Chapter 1

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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 Tanzanian 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 abortion[14] and the Ugandan cases on trafficking in persons[15] 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.