

Chapter 11

The Role of Appellate Courts

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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.