

THE CURSE OF BEYOND REASONABLE DOUBT

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Abstract

Strategic legislation has played an important role in the criminalization of Female Genital Mutilation. The nature of strategic litigation is one that involves the community being both the foundation and the propellor in some instances. The aim of this chapter is to first investigate the criminalisation of FGM. This entails taking a deep look into the Prohibition of FGM Act that was enacted in 2011 which make FGM illegal. Not only does the Act state that FGM is illegal, but also introduces other various offences pertaining to FGM. The chapter also seeks to elaborate on the various responses to the criminalisation; those who are for the criminalisation and against. This will encapsulate the effect of criminalisation including the laws driving the act underground as well as public participation, or lack thereof, during the enactment of the Prohibition of FGM Act. A further examination of the role of the state to protect its citizens is also done taking into account reporting, investigation and prosecution of the cases. Barriers to prosecution are also discussed at length. The chapter also probes the issue of reasonable doubt in the legal cases and directly relates the doctrine to the offences listed in the Act in a bid to examine whether the doctrine of beyond reasonable doubt truly aids in convictions or acquittals. Lastly, an investigation into the role of grassroots communities in litigation from the ground level to the national courts highlighting both the negative and positive impact the community bears on criminalisation and the prosecution of cases and a list of recommendations are provided.

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1 Introduction

Kenya is one of the countries in Africa that continues to fight the war against female genital mutilation (FGM). According to the United Nations Population Fund (UNFPA), in 2022 it is reported that 21 per cent of women aged between the ages of 15 to 49 years have undergone the cut.¹ This was recorded as a decrease in the number from 27 per cent that had previously been recorded in 2009.²

Kenya has ratified several international laws and treaties that have abolished the cut, such as the Universal Declaration of Human Rights (Universal Declaration); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Economic, Social and Cultural Rights (ICESCR); not forgetting to mention the regional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). This is made possible by article 2(6) of the Kenyan Constitution that states that any treaty ratified by Kenya shall form part of the laws of Kenya.

The aim of this chapter is threefold: First, it seeks to investigate the criminalisation of FGM and how the local communities have responded to said criminalisation; second, as criminalisation culminates in the prosecution of the said crime, we will look at the state obligations to protect and subsequent prosecution of FGM and related crimes before the national courts; and, lastly, an investigation into the role of grassroots communities in litigation from the ground level to the national courts highlighting both the negative and positive impact the community bears on criminalisation and the prosecution of cases. We shall start with the criminalisation and the community response.

1 United Nations Population Fund (2022), <https://www.unfpa.org/data/fgm/KE> (accessed 6 June 2022).

2 According to the Kenya Demographic and Health Survey 2014, there is evidence of a trend to circumcise girls at younger ages. 46% of circumcised women age 5-19 were circumcised at age 5-9, as compared with 17% of circumcised women age 45-49. While there is overlap in these categories, Muslim women are much more likely to be circumcised at age 5-9 (65 per cent) than women from other religious groups, as are Somali women (73 per cent). Urban women are more likely to be circumcised at age 5-9 (34 per cent) than rural women (24 per cent). About 78 per cent of women in urban areas are circumcised by age 14, compared with 69 per cent of those in rural areas. Women in the coastal region were most likely to have been circumcised when they were less than age 5 (22 per cent).

2 Criminalisation of female genital mutilation

The process of enacting legislation is cemented under the Constitution of Kenya, 2010. The Kenyan Constitution states that the legislative powers vest in Parliament.³ In theory, the first stage is referred to as the first reading where the Bill is introduced and a committee assigned to it. The next step is the second reading. At this stage the draft is read out loud and votes are taken as it regards to the outline of the said draft Bill. The committee then affects all passed amendments to the draft Bill. This is followed by the third reading where the draft Bill is scrutinised by legislators and, if satisfied, the legislators give it the final approval. The last stage is presidential assent where the head of the executive, the President, gives his assent and the Bill becomes law.⁴

The Prohibition of Female Genital Mutilation Act, 2011 (Act) was passed on 30 September 2011 and was consequently enforced on 4 October 2011. The Act criminalises FGM and other acts relating to FGM. According to the provisions of the Act, the elements of the offence with regard to FGM include:

2.1 Offence of female genital mutilation

Section 19 of the Act stipulates that it is an offence to perform FGM. It continues to list that if death occurs during the commission of FGM, the person upon conviction will be liable to imprisonment for life. Under subsection (6), it is clear that it is no defence to any charge under the section to state that the person on whom the act was performed consented to the act or that the person charged believed that such consent had been given.

2.2 Aiding and abetting female genital mutilation

Any person who aids, abets, counsels or procures a person to undergo FGM commits an offence.⁵

3 Art 109 Constitution of Kenya.

4 Kenya Law Reports; The Legislative Process, <http://kenyalaw.org/kl/index.php?id=528> (accessed 6 June 2022).

5 Sec 20 of the Prohibition of Female Genital Mutilation Act states: 'Aiding and abetting female genital mutilation: A person who aids, abets, counsels or procures

2.3 Procuring a person to perform female genital mutilation in another country

It is an offence for any person to take a person from Kenya to another country or arranges for another person to be brought to Kenya from another country for the purpose of performing FGM.⁶

2.4 Use of premises to perform female genital mutilation

An offence is committed if a person knowingly allows any premises over which they have control or are responsible for to be used for purposes of performing FGM.⁷

2.5 Possession of tools and equipment

Any person found in possession of a tool or equipment for a purpose connected with the commission of FGM commits an offence.⁸

2.6 Failure to report commission of offence

It is considered an offence if a person is aware that FGM has occurred or is in the process of being performed or intends to be performed and does not report it to a law enforcement officer.⁹

(a) a person to commit an offence under section 19; or (b) another person to perform female genital mutilation on that other person, commits an offence.'

6 Sec 21 of the Prohibition of Female Genital Mutilation Act states: 'A person commits an offence if the person takes another person from Kenya to another country, or arranges for another person to be brought into Kenya from another country, with the intention of having that other person subjected to female genital mutilation.'

7 Sec 22 of the Prohibition of Female Genital Mutilation Act states: 'A person who knowingly allows any premises, for which that person is in control of, or responsible for, to be used for purposes of performing female genital mutilation commits an offence.'

8 Sec 23 of the Prohibition of Female Genital Mutilation Act states: 'A person who is found in possession of a tool or equipment for a purpose connected with the performance of female genital mutilation, commits an offence.'

9 Sec 24 of the Prohibition of Female Genital Mutilation Act states: 'A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be, committed, fails to report accordingly to a law enforcement officer.'

2.7 Use of derogatory or abusive language

Any person who uses derogatory or any abusive language intended to ridicule or embarrass a woman who has undergone FGM or a man marrying or otherwise supporting a woman who has undergone the cut commits an offence and upon conviction shall be liable to a term of not less than six months' imprisonment or a fine not less than 50 000 Kenyan shillings (approximately 385 USD).¹⁰

Having been edified on the various crimes punishable as under the Prohibition of FGM Act and the fact that every Kenyan citizen is bound to the same regardless of whether or not they practise the culture, it is necessary for one to look into the responses that the criminalisation has received in various communities.

3 Responses to the criminalisation of FGM

In our view, two contrasting responses arise from the criminalisation of FGM, namely, those who agree with the criminalisation and others who the criminalisation bears no impact and still continue with the practice. We focus on the latter.

In 1920, as per an amendment to the United States Constitution, the US government banned the manufacture, sale and transport of intoxicating liquor.¹¹ It was argued that the prohibition would reduce crime and corruption and lower the tax burden on prisons. Granted that alcohol consumption rapidly reduced, in a few years the consumption was at an all-time high. To make matters worse, the type of alcohol that was being consumed was of a higher potency level and there was an increase in alcohol-related deaths, which then led to the repeal of the

10 Sec 25 of the Prohibition of Female Genital Mutilation Act states: 'Any person who uses derogatory or abusive language that is intended to ridicule, embarrass or otherwise harm a woman for having not undergone female genital mutilation, or a man for marrying or otherwise supporting a woman who has not undergone female genital mutilation, commits an offence and shall be liable, upon conviction, to imprisonment for a term not less than six months, or to a fine of not less than fifty thousand shillings, or both.'

11 18th Amendment- United States Constitution, <https://constitution.congress.gov/constitution/amendment-18/> (accessed 6 June 2022).

amendment banning the manufacture and sale of intoxicating liquor.¹² The prohibition of alcohol was not ineffective but was counterproductive.

It is our contention that demanding an instantaneously enforced law to end the cut does little to nothing to change the hearts and mind of communities. Further, vilifying those who practise it only pushes it further from the mainstream society and to far rural areas.¹³ An empirical analysis of FGM data supports this assertion. The prevalence varies greatly depending on the region – the (former) province with the highest prevalence is North Eastern (97.5 per cent of women aged 15 to 49), and the province with the lowest is Western (0.8 per cent). The prevalence is more common among women who live in rural areas, at 25.9 per cent, than among women who live in urban areas, at 13.8 per cent.¹⁴

According to a survey done by the Population Council in 2017, it was suggested that the criminalisation of the cut led to the fear of prosecution which drove the practice underground. This then in turn influences the survey respondents as they are unwilling to be honest, with the result that inaccurate data was gathered.¹⁵ The Kenya Demographic and Health Survey spanning across eight years, with a distinction on before and after the Prohibition of FGM Act, indicate that the prevalent areas are rural areas. Furthermore, as the majority of the people still practising FGM are grassroots communities, and given the rigidity of culture and traditions, the mere fact that the act is outlawed is not enough for them to stop the practice.

Another reason why the practice is still prevalent is the concept of participation in the legislative process. It is often argued that the law is largely unknown to those it is supposed to protect and those who

12 CJ Coyne & AR Hall *Four decades and counting: The continued failure of the war on drugs* (2017).

13 Reproductive Health Matters 'The history and role of the criminal law in anti-FGM campaigns: Is the criminal law what is needed, at least in countries like Great Britain?' <https://www.tandfonline.com/doi/pdf/10.1016/j.rhm.2015.10.001?needAccess=true> (accessed 6 June 2022).

14 28 Too Many 'FGM prevalence in Kenya', <https://www.28toomany.org/country/kenya/> (accessed 6 June 2022).

15 Population Council 'Female genital mutilation/cutting in Kenya: is change taking place? Descriptive statistics from four waves of demographic and health surveys', https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?article=1595&context=departments_sbsr-rh (accessed 2nd July 2023)

are supposed to apply it.¹⁶ In the legislative process, once a committee is assigned to a draft Bill, the committee is mandated to ensure that they obtain public views on the said Bill and issues that surround it. Under article 1 of the Constitution of Kenya, 2010, it is indicated that all sovereign power belongs to the people of Kenya and, thus, the people have a right to take part in any law-making process as under the Constitution. The same Constitution states that Parliament has a mandatory duty to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.¹⁷ This public participation is done through inviting submissions, holding public hearings and consulting the relevant stakeholders.¹⁸ The committee then takes into consideration the views expressed and makes amendments before returning the draft Bill to the floor of the house for discussion. However, no statute clearly indicates the length of public participation and further know-hows of the same.

There being no concrete laws on the parameters of public participation, we draw inferences from various court decisions in which the same has been elaborated. In the matter of *Mui Coal Basin* the Court held that public participation is not a formality and a programme of public participation needs to be developed by the state agency or legislative body.¹⁹ Furthermore, there should be different mechanisms that will enable inclusivity of all people.

Another example of where public participation was a contentious issue is *Dr Tatu Kamau v Attorney General & Others* at the High Court of Kenya, where Dr Tatu Kamau, the petitioner, requested the Court to declare that the Prohibition of Female Genital Mutilation Act, 2011 was unconstitutional due to lack of public participation.²⁰ The three-bench judge ruled otherwise and held that according to Parliament Hansard, there were proceedings in the departmental committee and debates by representatives of the people as it pertained to the draft Bill. A thorough investigation into the holding of the Court concluded that the Court never specified who the said representatives were and if their presence during the public participation of the Act was sufficient.

16 <https://copfgm.org/law%20and%20fgm> (accessed 13 June 2022).

17 Art 118 Constitution of Kenya.

18 National Assembly's *Public participation in the legislative process*.

19 *In the Matter of the Mui Coal Basin Local Community* [2015] eKLR.

20 Constitutional Petition 244 of 2019.

Considering the importance of public participation and the holding of the Court in the *Dr Tatu* case, a practical analysis of the stand in grassroot communities as it pertains to the cut is contradictory. Public participation ought to be examined vis-à-vis the level of illiteracy in the different communities. A case study of the Samburu community concludes that the recorded illiteracy level is 83 per cent. This means that the majority of the people in the community cannot fathom any legislation that has been enacted or is in the process of being enacted despite the fact that they are the ones to feel the impact of the same first hand. This leads us to the question of how a community can participate in a written Bill that they cannot comprehend. Consequently, according to Kenya National Bureau of Statistics, the prevalence rate of FGM in Samburu County is 78 per cent.

Regardless of the illiteracy levels and other factors contributing to the responses from the communities, as per the Constitution of Kenya, it is the duty of the state to protect its citizens from and ensure the fulfilment of all their rights and freedoms as so clearly enshrined under the Bill of Rights. These duties of the state to protect are discussed below.

4 State obligation to protect

The Constitution of Kenya imposes a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of every citizen in Kenya.²¹ It goes further to state that the state shall take legislative and policy measures to ensure the same.²²

The obligations are also in line with international laws that have been fully ratified by Kenya that espouse the primary obligation of the state in protection and fulfilment of human rights.²³ In this regard, states are expected to take appropriate steps to prevent, investigate, punish and redress any abuses by having in place effective policy, legal and regulatory measures.

The Kenyan criminal justice system involves four steps. The first is reporting of the crime, which is closely followed by the investigation of

21 Art 21(1) Constitution of Kenya, 2010.

22 Art 21(2) Constitution of Kenya, 2010.

23 Convention on the Elimination of All Forms of Discrimination against Women.

said crime. The result of the investigation determines the prosecution and, lastly, judgment and sentencing. From the enforcement of the Prohibition of FGM Act, there have been numerous reports of the commission of FGM, but very few cases have resulted in conviction, implying a disconnect between the first two steps and the latter, as discussed below.

4.1 Reporting

The first step is filing of a complaint or reporting the incident. Upon the report, the complainant is given an occurrence book number which basically means that a complaint was recorded and, therefore, can be investigated by the police. If the police investigates and establishes that a crime has been committed, it is forwarded to the Director of Public Prosecutions and the process of litigation begins.

Some communities prefer not to report the cases where the cut is performed, as the cut has been done by their family and/or those who have high status in the community. Furthermore, those who report it risk stigmatisation and rejection by the community. According to CEDAW, it gives recommendations for states to ensure effective complaint mechanisms and a whole range of criminal and civil remedies serving the purpose of addressing the lack of accountability of perpetrators in a family set-up. However, the same remains just a recommendation as Kenya is yet to fully practise the same.²⁴

After the reporting of a complaint or a crime being committed, the report is assigned to a police officer who begins the investigation.

4.2 Investigation

The ways of gathering evidence as per the conducting of the investigation are guided by various laws. The Constitution of Kenya protects human rights in the criminal justice system.²⁵ It further states the national values and principles of governance bind all state organs. The National Police

24 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), CEDAW General Recommendation 19: Violence against women, 1992, <https://www.refworld.org/docid/52d920c54.html> (accessed 13 September 2022).

25 Art 50 Constitution of Kenya.

Service Act lays down the functions of investigators and ways of gathering evidence.²⁶ Investigations are also guided by the rules of evidence. The general rule is that the evidence must be in relation to the fact.²⁷ As for international law, the Universal Declaration and the International Covenant on Civil and Political Rights (ICCPR) are ratified by Kenya and therefore form part of the laws.²⁸

Given the intimate nature of FGM, the investigation needs to be in line with the crime. The victims are taken to the police doctor for an examination and an official report called a P3 form. The P3 form is what is used during the prosecution of the offence before the national courts. Unfortunately, despite the fact that the form is clear unequivocal evidence of the offence being committed, that is not enough. The investigating officer needs to now investigate and arrest those responsible and gather additional witnesses in order to secure a conviction.

The police in charge of investigation also plays a major role in the continuance of the cut and the rare cases that proceed to prosecution. The police in affected communities do not investigate the reports made as either they also believe in the practice or they are paid off. It is no secret that corruption is one of the major vices that Kenya is fighting, hence the alleged payment of police officers is not unheard of. Several officers have been the subject of investigations by the Independent Policing Oversight Authority due to corruption.²⁹ In Samburu, though unsubstantiated, allegations plague the community that the police officers do not conduct or further investigations as they have been paid by the families or even local leaders.

Reliance can also be placed on the Samburu Girls Foundation.³⁰ The Rescue Centre is home to more than one thousand girls who have been rescued but there is no statistics in regard to any matter proceeding to court despite the fact that the offences have been reported and an occurrence book number given. In Samburu County, according to studies

26 Sec 28 National Police Service Act, 2014.

27 Sec 55 Evidence Act.

28 Art 10 United Declaration of Human Rights; art 13 International Covenant on Civil and Political Rights.

29 <https://www.ipoa.go.ke> (accessed 2 July 2023).

30 Samburu Girls Foundation is a rescue centre where the pastoralist girl child receives education and protection from physical, mental and emotional harm for personal development through life skills in a community setting, info@samburugirls.foundation.

done by the United Nations Children's Fund (UNICEF), the county has the second highest rate of FGM of girls and women aged between 11 and 49 years.³¹ The number of court cases is not representative of the prevalence of the practice. The reason for the lack of prosecution, in our opinion, is because of the laxity that exists in investigations.

The chances of the parties involved in the investigation coming from the same community are high. For example, in Samburu County, one might find that the perpetrator, police officer, doctor, victim and prosecutor, who all play different roles in the prosecution, are from the same practising community. Conflicts of interest can be seen as a hindrance as it serves as an interference with their ability to perform their professional roles. It can subconsciously compromise their judgment and decision-making skills in the matters.

The sanctions against the victims of FGM according to the Prohibition of FGM Act also offer a substantial hindrance to investigation as they are aware that they too can be prosecuted if evidence is brought forth that they underwent FGM, with or without consent.

The local chiefs who are meant to uphold the rule of law do the opposite as they are in cahoots with the elders and cutters of the communities.³²

Nevertheless, if the assigned police officer upon conducting his investigation establishes that a crime had indeed occurred, he forwards the file to the Director of Public Prosecutions who then initiates the criminal proceedings.

4.3 Prosecution

Criminal procedures are safeguards against the indiscriminate enforcement of criminal legislation and inhuman prosecution of offenders. Prosecution falls within the ambit of the Director of Public Prosecutions. The office of the Director of Public Prosecutions draws its mandate from the Constitution of Kenya together with the Office of the Director of Public Prosecutions Act, 2013. The Office in response

31 UNICEF *Baseline study report on female genital mutilation/cutting and child marriage* (2017).

32 'Chiefs in Narok accused of abetting FGM, early marriages' *Nation* 6 January 2022, <https://nation.africa/kenya/counties/narok/chiefs-in-narok-accused-of-abetting-fgm-early-marriages-3673596>

to the prosecution of crimes of FGM came up with a policy on standard operating procedures and rapid reference guide on the prosecution of FGM cases. An analysis of what a prosecutor must prove is detailed below.

4.3.1 *Offence of female genital mutilation*

To prove this offence, the act must be proven through a medical report and there has to be a perpetrator and they must be identified, be in possession of FGM paraphernalia and if the accused is a trained or registered medical practitioner for the purposes of performing the offence, the prosecution should avail documents of proof. If death occurred, the act of FGM must be proved in addition to the identification of the perpetrator and a post mortem report indicating the actual cause of death or the causation or remoteness of the death.

In *Sarah Chumo v Republic* (2020) eKLR the accused person was charged with six counts of performing FGM and was convicted.³³ The Court sentenced her to a total fine of 800 000 shillings and in default to serve 12 years' imprisonment. Sarah Chumo appealed the conviction and sentence on the basis that there was no identification by the victims and that the evidence brought by the victims was inconsistent and unreliable. The appellant also stated that the Court erred in convicting her yet the victims indicated that they voluntarily consented to the act and she was not granted an opportunity to meet the victims.

The Court held that it was immaterial whether the victims consented to the act as one cannot license another to commit a crime. The learned judge went on to hold that the appellant was indeed identified through the witness statements of the victims and the medical doctor in his testimony stated that upon examination, all four victims had indeed undergone the cut, thus was guilty. In an unfortunate turn of events, the judge set aside the sentence of 12 years and ordered the appellant to serve 12 months for each of the four counts convicted and they were to run concurrently. Considering that the appellant had been in custody for more than 12 months, the Court ordered her immediate release.

On the death of the victim, there is much public interest in *Republic v Eunice Sintama Lesale & 2 Others* (2014) eKLR where the parents were

33 Criminal Appeal 5 of 2019.

charged with murder after the deceased (their daughter) bled to death after being subjected to FGM.³⁴ The courts in 2014 set bail at 2 million Kenyan shillings. The matter is still ongoing.³⁵

4.3.2 *Aiding and abetting female genital mutilation*

The perpetrator must be identified and there must be evidence of any sort of assistance or advice given for purposes of perpetuating FGM and evidence of proof of aiding, for example, monetary facilitation, transportation of victims or buying paraphernalia to be used. On procuring FGM on oneself, the points to prove is the commission of the act and that the perpetrator is an adult.

In *IGK & 2 Others v Republic* (2020) eKLR the applicants were accused of aiding and abetting and were each sentenced to seven years' imprisonment.³⁶ The Court noted that they were the father, mother and grandmother of the victim and therefore had a greater responsibility to protect the child from harmful practices. The Court was also satisfied that the accused persons took the victim to be cut.

On self-procuring, the Court in *Charity Karimi & 2 Others v Republic* (2019) eKLR sentenced the accused persons to a fine of 200 000 shillings each and in default imprisonment for three years each.³⁷ The applicants voluntarily went and consented to being cut. The prosecution produced medical reports indicating that that they had indeed undergone the practice.

34 Criminal Case 24 of 2014.

35 The case brings a sigh of relief as the consequences of FGM has been felt throughout the community. The same is compare to *R v Katet Nchoe & Another v Republic* (2011) Eklr in which the appellants had been charged with manslaughter after the victim died as she underweight FGM. Before the Prohibition of Female Genital Mutilation Act, the only offence preferred was manslaughter, which does not impose a mandatory sentence upon conviction.

36 Criminal Revision 12 of 2019 Consolidated with Cr Rev.113 of 2020 and Criminal Revision 114 of 2020.

37 Miscellaneous Application 52 of 2019.

4.3.3 *Procuring a person to perform female genital mutilation in another country*

The evidence to prove this charge include proof of travel, proof that the reason for the travel was to procure FGM and that a medical report is provided to show that the act was performed.

4.3.4 *Use of premises to perform female genital mutilation*

There has to be clear evidence of ownership, possession or control of the premises and that the accused persons knew that the premises were being used to perform FGM and that it was performed. If tools used are traceable, they can also form part of the evidence.

In *Joan Bett v Republic* (2018) eKLR the appellant was charged with knowingly allowing her house to be used for the purpose of performing FGM.³⁸ She was convicted and sentenced to pay a fine of 200 000 shillings or in default to serve three years' imprisonment, on which she filed the present appeal. The appellant's grounds for appeal included that there was no evidence brought before Court that she had exclusive control of the house and that she was not found in the house. Additionally, she alleged that there was no evidence brought by the prosecution that FGM actually took place in the said house. The Court held that the assistant chief had testified indicating that the house belonged to the appellant and that the same was common knowledge. The learned judge also took into consideration that six girls had been found locked inside the house and they all identified the appellant as being the owner of the house and the fact that the medical doctor testified that the girls had undergone the cut was enough to find the appellant guilty. The appeal was found devoid of merit and the conviction and sentence were upheld.

4.3.5 *Possession of tools and equipment*

The points to prove to obtain a conviction include actual possession of the relevant tools and the tools were to be used for purposes of performing FGM.

38 Criminal Appeal 10 of 2017.

4.3.6 *Failure to report commission of offence*

For a charge to be preferred, there has to be proof that the accused person had knowledge that FGM was performed or about to be performed and that they did not report it to any law enforcement officer. The victim also has to be identified and must testify.

In *MMD & Another v Republic* (2017) eKLR the appellants had been charged with failure to report the commission of FGM and were convicted and sentenced to a fine of 200 000 shillings or one year's imprisonment.³⁹ In the appeal they stated that the lower court had failed to establish that they did not know that the victim had undergone the cut and that the prosecution had failed to prove beyond reasonable doubt that they knew about the procedure and the specific time at which they became aware. The Court took its time in assessing the charge drawn and held that the charge was defective and the appellants were charged with the failure to report the occurrence of the offence of FGM instead of a failure to report that an offence of genital mutilation has been committed. The Court went further to give meaning to 'being aware' and 'failure to report' and how both show gross amount of ambiguity and lack of clarity. In acquitting the appellants, the learned judge held that there was no evidence brought to show that the appellants were actually aware of the commission of the offence before they were called upon to make a report.

In *LCN v Republic* (2014) eKLR the Appellate Court acquitted the appellant who had been charged with a failure to report the commission of FGM that had been performed on her daughter.⁴⁰ The Court held that the minor testified under oath that all her mother did was take care of her after the fact and that she was not aware as it was her father who took her to the circumciser. As such, the Court held that the prosecution's evidence against the appellant was not satisfactory to meet the threshold required in establishing beyond reasonable doubt.

The Court in *SMG v RAM* (2015) eKLR also acquitted the parents of a minor who voluntarily went and underwent FGM.⁴¹ The Court held that the prosecution did not prove that the parents knew that their

39 Criminal Appeal 4 of 2017.

40 Criminal Appeal 92 of 2013.

41 Criminal Appeal 66 of 2014.

child went and had the cut performed. Moreover, the minor testified in court that she did not inform the parents of her plans. The Court failed to take into consideration that a minor cannot consent not only to the performance of a crime but in matters relating to health where harm can be done.

4.3.7 *Use of derogatory or abusive language*

To prove this offence, there has to be actual abusive or derogatory words used and a translation into English where applicable and that the intention was to offend or to embarrass. This is difficult to prove as the evidence to be brought before court diminishes the trial process to be one of 'he said/she said' without tangible evidence to support either party.

A brief analysis of the above cases gives varying conclusions due to the fact that under Kenyan laws, the courts have a wide discretion in matters of probative value of evidence brought before them and in terms of sentencing. No uniformity as it pertains to prosecution of FGM will be achieved. In addition to the wide range of discretion with which the courts are empowered, another aspect that has led to minimal successful prosecution of FGM is the doctrine of burden of proof as it relates to the different crimes in the Prohibition of FGM Act. A in-depth analysis is provided below.

4.4 Beyond reasonable doubt

In the Kenyan criminal justice system, in order to ensure a conviction, the prosecution has to prove its case beyond reasonable doubt.⁴² This means that not only does the evidence have to be brought before the court but the qualitative value of the evidence directly proves the commission or omission of the offence charged. In majority of the cases brought before any court of law that involves FGM, the evidence includes the victim and the victim statement, the investigating officer and the medical report from the government doctor.

Beyond reasonable doubt means that it must carry a high degree of probability. Lord Denning in *Miller vs Ministry of Pension*⁴³ stated:⁴⁴

⁴² P Kiage *Essentials of criminal procedure in Kenya* (2010).

⁴³ [1947] 2 ALL ER 372.

⁴⁴ Page 23.

Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In the cases discussed above in the prosecution of FGM crimes, it is clear that there exists a clash when it comes to the prosecution of FGM. The Act clearly directs that no one can consent to the practice and that it is not a defence to state that the victim consented to same.⁴⁵ However, local courts have used the testimony of minors stating that they voluntarily went to the circumciser themselves and acquitted most accused persons. The courts should take judicial notice that minors cannot make such choices and there is no law that allows any person to perform an act that is seen as harmful and a form of torture and especially if it will negatively impact their health.⁴⁶ Accordingly, a simple accusation of FGM, with or without evidence, should be enough to remove girls from their parents and/or convict accused persons.

There is also a need to shift the burden of proof in cases of FGM as it exists with the Sexual Offences Act. Although different schools of thought exist on the onus of proof in sexual offence cases, the majority of matters before courts, especially in instances where the age of the victim is in contention, the onus of proof shifts to the accused person. The most controversial case in which this shift was seen was in *Martin Charo v Republic* where the Court contended that despite the fact that a child cannot consent to having sexual intercourse, the behaviour of the child should also be taken into consideration.⁴⁷ The accused person testified under oath that the behaviour of the victim intimated that she was not a minor and that she informed him that she was over 18 years of age. The Court agreed and he was acquitted.

45 Sec 29 of the Prohibition of Female Genital Mutilation Act states: 'A person who commits an offence under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both.'

46 P Arshaougni "But I am an adult now ... sort of": Adolescent consent in healthcare decision making and the adolescent brain' (2006) 9 *Journal of Health Care Law and Policy* 316.

47 Criminal Appeal 32 of 2015.

In FGM cases, once a charge is preferred against an accused person, it should be enough that there is a medical report produced confirming that the victim did in fact undergo the cut. The onus would then lie on the accused person to prove otherwise. Insufficient evidence should not be considered a reason to acquit any perpetrator/accused person if the act has been confirmed. The courts should be mindful that the heavy evidence it requires to convict has a direct and negative impact on all those involved. In the cases studied above, the majority of the people charged are parents of the victims. The psychological torture it imposes on a child to stand in a dock and identify their parents as those who inflicted harm on them is unfathomable. Critics have pointed out that a simple accusation should be enough to remove girls from their parents.⁴⁸

The victim breaks the family unit as positive identification means conviction. Apart from the breakdown of the family unit, the provision of basic needs for the victim and her siblings diminish as the breadwinner would be behind bars. This shift, directly or indirectly forces the victim to pick up the slack and take care of the family. On a larger scale, in areas where the cutter is known, the victim's positive identification would lead to the conviction of people who have status in the community causing a rift among the community. It is our contention that the concept of reasonable doubt acts more of problem rather than a solution. Other certain challenges to prosecution include interference by politics, the issue of victim protection.

4.5 Barriers to prosecution

It is important to highlight two recurring challenges faced during the prosecution of FGM cases before National Courts. They include inference from politicians and victim protection as discussed below.

4.5.1 *Interference by politics*

In a democracy, law and politics are bound to confront one another be it in legislative procedure or the implementation of said procedure. The influence of politics is ideally strongest in legislative procedure. However,

48 M Berer 'The history and role of the criminal law in anti-FGM campaigns: Is the criminal law what is needed at least for countries like Great Britain?' (2015) *Reproductive Health Matters* 145-157.

in recent time and in matters in which the interest of the chosen few are higher than the majority, politics also influence the implementation of the law. At its foundation, both politics and law serve to bring about law and order.⁴⁹ It is this mismatch that we will discuss and its impact on the autonomy of the law as it relates to Female Genital Mutilation. The Chief Justice of England and Wales once reacted sharply to politicians using their influence and interfering with the judiciary and ordered that there should be short courses for the politicians to be educated on the boundaries that should exist between parliament and the judiciary.⁵⁰ It seems that the same should be applied in Kenya as well.

Kenya is divided into different geographical and legislative sections known as counties. In every county, there exists separate levels of leaders who represent the people these include Governors, Senators, Members of Parliament, Members of County Assembly and Women Representatives. These leaders are charged with the responsibility of serving the communities and ensuring that their views are represented in the legislative process. In most cases, these leaders come from practicing communities in the prevalent counties. This will then directly influence the implementation of anti FGM laws. As stated earlier in some cases, word on the street is that the politicians are the ones who allegedly bail out offenders and who allegedly use their influence to ensure that there are no prosecutions.

In *Ltodiyan Lekanoi & 20 Others vs Hon. John Lepil Lolkile*,⁵¹ a constitutional petition before the Nanyuki High Court, we were informed that the area Member of County Assembly had married off more than 5 young girls and impregnated them. The community wanted justice and instructed litigators to file a petition for the Member of County Assembly to be declared unfit to hold office and be prosecuted. The case was filed and prosecuted but had to come to a premature end when the court insisted the presence of the 5 young girls who by this time could not be found having migrated and hidden. Although the case

49 A Magnussen & A Banasiak 'Juridification: Disrupting the relationship between law and politics' (2013) *European Law Journal* 325.

50 C Rickard 'Unprecedented levels of political interference with courts – Chief Justice' 3 December 2020, <https://africanlii.org/article/20201203/%E2%80%988unprecedented-levels-political-interference-courts%E2%80%99%E2%80%93chief-justice> (accessed 12 June 2022).

51 Constitution Petition 4 of 2016.

did not come to the expected conclusion the effect was very strong and the MCA lost the 2017 elections despite being a strong candidate.

Another instance where politics interfere with the process of eradication of Female Genital Mutilation is in terms of elections and the quest for votes. This being an election year, politicians during their campaigns in the grassroots areas will either promise the communities that no one will be prosecuted for Female Genital Mutilation or they will not advocate for the eradication of the vice as they are trying to buy the votes of the citizens. In Samburu County, one of the cases brought before court involved the family member one of the local leaders.⁵² The court ordered them to pay a fine of Two Hundred Thousand Kenyan Shillings which they posted on the same day. The politicians also use their influence to intimidate the prosecutors and families of the victims pressuring them to recant their testimonies.

4.5.2 *Victim protection*

Victim protection bears its roots from the Constitution of Kenya where it states that victims of crimes and abuse of power must be protected. The Victim Protection Act was also enacted and it provides better information and support services including reparations and compensation to the victim. The Act also outlines the rights of victims in criminal proceedings, which include being informed in advance of the evidence by the prosecution and also giving their views during plea bargaining and victim impact statement in sentencing if offender is convicted.

In terms of offences under the Prohibition of Female Genital Mutilation Act, the office of the Director of Public Prosecution, who is in charge of all criminal proceedings, prepared a Standard Operating Procedure Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation cases. Under victim protection, the prosecutor is to ensure that the interests of the victim are considered when making any decision in relation to the trial.⁵³ Additionally, the telephone numbers or any information of how to contact the witnesses or victims shall not be

52 *Republic v Janet Lenolkul & Another* Criminal Case 4650 of 2021).

53 Office of the Director of Public Prosecution Standard Operating Procedures Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases.

recorded within the body of the witness statement so as to protect their identity and prevent intimidation by the accused or their accomplices.⁵⁴ The names of the victims should also be protected by the use of their initials and the details including the full names and contacts details of the victim should not be supplied to the accused at any point.

However, according to the Prohibition of Female Genital Mutilation Act, 2011, it provides sanctions for both the victims and perpetrators. The Act states that no person can consent to the practice and that it is no defence that the person consented to it and lists the punishment as imprisonment for a term of not less than three years or to a fine of not less than 200 000 shillings or both.⁵⁵ More people are knowledgeable about the penalty than they are of the other measures that various laws have taken to protect the victims.

Moreover, the victim protection mechanism is only seen in theory as at the grassroots level, the government has not implemented the support.⁵⁶ The majority of the rescue centres that shelter victims of FGM in prevalent communities are non-governmental organisations (NGOs) such as Samburu Girls Foundation in Samburu County. The communities have had varied reactions to the establishment of rescue centres as they were developing. In 2013 the community donated 15 acres of land where the Samburu Girls Foundation is set up. The foundation has also had its share of disputes with the community over the years and instances where men came with guns demanding the release of their 'wives' that they shelter. For rescue centres that rely on good faith donations from well-wishers, this type of battles may cause the centres to go under but the vision of realising the potential of the pastoralist girl is greater.

From various interviews with the girls from the Foundation, it is clear that they defied the community by running away from their practice and they are seen as outcasts. Others are optimistic and believe that it is only a matter of time before their families accept the reality and hope that they can reunite.

The last level of state obligations to protect its citizens in the realisation of the eradication of FGM is judgment and sentencing.

54 Office of the Director of Public Prosecution (n 54).

55 Sec 29 Prohibition of Female Genital Mutilation Act.

56 Sec 27 of the Prohibition of Female Genital Mutilation Act imposes a mandatory duty on the government to provide support services to victims of female genital mutilation.

Once the prosecutor has proven its case and the accused person has also presented their case and submissions brought forth, it now is for the court to retire and upon assessing the evidence, reach a judgment and subsequent sentencing if the court finds the accused person guilty.

5 Judgment and sentencing

Upon the completion of the presentation of both sides of the case, the courts now retreat to write and give their judgment. According to Justice Lee Muthoga, a Kenyan judge at the United Nations (UN) Mechanism for International Criminal Tribunals, the judgment needs to comprise an introduction in which the judge gives a brief of the matter at hand, then a summary of the prosecution's case, a summary of the defence case, issues to be determined, evidence and factual findings, applicable law, deliberations, the actual judgment, mitigation and, finally, sentencing.⁵⁷

As for sentencing, the courts are guided by the Judiciary's Sentencing Policy Guidelines.⁵⁸ The genesis of the policy guidelines is that sentencing has always been outrightly absurd and disproportionate in criminal cases and there was a need to limit the judicial discretion enjoyed by judicial officers. The policy sought to acknowledge the role the community and even the victim/complainant have in the criminal justice system. It allows the views of the victim to be taken into consideration and offers alternative sentencing like non-custodial orders such as the payment of compensation.

A further analysis of the case law chosen in this chapter clearly depicts that despite the existence of a sentencing policy which sought to streamline sentencing of criminal offences, judicial officers still use it whimsically leading to a low conviction rate of FGM offences.

The final part of the chapter seeks to examine the role of grassroots communities in the criminalisation of FGM. We will determine whether the impact, whether negative or positive, that FGM has had on communities and whether the grassroots communities act as a shield or a sword in the fight against FGM.

57 L Muthoga *Guidelines for judgement drafting* (2012).

58 http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf

6 Role of grassroots communities in criminalisation and recommendations

The final part of this chapter focuses on an investigation into the role of grassroots communities in litigation from the ground level until the national courts the reasons as to why criminalisation has not been effective in the fight against FGM. We will focus our discussion on culture and its various aspects, including threats of curses, dowry and marriage and lastly, give recommendations.

6.1 Culture

World renowned anthropologist Sir EB Taylor defined culture as a complex whole including knowledge, belief, customs and habits acquired by man as a member of society.⁵⁹ Ralph Linton in his book describes it as behaviour held in common.⁶⁰

What stands out from the above definition is the fact that culture is acquired and it is only acquired by man as part of a larger society or community. Article 11 of the Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people. Moreover, article 44 on the right to language and culture cements the right to participate in any cultural life of a person's choosing. However, the Constitution also places the burden on Parliament to enact laws that celebrate the cultural life of the citizens as well as protect the citizens from harmful practices.

The communities that practise FGM have been practising it for generations without fail giving those involved a sense of community. Kenya's founding father, the late Mzee Jomo Kenyatta, the first President of the Republic of Kenya, in his book *Facing Mount Kenya* shared about the sense of community that came about during the ceremonies.⁶¹

Among certain communities, such as the Maasai and Samburu, the practice is embedded within an elaborate ritual of initiation into adulthood. Circumcision is performed on both boys and girls. The members of these communities do not understand why male circumcision is not outlawed and term it discrimination. For the Samburu community,

59 E Varto *Brill's companion to classics and early anthropology* 99-131.

60 H Berkman & C Gilson *Consumer behaviour* (1986).

61 J Kenyatta *Facing Mount Kenya* (1938).

the process starts with beading, where the young uncircumcised girls who are not yet eligible for marriage are given specialised beads by Samburu warriors to signify the beginning of a sexual relationship. After the beading, the girl is cut and, lastly, early childhood marriage follows. In the case of PR, she was only nine years old when her uncles conspired to marry her off to a rich 30 year-old man.⁶² She underwent FGM and was married off the same day. Luckily, she was rescued and currently is in school under the Samburu Girls Foundation.⁶³ The cut signified the beginning of her new social, familial, sexual and reproductive role, and marriage often is the only economic option for the women in the communities.

Due to the sense of community that accompanies culture, circumcision is voluntary, celebrated and is a milestone in a girl's life. In Samburu community there generally is a season in which FGM is performed. The peer pressure experienced during this time is elevated. This applies to both the girls and their parents or guardians. Those who will not participate in the rite are seen as outcasts in the community. In *Dr Tatu Kamau* the respondent brought a witness, RJK, who testified that her community practised FGM as a rite of passage.⁶⁴ RJK detailed how she ran away from home at 12 years of age upon learning that she would be subjected to the cut. She returned three days later and suffered beatings at the hands of her family and her failure to undergo the cut caused her to be ridiculed and ostracised and she was forced to relocate.

Culture serves as one of the strongest inhibitors to the eradication of FGM due to various aspects, which include the threat of curses, dowry and marriage.

6.1.1 Curses

When a person seriously violates the norms of the society or community, they automatically enter into a state of sin without necessarily being cursed. The threat of being cursed and the actual curse are equally feared.

62 Name withheld as she is a minor.

63 Samburu Girls Foundation is a rescue centre where the pastoralist girl child receives education and protection from physical, mental and emotional harm for personal development through life skills in a community setting info@samburugirls.foundation.

64 Constitutional Petition 244 of 2019.

Curses is a major impediment to the eradication of FGM and the reason why the level of reporting cases is incredibly low. The threat of curses is also the reason why most people, however knowledgeable of the effects of the practice, still participate in the vice. In 2017 it made national news in the country how retired nurses were arrested and prosecuted in Embu county as they circumcised girls.⁶⁵ They stated in court that the main reason why they performed the circumcision was a fear of curses. It was their contention that they used modern surgical equipment and that, therefore, the risk of any infection was incredibly low.

In the Kuria community it is believed that curses would befall those who do not conform, for example, the death of a baby if the baby came into contact with the clitoris as the uncircumcised woman gave birth or the death of children who would walk over a spot in which an uncircumcised woman urinated.⁶⁶

It was also reported that hundreds of girls were spared in 2017 as the Kuria community believed that seven is a cursed number and thus would not perform any circumcision ceremony.⁶⁷ In central Kenya, the magistrate's court at Chuka sentenced a woman, Florence Muthoni from Tharaka-Nithi county, to six years' imprisonment after it was discovered that she forced her twin daughters to undergo FGM. In her defence during trial, she stated that the main reason why she performed the rite on her daughters was because wanted to avoid the curse from her deceased grandfather who had instructed all the girls in the family lineage to undergo the procedure.⁶⁸

6.1.2 Dowry

Ideally, dowry is higher if the girl has undergone the cut at the time of the marriage. The practice is seen as an elevation of the status of the girl and her family. This is due to the fact that the child is now of marriageable age,

65 J Muchiri 'Retire nurses, fear of curses complicate anti-FGM campaigns in Embu' *The Standard* 27 December 2017, <https://www.standardmedia.co.ke/eastern/article/2001264221/retired-nurses-complicating-campaign-against-fgm>.

66 Population Council (n 9).

67 E Batha 'Kenya's Kuria to halt female genital mutilation in "unlucky"' 1 February 2017, <https://reliefweb.int/report/kenya/kenyas-kuria-halt-female-genital-mutilation-unlucky-2017> (accessed 7 June 2022).

68 N Bhala 'Kenyan woman jailed for six years for circumcising twin daughters' 23 November 2018, <https://www.reuters.com/article/us-kenya-women-fgm-idUSKCN1NS1SI> (accessed 12 June 2022).

signifying the payment of dowry, and in pastoralist communities this is a source of income for the family. This was the case in *Melody Lanyasunya v Office of the Director of Public Prosecution & Others at the Nakuru High Court*.⁶⁹ The petition was sponsored by a PhD holder, Dr Titus Lanyasunya, to stop his prosecution at Maralal law courts for marrying the petitioner, ML, who was a minor. Fortunately, the Court dismissed the petition and ordered the criminal case to proceed. However, the criminal case came to an end after the death of Dr Lanyasunya. His Excellency the President Uhuru Kenyatta also made an official eulogy paying his respects to Dr Titus Lanyasunya but made no mention of the cases against him for early marriages.⁷⁰

The communities believe that once dowry is paid, it cannot be returned as the rite has already been performed. Incidents of men coming to forcefully take their 'wives' from rescue centres such as Samburu Girls Foundation are not unheard of.⁷¹ Since the majority of these communities are pastoralists, they value animals and, therefore, once dowry is paid, the minors belong to them. Some have attempted to break in armed with weapons such as guns and spears.

6.2 Marriage

For parents or guardians, their daughters will not be considered socially acceptable, thus not marriageable, if they do not participate in the rite and that, therefore, they are not fulfilling their roles as good parents. This view is corroborated by the late Mzee Jomo Kenyatta who was of the view that no proper Gikuyu man would be seen marrying an uncircumcised girl.⁷²

In the Kuria community, according to the council of elders, a girl who was not circumcised cannot be married or have a child. It is because of this pressure that one finds girls to succumb and opt to go for the cut.

69 Constitution Petition 21 of 2015.

70 The Presidency 'President Kenyatta eulogises Dr Lanyasunya, as a great researcher', <https://www.president.go.ke/2018/06/12/president-kenyatta-eulogizes-dr-lanyasunya-as-a-great-researcher/> (accessed 7 June 2022).

71 The word 'wives' is only used in the context that dowry has been paid and therefore traditional customary marriage has occurred. However, we take cognisance of the fact that the girls in question are minors and under the Children Act and Marriage Act lack capacity to enter into any form of marriage.

72 The New Humanitarian Justifying tradition: why some Kenyan men favour FGM (2005).

In some instances, where the girl fell pregnant, she would be forced to deliver at home where she would be circumcised before child birth or during labour.⁷³

6.3 Recommendations

In order to offer qualitative recommendations, we need to consider the impact litigation has had on the culture and then formulate our recommendations from there. These include, but are not limited to, the following:

6.3.1 *Education*

Pastoralist communities do not value education as much as they value marriage and cattle. The government should take up the burden of education and ensure that it is readily available and affordable in all parts of the country. There needs to be a shift from the focus of eradication to the focus on education. A lot of heavy lifting is placed on the eradication of FGM but the depth of comprehension seen from grassroots communities is rather shallow. As stated earlier, the majority of the communities have high levels of illiteracy. This means that they cannot understand what the law says and the impact of not abiding by the laws of the land. Moreover, it will enable the communities to actively participate in both in the politics of making laws and even in the implementation of the laws. The introduction to modules or short courses in the education curriculum for all levels of education can also play a role in a change of attitude towards FGM.

The role of economic development should not be taken lightly. Communities that still practise FGM involve those who do not have schools and still depend on traditional means of livelihoods, for example, pastoralism. If both the national and county government would upgrade the counties by building modern infrastructure that will force the communities to catch up, then the performance of FGM would gradually

73 Population Council 'Female genital mutilation practices in Kenya: The role of alternative rites of passage. A case study of Kisii and Kuria districts (2011), https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?article=1103&context=departments_sbsr-rh.

disappear as the communities are focused on more economically positive endeavours.

6.3.2 *Alternative rites of passage*

Alternative rites of passage involve various practices in which girls can enter into womanhood without having to undergo the cut. The first alternative rite of passage in Kenya was organised in Tharaka-Nithi in 1996. The main agenda was to desensitise parents into not cutting their girls. However, parents were apprehensive that their girls would not be considered women as no initiation was done, and they came up with an alternative rite.⁷⁴ Alternative rites can include graduation for the girls.

6.3.3 *Change of language*

Third, the language used is seen more of a roadblock than anything else. There is a need to shy away from the harsh language that anti-FGM crusaders and advocates use. In the *Dr Tatu Kamau* case, the petitioner brought up the fact that the definition of FGM in the Act presupposes malice and intention to incapacitate and destroy. Other scholars have shared the same sentiments.⁷⁵ Caution should be taken as it is a fight against a culture that has been practised for generations and the end FGM chant comes from outsiders. It therefore is seen as an attack that will not be taken lightly.

6.3.4 *Amendments to the Act*

Based on case law, there is also a need to amend the Prohibition of Female Genital Mutilation Act, 2011 to prevent instances where accused persons would be acquitted based on the ambiguity in and vague nature of the offences themselves, and the shift of burden of proof should be discussed and form part of the prosecution of FGM cases. Furthermore, the Act needs to be clear on the concept of consent and when it can be utilised.

74 BV Hannelore 'The Loita rite of passage': An alternative to the alternative of rite of passage?' (2021) *SSM Qualitative Research in Health* 4-6.

75 H Lewis 'Between Irua and "female genital mutilation": Feminist human rights discourse and the cultural divide' (1995) 8 *Harvard Human Rights Law Journal* 1.

7 Conclusion

The criminalisation of FGM, although a step in the right direction, has been met with various challenges. The expectations from the criminalisation was that the trend would decrease. However, the reality of the implementation of these laws has proven to be an uphill task both at the grassroots level and in national courts. The main effect of the criminalisation of FGM is not the conviction of perpetrators but driving the practice underground.

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