221–224) and public interest works (community service) (Art. 225) and their execution (Arts 226–246) OLPC Arts 35–96: General provisions on penalties and their execution, e.g. penalty categorisation, mitigating and aggravating circumstances and prescription of sentences	<i>Prosecution v Cyuma Miruho</i> [0142/10/CS] RWSC <i>Prosecution v Fatirakumutima</i> [2013] RWSC 0129 <i>Prosecution v Gatare</i> [2014] RWSC 0317 <i>Prosecution v Mpitabakana</i> [2014] RWSC 0129 <i>Prosecution v Naramabuye</i> [2014] RWSC 0071 <i>Prosecution v Nshutirakiza</i> [2015] RWSC 0047 of 2011 <i>Prosecution v Uwizeye Eustache</i> [2017] RWSC 0225 of 2013

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Tanzania	Law of Marriage Act S.66 prohibits a spouse from inflicting corporal punishment on the other spouse. Penal Code S.240: Common assaults S.241: Assaults causing actual bodily harm		Penal Code S.240: Common assault – imprisonment for 1 year S.241: Assault causing bodily harm – imprisonment for 5 years	
Uganda	PCA Chapter XXIII – Assaults Causing Grievous Bodily Harm S.219: Doing grievous harm			
Core incident type: Psychological abuse				
Kenya	–	–	–	
Rwanda	GBV Law Art. 26: Distorting the tranquility of one's spouse due to polygamy, adultery, dowry, reproduction and his/her natural physiognomy, or threatening to deprive one's spouse of the right to property and to employment		GBV Law Art. 26: Distorting the tranquility of one's spouse – imprisonment of 6 months to 2 years and a fine between 50,000 and 200,000Rwf Art. 20: Harassing one's spouse – imprisonment of 6 months to 2 years Art. 14: Adultery for offender and co-offender – imprisonment of between 6 months and 2 years	

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	OLPC (2012) Art. 203: Sexual harassment Art. 238: Refusal to provide support to spouse, descendants or ascendants Art. 239: Denial of freedom to practise family planning Art. 240: Harassment of spouse Art. 243: Family desertion Chapter IV: Threats to Harm a Person Art. 169: Threat to commit an act qualified as terrorism Art. 170: Verbal threats Art. 171: Threat by gestures, signs, images or a symbol Art. 172: Written threats Art. 173: Blackmail Art. 174: Penalty for blackmail			

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Tanzania	Penal Code S.138D: Sexual harassment S.195 and S.196: Manslaughter and murder (under provocation/diminished responsibility/emotional stress/cruelty/self-defence, insanity)		Penal Code S.13 D(1): Minimum sentence of 5 years of imprisonment <i>Murder</i> – maximum death	Agnes Doris Liundi v Republic [1980] TZCA 46 Jenesia Philemon v Republic [2011] TZCA 179 of 2009 Mwita Masabo v Republic [2002] TZCA 56
Uganda	PCA S.128(3): Indecent assault		PCA S.128(3): Indecent assault – 1 year imprisonment	
Core incident type: Economic abuse				
Kenya	Constitution of Kenya Arts 10, 43	It is a violation of the Constitution to detain patients for failure to pay medical bills; access to quality reproductive health care.	–	MAO & another v AG & others [2015] eKLR

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Rwanda	OLPC Art. 241: Disposal of marital property without consent of either spouse Art. 330: Appropriating a spouse's personal belonging Art. 404: Causing fire on another person's property Art. 406: Demolishing or damaging another person's buildings Distorting the tranquility of one's spouse by threatening to deprive one's spouse of the right to property and to employment			<i>Mujawimana et al. v Bank of Kigali Ltd (BK)</i> [2016] RWSC 0008 of 2014 <i>Mukamuseri Catherine v Mukagasana Domitilla</i> [2013] RWSC 0087 of 2012 <i>Rutabayiru v Batamuliza</i> [2016] RWSC 0013
Tanzania	Penal Code S.166: Desertion of children S.167: Neglecting to provide food and other necessities of life for children.			

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Uganda	PCA S.199: Responsibility of person who has charge of another S.200: Duty of head of family S.223: Failure to supply necessaries Chapter XXXII Offences Causing Injury to Property			<i>Mifumi and Ors v Attorney General and Kenneth Kakuru</i> [2014] UGSC 2
Core incident type: Forced marriage				
Kenya	Marriage Act S.3(2): Equal rights in marriage S.4: 18 years as minimum age of marriage for all women across religious and cultural divides		Marriage Act S.4: Violation of minimum age requirement – imprisonment for a term not exceeding 5 years or a fine not exceeding KSh 1 million or both	<i>Council of Imams and Preachers of Kenya, Malindi & 4 others v The Attorney General & 5 others</i> [2015] eKLR
Rwanda	OLPC Art. 275: Forcing a person to marry or not to marry a partner of his/her choice Art. 274: Kidnapping or confinement of a person with intent to live together as wife and husband			<i>Prosecution v Nshimiyimana</i> [2016] RWSC 00332 <i>Republic v Modest & another</i> [1969] Criminal Revision No. 26 of 1968

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Tanzania	<p>Art. 194: Living together with a child as husband or wife</p> <p>Art. 195: Participating in early or forced marriage of a minor</p> <p>Law of Marriage Act</p> <p>S.16 provides that marriage can be contracted only on the free will of parties</p> <p>S.13(1): 18 years as age of marriage for boys and 15 years for girls</p> <p>S.13(2) allows child marriages; provides that a party may enter into a marriage with the consent of the court, if he/she has attained the age of 14</p> <p>Penal Code</p> <p>S.133 and S.134: Abduction of girls under 16 years and above 16 years</p> <p>S.138: Defilement by husband of wife under 15 years</p>		<p>Penal Code: Abduction with intent to marry – 7 years of imprisonment</p> <p>Defilement by husband of wife under 15 years – 10 years of imprisonment</p>	<p><i>Bashford v Tuli</i> [1971] HCD 76</p> <p><i>Challimba Chimbalemba v Republic</i> [2011] Criminal Appeal No. 368 of 2008</p> <p><i>Nyakanga v Mehego</i> [1971] HCD 270</p> <p><i>Rebecca Z. Gyumiv The Attorney General</i></p> <p>Misc. Civil Cause No. 5 of 2016</p>

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
Uganda	PCA S.126(a): Abduction with intent to marry		PCA S.126(a): Abduction with intent to marry – 7 years imprisonment	<i>Juuko Musa v Uganda</i> [2010] UGCA 180 <i>Uganda v Abiriga Michael alias Mayia and Anor</i> Criminal Case No. 0094 of 2016 <i>Uganda v Akandinda Jackson HC</i> Criminal Case No. 69 of 2014 <i>Uganda v Kiryagana Emmanuel/HCT/03/CR/SC/0053</i> of 2011 <i>Uganda v Mwanje Aggrey/HCT/03/CR/SC/0416</i> of 2015 <i>Uganda v Ngabanziza Charles Mubende SC</i> No. 104 of 2016 <i>Uganda v Okello Steven</i> [2015] UGHC 093 <i>Uganda v Tumusiime Wilson HC</i> Criminal Session No. 137 of 2016
Core incident type: Female genital mutilation/cutting				
Kenya	Prohibition of FGM Act (2011) S.19(1): A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person, commits an offence		Prohibition of FGM Act S.19(2): If, in the process of committing the offence of FGM, a person causes the death of another – imprisonment for life	
Rwanda	–	–	–	–

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
Tanzania	Penal Code S.169A: criminalises FGM; protects women below 18 years old, leaving out adult women who are sometimes mutilated forcefully during child birth		Penal Code S.169A: Imprisonment between 5 and 15 years and fine not exceeding TSh 300,000	
Uganda	Prohibition of FGM Act S.2: Offence to carry out FGM S.3: Aggravated FGM is committed where death occurs as a result of FGM, the offender is a parent, guardian or a person having authority or control over the victim, the victim suffers a disability, the victim is infected with HIV as a result of FGM or FGM is done by a health worker S.4: Carrying out FGM on oneself, attempting to carry out FGM, procuring, aiding abetting FGM and participating in events leading to FGM	A magistrates' court is empowered on application to issue a protection order if the court is satisfied that a girl or woman is likely to undergo FGM (S.14) After convicting a person under this act, the court may, in addition to the punishment provided, order the accused to pay compensation to the victim for injuries suffered. Such order shall be deemed to be a decree enforceable under the Civil Procedure Act (S.13)	Prohibition of FGM Act S.2: <i>Carrying out FGM</i> – Imprisonment for a term not exceeding 10 years S.3(2): <i>Aggravated FGM</i> – imprisonment for life S.16(2): <i>Failure to report</i> – fine not exceeding 12 currency points or imprisonment not exceeding 6 months or both S.12 and S.13: <i>Discrimination and stigmatisation</i> – imprisonment for not more than 5 years	

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	S.16: Duty to report FGM acts or intent to report to the police S.11 and S.12: Discrimination, stigmatisation of a female who has not undergone FGM or a person who discriminates or stigmatises another person whose wife, daughter or relative has not undergone FGM			
Core incident type: Other GBV				
Kenya	Employment Act S.6: Sexual harassment in the work place by an employer, representative of an employer or co-worker S.88: Sexual harassment at workplace Counter Trafficking in Persons Act: Trafficking in persons for purposes of exploitation and that of financing, controlling, aiding or abetting the commission of the offence of trafficking in persons for purposes of exploitation		Counter Trafficking in Persons Act S.3(5): <i>Trafficking in persons</i> – imprisonment for a term of not less than 30 years or a fine of not less than KSh 30 million or both. In both cases, a repeat offender is liable to imprisonment for life	George Hezron Mwakio v Republic [2010] eKLR GMV v Bank of Africa Kenya Limited [2013] eKLR NML v Peter Petrausch [2015] eKLR PO v Board of Trustees, AF & 2 others [2014] Sheikh Ali Samoja v Republic [2016] eKLR

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Rwanda	GBV Law Art. 12: GBV-related cases shall be heard and pronounced at the scene of the crime, if it is convenient for the victim and if it is possible Art. 29: Intentional transmission of a terminal disease constitutes GBV OPLC Art. 153: Starving or denying drink to person for whom one is responsible Art. 204: Prostitution Art. 206: Encouraging, inciting or manipulating a person for the purpose of prostitution	GBV is a grounds for divorce (GBV Law Art. 6)	OLPC Art. 71: Factors taken into account by the judge in determining a penalty S.2: Mitigating factors/circumstances A.72: Minority of offender or an accomplice less than 18 years Arts 73–78: Provocation Arts 79–82: Recidivism Art. 84: Concurrence of offences Arts 85–87: Suspension of sentence/penalty Arts 89–94: Prescription of penalties Art. 95: Prescription of civil damages S.5: Ban on entry into a place and restriction of movement Art. 202: Penalties for the offence of GBV committed by use of medical or narcotic drugs, pictures, signs, speeches and writings Art. 245: Adultery Art. 252: Penalty for human trafficking Art. 253: Penalty for a person owning a place for human trafficking	Art. 7 GBV Law: The parent, trustee or any other person responsible for a child shall protect the latter against any GBV <i>RE v N.J.</i> [2015] RWHC 0787 [2015]

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	<p>Art. 207: Discouraging efforts to rehabilitate prostitutes</p> <p>Art. 208: Advertisement for facilitation of prostitution</p> <p>Art. 209: Running, managing or investing in a brothel</p> <p>Art. 210: Sharing the proceeds of prostitution</p> <p>Art. 211: Sharing the proceeds of prostitution by a child</p> <p>Art. 212: Aiding, abetting and protecting prostitution</p> <p>Art. 213: Providing a facility for prostitution</p> <p>Art. 273: Kidnapping and unlawful detention of a person</p> <p>Art. 274: Kidnapping or confinement of a person with intent to live together as wife and husband</p> <p>Art. 250: Definitions of human trafficking terms</p> <p>Art. 251: Participating in trafficking persons out of the country</p>		<p>Art. 246: Penalty for bigamy</p> <p>Art. 248: Penalty for cohabitation</p> <p>Art. 254: Penalty for buying a human being</p> <p>Art. 255: Penalties for a person engaged in trafficking in a human being for the purpose of indecent practices</p> <p>Art. 256: Penalties for trafficking in persons as a profession</p> <p>Art. 259: Penalties for a person who engages in child trafficking for the purpose of prostitution or indecent practices</p> <p>Art. 260: Penalties for child trafficking and involving children in indecent practices through different ways</p> <p>Art. 257: Temporary seizure and confiscation of places used for human trafficking</p> <p>Art. 177: Penalties for torture</p> <p>Art. 157: Penalty for involuntary manslaughter</p> <p>GBV Law</p> <p>Art. 17: <i>Abduction</i> – imprisonment of 5–8 years and a fine between 100,000 and 200,000RWF</p> <p>Art. 21: <i>Concubinage</i> – imprisonment of 2–4 years and a fine between 100,000 and 200,000RWF</p> <p>Art. 22: <i>Polygamy</i> – imprisonment of 3–5 years and a fine between 300,000 and 500,000RWF</p>	

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	Art. 258: Child kidnapping Art. 231: Abandonment or neglect of a child Art. 232: Neglect or abandonment of a child causing disability, death or disappearance Art. 233: Inciting parents to abandon a child Art. 234: Abandonment or neglect of an unable dependent Art. 235: Abandonment or neglect of an unable person causing serious illness or death Art. 236: Harassment of an elderly person Art. 403: Arson which results in death of persons Art. 218: Inflicting severe suffering on a child, harassing or imposing severe punishments on him/her Art. 219: Offering alcoholic beverages or tobacco to a child Art. 220: Engaging a child in narcotic drugs and arms trafficking or in the trade of other illegal products Art. 221: Exploiting a child by involving him/her in armed conflicts		Art. 22: Any person involved intentionally in polygamy by issuing documents or officiating such marriage – imprisonment of 5–8 years Art. 23: Sexual slavery – imprisonment of 10–15 years and a fine between 500,000 and 1,000,000RWF Art. 24: Sexual harassment way of orders, intimidation and terror over a person – imprisonment of 2–5 years and a fine between 100,000 and 200,000RWF Art. 34: Defamation on grounds of gender aimed at disparaging his/her personality or his/her work – imprisonment 2–5 years and a fine between 100,000 and 300,000RWF Art. 35: Disturbance of someone resulting in deprivation rights and thus GBV – imprisonment of 6 months–2 years and a fine between 100,000 and 500,000RWF Art. 36: Refusal to assist the victim of violence or to testify – imprisonment of 6 months to 2 years and a fine between 50,000 and 200,000RWF Art. 28]: Gender-based human trafficking – imprisonment of 15–20 years and a fine between 500,000 and 2,000,000RWF Art. 29: Intentionally transmitting a terminal disease sexually to someone else – life imprisonment Art. 30: Using drugs, narcotics, pictures, signs, language or writing to stir up sexual violence – imprisonment of 5–8 years and a fine between 100,000 and 200,000RWF	

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Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	Art. 223: Refusal to surrender a child Art. 224: Abduction of a child from his/her parents or guardians or where he/she habitually resides Art. 225: Participating in the adoption of a child for the purpose of trafficking Art. 226: Refusal to provide care to a child or unable dependant Art. 227: Child neglect by a parent or guardian without reasonable cause Art. 228: Neglect of a child on the basis of sex Art. 229: Recording and disseminating a child's pornographic picture or voice Art. 230: Advertising of children pornographic pictures Art. 187: Sexual torture Art. 188: Exhibition, sale or distribution of objects of sexual nature Art. 176: Torture Art. 178: Forced labour		Art. 18: Child neglect or harassment (putting someone in unrest condition by persecuting, nagging, scolding or insulting him/her and others) on the basis of sex/ gender discrimination or for purposes of spousal harassment –imprisonment of 6 months to 3 years	

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	<p>Art. 161: Throwing at another person anything likely to disturb or dirty him/her</p> <p>Art. 162 Self-induced abortion</p> <p>Art. 163: Causing a woman to abort with or without her consent</p> <p>Art. 164: Abortion resulting in death</p> <p>Art. 156: Definition of involuntary manslaughter and unintentional bodily injuries</p> <p>Art. 137: Manslaughter and intentional bodily injuries</p> <p>Art. 138: Premeditation</p> <p>Art. 139: Ambush</p> <p>Art. 140: Murder</p> <p>Art. 142: Spousal homicide</p> <p>Art. 143: Infanticide</p> <p>Art. 144: Poisoning</p> <p>Art. 145: Homicide committed by degrading acts or preceded by another felony</p> <p>S.3: Voluntary manslaughter, assault and battery</p> <p>Art. 215: Refusal to report offences of immorality committed against a child</p> <p>Art. 216: Refusal to assist a victim of violence or to testify on violence</p> <p>Art. 244: Adultery</p> <p>Art. 247: Cohabitation</p>			

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	<p>Art. 249: Prosecution of adultery and cohabitation</p> <p>Art. 568: False declaration to civil status registrar GBV Law</p> <p>Art. 8: Failure to cater for child under one's trusteeship just because of whether the child is male or female.</p> <p>Art. 9: Forbidden to fire a woman just because she is pregnant or on maternity leave</p> <p>Art. 10: Pregnancy and delivery shall not constitute causes for depriving a student of her right to education</p> <p>Art. 10: Use of drugs, films, signs, language, and other means with the intention of exercising GBV</p> <p>Art. 10: Obligation to prevent gender-based violence, rescue and call for rescue to assist the victims of this violence.</p> <p>Art. 11: Indecent (acts or behaviour contrary to good morals and politeness, degrading human being) conduct and behaviour</p>			

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Tanzania	Prevention and Combating of Corruption Act S.25: "Sextortion" Penal Code S.196: Murder S.132(1): Attempted rape S.137: Defilement of idiots or imbeciles S.138B: Sexual exploitation of children S.138C: Grave sexual abuse S.139: Procuration for prostitution Anti-Trafficking in Persons Act S.4–S.7: Trafficking in persons Penal Code S.140: Procuring rape S.141: Householder permitting defilement of a girl under 15 years on premises S.142: Permitting defilement of girl under 16 years on his premises. S.143: Detention in any premises with intent or in brothel S.143: Detention in any premises with intent or in brothel		Prevention and Combating of Corruption Act S.25: "Sextortion" – a fine of not less than 1–5 million TSh or imprisonment for not less than 3–5 years or both Penal Code S.196: <i>Murder</i> – maximum sentence of death S.132(1): <i>Attempted rape</i> – life imprisonment maximum sentence or imprisonment for not less than 30 years with or without corporal punishment S.137 <i>Defilement of idiots</i> – 14 years of imprisonment with or without corporal punishment S.138B: <i>Sexual exploitation of children</i> – minimum sentence 5 years' and maximum 20 years of imprisonment S.138C(2)(a): <i>Grave sexual abuse</i> – imprisonment for terms not less than 15 and above 30 years, compensation of amount determined by court to victim S.138C(2)(b) if the victim is under 15 years' imprisonment for not less than 20 years and not exceeding 30 years plus compensation to victim S.139: <i>Procuration for prostitution</i> – imprisonment for not less than 10 years and exceeding 20 years or fine not less than TSh 100,000 and not exceeding TSh 300,000 or both fine and imprisonment	

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	S.143: Detention in any premises with intent or in brothel S.149: Conspiracy to induce unlawful sexual intercourse S.163: Fraudulent pretence of marriage Cybercrimes Act S.13: Child pornography S.23: Cyber bullying		Anti-Trafficking in Persons Act S.4–S.7: <i>Trafficking in persons</i> – fine not less than TSh 5 million and not more than TSh 100 million or imprisonment for not less than 2 years Penal Code S.140: <i>Procuring rape</i> – fine of not less than TSh 100,000–300,000 or imprisonment for not less than 10 years and not exceeding 20 years or both fine and imprisonment S.141: <i>Permitting defilement of a girl under 15 years on premises</i> – imprisonment of 5 years and under 16 years is guilty of an offence S.149: <i>Conspiracy to induce unlawful sexual intercourse</i> – imprisonment for 3 years S.163: <i>Fraudulent pretence of marriage</i> – imprisonment for 10 years Cybercrimes Act S.13: Child pornography – fine not less than TSh 15 million or 3 times of undue advantage received or imprisonment for a term not less than 7 years S.23: <i>Cyber bullying</i> – fine not less than TSh 5 million or imprisonment not less than 3 years.	

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
Uganda	<p>PCA Chapter XIV S.131–S.149: All offences against morality, e.g. S.131: Procuration; S.149: Incest</p> <p>S.156: Desertion of children S.157: Neglecting to provide food etc. for children</p> <p>S.159: Child stealing S.187: Manslaughter S.188: Murder S.204: Attempt to murder and other offences connected with murder and endangering life or health, criminal recklessness and negligence (Chapters XX, XXI, XXII)</p> <p>S.219: Doing grievous harm Prevention of Trafficking in Persons Act S.10(2): Trafficking or aggravated trafficking in persons and does not report to police or other relevant authority</p>		<p>PCA S.131: Procuration – 7 years' imprisonment Prevention of Trafficking in Persons Act S.10: Trafficking or aggravated trafficking in persons and does not report to police or other relevant authority – a fine of five thousand currency points or imprisonment for six months S.3(1): Trafficking in persons – imprisonment for 15 years S.4: Aggravated trafficking – imprisonment for life, but can also be punishable with death if the offence is committed under any of the circumstances set out in S.5 of the Act International Criminal Court Act S.9: War crime – imprisonment for life</p>	<p>Uganda v Natukunda Faith [2012] UGHC 001 CEHURD & 3 others v The Attorney General [2011] CEHURD & 3 others v The Attorney General [2013] Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi [2007] UGHC 52 of 2006</p>

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	<p>S.3: Trafficking in person S4: Aggravated trafficking, where the victim of trafficking is a child; adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation; the offence is committed by a public officer, military personnel or law enforcement officer or the victim dies, becomes a person of unsound mind, suffers mutilation or gets infected with HIV/AIDS or any other life-threatening illness as a result of such trafficking.</p>			

(Continued)

Table A1. Statutory Laws Applicable to VAWG in Commonwealth Member Countries in East Africa (Continued)

Country	Legislative instrument/ provision	Measures	Sanctions	Case law
	<p>International Criminal Court Act S.9: Any person who commits a war crime (committing rape, sexual slavery enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence) in Uganda is liable on conviction to imprisonment for life</p> <p>Employment Act S.7(1): Sexual harassment – lodge a complaint with a labour officer who is empowered to make all of the orders he/she could have made if the complaint related to unjustified disciplinary penalty or unjustified dismissal</p> <p>Employment (Sexual Harassment Regulations)</p>			

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG

Country	Legislative instrument/provision	Measures	Sanctions	Case law
Kenya	<p>The Children Act makes provisions for the safeguarding of the rights and welfare of children, prohibitions and offences under Child Offenders Rules:</p> <p>These apply to proceedings with respect to a child who is charged with an offence. It is the duty of the court to ensure that the rules are implemented to enhance access to justice by children in conflict with the law</p> <p>Protection against Domestic Violence Act: Prevention, protection and assistance to internally displaced persons and Affected Communities Act</p> <p>Matrimonial Property Act provides for the rights and responsibilities of spouses in relation to matrimonial property</p> <p>Evidence Act (S. 124)</p> <p>Criminal Procedure Code</p> <p>Children Act (S. 13, S. 14, S. 15, S. 18)</p> <p>Civil Procedure Act (see Order 32 of Civil Procedure Rules)</p> <p>Police Act</p> <p>Law of Succession Act (S. 29, S. 35, S. 38, S. 40)</p> <p>The Victim Protection Act provides for the protection of victims of crime and abuse of power, to provide them with better information and support services, reparations and compensation and to provide special protection for vulnerable victims</p>	<p>Protection/restraining orders (S.8):</p> <ul style="list-style-type: none"> • Interim <i>ex parte</i> protection order (S.12) to remove the perpetrator from the matrimonial home • Protection order granting a victim exclusive occupation of the shared residence or a specified part • Restitution or compensation to the victim for, among others, the costs of any medical or psychological treatment incurred by the victim; the costs of necessary transportation, victim restitution, accommodation and other living expenses relating to the court proceedings leading to the conviction; or any other relief (S.26 and S.24) <p>Under S.23, a compensation order made against a convicted offender may be enforced as a judgement in civil proceedings. However, such order is not a bar to civil proceedings (Victim Protection Act)</p>		<p><i>Esther Wanjiru Kiarie v Mary Wanjiru Githathu</i> [2016] eKLR</p> <p><i>FIDA v The Attorney General & another</i> [2018] eKLR</p> <p><i>In the Matter of the Estate of the Late George Cheriwo Chepkosiom</i> [2017] eKLR</p> <p><i>J.O.O. (also known as J.M.) v The Attorney General & 6 others</i> [2018] eKLR of 2014</p> <p><i>M G N K v A M G</i> [2016] eKLR</p> <p><i>Ngoka v Madzomba</i> [2002] eKLR</p> <p><i>P K M v R P M</i> [2017] eKLR</p> <p><i>P N N v Z W N</i> [2017] eKLR</p> <p><i>Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguithi & 6 others</i> [2014] eKLR</p> <p><i>Peter Mburu Echaria v Priscilla Njeri Echaria</i> [2007] eKLR</p> <p><i>R P M v P K M</i> [2015] eKLR</p>

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
	<p>Witness Protection Act: Many women victims of sexual abuses, domestic violence and other abuses endure suffering without seeking legal redress owing to, among other reasons, fear of retaliation. The Act establishes:</p> <ul style="list-style-type: none"> • The right to privacy from intrusion by the media, health professionals, and any other person • Witness protection programme 			
Rwanda	<p>2004 Gacaca law: For all formal proceedings in respect to the offences of rape and sexual torture it is mandatory that they are conducted in camera (Art. 38)</p> <p>Hearing in public or in camera: Constitution Art. 151 states that court proceedings shall be conducted in public, unless the court determines that proceedings should be in camera on the grounds that a public hearing may have an adverse effect on general public order or cause moral embarrassment</p> <p>Code of Criminal Procedure Art. 155 also states that hearings are generally conducted in public. According to this law, a court can order for a hearing to be conducted in camera when it finds that a public hearing can be detrimental to public order and good morals. The court should record whether (part of) the hearing was conducted in public or in camera, because this has to be indicated in the judgement (Art. 162)</p>		<p>OLPC</p> <p>Penalties include: Community service (Art. 49) Confiscation of property (Art. 51) Release on parole (Art. 64) Loss of civic rights (Arts 66–68) Punishment of the crime of discrimination and sectarian practices (Art. 136) Penalty for a person who delays to disclose or provide information (Art. 590)</p>	

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
	OLPC Art. 569: Refusal to appear before the judicial police, public prosecution or other authority Art. 570: Concealing an offence or failing to assist a person in danger Art. 571: Destruction of evidence Art. 572: Threats or intimidation with intent to influence a complaint Art. 573: Harboursing or hiding a suspect or an offender Art. 574: Hiding a dead body of a murdered person Art. 575: Denial of justice Art. 576: Refusal to testify Art. 577: Refusal to answer questions from judicial authorities Art. 579: Giving false testimony Art. 580: False testimony due to a gift Art. 581: Influencing witnesses or judges Art. 582: Perjury Art. 583: Suborning of assistants in judicial organs Art. 586: Insulting those in the judicial organs Art. 587: Threats against judicial officers Art. 588: Discrediting a decision of judicial organs Art. 589: Non execution of court decision		Penalty for refusal to provide information or illegal withholding of information (Art. 591)	

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
Tanzania	<p>Law of Marriage Act – Part IV Property, Rights, Liabilities and Status: S.56. Rights and liabilities of married women; S.57. Equality between wives; S.58. Separate property of husband and wife; S.59. Special provisions relating to matrimonial home; S.60. Presumptions as to property acquired during marriage; S.61. Gifts between husband and wife; S.62. No liability for antecedent debts of spouse; S.63. Duty to maintain spouse; S.68. Status of widows</p> <p>Arts 12, 13 and 14 of Constitution recognises all human beings are equal and deserves equal protection before the law.</p> <p>National Employment Services Act: The government domesticated the International Labour Standards through the enactment of this law, which provides for equal opportunities to women and men in access to employment services</p> <p>Employment and Labour Relations Act: This prohibits discrimination in the workplace on the basis of gender, sex, marital status, disability, pregnancy and HIV status, among others (S.7). S.5 prohibits child labour</p>	<p>Law of Marriage Act S.69: Right to damages for breach of promise of marriage</p> <p>Consent of a victim of trafficking in persons shall be immaterial.</p> <p>Protection and care of victims is enunciated in the Anti-Trafficking in Persons Act</p>	<p>A person who commits any of the offences or trafficking of persons shall, on conviction, be liable to a fine of not less than TSh 5 million but not more than TSh 100 million or to imprisonment for a term of not less than 2 years and not more than 10 years or to both</p>	

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
	<p>Refugee Act: This provides for the protection of refugee women from violent acts. The Act also provides a legal framework for assisting refugees and provides for availability of essential services and amenities to the refugee community. Among others, the law requires that every refugee be provided with education in accordance with the Tanzania National Education Act</p> <p>Land Act S.3: Equal rights of men and women to occupancy and use</p> <p>Village Land Act: Both men and women have equal rights of ownership and access to land, including a customary right of occupancy</p> <p>Law of the Child Act and Juvenile Court Rules: Part II of the Act provides for the rights and welfare of the child, which are set out in S.4–S.13. They include the right to be protected from various forms of violence. S.7 provides for the right of a child to live with his/her parents or guardian. S.9 provides for the right of a child to be protected from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression</p> <p>Anti-Trafficking in Persons Act:</p>			

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
	<p>S.4.-(1): A person commits an offence of trafficking in person if that person- (a) recruits, transports, transfers, harbours, provides or receives a person by any means, including those done under the pretext of domestic or overseas employment, training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage; (b) introduces or matches a person to a foreign national for marriage for the purpose of acquiring, buying, offering, selling or trading the person in order that person be engaged in prostitution, pornography, sexual exploitation, forced labour, slavery, in-voluntary servitude or debt bondage; (c) offers or contracts marriage, real or simulated, for the purpose of acquiring, buying, offering, selling or trading a person in order that person be engaged in prostitution, pornography, sexual exploitation, forced labour or slavery. 10 involuntary servitude or debt bondage; (d) undertakes or organizes sex tourism or sexual exploitation; (e) maintains or hires a person to engage in prostitution or pornography; (f) adopts or facilitates the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced-labour and slavery, involuntary servitude or debt bondage; (g) recruits, hires, adopts, transports or abducts</p>			

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
Uganda	<p>The Domestic Violence Act provides for protection and relief to victims of domestic violence, punishment of perpetrators, procedure enforcement of orders made by the court and related matters</p> <p>The implementation system relies on dual jurisdiction by both the local authorities (Local Council Courts), as these are closer to the people, and the formal courts, which are often far away from populations in rural areas. Under the Act, local councils have powers to act to prevent acts of violence. Both local councils and the formal justice system are required to act swiftly and to hear cases within 48 hours. The formal courts are also empowered to issue orders to protect victims from further violence.</p> <p>The Trial on Indictments (Amendment) Statute regulates the granting of bail for serious offences such as rape and defilement</p> <p>The Magistrates' Courts (Amendment) Act abolishes the procedure of preliminary proceedings in criminal trials and renders certain serious offences, such as rape, bailable only by the High Court</p>	<p>Wide range of remedies to victims, including criminal sanctions, civil remedies and compensatory provisions in the Domestic Violence Act:</p> <ul style="list-style-type: none"> • Protection orders • Interim protection orders • Jurisdiction to issue interim protection orders and protection orders is vested in magistrates and family and children courts • Removing perpetrator from matrimonial home 	<p>A fine not exceeding 48 currency points or imprisonment for a term not exceeding 2 years or both and the court may give any other remedy it considers fit (Domestic Violence Act)</p>	<p><i>Uganda v Armoko</i> [2014] UGHC 69</p>

(Continued)

Table A2. Other Substantive and Procedural Legislative Provisions of General Application to VAWG (Continued)

Country	Legislative instrument/provision	Measures	Sanctions	Case law
	<p>Offence of failure to comply with the terms and conditions of a protection order</p> <p>Refugee Act: Protection for women and child refugees on account of vulnerability. Equal opportunities and access to procedures relating to refugee status and affirmative action to protect them from gender discriminating practices (S.33)</p> <p>Equal enjoyment and protection of all human rights and fundamental freedoms in economic, social, cultural, civil or any other fields, as provided for in the Constitution and other relevant laws in force and international and regional instruments to which Uganda is a party, in particular CEDAW and the ACHPR</p> <p>The Equal Opportunities Commission Act establishes the Equal Opportunities Commission. The Act provides a legal basis to challenge laws, policies, customs and traditions that discriminate against women</p>			

Table A3. Preventive Detention and Bail Provisions

Country	Legislative instrument and provision	Measures
Kenya	Bail and Bond Policy Guidelines (see pp. 16–30 and especially under 4.9(f), 4.16 (in defilement cases) and 4.26(f), especially in offences related to VAWG on views of the victim before bail is granted.	
Rwanda	<ul style="list-style-type: none"> • Code of Criminal Procedure Preventive detention – effective for 30 days (after the expiration of that period, it can be continuously renewed for 1 month) • Maximum period of preventive detention for misdemeanours 6 months • Felonies the maximum period of preventive detention is 1 year (Arts 98–104) <p>The accused (or his or her defence attorney) can also at any time apply for release on bail to the public prosecutor or to the court depending on the stage of the investigation.</p>	GBV-related conditions for bail (i.e. no contact orders, prohibition against harassment, stalking and threats to commit abuse, prohibition of third parties contacting victims on behalf of the accused, confiscation of weapons, liquor abstinence and participation in any available treatment programme or support group). Can also order re-detention of the accused, if deemed necessary, because of new and serious circumstances (Arts 101–102).
Tanzania	<p>Article 6(b) of the Constitution states, “No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence.” This provision is the basis of enunciating that a person charged in with a criminal offence has a right to bail. Substantive statutes creating offences and procedure have provisions relating to the granting of bail. For instance, the Criminal Procedure Act has S.148. There are no guidelines for determination of bail for those charged with VAWG and GBV.</p> <p>A person charged with offences under the Anti-Trafficking in Persons Act shall not be admitted to bail under S.148(5)(a)(vi) of the Criminal Procedure Act.</p>	The right to bail for the accused is also accorded to those charged with committing offences related to GBV and VAWG.

(Continued)

Table A3. Preventive Detention and Bail Provisions (Continued)

Country	Legislative instrument and provision	Measures
Uganda	<p>The 1995 Constitution: Art. 23(6)(a): Right of an accused person to apply to court to be released on bail subject to the legal requirements and conditions which must be fulfilled before court grants bail. Art. 23(6)(b): Right to be released on bail, if the person has been on remand for 60 days before trial, in respect of an offence that is triable by the High Court or subordinate court (Magistrates' Court) and mandatory bail – where an accused person is remanded in detention before trial starts for a continuous period exceeding 180 days for major offences. Art. 44: Right to a fair hearing. Magistrates' Court Act S.75(1): A pre-trial detainee may be granted bail. The TIA gives High Court unlimited power to grant or deny accused persons bail upon proof of exceptional circumstances. Police Act S.25: If a person is detained in police custody beyond 48 hours without being charged in court, then he or she can apply to a magistrate within 24 hours, who will then order for his or her release.</p>	

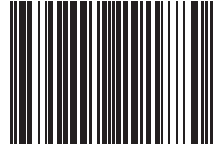


Courts are crucial to bringing about necessary changes in tackling violence against women and girls (VAWG). Thus, increasing the capacity of the judiciary to address VAWG promotes access to justice and ultimately gender quality.

This case law handbook has been developed by judges in Commonwealth East Africa as a contribution to the development of the jurisprudence of equality. It supports propagation of the procedural recommendations and good practices set out in the *Judicial Bench Book on Violence Against Women in Commonwealth East Africa*, with a view to providing judicial officers and rule of law practitioners with a comprehensive and up-to-date resource on adjudicating matters of VAWG in the East African jurisdictions. The handbook presents leading cases of relevance to these jurisdictions and is intended to add to local manuals, guidelines or handbooks that reflect local processes.

The handbook illustrates the relevance and usefulness of case law in highlighting manifestations of VAWG in the respective jurisdiction, application of the law (national and international), procedures, current and recommended court practices, sentencing, remedies, ratio decidendi, relevant obiter dicta and the recommended judicial process as set out in the judicial bench book.

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