

**CONFRONTING DOMESTIC VIOLENCE AGAINST WOMEN: A
COMPARISON BETWEEN SOUTH AFRICA AND KENYA.**

BY

N'KWELI SIEMA MWAGUNI

**A THESIS SUBMITTED IN CONFORMITY WITH THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS IN CHILD AND FAMILY LAW,
OF THE DEPARTMENT OF PRIVATE LAW, SCHOOL OF LAW**

MOI UNIVERSITY

2023

DECLARATION

Declaration by Candidate

This thesis is my original work and has not been submitted to any other University for the award of a Master's degree.

Signed _____

Date _____

N'kweli Siema Mwanguni

LLM/L86/14/14

Declaration by Supervisors

This thesis has been submitted for examination of a Master's Degree examination with my approval as university supervisors.

Signed _____

Date _____

Dr. Ruth Aura

Egerton University, Nakuru

Signed _____

Date _____

Dr. Nabil Orina

Moi University, Eldoret

DEDICATION

This thesis is dedicated to my family for their immeasurable support.

ACKNOWLEDGEMENT

I would like to thank the Almighty Allah for granting me good health. My sincere thanks go to my supervisors, Dr. Ruth Aura and Mr. Nabil Orina for their invaluable time, advice and guidance throughout the thesis. I would also like to extend my profound gratitude to my family especially my father and mother for their support both financially and emotionally. Finally, I would like to thank Kenya Coastal Development Project for its financial assistance which helped me complete this program.

ABSTRACT

Domestic violence is an act of violence against a person, or a threat of violence or of imminent danger to that person by any other person with whom that person is, or has been in a domestic relationship. This thesis focuses on domestic violence against women in Kenya, where despite the enactment of the Protection Against Domestic Violence Act the vice persists. The main objective of this research is to critically analyze the status of domestic violence against women in Kenya in light of the Protection Against Domestic Violence Act vis a vis the Domestic Violence Act of South Africa. This thesis derives its theoretical framework primarily from feminist theory which argues that patriarchy creates a fertile atmosphere for domestic violence. This thesis encompasses qualitative research of a doctrinal and comparative nature which is based on analyzing literature, books, journals, acts of parliament, published theses, internet sources, and international treaties for documented information on constitutional dispensation and policy, legislation and regulations, books, case law, journals articles and academic thesis. An analysis of the legal and policy framework vis a vis the provisions of the human rights standards show that both South Africa and Kenya have not sufficiently protected women from domestic violence. This was revealed by the rise of domestic violence cases in both countries. The implication of this is that the problem cannot be resolved without a multipronged approach that involves eradicating harmful cultural practices, compensation to victims, holding the government accountable, documenting domestic violence cases, and creating legal awareness.

Keywords: Domestic violence; women; feminism; patriarchy; human rights; International law; National law; Kenya; South Africa; best practices.

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENT	iv
ABSTRACT.....	v
TABLE OF CONTENTS.....	vi
TABLE OF CASES	ix
TABLE OF STATUTES.....	xi
ABBREVIATIONS	xii
CHAPTER ONE	1
INTRODUCTION	1
1.1 Background	1
1.2 Statement of the Problem.....	5
1.3 Objectives of the Study.....	5
1.3.1 Main objective.....	5
1.3.2 Specific objectives.....	6
1.4 Research Assumptions	6
1.5 Research Questions.....	6
1.6 Theoretical Framework.....	6
1.7 Research Methods.....	8
1.8 Literature Review.....	10
1.9 Chapter Breakdown	14
CHAPTER TWO	15
INTERNATIONAL AND REGIONAL FRAMEWORKS ADDRESSING	
DOMESTIC VIOLENCE AND ITS APPLICATION IN KENYA	15
2.0 Introduction.....	15
2.1 Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and Its General Recommendations	16
2.2 The United Nations Declaration on the Elimination of Violence against Women (DEVAW).....	20
2.3 AU Solemn Declaration on Gender Equality.....	22
2.4 Vienna Declaration and Programme of Action.....	23
2.5 The African Charter on Human and Peoples’ Rights (Banjul Charter).....	23

2.6 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).....	24
2.7 The Obligation of Kenya under International law to protect women from domestic violence	25
2.8 Fundamental rights infringed upon by domestic violence	27
2.8.1 The right to equality	28
2.8.2 The right not to be subjected to cruel, inhuman and degrading treatment	28
2.8.3 Freedom from discrimination.....	29
2.8.4 The right to life.....	30
2.8.5 The right to human dignity.....	31
2.9 Conclusion	31
CHAPTER THREE	33
KENYA'S LEGAL FRAMEWORK ON DOMESTIC VIOLENCE AND ITS CHALLENGES	33
3.0 Introduction.....	33
3.1 The Constitution of Kenya.....	33
3.2 The Protection Against Domestic Violence Act 2015	34
3.2.1 Comprehensive definition of domestic violence	35
3.2.2 Protection orders and Mode of application	35
3.2.3 Role and duties of the police	37
3.2.4 Powers of the court.....	38
3.2.5 Other features of the Act	40
3.3 Other legislations and policy frameworks addressing domestic violence against women.....	41
3.4 Challenges facing Kenya in addressing domestic violence against women	44
3.4.1 Cultural and traditional practices	44
3.4.2 Other challenges Kenya faces in addressing domestic violence against women	47
3.5 Conclusion	48
CHAPTER FOUR	49
DOMESTIC VIOLENCE IN SOUTH AFRICA: PROSPECTS, CHALLENGES AND LESSONS FOR KENYA	49
4.0 Introduction.....	49
4.1 Constitutional and Legislative Safeguards against Domestic Violence	49

4.2 Other measures put in place to protect women from domestic violence	55
4.3 Challenges experienced in implementing the DVA.....	57
4.4 Lessons that Kenya can learn from South African Experiences.....	60
4.5 Conclusion	61
CHAPTER FIVE	63
CONCLUSION AND RECOMMENDATIONS	63
5.1 Conclusion	63
5.2 Recommendations.....	64
REFERENCES	67

TABLE OF CASES

1. AB v CD (2001) 28 eKLR 210.
2. Beatrice Wanjiku and Another v. Attorney General and Others [2012] eKLR.
3. Bellotti v Baird 433 U.S. 622, 625 (1979).
4. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC).
5. County Council of Governors v Lake Basin Development Authority and 6 others [2017] eKLR.
6. David Ndungo Maina v Zipporah Wambui Mathara [2010] eKLR.
7. Esther Nangwanaa Nandi v Jones Chewe Bobo Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi.
8. J O O vs The Attorney General and Others [2018] eKLR.
9. In Re Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR.
10. Mary Rono v Jane Rono and William Rono Civil Appeal 66 of 2002 at Court of Appeal, Eldoret.
11. Mukungu v Republic (2003) EA.
12. Mwathi v Mwathi and Another (1995-1998) 1 EA 229.
13. Omar v The Government of the Republic of South Africa and Others (CCT 47/04) [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC); 2011 (7) BCLR 651 (CC); 446 (CC) (7 November 2005).
14. Purity Kanana Kinoti v. Republic [2011] eKLR.
15. Republic v Dominic Thiongo Kibucha 2006 eKLR.
16. Republic v Minister for Home Affairs and 2 Others Ex-parte Leonard Sitanize (2005) eKLR.
17. Seria v Minister of Safety and Security and others (9165/2004) [2004] ZAWCHC 26.

18. *S v Baloyi & Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC); 2011 (7) BCLR 651 (CC); BCLR 446(CC) (3 December 1999).
19. *S v Modise* (113/06) [2007] ZANWHC 73
20. *Stephen Kipkeror Cheboi v Republic* Criminal Appeal No.50 of 1991
21. *The Wilmina Achieng case* [1998] EA 177736.
22. *Van Eeden v Minister of Safety and Security* (Women's Legal Centre Trust as Amicus Curie) 2003 (1) SA 389 (SCA).
23. *Wambugi w/o Gatimu v. Stephen Nyaga Kimani* [1992] KAR 292 (Court of Appeal)

TABLE OF STATUTES

1. The Constitution of Kenya 2010
2. The Protection Against Domestic Violence Act of Kenya 2015
3. Law of Succession Act
4. Penal Code of Kenya
5. Sexual Offences Act of Kenya
6. The Prevention of Torture Act 2017
7. Treaty Making and Rectification Act No. 45 of 2012
8. The Constitution of South Africa
9. The Prevention of Family Violence Act (Repealed) of South Africa
10. Domestic Violence Act of South Africa
11. The Criminal Law (Sexual Offences and Related Matters) Amendment Act
32 of 2007 of South Africa

ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CAT	Convention Against Torture
DEVAW	Declaration on Violence Against Women
DVA	Domestic Violence Act
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
PADVA	Protection Against Domestic Violence Act
SGBV	Sexual Gender-Based Violence
SOA	Sexual Offences Act
UDHR	Universal Declaration of Human Rights
UNHCHR	United Nations High Commissioner for Human Rights
UN	United Nations

CHAPTER ONE

INTRODUCTION

1.1 Background

Domestic violence is a universal phenomenon that occurs in all cultures across the world.¹ It is experienced by everyone irrespective of their sex, race, ethnicity, religion, and class.² It is perpetrated by men and women and occurs in same-sex and heterosexual relationships³. Although both sexes can be perpetrators of domestic violence, victims are mostly women, with male victims being few.⁴ The Declaration on the Elimination of Violence against Women (DEVAW) defines violence as,

Any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life.⁵

Domestic violence, as evidenced by previous texts on the subject, is a term amenable to many definitions. It is violence that occurs in domestic relationships.⁶ Domestic violence takes various forms including physical aggression and threats. It also includes sexual or emotional abuse, control, intimidation, passive or covert abuse, economic deprivation and even stalking in some instances.⁷ The underlying motive of the abuser is always the need to exert power over his/her victim. Blame, denial, threats, isolation, humiliation, and domination are common methods used by abusers

¹ Bharani N, 'Domestic Violence and Human Rights'(2013) *International Research Journal of Social Sciences* vol 2(9) p 7.

² Charles Ngwena, 'Sexual Health and Human Rights in the African Region' (2011) ICHRP <<http://www.ichrp.org>> at 158

³ FIDA (K), 'Gender Based Domestic Violence in Kenya' (2008) Available at <<http://www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Violence-in-Kenya.pdf>> accessed on 7/12/2017.

⁴ National Crime Research Centre, 'Gender Bases Violence in Kenya,' (2014) pg 23-25

⁵ The Declaration on the Elimination of Violence Against Women's Articles 1 and 2 (DEVAW) gives a broad definition of abuse against women.

⁶ S 3(2) of *The Protection Against Domestic Violence Act 2015*

⁷ Bancroft Lundy and Jay G Silverman, 'The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamic' (2002) p.64

to exert authority over their spouse or partner. ⁸The impact of domestic violence is very devastating. Domestic violence victims are frequently subjected to physical and psychological abuse.⁹ Domestic violence can result in death, assault, battery and rape.¹⁰

Domestic violence against women has a historical bearing. ¹¹Under the Common Law of England, women were considered their husband's property and as such subject to their control and men had the right to beat their wives under the guise of family discipline. ¹²Cultural and societal standards are examples of historical power dynamics that contribute to domestic violence, particularly against women.¹³ This is most evident in the family, which has long been considered as society's fundamental unit.¹⁴ Gender stereotypes are formed inside the family unit. Women's violence is frequently rooted in societal traditions, allowing it to be done with impunity- and, in many situations, without it being called violence¹⁵. Traditional gender stereotypes may be reinforced by traditional rites such as widow cleansing and wife inheritance.¹⁶

International human rights instruments have identified domestic violence as a violation of human rights. ¹⁷Bharani notes that it deprives women of their right to equality and that it should be given more importance since it negatively affects women's lives.¹⁸ She also emphasizes that the treaties guarantee women's rights and

⁸UNHCR, Domestic Violence and Abuse: Warning Signs and Symptoms of Abusive Relationships, <http://www.helpguide.org/.../domestic-violence-abuse-types-signs-effects.htm> accessed on 7/12/2017.

⁹ WHO, 'Violence Against Women; Intimate Partner and Sexual Violence Against Women' (2011)

¹⁰ Bostock, D.J, Brewster, A.L, 'Intimate Partner Sexual Violence' (2003) p 32

¹¹ Patricia Kameri-Mbote, 'Violence against Women in Kenya; An Analysis of Law, Policy and Institutions' (2000-1) <http://www.ielrc.org/content/w0001.pdf> accessed on 27/11/2017.

¹² Ibid pg 3

¹³ Ibid

¹⁴See Article 45 (1) of the Kenyan Constitution.

¹⁵ Supra n 8

¹⁶Ibid

¹⁷ Supra n 1 pg 7

¹⁸ Ibid

that states must protect them from the vice.¹⁹ Kenya is a signatory to the Declaration on the Elimination of Violence Against Women²⁰, the Convention on the Elimination of Discrimination Against Women²¹, the African Charter on Human and Peoples' Rights (Banjul Charter),²² and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, all of which prohibit violence against women.²³

Domestic violence is rampant in Kenya. According to a poll conducted in 2003 and 2008-2009, 16% of married and divorced or separated women suffered sexual violence from their husbands, and 17% of women experienced sexual violence from a partner, respectively.²⁴ In a 2014 poll, 45% of women said they had experienced physical abuse, while 14% said they had encountered sexual violence. The survey also found that only 39% of married women reported experiencing domestic violence.²⁵ Similarly, in 2022, the Kenya National Bureau of Statistics found that 41% of married women experienced physical violence.²⁶ Other highly publicized cases of domestic violence against women in Kenya include those of Jackeline Mwendu who in July 2016 was brutally attacked by her husband who chopped off her hands with a machete and inflicted serious injuries on her face and forehead leaving her deaf for failing to

¹⁹ Ibid.

²⁰ Supra n 5 Article 2

²¹ Convention on the Elimination of All Forms of Discrimination Against Women adopted 18 December 1979, entered into force on 3 September 1981

²² The African Charter on Human and Peoples Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, reprinted in 21 I.L.M. 58 (1982) (entered into force Oct. 21 1986) ("Banjul Charter")

²³ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Sept.13, 2000, O.A.U. Doc.CAB/LEG/66.6, reprinted in Afr. Hum. Rts. L.J. 40, (entered into force Nov.25, 2005).

²⁴ Kenya National Bureau of Statistics (KNBS) and ICF Macro, Kenya Demographic and Health Survey 2008- 2009, Calverton, Maryland: KNBS and ICF Macro at 275.

²⁵ Kenya National Bureau of Statistics (KNBS), Kenya Demographic and health Survey 2014 at p 291-322

²⁶ Kenya National Bureau of Statistics (KNBS), Kenya Demographic and Health Survey 2022 at p 83-84

bear any children during their seven years of marriage.²⁷ Judith Muendi had her hands and right leg chopped with a machete by her husband after a domestic brawl in December 2015²⁸ and world record holder Agnes Tirop was stabbed to death in 2021 by her husband at her home in the western town of Iten.²⁹

There have been many efforts in the past to enact legislation that would address domestic violence in Kenya.³⁰ Domestic violence used to be tried under criminal statutes like the Penal Code³¹ and the Sexual Offences Act³². This simply served to exacerbate domestic violence, implying that the regulations were ineffectual and insufficient due to multiple inadequacies in the legislation.³³ A survey carried out by FIDA-Kenya revealed that most police officers do not arrest criminals if bribed.³⁴

Kenya's Constitution has been lauded both locally and internationally as being very progressive in promoting and protecting the human rights³⁵ of its citizens, especially the family.³⁶ The Constitution³⁷ led to the enactment of the Protection Against Domestic Violence Act (PADVA)³⁸ which is the main legislation that deals with domestic violence against women. Its mandate is to protect citizens from domestic

²⁷ Tom Ondicho (2018), 'Violence Against Women in Kenya: A Public Health Problem', Nairobi, Kenya: International Journal of Development and Sustainability pg 2035

²⁸ Stephen Nzioka (2016) Unenforced court decision leaves woman who lost limbs in domestic violence languish in poverty

²⁹ Yohannes Dibaba Wado (2021), 'Violence against women in Kenya: data provides a glimpse into a grim situation.' <https://theconversation.com/violence-against-women-in-kenya-data-provides-a-glimpse-into-a-grim-situation-170109> accessed on 9th October 2023.

³⁰ Tom G. Ondicho, *Battered Women: A social-legal Perspective of their Experiences in Nairobi* (2000), Center for African Area Studies, Kyoto University at 36.

³¹ *Penal Code Cap 63 Laws of Kenya*

³² *Sexual Offences Act No. 3 of 2006*

³³ Christine Wanjiru Kung'u, 'Criminalization of Marital Rape in Kenya' (2011). Faculty of Law, University of Toronto. <https://tspace.library.utoronto.ca/bitstream/1807/31288/8/Kung%27u_Christine_W_20111_LLM_thesis.pdf> on 22/11/2017.

³⁴ *Supra n 3*

³⁵ M Kiwinda Mbondenyei and J Osogo Ambani, 'The New Constitutional Law of Kenya' (2012)

³⁶ *Supra n 15* Article 29 and Article 45

³⁷ Speech by The Deputy Chief Justice of The Republic of Kenya at the 17th CMJA Triennial Conference Held In Wellington, New Zealand On 13th- 18th September 2015 p 6 and 7

³⁸ *Supra n 6*

violence. This thesis will analyze the PADVA in its attempt to address domestic violence and further draw recommendations geared towards making the PADVA more responsive to victims of domestic violence. Finally, it will analyze how South Africa has dealt with domestic violence against women and what intervention programs if any, Kenya can borrow to eradicate the vice.

1.2 Statement of the Problem

Kenya has enacted the PADVA to address domestic violence against women however, it persists. Statistics by various organizations show that cases of domestic violence are still rampant. Similarly, several incidences of domestic violence have been publicized in the media, including murder, rape, and assault. For example, a man torched his house killing his wife and two children because he had been conned of one million shillings.³⁹ Similarly, a man brutally assaulted his wife because she refused to shave her hair and stop wearing make-up.⁴⁰ These incidents occur at different levels in the country despite the existence of legislation. Kenya's Constitution ensures that women are protected from domestic violence as it guarantees women's protection against discrimination⁴¹, abuse, and torture.⁴²

1.3 Objectives of the Study

1.3.1 Main objective

1. To compare the legal framework for protecting women against domestic violence in Kenya and South Africa.

³⁹Kamau Maichuchie and Protus Onyango, Quarryman stabs wife and children' Standard Digital, 17th January 2018 <https://www.standardmedia.co.ke/article/2001266203/quarryman-stabs-wife-and-children-then-torches-house> assessed on 13th March 2018.

⁴⁰Mkamburi Mwawasi, 'Mombasa woman hospitalized after brutal assault by lover' Standard Digital, 9th March 2018 <https://www.standardmedia.co.ke/article/2001272521/husband-of-10-years-sexually-assaults-wife-over-make-up> assessed on 13th March 2018

⁴¹ Article 27

⁴² Article 29

1.3.2 Specific objectives

1. To examine the challenges Kenya and South Africa face in the implementation of their legal framework.
2. To examine best practices that Kenya can adopt from South Africa.

1.4 Research Assumptions

This thesis makes the following assumptions;

1. The legal framework of Kenya and South Africa guarantee women protection from domestic violence.
2. Kenya and South Africa still experience challenges in eradicating domestic violence against women despite the existence of a legal framework.

1.5 Research Questions

1. Does Kenya and South Africa have a working legal framework for addressing domestic violence against women?
2. What challenges does Kenya and South Africa face in combating domestic violence against women?
3. What best practices can Kenya draw from South Africa in protecting women from domestic violence?

1.6 Theoretical Framework

The debate over which theory best encompasses domestic violence has raged on for years. Since its ideologies capture the heart of the research questions and research problem that the study attempts to solve, this thesis derives its theoretical framework

primarily from feminist theory. Pasque and Wimmer argue that feminism is founded on three principles;⁴³

- a) *Women have something of value to contribute to every aspect of the world.*
- b) *Women are unable to achieve their goals because of the oppressive nature of the society.*
- c) *Feminism should work towards social transformation.*

Patriarchy is the institutionalization of men's authority over women. Since patriarchy causes of violence against women, the feminist viewpoint includes a critique of it. According to feminists,⁴⁴ men consider themselves superior thus patriarchy favors them.⁴⁵ Patriarchy is hegemonic in nature, subjugating and suppressing women since it is built on male domination.⁴⁶ Feminism is based on the idea that society is built in such a way that women are disadvantaged.⁴⁷ From a feminist perspective, patriarchy creates a fertile atmosphere for women's violence.

While women might be perpetrators of domestic violence, women are the most prevalent victims and suffer the most social consequences.⁴⁸ Many cultures recognize men's right to discipline their wives for being disobedient or troublesome.⁴⁹ This misuse of power and privilege is exemplified through violence against women. Feminism aims to combat male dominance and oppression of women via social patriarchal structures that encourage male chauvinism. Violence against women is how patriarchal for compliance is imposed, according to feminists. Domestic violence

⁴³ Penny Pasque and Brenton Wimmer, 'Introduction: Feminist Perspectives' (2011) available at www.myacpa.org assessed on 8/12/17 p 5

⁴⁴ Hooks, B, 'Feminism is for Everybody: Passionate Politic' (2000) Cambridge: South End Press. Pg. ix

⁴⁵ Supra n 41

⁴⁶ Danga T, 'Unpublished Thesis on Male Perspective of Gender Violence in South Africa' (2009) Fort Hare University. Alice, 28-29.

⁴⁷ Supra n 40

⁴⁸ Supra n 7 pp.64

⁴⁹ Ibid

was not regularly punished in the past due to ‘patriarchal presuppositions’ as it was regarded as a private affair whose public disclosure jeopardized the patriarchal family’s integrity.⁵⁰

Domestic violence has been criminalized in Kenya. The PADVA was enacted to protect women from domestic violence, hence it is assumed that the Act is primarily focused on meeting the security requirements of victims of domestic violence. Since women are considered second-class citizens in society and especially in the home, the Act was enacted in part to address the violence that women face in the home. The Act’s introduction supports the feminist idea that domestic violence is a public crime that demands public answers rather than a private concern that requires private solutions. Since feminism views domestic violence as gender inequality, the Act can be viewed as a law within that paradigm. In this regard, this thesis is intrinsically feminist in that it gives a proper framework for examining the PADVA to determine if it protects women from domestic violence.

1.7 Research Methods

Research methodology is a way to systematically solve a problem. It is the general pattern of organizing the procedure for collecting valid and reliable data for an investigation. To answer the research questions in Chapter One, the methods and methodology must stand up to scrutiny.⁵¹ Henn et al make the important distinction between ‘method’ and ‘methodology’.⁵² They state that ‘method refers to the range of

⁵⁰ Patricia Kameri-Mbote, ‘Violence Against Women in Kenya; An Analysis of Law, Policy and Institutions’ (2000-1) <<http://www.ielrc.org/content/w0001.pdf>> accessed on 14/3/2018

⁵¹ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 31.

⁵² Matt Henn, Mark Weinstein, and Nick Foard, ‘A Critical Introduction to Social Research’ (2nd ed, Sage 2006) 10.

techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole.⁵³

This thesis encompasses qualitative research of a doctrinal and comparative nature.⁵⁴ Qualitative research is defined as, ‘the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made’.⁵⁵ This research begins with a ‘doctrinal’ or ‘black letter law’ methodology. Legal doctrinal analysis entails a comprehensive examination of the status of domestic violence, challenges Kenya faces in the implementation of the PADVA, and the legal status of domestic violence against women. Consequently, this would entail a comprehensive examination of primary legal authorities, including the Constitution, Acts of Parliament, international instruments, and case Laws. Secondary sources such as books, literature, newspaper articles, journal articles, published theses and internet sources will be utilized.⁵⁶

The thesis also adopts a comparative method. It uses comparative law as a method of research rather than as a methodology.⁵⁷ Comparative research refers to the study of legal questions from the perspective of different jurisdictions. When incorporating a comparative approach in a thesis it is important to identify why the researcher has chosen this approach and how it can be justified as a legitimate method.⁵⁸ By examining another jurisdiction, one can see the problems, drawbacks, or maybe benefits of one’s jurisdiction more clearly. This helps in analyzing how the different elements of a jurisdiction develop into a system. The field of comparative law

⁵³ Ibid

⁵⁴ McConville and Hong Cui (2007), pp. 3-7

⁵⁵ Ian Parker, ‘Qualitative Research’ in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds), *Qualitative Methods in Psychology: A Research Guide* (OU 1994) 2.

⁵⁶ Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: doctrinal legal research. *Deakin law review*, 17(1), 83-119.

⁵⁷ John Wightman, *Contract: A Critical Commentary* (Pluto1996) 11.

⁵⁸ Ibid

typically adopts a subject-oriented approach, wherein it involves the comparison of legal systems about a specific subject matter across a minimum of two jurisdictions and the challenges faced in its implementation. This research employs the comparative law research method to examine the implementation and effectiveness of the Domestic Violence Act in South Africa, to determine the feasibility of adopting similar measures in Kenya.

1.8 Literature Review

This thesis reviewed scholarly literature on domestic violence by various authors to get a clear picture of domestic violence. It has been suggested that the battering of women by men is a defining element of practically all communities around the world. Bharani,⁵⁹ argues that domestic violence undermines the value of a woman as individuals by lowering their status in society. She goes on to state that domestic violence causes physical and psychological harm.⁶⁰ She points out that domestic violence is fundamentally demeaning and is the outcome of society's unequal treatment⁶¹ as it violates women's rights. She further states that domestic violence is illegal under the international law.⁶² This is true because inflicting pain whether physical or psychological on a woman violates her human rights as envisaged by the Kenyan legislation and the international instruments. Domestic violence inflicts physical and psychological agony on women that is tantamount to torture, as well as inhumane and degrading punishment. These are the cornerstones of all human rights, and governments are bound to protect them.

⁵⁹ Supra n 1 pg 7 and 8

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid pg 9

Violence against women stems from patriarchy. ⁶³It is rooted in the patriarchal assumption of women's subordinate status. Carolyn Holderread Heggen⁶⁴ observes that;

‘The inherent logic of patriarchy says that if men have the right to power and control over women and children, they also have the right to enforce that control...Domination and glorification of violence are characteristics of patriarchal societies...In patriarchy, women and children are defined about men who control the resources and the power. Women and children are the other, the object. Men are the norm, the subject. In a dominance-and-submission social order, there is no true mutual care. Subordinates are to care for the needs of the dominance.’

Burrill, Roberts, and Thornberry⁶⁵ have also considered the various factors that perpetuate domestic violence in African societies as opposed to Western societies. They contend that African practices related to marriage, for instance, dowry payment by the husband's family give them the right to exploit women and subject them to their commands⁶⁶. Similarly Ondicho argues that in Kenya, many communities still practice customary laws under which men pay dowry for their wives.⁶⁷ He goes on to state that traditions dictate that after the dowry has been paid, the parent releases power over their daughters to his husband who will then have the authority to reprimand his wife when on the wrong.⁶⁸ He also points out that the majority of domestic violence instances in Kenya go unreported due to societal, cultural, and religious elements that represent husbands' superiority in marital relationships.⁶⁹

⁶³ Steven R. Tracy, ‘Patriarchy and Domestic Violence: Challenging Common Misconceptions’ (2007) *Journal of the Evangelical Theological Society*, pg 576

⁶⁴ Carolyn Holderread Heggen, ‘Sexual Abuse in the Christian Homes and Churches’ (1993) Scottsdale, PA: Herald Press pg 85

⁶⁵Emily Burrill, Richard Roberts, and Elizabeth Thornberry, ‘Domestic Violence and the Law in Colonial and Postcolonial Africa’ (2010) 1

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

Itere on his part argues that women usually condone domestic violence because defying customs leads to them being ostracized by the community they belong to.⁷⁰ Implementation of the law has become difficult because women rarely talk about the abuses they suffer at the hands of their intimate partner. After all, it is regarded as a taboo subject in various communities in the country which inhibits victims from coming forward with their stories of domestic violence. These cultural practices and beliefs hinder the fight against domestic violence in Kenya. This lends credence to feminists' perspectives that society is patriarchal and the use of violence to sustain male patriarchy is accepted.

Meyersfeld⁷¹ argues that the implementation of law against domestic violence is a difficult problem to solve because it is constrained by the intimate nature of the relationship. She contends that there is lack of a correct conceptualization of domestic violence.⁷² Domestic violence persists because it is not seen as a human rights violation in some societies. Domestic violence occurs in a family unit and most members of the family in most cases keep the abuse private. Since the abuse is not reported, it makes it difficult to implement the laws that deal with domestic violence. This means then those perpetrators of the vice are not punished. There is need to raise public awareness on domestic violence so that victims of the vice can be protected through effective enforcement of the law.

⁷⁰ Ito Eze-Anaba, 'Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges' (2007) Vol. 14.21 p 29

⁷¹ Bonita C. Meyersfeld, 'Reconceptualizing Domestic Violence in International Law' (2003) 67 Albany Law Review 371

⁷² Ibid

Similarly, Njezula⁷³ condemns the lack of police collaboration in the fight against domestic violence, particularly against women. She observes that in South Africa, women who have been raped or assaulted face a criminal court system that is often incapable of assisting them in seeking retribution.⁷⁴ She also argues that police officers lack the expertise to deal with cases of domestic violence.⁷⁵ She also emphasizes the reality that domestic violence exists because society is tolerant of it.⁷⁶ Domestic violence can be curbed if police are made part of the solution. It is important to establish if Kenya faces a similar problem in eradicating domestic violence and come up with solutions to solve the problem. This will give victims of domestic violence the courage to report the abuses if they are guaranteed that the perpetrators will be prosecuted.

It has been argued that the laws that deal with domestic violence in Kenya are inadequate. Odhiambo and Oduor in their article⁷⁷ observe that patriarchal conceptions that the women and men's roles in society are at the root of violence, and that the official response to violence is consequently impacted by these gendered power relations. According to them, Kenya currently lacks legislation that deals with violence against women. Domestic violence revolves around patriarchal notions which deem the woman as inferior to the man. Society has deemed women as inferior. I should point out, however, that this piece was written some time ago, and that much has happened since then, such as the enactment of PADVA to particularly address domestic violence against women in its efforts to defend their rights. The thesis also

⁷³Aurelia Babalwa Njezula, 'Investigating Domestic Violence against Women in South Africa' (2006) <http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_gen8Srv25Nme4_4599_1242781895.pdf> on 28/11/2017.

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ruth Aura Odhiambo and Maurice Oduor, 'Gender Equality' (2012) in Lumumba PLO, Mbodenyi MK and Odero SO, *The Constitution of Kenya: Contemporary Readings* pp.99-151

points out that Kenya has enough legislation to deal with domestic violence, and that the issue is primarily in implementing laws that can achieve that.

1.9 Chapter Breakdown

This thesis comprises of five chapters as follows:

Chapter one serves as an overview of the study, introducing the reader to the research's content and goals. It covers the study's objectives, methodology, literature review, and outline, as well as an introduction to the study, the problem statement, and research questions.

Chapter two examines the various international instruments Kenya has ratified and accesses Kenya's obligations to address domestic violence against women.

Chapter three gives a detailed domestic legal framework of the laws touching on domestic violence. It strives to show how the law deals with domestic violence and it will also highlight the gaps that hinder the elimination of domestic violence. Case law will also be discussed by citing cases that relate to domestic violence.

Chapter Four examines South Africa's legal framework for dealing with domestic violence against women, as well as how South African courts interpret it. In addition, the difficulties that courts have had in interpreting the idea of domestic violence will be examined. In addition, the chapter will address the lessons Kenya can learn from South African domestic violence law.

Chapter five will discuss the conclusion and recommendations. The chapter will demonstrate whether the objectives were met, the problem statement resolved and whether the hypothesis was proved or disproved.

CHAPTER TWO

INTERNATIONAL AND REGIONAL FRAMEWORKS ADDRESSING

DOMESTIC VIOLENCE AND ITS APPLICATION IN KENYA

2.0 Introduction

Under Article 2(5) and (6) of the Constitution, international law once ratified, becomes law.⁷⁸ Article 2(6) of the Constitution imports international treaty provisions that Kenya has accepted as sources of Kenyan law.⁷⁹ However, international instruments and treaties ratified after the promulgation of the constitution must follow the procedure laid out in the Treaty Making and Ratification Act⁸⁰ before they become ratified.⁸¹

International and regional treaties have been ratified in Kenya in its fight against domestic violence against women.⁸² Whether or not, the ratified instruments will be held to have the same force as laws enacted by the Kenyan legislature, remains to be seen over time. The government, on the other hand, is required to implement all provisions set forth in regional and international instruments to protect women from the vice. It is a global phenomenon that has attracted the international community's attention as shown by the rafts of international bodies addressing it.⁸³ At the worldwide level, several programs and concerted attempts have been launched to combat the vice. This chapter seeks to examine the international legal framework and how they address domestic violence.

⁷⁸Supra n 15. This is a departure from the previous Constitution, which required treaties or conventions to be signed before they could be incorporated into Kenyan law. Kenya had to ratify the conventions it had signed before to the Constitution's enactment in order for them to have legal force.

⁷⁹*David Ndungo Maina v. Zipporah Wambui Mathara, Bankruptcy Cause No. 19 of 2010 [2010] eKLR.*

⁸⁰*Treaty Making and Ratification Act no 45 of 2012*

⁸¹ Ibid. The Act was passed by Parliament with the goal of "[giving] effect to article 2(6) of the Constitution and providing the mechanism for the making and ratification of treaties and related purposes."

⁸² This includes CEDAW, DEVAW, Maputo Protocol and the Banjul Protocol.

⁸³ An example of treaties includes CEDAW, DEVAW, and Maputo Protocol among others.

2.1 Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and Its General Recommendations

CEDAW was ratified⁸⁴ in 1984 to address discrimination against women. It identifies discriminatory acts and provides recommendations on how to address them.⁸⁵ Discrimination, occurs in all sectors of life.⁸⁶ The anti-discrimination clauses offer a foundation for women's protection against assault.⁸⁷ CEDAW obligates state parties *“to pursue all appropriate means and without delay a policy of eliminating discrimination against women by undertaking to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise⁸⁸; and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women⁸⁹.”*

CEDAW forbids State parties and public authorities from discriminating against women. Furthermore, State parties must take steps to abolish discriminatory practices, customs, laws, among others that harm women, such as enacting and updating legislation.⁹⁰ States must take measures that change their subjects' social and cultural patterns of behavior so as to eradicate prejudices and customary practices based on patriarchy.⁹¹ Domestic violence is condoned as in some cultures a man is permitted to chastise his spouse. Cultures also recognize a man as head of his household and can

⁸⁴ Supra n 22.

⁸⁵ FIDA (K) 2008 Report on Gender Based Domestic Violence in Kenya; Nairobi, FIDA (K) <<http://www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Domestic-Violence-in-Kenya.pdf>> on 12/11/2017

⁸⁶ Simonovic D, International Framework on Violence Against Women with focus on the CEDAW' (2012) Expert Group Meeting Prevention of violence against women and girls Bangkok, Thailand 17-20 September p.3.

⁸⁷ Supra n 22 see at Article 6

⁸⁸ Supra n 22 at article 2(e)

⁸⁹ Ibid at article 2 (f)

⁹⁰ Ibid

⁹¹ See Article 5

give direction including beating his wife which is perceived as discipline. These are practices that Article 5(a) is meant to cure.

CEDAW Committee monitors State Parties implementation through the reporting mechanism.⁹² Every four years, reports must be submitted for consideration by the Committee. The reporting mechanism is significant at the national level because it allows a party to track the efforts it has taken to eliminate gender discrimination and identify areas where the Convention is having trouble being implemented.⁹³ It also allows State parties to plan and strategize on the appropriate legal and policy measures it needs to identify and promote the equality of women.

On a global scale, the reporting mechanism can be used to facilitate conversation between parties and the Committee in order to assess their commitment and progress toward the elimination of all of discrimination. Reporting holds countries accountable since they are subject to international inspection.⁹⁴ The reporting mechanism has been used to detect and name underlying gender stereotypes that perpetuate discrimination against women in State Parties' laws, policies, and practices.

The convention does not directly address violence against women,⁹⁵ however several recommendations that tackle the same have been issued.⁹⁶ The Committee established under Article 21 of CEDAW makes deliberations of important issues affecting women through recommendations, which they expect state parties to implement. The principal goal and purpose of the recommendations is to give States Parties

⁹² Ibid Article 18 (1)

⁹³ Ibid

⁹⁴ Rebecca J. Cook & Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) at 5 at 133

⁹⁵ Supra n 22 Article 6

⁹⁶ Supra n 22

authoritative guidance on legislature and policy so as to ensure compliance with the Convention's obligations to protect women's rights.

Several recommendations have been made by the committee to guarantee that these rights are protected. General Recommendation No. 19⁹⁷ focuses on female-on-female violence. Gender-based violence, is discrimination that denies women the same rights as men.⁹⁸ Family violence is also recognized as a widespread form of violence against women.⁹⁹ Women are classified as being in need of aggressive government protection because intimate partner abuse has been proven to have a harmful impact on them. In July 2017, the Convention introduced general recommendation number 35¹⁰⁰. This was due to widespread gender-based violence and impunity that continues to persist around the world. It amplifies states obligations to tackle violence as set out in general recommendation no 28¹⁰¹, 30¹⁰² and 33¹⁰³. The Committee emphasizes systemic causes of gender-based violence, such as "the ideology of men's entitlement over women," as well as discrimination and gender stereotyping's harmful effects.¹⁰⁴

Further, General Recommendation No. 35 acknowledges that violence against women occurs in "all settings and dimensions of human interaction."¹⁰⁵ In addition, it recognizes that "gender-based violence may affect some women to differing degrees

⁹⁷See General Recommendation No.19

⁹⁸. Article 1 of CEDAW defines discrimination as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in their political, economic, social, cultural, civil or any other field".

⁹⁹ Supra n 86 paragraph 23

¹⁰⁰ See General Recommendation No.35

¹⁰¹The General Recommendation aims to clarify the scope and meaning of Article 2 of CEDAW, which lays out how States Parties can put the Convention's substantive provisions into practice in their own countries.

¹⁰²General Recommendation No. 30 offers authoritative advice on protection of human rights.

¹⁰³ CEDAW Committee stated that women's right to access to justice is necessary for the achievement of all of the Convention's rights.

¹⁰⁴Ibid Paragraph 19

¹⁰⁵Ibid Paragraph 20

or in various ways," necessitating a variety of legal and policy remedies.¹⁰⁶ Governments must also evaluate 'gender-neutral laws and regulations to avert existing imbalances,' and take appropriate corrective action if they do. It underlines how state regulations can put women at risk of being assaulted.

Finally, state parties under General Recommendation no 25,¹⁰⁷ have three responsibilities: to abolish discrimination, to deal with current gender relations, and to deal with the persistence of gender-based stereotypes that affect women. The committee suggested that state parties must implement measures to reduce violence against women. These include counseling, rehabilitation, civil remedies, punitive sanctions, civic information and training programs. This means that if there exists a law that discriminates against women, a state party would be obliged to modify or abolish the law, regulation or practice.¹⁰⁸ The concept that women are inferior to males violates their rights, and Kenya has a responsibility to abolish, alter, or modify any laws or customs that perpetuate this attitude.

Kenya submitted its 7th State report¹⁰⁹ to Committee and they gave their concluding remarks. The Committee was concerned by the survival of cultural norms and traditions, as well as patriarchal attitudes toward women's societal responsibilities, as reflected in women's unpleasant and unequal living conditions.¹¹⁰ The concluding remarks by the CEDAW Committee would have been more effective if they had identified the specific cultural norms and practices. Kenya was praised by the committee for enacting a new Constitution with a strong bill of rights that combats

¹⁰⁶ Ibid Paragraph 12.

¹⁰⁷ General Recommendation no 25 Article 4, of the CEDAW, On Temporary Special Measures, UN DOC A/59/38 (2004)

¹⁰⁸ Supra n 83 at p 5

¹⁰⁹ The Committee considered the seventh periodic report of Kenya (CEDAW/C/KEN/7) at its 963th and 964th meetings, on 19 January 2011 (see CEDAW/C/SR.963 and 964).

¹¹⁰ Committee on the Elimination of Discrimination against Women: Kenya, CEDAW, U.N. G.A.O.R., 66th Sess., Supp. No. 38 (A/66/38), Part III (2011) 142 at para. 17.

gender discrimination.¹¹¹The Committee encouraged Kenya to eliminate the vice by introducing comprehensive measures to address it.¹¹² Domestic violence is aggravated in Kenya by society's conventional view of women, which assumes that wives owe it to their husbands to satisfy them by fulfilling their requests. By not fully enforcing CEDAW's rules, the Kenyan government fails to meet its pledges to eliminate discriminatory practices against women. Kenya is bound to put an end to such discriminatory practices and customs as a signatory to the CEDAW.

2.2 The United Nations Declaration on the Elimination of Violence against Women (DEVAW)

DEVAW is dedicated solely to violence against women. It contains “*soft law*”, which refers to “*quasi-legal instruments that carry legal weight, though generally less than hard law legal instruments.*”¹¹³ It provides worldwide principles that states have acknowledged as vital in the fight to end violence against women, despite the fact that it is not legally enforceable.¹¹⁴ Violence is as “any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”¹¹⁵ It stated that violence against women included “physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the home, dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women, non-spousal violence, and violence related to

¹¹¹ Supra n 15 See Article 27(4).

¹¹² Supra n 88

¹¹³ Centre for Human Rights and Humanitarian Law Human Rights in the U.S.: A Handbook for Legal Aid Attorneys’ (2013) American University, Washington College of Law p.25.

¹¹⁴ Ibid p 25

¹¹⁵ Supra n 5 Article 1

exploitation," as well as "dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women."¹¹⁶

DEVAW further emphasizes that state parties cannot rely on their religious views to absolve them of their legal obligations to combat violence against women under international law. The Kenyan government cannot cite the country's norms and traditions, which encourage men's superiority over women, as an excuse to ignore DEVAW's commitment to protect women from domestic violence. States must also take all necessary policy and other efforts to eliminate violence against women quickly.¹¹⁷ State parties must also work to eliminate the vice by enacting national legislation and penalties to address human rights violations against women caused by the violence.¹¹⁸ The Convention is significant because it emphasizes that domestic violence is unacceptable, and states are expected to eliminate it.¹¹⁹

DEVAW also emphasizes the necessity of accumulating statistics on domestic violence against women, including the problem's prevalence and the effectiveness of preventative and restitution strategies.¹²⁰ Data collection is important as it can be used to identify the causes and factors that perpetuate domestic violence against women. Kenya will be unable to plan and strategize on how to end domestic violence against women without the data. DEVAW encourages states to report on how they are implementing its requirements.¹²¹ This is important as it allows states to monitor the steps, they have taken to eradicate domestic violence against women and identify the difficulties they have faced in implementing the declaration.

¹¹⁶Ibid Article 2(1)

¹¹⁷ Ibid Article 4

¹¹⁸ Ibid

¹¹⁹Ibid

¹²⁰ Ibid Article 4 (k)

¹²¹ Ibid Article 4 (m)

Kenya has yet to submit a report to the Committee. This signifies the underlying stereotypes in the laws, cultures, and policies among others that perpetuate domestic violence against women cannot be identified at the international level. This makes it difficult to monitor the steps taken by the country to combat domestic violence and to identify areas of difficulties in implementing the treaty.

2.3 AU Solemn Declaration on Gender Equality

The declaration reaffirms Africa's commitment to the ideal of gender equality.¹²² This declaration assists the fight gender-based violence by urging states to start public campaigns against it.¹²³ Domestic violence against women violates their rights and educating the public about it will abolish it from our society. In order to change society's attitude, states are required to establish legislation mechanisms that protect women against abuse.¹²⁴ The introduction of the PADVA which guarantees women protection from domestic violence by the Kenyan government is an important step towards eradicating this vice from our society. Educational programmes have been launched in the country aimed at eradicating violence in the country including domestic violence in line with this declaration.¹²⁵ Illiteracy is considered as one factor that contributes to domestic violence.¹²⁶ These programmes are designed to ensure that women gain knowledge and information on their rights enshrined in the national and international legal frameworks Kenya has ratified and acceded too and as a result of which women become less vulnerable.

¹²² See Article 4 of African Union's Constitutive Act's

¹²³ AU Solemn Declaration on Gender Equality, Paragraph 4

¹²⁴ Ibid

¹²⁵ EASSI, 'Situation Analysis of the EAC Partner States on Implementation of Gender Equality Commitments' 2016 pg 9 <https://www.eassi.org> assessed on 20th June 2018

¹²⁶ Sarah Marium, 'Women's level of Education and its Effect on Domestic Violence in Rural Bangladesh,' IOSR Journal of Humanities and Social Science, (2014) Volume 19, Issue 5, pg 41

2.4 Vienna Declaration and Programme of Action

Gender based violence is prohibited by this declaration. It acknowledges that detrimental traditional and cultural behaviors encourage violence against women¹²⁷ which is incompatible with human dignity. State parties are obligated to comply with international obligations and eradicate violence and discrimination against women.¹²⁸ It calls on governments and organizations to step up efforts to safeguard and promote human rights.¹²⁹ This can be accomplished by legal agreements, state action, and global collaboration in economic and communal development.¹³⁰ The elimination of domestic violence can also be eliminated through education, social support among other means.¹³¹ Kenya has conformed to the provisions of this declaration in her efforts to eradicate domestic violence against women by introducing a comprehensive bill of rights in the Constitution and the enactment of the PDVA guarantees women protection from domestic violence.

2.5 The African Charter on Human and Peoples' Rights (Banjul Charter)

It came into force on October 21, 1986.¹³² Although it does not contain explicit restrictions on domestic violence, the Banjul Charter's general rules may apply to domestic violence.¹³³ It calls on state parties to eradicate gender discrimination and protect women's rights. This stipulation could be viewed as requiring states to eliminate all types of discrimination, including domestic violence. The family is recognized as the foundation of the family unit in Article 18 of the Charter.¹³⁴ Women's rights must be protected in conformity with international instruments, and

¹²⁷Vienna Declaration and Programme of Action Article 1(18)

¹²⁸Ibid Article 1(22)

¹²⁹Ibid Article 1(18)

¹³⁰ Ibid

¹³¹ Ibid

¹³² It was ratified in Kenya on 23rd January 1992.

¹³³ African Charter on Human and People's Rights, 27th June 1981. It was ratified by Kenya on 23rd January 1992

¹³⁴ Ibid Article 18 (1)

states must ensure that discrimination against women is eradicated.¹³⁵ Domestic violence is usually perpetrated by members in a domestic setting.¹³⁶ This clause underlines the importance of the family in society and urges the government to take all reasonable actions to protect women from domestic violence by eliminating discrimination.

However, African governments declaring their sovereignty over international instruments obstructs the Charter's implementation. This view was affirmed in *Beatrice Wanjiku and Another v. Attorney General and Other* where the petitioners sought a ruling that civil detention for debtors' violations violates and threatens constitutional and human rights convention rights. The judge declared in his decision that international law principles are "subordinate to and should be in line with the Constitution."¹³⁷ As a result, if the Constitution's provisions exceed the Charter's, the Charter will be powerless to defend a violation of rights.¹³⁸ The Kenyan government is required by the Charter to protect women. By neglecting to address domestic violence, the Kenyan government discriminates against women which results in inequality.

2.6 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)¹³⁹

State parties are mandated to address violence against women in this treaty.¹⁴⁰

Violence is defined in the protocol as "any acts perpetrated against women that inflict

¹³⁵ Ibid Article 18 (3)

¹³⁶ Supra n 3

¹³⁷ *Beatrice Wanjiku and Another v. Attorney General and Others* Petition No. 190 of 2011 [2012] eKLR.

¹³⁸ Ebow Bondzie-Simpson, 'A critique of the African Charter on Human and People's Rights' (1988) 31 Howard LJ 643, 661

¹³⁹ Supra n 24 it came into effect on November 25, 2005, and is also known as the Maputo Protocol. Kenya ratified it on 8th October 2010.

them physical, sexual, psychological, or economic harm." ¹⁴¹ State signatories to the protocol have been expected to adopt and execute the necessary measures to safeguard women from abuse.¹⁴² States must also take adequate and effective measures to enforce laws prohibiting violence against women.¹⁴³ They must also adopt legislation and administrative measures to eliminate violence against women¹⁴⁴. States must also investigate the causes and consequences of violence against women and devise solutions¹⁴⁵. Promoting education to curb violence against women,¹⁴⁶ punishing perpetrators and implementing rehabilitation programmes¹⁴⁷ are other duties imposed on states. Finally, they must fund the development and execution of programs aimed at preventing and reducing violence against women. Kenya has incorporated the Protocol's provisions into Chapter 4 of the Constitution, giving the Charter's civil and political rights a stronger legal, policy, and institutional framework. Similarly, the PADVA ensures that women are protected from domestic violence, as stipulated in the Protocol.

2.7 The Obligation of Kenya under International law to protect women from domestic violence

The provisions of the Constitution of Kenya¹⁴⁸ and the PADVA¹⁴⁹ mandate the government to protect women from abuse. Furthermore, the Constitution specifies that any foreign treaties that Kenya has ratified are binding on the country.¹⁵⁰ By establishing anti-discrimination legislation, the CEDAW pushes states to eradicate

¹⁴⁰ Ibid Article 18(3)

¹⁴¹ Ibid Article 1

¹⁴² Ibid Article 3(4)

¹⁴³ Ibid Article 4(2)(a)

¹⁴⁴ Ibid Article 4(2)(b)

¹⁴⁵ Ibid Article 4(2)(c)

¹⁴⁶ Ibid Article 4(2)(d)

¹⁴⁷ Ibid Article 4(2)(e)

¹⁴⁸ Supra n 15 See Article 27 and 29

¹⁴⁹ See the provisions of the Act as discussed in chapter 3 of the thesis

¹⁵⁰ Supra n 15 Article 2(5) and 2(6) of the Constitution

prejudice against women.¹⁵¹ As part of this process, states are expected to pass legislation and take other efforts to combat prejudice against women.¹⁵² One example of such a measure is existing laws, rules, and conventions that discriminate against women.¹⁵³ In addition, the CEDAW calls for changes in men and women's "social and cultural patterns of action, with the goal of establishing de jure and de facto equality with men in the enjoyment of their human rights and freedom."¹⁵⁴ Under international law, Kenya is obligated to eliminate traditions and rituals that perpetuate domestic violence against women. As a state party, Kenya has a responsibility to reform its legislation in line with the criteria of the CEDAW and other agreements that protect women from violence.

In Kenya's seventh periodic report¹⁵⁵, the government emphasized that several courts had explicitly used CEDAW principles to protect women's rights against discrimination. In *Mary Rono vs. Jane Rono*¹⁵⁶ a succession dispute, the lower court had handed the appellants less of the property on the grounds that, as women, they were more likely to be married off. The court stated that the problem could not be addressed solely on domestic law, and that provisions of international instruments, albeit not domesticated, that had been ratified by Kenya, had to be considered. The Court of Appeal applied international law, determining that the previous Law of Succession, on customary land ownership was discriminatory toward women and girls.

As demonstrated, the judiciary has taken steps to eradicating discriminatory traditions against women by utilizing international law to strengthen their rights. The judiciary

¹⁵¹ Supra n 22 Article 2

¹⁵² Ibid Article 2 (c)

¹⁵³ Ibid Article 2 (f)

¹⁵⁴ Ibid Article 5 (a)

¹⁵⁵ Supra n 22 para 23

¹⁵⁶ *Mary Rono v Jane Rono and William Rono*, Civil Appeal 66 of 2002 at Court of Appeal, Eldoret

must take the lead in dispelling the misconceptions and preconceptions that domestic violence against women is acceptable. This is because the judiciary protects individual human rights when they are violated, and when things are brought to court for consideration, the court has the final say by defending the rights through its judgements. The courts contribute to the abolition of impunity by issuing these rulings.

In South Africa, a court declared the state accountable for failing to protect a sexual violence victim due to the state's failure to take action to stop the perpetrators of the crimes.¹⁵⁷ In *Carmichael v Minister of Safety and Security* and another, the court noted;

‘...the bill of rights obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection. Constitutional obligations are now placed on the state to protect, respect, promote and fulfill the rights in the Bill of rights and, in particular, the right of women to have their safety and security protected.’¹⁵⁸

When it comes to the state's positive commitment to take all necessary means to protect women from domestic violence, courts must develop laws that are consistent with the constitution, its spirit, and purpose. As a result, Kenya is required by international law to remove discriminatory practices that foster a climate of tolerance and impunity in the face of domestic violence against women.

2.8 Fundamental rights infringed upon by domestic violence

Domestic violence has never been considered a crime in the past. It was regarded as a personal matter that should be handled at home and never required government interference. Over time the concerted of advocacy has brought domestic violence as a

¹⁵⁷*Carmichael v Minister of Safety and Security* (2001) (4) SA 938 CC

¹⁵⁸ *Ibid*

crime and therefore a violation of rights under national and international law. This section highlights some of the violations.

2.8.1 The right to equality

International human rights instruments also guarantee this right.¹⁵⁹ The UDHR underscores that everyone has the right to equal protection from discrimination.¹⁶⁰ It also states that throughout marriage, parties thereto have equal rights.¹⁶¹ According to the ICCPR¹⁶², State parties are responsible for ensuring that the rights and duties of spouses are equal throughout their marriage.¹⁶³ When women are subjected to domestic violence, their rights to equal protection under the UDHR and the ICCPR is violated.

2.8.2 The right not to be subjected to cruel, inhuman and degrading treatment

The Prevention of Torture Act¹⁶⁴ guarantees the right to be free from inhumane treatment or punishment. International human rights instruments also provide the right to be free of cruel, inhuman, and degrading treatment which is stipulated in the UDHR¹⁶⁵ and the ICCPR.¹⁶⁶ According to General Comment No. 20 on article 7 of the ICCPR, the purpose of protection against violence is to protect the individuals' dignity.¹⁶⁷ Furthermore, the general comment emphasizes that no exceptions to the protection against cruel, inhuman, or degrading treatment, as provided for in Article 7

¹⁵⁹ See the provisions of CEDAW, DEVAW, Maputo Protocol and the Banjul Protocol.

¹⁶⁰ UDHR was adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.

¹⁶¹ Ibid at Article 16 (1)

¹⁶² ICCPR was adopted by the UN General Assembly on 16th December 1966 and came into force from March 1976

¹⁶³ Ibid Article 23 (4)

¹⁶⁴ *The Prevention of Torture Act 2017*

¹⁶⁵ Supra n 147 Article 5

¹⁶⁶ Supra n 150 Article 7

¹⁶⁷ General Comment No. 20 on Article 7 of the ICCPR para 2

of the ICCPR, are admissible, even in times of national emergency.¹⁶⁸ This emphasizes the value placed on the right under the ICCPR.

According to the Convention Against Torture (CAT), torture is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...”¹⁶⁹ The Committee emphasizes that anyone who has been harmed, whether psychologically or physically, is a victim of torture and cruel, degrading, or humiliating treatment, regardless of whether the perpetrator and the victim are related.¹⁷⁰ Domestic violence causes both psychological and physical harm, which is defined as "serious bodily or mental agony" in the CAT definition of torture. Domestic violence has a negative impact on women's well-being; hence it is critical that their right is protected. Many women have been subjected to physical pain while others have died from their injuries.¹⁷¹ All this amounts to acts of cruelty which the Kenyan government must take stern actions against.

2.8.3 Freedom from discrimination

International human rights instruments such as CEDAW¹⁷², UDHR¹⁷³, ICCPR¹⁷⁴ and ICESCR¹⁷⁵ all advocate for equality and non-discrimination. All people, regardless of color, gender, religion, or other status, should have equal access to rights. This basically means that all people should have the same access to certain rights. Individuals should have equal rights, which implies the substantive elements of the law should apply to everyone equally. This isn't to say that everyone should be treated

¹⁶⁸ Ibid para 3

¹⁶⁹ Convention Against Torture (CAT) Article 1

¹⁷⁰ General Comment No. 3 Implementation of article 14 by States parties at para 3.

¹⁷¹ James Kahongeh, ‘Man kills wife and three children in cold blood,’ Daily Nation, 6th May 2018 <https://www.nation.co.ke/news/Man-kills-wife--three-children-Roysambu/1056-4550068-jfvn0uz/index.html> assessed on 13th June 2018.

¹⁷² Supra n 22

¹⁷³ Supra n 147 Article 1, 2 and 7

¹⁷⁴ Supra n 150 Article 26.

¹⁷⁵ Ann F. Bayefsky, “The principle of Equality or Non-discrimination in International Law”, (1990) 11 Human Rights Quarterly, p. 5.

the same, but it does mean that they shouldn't be treated differently for arbitrary or irrational reasons.¹⁷⁶ Culturally domestic violence is not a crime and men are permitted to chastise their wives. This means that men are given authority over women and not vice versa. This amounts to discrimination as it is selectively applied.

CEDAW safeguards women against discrimination based on sex that may jeopardize their enjoyment of fundamental and human rights. CEDAW also requires governments to promote equality because the family falls under the state's responsibility to ensure the enforcement of human rights. The Kenyan government must take steps to safeguard women from domestic violence by condemning cultural beliefs that promote men's dominance over women.

2.8.4 The right to life

This is guaranteed by ICCPR¹⁷⁷ and the African Charter¹⁷⁸. ICCPR affirms that people have the right to life and that states have a responsibility to safeguard it.¹⁷⁹ Some cases of domestic violence have led to the death of victims. In the case of *Republic vs Dominic Thiongo Kibucha*¹⁸⁰, the accused was convicted of killing his girlfriend because of an alleged affair. Kenya is required by international law to ensure that no women die as a result of domestic violence. Thus, where there is a violation proper redress must be accorded.

¹⁷⁶ Li Weiwei, 'Equality and Non-discrimination under International Human Rights Law' (2004) The Norwegian Centre for Human Rights p 15

¹⁷⁷ Supra n 150 Article 6

¹⁷⁸ Supra n 23 at Article 4

¹⁷⁹ Supra n 150 Article 6

¹⁸⁰ *Republic vs Dominic Thiongo Kibucha 2006 [eKLR]*

2.8.5 The right to human dignity

Individuals' fundamental rights to freedom and physical integrity are derived from the right to human dignity.¹⁸¹ It is protected by human rights treaties to which Kenya is a member such as the UDHR¹⁸² and the ICCPR.¹⁸³ In *J O O vs the Attorney General and others*¹⁸⁴, the court in finding that that the respondents violated the petitioner's right to dignity declared right to dignity which must be respected. The petitioner was forced to give birth on a concrete floor in front of others, and the birth was videotaped. Similarly in *Republic Vs Minister for Home Affairs and 2 Others Ex-parte Leonard Sitanize*¹⁸⁵(2005) eKLR the Court stated;

“Human dignity is of Fundamental importance to any Society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights.”

Torture and punishment are a breach of rights guaranteed by the UDHR.¹⁸⁶ Gender-based violence stemming from cultural discrimination is incompatible with individual dignity and worth.¹⁸⁷ As a result, domestic violence clearly violates women's right to human dignity by making them feel degraded and less human. It also causes women to lose their self-esteem, confidence and respect in their communities.

2.9 Conclusion

The regional and international legal framework is replete with ideas aimed at safeguarding human rights by ensuring that women are safe from violence. The analysis of the regional and international legal framework has highlighted that abuse

¹⁸¹ De Waal J and Currie I, ‘The Bill of Rights Handbook’ (2005) 5th edition (Juta) p.273.

¹⁸² Supra n 147 Article 1

¹⁸³ Supra n 150 Article 10

¹⁸⁴ *Bungoma Constitutional Petition no 5 of 2014 J O O vs The Attorney General and Others [2018] eKLR*

¹⁸⁵ *Republic Vs Minister for Home Affairs and 2 Others Ex-parte Leonard Sitanize (2005) eKLR*

¹⁸⁶ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) article 2.

¹⁸⁷ Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 para 18.

against women as a human rights issue that warrants intervention. Kenya, as a state party to international frameworks, is obligated to ensure that domestic violence against women is eradicated and that women have access to their basic human rights. The following chapter examines Kenya's legislative structure and the challenges it faces implementing legislation that address domestic violence against women.

CHAPTER THREE

KENYA'S LEGAL FRAMEWORK ON DOMESTIC VIOLENCE AND ITS CHALLENGES

3.0 Introduction

The legal framework addressing domestic violence in Kenya is examined in this chapter. This will be achieved by examining the Constitution, the Protection Against Domestic Violence Act, other legislations and policies that address domestic violence. This chapter will be concluded by examining the factors that hinder the implementation of the PADVA.

3.1 The Constitution of Kenya¹⁸⁸

The Constitution's passage in 2010 ushered forth a new era of hope, particularly in terms of human rights protection. It has been praised as unique for protecting human rights¹⁸⁹ and intensified protection of individual rights and further amplified acknowledgement that discrimination on grounds of sex abuses universal human rights. Although the Constitution does not specifically address domestic violence, it does have a Bill of Rights that offers a broad protection for citizens' rights.¹⁹⁰ In *Purity Kanana Kinoti v. Republic*, the Court confirmed this position, ordering a police officer guilty of violating the accused's right to reimburse her.¹⁹¹ The Constitution binds not only the state but all individuals. This is advantageous to victims of domestic violence since the state should punish human rights violators as a deterrent.

Article 27 (1) provides extensive protection for the values of equality and non-discrimination¹⁹² which provides for equality before the law. This section prevents

¹⁸⁸ Supra n 15

¹⁸⁹ Supra n 33

¹⁹⁰ Supra n 15 Chapter 4 (Bill of Rights)

¹⁹¹ *Purity Kanana Kinoti v. Republic* [2011] eKLR.

¹⁹² Supra n 15 Article 27

any person from discrimination and implies that there is no hierarchy between men and women. In *Mukungu v Republic*,¹⁹³ corroboration in sexual offense cases was declared unconstitutional because it discriminated against women. The Court argued that treating women's evidence differently than men's evidence was unjustified and violated their right to equality.¹⁹⁴ Men cannot abuse women by imposing their superiority on them. Similarly in the *Ole Ntutu* case¹⁹⁵, it was pointed out that if Maasai customary law was discriminatory, and therefore inapplicable. Kenya has a constitutional obligation to protect women from domestic violence, and culture cannot be used as an excuse for such behavior.

3.2 The Protection Against Domestic Violence Act 2015¹⁹⁶

PADVA encapsulates Kenya's national, regional, and international commitments to ending domestic violence and achieving gender equality.¹⁹⁷ The Act is categorical in its recognition that domestic violence occurs in Kenya. The Act's passage marks a watershed moment in Kenya's fight against domestic violence, as it incorporates human rights concepts found in international instruments signed by the country. The Act was passed to ensure the safety of the family unit, as well as matters linked to or incidental to that safety.¹⁹⁸ Its goal is to eliminate and prevent domestic violence by acknowledging that it is undesirable conduct and providing effective legal protection to victims, such as authorizing the court to issue orders and ensuring quick and inexpensive access to the court system. The Act's key salient features are detailed below:

¹⁹³*Mukungu v Republic* (2003) EA

¹⁹⁴ Ibid

¹⁹⁵*In Re Estate of Lerionka Ole Ntutu (Deceased)* [2008] eKLR.

¹⁹⁶ Supra n 6. The Act was commenced on 16th May 2015

¹⁹⁷ Ibid see the preamble to the Act

¹⁹⁸ Ibid

3.2.1 Comprehensive definition of domestic violence

Domestic violence is defined as “violence against a person, or threat of violence or of imminent danger to that person by any other person with whom that person is, or has been, in a domestic relationship.”¹⁹⁹ The broad definition offered by the Act and its elements ensure that women are adequately protected. This is especially imperative due to the different forms that domestic violence can take, some of which are not readily discernible for example, psychological abuse. However, it should be noted that the Act in its definition does not specifically include marital rape as domestic violence and therefore married women are barred from claiming their violation of human rights when they are raped. This is a denial of their legal protection.²⁰⁰ Married women, raped within marriage, cannot seek the reliefs provided for under the Act. It would be expected that the Act, as the intended law under which marital rape would fall, would make such acts of violence illegal. However, the Act makes no mention of marital rape, despite the fact that it covers domestic violence in general. This is a glaring omission in the Act, because marital rape is a violation of women's rights, as defined by Kenya's Constitution and international instruments ratified by Kenya.²⁰¹

3.2.2 Protection orders and Mode of application

Protection orders are one of the most widely used legal responses for safeguarding the protection of women and children subjected to domestic violence.²⁰² Women obtain protection orders for a variety of reasons, the most common of which is the necessity for immediate protection.²⁰³ Domestic violence is protected under the Act through the

¹⁹⁹Ibid 6 s (2) and s 3 of the Act for the definition of domestic violence.

²⁰⁰Supra n 15 Article 27 (1)

²⁰¹ See the provisions of CEDAW and DEVAW

²⁰²Domestic and Family Violence Protection Orders in Australia; An Investigation of Information Sharing and Enforcement: State of Paper December 2015
https://d2c0iky46o3b1.cloudfront.net/anrows.org.au/s3fs-public/16_4.1%20Legal%20WEB_FINAL_0.pdf assessed on 21st May 2018 pg 1

²⁰³ Ibid

issuance of a protection order.²⁰⁴ The Act aims to protect all family members, especially women, from domestic violence and does not preclude anyone from seeking protection orders.²⁰⁵ In emergency situations, the court may issue an interim order which ensures that domestic violence victims are protected while the case is being heard. The protection order is made by way of an affidavit. Where the application is made by other parties other than the victim, the victim must be furnished with a copy of the same.²⁰⁶ Further applications can also be made in a representative capacity on behalf of children²⁰⁷ or other those who lack the capability to do so, such as when one lacks the ability to comprehend the nature of, and anticipate the repercussions of, actions affecting one's personal care and welfare.²⁰⁸ This includes people who are insane, unconscious or those who are unable to appreciate the import of their decisions.

The protection order is in effect the principal remedy under the Act to domestic violence victims. It's worth noting that the Act's procedures for requesting the order and generally participating with the law enforcement system in cases of violence are both victim-friendly. Exclusion of parties not allowed by the court to attend the proceedings, for example, is a prerequisite²⁰⁹ and a prohibition from publishing the victim's image in a newspaper²¹⁰ in order to protect the victim. If the court orders it, the proceedings can be held in private.²¹¹ This guarantees the parties their right to privacy as envisaged in the Constitution of Kenya,²¹² UDHR²¹³ and the ICCPR.²¹⁴

²⁰⁴Supra n 6 Article 2

²⁰⁵Ibid s 8 of the Act

²⁰⁶Ibid s 25 of the Act

²⁰⁷Ibid s 26 of the Act

²⁰⁸Ibid s 11 of the Act

²⁰⁹ Ibid 6 s 28 of the Act

²¹⁰ Ibid s 31

²¹¹Ibid s 28(3)

²¹²Supra n 15 Article 31 of the Constitution of Kenya

²¹³Supra n 147 Article 12 of UDHR

In *Bellotti v. Bair*²¹⁵ it was held that:

“Inherent in the right of privacy is the right to make decisions "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties... For anyone to interfere with one's decision “is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [one's] decision.”

The right to privacy safeguards women's rights not to be subjected to public scrutiny when testifying in court since domestic violence is a delicate and private matter which occurs in a domestic setting. This ensures that women giving evidence in court are not subjected to embarrassment or secondary victimization.

3.2.3 Role and duties of the police

According to Combrinck and Wakefield, the police are one of the most important state bodies in protecting the public from violent crime perpetrators infringing on their fundamental rights.²¹⁶ This reaffirms Article 27(1) of the Constitution, which provides for equal protection from the law.²¹⁷ Under the Act, police officers have a significant responsibility to perform. A police officer who receives a domestic violence report may: advise the victim to obtain shelter, medical treatment, or other appropriate assistance; advise the applicant of the reliefs and their right to file a criminal complaint.²¹⁸ The Act similarly provides for the right of the victim to report the case to an officer of the same sex.²¹⁹

In addition, primary responsibility of enforcing protection orders is bestowed upon the police who may arrest without a warrant anybody who violates a protection order within five years of making the order.²²⁰ Breach of a protection order results in a fine

²¹⁴Supra n 150 Article 17 (1) of ICCPR

²¹⁵*Bellotti v. Bair* 443 U.S. 622, 652 (1979).

²¹⁶ Combrinck, H. & Wakefield L., ‘Training for Police on the Domestic Violence Act,’ (2009) pg 10

²¹⁷ Supra n 15

²¹⁸Supra n 6 s 6(1)

²¹⁹Ibid s 6 (2)

²²⁰Ibid s 23(1)

of 100,000 shillings, twelve-month imprisonment, or both.²²¹ The penalty serves as a deterrent purpose especially where imprisonment is resorted to. It also serves to eliminate impunity by perpetrators as the penalties are hefty. The police are also vested with powers to arrest the respondent at any time of making the order if he is in breach of the order.²²² The Act is however silent on the geographical aspects of enforcement. It's unclear whether the order may be carried out outside of the court's jurisdiction. This is important since both parties may leave the court's jurisdiction, therefore the applicant must be protected wherever they go.

The Inspector General has been mandated to ensure that police officers are trained to enable them handle cases of domestic violence.²²³ However the Act is silent on who will provide the training. The Inspector General is also responsible for ensuring that domestic violence cases are reported and that complaints are handled quickly and efficiently. It should however be noted that since this law was enacted, the police have not released any data or report indicating the number of domestic violence cases against women that occur. The police still report cases of domestic violence under assaults, battery, and murder among others. This makes it difficult to monitor the prevalence of domestic in the country. Efforts should be made by the government to ensure that the police department embrace statistical data recording that recognizes this category of crime in a more discernible manner for easy identification as stipulated under DEVAW.

3.2.4 Powers of the court

The court has the power to order counseling and conciliation programs to ensure that the law is adhered too by prohibiting domestic violence, creating a safe environment

²²¹ Ibid s 22

²²² Ibid s 23

²²³ Ibid s 6(4)

for all family members, and fostering peaceful domestic relationships between and among the parties. Alternative dispute resolution is an important part of ensuring that the Constitution's recognized and guaranteed fundamental rights are realized.²²⁴ *In Council of County Governors v Lake Basin Development Authority & 6 others*, Justice Mativo stated,²²⁵ *that Court is required to encourage alternative dispute resolution by virtue of Article 159(2) (c) of the Constitution.'*

Alternative dispute resolution is a modern civil judicial system that aims to improve access to justice. It can assist the parties in engaging in communication when this was previously impossible, and in determining the worth of going to court on their own. However, alternative dispute resolutions are not feasible in all cases of domestic violence for example, where serious criminal cases such as assault causing bodily harm and murder have been committed.

The Act also provides for an award of compensation to the victim where the court deems this to be necessary.²²⁶ This means that victims of domestic violence may seek civil remedies against their perpetrators. The court considers the victim's pain and suffering, the cost of medical care for the injuries experienced, any lost wages resulting from the injuries, and the amount or worth of property seized, destroyed, or damaged when awarding damages.²²⁷ The court awards both special and general damages. This is especially important as it takes into account the loss that may have been sustained by the victim, both monetary and non-monetary arising from such

²²⁴ Supra n 15 Article 159 (2)

²²⁵ *Nairobi Constitutional Petition no 280 of 2017 Council of County Governors v Lake Basin Development Authority & 6 others*, [2017] eKLR

²²⁶ Supra n 6 s 32

²²⁷ Ibid

forms of abuse as verbal and psychological abuse which are not readily quantifiable.²²⁸

The Act also makes it clear that conduct that is considered domestic violence under the Act does not preclude it from being considered a crime under any other law²²⁹ thus a person may still be liable under other laws for an act of domestic violence. Domestic violence violators can now be tried under both the Penal Code and the SOA. This provision serves to avoid usurping the powers and roles of other law enforcement mechanisms. For instance, criminal law would still operate to bring to account a perpetrator of violent assault although the assailant may have been ordered to compensate his victim for the detriment suffered.

3.2.5 Other features of the Act

Domestic violence is patriarchal in origin, according to the Act, which recognizes that abuse can stem from harmful customary practices.²³⁰ All these crimes are often committed against women at the behest of men and done to serve the male interest. This reflects the CEDAW Committee's concern over Kenya's patriarchal attitudes on women's duties, responsibilities, and identities, which are reflected in women's disadvantaged and unequal life situations.²³¹ Based on the foregoing, it is clear that enacting the PADVA is a positive step toward ensuring that women are safeguarded from domestic violence. PADVA combines elements of Kenya's Constitution, as well as international law which ensure women's fundamental rights and freedoms.

²²⁸ Ibid

²²⁹ Ibid s 3(6)

²³⁰ Ibid 3

²³¹ Supra n 98

3.3 Other legislations and policy frameworks addressing domestic violence against women

The Sexual Offences Act (SOA)²³² is Kenya's primary statute governing sexual offenses. The Act criminalizes sexual connections between people who are related to each other in specified ways, thereby protecting women from sexual relations in the home.²³³ The consent clauses of the SOA give it even more strength. It states that someone consents to an act if she or he chooses to do so and has the freedom and capacity to do so.²³⁴ The rape provision can only be claimed by victims who are not married. The rape exemption has the effect of preventing married women from bringing up allegations of rape committed within the marriage, and thus from being protected. Courts have however addressed domestic violence against women divorce cases. In *Esther Nangwanaa Nandi v Jones Chewe Bobo*²³⁵ Justice Rawal found the respondent guilty of cruelty and adultery when granting the applicant, a divorce. Similarly, in *AB v CD*²³⁶ the court in granting the applicant a divorce stated that the female partner had the right to decline to submit to irrational demands of carnal association, and that amounts to cruelty.

Although the SOA has made great strides with respect to providing women protection from domestic violence, the provisions are not adequate. While the Act was intended to address the unique difficulty of sexual violence, there is currently no law that addresses other types of violence.²³⁷ Similarly, the exemption of marital rape as an offence bars women from reporting the offence. This not only puts women at risk of

²³² Supra n 30

²³³ Ibid See Section 20 of the Criminal Procedure Code.

²³⁴ Ibid s 42

²³⁵ *Esther Nangwanaa Nandi v Jones Chewe Bobo Divorce Cause 84 of 2005 at High Court of Kenya, Nairobi*

²³⁶ *AB v CD (2001) 28 eKLR 210*

²³⁷ Supra n 66 pp.120

domestic violence, but it also denies them the same legal protection as males, as stipulated by the Constitution and international treaties.

Another legislation that addresses domestic violence is the Penal Code.²³⁸ It is the law under which cases of assault²³⁹, grievous harm²⁴⁰, murder²⁴¹ among others are prosecuted. Its application however has not been effective. For example, in the *Wilmina Achieng case*²⁴², by lacerating his wife's private parts, the husband cruelly abused her. The accused justified his abuse by claiming that his wife arrived home late. He pleaded guilty but refused to take blame and was fined 10,000 Kenyan shillings, which he paid before returning home and attacking his wife. He was re-arrested and given a six-month term. In December 1999, he was pardoned and released from jail.²⁴³ In another case, the court freed Dickson Chege, who admitted to stabbing his wife to death over her suspected infidelity because he had been provoked by his wife's infidelity.²⁴⁴ The Penal Code also falls short when it comes to protecting potential victims or their family from domestic assault. As a result, it fails to notice the many forms of abuse and only intervenes after a crime has been committed, which can be fatal in some cases.

In addition, there are policies and guidelines that have been put in place in Kenya to support the existing legislations. For instance, *the National Framework toward Response and Prevention of Gender Based Violence in Kenya*²⁴⁵ organizes the responses of various state and non-state entities to sexual and gender-based violence

²³⁸ Supra n 29

²³⁹ Ibid s 251

²⁴⁰ Ibid s 234

²⁴¹ Ibid s 203

²⁴² *The Wilmina Achieng case* [1998] EA 177736. Available at <www.theperspective.org/kenya.html> at 7 January 2015.

²⁴³ Ibid

²⁴⁴ Amnesty International, *Kenya, 'Rape- The Invisible Crime'*, (2002), AI Index: AFR 32/001/2002 at 21

²⁴⁵ Kenya's National Framework for Responding to and Preventing Gender-Based Violence, 2014.

in Kenya. Gender-based violence is recognized as a public health issue.²⁴⁶ The policy gives guidelines for the various actors' coordination processes with the goal of ending the violence. The framework conforms with international treaties like CEDAW and DEVAW²⁴⁷ because they recognize that violence is diverse and varied, necessitating a multi-faceted response, as argued by feminists. The framework argues for the creation of a single national SGVB monitoring and evaluation mechanism that can collect and display SGBV data in a uniform manner for analysis.²⁴⁸

*The National Guidelines on the Management of Sexual Violence*²⁴⁹, is also vital since it lays out the necessary processes and services for dealing with sexual abuse survivors. It acknowledges sexual violence as a human rights and health issue that requires immediate action from all parties involved. The guidelines provide medical professionals with advice on how to care a sexual violence survivor,²⁵⁰ preservation of evidence for court use,²⁵¹ issues of psycho-social support and other ethical issues related to the management of health-related problems of sexual violence.²⁵² It has also made it easier and more detailed to document evidence for sexual offenses.²⁵³ All these serve to boost responses towards addressing the problems in pragmatic manner and alleviate the suffering associated with poor documentation which often results in acquittals.

²⁴⁶ Ibid pg 11

²⁴⁷ Ibid pg 12 and 13

²⁴⁸ Ibid pg 16

²⁴⁹ Ministry of Public Health & Sanitation Ministry of Medical Services 'National Guidelines on the Management of Sexual Violence' (2009) (2nd ed).

²⁵⁰ Ibid pg 8.

²⁵¹ Ibid.

²⁵² Ibid pg 18-24.

²⁵³ Ibid pg 24.

3.4 Challenges facing Kenya in addressing domestic violence against women

3.4.1 Cultural and traditional practices

Domestic violence against women in Kenya may also be analyzed from the cultural/traditional perspective. Violence in the home has found acceptance and tolerance in some of the traditional practices in Kenya. Large-scale violence against women has been made possible by adherence to traditional practices and State passivity in response to these norms and traditions.²⁵⁴ In order to uncover and alter the shared understanding on which desirable change or development can be founded, an analysis of traditions in reference to violence against women and treatment of women is required. Customary rules and practices coexist alongside national and international legislation in Kenya. The Constitution in its preamble recognizes this spirit by declaring “*we, the people of Kenya, proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation.*” The Constitution further recognizes “*culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.*”²⁵⁵

Kenya is a patriarchal society compromising diverse communities²⁵⁶ who practice different customs which affirm the position that women are inferior to men. Protecting women from domestic violence continues to be hampered by cultural ideas and stereotypes. Gender-based differentiation in our society has resulted in gender inequality.²⁵⁷ Traditionally, many communities were ruled by men who made all decisions and therefore women lacked a voice. For example, women in Mt Elgon note that domestic violence is normalized in their area. They state that, “*when women in*

²⁵⁴ Katharine. Bartlett, ‘Tradition, Change & the Idea of Progress in Feminist Legal Thought’ (1995) Wis. L. Rev. 303 at 305

²⁵⁵ Supra n 15 Article 11(1)

²⁵⁶ Ibid See the preamble of the Constitution

²⁵⁷ Dr. Scholastica Omondi et al, ‘The Current Analysis on Gender Equality and Discrimination in Kenya’ (2017) *International Journal of Scientific and Research Publications* Vol 7, Issue 8 pg 478

their community are beaten it means that they have been accepted so they do not say anything about the violence. They assert that they can go back to their [parents] home, and pay a fine if they want to come back [to your husband].' This emphasizes the inferior position of women in the society.²⁵⁸ Similarly an elder concurred that in Bukusu culture, before the first child is born, the woman must be beaten in order to show her legitimacy. This practice is known as *kuruka meko* (jumping the stove).²⁵⁹

Bride price is another culture that encourages domestic violence. Men are expected to pay dowry to the women's family in many Kenyan traditional weddings. This practice fosters a lot of violence because men use it to treat their women like property, for example, by beating them up because they paid bride price for them. In addition, women prefer to stay in violent marriages because they believe they owe it to their husbands because of the bride price they paid for them.²⁶⁰ When a traditional marriage comes to an end, dowry must be returned to the husband's family.²⁶¹ Many women choose to stay in violent marriages because they cannot repay the dowry.²⁶² Such customary practices are harmful to women and impede the realization of equality rights.

As explained, Kenyan customary laws inter-relate with the national and international laws in Kenya and this has worked to the detriment of women in some instances, such

²⁵⁸ Crime and Prevention Training, 'Kwale and Bungoma County Crime and Violence Surveys' (2016) pg 68

²⁵⁹ Ibid pg 68

²⁶⁰ J M Migai, 'The Penal Code and Spousal Rape: Is there need for legislature intervention?' (1995) *University of Nairobi Law Journal* Issue No. 2.

²⁶¹ Eugene Cotran, 'Casebook on Kenya Customary Law' (1987) pp.123-124.

²⁶² FIDA-Kenya, 'Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights' (2008) <www2.ohchr.org/English/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf> Accessed on 13/11/2017. See also Centre for Rights, Education and Awareness (CREAW), 'Bride Price: Is it modern day slavery?' (2006) it is stated that if a marriage does not work out, the bride price will be repaid, indicating that marriage is largely viewed as a family bond rather than an interpersonal commitment based on love. Marriage is solidified by the bride's riches, which gives a major portion of the bride's family a financial stake in the marriage's success, a kind of marital insurance.

as property inheritance. In *Mwathi v Mwathi and Another*²⁶³, the Court of Appeal applied the Kikuyu Customary Law in relation to an intestate estate, despite the fact that the Law of Succession Act²⁶⁴ was in force to determine whether Kikuyu unmarried girls cannot inherit their father's property. Some courts have however found customary laws to be discriminatory to women for example in *Mary Rono v Jane Rono and William Rono* the court stated that it was discriminatory to give the girls less acreage because they were women and could inherit elsewhere when they got married.²⁶⁵ Similarly in *Wambugi w/o v. Stephen Nyaga Kimani*²⁶⁶ under section 3 (2) of the Judicature Act, customary law is applicable if it's not derogatory to justice or morals.

The CEDAW Committee²⁶⁷ expressed its concerns and noted the role of harmful stereotypes in perpetuating violence against women as follows:

“The Committee reiterates its concern at the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life. The Committee is concerned that such customs and practices perpetuate discrimination against women, and are reflected in women's disadvantageous and unequal status in many areas, including in public life and decision-making and in marriage and family relations. The Committee notes that such stereotypes also contribute to the persistence of violence against women as well as harmful practices, including female genital mutilation (FGM), polygamy, bride price and wife inheritance; and expresses its concern that despite such negative impacts on women, the State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and harmful practices.”

²⁶³*Mwathi v Mwathi and Anor* 1995-1998) 1 EA 229

²⁶⁴*The Law of Succession Act (Kenya) Cap 160*

²⁶⁵Supra n 142

²⁶⁶*Wambugi w/o Gatimu v. Stephen Nyaga Kimani* [1992] KAR 292 (Court of Appeal)

²⁶⁷ Committee on the Elimination of Discrimination against Women: Kenya, CEDAW, U.N. G.A.O.R., 66th Sess., Supp. No. 38 (A/66/38), Part III (2011) 142 at para. 17

Kenya therefore needs to address the discriminatory laws and practices that allow an atmosphere of tolerance and impunity surrounding domestic violence. Kenya must address the underlying wrongful stereotype of treating women as inferior to the men and denying them access to justice.

To establish effective remedies, the law must be based on a knowledge of the role of traditions in women's treatment.

3.4.2 Other challenges Kenya faces in addressing domestic violence against women

Majority of Kenyan women are unaware that domestic violence is a violation of their rights because they're not knowledgeable about their rights.²⁶⁸ Women have accepted abuse from their partners.²⁶⁹ According to CEDAW's concluding recommendations, the government should improve women's understanding of their rights by introducing legal literacy initiatives that use all relevant channels, including the media.²⁷⁰

Similarly, the Police reluctance to handle the cases discourages victims of domestic violence from reporting them.²⁷¹ Domestic violence situations, for example, are often trivialized, and perpetrators are not always punished when victims report them to the police.²⁷² They also encourage women to use traditional dispute resolution methods, such as having a family member arbitrate an issue.²⁷³ According to FIDA, the police's indifference was regarded as a major source of violence, particularly sexual violence among teenagers. Most police officers appear to be uninterested in apprehending the

²⁶⁸FIDA Kenya, 'Women's Land and Property Rights in Kenya', <http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf> accessed on 19th March 2018

²⁶⁹ The Committee considered the seventh periodic report of Kenya (CEDAW/C/KEN/7) at its 963th and 964th meetings, on 19 January 2011 (see CEDAW/C/SR.963 and 964).

²⁷⁰ Ibid

²⁷¹ Patricia Kimeri Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law'(2011) pg 11

²⁷² Ibid

²⁷³ Claire McEvoy, 'Battering, Rape and Lethal Violence; A Baseline of Information on Physical Threats against Women in Nairobi' (2013) pg 49 <http://covaw.or.ke/wp-content/uploads/2013/12/SAS-WP13-VAW-Nairobi.pdf> accessed on 19th March 2018

criminals, especially if they are willing to 'purchase' their release.²⁷⁴ Furthermore, the police's ability to respond to crime is harmed by a lack of proper resources and infrastructure. Many victims of domestic violence, for example, find it difficult to appraise hospitals and police stations, making it impossible to gather evidence that may be used to prosecute domestic violence perpetrators.²⁷⁵ As a result, the lack of enforcement measures has hampered women's human rights protection.

3.5 Conclusion

Kenya has made significant progress in combating domestic violence against women. PADVA ensures that women are safeguarded from domestic violence and that their fundamental rights and freedoms are respected. However, despite all the measures introduced to eradicate domestic violence, it still persists. This is attributed to harmful cultural practices, police inaction and lack of legal awareness which continues to hinder its implementation. To ensure that women are safe from domestic violence, these barriers must be removed. The following chapter assesses how South Africa has dealt with domestic violence and examines what lessons, if any, Kenya can take away as well as any obstacles that South Africa has faced in dealing with domestic violence.

²⁷⁴ Supra n 3 pg 36

²⁷⁵ Ibid pg 12

CHAPTER FOUR

DOMESTIC VIOLENCE IN SOUTH AFRICA: PROSPECTS, CHALLENGES AND LESSONS FOR KENYA

4.0 Introduction

Despite variations around the world, there is one similarity that draws across different cultures from time immemorial, which is the differential treatment of women from men. History portrays that women were treated as chattels, lacking autonomy and not having an independent mindset.²⁷⁶ The approach to domestic violence against women varies from State to State. Positive strides have been witnessed in recent years as more and more jurisdictions have enacted legislation to eradicate domestic violence against women. Like Kenya, cases of domestic violence against women in South Africa persist. South Africa has for a long time had legislation to tackle the vice and it is vital to appreciate the progress (or lack of) made to see how Kenya compares.

4.1 Constitutional and Legislative Safeguards against Domestic Violence

According to the 2017-2018 crime statistics, sexual offences, appear second on the list of 17 most serious community-reported crimes in South Africa, after murder, with 40,035 sexual offences reported against women, with sexual abuse amounting to 2.7% of domestic crimes reported.²⁷⁷ Similarly, statistics released in 2021 show that 21% of women had experienced physical violence by a partner.²⁷⁸ South Africa has been progressive in recognizing domestic violence against women as a human rights issue and further enacted provisions to address and criminalize it. The Constitution was enacted to heal the injustice caused by apartheid by establishing an open and

²⁷⁶ S.B Miller, *Against Our Will: Men, Women and Rape* (1975) 18.

²⁷⁷ South African Police Service Report, *Crime Situation in RSA Twelve Months 01 April 2017 to 31 March 2018* (2018) 32.

²⁷⁸ <https://www.ier.co.za/domestic-violence-statistics-in-south-africa/> assessed on 7th October 2023

democratic society founded on human rights.²⁷⁹ Section 12(c) states that: “everyone has the right to freedom and security of the person, which includes the right to be free from violence from either public or private sources.”²⁸⁰ This right is metamorphosis that is modeled on Article 5²⁸¹ of the International Convention on the Elimination of All Forms of Racial Discrimination²⁸².

In the case of *S v Baloyi*²⁸³, domestic violence is concealed and recurring in nature, which continues violating a constitutionally mandated right to be free from violence. Read with section 7(2) of the constitution²⁸⁴, the state is required by section 12(1) to guarantee everyone's right to be free of domestic violence. These obligations stem from the state's constitutional commitment to safeguard, preserve, promote, and fulfill the rights entrenched in the Bill of Rights, as the court correctly noted. This position was further affirmed in the case of *Carmichele v Minister of Safety and Security* where²⁸⁵ it was held that;

“... Constitutional obligations are now placed on the state to respect, protect, promote and fulfill the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.”

The court observed that the state is required abolish violence against women.²⁸⁶ It further stated that the courts have a responsibility to create the common law in order to provide mechanisms for keeping the government accountable.

As seen in the *Carmichele case*²⁸⁷, when the state fails to fulfill its obligation, damages may be sought. This was further expressed in *Van Eeden v Minister of Safety*

²⁷⁹ See the preamble of *The Constitution of the Republic of South Africa* (1996).

²⁸⁰ Ibid s 12(c)

²⁸¹ Ibid Article 5 (b)

²⁸² The Convention was ratified on 5th December 1995.

²⁸³ *S v Baloyi & Others* 2000 (1) BCLR 86 (CC).

²⁸⁴ Supra n 281

²⁸⁵ Supra n 148

²⁸⁶ Ibid.

and Security (Women's Legal Centre Trust as Amicus Curiae).²⁸⁸ The appellant's appeal for damages after she was raped by a man who had escaped police custody was upheld. The state should actively avert violations of the constitutional right of its citizens. The court determined that the state owed the appellant an international legal commitment to protect women from abuse and that the state was liable for any damages she could prove. It is clear from the preceding discussion that courts place a high value on the constitutional commitment to protect women from domestic violence. The court in the *Baloyi*²⁸⁹ case observed that, clause 12(1) (c) allows for the enactment of legislation to address domestic violence. Such a law would not be an end in itself, as it would not be able to eradicate domestic violence on its own, but rather a preventive tool, aimed at providing protection, preventing future abuse by abusers, and ultimately promoting restorative justice.²⁹⁰

The Domestic Violence Act²⁹¹ (DVA) is the main legislation protecting women from domestic violence. It replaced the Prevention of Family Violence Act (PFVA), expanding the scope of 'family' and broadening the definition of a 'domestic relationship.'²⁹² It is clear from the preamble that the DVA was enacted in response to an increase in domestic violence cases, as it states: "Recognizing that domestic violence is a serious evil and that domestic violence recurs frequently in South African society." The word re-occurrence is used in the preamble to imply that domestic violence instances continue to occur in the country. In *Seria v The Minister of Safety and Security and Others*²⁹³ it was held that "*in reaction to the alarmingly*

²⁸⁷ Supra n 148

²⁸⁸ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* 2003 (1) SA 389 (SCA)

²⁸⁹ Supra n 285

²⁹⁰ Ibid

²⁹¹ Domestic Violence Act of 1998

²⁹² *Prevention of Family Violence Act*, No. 133 of 1993.

²⁹³ *Seria vs Minister of Safety and Security and Others* (9165/2004) [2004] ZAWCHC 26 at pg 2

high prevalence of domestic violence in South African society, the DVA was enacted."

The judge praised the Act for being "the awaited addition to the South African Jurisprudence and that it will promote rights of equality, freedom and security of the person."²⁹⁴

The Act expresses South Africa's commitment to ending domestic violence and achieving gender equality on a national, regional, and international level.²⁹⁵ Domestic violence is a social scourge that is endemic in South Africa, according to the Act, which is emphatic in its acknowledgement.²⁹⁶ In *Omar vs The Government of South Arica and Others*,²⁹⁷ the DVA in the fight against domestic violence, plays an important social and legal role, and the government is bound by the Constitution and international law to do so. Mr. Omar sought an injunction Court declaring Section 8 of the Act unlawful in this instance. The appeal was dismissed because the Act serves vital role in combating domestic violence and fulfilling the country's constitutional and international duties to prevent domestic violence. Section 8's goal is to establish a mechanism for ensuring that protection orders are followed and that complaints are protected from additional domestic violence.²⁹⁸ The Constitution encourages the attainment of equality, and in order to do so, it requires the government to enact legislation and take other steps to protect and advance people who have been unfairly discriminated against, or groups of people who have been unfairly discriminated against.²⁹⁹

²⁹⁴ Ibid pg 26

²⁹⁵ Supra n 293 (See the preamble to the Act)

²⁹⁶ Ibid.

²⁹⁷ *Omar v The Government of the Republic of South Africa and Others* (CCT 47/04) [2005] ZACC 17; 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC); 2011 (7) BCLR 651 (CC); 446 (CC) (7 November 2005).

²⁹⁸ Ibid

²⁹⁹ Supra n 281 s 9 (2)

The definition of domestic violence in the DVA's is vast.³⁰⁰ It safeguards women who are married to the perpetrator as well as those cohabiting.³⁰¹ It also expanded the scope of legal remedies available and increased police authority in domestic violence cases. The South African Police Service (SAPS) has a positive responsibility under the Act to help a complaint and, when necessary, to provide proper housing and medical treatment.³⁰²

The Act also offers various reliefs to victims of domestic violence such as an eviction order,³⁰³ and a protection order.³⁰⁴ The Act's protections for women ensure that they are safe from domestic violence. The court's powers and jurisdictions have also been expanded. For example, courts have an increased criminal jurisdiction,³⁰⁵ if a respondent fails to observe the protection order, they may be imprisoned to up to 5 years. Finally, protection orders can be enforced all over the country.³⁰⁶ Domestic violence perpetrators may be required by the court to compensate victims of domestic violence³⁰⁷ since it amounts to a delict. A delict is an act in which a person causes injury to another in an unjust and guilty manner.³⁰⁸ The concept of wrongdoing inflicting injury on another is an evident and necessary component of all legal systems, and it is a fundamental premise of South African common law. The Bill of Rights recognizes this assumption as well³⁰⁹ which provides that everyone has the right to human dignity,³¹⁰ the right to life³¹¹ and the right to security of her/his

³⁰⁰ Supra n 292 s 2

³⁰¹ Ibid

³⁰² Ibid s 2(a).

³⁰³ Charlotte Bendall, 'The Domestic Violence Epidemic in South Africa: Legal and Practical Remedies' *Women's Studies: An inter-disciplinary journal* 39:2 pp.100-118. The eviction order denies the perpetrator access from the home or place of abode.

³⁰⁴ Supra n 292 s 4. This is a court order that directly tells an abuser to stop abusing someone.

³⁰⁵ Ibid s 17

³⁰⁶ Ibid s 12(3)

³⁰⁷ Ibid s 7 (4)

³⁰⁸ J Neethling et al, '*Law of Delict*' (1990), Durban: Butterworths pg 4

³⁰⁹ Ibid

³¹⁰ Supra n 281 s 10

person.³¹² Only when a recognized cause of action exists on which monetary compensation can be recovered can damages be awarded.

Delictual remedies are compensatory in nature, meaning they compensate the prejudiced party for the harm inflicted by the perpetrator. This compensation comes in the form of a monetary reward for a person's disability or loss. The purpose of a damages award is to put a party whose rights have been infringed in the same position as if his or her rights had been respected, as far as money can do so. Damages try to recompense injuries by enacting vengeance for the wrong and satisfying the victim's and community's sense of justice in certain cases where damage or loss cannot be compensated.³¹³

South Africa further enacted the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007³¹⁴ which reaffirms the country's legal standing when it comes to domestic violence. It provides that that “it is not a valid defense for an accused person to contend that a marital or other relationship exists or existed between him or her and the complainant.”³¹⁵ This means that a married or an unmarried man shall not have the opportunity to use the existence of an intimate relationship as a defence in trial. Despite outlawing rape, judges use marriage as a mitigating factor in rape cases.³¹⁶ For example, in *S v Modise*³¹⁷ the appellant was convicted of attempting to rape his wife. However, the high Court opposed the trial court's punishment imposed and stated:

This is a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would

³¹¹Ibid s 11

³¹²Ibid s 12

³¹³ Supra n 310 pg 178

³¹⁴*The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007*

³¹⁵*Ibid s 3(a).*

³¹⁶ Hancox G (2012) Marital Rape in South Africa pp 71

³¹⁷ S V Modise (113/06) [2007] ZANWHC 73

ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behavior. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance.

This ruling reinforces societal beliefs that exalts men and give men authority of women as wives. Suffice to say that even judges are not entirely free from biases associated with their traditionally thinking when it comes to writing or pronouncing judgments on matters relating to family issues.

4.2 Other measures put in place to protect women from domestic violence

To support existing legislation, South Africa has established institutions, policies, and recommendations. In South Africa, specialized sexual offence courts were established in response to an increase of sexual offence cases recorded and the difficulty involved in prosecuting them. The necessity to recognize that victims of sexual violence deserve care that differs from that of other crime victims, as well as the fact that sexual offenses are difficult to prosecute due to the nature of the crime, were among the fundamental aspects of these specialist courts.³¹⁸ In 1993, the Wynberg Regional Magistrate's Court in Cape Town inaugurated the country's first specialist sexual offenses court.³¹⁹

Specialized courts were created to reduce insensitive treatment of sexual offender complainants, encourage a coordinated and integrated approach to criminal justice agencies' handling of these cases, and improve the rate of sexual offense reporting, prosecution, and conviction.³²⁰ The goal of the specialist sexual offenses court,

³¹⁸ South African Law Commission (2001) pg 70-71

³¹⁹ KD Muller and IA van der Merwe, 'The Sexual Offences Prosecutor: A New Specialization?' (2004) *Journal for Juridical Science* 29 (1) pg 135

³²⁰ *Ibid*

according to the Department of Justice, was "to effect more compassionate and specialized treatment of plaintiffs and prosecutions."³²¹

The National Policy Guidelines for the Treatment of Victims of Sexual Offenses finalized in 1998, were later introduced by the government. It included protocols for police, health, welfare, judicial, and prison workers in an attempt to improve victims' experiences with the criminal justice system.³²² In 2004, the government went even farther by issuing the Integrated Domestic Abuse Training Programme Manual, which was designed to enable police officers, prosecutors, magistrates, counselors, and victim assistant officers better comprehend domestic violence issues.³²³

Special facilities such as thuthuzela centers, family courts and sexual offences courts have also been set up.³²⁴ The goal of establishing family courts was to put all family-related problems before the courts under one roof, including divorce and family abuse cases.³²⁵ The thuthuzela centers, on the other hand, serve as one-stop service centers where victims can get help from the police, counselors, doctors, and prosecutors.³²⁶ They're a crucial part of the anti-rape effort, with the purpose of decreasing secondary trauma, raising conviction rates, and reducing case closure time. They operate out of public hospitals in areas where rape is a common occurrence.³²⁷ When sexual offenses courts exist, they are also tied to them. They allow rape victims to file a police report as well as obtain counseling and medical care all in one location. They've been recognized as a model for how to deal with sexual violence.³²⁸

³²¹ South African Department of Justice (1992-3) pg 97

³²²Supra n 305 pp.100-118

³²³ Ibid.

³²⁴Lisa Vetten, 'Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice' (2005) pg 2

³²⁵ Ibid pg 2

³²⁶ Ibid pg 2

³²⁷ Ibid

³²⁸ Ibid

The Family Violence, Child Protection, and Sexual Offenses Units (FCS Units), that provide specialized police responses to family and sexual violence, were reintroduced in December 2011 by the Minister of Police. In mid-2015, there were 176 units around the country.³²⁹This has reinforced South African's commitment to eradicate domestic violence by ensuring that women are protected.

4.3 Challenges experienced in implementing the DVA

The DVA has made significant progress in combating domestic violence but it still has a long way to go in terms of implementation. Its effective implementation has however been impeded by several factors.

For starters, domestic violence data are notoriously tough to come by.³³⁰ Police data only includes offenses that have been reported, such as assault, rape, or malicious property damage. Police data only includes offenses that have been reported, such as assault, rape, or malicious property damage. Despite the fact that the DVA requires police to retain a record of domestic violence crimes, a Civilian Secretariat for Police audit showed that just 2 out of the 145 police stations were compliant. Furthermore, most domestic violence crimes go unreported due to fear, intimidation, embarrassment, and or reprisal.³³¹Domestic Violence was not specifically mentioned in the SAPS Crime Status report for 2011-2012; instead, these violent acts were categorized under "Contact Crime," with incidents described as "arguments and conflict about money, family relationships, sexual relationships, work situations, and so on," which served the causes of these crimes. Furthermore, it indicated that;

³²⁹<http://www.saps.gov.za/newsroom/msspeechdetail.php?nid=4936> assessed on 19th May 2018

³³⁰Dissel, A and Ngubeni, K. 'Giving Women their Voice: Domestic Violence and Restorative Justice in South Africa,' (2003) Centre for the Study of Violence and Reconciliation. Stellenbosch.

³³¹ Bollen, S. et al (1999) Violence against women in Metropolitan South Africa: A study on Impact and Service Delivery. Institute for Security Studies. Monograph Series No. 41.

“Police officers are powerless to prevent crimes of this sort because (a) prior information about such crimes is rarely available, and (b) these crimes are mostly committed in private locations where direct policing is not possible. In these cases, policing's role is typically limited to providing a user-friendly and supportive environment for victims or complainants, allowing them to leave their private spaces and report the crimes, as well as ensuring that reported occurrences are thoroughly investigated to aid effective prosecution of perpetrators.”³³²

The DVA's oversight is not being carried out satisfactorily. Charlotte Bendall³³³ has noted that the Independent Complaints Directorate has only submitted one report on domestic violence to parliament since the Act's operationalization.³³⁴ These reports were created but never tabled, according to both the ICD and the SAPS, since parliament did not request for them, thus failing its statutory oversight responsibility. In addition, the Department of Justice and Constitutional Development has yet to develop a suitable method for evaluating the performance of courts in respect to the DVA.

On several occasions, the police have been accused of exhibiting a lack of understanding of the procedures to be followed in domestic violence cases.³³⁵ Factors such as under-resourcing of courts and police stations, police perceptions of domestic violence, fragmented service provision from the courts, police, and health sector, and a lack of information for applicants about the application procedure have all hampered the DVA's effective implementation.³³⁶

Secondly, women who file for protective orders often withdraw them later. Mosaic, a non-governmental organization, and the University of Cape Town's Gender, Health,

³³² The SAPS Crime Report 2011-2012 pg 6

³³³ Supra n 305 pg 110-111

³³⁴ Ibid

³³⁵ Submission to the Portfolio Committee & Select Committee on Women, Youth, Children and People with Disabilities: Implementation of the Domestic Violence Act, No. 116 of 1998. Available at <<http://www.tlac.org.za/wp-content/uploads/2012/01/Implementation-of-the-Domestic-Violence-Act.pdf>> on 27/11/2017.

³³⁶ Supra n. 324 pg 7-8

and Justice Research Unit collaborated on a study in 2008/9. The researchers wanted to determine why petitions for protection orders under the DVA were withdrawn. It was discovered that the withdrawal of protection orders, was occasioned by the severity of the violence experienced, the history of the violence, threats and their mistrust of the courts and its officials.³³⁷

There is also a shortage of assistance in dealing with the Act's procedural features. Complainants may be assisted by clerks who are not legally trained, and the weight of pursuing a claim then rests on victims who are handed documents from the court and are expected to proceed with them despite their lack of knowledge.³³⁸ There are no dedicated domestic violence courts, but magistrates may be able to handle the issue by dividing cases among themselves and setting aside certain times to deal with domestic violence claims.³³⁹ This permits magistrates to pool their resources and facilities to handle domestic violence cases. Curran and Bonthuys³⁴⁰ believe that one of the DVA's flaws is that it prevents protection orders from being issued in ordinary courts. They claim that lack of knowledge, minimal or no support from family and community, and fear of victimization all contribute to the persistence of domestic violence in rural communities because it is linked to a variety of factors, including culture.³⁴¹

Litigation of cases on domestic violence is costly. For the small number of legal organizations dedicated to making the Bill of Rights a reality for women, it is

³³⁷ Artz L, 'Fear or failure: Why Victims of Domestic Violence Retract from the Criminal Justice Process,' (2011) South Africa Crime Quarterly pg 37

³³⁸ Supra n 324 p 20

³³⁹ Ibid

³⁴⁰ Curran E and Bonthuys E, 'Customary Law and Domestic Violence in Rural South African Communities', (2005) 21 SAJHR 607

³⁴¹ Mogale S et al, 'Violence against Women in South Africa, Policy Positions and Recommendations' (2012)

becoming a new source of power.³⁴² Constitutional Court cases have begun to investigate and outline the police and judicial roles under the Bill of Rights.³⁴³ These mostly focused on state obligations in the context of rape, and they have begun to create a delictual duty on the part of state actors. These kind of test cases are critical. However, their high costs mean that only wealthy women will be able to use this method of holding the government accountable.³⁴⁴

Furthermore, once a precedent has been established, public interest law organizations are unlikely to pursue similar cases in the future. Such cases, it is arguable, would need to be run frequently for genuine impact, in order to imprint both the principle and the pecuniary penalties on criminal justice system practices. Rather than being unusual, such delictual sanctions for non-compliance should ideally be guaranteed.³⁴⁵

4.4 Lessons that Kenya can learn from South African Experiences

a) Civil Remedies

Kenya should introduce civil remedies to victims in appropriate cases when the state fails to protect women. South Africa courts have in various cases³⁴⁶ compelled the state to compensate victims of domestic violence because they failed to protect them from the vice. Gender-based violence imposes obligations on states, to provide effective protection including criminal penalties, civil remedies, and compensatory provisions.³⁴⁷ The law should include compensation measures in the PADVA so that the government can be fined for failing to protect women.

³⁴² Supra n 329 pg 9

³⁴³ Ibid

³⁴⁴ ibid

³⁴⁵ Ibid

³⁴⁶ Supra n 284 and 285

³⁴⁷ Neo Morei, 'Domestic Violence in South Africa: Women and Children under Siege? (2014) 'Mediterranean Journal of Social Sciences Vol 5 pg 931

b) Criminalizing marital rape

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 of South Africa affirms the country's legal status on marital rape which protects women.³⁴⁸ The existence of marriage, on the other hand, can be invoked as a valid defense in Kenyan criminal law by a man who raped his wife. A husband does not need his wife's agreement to have sex under the Penal Code. As a result, marriage has been utilized as a defense in rape cases under Kenya's present criminal statutes. This is a breach of the Kenyan Constitution's and international human rights instruments.

c) Establishing care centres

Care centers should be based in hospitals and collaborate with Kenyan law enforcement. Victims will be able to seek treatment, counseling, and file complaints with the police all at one place after they are admitted to the hospital. Domestic violence victims will receive the care they deserve, and domestic violence perpetrators will be held accountable.

d) Keeping records

Kenyan has an obligation under international law to keep records of domestic violence so as to establish gaps in the law. The police stations should keep a separate record of all domestic violence cases reported to them. The registry on domestic violence cases will aid the government in analyzing whether the PADVA is effective in its fight against domestic violence and whether it is meeting its international duties to protect women.

4.5 Conclusion

South Africa has made tremendous headway in combating domestic violence against women by enacting the DVA, the Criminal Law (Sexual Offences and Related

³⁴⁸ Supra n 316

Matters) Amendment Act, and other laws that protect women. South Africa has built care centers and specialist courts to protect women from domestic violence, among other things. This highlights the country's efforts to eliminate domestic violence against women, which Kenya should learn from. However, despite the government's efforts to abolish violence against women, it continues to occur. This is due to a variety of socioeconomic and cultural reasons. As shown in this chapter, criminalizing domestic violence is insufficient to fix the problem; instead, more emphasis should be placed on implementation methods, political will to enforce legislation, and improved public education about women's rights and the impact of domestic violence.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The aim of the thesis was to interrogate the current status of domestic violence against women in Kenya in light of the PADVA. It also set out to examine regional and international human rights instruments that protect women's rights, as well as conduct a comparative study of South Africa's domestic violence legislation to interrogate how they've implemented their laws and what Kenya can learn to improve the PADVA's implementation. On a global scale, its prevalence and the recognition and acceptance of human equality and non-discrimination has recognized it a crime and a violation of rights as evidenced from the both international and national laws. For instance, feminists contend that domestic violence against women impairs their ability to participate equally with men in societal matters in addition to being an affront to their rights to personal and bodily integrity.

Kenya has embraced regional and international law provisions by promulgating a Constitution with an exhaustive bill of rights and the enactment of the PADVA, SOA, Penal Code and various policies. All these legislations and policies guarantee women protection from domestic violence. However, their implementation is hindered by several factors which include harmful cultural practices, police inaction and lack of legal awareness. Different cultures affirm the position that women are inferior to men. Protecting women from domestic violence continues to be hampered by cultural ideas and stereotypes.

Kenya and South Africa have made attempts to address domestic violence against women as discerned from their constitutional, legislative and policy frameworks. However South Africa has made greater strides and efforts in dealing with domestic

violence against women since it has had its legislations and policies longer than Kenya. Its jurisprudence on domestic violence is much developed as well as its intervention programmes which Kenya can learn from in its goal to eradicate domestic violence against women. From the thesis one can conclude that despite of the enactment of the PADVA to fight domestic violence against women in Kenya, the vice still persists.

5.2 Recommendations

I propose the following measures to reduce domestic violence in Kenya:

- a) Amendment of the PADVA and SOA
- b) Eradication of harmful customary practices, police inaction and lack of legal awareness
- c) Keeping data on domestic violence
- d) Reporting
- e) Compensating victims of domestic violence

a) Amendment of the PADVA and SOA

The definition of domestic violence in the PADVA should be amended to include marital rape. Rape is an offence whether it occurs to married or unmarried women and the Act should encompass this. Similarly, Section 43(5) of the SOA should be repealed because it precludes the implementation of Section 3 in conjunction with Section 43. As a result, section 43(5) exempts spouses from the rape provision's implementation, effectively depriving married couples of legal protections against rape. To prevent the non-application of marital rape legislation, the government must continue to endeavor to persuade the legal community that marital rape is a criminal

offense. As a result, police officers, public prosecutors, and courts should be educated on the criminal nature of marital rape and the resulting human rights violations.

b) Eradication of harmful customary practices, police inaction and lack of legal awareness

One of the challenges that hinder the implementation of the PADVA is the existence of harmful traditional and cultural practices such as bride price and wife inheritance. The practice of harmful traditional practices and state inaction has made domestic violence against women persist. Kenya should get rid of discriminatory conventions, traditions, and practices that make it difficult for women to exercise their rights. The government should address the false assumption that women are inferior to males and that they are denied equal access to justice. Secondly, through creating a friendlier atmosphere among law enforcement agencies, victims of domestic violence should be encouraged to report the incidence to the authorities. In order to accomplish this, the government must concentrate on developing dedicated domestic violence investigation and prosecution teams. Finally, legal awareness should be tailored to educate women on their rights. Information regarding the law on domestic violence and its consequences, as well as a human rights program, must be included in the curriculum at universities and academic institutions. Domestic violence and the human rights that it infringes are also brought to the attention of women through public education.

c) Keeping data on domestic violence

Domestic violence is classified under other areas because there is no crime labeled "domestic violence." This makes it difficult to establish how rampant it has become in Kenya in order to eradicate it. It should be mandatory for the police to keep a separate register on cases of domestic violence and not lump them with cases of assault, rape,

murder among others. Similarly, the police should be mandated to release to the public the statistics of cases of domestic violence that occur against women every year so that the prevalence of domestic violence can be monitored. This will enable Kenya strategize on the appropriate measures to eradicate the vice and comply with the international obligations to protect women from domestic violence.

d) Reporting

As illustrated in the thesis, Kenya rarely submits reports to the various regional and international instruments it has ratified and acceded to. Regional and International instruments such as CEDAW, Maputo Protocol among others require state parties to submit reports on domestic violence against women. Kenya should periodically submit reports to the various committees of international bodies on the status of domestic violence against in the country. This is important as it allows Kenya to monitor the steps it has taken to eliminate the vice and to also identify areas of difficulties in implementing the PADVA. Reporting will also help in planning and strategizing on the appropriate legal and policy measures it needs to promote equality and non-discrimination of women.

e) Compensation of victims of domestic violence

Kenya is required to protect women from domestic violence by CEDAW and DEVAW, among others. Kenya should enact a delict law, similar to that of South Africa. A delict is an act in which a person causes injury to another in an unjust and guilty manner. A perpetrator of domestic violence can be compelled by the court to pay damages his victims. The law of delict should be premised on the Bill of rights which guarantees every woman their rights. When there is a recognized cause of action, victims of domestic violence can file a claim for damages. The award for damages must only be given to a party who has been subjected to domestic violence.

REFERENCES

- Amnesty International, 'Kenya: Rape- The Invisible Crime', (2002).
- Ann F. Bayefsky, "The principle of Equality or Non-discrimination in International Law", (1990) 11 Human Rights Quarterly.
- Artz L, 'Fear or failure: Why Victims of Domestic Violence Retract from the Criminal Justice Process,' (2011) South Africa Crime Quarterly
- Aurelia Babalwa Njezula, 'Investigating Domestic Violence against Women in South Africa', (2006)
- Bancroft Lundy and Jay G Silverman, 'The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamic', (2002) Sage Publications (CA).
- Barbara Stark, (2005) 'International Family Law: An Introduction', Ashgate Publishing Limited.
- Benedetta Faedi Duramy, 'Judicial Developments in the Application of International Law to Domestic Violence', (2012) Journal of Gender, Social Policy and the Law Vol. 21:2.
- Bharani N, 'Domestic Violence and Human Rights', (2013) International Research Journal of Social Sciences Volume 2(9).
- Bianca Talbot, 'Radical Feminism's Opposition to Liberty', (2015) The Western Australian Jurist Vol 6.
- Bonita Meyersfeld, 'Domestic Violence, Health, and International Law', (2008) 22 EMORY INT'L L. REV. 61, 66.
- Bonita C. Meyersfeld, 'Reconceptualizing Domestic Violence in International Law' (2003) 67 Albany Law Review 371.
- Bostock, D.J, Brewster, et al, (2003) 'Intimate Partner Violence'.
- Carolyn Holderread Heggen, 'Sexual Abuse in the Christian Homes and Churches', (1993) Scottsdale, PA: Herald Press.
- Catherine MacKinnon, 'Towards A Feminist Theory of the State' (1989) University Press.
- Center for Rights, Education and Awareness (CREAW), Bride Price: Is it Modern Day Slavery? (2006) Nairobi: Centre for Rights, Education and Awareness.
- Charles Ngwena, 'Sexual Health and Human Rights in the African Region' (2013) International Research Journal of Social Sciences vol. 2(9).
- Charlotte Bendall, 'The Domestic Violence Epidemic in South Africa: Legal and Practical Remedies' (2010); Women's Studies: An Inter-Disciplinary Journal.
- Chineze J Onyejekwe, 'The Interrelationship between Gender Based Violence and HIV/AIDS in South Africa', (2004) Journal of International Women's Studies Volume 6.

- Christine Wanjiru Kung'u, 'Criminalization of Marital Rape in Kenya' (2011). *Faculty of Law, University Toronto*. <https://tspace.library.utoronto.ca/bitstream/1807/31288/8/Kung%27u_Christine_W_201111_LLM_thesis.pdf> on 22/11/2017.
- Claire McEvoy, 'Battering, Rape and Lethal Violence; A Baseline of Information on Physical Threats against Women in Nairobi,' (2013).
- Connie Ngondi-Houghton, 'The State of Human Rights in Kenya; International Commission of Jurists (Kenya Chapter)', (1999)
- Combrick H. and Wakefield L. 'Training for Police on the Domestic Violence Act,' (2009)
- Danga T, 'Unpublished Thesis on Male Perspective of Gender Violence in South Africa', (2009) Fort Hare University. Alice.
- Deal J E and Wampler K S, 'Dating Violence: The Primacy of Previous Experience' (1986) 3 *Journal of Social and Personal Relationships* 457.
- DeKeseredy W S et al, 'The Meanings and Motives for Women's use of Violence in Canadian College Dating Relationships: Results from a National Survey' *Sociological Spectrum*, (1999).
- De Waal J and Currie I, 'The Bill of Rights Handbook', (2005) 5th Edition.
- Dissel, A. and Ngubeni, K. 'Giving Women their Voice: Domestic Violence and Restorative Justice in South Africa,' (2003).
- Dorothy Q Thomas and Michele E Beasley, 'Domestic Violence as a Human Rights Issue', (2003) *Human Rights Quarterly* Vol. 15
- Dr. Patricia Kameri-Mbote, 'Violence against Women in Kenya: An Analysis of Law, Policy and Institutions' (2000).
- Dr. Scholastica Omondi et al, 'The Current Analysis on Gender Equality and Discrimination in Kenya', (2017) *International Journal of Scientific and Research Publications* vol. 7 Issue 8.
- Dutton, M.A, 'Women's Response to Battering: Assessment and Intervention', (1992) New York: Springer.
- Dutton, M.A., 'Post-Traumatic Therapy with Domestic Violence Survivors', (1994) In M.B. Williams & J.F. Sommer (Eds.), *Handbook of Post-Traumatic Therapy* (pp. 146-161). Westport, CT: Greenwood Press.
- EbowBondzie-Simpson, 'A Critique of the African Charter on Human and People's Rights', (1988) 31 *Howard LJ*.
- Emily Burrill, Richard Roberts, and Elizabeth Thornberry, 'Domestic Violence and the Law in Colonial and Postcolonial Africa' (2010) 1st edition.
- Eugene Cotran, 'Casebook on Kenya Customary Law', (1987) Butterworths.
- Federation of Women Lawyers in Kenya, 'Gender Based Domestic Violence in Kenya' (2008)

- FIDA (K) (2008), 'Gender Based Domestic Violence in Kenya'. Available at <http://www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Violence-in-Kenya.pdf>
- Fredrick Ombwori, 'Status of Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province', (2009) Institute of Economic Affairs Series NO 22.
- García-Moreno C., Jansen H., Ellsberg M., Heise L., and Watts C., (2005) WHO Multi-country Study on Women's Health and Domestic Violence against Women (Geneva: World Health Organization, 2005).
- Hancox G, 'Marital Rape in South Africa' (2012).
- Hooks B, 'Feminism is for Everybody: Passionate Politic' (2000) Cambridge; South End Press
- Ingrid Sinclair and Anél du Plessis, 'Domestic Violence Adjudication in South Africa: A View on Therapeutic Jurisprudence and Human Rights Protection of the Female Victim'. Available at [www.aija.org.au/TherapJurisp06/Monograph%20Papers/2%20Sinclair & Du Plessis.pdf](http://www.aija.org.au/TherapJurisp06/Monograph%20Papers/2%20Sinclair%20&%20DuPlessis.pdf)
- Hutchinson, T., & Duncan, N. (2012). Defining and describing what we do: doctrinal legal research. *Deakin law review*, 17(1), 83-119.
- Ian Parker, 'Qualitative Research' in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds), *Qualitative Methods in Psychology: A Research Guide* (OU 1994) 2.
- Itoro Eze-Anaba, 'Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges' (2007) Vol 14.21
- J M Migai, 'The Penal Code and Spousal Rape: Is there need for legislature intervention?' (1995) University of Nairobi Law Journal Issue No. 2.
- J Neethling et al, 'Law of Delict' (1990), Durban: Butterworths
- J. and L. Saltzman, 'Fatal Violence among Spouses in the United States', (1976-85) *American Journal of Public Health*. 1989; 79(5).
- John Wightman, *Contract: A Critical Commentary* (Pluto 1996) 11.
- Judith Lorber; 'The Variety of Feminism and the Contribution to Gender Equality' (2013).
- Kate Paradine and Jo Wilkinson, *Protection and Accountability: The Reporting, Investigation and Prosecution of Domestic Violence Cases*. (2004) HM Crown Prosecution Service Inspectorate
- Katharine T. Bartlett and Deborah L. Rhode, 'Gender Law and Policy' (2010) New York: Aspen Publishers.
- Katharine T. Bartlett, Deborah L. Rhode and Joanna Grossman, 'Gender and Law: Theory, Doctrine, Commentary' (6thed, 2013) Wolters Kluwer Law & Business.

- Katherine Bartlett, 'Tradition, Change and the Idea of Progress in Feminist Legal Thought', (1995) *Wis. L. Rev.* 303.
- Kathy Majitenyi, 'Cases of Domestic Violence Increase in Kenya' *Voice of America*, 4 March 2010 <http://www.voanews.com/english/news/Cases-of-Domestic-Violence-Increase-in-Kenya-86691287.html>.
- KD Muller and IA van der Merwe, 'The Sexual Offences Prosecutor: A New Specialization?' (2004) *Journal for Science* 29(1).
- Kristin L. Anderson, 'Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches,' (1997) *Journal of Marriage and the Family* 59.
- Kristof Nicholus D and WuDunn Sheryl, 'The Women's Crusade' (2009) *The New York Time*.
- Li Weiwei, 'Equality and Non-discrimination under International Human Rights Law' (2004): The Norwegian Centre for Human Rights.
- Liberty Aldrich and Robyn Mazur, 'Domestic Violence in Rural Communities; Applying Key Principles of Domestic Violence Courts in Smaller Jurisdictions', (2005).
- Lisa Vetten, 'Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice' (2005).
- Marc E Angelucci, 'Male Victims of Domestic Abuse'. (2010) *The New York Times Company* 3.
- Maren E. Hyde and Tracy Juliao, 'Theoretical Basis for Family' (2012) Jones & Bartlett Learning.
- Martin S Fiebert, 'Examining Assaults by Women on Their Spouses or Male Partners: An Annotated Bibliography', (2000).
- M Kiwinda Mbondenzi and J Osogo Ambani, 'The New Constitutional Law of Kenya', (2012). Nairobi: Claripress Limited
- Mangai Natarajan, 'Domestic Violence: The Five Big Questions', (2007) Ashgate Publishing Limited.
- Marjorie Agosin, 'Women, Gender and Human Rights: A Global Perspective', (2002) Rutgers: The State University
- Matczak, A., Hatzidimitriadou, E., and Lindsay, J., *Review of Domestic Violence policies in England and Wales* (2011). London: Kingston University and St George's, University of London.
- Matthews S and Abrahams N, 'Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act (No. 116 of 1998) on Women' *The Gender Advocacy Programme and the Medical Research Council (Gender and Health Research Group)*, (2001).
- Matt Henn, Mark Weinstein, and Nick Foard, 'A Critical Introduction to Social Research' (2nd ed, Sage 2006).

- Mogale S et al, 'Violence against Women in South Africa: Policy Positions and Recommendations,' (2012).
- Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007)
- Neo Morei, 'Domestic Violence in South Africa: Women and Children under Siege?' (2014) *Journal of Social Sciences* Vol 5.
- Newton C.J, MA, 'Mental Health Journal', (2001)
- Nieves Rico, 'Gender Based Violence: A Human Rights Issue', (2007).
- Nigel Lowe and Gillian Douglas, 'Bromley's Family Law' (2007), 10th Edition Oxford University Press.
- Njezula A B, 'Investigating Domestic Violence against Women in South Africa', (2006) (MPhil Thesis University of Western Cape.)
- Patricia Kameri-Mbote, 'Violence against Women in Kenya; An Analysis of Law, Policy and Institutions,' (2000-1).
- Patricia Kimeri Mbote and Migai Akech, 'Kenya Justice Sector and the Rule of Law', (2011)
- Penny Pasque and Brenton Wimmer, 'Introduction: Feminist Perspectives', (2011) available at www.myacpa.org assessed on 8/12/17.
- Peter Mugambi, 'Introduction to Law', (2011) Law Africa Publishing (K) Ltd.
- Pracher M "The Marital Rape Exemption: A Violation of a Woman's Right of Privacy" 1981(11:3) *Golden Gate University Law Review*.
- Radhika Coomaraswamy, 'Combating Domestic Violence: Obligations of the State,' (2002) *Innocenti Digest* 11.
- R B Flowers, 'Women and Criminality', (1987), *International Bibliography of Sociology* 217
- Rebecca Probert, Cretney and Probert's, 'Family Law,' (2012) 8th Edition Sweet & Maxwell.
- Rebecca J. Cook & Simone Cusack, 'Gender Stereotyping: Transnational Legal Perspectives' (2010) Philadelphia: University of Pennsylvania Press.
- Ruth Aura Odhiambo and Maurice Oduor, 'Gender Equality', in Lumumba PLO, Mbodenyi MK and Odero SO, *The Constitution of Kenya: Contemporary Readings*, (2012)
- Sally Merry et al, 'Law From Below: Women's Human Rights and Social Movement in New York City', (2010) *Law and Society Review*.
- Saltzman *et all*, 'Domestic Violence Facts', (2002).
- Sarah Galvani, 'Alcohol and Domestic Violence: Violence against Women', (2006) Volume,' 12 Number 7.

- Sarah Marium, 'Women's level of Education and its Effect on Domestic Violence in Rural Bangladesh,' IOSR Journal of Humanities and Social Science, (2014).
- Simonovic D, 'International Framework on Violence against Women with Focus on the CEDAW' (2012).
- South African Law Commission (2001).
- South African Department of Justice (1992-3).
- Steven R Tracy, 'Patriarchy and Domestic Violence: Challenging Common Misconceptions' (2007) Journal of the Evangelical Theological Society.
- Suri Rantapala, 'Jurisprudence', (2009) Cambridge University Press.
- Tom G. Ondicho, 'Battered Women: A Social-Legal Perspective of their Experiences in Nairobi', (2002) Center for African Area Studies, Kyoto University.
- Tom Gesora Ondicho, 'Domestic Violence in Kenya: Why Battered Women Stay,' (2013) International Journal of Social and Behavioral Science Volume 1(4).
- Tony Wragg, 'Nutshells Family Law', (2013) 9th Edition Thomson Sweet and Maxwell
- Waits Kathleen, 'The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions', (1984-85) 60 Washington Law Review.
- Wandia Mary, "The Process of Integrating Gender in the PRS Process in Kenya and the Challenges Encountered by the Gender Lobby Groups", (2002) Nairobi FEMNET
- Wallace Harvey, 'Family Violence: Legal, Medical and Social Perspectives', (2004).
- Waheeda Amien, 'Recent Developments in the Area of Women's Rights in South Africa: Focus on Domestic Violence and Femicide' <www.engender.org.za/publications/DV&Femicide.pdf>

International Instruments

- African (Banjul) Charter on Human and Peoples' Rights.
- AU Solemn Declaration on Gender Equality.
- UN Convention Against Torture.
- Convention on the Elimination of All Forms of Discrimination against Women.
- Convention on the Rights of the Child.
- International Covenant on Civil and Political Rights.
- International Convent on Economic, Social, and Civil Rights.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Vienna Declaration and Programme of Action.

UN Declaration of the Elimination of Violence against Women.

Universal Declaration of Human Rights.

Policies

National Framework towards Response and Prevention of Gender Based Violence in Kenya.

The National Guidelines on the Management of Sexual Violence in Kenya.

The National Policy Guidelines for Handling of Victims of Sexual Offences in South Africa.

The Integrated Domestic Violence Training Programme Manual in South Africa.

Reports

Central Bureau of Statistics (CBS) [Kenya], Ministry of Health [Kenya] and ORC Macro, 2004, Kenya.

Crime and Prevention Training, 'Kwale and Bungoma County Crime and Violence Surveys,' (2016)

Demographic and Health Survey 2003): Key Findings, Calverton, Maryland, USA at 14.

Kenya National Bureau of Statistics (KNBS) and ICF Macro, Kenya Demographic and Health Survey 2008- 2009, Calverton, Maryland: KNBS and ICF Macro at 275.

Kenya National Bureau of Statistics (KNBS), Kenya Demographic and health Survey 2014 at 291-322.

Kenya National Bureau of Statistics (KNBS), Kenya Demographic and health Survey 2022 at 83-84.

Kenya National Bureau of Statistics, 'The Demographic and Health Survey 2008-2009' June 2010.

National Crime Research Centre, 'Gender Bases in Kenya,' (2014).

Report on the Special Rapporteur on Violence against women, its Causes and Consequences on her mission to South Africa, December (2015).

The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of all forms of Discrimination against Women.

The SAPS Crime Report 2011-2012.

UNFPA (2006). “Kenya: Creating a Safe Haven, and a Better Future, For Maasai Girls Escaping Violence” Chapter 5. Programming to Address Violence against Women: 10 Case Studies 50.

UNAIDS (2006). Violence against Women and Children in the Era of HIV and AIDS: A Situation and Response Analysis in Kenya 13

Newspaper Articles

James Kahongeh, ‘Man kills wife and three children in cold blood,’ Daily Nation, 6th May 2018 <https://www.nation.co.ke/news/Man-kills-wife--three-children-Roysambu/1056-4550068-jfvn0uz/index.html> assessed on 13th June 2018.

Kamau Maichuchie and Protus Onyango, Quarryman stabs wife and children’ Standard Digital, 17th January 2018 <https://www.standardmedia.co.ke/article/2001266203/quarryman-stabs-wife-and-children-then-torches-house> assessed on 13th March 2018.

Mkamburi Mwawasi, ‘Mombasa woman hospitalized after brutal assault by lover’ Standard Digital, 9th March 2018 <https://www.standardmedia.co.ke/article/2001272521/husband-of-10-years-sexually-assaults-wife-over-make-up> assessed on 13th March 2018