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UNDERSTANDING WOMEN'S RIGHTS TO CULTURE, CONSENT, AND THE NEED TO PROHIBIT FEMALE GENITAL MUTILATION IN KENYA: *KAMAU V ATTORNEY GENERAL & OTHERS*

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Abstract

Kenya enacted the Prohibition of Female Genital Mutilation Act 32 of 2011 (the Act) which commenced on 4 October 2011. In 2017 a Kenyan medical doctor filed a petition at Machakos in the High Court of Kenya in the case of Dr Tatu Kamau v the Honourable Attorney General & Others *seeking to declare specific provisions of the Act as well as the entire Act unconstitutional for, among other reasons, infringing on the rights of adult women to participate in their culture and religion, a lack of public participation when Parliament was enacting the Act and discriminatory to the extent of prohibiting female genital mutilation against women but allowing men to undergo circumcision. The Court delivered its judgment on 17 March 2021 where it upheld the constitutionality of the Act but made proposals to Parliament to amend section 19 of the Act to prohibit type IV FGM. This chapter analyses the judgment in relation to the constitutionality of the Prohibition on Female Genital Mutilation Act, specifically whether an adult woman can be prohibited from freely choosing to undergo*

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FGM in line with her culture. The author also makes the following contributions in relation to the judgment: that adult women cannot consent to harm being done on them; that state obligations both at the constitutional/domestic level, regional and international level demand that the state take all necessary measures to prevent and protect women from violence against women and the balancing of rights and limitation of rights is necessary in instances where women want to undergo FGM for other purposes.

1 Introduction

This chapter analyses the judgment delivered in the High Court of Kenya in *Dr Tatu Kamau v the AG & Others.*[1] The judgment arises from a petition filed by a medical doctor, Dr Tatu Kamau (Dr Kamau) who challenged the constitutionality of the Prohibition of Female Genital Mutilation Act (Act)[2] on the basis that it prohibits and criminalises female genital mutilation (FGM).[3] She argued that the Act violated the constitutional rights of adult women to equality and non-discrimination;[4] the freedom of conscience, religion, belief and opinion;[5] the right to the highest standard of attainable health;[6] and the right to participate in a cultural life of one's own choice.[7] In addition, Dr Kamau challenged the Anti-Female Genital Mutilation Board (Board) because the functions it is mandated to carry out infringe on the rights of women who want to practise FGM.

The judgment addressed different issues for determination, but this chapter will only provide an analysis of the judgment with respect to four issues. The first is the right to culture and the scope of harmful cultural practice; the second the issue of consent to undergo FGM; the third part will be on criminalisation of all types of FGM; and, finally, the fourth part will address the balancing of rights in relation to FGM.

1 Petition 244 of 2019 (*Kamau).*
2 Act 32 of 2011.
3 Dr Tatu Kamau did not use the term 'female genital mutilation' but instead insisted on it being called 'female circumcision'. The 10th interested party also referred to it as female circumcision.
4 Art 27 Constitution of Kenya, 2010 (Constitution).
5 Art 32 Constitution.
6 Art 43 Constitution.
7 Art 44 Constitution.

2 Background

The primary source of challenge for Dr Kamau in the petition was that provisions of the Act are unconstitutional. Dr Kamau filed the suit on behalf of communities that practise 'female circumcision' and for women who have been jailed for carrying out the rite.[8] The Constitution of Kenya, 2010 (Constitution) allows any person to institute court proceedings in their own interest as well as on behalf a group of persons, where they claim that a right or fundamental freedom has been denied, violated or infringed.[9] This petition could be classified as one filed in the public interest even though the prayers sought were challenged for being contrary to the public interest. A public interest litigation does not cease from being in the public interest because the arguments are not in line with the law. A case is public interest in nature once the petitioner pleads that they have filed the suit on behalf of members of the public. The Kenyan Constitution introduced public interest standing that previously was not accepted under the old Constitution. This means that a party does not need to provide proof that they are directly affected by violations for them to appear before the Court to pursue a case, and they can file a case in the public interest.

The respondents who were sued were the Attorney-General, the Anti-Female Genital Mutilation Board, and later the Director of Public Prosecution applied to be joined in the case as a respondent.[10] There were also ten interested parties and the roles that they played in the case as highlighted in the submissions. There were also two *amici curiae* who contributed to the case on different areas of the law.

In the amended petition Dr Kamau used the term 'female circumcision' and 'female surgery' and not 'female genital mutilation' (FGM) because she averred that the latter showed malice, yet it was part of national heritage.[11]

8 *Kamau* (n 1) para 5.
9 Arts 22 (1) & (2)(b) Constitution.
10 *Kamau* (n 1) para 2.
11 Amended Petition para 9 when she defines the procedures that are considered FGM under sec 2 of the Act and para 13 where Dr Kamau argued that mutilation cannot be used to cure physical or mental health as per the exception in sec 19(3) of the Act, which deals with exceptions where medical professions can carry out FGM. See also *Kamau* (n 1) para 12(a).

It is also worth noting that although the petition challenged the rights of adult women and categorically excluded issues on children, the Court allowed organisations on children's rights to join the case. The interested parties that joined the case on behalf of children averred that, although the case only argued for FGM for consenting adult women, children were at risk if the Act was to be amended as they are the ones on whom communities culturally conduct FGM. The Court recognised that from the evidence provided in court by women who underwent FGM, it was carried out when they were as young as nine years of age in some instances.[12]

3 Culture, consent, criminalisation and the balancing of rights

As already stated, the judgment analysed several issues for determination. This chapter will tackle the issues of culture; consent to undergo FGM for adult women; the criminalisation of FGM; and the balancing of rights of FGM. This is mainly because these four main issues set forth jurisprudential anchors not only for future cases on FGM but also in instances where people might seek to practise cultural practices that can cause harm. It is also the first case in Kenya that was not criminal in nature that addressed aspects of FGM.

3.1 The right to culture and the prevention of harmful cultural practices

3.1.1 Harmful cultural practices

In addressing issues related to the right to culture and prevention of harmful cultural practices, the judgment began by examining the different terms used to refer to FGM. These terms were female circumcision and female cutting, which the court stated all refer to procedures that deal with the partial or total removal of external genitalia or any injury or harmful procedure on the female genitalia.[13] The Court further added that this procedure must be for non-medical purposes.[14] The petitioner

12 *Kamau* (n 1) para 117.
13 *Kamau* (n 1) 124.
14 As above.

and 10th interested party were strongly against using the term 'female genital mutilation' and the Court then found that it was necessary to examine FGM, its causes and consequences in order to determine whether there was any harm occasioned by the procedure.[15]

The Court relied on the definition of harm from the Penal Code,[16] and Black's *Law dictionary*.[17] 'Harmful cultural practice' is not defined under article 260 of the Constitution, which is the definition clause. However, the Court correctly noted that the phrase 'harmful cultural practice' is found in other provisions of the Constitution.[18] The prohibition of harmful cultural practices is provided for in Part Three of the Bill of Rights of the Constitution titled 'Specific application of rights'. To be precise, the Constitution emphasises that the specific part of the Bill of Rights expounds on certain rights to 'ensure greater certainty of application of those rights and fundamental freedoms to certain groups of persons'.[19]

There also are no national legislations that have expressly defined 'harmful cultural practices',[20] but national legislation prohibits harmful cultural practices. The Children's Act prohibits 'harmful cultural rites' and lists female circumcision as one of the harmful cultural rites.[21]

Case law has defined instances where FGM is a harmful cultural practice, but this was in line with the classification as such under the Children Act because FGM was conducted on a 16 year-old child. This was in the case of *Katet Nchoe & Another v Republic*,[22] where the High Court dealt with a case where two accused persons were charged with manslaughter arising out of FGM where the second appellant approached the first appellant to perform FGM on her 16 year-old daughter. The

15 *Kamau* (n 1) para 129.
16 As above.
17 *Kamau* (n 1) para 130.
18 Art 53(1)(d) of the Constitution provides that every child has the right to be protected from harmful cultural practices. Art 55(d) of the Constitution commands the state to take measures to ensure that the youth are protected from harmful cultural practices.
19 Art 52(1) Constitution.
20 *Kamau* (n 1) ara 131.
21 Ch 141 of the Laws of Kenya, Act 8 of 2001, sec 14(1) reads: 'No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.'
22 Criminal Appeal 115 of 2010 as consolidated with Criminal Appeal 117 of 2010 (*Nchoe*).

High Court in this instance recognised the harmful nature of the FGM custom.[23]

Regionally, Kenya together with some other African countries ratified the African Charter on Human and Peoples' Rights (African Charter)[24] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[25] (African Women's Protocol). These two treaties expressly distinguish between promoting positive cultural values and prohibiting harmful cultural practices. These regional instruments are applicable in Kenya under article 2(6) of the Constitution that states that international treaties that Kenya has ratified are part of Kenyan law.

Article 17 of the African Charter, which entered into force on 21 October 1986, and places a duty on the individual to 'preserve and *strengthen positive African values in his relations with other members of the community ... and, in general, to contribute to the moral well-being in the society*'.[26] This provision is more general and places a duty on individuals when they exercise their culture with others rather than a right to culture.[27] It also places a duty on the state to promote and protect traditional values recognised by the community. These provisions, however, are problematic considering that in most African patriarchal communities, the traditional values and cultures are often dictated by men who are the designated traditional elders.

Despite the African Charter coming into operation and other international instruments protecting women against discrimination, women in Africa continue to experience 'harmful practices', including FGM.[28]

However, on 25 November 2005 the African Women's Protocol entered into force and provides wider rights guaranteed to women in relation to culture. Article 17(1) enshrines the right of women to live in

23 *Nchoe* (n 22) 4. The learned judge held: 'In our case, female genital mutilation is certainly harmful to the physical and no doubt the psychological and sound well-being of the victim. It may lead to childbirth complications, in this case, it led to premature death of a teenager. That kind of custom could truly be well discarded and buried in the annuals of history, just as we no longer remove our two, four or six teeth from our lower jaws, or adorn our faces, cheeks with healed blisters.'

24 Kenya ratified the African Charter on 23 January 1992.

25 Kenya ratified the African Women's Protocol on 6 October 2010.

26 Art 29(7) African Charter.

27 Art 17(3) African Charter.

28 Preamble to African Women's Protocol.

a positive cultural context. Article 17(2) also places a duty on the state parties to 'take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels'. This provision has been argued to be progressive to the extent of giving women agency to dialogue with members of the community who have the power to impact change to culture – that is, men who are often the elders in the community.[29] Therefore, the provision is a strategy for women to actively participate in the development of positive cultural contexts.[30] It also extensively prohibits harmful cultural practices on women and girls. Other international instruments on the rights of the child also list the criteria for recognising harmful cultural practices.[31]

The High Court relied on the definition of harmful cultural practices as provided in the African Women's Protocol.[32] The Women's Protocol mandates the state 'to enact and effectively implement appropriate legislation or regulatory measures including prohibiting harmful

29 J Geng 'The Maputo Protocol and the reconciliation of gender and culture in Africa' in SH Rimmer & K Ogg (eds) *Research handbook on feminist engagements with international law* (2019) 17.

30 As above.

31 The Joint General Recommendations 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on Harmful Practices, dated 4 November 2014, lists the criteria of recognising harmful cultural practices. Para 16 provides as follows: 'For the purposes of the present joint general recommendation/General Comment, practices should meet the following criteria to be regarded as harmful: (a) They constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the two Conventions. (b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential. (c) They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors. (d) They are imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.'

32 Art 1(g) of the African Women's Protocol defines harmful cultural practices to mean '[a]ll behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.

practices that endanger the health and well-being of women'.[33] It also mandates state parties to prevent harmful cultural practices.[34]

The Court relied on article 5(b) of African Women's Protocol, which expressly condemns FGM and places an obligation on state parties to prohibit all forms of FGM that negatively affect the human rights of women through legislative measures backed by sanctions of all forms of FGM. Article 5(b) of the Women's Protocol expressly obligates the state to FGM through legislative measures backed by sanctions. Kenya ratified the treaty on 6 October 2010 and enacted the Prohibition of Female Genital Mutilation Act on 4 October 2011. Therefore, the Act needs to be in line with international standards that have placed a ban on all forms of FGM. This, therefore, is also in line with the Court's finding that the Act is faulted to the extent of omitting type IV FGM,[35] in the definition of the different types of FGM defined under section 2 of the Act.[36]

Indeed, the Constitution obligates the state to enact and implement legislation to fulfil its international obligations on human rights and fundamental freedoms.[37] Besides, article 19(3)(b) clarifies that the rights in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights but recognised or conferred by law. Accordingly, women have a right under the African Women's Protocol to be free from FGM and other forms of harmful cultural practices that negatively affect the human rights of women.

Consequently, the Constitution obligates the state and every state organ to observe, respect, protect, promote and fulfil the right of every woman to be free from FGM.[38] Certainly, under article 21(3) all state

33 Art 2(1)(b) African Women's Protocol.
34 Art 2(2) African Women's Protocol. It reads: 'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.'
35 The World Health Organisation (WHO) defines Type IV Female Genital Mutilation as 'all other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterisation', https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work/female-genital-mutilation/types-of-female-genital-mutilation (accessed 2 January 2023).
36 *Kamau* (n 1) para 105.
37 Art 21(4) Constitution.
38 Art 21(1) Constitution.

organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

In terms of policy, the Ministry of Health and Sanitation and the Population Reference Bureau published a policy brief titled 'Ending female genital mutilation: Laws are just the first step'[39] which recognises FGM as a harmful traditional practice.[40] Kenya further published the National Plan of Action for the Elimination of Female Genital Mutilation in Kenya 1999-2019, Nairobi, June 1999 in which it categorised FGM as a harmful traditional practice.

Several bodies of the United Nations (UN) have stated that FGM has no benefits.[41] They emphasise that there are no health benefits of FGM because 'the removal or damage to healthy, normal genital tissue interferes with the natural functioning of the body and causes several immediate and long-term health consequences'.[42] In addition, there are short and long-term health and psychological effects of FGM. For example, short term effects include infections, and long-term consequences include decreased sexual enjoyment, chronic pain and post-traumatic stress disorder. Children of mothers who have undergone FGM have higher death rates during and after birth, unlike those mothers who have not undergone FGM.[43]

In addition, Kenya, with other countries, has committed itself to the Sustainable Development Goals (SDGs), and among them is to achieve gender equality and empower all women and girls.[44] Among the targets is the elimination of all harmful practices, such as early and forced marriage

39 Republic of Kenya, Ministry of Health and Sanitation and the Population Reference Bureau published a policy brief titled 'Ending female genital mutilation: Laws are just the first step' Policy Brief 32 June 2013.

40 As above.

41 OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM & WHO 'Eliminating female genital mutilation: An interagency statement' 2008 1.

42 As above.

43 OHCHR and others (n 41) 11. See also PD Mitchum 'Slapping the hand of cultural relativism: Female genital mutilation, male dominance and health (2013) 19 *William and Mary Journal of Women and the Law* 585 592.

44 Goal 5 Sustainable Development Goals.

of children and female genital mutilation.[45] The relevant indicator is the percentage of girls and women aged 15 to 49 years who have undergone FGM/cutting.[46]

Based on the definitions of harmful cultural practices listed above, the testimony and affidavit evidence provided by medical experts and several witnesses who underwent FGM, the Court held that FGM is a harmful cultural practice.[47]

Further, the definition of youth under the Kenyan Constitution consists of persons who have attained 18 years of age but are not more than 35 years of age,[48] and the African Women's Protocol defines women as persons of the female gender, including girls. [49] This definition, read together with article 55 of the Constitution of Kenya, requires the state to ensure that women above the age of 18 years and between the ages of 18 and 35 years are protected from harmful cultural practices such as FGM. These laws show that the nature of the harm does not end the moment a girl turns 18 years, or a woman turns 36 years and is no longer a youth, because the impact of the harm remains the same.

Given the lack of definition or criteria of identifying harmful cultural practices that have not been expressly listed in legislation or the Constitution, the High Court could have taken the approach taken in *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others (Satrose Ayuma),*[50] where the High Court recognised that there were no laws in Kenya to deal with the procedures of evictions. The High Court proceeded to adopt the procedures laid down in the UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007) because Kenya had already ratified the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). This judgment was also directed to Parliament to enact legislation on the procedure of evictions.[51] Only three years after the judgment was delivered, that is, 21 September

45 SDG target 5.3.
46 http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-5-gender equality/targets/ (accessed 11 March 2018).
47 *Kamau* (n 1) paras 137-138.
48 Art 260 Constitution.
49 Art 1(k) African Women's Protocol.
50 Petition 65 of 2013, judgment delivered on 30 August 2013, paras 79-88.
51 Petition 65 (n 50) para 109.

2016, the Land Laws Amendment Act[52] provided for the procedure of evictions that drew heavily from the UN Guidelines earlier relied on in the *Satrose Ayuma* case.

The High Court perhaps could have developed a working definition of the phrase 'harmful cultural practice' from the different international laws and instruments that have sought to categorise which practices are harmful cultural practices. This could be as follows: Harmful cultural or traditional practices include:

(a) a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the Constitution and other laws;

(b) discrimination against women, men or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;

(c) traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors;

(d) they are imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.

3.1.2 The right to participate a culture of one's own choice (article 44)

The Court analysed the right to culture under the Kenyan Constitution in relation to the right of women to undergo FGM as per their culture. This is because it was the central issue of the case. Dr Kamau contended that the right to participate in a cultural life of one's own choice has been violated because willing women from communities who once carried out the cultural practice of FGM can no longer do so. She further suggested that they have also lost their cultural claim of acceptance before their loved ones and elders. She averred that the offences under sections

52 Act 28 of 2016, sec 98.

19(6), 20 and 21 of the Act condemned and misrepresented an age-old tradition as violent and dangerous.[53]

Dr Kamau also argued that section 19(5) of the Act violates the right to participate in a cultural life of one's own choice under article 44 of the Constitution to the extent that it provides that a person's culture, religion, other custom or practice cannot be used to perform FGM and that it can only be performed on a person for a physical or mental health purpose.

Section 19 of the Act provides for the offence of FGM as follows:

(1) A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person commits an offence.

...

(3) No offence under subsection (1) is committed by an approved person who performs –

(a) a surgical operation on another person, which is necessary for that other person's physical or mental health.

...

(5) In determining, for purposes of subsection (3)(a), whether or not any surgical procedure is performed on any person for the benefit of that person's physical or mental health, a person's culture, religion or other custom or practice shall be of no effect.

(6) It is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given.

Sections 20 and 21 of the Act read:

20 A person who aids, abets, counsels or procures –

(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.

21 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.

Based on the above provisions, in a nutshell the constitutional challenge from the amended petition on the provisions were that, first, the criminal

53 Amended Petition (n 11) para 16.

offences provided under sections 19(6), 20 and 21 of the Act violate the rights of women to participate in a cultural life of their own choice, which is FGM.

Second, the exception for approved persons (medical practitioners and midwives) performing FGM only for physical and mental health purposes, during labour and childbirth and not for cultural reasons, infringes on the right to participate in a cultural life of one's own choice.[54]

The Court further found that it was important to understand the content of the right to participate in a cultural life of one's own choice to determine whether the provisions of the Act have interfered with the right. In Kenya, culture, and the right to participate in a cultural life of one's own choice, are provided for under articles 11 and 44 of the Constitution. The right to participate in a cultural life of one's own choice is enshrined in article 44 of the Constitution. It guarantees every person the right to participate in the cultural life of the person's choice.[55] It also guarantees a person belonging to a cultural or linguistic community with the right together with other members of the community to enjoy their culture,[56] and not to be compelled by another person to undergo any cultural practice or rite.[57]

This right is also guaranteed in several international and regional instruments to which Kenya is a party. The Constitution stipulates that the general rules of international law and international treaties that Kenya has ratified form part of Kenyan law.[58] The African Charter protects the individual's right to participate in the cultural life of his or her community and recognises the duty of the state to promote and protect the moral and traditional values of a community.[59] ICESCR[60] obligates states to recognise the right of everyone to take part in cultural life.[61] The Convention on the Elimination of All Forms of Discrimination against

54 This was a challenge based on sec 19(5) of the Act.
55 Art 44(1) Constitution.
56 Art 44(2)(a) Constitution.
57 Art 44(2)(b) Constitution.
58 Arts 2(5) & 5 Constitution. See also the Court of Appeal judgments in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 Others* Civil Appeal 172 of 2014; [2017] eKLR; *Karen Njeri Kandie v Alssane Ba & Another* Civil Appeal 20 of 2013; [2015] eKLR; *David Njoroge Macharia v Republic* Criminal Appeal 497 of 2007; [2011] eKLR.
59 Arts 17(1) & (2).
60 Kenya ratified ICESCR on 1 May 1972.
61 Art 15(1).

Women (CEDAW)[62] places a duty on state parties to take all appropriate measures to eliminate discrimination against women, including through ensuring that they participate in a cultural life.[63]

Although 'culture' or a 'cultural life' is not expressly defined in the Constitution, article 11 recognises culture as the foundation of the Kenyan people. The Universal Declaration on Cultural Diversity of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), 2001, defines culture in its fifth preambular paragraph as 'the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'.[64]

The following therefore are the elements of the right to participate in a cultural life of one's own choice, namely, that (i) every person has the right to participate in a cultural life;[65] (ii) participation must be out of one's own choice; (iii) the right to enjoy culture within a community and with members of the community; and (iv) a person must refrain from forcing another person to practice and observe cultural practices.

Courts have dealt with the question of the right to participate in a cultural life of one's own choice. In the case of *JK (suing on behalf of CK) v Board of Directors of R School & Another*[66] the High Court dispensed with the issue of whether the petitioner's child should be allowed to wear dreadlocks in the respondent's school. According to the petitioner, her son had a right to exercise a culture of his own choice by wearing dreadlocks, as he was part of the Jamaican culture from where his father hailed. On the other hand, the respondent school argued that the

62 Kenya ratified CEDAW on 9 March 1984.

63 Art 13(1). See also art 22 of the Universal Declaration.

64 Art 2 of the Fribourg Declaration on Cultural Rights defines culture as 'those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings that they give to their existence and to other developments'.

65 Y Donders 'The enjoyment of cultural rights by women on an equal basis with men' in L Belder & H Porsdan (eds) *Negotiating cultural rights issues at stake, challenges and recommendations* (2017) 100-120. The author posits that 'personal cultural identities are made up of participation (or non-participation) in different (cultural) communities' (106).

66 High Court Petition 450 of 2014; [2014] eKLR (JK (suing on behalf of C, K) (*JK*).

petitioner neither provided evidence of the Jamaican culture exercised, nor did the child profess the Rastafarian religion.

The High Court held that it was the obligation of the petitioner to demonstrate to the Court the Jamaican culture that her child practised.[67] However, there was no evidence placed before the court by the petitioner to prove the child's 'Jamaican culture'. The Court further held:[68]

> While the wearing of dreadlocks for cultural or religious reasons is in my view entitled to protection under the Constitution and should be accorded reasonable accommodation, the sporting of dreadlocks for fashion or cosmetic purposes is not, and an institution such as the representative school is entitled to prohibit it in its grooming code.

In analysing whether the cultural right to practise FGM has been infringed, the Court examined the evidence that the petitioner produced to support their case as well as the Act. The title of the Act illustrates that its purpose is 'to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes'.

Sections 19, 20 and 21 further place criminal sanctions on persons who perform FGM or aid and abet the practice of FGM. The only exceptions where an offence is not committed are contained in section 19, which provides that an approved person[69] can conduct FGM during a surgical operation that is (i) necessary for a person's physical or mental health; and (ii) conducted in any stage of labour or birth.

It is not in dispute that FGM is considered a cultural practice.[70] In effect, Dr Kamau argued that the Act restricted an individual from exercising the right to practise a culture of one's own choice. This is because it creates an offence in instances where FGM is carried out. In essence, the argument means that if a woman belongs to a culture that practises FGM, she cannot participate in it because the Act prohibits it, and she could face criminal sanctions for performing it.

67 *JK* (n 66) para 48.
68 *JK* para 51.
69 According to sec 19(4) an 'approved person' is a medical practitioner in subsection (3)(a), and in (b) it includes a medical practitioner, midwife or anyone training to become a medical practitioner or a midwife.
70 Republic of Kenya (n 39) 3-4.

Article 44 is not the only provision in the Constitution dealing with the right to participate in a cultural life of one's own choice. The Constitution must be read as an integrated whole to verify if there are other instances where cultural practices are provided for in the Constitution that have a bearing or affect the practice of FGM. In the Ugandan case of the *Tinyefuza v the Attorney General*[71] the Court held that '[t]he entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other'.[72]

Further, in the Supreme Court of Kenya decision in *In Re the Matter of the Kenya National Human Rights Commission*[73] the Court interpreted the holistic interpretation of the Constitution to mean reading a constitutional provision alongside other provision considering the history of the Constitution, the issues being disputed and the current circumstances.[74]

Based on the above, the Bill of Rights contains provisions that prohibit and direct the state from taking measures to ensure that 'harmful cultural practices' are barred. This means that the Constitution acknowledges that harmful cultural practices are prohibited. This type of analysis is critical because, based on article 2(4) of the Constitution, any law or act that violates the Constitution shall be declared unconstitutional to the extent of its unconstitutionality.

Dr Kamau also stated that the Act defines 'female circumcision' as 'mutilation', which connotes an intention to incapacitate and destroy, and that female circumcision *is part of the national heritage and history*.[75]

Although the Court did not delve into the issue of what the heritage of Kenya was in relation to FGM, it is critical to show that FGM was never a heritage of Kenya. The heritage of Kenya is mentioned in the Constitution. The first instance is in the Preamble, which provides that the people of Kenya are respectful of the 'environment which is our heritage and determined to sustain it for the benefit of future

71 Constitutional Petition 1 of 1996 [1997] UGCC 3.
72 Constitutional Petition (n 71) 18.
73 Reference 1 of 2012 [2012] eKLR.
74 *Kenya National Human Rights Commission* (n 73) para 26.
75 Amended Petition (n 11) para 10.

generations'. Second, article 11 of the Constitution recognises culture.[76] In a nutshell, article 11(1) of the Constitution recognises culture as the foundation of the nation; article 11(2)(a) obligates the state 'to promote all forms of natural and cultural expressions through ... traditional celebrations ... and other cultural heritage'; and article 11(3)(a) also commands Parliament to enact legislation 'to ensure communities receive compensation on royalties for the use of their cultures and cultural heritage'.[77] The Court, however, recognised legislation specific to cultural heritage, that is the Protection of Traditional Knowledge and Cultural Expressions Act,[78] which defines intangible cultural heritage to mean 'the practices, representations, expressions, knowledge and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognised as part of their social cultural heritage'.

From the above reading of the Constitution, culture is recognised as the foundation and the cumulative civilisation of the Kenyan people and that the state has the duty to promote all forms of traditional celebration and cultural heritage. The Court should have noted that beyond the definitions of cultural heritage, cultural heritage *is not* national heritage. The cultural heritage of a group of people cannot be considered a national heritage. One reason is because the cultural heritage of a specific group of people is not necessarily adopted by other cultures to the extent that it becomes a national heritage. FGM, which is a cultural practice in few cultural communities in Kenya, cannot be classified as a national heritage. Further, considering that it is a harmful cultural practice, it cannot be deemed a national heritage that all Kenyan people recognise.

The case also unveiled issues related to cultural relativism, cultural diversity, and the universality of rights. Dr Kamau averred that each community has the liberty to practise any culture that is 'native' and relevant to that society without the imperialist imposition from another culture that holds a different set of beliefs and opinions.[79] She also opines

76 The relevant part of art 11(1) of the Constitution states: '(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation. (2) The State shall –
(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.'

77 *Kamau* (n 1) para 204.

78 33 of 2016.

79 Amended Petition (n 11) para 15.

that those moral principles are not apparent and widely acclaimed and, therefore, there is a need for tolerance of and respect for all cultures, and a misrepresentation of a cultural practice by external societies should not take precedence.[80]

The proponents of cultural relativism argue that all customs, traditions, practices and beliefs ought to be respected and cherished, with no moral codes, whereas those of universality state that rights belong to everyone wherever the individual may or may not be.[81] Tilley in his journal article titled 'Cultural telativism'[82] puts it simply that

> a judgment as to whether a culture is valid or not: is *universally valid* in case it is valid for everyone; that it is *locally valid* if it is valid for some but not all cultures; and it is culturally relative just in case it has features that ensure that it is best locally valid and never universally so.[83]

On the other hand, recent authors, such as Msuya, argue that cultural relativism has been criticised for ignoring the violation of women's rights and actually supporting perpetuating violations of human rights.[84] Tamale also raises the differences between African feminism and cultural relativism where African feminists' argument is that attention should be paid to gender whereas relativists argue that culture should be upheld.[85]

Based on the above definitions, when it comes to women's rights, cultural relativism will seek to promote culture at the expense of women's rights, especially where the custodians of the culture often are men in patriarchal societies. Whereas cultural diversity is respected under the Constitution, the universality of rights and limitation of some rights also exists.[86] This means that where cultures are harmful or discriminatory towards women or other marginalised groups, they cannot be upheld.

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80 Amended Petition (n 11) para 16.

81 S Aleksandra 'Amid cultural relativism and human rights universalism: The case of female genital mutilation/cutting: A cultural practice and a human rights violation' LLM dissertation, Tilburg University, 2017 3.

82 This was earlier published in *Human Rights Quarterly* (2000) 22 501, now published on https://philpapers.org/rec/TILCR (accessed 23 January 2018).

83 Tilley (n 82) 5.

84 NH Msuya 'The concept of cultural relativism and women's rights in sub-Saharan Africa' (2019) 54 *Journal of Asia and African Studies* 1150.

85 S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights' 155, https://www.fahamu.org/mbbc/wp-content/uploads/2011/09/Tamale-2007-Right-to-Culture.pdf (accessed 2 January 2023).

86 See arts 19(2) & (3) of the Constitution supporting this and which reads: '(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social

The Constitution of Kenya and international instruments promote cultural diversity and the universality of rights. This means that under the recognition of cultural diversity, Dr Kamau has the right to practise a culture of her own choice, different from others. However, a reading of articles 2(4) and 25 of the Constitution illustrates that the right to practise a culture of one's own choice is not an absolute right and, therefore, the right may be limited, or a cultural practice can be declared unconstitutional to the extent of its unconstitutionality. Article 2 states that the Constitution is supreme and any act or contravention, even cultural practices under the notion of cultural relativism, are invalid.

In relation to the right to culture the Court held that culture is dynamic,[87] and although the Constitution grants people the freedom to exercise their own culture, the freedom must be carried out in line with other constitutional provisions.[88] This means the freedom is subject to limitations. It is interesting that the Court, in an *obiter dictum, provided instances of limitations of freedoms where attempted suicide*[89] and abortion[90] constitute offences in the Penal Code.[91]

The Court also conducted an analysis under article 24 of the Constitution and found that, indeed, the right to culture can be limited in an open and democratic society. In this instance, the Court held that by the Act creating the offence of FGM, it was a justifiable limitation of the right to culture because of the duty of the state to protect persons against harmful cultural practices.[92]

3.2 Consent to female genital mutilation

The other question that arose was whether willing women should undergo the procedure, and its related question, namely, what the effect

justice and the realisation of the potential of all human beings. (3) The rights and fundamental freedoms in the Bill of Rights – (a) belong to each individual and are not granted by the state; (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this chapter; (c) are subject only to the limitations contemplated in this Constitution.'

87 *Kamau* (n 1) para 205.
88 *Kamau* (n 1) para 211.
89 Sec 226 Penal Code.
90 Secs 158-160 Penal Code.
91 *Kamau* (n 1) para 211.
92 *Kamau* (n 1) paras 201 & 210.

of allowing this would be. Dr Kamau argued that willing women and not children should be allowed to undergo the procedure, as per their culture. Article 53 as well as the Children's Act protect children from undergoing the procedure. Therefore, the law is clear that FGM should not be performed on children.

With respect to willing women, article 260 of the Constitution defines an adult as a person who has attained the age of 18 years. Section 2 of the Children's Act defines a child as 'any human being under the age of 18 years'. Article 55 of the Constitution also requires the state to put in place measures to prohibit harmful cultural practices against 'the youth'. According to article 260 of the Constitution, the term 'youth' means 'the collectivity of all individuals in the Republic who (a) have attained the age of eighteen years; but (b) have not attained the age of thirty-five years'.

Using a holistic reading and interpretation of the Constitution as to who should not undergo harmful cultural practices, we submit that the Court should consider interpreting articles 53 and 55(d) to mean that the Constitution mandates the state to protect girls (children) as well as women between the ages of 18 and 35 years from harmful cultural practices such as FGM. Therefore, based on this interpretation, the state has a duty to protect women between the ages of 18 and 35 years against FGM.

However, the next question for the Court to decide would be whether article 55(d) of the Constitution, which requires the state to put in place measures to prohibit harmful cultural practices, can limit a person's right to participate in a cultural life of one's own choice under article 44(1) of the Constitution. The answer to this is in the negative. This is because, first, an express provision of the Constitution must be implemented in its entirety unless a constitutional amendment as per article 255 is done. Second, article 19(3)(c) of the Constitution stipulates that '[t]he rights and fundamental freedoms in the Bill of Rights – (c) are subject only to the limitations contemplated in this Constitution'. The general limitation clause is enshrined in article 24 of the Constitution. Article 52(2) of the Constitution further provides that in interpreting the rights under Part Three, '[t]his Part shall not be construed as limiting or qualifying any right'. '

A reading of articles 19(3)(c), 24 and 52(2) of the Constitution means that although articles 53(1)(d) and 55(d) prohibit harmful

cultural practices, they cannot be seen to be limitations on the rights under article 44(1). However, we wish to reiterate that the Constitution proscribes harmful cultural practices in relation to persons below 18 years and between the ages of 18 and 35 years with no exception. The Court ought to have conducted an analysis that if the tate has the duty to protect the women in these age brackets, then women above the age of 35 years should also be protected from harmful cultural practices. The special protection for children and the youth, therefore, should be extended to women above the age of 35 years. Article 55 of the Constitution only sought to emphasise the protection of rights of the youth who were previously marginalised. Indeed, it could be interpreted that a harmful cultural practice does not become harmless the moment a woman reaches the age of 36 years. Women also fall in the category of persons who were previously marginalised.[93]

From the wording of article 44, the scope of the right is that the participation in a cultural life is a matter of choice. This is emphasised both article 44(1) by the reference to 'the right to ... participate in the cultural life, of the person's choice' and in clause (3): 'A person shall not compel another person to perform, observe or undergo any cultural practice or rite'. What this means is that there is no right to compel or force another person to undergo any cultural practice.

The case Dr Kamau raised was not related to compulsion, but to free choice. However, the questions the Court seemed to ask itself was how it happens that even young or old women choose to undergo such a procedure that is painful and causing harm. Do they do so because of pressure and persuasion? Is the choice of a woman who has no or little idea that other women do not undergo such a practice really a free choice?

The Court scrutinised the cultural reasons as to why the practice is done to arrive at a decision whether the decision of a woman to undergo FGM is her free choice. The Court indeed analysed the evidence of

93 Art 56 of the Constitution protects minority and marginalised groups and mandates the state to ensure that there are affirmative action measure to promote their culture, in this instance their positive culture. Art 260 of the Constitution defines marginalised group to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in art 27(4). Women in Kenya were previously marginalised based on their gender. See *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, dissenting opinion of Mutunga CJ, as he then was, para 11.4.

three survivors who confirmed that misinformation, deception and societal pressure contributed to them undergoing the cut.[94] One witness who managed to escape the cut suffered beatings from family and was shunned by the community and future prospective suitors who could have married her in future because of her refusal to undergo FGM.[95]

Other evidence, although not mentioned in the judgment, which shows the causes of FGM is the National Plan of Action for the Elimination of Female Genital Mutilation in Kenya,[96] where it is noted that the rationale behind the practice of FGM in communities in Kenya include that it is a rite of passage for girls to womanhood; it protects girls and guarantees that they are accepted and respected in the community; it makes girls and women suitable for marriage; it promotes the birth of healthy children; it ensures cleanliness; ensures that the girls remain virgins; enhances male sexuality; and prevents promiscuity as well excessive clitoris growth.[97] Socially, girls or women who have not undergone the procedure are often stigmatised and not accepted in their communities.[98]

As the Court noted, the reasons for performing FGM are to be suitable for marriage and to suppress women's sexuality, and a failure to do so will result in not being accepted by the community. The Court also evaluated whether these reasons affected the choice of a woman to participate in a cultural practice such as FGM.[99]

The Court analysed the issue of choice using the case of *United Millers Limited & Another v John Mangoro Njogu,*[100] where Mativo J commented as follows:

> A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

94 *Kamau* (n 1) para 167.
95 As above.
96 Republic of Kenya National Plan of Action for the Elimination of Female Genital Mutilation in Kenya 1999-2019, Nairobi, June 1999.
97 Republic of Kenya (n 96) para 1.3.
98 As above.
99 *Kamau* (n 1) para 171.
100 High Court Nyeri Civil Appeal 118 of 2011; [2016] eKLR.

In addition, the European Court of Human Rights has examined choice in relation to a person conducting harm on themselves. In the case of *Laskey, Jaggard and Brown v the United Kingdom*[101] the issue of whether willing consenting adults who participate in sado-masochistic encounters in private should be criminally punished and whether the sanctioning of these encounters was in violation of the right to private life under article 8 of the European Convention of Human Rights. In that case the petitioners argued that they were willing consenting adults and that the sado-masochism encounters were a form of sexual expression and not violence because there were neither permanent injuries, infections to wounds nor was medical treatment required after the acts. They further argued that the state could not regulate private morality and that the Act that criminally sanctioned their acts violated their right to a private life under article 8 of the European Convention of Human Rights.

The European Court of Human Rights dealt with the issue of whether the state could regulate actions of willing consenting adults. It held that the state could regulate activities that caused harm and that, therefore, the state did not infringe the petitioners' right to a private life.[102]

From the above case, what is essential in the protection of rights is not whether a willing adult consents to participate in an activity due to one or another reason. The state has the responsibility in instances where the act consented to can cause harm to regulate such actions. This means that the state's duty to uphold, protect and to fulfil rights in the Bill of Rights does not diminish because an adult has consented to participate in harmful activities.

In the *Kamau* case the cultural reasons for performing FGM on girls and women can, therefore, be interpreted to mean that they decided to go undergo FGM, primarily because of heavy persuasion, amounting to coercion because of a fear of lack of acceptance in the community. It will

101 ECHR Application: 109/1995/615/703-705.

102 *Laskey, Jaggard and Brown* (n 101) paras 43-44. The Court held: '43. The Court considers that one of the roles which the state is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise. 44.The determination of the level of harm that should be tolerated by the law in situations where the victim consents are in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.'

not be an informed decision and choice to undergo the practice for their own benefit or enjoyment. If people routinely based on heavy persuasion and societal pressure, this amounts to coercion and is not a violation of any right to exercise one's culture, because the element of choice is absent. The girl or woman has not made a choice to participate in the culture.

The Court held that although FGM is a cultural practice, a person has no constitutional right to undergo a harmful cultural practice, and since the element of choice is absent, there is no violation of the right to culture as espoused in article 44(3) of the Constitution.[103]

4 Conclusion

In conclusion, the judgment of the Kenyan High Court clearly affirmed that every person has the constitutional right to practise a culture of their choice. However, this right may be limited by the state if the culture being practised is not positive but a harmful cultural practice. Kenya met its constitutional and international law obligations to ensure that girls and women are protected from any form of harmful cultural practices such as FGM through the enactment of the Act, which was a legislative measure used to eradicate this harm. FGM is a form of violence against women and, therefore, Kenya met its state due diligence obligation to protect women from undergoing FGM, and where they have undergone it, to ensure that the perpetrators are punished. The Court also noted that the Act fell short of creating an offence of all types of FGM through the exclusion of type IV FGM, and noted that a specific group of women could use the gap in the law to pay for procedures that would be categorised under type IV FGM, and it was necessary that such procedures be criminalised in line with the Constitution and the law. Therefore, although the Dr Tatu Kamau case was filed with the goal of decriminalising and medicalising FGM in Kenya, the Court affirmed the constitutional aspirations of the Kenyan people to ensure that this harmful cultural practice is completely eradicated, and that women are fully protected.

103 *Kamau* (n 1) para 215.

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