

## Legal Explainers

### Republic of Kenya

The Republic of Kenya (henceforth, “Kenya”) is a country in East Africa where the President is the head of the state *and* the government. The laws and rules are passed by a single government authority and are thus, uniformly applied throughout the country.

Kenya faces high levels of gender-based violence especially in three specific areas – female genital mutilation, domestic violence, and violence against women in police custody. While the Kenyan Constitution prevents these acts of violence in general, the Kenyan government has also introduced other individual, issue-specific laws. The Sexual Offences Act, 2006, Prohibition of Female Genital Mutilation Act, 2011, and the Protection against Domestic Violence Act, 2015, are a few to mention.

On the international front, similar to the Federal Republic of Nigeria, Kenya has also ratified the Convention on the Elimination of all Forms of Discrimination against Women, 1975 (CEDAW), the Universal Declaration of Human Rights, 1948, and the MAPUTO Protocol.

#### Law Guide:

<a href="#">The Children Act, 2001</a>	The Children Act is a broad law on the rights of children, parental responsibility, fostering and adopting children, custody, guardianship, child offenders, and protection of children.
<a href="#">The Sexual Offences Act, 2006</a>	This law defines various sexual offences and the corresponding punishments in Kenya.
<a href="#">Counter-Trafficking in Persons Act, 2010</a>	This law is Kenya’s implementation of its obligations under the UN Convention against Transnational Organised Crime to prevent and punish trafficking of women and children.
<a href="#">Constitution of Kenya [Rev. 2010]</a>	Supreme law of the land. Bill of Rights under Chapter IV.
<a href="#">Prohibition of Female Genital Mutilation Act, 2011</a>	This law prohibits the practice of female genital mutilation to protect a woman’s mental and physical integrity.
<a href="#">National Gender and Equality Commission Act, 2011</a>	This Act came into force with the exclusive objective to establish the National Gender and Equality Commission in Kenya.
<a href="#">Protection against Domestic Violence Act, 2015</a>	This law protects and offers relief to victims of domestic violence in Kenya.
<a href="#">The Computer and Cybercrimes Bill, 2016</a>	This Bill was published in the <a href="#">Kenyan Gazette</a> in June, 2017, implying that a separate law on cybercrimes in Kenya will be in place in the near

	future. In the unlikelihood that this bill will undergo any staggering changes, current provisions dealing with gender based violence and harassment will hold good.
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## Sexual Violence Laws

### The Sexual Offences Act, 2006:

#### Rape:

#### How has rape been defined under the Sexual Offences Act?

As per Section 3, a person (either man or woman) commits the offence of rape if (s)he:

1. *intentionally* and *unlawfully* penetrates another person with his/her genital organs;
2. does not get consent from the other person; or
3. obtains consent from the other person but through force, threat, or intimidation.

Section 43 defines “intentional and unlawful” as

- a. coercion or use of force;
- b. false representation; or
- c. taking advantage of a person who is a child, unconscious, or unsound.

Both **men and women** can be tried for the offence of rape.

#### What is the punishment for rape?

Rape offenders are punished by imprisonment for a term ranging from 10 years to life imprisonment (Section 3).

Section 4 punishes the **attempt to commit rape** by imprisonment for 5 years, which may be extended to life imprisonment.

#### Gang rape:

A person who commits the offence of rape along with other people (one or more), are jointly guilty of **gang rape** and will be imprisoned for a term ranging from 15 years to life imprisonment (Section 10).

#### Sexual Assault:

Sexual assault is committed when a person *unlawfully* penetrates another person’s genital organs with

1. any body part of either person; or
2. an object.

### **What is the punishment for sexual assault?**

Section 5 punishes the offence of sexual assault by imprisonment for a term ranging from 10 years to life imprisonment.

### **Compelled/Induced Indecent Acts:**

*Indecent act* means any unlawful and intentional act where there is

1. contact between one person's body and another person's genital organs, breasts, or buttocks, but does not include penetration;
2. a display of pornographic material to another person against their will.

Section 6 punishes a person who compels or prompts another person to engage in any indecent act with

1. the person themselves;
2. a third person; or
3. an object, including an animal.

### **What is the punishment for compelled indecent acts?**

The punishment for a compelled or induced indecent act is imprisonment for 5 years, fine, or both (Section 6 and 11A).

Rape or any indecent act with a family member, child, or mentally unstable person is punishable by imprisonment for 10 years (Sections 7 and 11).

### **Prostitution:**

#### ***Prostitution exploitation:***

Forcing a person to become a prostitute and controlling the prostitute's business to make profits is an offence punishable by imprisonment for 5 years, fine, or both (Section 17).

#### ***Trafficking:***

A person who facilitates the travel of another person, within or across borders of Kenya, with the intention of committing any sexual offence against that person, is guilty of the offence of *trafficking for sexual exploitation*.

Section 18 punishes the offence by imprisonment for 15 years, fine, or both.

### **Incest:**

#### **What is incest?**

Incest refers to sexual activity between blood related family members.

#### ***By a male person:***

Incestuous activity by a man which includes penetration with a female who is either his daughter, granddaughter, sister, mother, niece, aunt, or grandmother is an offence under Section 20.

**Note:** Penetration only with a *female* person. Homosexuality is an offence in Kenya.

***By a female person:***

Section 21 punishes women who cause penetration with a male family member who is either her son, father, grandson, grandfather, brother, nephew, or uncle.

**What is the punishment for incest?**

Punishment for this offence is imprisonment for 10 years.

If the victim is below 18 years of age, the offender (man or woman) will be punished by life imprisonment. In addition to this punishment, the court also has the power to remove the offender's guardianship powers.

**Sexual offences by a person of authority:**

Section 24 punishes any person who takes advantage of his/her official position to seduce a person to engage in any sexual activity (excluding defilement and rape).

The official could be a

1. superintendent or manager of a jail;
2. law enforcement officer;
3. manager or staff of a hospital; or
4. teacher, principal, or employee at a school;

The punishment is imprisonment for 10 years.

**Vulnerable witnesses:**

Vulnerable witnesses include the victim, a child, or a mentally disabled person.

In a criminal trial for a sexual offence, Section 31 allows the court to declare a witness to be vulnerable and may

1. allow the witness to give evidence under protective cover;
2. appoint a person/intermediary to represent the vulnerable witness;
3. order private court proceedings; or
4. prevent the victim's identity from being published.

**Dangerous sexual offender:**

A dangerous sexual offender is a person who has been convicted for

1. more than one sexual offence;
2. a sexual offence accompanied by violence and/or threats; or
3. a sexual offence against a child

If the offender is released after serving a part of his/her sentence, Section 39 allows the court to order for the supervision of the offender for at least 5 years.

### **Inadmissibility of previous sexual history:**

The sexual history and experience of *any person* (victim, offender, and any other witness) shall not be questioned or admitted in court. Only questions regarding sexual conduct in relation to the offence committed may be asked (Section 34).

### **Counter-Trafficking in Persons Act, 2010:**

#### **What is trafficking in persons?**

Trafficking in persons is a punishable offence where one person recruits, transports, or receives another person or child **to exploit** them. This could take place by use of force, threat, abduction, fraud, bribes, etc. Consent of the trafficked person (victim) is irrelevant (Section 3).

#### **What is the punishment for trafficking?**

A person who traffics another person will be punished by imprisonment for 30 years, fine, or both. Any other person who assists the offender will be punished by imprisonment for 3 years, fine, or both (Section 3).

If the offender is not a citizen of Kenya, (s)he will be deported after his/her imprisonment term and will be permanently barred from entering Kenya (Section 26).S

#### **Promoting trafficking in persons by**

1. allowing the use of a house or building to promote trafficking;
2. publishing material that promotes trafficking; or
3. funding trafficking in persons

is a punishable offence by imprisonment for 20 years, fine, or both.

*All subsequent convictions of trafficking in persons or children are punishable by life imprisonment (Sections 3 and 4).*

#### **Other punishable offences:**

1. Fraudulently getting travel documents from Government agencies to assist trafficking in persons is punishable by imprisonment for 10 years, fine, or both (Section 6).
2. Facilitating entry and exit from Kenya to promote trafficking in persons is punishable by imprisonment for 30 years, fine, or both (Section 7).
3. Life threatening/permanent harm or death of the victim are punishable by life imprisonment (Section 9).

## **Do victims have any safeguards during a trial for the offence of trafficking in persons?**

Yes. Public authorities, courts, and all other people involved in the investigation or trial will respect the victim's **right to privacy**. The court can order for the trial proceedings to be private i.e. held in camera.

Any person who discloses the name, identity, details about the offence, or the trial proceedings will be punished by imprisonment for 5 years, fine, or both (Section 11).

## **Remedies, support, and protection of victims:**

In addition to the offender's imprisonment term and fine, the court can also order the offender to pay any costs for the victim's medical or/and psychological treatment, living expenses, and transportation (Section 13).

Victims of trafficking will **not be criminally liable** for any offence that directly results from trafficking (Section 14). Victims are also exempt from paying court fees in a civil suit claiming for damages (Section 16).

The Government will offer services to victims including transportation to their home in Kenya, shelter, reintegration into the society, work for gain, medical and psychological support, and legal aid (Section 15).

## **Counter-Trafficking in Persons Advisory Committee (Part IV of the Act):**

The Act requires a committee (Counter-Trafficking in Persons Advisory Committee) against trafficking to be set up to combat trafficking and offer rehabilitative and protective programmes for victims of trafficking.

Other functions of this committee include

1. Advising the government on ways to prevent and suppress trafficking;
2. Raise awareness and spread information on the law and issues regarding trafficking in persons;
3. Documentation of information on trafficking in Kenya to create new policies;
4. Offer more rehabilitative and counselling programmes for victims;
5. Increase public information campaigns against trafficking in persons.

## **Establishment of a Trust Fund (Part V of the Act):**

A **National Assistance Trust Fund for Victims of Trafficking in Persons** will assist victims of trafficking. The Fund will receive money from the Government, confiscated property from trafficking offenders, donations, etc.

## **Prohibition of Female Genital Mutilation Act, 2011:**

### **What is female genital mutilation (FGM)?**

FGM takes into account any procedure where there is a partial or complete removal of the female genitalia for non-medical reasons. It includes

1. Clitoridectomy – partial or total removal of the clitoris;
2. Excision – partial or total removal of the clitoris and labia minora;
3. Infibulation – narrowing the vaginal orifice.

### **The Offence of FGM:**

- If a person *training to become a medical practitioner or midwife* performs FGM on another person, it is a punishable offence under Section 19 of the Act.
- If the person dies as a result of the mutilation, he will be punished by life imprisonment. Consent to FGM is not a defence even if it was voluntary. The offence of FGM excludes any surgical operation necessary for a woman's health or during labour or birth.
- Aiding or/and abetting FGM are punishable offences under Section 20.
- Section 21 punishes a person who takes a woman to another country, or arranges for a person to come to Kenya to perform FGM on a woman.
- It is an offence for a person to allow his/her space to be used to perform FGM (Section 22).
- Failure to report FGM is an offence under Section 24.
- Ridiculing or/and embarrassing a woman for not having undergone FGM is an offence and is punishable by imprisonment for 6 months, fine, or both (Section 25).

### **What is the punishment for FGM?**

A person who commits any of the offences mentioned above will be imprisoned for 3 years, fined, or both (Section 29).

### **Anti-FGM Board (Part II of the Act):**

The Act mandates an anti-FGM board to be established. The board will be a company that can sue and be sued, hold property, borrow money and make investments, and enter into contracts. The functions of this board are to

1. raise awareness against the practice of FGM;
2. advise the government on all matters relating to FGM;
3. create policies and offer support to other institutions that organise FGM eradication programmes.

### **The Computer and Cybercrimes Bill, 2016:**

#### **Cyberstalking and Cyberbullying:**

When one or many people repeatedly communicate with another person to **create a fear of violence** against them or their property, they are guilty of cyberstalking and cyberbullying.

Section 14 punishes the offender by imprisonment for 10 years, fine, or both.

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## Sexual Violence and Children

### The Children Act, 2001:

#### Rights of Children:

A child is defined as a person below 18 years of age. The following are the rights of every child in Kenya:

1. Every child has the **right to life**. The child's growth, development, and welfare will be of paramount importance in private and public institutions (Section 4).
2. Section 5 **prohibits discrimination** of children on grounds of origin, sex, religion, custom, language, colour, socio-political status or disability.
3. **Right to parental care**: a child has the right to live and be cared for by his parents and/or guardians (Section 6).
4. Children shall have the **right to free basic education** which is a responsibility jointly shared by the Government and parents. They will also have the **right to religious education** with suitable guidance (Section 7 and 8).
5. Section 9 ensures every child's **right to health and medical care**.
6. Children have the right to be protected from economic exploitation, hazardous labour which could affect the child's mental and/or physical health, armed conflict, etc.  
  
The Government will provide every child who is a victim of armed conflict with rehabilitative care and reintegration into the society (Section 10).
7. Disabled children have the **right to be treated with dignity**, be given medical treatment, education, and other benefits (Section 12).
8. **Protection from abuse**: All children will be protected from mental, physical, and psychological abuse through exploitation by sale, trafficking or abduction (Section 13). Children are also entitled to protection from the use, production trafficking or distribution of harmful drugs (Section 16).
9. **Female genital mutilation**: Children are protected from FGM, female circumcision, and other traditional rites and practices that may affect their health, welfare, and dignity (Section 14).
10. **Sexual exploitation**: No child can be sexually exploited for prostitution or sexual activity, or be exposed to obscene material (Section 15).

#### What is the punishment if any of these rights are violated?

If any person takes away any of the above-mentioned rights from a child, they will be punished by imprisonment for 1 year, fine, or both (Section 20).

## **National Council for Children's Services** (Part IV of the Act)

This Council is a body corporate which can sue and be sued, hold property, make investments, enter into contracts, and receive grants and gifts for child related projects. The **functions** of this Council are to create policies for the welfare of children, coordinate education programmes, assist disabled and mentally/sexually abused children, raise public awareness on the rights and interests of children, and so on.

### **Children in Need:**

When there is a child in need of care such as an abandoned or disabled child, a female child being subjected to FGM or circumcision, domestic violence, or sexual abuse, any person can report it to an authorised officer (police officer or children's officer).

The officer can take the matter to the Children's Court which in turn can make temporary accommodation arrangements for the child (Section 120). If the child requires medical attention, the officer will take the child to a health institute for treatment (Section 121).

### **Child Offenders** (Part XIII of the Act)

Children can be tried for any offence except murder or for an offence where the child is being tried with an adult. **Punishment will not include** imprisonment or death sentence. Depending on the case and the age of the child, the Court could either ask the child offender to pay a fine, go on probation, attend a rehabilitation school, or do community service.

## **The Sexual Offences Act, 2006:**

### ***Defilement:***

#### **What is defilement?**

Defilement occurs when a child is penetrated by another person or object.

#### **How is defilement punished?**

Section 8 punishes the defilement of a child

1. below 11 years by life imprisonment;
2. between 12-15 years of age by imprisonment for 20 years;
3. between 16-18 years of age by imprisonment for 15 years.

If the person guilty of defiling a child is below 18 years of age, the Borstal Institutions Act and the Children Act will apply to him/her.

Attempt to commit defilement is punishable by imprisonment for 10 years (Section 9).

### ***Promotion of sexual offences with a child:***

The promotion or sale of any article containing a sexual offence with a child, or the display of the article to encourage a child to perform a sexual offence is punishable by imprisonment for 5 years (Section 12).

### ***Child Trafficking:***

A person who transports, supplies, recruits, transfers, or receives a child, within or across the borders of Kenya, to allow the commission of any sexual offence against the child will be

1. punished for the sexual offence itself; and
2. punished for the offence of child trafficking by imprisonment for 10 years and fine (Section 13).

Similarly, ***child sex tourism*** (where a person promotes sexual offences against a child through tourism advertisement) is punishable by imprisonment for 10 years and fine (Section 14).

### ***Child prostitution:***

#### **What is child prostitution?**

Child prostitution refers to a person's offer, purchase, and engagement with a child for activities including sexual abuse, sexual intercourse, and indecent or obscene exhibition of any sexual activity with the child.

Section 15 punishes the offender by imprisonment for 10 years.

### ***Child pornography:***

A person who displays, sells, distributes, exports, or imports any obscene images, words, or audio-visual material depicting a child engaged in sexual acts, is guilty of the offence of child pornography and will be punished by imprisonment for 7 years and fine under Section 16.

### **Counter-Trafficking in Persons Act, 2010:**

#### **Child Trafficking:**

If a person

1. adopts or offers to adopt a child;
2. fosters or offers to foster a child; or
3. offers guardianship to a child or vice-versa

with the sole purpose of exploiting the child, the person has committed the offence of child trafficking.

#### **What is the punishment for child trafficking?**

Punishment for child trafficking is imprisonment for 30 years, fine, or both (Section 4).

### **The Computer and Cybercrimes Bill, 2016:**

#### **Child pornography:**

## What is child pornography?

Child pornography includes any audio or visual depictions of a child engaged in sexually explicit conduct, or any realistic images which depict a child engaged in sexual conduct.

## What is the punishment for child pornography?

A person who publishes, produces, or owns child pornography via a computer system is punishable by imprisonment for 25 years, fine, or both (Section 11).

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## Sexual Violence at the Workplace

### The Sexual Offences Act, 2006:

#### Sexual Harassment:

Sexual harassment takes place when any authoritative person or public officer makes unwelcome sexual advances.

## What is the punishment for sexual harassment?

Section 23 of the Sexual Offences Act punishes the offender by imprisonment for 3 years, fine, or both.

## Are there any other pre-requisites to prove sexual harassment?

Yes. The victim must show that the sexual advance

1. was for employment purposes;
  2. would affect a decision relevant to the victim's career growth;
  3. creates an offensive work environment for the victim; or
  4. denies the victim a service owed to them by a public officer.
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## Sexual violence in the domestic space

### Protection against Domestic Violence Act, 2015:

#### What is domestic violence?

Section 3 defines domestic violence as *violence* or threat of violence against a person from any other person with whom they are in a *domestic relationship*. Even a single act of violence will be considered as abuse.

**Violence** includes child marriage, female genital mutilation (FGM), forced marriage, sexual violence within a marriage, virginity testing, harassment, sexual abuse, mental abuse, and verbal abuse.

Section 4 defines **domestic relationships** as marriages, live-in-relationships, previous marriages, and relationships with family members (spouse, children, parents, siblings, and close relatives).

An act of domestic violence does not prevent the offender from being tried for another offence under any other law (Section 3).

### **What happens after a person files a complaint of domestic violence?**

The person (usually a police officer) to whom the complaint is filed will

1. begin investigation;
2. advise the victim of any relief available at a shelter home or via medical assistance; and
3. advise the victim of their right to lodge a criminal complaint (Section 6).

### **Can a third party file a domestic violence complaint?**

Section 7 allows a person who suspects the commission of domestic violence to inform a police officer. A person who attacks or intimidates the informant commits an offence.

The court will not hear the application if the victim or representative objects to the application (Section 26).

### **Protection order:**

#### **What is a protection order? How can a person apply for it?**

Protection or restraining orders are granted by courts to protect a person from domestic violence, harassment, or assault. The order will direct the offender not to

1. physically, sexually, or economically abuse the applicant (victim) or their property; or
2. harass, stalk, or intimidate the applicant (Section 19).

A person in a domestic relationship can apply to the court for a protection order against the other person in the relationship. For children and mentally disabled people, a representative can apply for a protection order (Sections 8-11).

Representatives of a child could be a parent, guardian, relative, police officer, or social welfare officer. A mentally disabled person can be represented by a police officer or a court appointed person.

A court can **grant a protection order** if it finds the respondent guilty of using domestic violence against the applicant or the applicant's family members (Section 13). The order will stay in force a term specified by the court and can be reviewed periodically (Section 21).

### **Counselling:**

The court can also direct the parties to partake in counselling or any conciliatory programmes to promote a protective domestic environment (Section 14).

### **What are the implications when the respondent breaches the protection order?**

The court will imprison the respondent/offender for 1 year, levy a fine, or both (Section 22).

### **Compensation:**

If the victim of domestic violence suffers any personal injuries or damage to his/her property, the court may award the victim compensation for the loss (Section 32).

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### **National Gender and Equality Commission Act, 2011:**

This Act came into force with the exclusive objective to establish the National Gender and Equality Commission in Kenya. A few functions of the Commission are to

1. promote gender equality and freedom from discrimination;
  2. advise and facilitate the incorporation of principles of equality and freedom from discrimination in national laws and policies;
  3. investigate any violations and recommend improvements in the way institutions function;
  4. raise awareness on economic and social rights mentioned in the Kenyan Constitution;
  5. organise research on equality and freedom from discrimination; and
  6. work with the National Commission of Human Rights and other similar institutions to promote and protect fundamental human rights.
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### **Constitution of Kenya [Rev. 2010]:**

#### **Bill of Rights:**

Chapter IV of the Kenyan Constitution gives every citizen certain fundamental rights which include the freedom to dignity and to promote social justice. Government bodies and public officers have the additional duty to protect fundamental rights of women, children, and any other vulnerable or minority group.

Fundamental freedom from torture, cruel and inhuman treatment, slavery, and the right to a fair trial cannot be taken away or restricted in any circumstance. Other important fundamental rights relevant to the protection of women and children include:

1. Right to equality and freedom from discrimination (Article 27)
2. Right to human dignity (Article 28)
3. Right to freedom and security of the person (Article 29)
4. Freedom from slavery and forced labour (Article 30)
5. Right to privacy (Article 31)
6. Economic and social rights (Article 43)
7. Rights of children (Article 53)

#### **Implications of fundamental rights:**

The effect of fundamental rights is the acknowledgment that every human being (man or woman) has the basic right to be treated equally, with dignity and integrity, free from

discrimination and any inhumane, violent treatment. Additionally, every child has the right to free education, nutrition, protection from abuse, violence and exploitative labour, and parental care.

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