



# BREATHING LIFE INTO THE MAPUTO PROTOCOL:

## JURISPRUDENCE ON THE RIGHTS OF WOMEN AND GIRLS IN AFRICA (2ND EDITION)

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# FOREWORD



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The first edition of *Breathing Life into the Maputo Protocol* was released on the 15th anniversary of the Protocol. Six years later, despite the changing times and global challenges such as the COVID-19 pandemic, the enduring strength of the Maputo Protocol's framework has provided great comfort as it continues to support and advance the promotion and protection of women's rights across Africa.

July 2024 marked the 21st anniversary of the adoption of the Maputo Protocol, and one thing has remained apparent: the ratification of the Maputo Protocol by states is just the first step in achieving gender equality. For transformative gender equality to be realized, a Multi-Sectoral Approach has to be adopted due to the connection of laws, policies, and services. This would provide a framework for convening different sectors within governments and actors outside of government to work together with the Judiciary in protecting and realizing women's rights.

This Case Digest reminds us that as we reflect on the progress made 21 years since the adoption of the Protocol, it is crucial to continue examining and understanding how its provisions are applied and interpreted within our judicial systems. In this context, the role of the courts becomes even more vital. Courts serve as a strategic avenue for challenging the non-implementation of the Protocol and inspiring its application through various decisions and judgments.


This Case Digest provides an invaluable resource for such an examination. It meticulously analyzes key decisions from regional and national courts across Africa, where the Maputo Protocol or its relevance has been invoked. Through this comprehensive analysis, the Digest highlights how the Protocol's principles have been applied in various legal contexts, offering critical insights into both the successes and challenges of its implementation.

The decisions included in this Digest reflect a range of judicial interpretations and applications of the Protocol, illustrating the evolving understanding of women's rights within African legal frameworks. From landmark rulings affirming the Protocol's commitments to areas where no articles have yet been litigated, this Digest serves as a crucial reference for legal practitioners, scholars, and advocates working towards gender equality.

The Digest not only sheds light on the advancements achieved but also underscores the need for continued advocacy and judicial vigilance to address the persistent disparities and barriers faced by women and girls. This Digest is intended not only as a resource for legal practitioners and scholars but also as a call to action for all stakeholders committed to advancing the rights of women and girls in Africa. We urge stakeholders to support initiatives that align national laws with the commitments of the Maputo Protocol, enhance education and training on women's rights for legal practitioners and policymakers, and establish mechanisms to monitor the implementation of the Protocol and hold governments accountable.

At a personal level, I appreciate that Judicial Officers play a crucial role in interpreting legal instruments and shaping jurisprudence, contributing to the law's evolution and its application in society. The ongoing training provided by Equality Now and the SOAWR Coalition on the role of judicial officers in implementing the Maputo Protocol and promoting women's rights in Africa has significantly influenced how women's issues are adjudicated across various jurisdictions. Indeed, through the training, Judicial Officers can appreciate the power of the Judicial Pen.

I commend Equality Now and the authors of this Digest for their dedication to this important work and encourage all stakeholders to engage with this Digest as a tool for fostering greater understanding and action towards achieving gender equality.



*“Women and girls in Africa deserve to be served by the law fairly, equally and without bias.”*

# ACRONYMS AND ABBREVIATIONS

<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ACJHR</b>	African Court of Justice and Human Rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>ACERWC</b>	African Committee of Experts on the Rights and Welfare of the Child
<b>AfCHPR</b>	African Court on Human and Peoples' Rights
<b>APHRC</b>	African Population and Health Resource Center
<b>AU</b>	African Union
<b>BPfA</b>	Beijing Declaration and Platform for Action
<b>CALS</b>	Center for Applied Legal Studies
<b>CCJ</b>	Community Court of Justice of the Economic Community of West Africa States
<b>CCU</b>	Constitutional Court of Uganda
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CEHURD</b>	Center for Health, Human Rights and Development
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>DMS</b>	Director of Medical Services
<b>ECOWAS</b>	Economic Community of West African States
<b>FGM/C</b>	Female Genital Mutilation/Cutting
<b>HIV/AIDS</b>	Human Immunodeficiency Virus and Acquired Immune-Deficiency Syndrome
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>CESCR</b>	International Covenant on Economic Social and Cultural Rights
<b>JCA</b>	Judicial Commission Act
<b>JSC</b>	Judicial Service Commission
<b>JIFA</b>	Judicial Institute for Africa
<b>Maputo Protocol</b>	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
<b>MPSI</b>	Maputo Protocol Scorecard and Index
<b>NGEC</b>	National Gender and Equality Commission
<b>NGO</b>	Non-Governmental Organization
<b>OAU</b>	Organization of African Unity
<b>OSC</b>	One Stop Centre
<b>OSJI</b>	Open Society Justice Initiative
<b>QECH</b>	Queen Elizabeth Central Hospital
<b>SADC</b>	Southern Africa Development Community
<b>SADR</b>	Sahrawi Arab Democratic Republic
<b>SADSAWU</b>	South African Domestic Service and Allied Workers Union
<b>SAPS</b>	South African Police Service
<b>SDGEA</b>	Solemn Declaration on Gender Equality in Africa
<b>SOAWR Coalition</b>	Solidarity for African Women's Rights Coalition
<b>SORMA</b>	Sexual Offenses and Related Matters Act
<b>SGBV</b>	Sexual and Gender-Based Violence
<b>TL</b>	Tubal Ligation
<b>UDHR</b>	Universal Declaration on Human Rights
<b>UNCRPD</b>	UN Convention on the Rights of Persons with Disabilities
<b>VAPP Act</b>	Violence Against Persons Prohibition Act
<b>WLCT</b>	The Women's Legal Centre Trust

# ACKNOWLEDGMENTS



**Faiza Jama Mohamed**  
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Equality Now expresses profound gratitude to the Judicial Institute for Africa (JIFA) for its invaluable research support. JIFA's efforts have played a pivotal role in ensuring the success and quality of this **2nd edition of *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa Case Digest***.

We also extend our sincere appreciation to the esteemed judicial officers from various parts of Africa who provided crucial cases related to implementing the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). Their invaluable insights have greatly enriched the content of this Digest, making it a comprehensive and well-informed resource.

Equality Now also acknowledges the outstanding contribution of individuals who have played significant roles in framing this Digest. The collaborative efforts of Equality Now staff, the Judicial Institute For Africa and participants of the Externship Programme, jointly convened by Equality Now and the judiciaries of Kenya and Uganda, have been instrumental in developing the various themes. Their contribution to conceptualization, review, editing, and extensive research is appreciated. We especially recognize the dedicated contribution of the following individuals: Esther Waweru, Mumbi Mugo, Naomi Mwangi, Fareeha Ali Yahya and judicial externs—Susan Murungi (2020), Gicuku Karugu (2020–2022), Neiunje Wanjala (2021), Ivy Shiechelo Omondi (2021–2022), and Wallace Nderu (2021–2022). We are also grateful to Caroline Osero-Agengo for her editing support.

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# EXECUTIVE SUMMARY

July 2023 marked the 20<sup>th</sup> anniversary of the adoption of the Maputo Protocol, which established a solid framework for promoting and protecting women's rights in Africa. However, periodic reports from States Parties indicate that the implementation of the Maputo Protocol has been slow.

Therefore, the courts remain a strategic avenue for challenging the non-implementation of the Maputo Protocol while inspiring its implementation through the application of various decisions and judgments.

In 2018, Equality Now published a Case Digest titled *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa*<sup>1</sup>, which analyzed decisions from courts across Africa and from regional human rights mechanisms that referred to or implemented the Maputo Protocol between 2004 and 2018. Equality Now has trained several judicial officers in collaboration with JIFA and other organizations across Africa. There is a reasonable expectation that these trainings have contributed to the increase in referencing the Maputo Protocol in the submissions and court decisions, which is reflected in the current case digest.

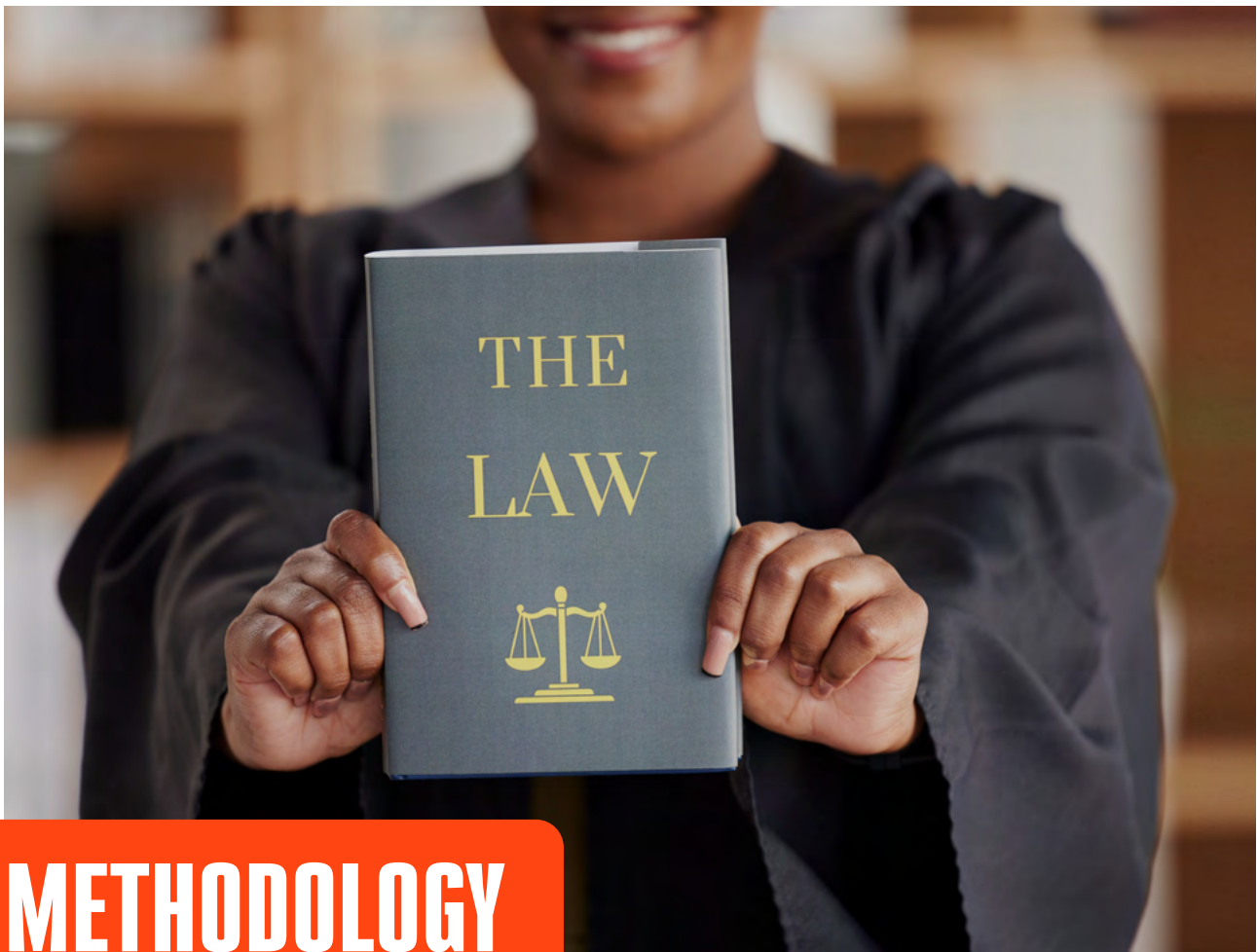
This second edition of the Digest analyzes 26 judgments and decisions from 11 countries. These decisions, made from 2019 to 2024, illustrate how legal practitioners can apply the Maputo Protocol in strategic litigation in national and regional courts to promote and protect women's and girls' rights in Africa. The countries covered include The Gambia, Kenya, Malawi, Mali, Namibia, Nigeria, Sierra Leone, South Africa, Tanzania, Uganda, and Zimbabwe.

This Digest also analyzes the decisions of regional courts, judicial and quasi-judicial bodies, and human rights reporting mechanisms in the interpretation, adjudication, and advice on the respective human rights instruments, including the Maputo Protocol. These include the African Court on Human and Peoples' Rights (AfCHPR) and the ECOWAS Community Court of Justice. The cases analyzed in this Digest are drawn from common law, civil law, and hybrid legal jurisdictions in Africa at all judicial levels, including courts of first instance, appellate courts, and supreme courts.

The Digest, therefore, demonstrates a growing recognition of the need to enhance the promotion and protection of the rights of women and girls as set out clearly in progressive jurisprudence analyzed herein. These decisions provide an authoritative reference point for supporting legal action in similar cases in the future. At the same time, some decisions highlight gaps in interpreting and protecting women's rights and provide the necessary evidence to support advocacy and other actions to address these gaps.

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<sup>1</sup> [https://equalitynow.storage.googleapis.com/wp-content/uploads/2018/04/16122236/Breathing\\_Life\\_into\\_Maputo\\_Protocol\\_Case\\_Digest-Jurisprudence\\_on\\_the\\_Rights\\_of\\_Women\\_and\\_Girls\\_in\\_Africa.pdf](https://equalitynow.storage.googleapis.com/wp-content/uploads/2018/04/16122236/Breathing_Life_into_Maputo_Protocol_Case_Digest-Jurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf)



Credit: Jacob Wackerhausen / iStock

## METHODOLOGY

Identifying cases for this Digest involved a thorough desk review of published decisions sourced through online platforms and various repositories such as case law databases, legal reporting websites, and case compendia. Additionally, judicial officers from across the continent, who had previously been trained by Equality Now on implementing the Maputo Protocol, contributed by recommending relevant cases for analysis and inclusion.

The Digest is organized chronologically by thematic areas corresponding to each article of the Maputo Protocol. However, for certain articles, no decisions on cases litigated on these specific themes were available online; thus, they are not included in the analysis section.

Each case analysis begins by identifying the specific rights of women or girls whose violation is the subject of the case. This is followed by a summary of the facts of the case, an analysis of the judicial reasoning, and a commentary on the decision based on relevant provisions of the Maputo Protocol.

In developing this Digest, every endeavor was made to ensure that it is as comprehensive and relevant as possible and complementary to the first Case Digest,<sup>2</sup> establishing a continuity of effort and highlighting Equality Now's commitment to fostering a legal culture that prioritizes women's rights and also contributes to the mission of the SOAWR Coalition. However, it is important to note that the contents of this Digest may not include all the recent cases where the Maputo Protocol was relied upon or referenced in the decisions of the respective judicial bodies and human rights monitoring mechanisms. This potential gap is because certain decisions might not have been accessible, published, or reported at the time of developing the Digest.

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<sup>2</sup> *Ibid*, No 1



An analysis of the jurisprudence on the human rights of women and girls must invariably begin with the affirmation that women's rights are human rights. This affirmation mirrors the meaning of the Universal Declaration on Human Rights (UDHR), which recognizes the inherent dignity and equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world.

In its preamble, the Universal Declaration of Human Rights (UDHR) provides that all human beings are born free and equal in dignity and rights<sup>3</sup>. Consequently, women and girls are endowed with fundamental rights, such as access to education, freedom from violence, equal pay for equal work, and the right to vote. However, worldwide, many women and girls are denied their rights for reason solely because of their sex or gender.

At a continental level, Africa enjoys a robust legal and policy framework on the rights of women and girls, gender equality, and protection from gender-based violence. The legal frameworks at the continental level include the Maputo Protocol, the African Union Gender Policy 2009,<sup>4</sup> the AU Strategy for Gender Equality and Women's Empowerment<sup>5</sup>, the Continental Result Framework Monitoring and Reporting Implementation on Women Peace and Security<sup>6</sup>, the Solemn Declaration on Gender Equality in Africa<sup>7</sup>, and the AU Framework of Cooperation Concerning Prevention and Response to Conflict-Related Sexual Violence in Africa, 2014.<sup>8</sup>

The decisions analyzed in this Digest demonstrate a growing recognition of the need to promote and protect the rights of women and girls through progressive jurisprudence that reflects this legal and policy framework. At the same time, some of the decisions highlight existing gaps in the protection of these rights and point to the need for greater action to address the discrimination and inequality women and girls face.

<sup>3</sup> *Ibid*

<sup>4</sup> <https://www.un.org/shestandsforspeace/content/african-union-gender-policy-2009>

<sup>5</sup> [AU Strategy for Gender Equality and Women's Empowerment | African Union](#)

<sup>6</sup> <https://www.un.org/shestandsforspeace/content/continental-result-framework-monitoring-and-reporting-implementation-women-peace-and-security>

<sup>7</sup> [https://au.int/sites/default/files/documents/38956-doc-assembly\\_au\\_decl\\_12\\_iii\\_e.pdf](https://au.int/sites/default/files/documents/38956-doc-assembly_au_decl_12_iii_e.pdf)

<sup>8</sup> <https://www.peaceau.org/uploads/au-un-framework-of-cooperation-on-csvr.pdf>

# THE RIGHTS OF WOMEN AND GIRLS IN AFRICAN HUMAN RIGHTS INSTRUMENTS

The legal instruments and policy documents adopted by African Union Member States indicate the importance and, hence, prioritization of women's and girls' rights in the African human rights system.

## **3.1 African Charter on Human and Peoples' Rights<sup>9</sup>**

The African Charter on Human and Peoples' Rights, also known as the Banjul Charter, was adopted in Nairobi, Kenya, on 27 June 1981 by the Assembly of Heads of State of the then Organization of African Unity (OAU). The Banjul Charter is one of the human rights instruments that is widely cited, not only in continental legal and policy documents, but also in national and sub-regional instruments, and in litigation. Along with other regional human rights instruments that it inspired, the Banjul Charter continues to provide a reference point in the elaboration of the national Bill of Rights, and the corresponding laws giving effect to specific human rights. It is equally iconic in its contribution to the corpus of international human rights<sup>10</sup>.

Women's rights are covered in the overarching human rights protection that the Banjul Charter offers generally. The Preamble and Articles 1-7 set the foundations for the rights to nondiscrimination, equality, dignity, and equal protection before the law. Article 18(3) provides for the elimination of every discrimination against women and the protection of women and the child as stipulated in international instruments and conventions<sup>11</sup>. Article 66 provides for special protocols to supplement the provisions of the Banjul Charter, if necessary, and is the basis upon which the following protocols and agreements have been adopted, namely: the Maputo Protocol, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (AU Protocol on the Rights of Older Persons)<sup>12</sup>, and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disability<sup>13</sup>. The Banjul Charter also inspired the development of the African Charter on the Rights and Welfare of the Child (the Children's Charter).

The implementation of the African Charter and its Protocols and the Children's Charter is monitored through three human rights institutions: the African Commission on Human and Peoples' Rights (the Commission), the African Court on Human and Peoples' Rights (the African Court), and the Committee of Experts on the Rights and Welfare of the Child (the Committee).

## **3.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)<sup>14</sup>**

The Maputo Protocol has been described as one of the world's most comprehensive and progressive women's human rights instruments<sup>15</sup>. It was adopted by AU Heads of State and Government in Maputo, Mozambique, on 11 July 2003. It is the main regional instrument in Africa for protecting the rights of women and girls. As of September 2024, 45 out of 55 countries have ratified the Maputo Protocol.

9 [Banjul Charter e.pdf \(au.int\)](#)

10 [The realities of 40 years of implementing the African Charter on Human and Peoples' Rights | African Union \(au.int\)](#)

11 *Ibid* No 10 [Article 18 \(3\)](#)

12 [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa](#)

13 [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa](#)

14 <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>

15 [The Maputo Protocol: Protecting African Women's Rights - Equality Now](#)



The Maputo Protocol has given rise to adopting and promulgating equally innovative and progressive legislation, policies, and other institutional mechanisms to advance women's human rights in Member States. According to a report by the African Population and Health Research Center (APHRC),<sup>16</sup> the ratification of the Maputo Protocol has contributed largely to the development and implementation of policies and laws aimed at safeguarding women from violence and assault in many African countries, even though some have placed reservations on some articles as discussed below. Citing Kenya as an example, APHRC notes that this has been buttressed by several international and regional human rights instruments, adding that Kenya has enacted several laws against sexual violence and discrimination, with the Constitution forbidding all forms of discrimination, including gender-based violence.

The increased recognition of women's rights can also be attributed to the implementation of the Maputo Protocol. Rwanda is the first country with the highest number of female representatives in parliament, with more than 60% of seats occupied by women. Other countries, including Mozambique and South Africa, have made substantial progress in increasing women's participation in politics and decision-making at the national and local levels. In Kenya, while the 2010 Constitution introduced the two-thirds gender rule to enhance women's political representation, the country has yet to comply with this principle fully. Despite the initial promise of increased opportunities for women in political seats, progress towards achieving the required gender balance in parliament remains unfulfilled.

The Maputo Protocol has also increased women's protection from harmful practices. Ethiopia, which ratified the Maputo Protocol in 2018, outlawed child marriage and female genital mutilation (FGM) in 2000 and 2005, respectively, and has, since the ratification, implemented national policies and strategies to combat them effectively.

To promote the ratification and implementation of the Maputo Protocol, the African Heads of State and Government adopted in 2004 the Solemn Declaration on Gender Equality in Africa (SDGEA), in which they committed to ratifying the Maputo Protocol to pave the way for its domestication and implementation alongside other national, regional, and international instruments on gender equality and women's empowerment.

### **3.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons<sup>17</sup>**

Article 22 of the Maputo Protocol provides for the Special Protection of Elderly Women and calls on Member States to address the physical, economic, and social needs of elderly women and protect their right to freedom from violence, including sexual abuse, discrimination based on age, and the right to be treated with dignity. Adopting the Protocol on the Rights of Older People covers a broad range of rights that complement Article 22 of the Maputo Protocol.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons is founded on several policy documents at the African Union, including the AU Policy Framework and Plan of Action of Ageing of 2002<sup>18</sup>, which led to the establishment of the Advisory Council on Ageing and the AU Social Policy Framework for Africa of 2008<sup>19</sup>.

The development of this Protocol kicked off in 2008 with the formation of the African Commission on Human and Peoples' Rights (ACHPR) of the Working Group on the Rights of Older Persons in Africa. In May 2009, the Working Group was reformulated to include the Rights of Persons with Disabilities. The African Commission on Human and Peoples' Rights adopted the draft Protocol at its 52nd Session in 2012, with a provision in Article 21 for a continental mechanism in the form of an Advisory Council on Ageing of the AU. This was to facilitate the implementation and follow-up of the continental policies and plans on aging. Following a validation workshop with all stakeholders in December 2013, the Protocol was adopted on 31 January 2016.

<sup>16</sup> <https://aphrc.org/blogarticle/taking-stock-maputo-protocol-in-advancing-womens-rights/>

<sup>17</sup> No 12, *supra*

<sup>18</sup> <https://www.un.org/esa/socdev/ageing/documents/implementation/AUFrameworkBook.pdf>

<sup>19</sup> [https://au.int/sites/default/files/documents/30218-doc-social\\_policy\\_framework\\_for\\_africa\\_-\\_final\\_-\\_18\\_nov\\_2008.pdf](https://au.int/sites/default/files/documents/30218-doc-social_policy_framework_for_africa_-_final_-_18_nov_2008.pdf)



The Protocol prohibits all forms of discrimination against older persons and addresses the social and cultural stereotypes that marginalize older persons. It calls on Member States to eliminate discrimination and all forms of stigmatization against older persons in law and society. It calls on Member States to institute urgent measures aimed at addressing the needs of older people, such as access to regular incomes, equitable distribution of resources, employment opportunities, access to appropriate health services, access to basic social services such as food, water, clothing, and shelter; access to good care and support from the family, the state, civil society, and private organizations.

It also calls for the recognition of older persons' contributions to the care of people with AIDS and orphans, respect and recognition of their role and contribution to society, and recognition of their special needs in emergency situations.

As of May 2024, this Protocol had been ratified by 12 Member States and required 3 more ratifications to enter into force. No reservation or declaration has been entered or made on this Protocol.

### **3.4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa<sup>20</sup>**

Official government statistics from the African region report the percentage of persons with disabilities to be as low as 2-5%, but in some countries, it is likely to be closer to 20-22% due to the prevalence of conflict, forced displacement and a lack of access to adequate medical services. To attain the objectives of the Maputo Protocol, it is important to analyze the multiple layers of discrimination women and girls face in Africa and the intersections with other laws, policies, and treaties. Implementing these intersecting laws will reinforce the implementation of the equality and non-discrimination provisions of the Maputo Protocol.

This Protocol on the Rights of Persons with Disabilities was adopted on January 29, 2018, signed by 13 and ratified by 10 Member States, none of which has entered or made any reservation or declaration. The Protocol seeks to promote, safeguard, and ensure the complete and equal exercise of all human and peoples' rights for individuals with disabilities in Africa and to ensure respect for their inherent dignity. The Protocol complements the UN Convention on the Rights of Persons with Disabilities (UNCRPD) by addressing these rights of persons - from an African perspective, considering the lived realities of individuals with disabilities on the continent while maintaining the core values and principles set forth in the UNCRPD.

### **3.5 African Charter on the Rights and Welfare of the Child<sup>21</sup>**

The African Charter on the Rights and Welfare of the Child (ACRWC/the Children's Charter) was adopted by the Organization of African Unity on 11 July 1990 and came into force on 29 November 1999. The Charter is a regional human rights instrument addressing issues of particular interest and importance to children in Africa.

The Children's Charter closely intersects with the Maputo Protocol, as the two treaties address girls' rights. It is also important to cross-reference the two treaties to address the incremental and evolving discrimination that girls face from birth through adulthood into older ages. The effective implementation of the Children's Charter supports the implementation of the Maputo Protocol and vice versa.

To date, 53 of the 55 AU Member States have ratified the Children's Charter.

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<sup>20</sup> No 13, *supra*

<sup>21</sup> [https://au.int/sites/default/files/treaties/36804-treaty-african\\_charter\\_on\\_rights\\_welfare\\_of\\_the\\_child.pdf](https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf)

# MECHANISMS FOR ENFORCEMENT OF HUMAN RIGHTS IN THE AFRICAN SYSTEM

## ***4.1 African Commission on Human and Peoples' Rights<sup>22</sup>***

The African Commission on Human and Peoples' Rights (the Commission) whose mandate is protecting and promoting human and people's rights and interpreting the African Charter on Human and Peoples' Rights, the legal framework under which it is established.

The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. Subsequently, its Secretariat has been in Banjul, The Gambia.

Between 1996 and 2010, the Commission set up 12 Special Mechanisms that have adopted 272 resolutions and presented 40 mission reports to date. Additionally, between 2004 and 2016, the Commission set up 4 internal mechanisms that have adopted 34 resolutions to date. These resolutions and reports have contributed greatly to advancing human rights on the continent, including in popularizing and implementing the Maputo Protocol.

Whereas it was not possible to get information on the total number of cases decided by the Commission to date, a report by the Open Society Justice Initiative (OSJI) notes that between October 1996 and May 2010, the Commission decided 189 cases<sup>23</sup>. Additional information indicates that between January and December 2020, the African Court delivered 55 decisions and received 40 new cases and one request for an advisory opinion<sup>24</sup>. This illustrative indication of the number of cases decided by the Commission would point to an increase in the number of cases between 2010 and 2020.

The Special Rapporteur on the Rights of Women in Africa, in her report to the Executive Council in 2022, noted that her mandate includes protecting women from violence and discrimination, including sponsoring Resolutions relating to women's rights in general and violence against women in particular. She cited several Resolutions: ACHPR/res.284 (lv) 2014: Resolution on the suppression of sexual violence against women in the DRC; ACHPR/res.283 (lv) 2014; Resolution on the situation of women and children in armed conflict; ACHPR/res.173 (xlv111) 10; Resolution on the crimes committed against women in the DRC; ACHPR/res.111 (xxxii) 07; Resolution on the right to a remedy and reparation for women and girl victims of sexual violence. She noted particularly that the mechanism giving rise to her mandate, together with its partners, prepared Guidelines on Sexual Violence and its Consequences, which have been adopted by the Commission and were at the time of the report being popularized. She identified the opportunity for CSOs to collaborate with her on her mandate and highlighted the need for working in collaboration with governments to enhance partnerships among Government institutions while supporting non-governmental and community-based organizations working on gender equality and women's empowerment.<sup>25</sup>

The African Commission has also issued several press statements and press releases citing its resolutions and reports noted above in their push towards compliance and fulfilling state obligations in the various human rights instruments.

<sup>22</sup> [Mandate of the Commission | African Commission on Human and Peoples' Rights \(au.int\)](#)

<sup>23</sup> <https://www.justiceinitiative.org/publications/african-commission-human-and-peoples-rights>

<sup>24</sup> [https://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1996-20962021000200025](https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962021000200025)

<sup>25</sup> [Special Rapporteur on Rights of Women in Africa - 71OS | African Commission on Human and Peoples' Rights \(au.int\)](#) April 2022

## 4.2 African Court on Human and Peoples' Rights<sup>26</sup>

The African Court on Human and Peoples' Rights (the African Court) is the judicial arm of the African Union. It was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the African Court Protocol), which entered into force on 16 January 2004. The African Court sits in Arusha, Tanzania.

Its mission is to enhance the protective mandate of the African Commission on Human and Peoples' Rights by strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples' Rights, as well as other international human rights instruments, through judicial decisions.

The African Court has contentious and advisory jurisdictions. Section 3 of the African Court Protocol confers jurisdiction on the African Court to hear contentious matters, including all cases and disputes submitted regarding the interpretation and application of the Charter, the African Court Protocol, and any other relevant human rights instrument ratified by the concerned States.

The Advisory jurisdiction is found under Article 4 of the Protocol, which provides that the African Court may, at the request of a Member State of the African Union, any of the organs of the African Union or any African organization recognized by the African Union, provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

The African Court can only deal with cases submitted against Member States that have ratified the African Court Protocol and deposited a declaration under Article 34(6), accepting the Court's competence to receive cases under Article 5(3). Article 5(3) stipulates that the Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34(6).

Since its operationalization in 2006, the jurisprudence of the Court has reinforced human rights principles on the continent. The Court has, however, enjoyed limited support from the Member States.<sup>27</sup> Of the 34 member states that have ratified the Protocol to date, 12 member states have made declarations listed here in chronological order, namely Burkina Faso, Benin, Côte d'Ivoire, Ghana, Guinea Bissau, Malawi, Mali, Niger, Rwanda, Tanzania, The Gambia, and Tunisia. Of these, 4 Member States subsequently withdrew their declarations. These are Benin, Côte d'Ivoire, Rwanda and Tanzania.<sup>28</sup>

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<sup>26</sup> Basic Information - African Court on Human and Peoples' Rights ([african-court.org](http://african-court.org))

<sup>27</sup> MA Nyarko & MA Plagis, *Supporting the Mandate of the African Court*, African Human Rights Policy Paper 2, November 2020 ([up.ac.za](http://up.ac.za))

<sup>28</sup> <https://www.african-court.org/wpafc/declarations/>

### **4.3 African Committee of Experts on the Rights and Welfare of the Child<sup>29</sup>**

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established in July 2001. Its mandate is drawn from Articles 32-46 of the African Charter on the Rights and Welfare of the Child (Children's Charter), which was adopted by the Heads of State and Government of the OAU on 11 July 1990 and came into force on 29 November 1999.

The ACERWC is a quasi-judicial treaty body mandated to monitor the implementation of the Children's Charter and promote and protect children's rights in Africa.

The mandate of the ACERWC is derived from Articles 32-45 of the Children's Charter, Article 42, which spells out the main functions of the ACERWC as follows:

- ▶ Promotion and protection of children's rights.
- ▶ Monitoring the implementation of the Children's Charter.
- ▶ Interpreting the provisions of the Children's Charter; and
- ▶ Other tasks entrusted to it by the Assembly of the Heads of States and Governments and Organs of the African Union.

To carry out and deliver on its mandates, ACERWC undertakes various activities in accordance with the provisions of the Children's Charter. The following are some of the main mandates and activities of the ACERWC, based on articles 42-45 of the Children's Charter and the Rules of Procedures of the ACERWC.

- ▶ Consideration of State Party Reports on the implementation of the Children's Charter.
- ▶ Consideration of Communications on alleged violations of the Children's Charter.
- ▶ Investigations/Country visits to assess the implementation of the Children's Charter.
- ▶ Development of Norms and Standards in the form of General Comments and Guidelines on matters covered by the Children's Charter.
- ▶ Undertake research and studies on children's rights issues in the Continent.
- ▶ Lead the Celebration of the Day of the African Child.
- ▶ Issue Resolutions, Declarations, Statements, and Letter of Urgent Appeals.
- ▶ Monitor the Implementation of Agenda 2040.<sup>30</sup>

In fulfilling its mandate, the ACERWC may also establish special mechanisms and assign specific tasks or mandates to either an individual member or a group of members to prepare its sessions or execute special programs, studies, and projects.

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<sup>29</sup> [Overview Of the African Charter on The Rights and Welfare Of The Child | ACERWC - African Committee of Experts on the Rights and Welfare of the Child](#)

<sup>30</sup> [https://au.int/sites/default/files/newsevents/agendas/africas\\_agenda\\_for\\_children-english.pdf](https://au.int/sites/default/files/newsevents/agendas/africas_agenda_for_children-english.pdf)

# THE ROLE OF NATIONAL COURTS



Credit: Jacob Wackerhausen / iStock

National courts play an important role in the protection of human rights. To quote Fahed Abul-Ethem in this regard,

*“One of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary. Standards developed by the judiciary have a significant beneficial effect of making people’s lives better and accomplishing the government’s goals easier. In addition, these standards may ensure a better understanding of the relationship between the people and their government, on the one hand, and among the members of the international community, on the other.”<sup>31</sup>*

In his paper, “Human Rights Protection by Ordinary Courts,” Jose de la Mata Amaya.<sup>32</sup> notes that,

*“Protection of human rights by the Courts propounds two levels: the domestic and the international. In its turn, from the internal point of view, the constitutional guarantee and the judiciary (ordinary courts) guarantee must be distinguished. And, finally, at the judiciary level, there are several different guarantees provided by every different kind of Courts (civil, criminal, administrative).”*

Effectively, Mr. Amaya notes that the protection of human rights occurs at two levels: the international and domestic levels. At the domestic level, differences emerge between the guarantee of human rights in the substance of the constitutions and their application in the judiciaries, which provide varying levels of guarantees across the various court systems.

As the analysis below demonstrates, national courts have consistently stepped up the protection of women’s rights as articulated in international, regional, and domestic laws, with constitutional courts playing a significant role in safeguarding the fundamental rights and freedoms of women and girls.

Several national constitutions in Africa have a Bill of Rights that defines the parameters of human rights protection, clearly referencing the applicability of international instruments in their municipal courts.

<sup>31</sup> The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective, [Fordham International Law Journal, Volume 26, Issue 3 2002 Article 8](#),

<sup>32</sup> Human Rights Protection by Ordinary Courts, Human Report by Mr José de la Mata Amaya (Magistrate, Spain) Conference on “Human Rights Protection Systems” (Bishkek, 21-22 November 2002)





Credit: Andrey Popov / iStock

# ANALYSIS OF JUDICIAL DECISIONS ON WOMEN'S RIGHTS IN AFRICA

The analysis of selected decisions on women's rights in Africa is framed on the themes covered in the Maputo Protocol. It is done chronologically in line with the respective Articles of the Protocol. It is, however, emphasized that the rights espoused in the Maputo Protocol are all interrelated, interdependent, indivisible, and universal. The principles of indivisibility (all human rights have equal status and cannot be positioned in hierarchical order) and the mutually reinforcing nature of human rights, interdependence (each right depends at least to some degree on the fulfillment of the other rights), mean that to achieve substantive gender equality for women, measures, strategies, and programs must be comprehensive and multisectoral in nature<sup>33</sup>. It is also important to note that not all the Articles have cases that have been litigated.

<sup>33</sup> [WomensRightsinAfrica\\_singlepages.pdf \(ohchr.org\)](#) at p.8

## 6.1 ARTICLE 2: ELIMINATION OF DISCRIMINATION AGAINST WOMEN

In Article<sup>34</sup>, the Protocol guarantees the protection of women from all forms of discrimination in public and private spaces. It urges governments to include the principle of equality between women and men, if not already done, in their national constitutions and other legislative instruments and ensure its effective application. Additionally, State Parties are required to remedy any existing discrimination in the civil, political, economic, social, and cultural contexts.

### **6.1.1 Bernard Odero Okello & another vs Cabinet Secretary for Industrialization, Trade and Enterprise Development & another; Cyprian Mugambi Ngutari & 7 others (Interested Parties) [2020] eKLR (Employment and Labour Relations Court, Kenya)**<sup>35</sup>

#### **Issue: Appointment and representation of women in appointive positions**

##### **Facts**

The Petitioner challenged the appointment of only one woman out of the five members of the Business Premises Rent Tribunal in Kenya on the basis that the appointments made by the 1<sup>st</sup> Respondent violated the two-thirds gender rule, thereby contravening Article 27 (8) of the Constitution of Kenya 2010 (hereinafter the Constitution). Under this Article, the State is obligated to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

To support his claim, the Petitioner invoked Article 2 of the Maputo Protocol, Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and other provisions of the Constitution. The Petitioner sought various remedies, including a declaration that the appointments of the 1<sup>st</sup> to 5<sup>th</sup> interested parties contravened Articles 27(3)(4) and (8) of the Constitution, Article 2 of CEDAW, and Article 2 of the Maputo Protocol.

##### **Decision**

The Court declared that the appointment of the 1<sup>st</sup> to 5<sup>th</sup> interested parties was in violation of Articles 2, 10, 27, 47, 169(1)(d), 172(1), 232(1)(f) & (g) and 259 of the Constitution; Article 2 of CEDAW; Article 2 of Maputo Protocol; Section 32 of the Judicial Service Act and Section 10 of the Public Service (Values and Principles) Act.

The Court acknowledged Kenya's commitments under CEDAW, the Beijing Declaration and Platform for Action (BPfA), and the Maputo Protocol, which all call for the elimination of all forms of discrimination against women. The Court aligned its decision with the High Court decision in **Marilyn Kamuru and Others vs Attorney General and Another (2016) eKLR**<sup>36</sup>, which emphasized immediate rather than gradual implementation of the two-thirds gender rule. The Court noted that the appointment of not more than two-thirds of the same gender was a bare minimum.

##### **Analysis**

The case was centered on the two-thirds gender rule in the Constitution of Kenya 2010, in which Article 27 addresses historical, existing, and future discrimination and inequality. The court noted that the Article focuses on the culturally informed and historical discrimination against women. Consequently, Article 27(6) mandates Parliament to take measures, including legislative action and affirmative action programs and policies, to address historical discrimination suffered by individuals or groups. This provision is buttressed by Article 27 (8), which provides for affirmative action, stipulating that not more than two-thirds of elective or appointive posts shall be from the same gender.

<sup>34</sup> [https://au.int/sites/default/files/treaties/37077-treaty-charter\\_on\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf), Article 2

<sup>35</sup> [Petition 100 & 99 of 2020 \(Consolidated\) - Kenya Law](#)

<sup>36</sup> <https://kenyalaw.org/caselaw/cases/view/129670/>

## Commentary

In holding that the appointment of only one woman out of five appointees to the local tribunal violated Articles 27(3)(4) and (8) of the Constitution of Kenya, Article 2 of the Maputo Protocol, and Article 2 of CEDAW, the Court affirmed the principle of equality and nondiscrimination. This case stands in sharp contrast to a similar case of the **National Gender & Equality Commission (NGEC) & another vs. Judicial Service Commission (JSC) and 2 Others**<sup>37</sup>, which is discussed under Article 8, where it was held that the JSC was within their rights to consider the merits of the potential appointees and that the eventual appointment did not offend the two-thirds gender rule.

The Court in the NGEC case held that “the 1<sup>st</sup> Respondent (the JSC) was involved in an appointive exercise, and from the words of the constitution, it did not require legislation to implement the two-thirds gender principle in appointive positions. All it required was action to facilitate compliance with the principle. Any claim that the recommendation for appointment failed to comply with the gender principle, would have to be looked at from the perspective of whether these were appointive positions”.

## 6.2 ARTICLE 3: RIGHT TO DIGNITY

Article 3 of the Protocol<sup>38</sup> provides that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. Additionally, it provides that every woman shall have the right to respect as a person and to the free development of her personality. This Article calls on States Parties to advance the appropriate implementation of women's rights.

### 6.2.1 *Darboe and Ors vs The Republic of The Gambia (ECW/CCJ/APP/27 of 2019) [2020] ECOWAS CJ* <sup>139</sup>

#### Issue: Torture, inhuman and degrading treatment

#### Facts

The Applicants were arrested, detained, and subjected to severe torture by the Respondent during peaceful protests. One of the detainees died because of the torture inflicted by the Respondent, while seven others were hospitalized due to injuries sustained from various forms of torture. The Applicants' case cited the violation of their human rights under Articles 4, 5, 6, 7, 10, 11 & 13 of the Banjul Charter; violation of Articles 3, 4(1) and 25 (a) of the Maputo Protocol; and violation of Article 1 (j) of the ECOWAS Protocol on Democracy and Good Governance.

#### Decision

The Court found that the acts of torture, inhuman, and degrading treatment violated Article 5 of the Banjul Charter.

The Court also referred to numerous regional and international court decisions on torture, cruel, inhuman, and degrading treatment. It concluded that the principle of presumption of innocence until proven guilty should have been applied to the Applicants. The Court noted that the Applicants were entitled to bail, considering also the Court's observation that the alleged offense was not a felony but an offense against public order. Despite the lack of evidence rebutting allegations that the Applicants had been kept in inhumane prison conditions, the Court held that the Respondent was in violation of Article 5 of the Banjul Charter.

#### Analysis

Although the Court found that the arrest and detention of the Applicants was not unlawful since the protest was illegal, the inhumane treatment of the Applicants while in custody was found to be in violation of the Applicants' right to dignity under Article 5 of the Banjul Charter. The Court established that on the basis of three elements, the Applicants had proved beyond reasonable doubt that their rights to life, integrity, and security of the person and

<sup>37</sup> <https://kenyalaw.org/caselaw/cases/view/135563/>

<sup>38</sup> *Supra*, No 38, Article 2

<sup>39</sup> *Darboe and Ors vs The Republic of The Gambia (ECW/CCJ/APP/27 of 2019) [2020] ECOWAS CJ* 1 (20 January 2020) – African LII

to dignity had been violated. The Applicants had to prove the infliction of severe pain or suffering by, or with the consent or acquiescence of the state authorities for a specific purpose, such as giving information, punishment, or intimidation.

### Commentary

The Darboe case, when considered against the Maputo Protocol, reinforces the importance of upholding human rights standards, ensuring the protection of all individuals, and condemning any form of violence, torture, or inhuman treatment, irrespective of gender, particularly in the context of public protests and demonstrations. The acts of slapping, kicking, masking, blindfolding, being stripped naked, handcuffing, unconsciousness and fainting, being confined in a dark room, and inadequate feeding come with their physical and psychological effects. Physical violence results in humiliation and affects the identity and dignity of the person. Slapping the faces of the Applicants could amount to the loss of sight, speech, and hearing.

The Court did not address Articles 3, 4(1), and 25 (a) of the Maputo Protocol despite the Applicants' very clear submission on the same. As the Maputo Protocol draws inspiration from the Banjul Charter, the relevance of its provisions to the case cannot be gainsaid.

## 6.3 ARTICLE 4: THE RIGHTS TO LIFE, INTEGRITY, AND SECURITY OF THE PERSON

The Protocol provides that every woman shall be entitled to respect for her life and the integrity and security of her person<sup>40</sup>. States Parties are obligated to take appropriate and effective measures to prohibit all forms of exploitation, cruel, inhuman, or degrading punishment and treatment against women.

### 6.3.1 *Tshabalala vs The State; Ntuli vs The State* [2019] ZACC 48 (Constitutional Court, South Africa)<sup>41</sup>

**Issue: Application of the doctrine of common purpose to the crime of rape**

#### Facts

In this case, the Constitutional Court had to determine whether the common-law doctrine of common purpose is applicable in matters of common-law crime of rape. The doctrine stipulates that if two or more people have a common purpose to commit a crime and act together to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the other.

In 1998, in a violent rampage, a group of men attacked homes in the Umthambeka section of Tembisa, Gauteng province. In what appears to have been a premeditated attack, they masqueraded as police broke into homes, assaulted occupants, and raped eight females, some repeatedly, while other members of the group kept watch outside. Among the victims were a 14-year-old girl and a visibly pregnant woman. The attackers were apprehended, leading to litigation that raised questions about the application of the doctrine of common purpose to the common law crime of rape. On November 23, 1999, The High Court convicted Mr. Tshabalala, Mr. Ntuli, and the other co-accused on various charges, including the common law crime of rape based on a common purpose.

Nine years later, Mr Tshabalala unsuccessfully petitioned the Supreme Court of Appeal for leave in an appeal against his conviction and sentence. In November 2012, Mr. Phetoe, one of the co-accused, was granted leave to appeal his conviction and sentence to the Full Court of the High Court. The Full Court held that the doctrine of common purpose

<sup>40</sup> Supra, No 43 Article

<sup>41</sup> *Tshabalala v S; Ntuli v S* (CCT323/18; CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019) (saflil.org)



could not be applied to crimes that can be committed only through the instrumentality of a person's own body and that the doctrine could, therefore, not apply to the common law crime of rape. It, however, held that Mr. Phetoe was an accomplice to the rape, having associated himself with a group that had terrorized and raped the complainants. Consequently, the Full Court altered his conviction to one of being an accomplice in respect of the common law crime of rape and sentenced him to one term of life imprisonment. Dissatisfied with the decision of the Full Court, on 7 November 2016, Mr. Phetoe successfully applied for special leave to appeal to the Supreme Court of Appeal.

Mr. Phetoe's success at the Supreme Court of Appeal inspired Mr Tshabalala to apply to the Constitutional Court in December 2018 for leave to appeal against his conviction and sentence.

The Constitutional Court was tasked with addressing the issue of whether an accused can be convicted of the common-law crime of rape based on the application of the doctrine of common purpose. Two principal issues arose for determination, namely whether the doctrine applies to the common law crime of rape and, if not, whether there was any rational basis for a distinction between the common law crime of rape and other crimes where the doctrine applies. The Applicants' challenge was that under common law, the crime of rape is an instrumentality offense which, by its nature, can only be committed by a male using his own genitalia and not by an individual who is merely present when the offense is committed, and who by his conduct (through his association or active participation) either promotes, encourages or facilitates the successful commission of the offense. This is the definition in the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No 32 of 2007) SORMA<sup>42</sup>.

### Decision

The Court held that the Applicants knowingly, and with the requisite intention, participated in the group's activities and fully associated themselves with its criminal designs. It held further that it was disingenuous on the part of the accused to now contend that because they did not penetrate the complainants, they should not be found guilty based on the doctrine of common purpose. That argument, the main judgment continued, loses sight of the fact that the main object of the doctrine is to criminalize collective criminal conduct and, in the process, address societal needs to combat crime committed during joint enterprise. It is for that reason that the causal prerequisite in consequence crimes such as murder, robbery, and assault were found to be ineffectual.

Additionally, the main judgment highlighted the alarming prevalence of rape in South Africa, emphasizing the need for collaborative efforts by the courts, society, and law enforcement agencies to combat this widespread issue. The judiciary, it noted, can contribute to this effort by dispelling the misguided belief that rape is solely a crime driven by sexual motives. The judgment further cautioned that continuing this assumption of sexual motive would implicate the Constitutional Court and other courts in perpetuating patriarchy and a culture supportive of rape.

### Analysis

The Court, in assessing the influence of international law on the doctrine of common purpose to rape cases, emphasized the significance of the Maputo Protocol in safeguarding women's rights and combating violence. It also stated that the Maputo Protocol mandates States Parties to enact and enforce laws aligning with its objectives. The Court further noted that South Africa is party to multiple international instruments to which it is bound, such as CEDAW, which condemns discrimination against women in all its forms and obliges state parties to take all appropriate measures to eliminate discrimination against women by any person, organization, or entity. The Court noted further that the CEDAW obligates state parties to modify social and cultural patterns of conduct to remove stereotypical gender roles.

These obligations, now part of customary international law, underscore the global imperative to strengthen domestic laws to protect women's rights. The Court acknowledged that evolving the common law crime of rape is necessary to fulfill international obligations, placing an obligation on the State, including the Court, to enhance domestic laws for the protection of women from sexual violence.

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42 [https://www.gov.za/sites/default/files/gcis\\_document/201409/a32-070.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a32-070.pdf)



## Commentary

The SORMA describes the offense of rape as involving more than the instrumentality of male genitalia into female genitalia, thereby broadening the definition of rape. The SORMA was quoted several times in the unanimous judgment<sup>43</sup> to justify the applicability of the doctrine of common purpose. They referred to the SORMA definition of rape, which includes the penetration of the victims' genitalia using items or objects other than the perpetrators' genitalia. The Court also addressed itself to Article 4 of the Maputo Protocol, which obligates State Parties to take appropriate and effective measures to safeguard the rights to life, integrity, and security of the person.

The Constitutional Court decision provided clarity where none hitherto existed on the application of the doctrine in matters of common-law crime of rape; the doctrine was applied in some cases but excluded in that of **Tshegofatso Pule**<sup>44</sup> whose body was discovered hanging from a tree while she was 8 months pregnant. This case happened at a time when sexual violence against women had been steadily on the rise.

The doctrine of common purpose has been applied in several cases referenced in the analysis in the Kenya Law Reports entitled **"The Doctrine of Common Purpose Does not Apply to Criminal Conduct Consisting only of Circumstance Crimes."**<sup>45</sup>

### **6.3.2 Sarah Kingsley Odoro vs ECOWAS Commission and Ors (ECW/CCJ/APP/33 of 2018) [2021] ECOWAS CCJ 6**<sup>46</sup>

**Issues: Right to dignity; the right to life, integrity, and security of the person**

## Facts

The proceedings arose from the Applicant's allegation that the 3<sup>rd</sup> Respondent violated her rights under Articles 4, 5, 6, 12, and 14 of the African Charter and Articles 3 and 4 of the Maputo Protocol.

The Applicant claimed that her relationship with the 3<sup>rd</sup> Respondent initiated through a customary-law marriage in 1995, faced challenges despite an initial period of harmony. The Applicant had a son at the time of contracting the marriage whom the 3<sup>rd</sup> Respondent legally adopted. The couple experienced difficulties in conceiving a child, and the desire to adopt a child was met with resistance from the 3<sup>rd</sup> Respondent's family. The strain escalated into allegations of physical assault and threats by the 3<sup>rd</sup> Respondent, who then initiated divorce proceedings against the Applicant in Togo.

The Togolese Court ordered the 3<sup>rd</sup> Respondent to withdraw the case and re-institute the proceedings in Nigeria. The situation seemingly worsened as the 3<sup>rd</sup> Respondent allegedly married another woman who occupied the matrimonial property, leading to the eviction of the applicant and her son, who was subsequently rendered homeless. The Applicant sought a ten-point relief from the Court on protecting her rights to life, freedom of movement, personal liberty, and dignity. She also sought orders compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, as employers of the 3<sup>rd</sup> Respondent, to mandate the 3<sup>rd</sup> Respondent to reinstate her into her property. She sought orders preventing the 3<sup>rd</sup> Respondent from incessantly threatening her and violating her rights and that her eviction together with her son was illegal and a violation of their rights. She alleged violation of Articles 3 and 4 of the Maputo Protocol on the right to dignity and the right to life, integrity, and security of the person, respectively. She also relied on Articles 4, 5, 6, and 14 of the Banjul Charter on the right to life, protection from torture, inhuman and degrading treatment, liberty, and property, respectively.

<sup>43</sup> *Supra*, No 56 at paragraph 62

<sup>44</sup> <https://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACP/JHC/2022/174.html&query=shoba>

<sup>45</sup> <http://kenyalaw.org/kenyalawblog/doctrine-of-common-purpose-does-not-apply-to-criminal-conduct/>

<sup>46</sup> <https://caselaw.ihrda.org/en/entity/8g4revfn7mb?page=31>

## Decision

The Court ruled on a preliminary objection that the Applicant's case fell short as it was a domestic case between the Applicant and her husband, the 3<sup>rd</sup> Respondent, that could not be associated with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It held further that the 3<sup>rd</sup> Respondent did not do the wrongful acts complained of by the Applicant in his official capacity.

## Analysis

The Court held that it lacked jurisdiction to entertain this case for the above reasons. The Court asserted that the narration of the Applicant's case concerned disputes around their matrimonial home and did not identify any infraction that can be attributed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, which amounts to either an official action or omission on their part. The Court concluded that the facts of this case clearly failed to implicate the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within the meaning of Article 9(g) of the Supplementary Protocol A/Sp.1/01/05<sup>47</sup> amending the Preamble and Articles 1, 2, 9, and 30 of the Protocol A/P1/7/91<sup>48</sup> relating to the Community Court of Justice. It also failed according to Article 4 Paragraph 1<sup>49</sup>, which gives access to the Court to the Executive Secretary, where action is brought for failure by a Member State to fulfill an obligation.

## Commentary

This case delved into procedural matters outlined in Article 9(4) and Article 10(d) of the Supplementary Protocol A/Sp.1/01/05. The application of these provisions played a significant role in shaping the Court's approach to the legal proceedings on matters brought under the Maputo Protocol.

This ruling emphasized that a valid case before an international court, like the Community Court of Justice, should include facts of an alleged violation of an international instrument and establish that the Respondent is a Member State and a signatory to the instrument. This precaution is essential to avoid conflicts with national courts. Further, the Court held that mere reference to specific violations of the Banjul Charter by the Applicant does not automatically clothe the case with an international character and thus justifies the Court's assumption of jurisdiction.

Even though the case is clearly related to Articles 3 and 4 of the Maputo Protocol, the lesson to be gleaned from this judgment on admissibility is important. Additionally, the case is relevant to the Maputo Protocol at Article 7 on separation, divorce, and annulment of marriage and Article 8 on access to justice and equal protection before the law.

### 6.3.3 *AK vs Minister of Police [2022] ZACC 14 (Constitutional Court of South Africa)*<sup>50</sup>

**Issues: Right to life, integrity and security of the person, rape, delict, wrongfulness, negligence, extent of police liability for negligent police work, psychopathological harm**

## Facts

The Applicant was attacked, robbed, and held in captivity among the bushes and sand dunes abutting Kings Beach in Gqeberha (formerly Port Elizabeth) from 14h30 on 9 December 2010, where she was repeatedly raped. She escaped on the morning of 10 December 2010. Her relative had, in the intervening period, reported her missing, but despite an intensive search by the police, they did not find her but found her abandoned vehicle. After two and a half years of what the court termed as her "attempts to coax the SAPS into conducting what she believed to be a proper investigation," the Applicant instituted an action in the High Court in November 2013 to hold the Respondent delictually liable for the alleged negligent omission to conduct an effective search and investigation.

## Decision

The Court held that the Minister of Police (Minister) was not delictually liable for the alleged omissions of the South African Police Service (SAPS) concerning their search and subsequent investigation into the crimes committed

47 [http://www.courtecawas.org/wp-content/uploads/2018/11/Supplementary\\_Protocol\\_ASP10105\\_ENG.pdf](http://www.courtecawas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP10105_ENG.pdf)

48 [http://www.courtecawas.org/wp-content/uploads/2018/11/Protocol\\_AP1791\\_ENG.pdf](http://www.courtecawas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf)

49 [Supplementary Protocol \(courtecawas.org\)](http://www.courtecawas.org)

50 <https://lawlibrary.org.za/akn/za/judgment/zacc/2022/14/eng@2022-04-05/source.pdf>

against Ms AK (Applicant). The Minister's appeal on this matter was allowed. The Supreme Court of Appeal held that the High Court's findings that the elements of negligence, wrongfulness, and causation were established could not be supported by the evidence presented on the Applicant's behalf. For all these reasons, the Applicant's claim was dismissed. The Applicant appealed to the Constitutional Court against the decision of the Supreme Court of Appeal's Constitutional Court of South Africa, which held in her favor and effectively dismissed the Minister's earlier appeal in the Supreme Court of Appeal. The Constitutional Court relied on the Maputo Protocol and the CEDAW and extensively referenced the concluding observations of the CEDAW Committee on South Africa's 5<sup>th</sup> periodic report<sup>51</sup>.

### Analysis

The Constitutional Court of South Africa underscored the well-established principle that a state's obligation to prevent rape and various manifestations of gender-based violence constitutes a customary norm in international law. In emphasizing South Africa's commitment to upholding women's rights, the Constitutional Court noted that South Africa is party to key treaties, notably the CEDAW and the Maputo Protocol. These international instruments collectively recognize gender-based violence as a deleterious expression of discrimination against women, posing a direct challenge to their entitlements to equality and sexual autonomy. The Constitutional Court referenced these treaties as it acknowledged the gravity of gender-based violence, which it noted is an infringement of fundamental human rights.

### Commentary

In this case, it is worth noting that the Applicant and the first amicus, Center for Applied Legal Studies (CALS), referred to international and foreign law in support of their submissions on the standard required of the police to conduct an effective search and investigation. In their submissions, they relied on Article 4 of the Maputo Protocol and Articles 1, 2, 3, 6, 11, 12, and 16 of CEDAW<sup>52</sup> to emphasize the extent of violation that resulted in crimes against women and children in the form of gender-based violence.

### 6.3.4 *S vs Thys (CC 19 of 2020) [2021] NAHCMD 190 (High Court of Namibia)*<sup>53</sup>

#### Issue: Death following intimate partner relationships (crime of passion)

#### Facts

The accused and the deceased had been in a romantic relationship for eight months at the time of the incident. The accused heard from a third party that the deceased intended to cheat on him with her ex-boyfriend. That information angered the accused and made him jealous, as a result of which he went to 'discipline' his girlfriend. The mode of discipline was a stab in her chest with a solid steel wire, which penetrated her aorta, killing her instantly. The accused accepted responsibility for the wrongful deed and entered a guilty plea under Section 112(2) of the Criminal Procedure Act as amended. The accused and his sister testified in mitigation of the sentence. The Court heard that he was a first offender aged 26 years. He expressed remorse and sought forgiveness for his actions. His sister confirmed that the accused and the deceased had a peaceful relationship and that their family had apologized to the family of the deceased. One of the deceased's sisters testified in favor of aggravation of the sentence. She testified about the consequences of the death of her sister, noting that it suddenly left three children without their primary caregiver and placed a financial strain on other family members who were already facing financial difficulties.

#### Decision

The accused was found guilty of murder (direct intent) as read with the provisions of the Combating of Domestic Violence Act (Act 4 of 2003). He was sentenced to 29 years' imprisonment.

#### Analysis

The judge held that the accused's remorse expressed under oath was valid, noting that the accused had entered a guilty plea and accepted responsibility for his actions. The Court considered this in mitigation of the sentence. The

<sup>51</sup> *Ibid*, Paragraph 88

<sup>52</sup> *Ibid*, paragraph 88

<sup>53</sup> [S v Thys \(CC 19 of 2020\) \[2021\] NAHCMD 190 \(27 April 2021\) - NamibLII](#)

Court held that the assertion by the accused that he had consumed liquor with an apparent content of 16% volume of alcohol, without any further details, was insufficient to sustain a use of intoxication as a mitigating factor in sentencing. It further held that murder is a serious offense that affects the victim and the dependants, in this case, three children who were left without a primary caregiver. The issue of violent masculinity in society was addressed and noted as having no place in an egalitarian society and, therefore, punishable by severe custodial sentences.

The Court further noted that the accused's personal circumstances pale against the magnitude of the other issues addressed in the case, thus warranting imprisonment.

In passing judgment, the judge decried the rising cases of women killed by their intimate partners despite the existence of a robust law to curb domestic violence buttressed by international and regional instruments to which Namibia is a State Party, including CEDAW and the Maputo Protocol. The courts were also noted to have played their part in routinely passing severe sentences to perpetrators.

### Commentary

While the reasons or motives for the perpetration of violent acts are numerous and diverse, the one common thread therein appears to be remnants of a patriarchal system that accords more power to men than women. In cases such as the current one, it manifests in the practice of men who use such power as a tool of violence to exert control over their female partners. This is reflected in this case, where the accused was under the mistaken belief that his explanation of simply "disciplining" his girlfriend under threat of her infidelity would be adequate in affording him an acquittal for murder. In passing the sentence, the Court addressed itself to the circumstances of the case in view of the laws, considering also the societal interest in curbing offenses of this nature. Even though the judgment did not explicitly refer to the Protocol, it was informed by the principles of human rights and women's rights in the Maputo Protocol, to which Namibia is a State Party.

In holding that the notion of violent masculinity has no place in an egalitarian society, the judge added that inevitably, the courts will treat such violence perpetrated against women with the disdain that it deserves in the form of more severe sentences. The non-tolerance of violence reflects Article 4 of the Maputo Protocol and affirms the right of women to dignity in line with Article 2. The intersectionality of the issues that underpin women's rights means that in implementing the Maputo Protocol, all actors, including Member States and women's rights defenders, must draw from the broad range of human rights instruments and national laws in addressing women's rights violations.

### **6.3.5 Centre for Domestic Violence Prevention and Others vs Attorney General of Uganda (Constitutional Petition No. 13 Of 2014) [2021] UGCC 20<sup>54</sup>**

**Issues: Equality and non-discrimination, right to privacy, and the right to freedom of expression**

#### Facts

A group of Ugandan non-governmental organizations and individuals challenged the constitutionality of the Anti-Pornography Act 2014 in the Constitutional Court of Uganda (CCU). The Petitioners argued that the Act was inconsistent with several articles of the Constitution of the Republic of Uganda 1985, including Articles 2(1) & (2), 24, 28, 29, and 44, and violated the right to equality and non-discrimination, the right to privacy, the right to freedom of expression, and the right to a fair trial.

They also averred that Sections 11(1) and 15(1) & (2) of the Anti-Pornography Act 2014 were inconsistent with or in contravention of the right to personal liberty, privacy, and property as guaranteed under the Ugandan Constitution. It was their contention that the Anti-Pornography Act 2014 was inconsistent with or in contravention of obligations with regards to the rights guaranteed under international human rights instruments ratified or acceded by Uganda, including the UN Covenant on Civil and Political Rights, 1966, UN Covenant on Economic, Social & Cultural Rights, 1966, the CEDAW and the Maputo Protocol.

<sup>54</sup> [Centre for Domestic Violence Prevention and Others v Attorney General of Uganda \(Constitutional Petition No. 13 of 2014\) \[2021\] UGCC 20 \(13 August 2021\) - ULI](#)

## Decision

In August 2021, the CCU unanimously declared sections of the Anti-Pornography Act 2014 null and void, finding it inconsistent with the Constitution of Uganda. Specifically, the CCU noted that:

*“Sections 2 and 13 of the Anti-Pornography Act 2014 are inconsistent with, or in contravention of Articles 2 (1) & (2), 28 (12), and 29 (1) (a) of the Constitution of the Republic of Uganda. Sections 11 (1) and 15 of the Anti-Pornography Act are inconsistent with Articles 23, 26 and 27 of the Constitution. Sections 2, 11, 13 and 15 of the Anti-Pornography Act are hereby declared null and void for inconsistency with the Constitution.”*

## Analysis

The Petitioners in the case argued that the Act was discriminatory and violated the right to equality and non-discrimination.

It is important to also note the Petitioners' contention that the impugned provisions of the Anti-Pornography Act 2014 were in contravention of, or inconsistent with, obligations regarding the rights guaranteed under international human rights instruments, which Uganda is party to. However, the petitioners failed to provide any details thereon because they failed to show the inconsistencies between the Act and the said international human rights instruments.

## Commentary

This case effectively affirms the principles contained in Article 3 on the right to dignity, Article 4 on the right to life, integrity, and security of the person, and Article 8 on access to justice and equal protection before the law of the Maputo Protocol.

This case is comparable to the case of **Sarah Kingsley Odoro**<sup>55</sup>, where state action regarding the alleged violation could not be established. In the present case, counsel argued that although no state agent participated in undressing women, the state created the toxic environment that facilitated these actions by enacting the Anti-Pornography Act 2014, whose definition of the term pornography is vague, uncertain and, therefore, unconstitutional. Counsel referred to **Salvatori Abuki & Anor vs Attorney General**<sup>56</sup>, which held that it is important to consider the purpose and effect principle while determining whether a statute is constitutional. Counsel for the Petitioners contended that the effect of the impugned law disproportionately affected women and infringed on their rights as provided under the constitution.

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<sup>55</sup> *Supra*, No 50

<sup>56</sup> Attorney General vs Salvatori Abuki (Constitutional Case 2 of 1997) [1997] UGCC 10 (13 June 1997) <https://ulii.org/akn/ug/judgment/ugcc/1997/10/eng@1997-06-13>



## 6.4 ARTICLE 5: ELIMINATION OF HARMFUL PRACTICES

In this Article, the Protocol provides that States Parties shall prohibit and condemn all forms of harmful practices that negatively affect the human rights of women and are contrary to recognized international standards. To do this, they must take all necessary action to address the manifestations and causes of harmful traditional practices.

### 6.4.1 *Tatu Kamau vs Attorney General & 2 others (Petition 8 of 2017, High Court of Kenya)*<sup>57</sup>

**Issues: Constitutionality of the Prohibition of the Female Genital Mutilation (FGM) Act; women's rights to equality, culture, and identity (right to a positive cultural context), right to health, right to dignity**

The Petitioner, Dr Tatu Kamau (a public health doctor), challenged the constitutionality of the Prohibition of the Female Genital Mutilation (FGM) Act and the Anti-Female Genital Mutilation Board in Kenya. She averred that Sections 2, 5, 19, 20, and 21 of the FGM Act infringe on women's rights to uphold and respect their culture and identity and their rights to dignity and non-discrimination under the Constitution of Kenya. The Petitioner further argued that by prohibiting qualified medical practitioners from performing female circumcision, the Act violates women's access to the highest attainable standard of health.

#### Decision

The Court held that FGM is unlawful regardless of consent. The Court dismissed the petition and ordered the Attorney General to forward proposals to the National Assembly to consider amendments to Section 19 of the Prohibition of the Female Genital Mutilation Act (No. 32 of 2011) with a view to prohibiting all harmful practices of female genital mutilation (FGM).

In arriving at this decision, the Court observed that from the evidence, it was demonstrated that the practice of FGM/C implicates not only the right to practice cultural life but also the right to health<sup>58</sup>, human dignity<sup>59</sup> and in instances when it results in death, the right to life<sup>60</sup>. It is noted further that the provisions of international treaties are also clear: not all traditional practices are prohibited, but only those that undermine international human rights standards. The Court referred to the provisions of several treaties, including Article 2 of the CEDAW and General Comment No. 14 of the Committee on Economic, Social, and Cultural Rights (CESCR) on the highest attainable standard of health.

#### Analysis

The Court addressed various issues, including whether the prohibition of FGM violated women's rights to dignity, culture, and religion; the factors to consider in limiting these rights, namely equality and non-discrimination; and whether the prohibition of FGM while allowing male circumcision, constituted unreasonable discrimination. Analyzing conflicting rights, the Court emphasized that rights to culture and religion, while protected, are not absolute and can be limited if inconsistent with other constitutional provisions. International law recognizes limitations on cultural practices, such as FGM, due to their potential harm and violation of fundamental rights. The Court cited Article 1(g) of the Maputo Protocol, defining harmful practices affecting women's rights and obliging states to eliminate them.

In limiting the right to culture, the Court relied on Article 24 of the Constitution of Kenya, requiring limitations to be reasonable and justifiable based on human dignity, equality, and freedom. Article 25 ensures protection from

<sup>57</sup> [Constitutional Petition 244 of 2019 - Kenya Law](#)

<sup>58</sup> *Supra*, No 15 Maputo Protocol Article 14

<sup>59</sup> *Ibid*, Article 3

<sup>60</sup> *Ibid*, Article 4

torture and cruel treatment without limitations, justifying restrictions on harmful cultural practices aligning with constitutional values.

Examining the role of consent, the Court found that survivors were often misled, deceived, and pressured, leading to ill-informed decisions and resulting in harm. Despite consent, the Court held that the FGM Act was constitutional, emphasizing that allowing consent as a defense would violate women's rights.

The Court addressed the differentiation between FGM in women and circumcision of men, noting that whereas the health benefits of male circumcision have been established, similar evidence was lacking for female circumcision. Consequently, the Court deemed the differentiation justified, dismissing claims of unfair discrimination.

### Commentary

This case highlights the judiciary's commitment to upholding human rights, particularly women's rights. In its decision, the Court sent a powerful, unequivocal message that FGM is unlawful, regardless of any purported consent. The reference in the judgment to the Maputo Protocol and other international instruments, to which Kenya is party, is an affirmation of the judicial intention to apply the normative standards clearly set out in the Maputo Protocol, in this case, the right to health and dignity in Articles 14 and 3 respectively as already noted above. The case also relates to Article 17 of the Maputo Protocol on the right to a positive cultural context.

### 6.4.2 *Mbhamali vs S (AR579/2019) [2021] ZAKZDHC 35 (High Court of South Africa)*

#### Issues: Child marriage; rape of a minor

#### Facts

This was an appeal against the conviction of the 1<sup>st</sup> Appellant of the rape of a 14-year-old child. The 2<sup>nd</sup> Appellant, who introduced the child to the 1<sup>st</sup> Appellant, was charged with failing to report a sexual offense. The 2<sup>nd</sup> Appellant had initially offered to care for the Complainant, who was raised by her single father. The Complainant dismissed the 2<sup>nd</sup> Appellant's claim of finding a husband for her as a joke. However, after the Complainant started living with the 2<sup>nd</sup> Appellant, she was taken to the 1<sup>st</sup> Appellant's house and introduced as a prospective wife.

All three individuals, the Complainant, her father, and the 2<sup>nd</sup> Appellant, belonged to the same church, which encouraged marriage among its members. Despite this, the church practice did not allow sexual intercourse before marriage, even if the individuals had been introduced to each other. Unfortunately, the Complainant was forced to engage in sexual intercourse with the Appellant multiple times.

#### Decision

The appeal was dismissed as the Appellant failed to provide compelling reasons or evidence that would warrant overturning the original conviction. The court found that the arguments presented did not adequately challenge the lower court's findings.

#### Analysis

In its judgment, the Court referenced criminal law provisions prohibiting child marriages and sexual violations against children. It also cited Section 28(1)(d) of the Constitution, which protects children from maltreatment, neglect, and abuse. It further relied on the landmark case of *Jazile vs S*<sup>61</sup>, where the Court deemed the *ukuthwala* custom unlawful.

The Court referenced studies from Zimbabwe, Malawi, and South Africa, exploring the contribution of religious beliefs to child abuse. These studies underscored the tension between children's rights and cultural rights, highlighting the necessity of curbing culturally justified practices that amount to child abuse. The Court referred to Joint General Recommendation/General Comment 31 of CEDAW and the Committee on the Rights of the Child,

<sup>61</sup> <https://www.saflii.org/za/cases/ZAWCHC/2015/31.html>

classifying child marriage as a form of forced marriage lacking full, free, and informed consent.

The Court also considered international legal instruments, including CEDAW, the Convention on the Rights of the Child (CRC), and the Convention on the Consent to Marriage. It concluded that child marriages, often disguised as religious practices, constitute significant social, legal, and human rights problems. It called for continued legal action against such practices to protect children's rights under the Constitution and international legal instruments.

### Commentary

The Court's stance underscores the Protocol's commitment to eradicating harmful practices affecting the fundamental rights of women and girls. Notably, the rejection of consent as a defense to child marriage emphasizes the Protocol's recognition that certain practices, even where deemed to be consensual, still amount to violations of human rights, particularly since the Protocol provides clear protection.

## 6.5 ARTICLE 6: MARRIAGE

Under this Article<sup>62</sup>, States Parties are required to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. This means enacting appropriate national legislative measures to guarantee that all marriages take place with the free and full consent of both parties, who must be over 18 years old. This Article also notes that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected.

### 6.5.1 *Women's Legal Centre Trust vs President of the Republic of South Africa and Others [2022] ZACC 23 (Constitutional Court of South Africa)*<sup>63</sup>

**Issue: The unconstitutionality of the Marriage Act and the Divorce Act; failure to recognize Muslim marriages; Sharia law; infringement of the right to dignity of women in Muslim marriages**

#### Facts

The Women's Legal Centre Trust (WLCT) filed an application in the Constitutional Court seeking to confirm an order of the Supreme Court of Appeal that declared specific provisions of the South African Marriage Act 25 of 1961 and the Divorce Act of 1979 unconstitutional. The WLCT asked that the court grant relief as extensively as possible in confirming such a declaration, noting that if the order for the declaration of invalidity only applies prospectively, several Muslim women would continue to experience grave injustice.

The WLCT contended that these provisions did not adequately protect the rights of Muslim women and children, particularly in terms of dignity and equality, as they do not afford the same recognition to Muslim marriages as civil and customary marriages. Further, as a separate conditional cross-appeal, the WLCT asked that in the event that the Court declined to confirm the order of constitutional invalidity, the earlier order of the High Court of South Africa, Western Cape Division, Cape Town, be reinstated. This previous order effectively declared that the state is obligated in terms of Section 7(2) of the Constitution to enact legislation to recognize Muslim marriages and to regulate the consequences of such recognition.

#### Decision

The Court confirmed the Supreme Court of Appeal's order of invalidity and declared the Marriage Act and the Divorce Act inconsistent with the Constitution. The Court further found that the common law definition of marriage was inconsistent with the Constitution and consequently invalid.

<sup>62</sup> *Supra*, No 15 Article 7

<sup>63</sup> [Women's Legal Centre Trust vs President of the Republic of South Africa and Others \[2022\] ZACC 23 \(28 June 2022\) - Law Library](#)

## Analysis

The Court held that South Africa had a duty to recognize all *de facto* Muslim or Sharia marriages in line with the Constitution. Whereas the Court referred to international agreements like CEDAW, noting specifically General Recommendations 21 and 29 of the CEDAW Committee, CEDAW General Comment 33, and the CEDAW Committee's response to South Africa's periodic report in September 2010<sup>64</sup>, Articles 6 and 7 of the Maputo Protocol, ICCPR, and the Southern African Development Community Gender and Development Protocol (SADC Gender Protocol), to which South Africa is a party, the court made no mention of these instruments in summing up the case.

The Court noted the existence of the Recognition of Customary Marriages Act but emphasized the need for legislation recognizing Muslim marriages to avoid discrimination on grounds of equality, human dignity, and freedom of religion. This decision must be considered in light of the reservation that South Africa placed on the Maputo Protocol, which was not featured in the judgment. This could be because, at the time of the judgment, South Africa had yet to domesticate the Maputo Protocol through an enactment under Section 231 of the Constitution.

## Commentary

Article 6 of the Maputo Protocol mandates States Parties to guarantee equal rights for women and men in marriage, requiring legislative and other appropriate measures to uphold this equality. It underscores the importance of considering both spouses as equal partners in marriage and emphasizes the need for protection during the subsistence of the marriage. By declaring the disputed provisions within the Marriage Act and Divorce Act unconstitutional, the decision expanded legal protections for Muslim marriages, aligning them with the rights provided to common-law marriages. This decision resonates with the core principles articulated in Articles 2, 6, and 7 of the Maputo Protocol.

### 6.5.2 *Uganda vs Nakoupuet (Criminal Case 109 of 2016) [2019] UGHCCRD 73 (High Court, Uganda)*<sup>65</sup>

#### Issue: Marriage, rape, forced marriage, torture, cruel and degrading treatment

## Facts

The accused faced a charge of rape under sections 123 and 124 of the Penal Code Act. The victim (PW1) met the accused at her father's residence, where he showed interest in her. Despite an attempt by the accused to abduct PW1, the latter escaped and returned home, going against a newly arranged marriage. During this time, PW1 was married to Nyanga Michael (PW2), who had not completed the dowry payment for some cows.

The accused partially paid the dowry, but PW1 refused to consent to the new marriage arrangement. Coerced by her family, she was compelled to be a wife to the accused. Subsequently, she was forcibly taken by her brothers to the accused's home, where they restrained her on the floor while the accused raped her. The accused denied the allegations.

## Decision

The accused was convicted on the charge of rape and sentenced to 15 years in prison, with a deduction of the 3 years already served in remand during the case.

## Analysis

The Court, in relying on the Constitution, found that "cultural" rape constitutes torture; cruelty; inhuman, and degrading treatment. This would fall within the meaning of Article 4(1) of the Maputo Protocol that guarantees the rights of every woman to respect for her life, as well as the integrity and security of her person. This Article prohibits all forms of exploitation, cruel, inhuman, or degrading punishment and treatment. Similarly, Article 24, as buttressed by Article 44 of the Constitution of Uganda 1995, declares as a non-derogable right that no person shall be subjected to any form of torture or cruel, inhuman, or degrading treatment or punishment. Additionally, Article

<sup>64</sup> *Ibid*, paragraph 35

<sup>65</sup> [Uganda vs Nakoupuet \(Criminal Case No. 109 of 2016\) \[2019\] UGHCCRD 14 \(25 January 2019\) - ULLI](#)

32(2) of the Constitution of Uganda 1995 opposes laws, cultures, or traditions that undermine women's dignity, welfare, or interests.

Referring to Article 6 of the Maputo Protocol, the Court highlighted the principle of equal rights for men and women as equal partners in marriage. It noted that Uganda committed to enacting laws to ensure that marriages occur with both parties' free will and full consent. The Court underscored women's right to choose a spouse, citing Article 16(1) of the CEDAW. It also noted that Article 31(1) of the Constitution aligns with CEDAW's Article 16(1), affirming the equal right of men and women to choose a spouse freely.

### Commentary

According to Article 6 of the Maputo Protocol, every woman has the right to select a spouse, and women are entitled to equal rights as partners in marriages. Article 16(1) of the CEDAW, to which Uganda is a party, requires States Parties to take appropriate measures to eliminate discrimination in all marriage-related matters, emphasizing the equal right of both men and women to freely choose a spouse and enter marriage with their full and voluntary consent.

Engaging in acts of rape under the pretext of claiming someone as a 'wife' is not only regressive but constitutes a criminal act, in clear violation of Article 6 of the Maputo Protocol.

### **6.5.3 Attorney General vs Rebeca Z. Gyumi (Civil Appeal 204 of 2017) [2019] TZCA 348 (In the Court of Appeal of Tanzania)**<sup>66</sup>

#### **Issue: Child marriage, discrimination, access to education**

#### **Facts**

The Appellant, the Attorney General, challenged the judgment delivered by the High Court of Tanzania on 8 July 2016. In the judgment, the High Court held that sections 13 and 17 of the Law of Marriage Act were unconstitutional. Section 13 set the minimum age of marriage as 15 years for girls and 18 years for boys. It also allowed marriages between boys and girls above the age of 14 with the permission of the Court. Section 17 of the Law of Marriage Act required girls under the age of 18 to obtain the consent of their fathers to marry. Section 17 privileges the father's consent since the mother can only give consent if the father is deceased. The High Court also directed the Government through the Attorney General to amend the law within one year from the date of the decision to set the minimum age of marriage to 18 years for both boys and girls.

#### **Decision**

The Court of Appeal upheld the High Court's decision that Sections 13 and 17 of the Law of Marriage Act were unconstitutional. It reiterated that the Government, through the Attorney General, was to abide by the order of the High Court and cause the amendment of the Law of Marriage Act.

#### **Analysis**

The Court noted that by ratifying and domesticating international, regional, and sub-regional instruments, the Government of Tanzania has signified a commitment to enforce them and ensure the smooth realization of human and people's rights. The Court referred to Article 6 of the Maputo Protocol, which obliges States Parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. This Article also requires State Parties to enact appropriate national legislation to guarantee that marriages take place with the free will and full consent of both parties and to set the minimum age of marriage for women at 18 years.

The Court dismissed the argument that early maturity justified early marriages for girls, noting that this averment lacked scientific proof. The Court aligned itself with the High Court's findings that the enforcement of these sections exposes girls to significant matrimonial obligations and health risks, including domestic and gender-based violence,

<sup>66</sup> [Attorney General vs Rebeca Z. Gyumi \(Civil Appeal 204 of 2017\) \[2019\] TZCA 348 \(23 October 2019\) - TanzLII](#)



psychological distress, miscarriage, and teenage pregnancies. The Court also noted that these provisions resulted in unequal treatment of girls and boys.

The Court dismissed the state's argument that customary and Islamic law governs matters of marriage as outlined in the Law of Marriage Act, concurring with the High Court's determination that, according to Tanzanian law, the provisions of the Law of Marriage Act supersede the rules of customary and Islamic law.

### Commentary

Apart from dealing with issues under Article 6 of the Maputo Protocol, this case also covers issues under Article 2 (Elimination of Discrimination) and Article 5 (Elimination of Harmful Practices).

This case reaffirms the landmark decision by the High Court of Tanzania that girls should have the right to consent to marriage and that the minimum age of marriage should be 18 years for boys and girls. At the time of compiling this Digest, the Government of Tanzania had yet to amend the provisions of Sections 13 and 17 of the Law of Marriage Act. The High Court decision is reported in the first edition of the Case Digest entitled *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Women and Girls in Africa*<sup>67</sup>. However, despite the government's reluctance to work on amending the law, the judges are rendering decisions on the age of marriage cases, that align with Tanzania's obligations under the Maputo Protocol, as evidenced in the case of *Mzumbe Masunga @ Maguryati and Another vs Republic* discussed below<sup>68</sup>.

#### **6.5.4 Mzumbe Masunga @ Maguryati and Another vs Republic (Criminal Appeal 54 of 2022) [2023] TZHC 16379 (High Court of Tanzania)**<sup>69</sup>

**Issue: Age of consent to marriage, sexual violence against girls**

### Facts

The Appellants challenged their conviction and sentence by the trial court where the 1<sup>st</sup> Appellant had been charged and convicted of the rape of a 13-year-old girl, whom he was married to. The trial court sentenced him to a minimum of 30 years in prison. The 2<sup>nd</sup> Appellant was charged and found guilty of sexual exploitation and sentenced to 15 years in prison. He was the father of the girl and had authorized the marriage of the underage girl.

### Decision

In dismissing the appeal in its entirety, the Court held that it lacked merit and was baseless.

### Analysis

The Court determined that, in the case of the first Appellant, the prosecution successfully demonstrated the essential elements of rape against the victim, establishing that the girl was under 18 years old and that sexual penetration had occurred. In the case of the 2<sup>nd</sup> Appellant, the Court found that as the father of the victim, he was aware that the girl was a 13-year-old minor yet had orchestrated her marriage in disregard to the imminent harm to the girl. Consequently, this constituted a form of sexual abuse prohibited by law.

The Court referred to the case of *Attorney General vs. Rebeca Z. Gyumi*<sup>70</sup>, in which the Court of Appeal upheld the High Court's decision that sections 13 and 17 of the Law of Marriage Act were unconstitutional because they failed to uphold the principles of international, regional, and sub-regional instruments, including Article 6 of the Maputo Protocol.

In further reference to *the Gyumi* case, the Court of Appeal held that Section 130 (2) (e) of the Penal Code was redundant to the extent of its recognition of marriage with a girl of 15 years. Section 130 (2) (e) of the Penal Code

67 [Breathing Life into Maputo Protocol Case Digest-Jurisprudence on the Rights of Women and Girls in Africa.pdf](#), p42

68 [Mzumbe Masunga @ Maguryati and Another vs Republic \(Criminal Appeal 54 of 2022\) \[2023\] TZHC 16379 \(24 March 2023\) - TanzLII](#)

69 *Ibid*

70 *Ibid*

states that “A male person commits the offence of rape if he has sexual intercourse with a girl or a woman... with or without her consent when she is under eighteen years of age unless the woman is his wife who is fifteen or more years of age and is not separated from the man.” The Court noted the lack of legal coherence in this provision, highlighting that it categorizes an act as rape only when committed against an unmarried girl under 18 years old.

### Commentary

Apart from Article 6 of the Maputo Protocol, this case also addresses issues covered under Article 3 (Right to dignity) and Article 4 (the rights to life, integrity, and security of the person).

This case heavily relied on the landmark decision in the case of **Attorney General vs Rebeca Z. Cyumi**. It also brings to the fore the discrepancy in the prosecution of the offense of rape that is grounded on inequality and discrimination in terms of marital status. This calls for attention to ensure that the law on rape is amended to criminalize the marital rape of women and girls.

## 6.6 ARTICLE 7: SEPARATION, DIVORCE AND ANNULMENT OF MARRIAGE

Closely linked to Article 6, this Article calls on States Parties to the Maputo Protocol to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce, or annulment of marriage.

### **6.6.1 Mhangami (Nee Matshalaga) vs Mhangami (523 of 2021) [2021] ZWHHC 523 (High Court, Zimbabwe)**<sup>71</sup>

#### Issue: Matrimonial property in divorce

#### Facts

The parties were married in 1989 and had four children, all of whom were adults at the time the case was instituted. The dispute centered around the definition of matrimonial property in the event of a divorce and the applicable principle in the division of such property. Two disputed properties were acquired during the marriage. One in Budiro was registered in the name of the husband, the Defendant in this case, while the other in Marlborough was registered in their joint names and was their matrimonial home.

At the divorce, the wife, who is the Plaintiff, sought a 50% share of the property acquired during marriage, while the husband indicated that her share amounted to 10%.

The Defendant also averred that the house registered in his name was donated to his mother living there. On the other hand, the Plaintiff noted that they had simply allowed the Defendant's mother to live on the property, which, in her view, was matrimonial property. The Defendant also argued that the matrimonial property was the inheritance of their adult children and that the Plaintiff was, therefore, not entitled to the 50% share claimed.

#### Decision

In declaring that the parties had a right to a 50-50 division of all the property registered in the name of the Plaintiff and the Defendant, the Court held that the Budiro property, even though acquired during the marriage, was not used by the Plaintiff and Defendant for the duration of the marriage. In the judgment, the Court noted that it was clear that the property was acquired for the use and benefit of the Defendant's mother. The Court also set out in the judgment a clear process and timeline by which the division would be done.

<sup>71</sup> [Mhangami \(Nee Matshalaga\) vs Mhangami \(523 of 2021\) \[2021\] ZWHHC 523 \(23 September 2021\) - ZimLII](#)

## Analysis

The Court held that the registration of the property that was the matrimonial home in the names of both parties demonstrated a clear intention to hold the property in equal share, as reflected in the evidence. As articulated in ***Chapeyama vs Chapeyama 2000 (2) ZLR 175 (SC)***<sup>72</sup>, the registration of a property in the names of a husband and wife confers real rights to the property. The Court held that the Defendant's argument that the Plaintiff was not entitled to a 50% share of the matrimonial home was informed by the wage gap between the two parties and the resultant difference in levels of contribution. The Court also ruled that his other argument that the property was for their children could not hold as the creation of a trust in favor of the children or transfer of the property to the adult children would have expressly demonstrated such intention. It was noted that the Matrimonial Causes Act in Section 7(5) recognizes written agreements by consent in the resolution of property distribution on divorce.

In the judgment, the Court cited Article 16 (c) of CEDAW, which provides for the fundamental principle of equality in marriage and at its dissolution. Article 5 of CEDAW requires States Parties to actively address stereotypes on the roles of men and women that impede equality. The Court further cited Article 6 of the Maputo Protocol, which requires States Parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Even though the Court did not refer to Article 7, which addresses separation, divorce, and annulment of marriage, the judgment aligns with Article 7(d), which provides that in case of separation, divorce, or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

## Commentary

The case *Mhangami (Nee Matshalaga) vs Mhangami (523 of 2021) [2021] ZWHHC 523* highlights important issues surrounding marriage, inheritance, and the rights of women. The High Court had to consider the implications of customary law and how it intersects with statutory law, particularly regarding property rights and the status of women. The case underscored the tension between customary practices and statutory provisions. It raises questions about how customary law, often patriarchal in nature, can sometimes conflict with the rights granted under statutory law, particularly concerning women's rights to inheritance and property. The Court's decision illustrates the ongoing struggle for gender equality, where women often face significant barriers when it comes to property rights, and this case serves as a reminder of the need for legal reforms to ensure that women's rights are fully protected and recognized in both customary and formal legal systems.

### **6.6.2 Perus Lucas vs Shomari Bahati (PC Matrimonial Appeal 6 of 2021) [2021] TZHC 3403 (High Court of Tanzania)**<sup>73</sup>

#### **Issue: Division of matrimonial property**

## Facts

This was an appeal against the decision of the first appellate court. The Appellant and the Respondent were married in 2010 and divorced in 2018. During the marriage, they jointly acquired several properties. At the trial court, the matrimonial property was divided between the parties. The first appellate court partly faulted the trial court's decision. The Appellant's contention was that the first appellate court erred in law and, in fact, by not upholding the trial court's judgment, which distributed all matrimonial property acquired jointly during the marriage between the Appellant and the Respondent. The Appellant also contended that the first appellate court further held that the trial court erred in law and, in fact, by admitting, without any documentary evidence from the Respondent to substantiate these claims, that the Appellant was awarded other property not acquired jointly. The Respondent, in turn, asserted that certain property was exclusively his, justifying the appellate court's disagreement with the trial court's decision, and sought to have the trial court's decision upheld.

<sup>72</sup> <https://www.jsc.org.zw/upload/Judgements/High%20Court/Harare/2023/HH%2011-23.pdf>

<sup>73</sup> [Perus Lucas vs Shomari Bahati \(PC Matrimonial Appeal 6 of 2021\) \[2021\] TZHC 3403 \(19 May 2021\) - TanzLII](#)

### Decision

The second appellate court quashed the decision of the first appellate court and partially upheld the trial court's decision. The present Court ordered that the matrimonial property be divided as follows: the matrimonial house be sold, with each party receiving a 50% share, a plot (sold to the Appellant's aunt) to be awarded to the Appellant, and a 10-acre plot to be divided equally between the parties.

### Analysis

The Court consolidated the Appellant's contention and found that the first appellate court's decision to fault the trial court's finding without stating any reason was unjustifiable and quashed the decision of the first appellate court while partly upholding the trial court decision. On the Respondent's claim that some of the property belonged to him exclusively, the Court found that this was not sufficiently substantiated to show that he had acquired the subject properties before marriage. The Court stated that neither party proved exclusive ownership of the properties. Further, the Court highlighted the case-specific nature of contribution assessment and referenced Article 7 of the Maputo Protocol, supporting equitable sharing of joint property in a divorce. Consequently, it found that the first appellate court's reversal of the trial court's findings was unjustifiable.

### Commentary

This case highlights the fact that where there is no evidence to prove that property was acquired before marriage, the presumption is that the property was acquired during the marriage and is therefore considered matrimonial property. The Court, however, maintained that in determining contribution towards the acquisition of matrimonial or family assets, every case must be decided in accordance with its peculiar facts and circumstances. Whereas this is not necessarily a fully positive jurisprudence based on Article 7 of the Maputo Protocol, it does provide reasonably objective perspectives to inform litigation.

## 6.7 ARTICLE 8: ACCESS TO JUSTICE AND EQUAL PROTECTION BEFORE THE LAW

Under this Article, the Maputo Protocol calls on Member States to ensure that women and men are equal before the law and that women shall have the right to equal protection and benefit of the law. States Parties must take all appropriate measures to facilitate access to legal services, including legal aid, legal awareness, and sensitization of women's rights. Further, judicial bodies must undertake their work based on gender equality, with States ensuring that women participate in the administration of justice and law enforcement. This Article also covers the obligation of state parties to reform existing discriminatory laws and practices to promote and protect women's rights.

### **6.7.1 National Gender & Equality Commission & another vs Judicial Service Commission & 2 others [2017] eKLR<sup>74</sup>**

**Issue: Access to justice, gender equality, discrimination against women**

#### Facts

In 2016, vacancies were announced following the retirement of the Chief Justice, Deputy Chief Justice, and a Supreme Court Judge. When the Hon. Justice Lenaola was recommended for the position of Judge of the Supreme Court, the Petitioners argued that a woman should have been recommended instead, in adherence to Article 27 (8) of the Kenyan Constitution that provides for the two-thirds gender rule as follows: -

<sup>74</sup> <https://kenyalaw.org/caselaw/cases/view/135563/>

*“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”*

It was the Petitioners’ contention that the Supreme Court, as constituted then, with five men and two women, contravened the two-thirds gender rule.

### **Decision**

The High Court ruled that the wording of paragraph 13 of the First Schedule to the Judicial Service Act (JSA) and Article 166(3) of the Constitution require the Judicial Service Commission (JSC) to consider competence as the first criterion before considering any other criteria, including gender. The Court found that the JSC had made all necessary considerations in line with the JSA and Article 166(3) and held that Justice Lenaola’s appointment was constitutional.

### **Analysis**

In examining Article 8 of the Maputo Protocol and its analysis of Article 27 of the Constitution, the Court emphasized the two-thirds gender principle as an important principle of human rights. The Constitution prohibits one gender from occupying more than two-thirds of elective or appointive positions. The Petitioners aimed to demonstrate that the composition of the Supreme Court offended this principle and urged the Court to hold as such. Despite this assertion, the Court held that considering constitutional provisions, the Judicial Service Act (JSA), and jurisprudence from the Supreme Court, the Judicial Service Commission’s recommendation of Justice Lenaola had not breached the Constitution.

The Court held further that the functions of the JSC are provided for under Article 172(2), one of which is to recommend persons for appointment as judges. It added that in performing its duties under Article 172(2), JSC is to undertake a competitive and transparent process of appointment of judicial officers and other staff of the judiciary, as well as promotion of gender equality. It held that this role had been undertaken competitively.

### **Commentary**

While the Court emphasized the importance of individual qualifications in public sector appointments, it overlooked the historical reality that women often have unequal opportunities to access leadership in institutions such as the Judiciary. The Court also failed to recognize historical discrimination against women in several public institutions in Kenya, including the judiciary, thereby failing to avail to the case a progressive interpretation of Article 2 of the Maputo Protocol on the elimination of discrimination against women. Applying the two-third gender principle would have reflected the values expressed in Article 10 (2) (b) of the Constitution of inclusion and equality and Article 8 of the Maputo Protocol.



## 6.8 ARTICLE 9: RIGHT TO PARTICIPATION IN THE POLITICAL AND DECISION-MAKING PROCESS

States Parties shall take specific positive action under this Article to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures. It further provides that States Parties should facilitate the participation of women in elections and other governance processes without discrimination as equal partners with men<sup>75</sup>.

Cases concerning this Article have not been found during the development of this Digest.

## 6.9 ARTICLE 10: RIGHT TO PEACE

This Article provides that women have the right to a peaceful existence and to participate in promoting and maintaining peace. It lists several obligations of States Parties to ensure the increased participation of women, including participation in the promotion of and in programs of education for peace and a culture of peace; engagement in conflict prevention management and resolution processes at all levels and in decision-making processes that protect the rights of all, particularly women, in situations of conflict and displacement. This Article also provides for the participation of women in the planning, formulation, and implementation of post-conflict reconstruction and rehabilitation.

In Article 10(3), the Protocol calls on States Parties to undertake the necessary measures to significantly reduce military expenditures in favor of spending on social development in general and the promotion of women in particular.

There were no cases directly related to this Article. However, in the case of ***Coalition on Violence Against Women and 11 Others vs Attorney General of the Republic of Kenya and others***<sup>76</sup> the judge made a declaratory order to the effect that the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence is a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Petitioners. In articulating the right to equality, remedy, and protection of the law, the judge also referred to Article 8 of the UDHR, Article 3 of the ICCPR, and Article 25 of the Maputo Protocol. By referencing the right to equality, the right to remedy, and the right to protection of the law, the judgment reinforces the importance of legal accountability in fostering peace and security.

This case has been highlighted in this Digest under Article 25 of the Maputo Protocol.

<sup>75</sup> Supra, No 1 page 64

<sup>76</sup> [Coalition on Violence Against Women & 11 others vs Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission\(Interested Party\); Kenya National Commission on Human Rights & 3 others\(Amicus Curiae\) \[2020\] eKLR \(High Court of Kenya\)](#)

## 6.10 ARTICLE 11: PROTECTION OF WOMEN IN ARMED CONFLICTS

Under this Article, States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations affecting the population, particularly women. They also undertake, in accordance with the obligations incumbent upon them under international humanitarian law, to protect civilians, including women, irrespective of the population to which they belong, in the event of armed conflict.

They further undertake to protect asylum-seeking women, refugees, returnees, and internally displaced persons, against all forms of violence, rape, and other forms of sexual exploitation and to ensure that such acts are considered war crimes, genocide, and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

**Issue: Rape, sexual violence, forced marriage, and torture by non-state actors**

### 6.10.1 ECW/CCJ/APP/58/18, *Collectif Cri de Coeur pour le Mali vs The Government of Mali*.<sup>77</sup>

#### Facts

The Applicant, *Collectif Cri de Coeur pour le Mali*, a human rights organization representing the victims, sought judicial redress for violations of the rights of the victims of sexual abuse related to the conflict in the country's North under various international human rights treaties, including the Maputo Protocol. The Court, however, concluded that the Applicant's claims lacked sufficient evidence and legal grounding to hold the government responsible.

The Applicants informed the Court that since January 2012, Mali had been a theater of armed conflicts, especially in the northern part of the country, which was under the control of armed groups. They claimed that, during the occupation of the town of Gao from April 2012 to January 2013, many acts of sexual violence were committed against women and girls.

#### Decision

On 29 January 2024, the ECOWAS Court dismissed multiple claims brought by *Collectif Cri de Coeur pour le Mali* against the government of Mali. The case, premised on allegations of human rights violations during a conflict, included charges of rape, sexual violence, forced marriage, and torture by non-state actors.

#### Analysis

Some of the Applicants, who were among the victims of the alleged violations, said they lodged complaints and claims for indemnification through their lawyers as far back as 2016. They alleged that the trial judge held their files for an unreasonable time before sending them to the Public Prosecutor of the Republic of Mali in Gao. They claimed that the latter returned their files after five months, informing them of his inability to proceed with the case on the ground that the alleged facts constituted a crime of terrorism and could only be handled by a specialized Court.

The Applicants said they had been unable to access their files since then and that no other decision had been made to advance proceedings in the case. They claimed that they had been denied justice and that, by its inaction, Mali violated and continued to violate its obligations under the international human rights treaties to which it was a party.

They urged the Court to declare that the State of Mali had violated their rights to fair trial and effective remedy, the rights of children to health care and health services, and their rights to compensation. They asked the Court

<sup>77</sup> [A decision setting back the fight against sexual violence linked to armed conflict in West Africa - Avocats sans frontières Canada \(asfcanada.ca\)](https://www.asfcanada.ca)

to order the Respondent to open investigations and prosecutions against the perpetrators and provide the victims with judicial, legal assistance, medical and psychological care. They also asked the Court to order the payment of 40,000,000 FCFA (approximately 67,000 USD) for physical harm and 15,000,000 FCFA (approximately 25,000 USD) for moral harm to each of the victims.

The State of Mali contested the claims, pleading lack of jurisdiction of the Court and inadmissibility of the case. The Court recognized its jurisdiction and confirmed the case's admissibility but ultimately dismissed the Applicants' claims on merit.

In respect of the violation of the rights to fair trial and the right to effective remedy, the Court held that the Applicants had not supported their claims with compelling facts and evidence to establish a derogation of the guarantees under Article 7 of the African Charter on Human and Peoples' Rights (ACHPR).

On violating the Applicant's rights to the prosecution of perpetrators under the Maputo Protocol, the Court held that the Respondent, having established a mechanism to discharge its obligation, did not breach the rights of the Applicants. The Court dismissed other claims for lack of sufficient evidence.

### Commentary

In this case, the Court not only addressed itself to the laws and treaties that had been violated but also considered the issue of the right to an effective remedy, bringing to light the important issue of evidence. In this case, it is to be noted that there were close to 6 years between the violations and the filing of the case in the ECOWAS Court. It was not demonstrated why the delay had occurred. Additionally, the applications had the opportunity to file the case in the ECOWAS Court without exhausting local remedies<sup>78</sup>.

## 6.11 ARTICLE 12: RIGHT TO EDUCATION AND TRAINING

Under this Article, the Maputo Protocol calls on States Parties to ensure equality in substance and access to education while preventing abuse and gender-based violations in learning institutions.

It also provides that States Parties shall take specific positive action to promote the right to education and the participation and inclusion of women in pursuing these rights.

### **6.11.1 Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (CWS SL) (On Behalf of Pregnant Adolescent School Girls in Sierra Leone) vs Sierra Leone, 2019 (ECOWAS Community Court of Justice)**<sup>79</sup>

**Issue: Discrimination against pregnant schoolgirls, limitation of equal opportunity and access in the sphere of education**

### Facts

Following an outbreak of the Ebola pandemic, the Respondent, the Republic of Sierra Leone, closed schools from June 2014 to April 2015. This saw an increase in the rate of teenage pregnancies. The then Minister of Education, Science, and Technology made a public statement directing that all pregnant schoolgirls be denied access to school so as not to be a negative influence on their peers. This statement became a policy, and the Respondent also established separate, alternative schools for the pregnant girls, which operated three days a week and offered

<sup>78</sup> In the Community Court of Justice, ECOWAS, holden in Abuja FCT. Suit no. ECW/CCJ/APP/05/08 -Ocean Yjng Nigeria Ltd. Vs Republic of Senegal

<sup>79</sup> [ECW/CCJ/JUD/37/19 Women Against Violence and Exploitation in Society \(WAVES\) & Child Welfare Society, Sierra Leone \(CWS SL\) \(On Behalf of Pregnant Adolescent School Girls in Sierra Leone\) vs Sierra Leone, African Human Rights CLA 2.0 \(ihrda.org\)](#)

limited education, teaching only four subjects: mathematics, English language, integrated science, and social studies. These schools integrated all the learners of different ages and academic progress into one classroom.

### Decision

The Court held that the policy and the resultant actions amounted to discrimination against pregnant schoolgirls in Sierra Leone. The Court held that Sierra Leone was in violation of Articles 2, 3, 17(1), 18(3) & 25 of the Banjul Charter; Article 28(1) of the Convention on the Rights of the Child<sup>80</sup>; Articles 1 & 3 of the Convention against Discrimination in Education of 14 December 1961<sup>81</sup>.

Consequently, the Court ordered that:

- a) The prohibitive policy can be revoked with immediate effect;
- b) The Respondent state takes steps to abolish the separate schools established for pregnant girls and integrate the girls already enrolled in the mainstream schools;
- c) The Respondent state develops strategies, programs, and nationwide campaigns to reverse the negative societal attitudes that support the discrimination and bias against pregnant girls attending school;
- d) The strategies and programs must enable teenage mothers to attend school and/or develop income-generation-driven programs for pregnant girls; and
- e) The Respondent State integrates sexual and reproductive health into school curricula as this increased knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancy.

The Court held that Sierra Leone was in violation of Articles 2, 3, 17(1), 18(3) & 25 of the Banjul Charter; Article 28(1) of the Convention on the Rights of the Child<sup>82</sup>; Articles 1 & 3 of the Convention against Discrimination in Education of 14 December 1961<sup>83</sup>.

### Analysis

The Court observed that the directive by the Minister of Science, Education, and Technology and the subsequent action of the Respondent were discriminatory against pregnant schoolgirls because there was no reasonable justification for the differential treatment of the pregnant girls. Further, it was the responsibility of the State of Sierra Leone to ensure that girls attend school without discrimination based on pregnancy with access to equal opportunities as anyone else. The Court held that the establishment of different schools with fewer facilities and standards for pregnant girls was discriminatory as their male peers, who may have impregnated them, attended regular schools with better facilities and access to full curricula. Based on the above, the Court further held that the conduct of separating the girls was stigmatizing and could be seen as a form of punishment for being pregnant.

### Commentary

In this case, the petitioners cited Article 12 (Right to Education and Training) and Article 2 (Elimination of Discrimination Against Women) of the Maputo Protocol among the provisions of human rights instruments that the Respondents violated. The Court failed to explicitly refer to the Maputo Protocol in its decision, which relates to Article 2 on eliminating discrimination against women, Article 3 on dignity, Article 12 on the right to education and training, and Article 14 on health and reproductive rights.

In this case, the decision had a significant positive impact on girls in the country. In partnership with the Government, civil society organizations working in Sierra Leone established a Task Force on Sexual and Reproductive Health to advise the Minister of Science, Education, and Technology and the Government on issues relating to the radical inclusion of women and girls in Sierra Leone's national development. The Government adopted three policy documents, namely, the Sierra Leone National Policy on Radical Inclusion in Schools - a radical inclusion policy

80 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

81 <https://unesdoc.unesco.org/ark:/48223/pf0000188526#:~:text=CONVENTION%20AGAINST%20DISCRIMINATION%20IN%20EDUCATION%20Paris%2C%2014%20December%201960%20The,of%20Human%20Rights%20asserts%20the>

82 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

83 <https://unesdoc.unesco.org/ark:/48223/pf0000188526#:~:text=CONVENTION%20AGAINST%20DISCRIMINATION%20IN%20EDUCATION%20Paris%2C%2014%20December%201960%20The,of%20Human%20Rights%20asserts%20the>

readmitting all pregnant or child mothers to school; the Comprehensive School Safety Policy aimed at ensuring (i) safe school facilities and learning environment; (ii) disaster risk reduction in schools; and (iii) protection from violence and other forms of abuse including sexual violence/abuse and harm in and around schools; and comprehensive sexuality education policy.

**6.11.2 Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) vs United Republic of Tanzania (The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Communication No: 0012/Com/001/2019 Decision No 002/2022)**<sup>84</sup>

**Issue: Discrimination against pregnant schoolgirls, lack of equal opportunity and access in the sphere of education, lack of informed consent for girls, unlawful detention of pregnant girls**

**Facts**

The Complainants, on behalf of Tanzanian girls, submitted a communication against the Respondent state to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), hereinafter the Committee. The key issues raised were that the Respondent state subjected primary and secondary school girls to mandatory pregnancy testing and refused to admit into and expelled pregnant or married schoolgirls from school, with no exceptions. They contended further that the policy ensured that girls were not readmitted to school even after childbirth. These schoolgirls were subjected to unlawful detention or harassment until they exposed the identity of the person who impregnated them. As this happened, the Government failed to provide access to sexual reproductive health information and services to prevent unplanned pregnancies.

**Decision**

The Committee found that the Respondent State violated several provisions of the African Charter on the Rights and Welfare of the Child (ACRWC), including obligations related to non-discrimination, the child's best interests, education, health, protection against abuse, and harmful practices. Accordingly, the Committee recommended that the Respondent State:

- a) Immediately prohibit mandatory pregnancy testing in schools and health facilities and publicly announce the prohibition;
- b) Review the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No. 295 of 2002, and in so doing, remove wedlock as a ground of expulsion and provide an indication that expulsion should be interpreted narrowly and not apply in cases of pregnancy of schoolgirls;
- c) Undertake concrete steps to prevent the expulsion of pregnant and married girls from schools, including by providing laws and policies on the same;
- d) Remove any non-re-entry policy of schoolgirls, including girls who had dropped out of school due to pregnancy or wedlock;
- e) Immediately re-admit schoolgirls who had been expelled due to pregnancy and wedlock and provide special support programs to compensate for the lost years and ensure better learning outcomes for the returned girls;
- f) Provide clear guidance to school administrators that girls who drop out of school due to pregnancy or wedlock are allowed to come back to school with no preconditions;
- g) Investigate the cases of detention of pregnant girls and immediately release detained pregnant girls being interrogated to reveal who impregnated them, and stop such kinds of illegal arrests of pregnant girls;
- h) Provide sexuality education for adolescent children and provide child-friendly sexual reproductive and health services;
- i) Undertake extensive sensitization of teachers, health care providers, police, and other actors with regard to the protection that should be accorded to pregnant and married girls;
- j) Undertake proactive measures towards the elimination of child marriage and other harmful practices that affect girls, including by taking measures to address the underlying factors such as gender-based discrimination, poverty, and negative customary and societal norms;

84 <https://www.acerwc.africa/sites/default/files/2022-10/ACERWC%20Decision%20final%20Communication%20No-%200012Com0012019.Tanzania.pdf>



- k) Create a conducive reporting and referral mechanism for survivors of sexual violence, including child marriage, and provide psychosocial support, rehabilitation, and reintegration services for the survivors;
- l) Investigate and prosecute perpetrators of sexual violence and child marriage;
- m) Take action against any actors who conduct forced pregnancy testing of any kind or who discriminate against girls on the grounds of their pregnancy or marital status, including expulsion and detention; and
- n) Provide special support to pregnant and married girls to continue their education in a school of their choice based on their consent.

### Analysis

The Committee concluded that “mandatory” pregnancy testing is synonymous with “forced” testing, as girls had no option to refuse and lacked informed consent. This practice caused psychological harm and physical pain, and the humiliating manner of expelling girls constituted cruel, inhuman, and degrading treatment. The stigma attached to these tests reflects structural gender-based discrimination, subjecting girls to scrutiny regarding their sexuality, even in cases of sexual abuse, and is not in the best interest of the child.

Referencing the case of **WAVES and CWS-SL vs. The Republic of Sierra Leone**, the Committee emphasized that the Respondent State violated the right to education of girls through discriminatory practices, highlighting the negative impact of segregating pregnant girls from their peers. The Committee determined that policies leading to the expulsion of pregnant and married girls violated their right to education.

The Committee invoked Article 1(g) of the Maputo Protocol, stating that Member States must facilitate continuous education for girls, including re-entry after childbirth, and adopt measures to prevent child marriage and teenage pregnancy, with no exceptions.

Furthermore, the Committee criticized the detention of pregnant girls until they revealed the identity of their impregnators, viewing it as discrimination based on gender, age, and health. This illegal detention of survivors of sexual violence compounded their suffering and violated international human rights standards.

Lastly, the Respondent State’s failure to provide access to sexual and reproductive health information and services violated Article 14 of the Maputo Protocol. The Committee emphasized the need for a safe, supportive environment for adolescent mothers, ensuring access to information, counseling, and health services.

### Commentary

Apart from Article 12 of the Maputo Protocol, this case also relates to Article 1 (Definitions), Article 2 (Elimination of Discrimination Against Women), Article 3 (Right to Dignity), Article 4 (the Rights to Life, Integrity and Security of the Person), Article 5 (Elimination of Harmful Practices), Article 6 (Marriage) and Article 14 (Health and Reproductive Rights) of the Maputo Protocol.

It is worth noting that the ban by the government of the United Republic of Tanzania on pregnant girls from attending public primary and secondary schools or re-accessing the schools after delivery was also the subject matter in the case of [Mwambipile and Equality Now vs United Republic of Tanzania \(Application No. 042/2020\) \[2022\] AfCHPR 38 \(1 December 2022\)](#)<sup>85</sup>. In this case, the majority decision of the Court was that the case was inadmissible because the measures sought by the Applicants were identical to those sought in the complaint brought before the ACERWC.

However, there were two dissenting opinions and a separate opinion in which the judges opined that the applications before the Court and the communication before the ACERWC were undoubtedly similar but not identical. The two opinions noted that some of the violations alleged before the Court were not featured in the case before the Committee; hence, the Court should have addressed the additional allegations raised.

<sup>85</sup> [African Court Cases | Details of a case \(african-court.org\)](#)

## 6.12 ARTICLE 13: ECONOMIC AND SOCIAL WELFARE RIGHTS

The Maputo Protocol provides that States Parties shall adopt and enforce legislative and other measures to guarantee women equal work, career advancement, and other economic opportunities.

### 6.12.1 *Mahlangu and Another vs Minister of Labour and Others*, ZACC 24, 2020 (Constitutional Court of South Africa)<sup>86</sup>

#### Issue: Discrimination against women working in the informal sector

##### Facts

Ms. Mahlangu was employed as a domestic worker in a private home at the time of her death. Following her demise, her daughter, the 1<sup>st</sup> Applicant, who was financially dependent on her mother at the time, approached the Department of Labour to enquire about compensation for her mother's death. She was informed that she could neither get compensation under the Compensation for Occupational Injuries and Diseases Act nor unemployment insurance benefits for her loss, which the Act would ordinarily cover. Assisted by the 2<sup>nd</sup> Applicant, the South African Domestic Service and Allied Workers Union (SADSAWU)-she filed an application in the High Court of South Africa. She sought to have Section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act declared unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of "employee," hence denying them compensation in the event of injury, disablement or death in the workplace.

##### Decision

The Court declared that Section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 was unconstitutional. It also directed that the declaration of the unconstitutionality of the said provision must apply retrospectively and with immediate effect to provide relief to domestic workers who had been injured or who had died while in employment prior to the granting of the order.

##### Analysis

The Court observed that domestic workers experience discrimination because of their gender. It held that Section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act was, therefore, discriminatory. To support the inclusion of domestic workers in social security benefits under the Compensation for Occupational Injuries and Diseases Act, the Court invoked the social security provisions of international and regional instruments that South Africa has ratified, including Article 13(f) of the Maputo Protocol, which requires States Parties to "adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities through establishing a system of protection and social insurance for women working in the informal sector, and sensitize them to adhere to it."

##### Commentary

In addition to Article 13 of the Maputo Protocol, this case also covers issues addressed under Article 4 (the rights to Life, Integrity, and Security of the Person).

This case is significant as it recognized the value of domestic workers, the majority of whom are often women. The Court highlighted that the Maputo Protocol constitutes a model framework and an endless source of inspiration for women in Africa, as it aims to put an end to gender stereotypes and discrimination against women and to bring about the economic emancipation of women in the fields of civil, political, and reproductive health rights.

<sup>86</sup> *Mahlangu and Another vs Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) (saflii.org)

## 6.13 ARTICLE 14: HEALTH AND REPRODUCTIVE RIGHTS

Under this Article, States Parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted, including the right to medical abortion in cases of sexual assault, rape, or incest or where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

Under Article 14 (2), States Parties are obligated to take all appropriate measures to provide adequate, affordable, and accessible health services for all women; establish and strengthen existing pre-natal, delivery, and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding and protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

### **6.13.1 State (oao HM (guardian) on behalf of CM (minor)) vs Hospital Director of Queen Elizabeth Central Hospital & the Minister of Health (Judicial Review Cause 3 of 2021) [2021] MWHC 43<sup>87</sup> - Malawi**

#### **Facts**

The Applicant filed a case under a certificate of extreme urgency and grounds for leave to apply for Judicial Review. The Applicant was a 15-year-old minor suing through her guardian HM and biological brother. The decision made by the first defendant through its medical officers at One Stop Centre Clinic (OSCC) at Queen Elizabeth Central Hospital (QECH) on or about 30th March 2021 denying the applicant access to safe termination of pregnancy (the Decision) is the basis for this decision. This was, therefore, an application for leave to apply for Judicial Review against the defendant's decision through its medical officers at the OSCC of QECH denying the applicant access to safe termination.

#### **Decision**

In its decision on 15 June 2021, the High Court in Malawi denied a request by the Applicant for leave to file for Judicial Review, challenging the hospital's decision not to perform an abortion as the court held that there was no proof of such request from the Applicant. Further, the Court held that Judicial Review could only be made where a public institution was at play and found that this was not the case herein.

However, the Court reaffirmed the statutory protections for legal abortion, noting that the restrictions on access to safe and legal abortion under the Penal Code were exempted when the life of the pregnant woman is in danger and, further, that the preservation of a woman's life includes preservation of mental and physical health. This broad interpretation by the Court on the law on abortion also contained the interpretation of the process of accessing abortion in Malawi that included an unambiguous request by the woman or girl in the presence of a health care provider clearly detailing the existing condition and how it impacts their life or health. Upon review, the health provider could decide on whether or not to provide the abortion service.

#### **Analysis**

The Court, in its ruling, went a step beyond the actual text of the Penal Code and clarified the process a woman or girl should follow to receive an abortion in Malawi. More importantly, the Court expanded the interpretation of the life-threatening exception in the Penal Code to include the physical and mental health of the woman.

<sup>87</sup> <https://malawilii.org/akn/mw/judgment/mwhc/2021/43/eng@2021-06-15>

## Commentary

This is the first non-criminal abortion case in Malawi and the first time a court has attempted to interpret provisions of the Penal Code. This is a ruling of the High Court, binding on all lower courts and public officers. The Court also found that the Applicant had already filed charges against the father of her unborn child, and this case was ongoing in a criminal court.

### **6.13.2 PAK & another vs Attorney General & 3 others (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (High Court of Kenya)**

**Issue: Operationalization of Article 26(4) of the Constitution, sexual and reproductive health and rights**

## Facts

The 1<sup>st</sup> Petitioner became pregnant while still in secondary school and had complications from her pregnancy, from which she sought treatment at Chamalo Medical Clinic, where she received emergency care from the 2<sup>nd</sup> Petitioner. The 2<sup>nd</sup> Petitioner diagnosed her with a spontaneous abortion and performed a successful manual vacuum evacuation. Plainclothes police officers later stormed the clinic, confiscated treatment records, and arrested the Petitioners and two female employees. The 1<sup>st</sup> Petitioner was forced to undergo a medical examination at Kilifi County Hospital and was charged with procuring an abortion, while the 2<sup>nd</sup> Petitioner faced related charges. The Petitioners filed the present petition, pleading violation of constitutional rights, including the right to life, privacy, health, and freedom from torture.

## Decision

The Court determined that PAK, the 1<sup>st</sup> Petitioner, had exercised her right to access medical treatment, potentially preventing imminent danger to her life or health. The criminalization of abortion without a clear statutory and administrative framework for therapeutic abortion, as outlined in Article 26(4) of the Kenyan Constitution, restricts reproductive rights. This lack of clarity, the Court found, may lead to arbitrary and unfair prosecutions by the Office of the Director of Public Prosecutions (ODPP). The Court found that the proceedings were unfounded and should be quashed as there was no prima facie evidence that the abortion was conducted outside the threshold of Article 26(4) of the Constitution.

## Analysis

There being no national legislation on abortion, the Court relied on international law. The Court found that restrictive abortion laws, coupled with the absence of effective legislation supporting Article 26(4) of the Constitution, exposed women and girls to mental and physical health risks associated with unsafe abortion. Such laws also stigmatize women and girls seeking abortion, violating their right to life and the right to the highest attainable standard of health. The Court referred to the UN Human Rights Committee General Comment No. 36, stressing the importance of Member States ensuring women's access to safe abortions.

Additionally, the Court referenced American jurisprudence, specifically *Roe vs. Wade* 410 US 113 [1973]<sup>88</sup> (before it was overturned), to illustrate that the right to privacy extends to a woman's decision to have an abortion.

The Court held that forcing someone to carry a pregnancy to term or to seek an unsafe abortion was deemed to be a violation of their human rights, particularly the right to life, right to health, right to bodily autonomy, right to protection from inhumane and degrading treatment, right to be free from torture/cruel treatment and the right to be free from discrimination.

## Commentary

This case was the first judgment in Kenya to recognize the right to safe abortion for women and girls. Even though not absolute, the right to health and reproductive rights (Article 14) is significantly linked to one's right to life. General Recommendation No. 24 on Article 12 of CEDAW recommends that legislation criminalizing abortion

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<sup>88</sup> [Roe vs. Wade: 410 U.S. 113 \(1973\) : Justia US Supreme Court Center](#)

should be amended to withdraw punitive measures imposed. The case also addresses Article 3 and Article 4 of the Maputo Protocol. Other rights cited include the right to the highest attainable standard of physical and mental health; the right to benefit from scientific progress and its realization; the right to decide freely and responsibly on the number, spacing, and timing of children; and the right to be free from torture, cruel, inhuman, and degrading treatment, and punishment.

While appreciating the Court's efforts in enforcing women's rights, it must be noted that the Court restricted itself from rendering Sections 158 and 159 of the Penal Code unconstitutional. The Court also declined the request by the Petitioners for a permanent injunction preventing the police from arresting persons seeking medical abortion care.

Considering the lack of a policy framework, the Court addressed the issue and provided precedence, highlighting the Maputo Protocol and various international human rights instruments.

### **6.13.3 Center for Health, Human Rights and Development (CEHURD) & 3 Ors vs Attorney General (Constitutional Petition No. 16 of 2011) [2020] UGCC 12 (Constitutional Court of Uganda)**<sup>89</sup>

#### **Issue: Violation of the right to health and life, maternal mortality**

##### **Facts**

The Petitioners challenged the actions and omissions of the Government of Uganda for failure to provide basic maternal health services in violation of the right to health, the right to life, and women's human rights under the Constitution of Uganda. The case concerned two women, Ms. Nalubowa and Ms. Anguko, who required maternal care but died in public hospitals because the medical personnel did not attend to them.

##### **Decision**

The Court held that the State had violated the right to health and the right to life under the Constitution of Uganda and was, therefore, liable for the deaths of Ms. Anguko and Ms. Nalubowa. Accordingly, the Court awarded the Petitioners compensatory and punitive/exemplary damages. It also ordered the Government to prioritize and allocate sufficient funds in the national budget towards maternal health care and to ensure that all staff providing maternal health care services in Uganda are fully trained. It was further held that all health centers should be sufficiently equipped within two financial years. The Respondent state was ordered to compile and submit to Parliament, with a copy to the Court, a full audit report on maternal health status in Uganda at the end of each of the subsequent two financial years. The Respondent State was ordered to submit a progress report on implementing the orders.

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<sup>89</sup> [Center for Health, Human Rights and Development \(CEHURD\) & 3 Ors vs Attorney General \(Constitutional Petition No. 16 of 2011\) \[2020\] UGCC 12 \(19 August 2020\) - ULLI](#)



## Analysis

The Court established high out-of-pocket expenses and a lack of *mama* kits (the basic supplies required for clean and safe delivery). It also noted the high numbers of women dying during labor due to a lack of basic maternal health commodities, staff shortages, and inexperienced staff. The Government's inaction in implementing a roadmap to accelerate the decrease of maternal mortality violated the rights of women under the Constitution of Uganda. It dismissed the Respondent's plea for limited resources, stating that there was a need for the government to harness resources and ensure that hospitals provide free basic lifesaving services.

The Court also found that the Respondent State was liable for the inadequate maternal services caused by scarce drugs, negligent professional care, and ill-equipped facilities. It noted that the deaths of Ms. Anguko and Ms. Nalubowa were caused by the unavailability of basic maternal health services and negligence in care, which amounted to cruel, inhuman, or degrading treatment and a violation of the right to dignity.

## Commentary

Apart from Article 14 of the Maputo Protocol, this case covered Article 2 (Elimination of Discrimination Against Women), Article 3 (Right to Dignity), and Article 4 (The Rights to Life, Integrity, and Security of the Person).

This decision is significant because it highlights the importance of access to proper maternal and emergency obstetric care in promoting and protecting women's constitutional rights to health and life.

### **6.13.4 Federation of Women Lawyers (FIDA – Kenya) & 3 others vs Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR (High Court of Kenya)<sup>90</sup>**

#### **Issue: Unsafe abortion, right to the highest standard of attainable health**

## Facts

At 14, JMM was defiled and became pregnant. She sought an abortion from an unqualified individual, resulting in an unsafe procedure that left her in poor health. JMM was transferred between medical facilities due to a lack of resources, ultimately undergoing surgery for complications, including septic abortion and chronic kidney disease at a national hospital. Despite receiving treatment, her family could not afford her medical fees, leading to her detention in the hospital under poor conditions. She eventually succumbed to kidney failure at 18, represented in court by her mother and guardian, "PKM".

The petition centered on the withdrawal of the "Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya" and the "National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies." The Petitioners challenged the constitutionality of the Director of Medical Services' actions, who had issued a memorandum prohibiting health workers from training on safe abortion practices and using the drug Medabon, claiming that the 2010 Constitution made abortion on demand illegal.

The Petitioners argued that JMM's case exemplified the many young women who suffered or died from unsafe abortions after the withdrawal of the guidelines. They noted that many women resort to unsafe methods due to lack of access to trained healthcare providers, inadequate information about legal abortion, or fear of the costs associated with legal services.

## Decision

The Court held that abortion is illegal in Kenya, save for the exceptions provided under Article 26(4) of the Constitution of Kenya 2010, and that pregnancy resulting from rape and defilement, if in the opinion of a trained health professional, poses a danger to the life or the health (physical, mental and social well-being) of the mother, may be terminated. The Court also held that the Ministry of Health's 2013 withdrawal of the 'Standards and Guidelines'

<sup>90</sup> <http://kenyalaw.org/caselaw/cases/view/175490/>

and 'Training Curriculum for Healthcare Professionals on Abortion' was unlawful, arbitrary, unconstitutional, and thus null and void. As a result of the Respondents' actions, the Court awarded compensation to the personal representative of the estate of JMM for material and emotional harm suffered.

### Analysis

To address the issue of whether pregnancy resulting from sexual violence, i.e., rape or defilement, falls under the permissible legal circumstances for abortion under Article 26(4) of the Constitution, the Court noted that it is not the cause of the danger that determines whether an abortion is necessary but the effect of the danger. It, therefore, followed that if a pregnancy result from rape or defilement, or in the opinion of a trained health professional, endanger the life or physical, mental, and social well-being of a mother, then abortion is permissible. Further, the Court's position was that while Kenya made a reservation to Article 14 (2)(c) of the Maputo Protocol, the words of the Article are largely similar to those used in the Constitution. Article 14 (2) (c) of the Protocol states that women have the right to safe abortion in cases of sexual assault, rape, incest, and when the pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

On the decision to withdraw the 2012 Standards and Guidelines and Training Curriculum, the Court found that by this withdrawal, the DMS had, in effect, disabled the efficacy of Article 26(4) of the Constitution of Kenya. That action, which in the Court's view constituted a limitation of the rights under Article 26(4), derogated from the core or essential content of the right and was clearly not justifiable. It was prejudicial to the petitioners and violated the rights of the petitioners and other women and adolescent girls of reproductive age whose interest they represent to the highest attainable standard of health guaranteed under Article 43(1) (a) of the Constitution of Kenya. Thus, the directive by the DMS created an environment in which survivors of sexual violence could not access safe, quality services despite the clear constitutional guarantee.

### Commentary

The Court's conclusion that JMM and all persons who need treatment were entitled to emergency treatment, including post-abortion care, irrespective of the circumstances, aligns with Article 14 (2) (c). Apart from Article 14 of the Maputo Protocol, this case also addresses rights covered under Article 2 (Elimination of Discrimination Against Women), Article 3 (Right to Dignity), and Article 4 (the Rights to Life, Integrity, and Security of the Person).

This decision is significant because it acknowledges the mental and physical health of survivors of sexual violence. The Court further recognized the fact that these survivors are usually faced with the difficult choice of resorting to unsafe means to get rid of unwanted pregnancies with dire consequences to their health and lives. In the alternative, victims of sexual violence are condemned to carry unwanted pregnancies to term, with detrimental effects on their health and socio-economic status. It is also significant as it acknowledges the linkages between the protections provided to women under Article 14 (2) (c) of the Maputo Protocol, Article 26 (4) of the Constitution of Kenya 2010, and Kenya's reservation on Article 14 (2) (c) of the Maputo Protocol.

**6.13.5 LA W & 2 others vs Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) [2022] KEHC 17132 (eKLR)(High Court of Kenya)<sup>91</sup>**

**Issue: Right to reproductive healthcare, right to informed medical decisions**

### Facts

The 1<sup>st</sup> Petitioner, during an antenatal consultation at the 1<sup>st</sup> Respondent health center, tested positive for HIV. She was advised not to have more children due to health risks and received vouchers for a cesarean section (CS) and tubal ligation (TL) from a community health worker in Korogocho. The 1<sup>st</sup> Respondent's hospital performed the procedures, resulting in the petitioner's permanent inability to conceive. She claimed a violation of reproductive health rights, dignity, and social justice, alleging the lack of informed consent and torture.

<sup>91</sup> [Constitutional Petition 606 of 2014 - Kenya Law](#)

The 1<sup>st</sup> Respondent argued that the 1<sup>st</sup> Petitioner gave informed consent at the 2<sup>nd</sup> Respondent's health center, which independently handled screening and voucher issuance. As an independent contractor, the 1<sup>st</sup> Respondent contended that they executed their contractual mandate and that the procedures were consensual.

### Decision

The Court found that the act of the 1<sup>st</sup> Respondent to sterilize the 1<sup>st</sup> Petitioner by way of bilateral tubal ligation was undertaken without obtaining the 1<sup>st</sup> Petitioner's informed consent. As such, it amounted to a violation of the 1<sup>st</sup> Petitioner's constitutional rights.

### Analysis

The Court addressed the contention on whether the 1<sup>st</sup> Petitioner was adequately informed about the bilateral tubal ligation procedure and its lifelong consequences. Considering the petitioner's low literacy level, economic vulnerability, and limited understanding of family planning, the Court held that the 1<sup>st</sup> Respondent had an obligation to communicate the procedure, its implications, and available family planning alternatives in a language that the 1<sup>st</sup> Petitioner could comprehend. The Court rejected the argument that informed consent was obtained at the 1<sup>st</sup> Respondent's health center, emphasizing the need for the 1<sup>st</sup> Respondent to have exercised due diligence on its part. The Court concluded that the 1<sup>st</sup> Petitioner knew she was being sterilized but was unaware of its permanence, and the process of obtaining consent did not adhere to legal requirements for informed consent.

### Commentary

In this case, the Petitioners stated that the action of the Respondents violated international treaties to which Kenya is a party, including Article 14 of the Maputo Protocol. The General Comment No. 2 on Article 14(1)(a), (b), (c), and (f) of the Maputo Protocol is also applicable to Kenya. It requires state parties to ensure that the right to health of women, including the right to sexual and reproductive health, is respected and promoted.

## 6.14 ARTICLE 15: RIGHT TO FOOD SECURITY

This Article provides that States Parties shall ensure that women have the right to nutritious and adequate food. State parties must, therefore, take appropriate measures to provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food. States Parties must also establish adequate systems of supply and storage to ensure food security.

Cases concerning this Article have not been found during the development of this Digest.

## 6.15 ARTICLE 16: RIGHT TO ADEQUATE HOUSING

Under this Article, women shall have the right to equal access to housing and acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant women access to adequate housing, regardless of their marital status.

Cases concerning this Article have not been found during the development of the Digest.

## 6.16 ARTICLE 17: RIGHT TO POSITIVE CULTURAL CONTEXT

This Article provides that women have the right to live in a positive cultural context and to participate at all levels in determining cultural policies. States Parties are obligated to take all appropriate measures to enhance women's participation in the formulation of cultural policies at all levels.

Cases concerning this Article have not been found during the development of this Digest. However, the *Tatu Kamau*<sup>92</sup> case can be cited, where the court held that the right to practice one's culture must be applied against all other rights, including the right to life, dignity, and security of the person. It can, therefore, be deduced that the effective application of this right leads to a positive cultural context.

## 6.17 ARTICLE 18: RIGHT TO A HEALTHY AND SUSTAINABLE ENVIRONMENT

This Article guarantees women's right to live in a healthy and sustainable environment. States Parties are, therefore, obligated to take all appropriate measures to ensure women's greater participation in the planning, management, preservation, and sustainable use of natural resources at all levels.

The duty of the State is also noted to promote research and investment in new renewable energy sources and appropriate technologies, including information technologies, and facilitate women's access to and participation in their control. The State is also mandated to protect and enable the development of women's indigenous knowledge systems, regulate the management, processing, storage, and disposal of domestic waste, and ensure that proper standards are followed for the storage, transportation, and disposal of toxic waste.

Cases concerning this Article have not been found during the development of this Digest.

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92 *Supra*, No 61

## 6.18 ARTICLE 19: RIGHT TO SUSTAINABLE DEVELOPMENT

This Article recognizes women's right to fully enjoy their right to sustainable development. It, therefore, obliges States Parties to take all measures to introduce the gender perspective in national development planning procedures.

The Article reinforces the State's duty to ensure the participation of women at all levels in the conceptualization, decision-making, implementation, and evaluation of development policies and programs, similar to Article 9, which protects women's right to participate in politics and decision-making. The Article promotes women's access to and control over productive resources such as land and guarantees their right to property.

States Parties are obligated to promote women's access to credit, training, skills development, and extension services at rural and urban levels to provide women with a higher quality of life and reduce poverty among women. Additionally, States Parties must consider indicators of human development specifically relating to women in the elaboration of development policies and programs and ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programs are reduced to the minimum for women.

Cases concerning this Article have not been found during the development of this Digest.

## 6.19 ARTICLE 20: WIDOWS' RIGHTS

This Article begins with the statement of the duty of States Parties to take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

- a) That widows are not subjected to inhuman, humiliating, or degrading treatment.
- b) That a widow shall automatically become the guardian and custodian of her children, after the death of her husband unless this is contrary to the interests and the welfare of the children.
- c) That a widow shall have the right to remarry and, in that event, to marry the person of her choice.

Cases concerning this Article have not been found during the development of this Digest.

## 6.20 ARTICLE 21: RIGHT TO INHERITANCE

Under this Article, a widow shall have the right to an equitable share in the inheritance of her husband's property. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. The Article affirms that women and men shall have the right to inherit, in equitable shares, their parents' properties.

Cases concerning this Article have not been found during the development of this Digest.



## 6.21 ARTICLE 22: SPECIAL PROTECTION OF ELDERLY WOMEN

States Parties undertake to provide protection to elderly women and take specific measures commensurate with their physical, economic, and social needs, as well as their access to employment and professional training. They further commit to ensuring the rights of elderly women to freedom from violence, including sexual abuse, discrimination based on age, and the right to be treated with dignity.

These rights are further affirmed in the AU Protocol on the Rights of Older Persons, which was adopted in 2016 but has yet to enter into force<sup>93</sup>.

Cases concerning this Article have not been found during the development of this Digest.

## 6.22 ARTICLE 23: SPECIAL PROTECTION OF WOMEN WITH DISABILITIES

States Parties undertake to:

- a) Ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic, and social needs to facilitate their access to employment, professional, and vocational training, and participation in decision-making.
- b) Ensure the right of women with disabilities to freedom from violence, including sexual abuse and discrimination based on disability.

The rights upheld by this Article are buttressed by the AU Protocol on the Rights of Persons with Disabilities, which is yet to enter into force<sup>94</sup>.

Cases concerning this Article have not been found during the development of this Digest.

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<sup>93</sup> No 17, *supra*

<sup>94</sup> No 20, *supra*

## 6.23 ARTICLE 24: SPECIAL PROTECTION OF WOMEN IN DISTRESS

Under this Article, the States Parties undertake to ensure the protection of poor women and women heads of families, including women from marginalized population groups, and provide an environment suitable to their condition and their special physical, economic, and social needs.

They further undertake to ensure the rights of pregnant or nursing women or women in detention by providing them with an environment that is suitable to their condition and the right to be treated with dignity.

### **6.23.1 *The State vs The Officer In-Charge| Ex Parte: Banda & Others (Judicial Review 28 of 2018) [2022] MWHC 139 (High Court of Malawi)***<sup>95</sup>

#### **Issue: Discrimination against women during arrest and detention**

##### **Facts**

The Applicants successfully sought leave to apply for Judicial Review. The facts of the case were that the Applicants were randomly arrested with 20 other people in a purported swoop by Kasungu Police. The Applicants stated that at the time of their arrest, they were not informed of the reasons for their arrest despite demanding this information from the police. They were taken into police custody and spent a night in the police cells but were not informed of the reason for their detention. The day following their arrest, they were charged with the offense of being rogue and vagabond and were told by the police to plead guilty or face detention in prison on remand. They were convicted and fined on the aforesaid charges.

##### **Decision**

The Court found that the indiscriminate swoop by the police was unconstitutional, unlawful, and contrary to their duty to protect human rights. Further, the court found the following actions of the police as being unconstitutional and unlawful: a) failure to promptly inform the Applicants of the charges preferred against them at the time of arrest, and b) the conduct of the police at the police station, coercing the Applicants to plead guilty to the offense of being rogue and vagabond. The Court directed the police to develop proper guidelines for swooping exercises and granted an order of compensation to the Applicants.

##### **Analysis**

The Court observed that often, regarding women, the State fails to prove the elements of the offenses charged and that the police abuse swooping exercises by arresting women from rest houses or those who are not offenders. The Court noted that in most cases, they enter a plea of guilty so that they are given a fine or released rather than remaining in custody awaiting trial. Additionally, the police often discriminate by arresting only women, even when men are present in the same places and are engaging in similar activities. Based on this, the Court held that police should not take advantage of and abuse the law by arresting people without due legal or justifiable cause.

In making its decision, the Court also held that vagrancy laws and by-laws, including those allowing someone to be arrested without a warrant, tend to violate human rights, particularly women's rights, and contravene Articles 2 and 3 of the Banjul Charter. In arriving at this, the Court analyzed whether "vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without a warrant simply because the person has no 'means of subsistence and cannot give a satisfactory account' of him or herself, violate Article 24 of the Maputo Protocol"<sup>96</sup>.

<sup>95</sup> [The State vs The Officer In-Charge| Ex Parte: Banda & Others \(Judicial Review 28 of 2018\) \[2022\] MWHC 139 \(22 July 2022\) - MalawiLII](#)

<sup>96</sup> Ibid, page 33

## Commentary

This case highlighted the violation of the right of women to be treated with dignity, particularly during arrest and detention, which offended Articles 8 and 24 of the Maputo Protocol. The issues raised in this case relate to Articles 3 and 4 of the Maputo Protocol, and the petitioners pleaded similar Articles of the Banjul Charter related to the Maputo Protocol. This case raises issues similar to those raised in the *Dorothy Njemanze & 3 others vs The Federal Republic of Nigeria*.<sup>97</sup> The judgment was delivered on 12<sup>th</sup> October 2017. This case is also discussed in the first edition of the Case Digest<sup>98</sup>.

## 6.24 ARTICLE 25: REMEDIES

Under this Article, States Parties commit to providing appropriate remedies to any woman whose rights or freedoms have been violated. They also undertake to ensure that such remedies are determined by competent judicial, administrative, or legislative authorities or by any other competent authority provided for by law.

**6.24.1 Coalition on Violence Against Women & 11 others vs Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights & 3 others(Amicus Curiae) [2020] eKLR (High Court of Kenya)**<sup>99</sup>

**Issue: Right to appropriate remedies for women whose rights or freedoms have been violated**

### Facts

Following the announcement of Kenya's presidential election results in December 2007, widespread violence and demonstrations ensued and continued from late December 2007 until March 2008. During this period of unrest, several women, men, and children were targeted, attacked, and subjected to various forms of sexual and gender-based violence ('SGBV'), including rape, gang rape, sodomy, defilement, forced pregnancy, forced circumcision and mutilation, or forced amputation of genital organs.

The Petitioners sued the Respondents for failing to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to SGBV. They also averred that the failure to provide effective remedies to the victims of SGBV violated the fundamental rights of the 5th to 12th Petitioners and other victims.

### Decision

The Court determined that the State violated the 5th, 6th, 8th, and 9th Petitioners' rights, and the State failed to provide effective remedies to them. Accordingly, the Court declared that the failure to conduct independent and effective investigations that would have led to the prosecution of SGBV-related crimes during the post-election violence was a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5th, 6th, 8th and 9th Petitioners.

Moreover, the Court declared that the right to life, the right to the prohibition of torture and inhuman and degrading treatment, the right to security of the person, the right to protection of the law, the right to equality and freedom from discrimination, and the right to remedy were violated in relation to the 5th, 6th, 8th, and 9th Petitioners during the 2007-2008 post-election violence and that Kenya had a duty to protect those rights.

<sup>97</sup> <http://www.courtecawas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2017-ENGLISH.pdf>, page 139

<sup>98</sup> *Supra*, No 1

<sup>99</sup> <http://kenyalaw.org/caselaw/cases/view/206218/>

## Analysis

The Court noted that the State has an obligation to prevent violations committed by State and non-state actors and protect citizens from threats to their rights. Regarding the 5th, 6th, and 9th Petitioners, the Court found that they were assaulted by State actors (police officers), yet no investigations, arrests, or prosecutions were initiated. Their rights to life, security of the person, and protection from torture were therefore infringed upon by the actions of the State actors, which, in line with national, regional, and international law, are regarded as actions by the State itself. In the case of the 8th Petitioner, who was assaulted by non-State actors, the Court noted that once she reported the rape, the State, through the police, owed her a duty of care to investigate her report and make arrests, and when they failed to do so they in effect violated her rights to life; security of the person; and protection from torture, inhuman and degrading treatment or punishment.

For the above reasons, the Court observed that there was discrimination against the 5th, 6th, 8th, and 9th Petitioners, as the State was owed a duty of care to not only refrain from harming them but also investigate and prosecute those causing them harm and compensate them appropriately. The Court further noted that sexual violations amount to human rights violations and should be compensated in the same manner that other rights and freedoms are.

## Commentary

This case relates to several articles of the Maputo Protocol: Article 4 (the Rights to Life, Integrity and Security of the Person), Article 10 (Right to Peace) and Article 25 (Remedies). This case is significant as it draws upon the State's obligation to protect, respect, and uphold human rights even where private citizens commit the violations. The decision of the High Court demonstrates that under international human rights instruments, Member States cannot escape liability for the infringement of human rights if non-state actors do not commit the violation. Member States must be cognizant of the fact that they have an obligation to ensure that private citizens, companies, etc., are not infringing the human rights of others, and where violations occur, the State must ensure that the same are effectively punished and victims given access to the appropriate remedies.

### 6.24.2 *Idris vs Federal Republic of Nigeria (ECW/CCJ/APP/30 of 2019) [2022] ECOWASCJ 7*<sup>100</sup>

#### Issue: Remedies to violation of rights

## Facts

The Applicant's case was that at the age of seventeen years, she was violently raped by one Peter Okoro in Lagos State of Nigeria. She submitted that a medical examination confirmed that she was indeed raped, and a report was subsequently made to the Nigerian Police in Lagos State. After police investigations, the suspected perpetrator was charged with the offenses of rape and unlawful assault before the Lagos State Magistrate Court, Ajah Division. The Applicant stated that although she had orally testified in the case, at the time of filing the suit, other witnesses of the prosecution had not been called, and the accused had not opened his defense for close to seven years. She contended that the State had, therefore, failed to conduct a speedy and effective trial against the perpetrator, thus violating her right to a fair trial.

## Decision

The Court partially allowed the reliefs sought by the Applicant. It held that the Respondent had violated the Applicant's right to a fair trial by failing to promptly and effectively prosecute the alleged perpetrator of sexual violence. Accordingly, the Court ordered that the Respondent carry out an effective prosecution of the suspected perpetrator of sexual abuse on the Applicant, who was standing trial at the Lagos Magistrate Court. The Court noted that if found guilty, the Court should give him the appropriate punishment in compliance with the extant laws of the Respondent state. The Court also ordered the Respondents to submit a report on the measures taken to implement the decision of the Court within six (6) months of the date of the notification of the Judgment.

<sup>100</sup> [Idris vs Federal Republic of Nigeria \(ECW/CCJ/APP/30 of 2019\) \[2022\] ECOWASCJ 7 \(23 March 2022\)](#)

## Analysis

The Court noted that the prolonged delays in the dispensation of justice in the national courts of the Member States on unsubstantiated excuses fall short of acceptable international standards of access to justice. On the right to a fair trial, the Court held that the tenets of fair hearing include consideration of the length of the trial and the reasonability of the length of the trial to determine if justice has been so unreasonably delayed as to occasion the violation of the right to a fair trial. In the instant suit, both parties were agreeable that the perpetrator of the alleged rape was before the Court. However, the delay with which he was brought to trial was unreasonably long, effectively denying the Applicant justice.

## Commentary

This case addresses issues under Article 25 of the Maputo Protocol, as well as Article 2 (Elimination of Discrimination Against Women), Article 3 (Right to Dignity), and Article 4 (the Rights to Life, Integrity, and Security of the Person).

In this case, the Applicant relied on Article 25 of the Maputo Protocol, which provides that States Parties shall undertake to provide appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated and ensure that such remedies are determined by competent judicial, administrative, or legislative authorities or by any other competent authority provided for by law.

It is also worth noting that the Court reiterated that it did not seek to establish the truth of the allegation of rape but only consider the right of the Applicant to a fair trial, and it granted the appropriate remedy.

This case also enhances the comprehension of Article 8 (Access to Justice) of the Maputo Protocol by shedding light on the significant challenges that women encounter in pursuing justice, including issues such as the loss or misplacement of crucial evidence and unwarranted, prolonged delays in the justice system.

## Conclusion

In developing this Case Digest, Equality Now appreciates that there may be other decisions that reference the Maputo Protocol in addition to those cited in this Digest. Even though cases are decided on a regular basis, there are delays with the publication of these decisions. As an indication of this, the African Commission has, for instance, come under the direct scrutiny of civil society organizations who have challenged its interpretation of Article 59(1), which requires the Commission to keep confidential the actions under the Communications procedure until such action is authorized for publication by the AU Heads of State and Government. This interpretation means that the decisions of the human rights bodies cannot be published until they are authorized by the AU Heads of State and Government<sup>101</sup>. Similarly, delays in finalizing cases have led to the slow pace with which new decisions emerge<sup>102</sup>.

Therefore, it is important that this Digest and similar publications on the existing case law are updated regularly so that lawyers and other judicial officers can access the information in good time and serve the intended purpose of protecting and promoting the rights of the women of Africa as espoused in the Maputo Protocol.

Equality Now has trained lawyers from across Africa over an 8-year period, reaching at least 500 lawyers with knowledge and training on the Maputo Protocol. The organization continues to train judges and judicial officers in collaboration with the judiciaries of various countries. With increased awareness, there is expected to be more reference to the Maputo Protocol in the decisions of national and regional judicial bodies by the bar and bench. It is also hoped that the jurisprudence emanating from the strategic litigation undertaken to challenge the violations of the provisions of the Maputo Protocol will positively contribute to legal reform processes and to jurisprudence that will enhance the protection of women's rights.

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<sup>101</sup> [Article 59\(1\) statement launch campaign - ISLA \(the-isla.org\)](#)

<sup>102</sup> [Africa: States frustrate continental rights bodies' efforts to uphold human rights - Amnesty International](#)



# MAPUTO PROTOCOL: THE VISUALS

21 years since its adoption, the Maputo Protocol continues to catalyze significant progress for women and girls in Africa. These images, representing different advocates of the Maputo Protocol, capture these moments frozen in time.



Commissioner Janet Sallah-Njie - Special Rapporteur on the Rights of Women in Africa & Vice Chairperson of the ACHPR



African Judges training on the Maputo Protocol



Kenyan advocates who defended the anti-FGM law



Faiza Mohamed, Equality Now Africa Executive Director and long-standing champion of the Maputo Protocol



SOAWR members reflecting on 20 years of the Maputo Protocol



Judge presiding over the Tatu Kamau case



Activists lobbying against FGM bill



Presenting a lifetime award to ACDHRS

# RECOMMENDED REFERENCES

1. Breathing Life into Maputo Protocol Case Digest: Jurisprudence on the Rights of Women and Girls [https://equalitynow.storage.googleapis.com/wp-content/uploads/2018/04/16122236/Breathing\\_Life\\_into\\_Maputo\\_Protocol\\_Case\\_Digest-Jurisprudence\\_on\\_the\\_Rights\\_of\\_Women\\_and\\_Girls\\_in\\_Africa.pdf](https://equalitynow.storage.googleapis.com/wp-content/uploads/2018/04/16122236/Breathing_Life_into_Maputo_Protocol_Case_Digest-Jurisprudence_on_the_Rights_of_Women_and_Girls_in_Africa.pdf)
2. A Guide to Using the Protocol on the Rights of Women in Africa for Legal Action: [Manual\\_on\\_Protocol\\_on\\_Women\\_Rights\\_in\\_Africa\\_EN.pdf](#) (storage.googleapis.com)
3. African Commission on Human and Peoples' Rights: <https://achpr.au.int/>
4. African Court on Human and Peoples' Rights: [Home - African Court on Human and Peoples' Rights \(african-court.org\)](#)
5. African Legal Information Institute: [Home - AfricanLII](#)
6. African Human Rights Case Law Analyser: <http://caselaw.ihlda.org/>
7. Committee on Economic, Social and Cultural Rights: [Committee on Economic, Social and Cultural Rights | OHCHR](#)
8. Committee on the Elimination of Discrimination Against Women: [Committee on the Elimination of Discrimination against Women | OHCHR](#)
9. Committee on the Rights of the Child: [Committee on the Rights of the Child | OHCHR](#)
10. ECOWAS Community Court of Justice: [CCJ Official Website \(courtecowas.org\)](#)
11. Human Rights Committee: [Human Rights Committee | OHCHR](#)
12. Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa: [Journey to Equality: Maputo Protocol \(soawr.org\)](#)
13. Kenya Law Reports: <https://kenyalaw.org>
14. Litigating Before the African Commission on Human and Peoples' Rights: A Practice Manual: [Litigating Before The African Commission on Human and Peoples' Rights: A Practice Manual - Equality Now](#)
15. Litigating the Maputo Protocol: A Compendium of Strategies and Approaches for Defending the Rights of Women in Africa: [Litigating the Maputo Protocol: A Compendium of Strategies and Approaches for Defending the Rights of Women in Africa - Equality Now](#)
16. Navigating Human Rights Complaints Mechanisms: Rules, Tools and Resources: [8085\\_BRO\\_Complaint Mechanism Summaries - v9.indd \(ishr.ch\)](#)
17. Preview: Kenya Judicial Bench Book on Trafficking for Sexual Exploitation <https://equalitynow.org/resource/preview-kenya-judicial-bench-book-on-trafficking-for-sexual-exploitation/>
18. Southern African Legal Information Institute: [Southern African Legal Information Institute \(saflii.org\)](#)
19. To End Child Marriage in Southern and Eastern Africa, Governments Need to Strengthen Laws and Implementation: [To End Child Marriage in Southern and Eastern Africa, Governments Need To Strengthen Laws and Implementation - Equality Now](#)
20. Uganda Legal Information Institute: [Home - ULII](#)
21. Universal Declaration on Human Rights: [Universal Declaration of Human Rights | United Nations](#)

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