

**FACTORS INHIBITING THE REALIZATION OF LEGAL JUSTICE FOR SEXUAL  
VIOLENCE SURVIVORS IN KIBERA SLUMS**

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**DECLARATION**

I hereby declare that this proposal is my original work and has not been presented for any academic degree in any other university.

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## **ABSTRACT**

In spite of the many initiatives that presently exist to address domestic violence in general, communities living in Kibera slums are yet to stamp out or significantly reduce the cases of sexual violence. Its ugly face spans from manifest physical abuse and sexual violence, to subtle violations such as verbal abuse and deprivation of their entitlements within the family. One of the main reasons why sexual violence in Kibera slums does not recede has to do with the lack of adequate laws to deal with it. Kenya has few laws that criminalize sexual violence. In Kenya today, the prevalence levels of sexual violence are high, mainly affecting girls and women. These occur against the existence of both national and international legal, policy and institutional frameworks aimed at safeguarding the sexual and reproductive rights of all Kenyans. All the legal, policy and other measures notwithstanding, generally, prosecuting sexual violence matters in the Kenyan courts is a daunting task for women. The implication of the impunity with which society and government treat sexual violence dehumanizes women, whose concerns are trivialized by the very society in which they play significant social and economic roles. Our study sought to establish the factors inhibiting the realization of legal justice for sexual violence survivors in Kibera slums by examining the forms of sexual violence in Kibera slums, the legal framework addressing sexual violence in Kibera slums and the factors inhibiting the realization of legal Justice for sexual violence survivors in Kibera slums. The study used descriptive exploratory design to collect qualitative and quantitative data. The population encompassed of women who have experienced or witnessed gender based violence within Kibera. The sample population consisted of 50 respondents. Questionnaire, Focus Group Discussions and interview guides were used for gathering both qualitative and quantitative primary data. Individual who are survivors of sexual violence and they provided stories about their live experiences. Data was analysed and presented using graphical and statistical techniques and narratives. The findings were presented and they show that sexual violence in Kibera slums is rampant affecting women. Majority of the cases are not reported because victims do not believe that the justice system can offer a prompt and effective remedy and are fearful of the discriminatory treatment to which the judicial system may subject them if they file complaints. Findings show that revealed that the police and other state institutions are reluctant to intervene and enforce restraining orders against aggressors.

## **CHAPTER ONE**

### **INTRODUCTION**

#### **1.1 Background to the Study**

Violence against women is perhaps the most widespread and socially tolerated of human rights violations, cutting across borders, race, class, ethnicity and religion. UNHCR (2014) observes that sexual violence is a particularly disturbing phenomenon which exists in all regions of the world. Kenya is not an exception to this form of brutality which negatively affects women and girls in particular. The term refers to any harmful act that is perpetrated against one person's will and that is based on socially ascribed (gender) differences between males and females (Inter-Agency Standing Committee, 2005). It includes acts that inflict sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, whether occurring in public or in private life.

Sexual violence entails widespread human rights violations, and is often linked to unequal gender relations within communities and abuses of power. According to Jewkes, (2002) violence against women is rooted in gender inequality. He argues that violence against women involves men and women where 'the female is usually the victim and which arises from the unequal power relationships between men and women. 'It can take the form of sexual violence or persecution by the authorities, or can be the result of discrimination embedded in legislation or prevailing societal norms and practices. It can be both a cause of forced displacement and an intolerable part of the displacement experience. Sexual violence in Kenya, as elsewhere in the world, is a complex issue that has as its root the structural inequalities between men and women that result in the persistence of power differentials between the sexes. Women's subordinate status to men in many societies, coupled with a general acceptance of interpersonal violence as a means of resolving conflict, renders women disproportionately vulnerable to violence from all levels of society: individual men, within the family and community, and by the state.

In blaming men's violence for the impoverishment of the women, Cornwall Andrea states: Men's violence is a key determinant of the inequities and the inequalities of gender relations that both dis-empower and impoverish women. Violence is a fundamental dimension of human poverty. Yet, men's natural aggression' is often invoked as a defining characteristic of an

essential gender difference and as an explanation for gendered hierarchical arrangements in the political and economic contexts of richer and poorer countries alike.

The impact of Sexual violence is devastating. The individual women who are victims of such violence often experience life-long emotional distress, mental health problems and poor reproductive health, as well as being at higher risk of acquiring HIV and intensive long-term users of health services. In addition, the cost to women, their children, families and communities is a significant obstacle to reducing poverty, achieving gender equality and ensuring a peaceful transition for post-conflict societies. This, in conjunction with the mental and physical health implications of gender-based violence, impacts on a state or region's ability to develop and construct a stable, productive society, or reconstruct a country in the wake of conflict.

Effective protection can be established only by preventing Sexual violence, identifying risks and responding to survivors, using a coordinated, multi-sectoral approach. The present protection environment in Kenya is fraught with challenges and filled with opportunities, which should be carefully considered when devising responses. Whereas the Kenyan legal framework provides a mechanism for addressing Sexual violence, the levels to which the frameworks respond to the plight of the survivors of Sexual violence is debatable. The legal and policy framework mostly focuses on bringing of the accused person to 'justice' without a corresponding obligation of alleviating the conditions of the survivor of Sexual violence. In fact, the survivor of Sexual violence is more of an alien to the criminal justice system because the offence is perceived by the system to have been committed against the state, not against the survivor of the Sexual violence as an individual.

The state in most cases perpetrates or tolerates violence against women either through action or non-action by prioritizing custom or tradition over the respect of fundamental freedoms and rights belonging to women. Kenya is especially guilty of having a system that is replete with cases of abuse of women's rights. However, the recent case of *C.K.(A Child) Through Ripples International As Her Guardian And Next Friend) & 11 Others v. Commissioner Of Police/Inspector General Of The National Police Service & 3 Others* (Kenya Law report, 2013) where the High Court made a finding that the police's failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringed upon the petitioners right to equal protection and benefit

of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 was a step forward in the right direction. In addition, the court observed that by failing to enforce existing defilement laws the police contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.

According to the World Health Organisation (WHO) multi-country study, between 16% and 59% women from Africa had ever experienced sexual violence from intimate partners (WHO 2005). Sexual violence is seen in domestic law and international human rights frameworks as a violation of the rights of women and girls and boys and men (FIDA 2002). The World Health Organisation indicates that, a wide range of sexual violence takes place in different settings in Kenya. These include: rape within marriage or dating relationships; rape by strangers; systematic rape during armed conflict; unwanted sexual advances or sexual harassment, including demanding sex in return for favours (Republic of Kenya).

According to the 2008-09 KDHS findings that investigated women's experience of sexual violence, including whether the respondent's first sexual intercourse was forced against her will, forced first sexual intercourse is not uncommon among Kenyan women; 12 percent of women aged 15-49 reported that their first sexual intercourse was forced against their will. For women whose first sex encounter was before age 15, they are more likely to report that that the intercourse was forced compared to those who initiated sex at an older age. The findings further indicate that one in five Kenyan women (21 percent) has experienced sexual violence. In 2007/8 Kenya witnessed an unprecedented scale of civil strife following disputed national elections. High rates of sexual violence were reported in slums. Among post-election sexual violence survivors interviewed in Kibera, only 23% reported the matter to the police (CARE ECA RMU, 2008).

Kibera is the largest slum in Eastern Africa with an estimated population of 1 million people. The area is roughly divided into 17 villages usually defined by tribal ethnicity. Kibera is located 5 kilometres South East of Nairobi city Centre and it lies at an altitude of 1,670m above sea level, latitude 36 degrees, 50° east and longitude 1 degree, 17° south about 140 km south of the equator (Karanja et al. 2002.). The growth of Kibera as an informal settlement is closely connected with Nairobi city's phenomenal growth. Life there is a daily struggle with poverty,

crime, and diseases. Many Kibera residents work in Nairobi's industrial sector for wages near € 2 per day. The Kenya to Uganda railway passes through Kibera. Living structures are constructed haphazardly on every available space leaving narrow alleys which serve as open sewers and footpaths (Karanja, et al. 2002.). Poor infrastructure affects the delivery of health care services, water and sanitation, and the economic livelihood of the Kibera community. These dire conditions are catalysts for high alcohol and substance abuse, which previous data has shown to be contributing factors of sexual violence.

## **1.2 Statement of the problem**

In spite of the many initiatives that presently exist to address domestic violence in general, communities living in Kibera slums are yet to stamp out or significantly reduce the cases of sexual violence. The victims of this vice in Kibera slums, like in most other societies and cultures in the world are mostly women. Its ugly face spans from manifest physical abuse and sexual violence, to subtle violations such as verbal abuse and deprivation of their entitlements within the family. The causes of these are well known and documented (FIDA, 1997, 2000 & 2002; CREAM, 2006). They range from the low status society accords to women, to poor policy and legal frameworks that condone or ignore the prevalence and perpetuation of domestic violence. Indeed, sexual violence against women in Kibera slums has been a recurring theme in FIDA (K)'s Annual Reports and other periodic exploratory studies that the organization has conducted over the years.

One of the main reasons why sexual violence in Kibera slums does not recede has to do with the lack of adequate laws to deal with it. Indeed, Kenya has few laws that criminalize sexual violence in spite of her being a signatory to CEDAW. It is no wonder therefore, that a government's study report on sexual violence (n.d.) placed at 44% married, separated or divorced women that have ever been subjected to sexual violence, while a private study placed it at 83%. In the 2009 Kenya Demographic and Household Survey (KDHS), 49% of women in Kibera slums were reported as having experienced sexual violence since the age of 15. About 16% in married, divorced or separated woman had experienced sexual violence.

In Kenya today, the prevalence levels of sexual violence are high, mainly affecting girls and women. These occur against the existence of both national and international legal, policy and

institutional frameworks aimed at safeguarding the sexual and reproductive rights of all Kenyans. All the legal, policy and other measures notwithstanding, generally, prosecuting sexual violence matters in the Kenyan courts is a daunting task for women. The implication of the impunity with which society and government treat sexual violence dehumanizes women, whose concerns are trivialized by the very society in which they play significant social and economic roles. The process causes stigma and embarrassment to the survivors who in many incidences are women. These offences are committed in secrecy and survivors lack direct eyewitnesses to corroborate their evidence as required by the law. On the other hand, police are reluctant to prosecute the perpetrators and instead intimidate women causing them more psychosocial trauma and subjecting them to additional stigma. For men, the inquiry was informed that they are in most cases too embarrassed to report incidence of sexual or other forms of violence suffered. This study thus seeks to identify and examine the factors inhibiting the realization of legal justice for sexual violence survivors in Kibera slums.

### **1.3 Research objectives**

#### **1.3.1 General objective**

To establish the factors inhibiting the realization of legal justice for sexual violence survivors in Kibera slums

#### **1.3.2 Specific objectives**

- i. To establish the forms of sexual violence in Kibera slums
- ii. To find out the legal framework addressing sexual violence in Kibera slums
- iii. To identify the factors inhibiting the realization of legal Justice for sexual violence survivors in Kibera slums.

### **1.4 Research Questions**

- i. What are the forms of sexual violence in Kibera?
- ii. What legal frameworks address sexual violence survivors in Kibera slums?
- iii. What factors inhibit the realization of justice for the sexual violence survivors in Kibera?

### **1.5 Justification of the study**

Across the world and in developing countries such as Kenya, and especially in informal settlements, women and girls are the most susceptible to the impacts sexual violence because they have less control over their sexuality. Sexual violence cases are also among the underreported human rights violations hence, victims rarely realize legal justice. This study will be carried out in Kibera slums of Nairobi County and will investigate the factors inhibiting sexual violence victims from realizing legal justice. This study will inform sexual violence eradication strategies through helping the victims of sexual violence to attain their rights. It will also uphold gender equality and equity and access to justice for women and as a result support in achieving social pillar of vision 2030.

The study will be of great importance to various government agencies including the National Equality and Gender Commission, the judiciary, and the police and as a result, will uplift the living standards of women who are more prone to gender based and sexual violence. It will also act as a rich source of information for the National Government, Nairobi County government, as well as development partners.

Finally the study is useful to other scholars as a source of knowledge for further research. This study is also important to scholars who are interested in this area to identify the knowledge gaps that exist and strive to fill the devoid. This research also adds to the bank of knowledge on sexual violence research and methodology.

### **1.6 Scope and limitations of the study**

The study shall collect the views of women, community leaders, social workers who have experienced or interacted with sexual violence victims. It shall also seek information from NGOs in Kibera who deal with sexual violence and who have interacted with the sexual violence victims in attempts to seek justice. The study uses the human rights approach as the explanatory theory looking into how sexual rights of individuals within Kibera are either upheld or violated and as to whether certain gaps exist within the legal system to inhibit the realization of justice. Although many issues revolve around sexual violence such as health issues, this study will not delve into such due to time limitation as well as inadequate financial resources.

Since the study deals with sexuality which is a sensitive and private issue in the African society, it may be difficult to source information from the respondents. The study will therefore use simple random sampling to sample its respondents and will assure the respondents of the researcher's duty to uphold privacy and confidentiality of the study participants. Kibera being an over researched area may present a challenge of having professional respondents who may not have had the experience and hence data may be rehearsed. This shall be overcome through repeating the questions, cross checking the answers and using purposive sampling as the procedure.

### **1.7 Research Assumptions**

- i. There are forms of sexual violence in Kibera slums
- ii. There is a legal framework addressing sexual violence in Kibera slums
- iii. There are factors inhibiting the realization of legal Justice for sexual violence victims in Kibera slums.



## **CHAPTER TWO**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

The literature review for this study is based on the study objectives. The literature focuses on, the forms of sexual violence; legal framework addressing sexual violence; the factors that inhibit the victims of sexual violence and Legislations and Policy Implementation Challenges inhibiting realization of legal justice for sexual violence victims.

#### **2.2 Forms of sexual violence in Kenya**

The World Health Organisation (2002) indicates that, a wide range of sexual violence takes place in different settings in Kenya. These include: rape within marriage or dating relationships; rape by strangers; systematic rape during armed conflict; unwanted sexual advances or sexual harassment, including demanding sex in return for favours; sexual abuse of persons with physical or mental disabilities; sexual abuse of children; forced marriage or cohabitation, including the marriage of children; denial of the right to use contraception or to adopt other measures to protect against sexually transmitted diseases; forced abortion; violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity; forced prostitution and trafficking of people for the purpose of sexual exploitation. Most of these forms of sexual violence target women including rape, attempted rape, sexual assault, defilement, gang rape, indecent acts, sexual harassment, exploitation, forced prostitution and deliberate transmission of HIV and other sexually transmitted diseases.

##### **2.2.1 Rape**

Rape is a term generally used to indicate an act of forced or coerced oral, anal, or vaginal penetration. Rape occurs when a person forces a woman or a man to have sex with that person against the man or woman's will. Rape includes forced anal penetration of girls, women, boys and men. The force may be mental or physical. The terms sexual assault and sexual abuse are often used interchangeably and refer to unwanted sexual acts — ranging from exhibitionism to penetration — that involve threats of physical force, intimidation and deception. Under the Sexual Offences Act, a person who commits this offence shall be jailed for 10 years or more. A person who attempts to rape shall be jailed for 5 years or more. These penalties can be increased

to life imprisonment. Where two or more people rape or defile someone they shall be guilty of gang rape and shall be jailed for 15 years or more. Whereas laws differ by state, nearly all states have enacted rape shield laws that disallow interrogating the victims about their sexual history. Several states also provide privacy protection by excluding or limiting public exposure of the victim's identifying information (such as name, address, and telephone number). Most laws are now gender and relationship neutral.

### **2.2.2 Defilement**

Where a person commits an act which causes penetration with a child below the age of 18 years, they will have committed the offence of defilement. The punishment for defilement depends on the age of the child. A person who defiles a child whose age is 11 years and below shall be sentenced to life imprisonment, between the ages of 12 and 15 years shall be jailed for 20 years or more and between the ages of 16 – 18 years shall be jailed for 15 years or more. It shall not be a defence that the child agreed to the acts unless the child deceived the accused into believing they were over 18 years and the accused reasonably believed that the child was above 18 years.

The actual incidence of child sexual abuse is difficult to measure, since it is one of the most underreported forms of crime. It is estimated that only 10 to 20 per cent of the sexual abuse incidents are actually reported. Fear, embarrassment and concern about the possible response of social, medical and legal agencies most likely contribute to underreporting (Fogel and Lauver, 1990).

### **2.2.3 Sexual Assault**

Sexual assault occur when a person unlawfully and purposefully uses an object or any part of their body (except his or her private parts) or any part of an animal to penetrate the private parts of another person without the person's permission. When found guilty, a person shall be jailed for at least 10 years and this can be increased to life imprisonment. The only exception is where such penetration is carried out for proper, professional and hygienic medical reasons.

### **2.2.4 Sexual harassment**

When a person in authority uses their position of authority to try and make another person have sexual intercourse with them against their will, that person in authority is guilty of sexual

harassment and shall be jailed for 3 years or more or made to pay a fine of Kshs. 100,000 or both. A person who is claiming to have been sexually harassed has to prove that submission or rejection to the harassment was to be used as a basis to decide whether they would get employment or assistance from the person harassing them, decide conditions of employment or affect their performance at work or in school among others (Geer et al, 1994).

### **2.3 Justice and legal reform to sexual violence**

There is increasing skepticism that reform of rape law alone can change victims' experiences appreciably. Stubbs (2003) has suggested that while legal reforms may have "symbolic value", they are "likely to be limited in effectiveness" because of the "resilience of cultural mythologies about women and about sexuality". Koss (2006) has made a bold "call for action" for considering alternatives to conventional criminal justice, including restorative justice conferences; and Naylor (2010) has proposed a restorative justice conference model, along with a specialist court. Edited collections on gendered violence and restorative justice have canvassed the views of academics and practitioners (Ptacek, 2005, 2010; Strang & Braithwaite, 2002), many of whom support the development of alternatives. Those in the victim support and advocacy sector have also contributed to this shift in perspective (Amstutz, 2004; Achilles, 2004; S. Herman, 2004; Worth, 2009).

Legal reform has had dual goals of efficacy (i.e., increasing the likelihood of conviction) and process (i.e., "attention to women's perceptions and experience of the process itself"), but these goals do not "always coincide" (p. 831). Further, they emphasized the role of "cultural and epistemological constructions of gender and violence" in hindering desired change. Such cultural constructions explain why despite legal reform, many victims remain dissatisfied by their experiences in the criminal justice system; and why we cannot assume that alternatives will be any less affected by them (Stubbs, 2003; see also Smart, 1989). However, innovative practices have the potential to "prize open cracks in patriarchal structures" (Braithwaite & Daly, 1994, p. 210), to build "links, interruptions" to stop violence (Pennell & Burford, 2002, p. 126), and to "check and challenge" an offender's denials and minimizations of sex offending (Daly & Curtis-Fawley, 2006)

### **2.3.1 Justice Needs Compared to Justice Response**

The law and order agenda supported by the anti-sexual violence movement has achieved major law and policy reforms dating back to the 1970s, including expanding definitions for rape, removing corroboration requirements, establishing rape shield protections, opening avenues for civil justice, increasing punitive responses for sexual assault (longer sentences, sex offender registration, community notification, and civil commitment), educating criminal justice personnel, and introducing restorative elements including compensation schemes, rights to notification, and victim impact statements. Some coalitions have opposed some of these changes and recently the National Alliance to End Sexual Violence has expressed concerns about civil commitment and mandatory minimum sentences (personal communication, July 18, 2007). This coalition views these policies as reactionary agendas driven by politicians who respond expediently to high profile cases. For the purposes of this article, it is important to recognize that criminal sanctions are only realized when cases have been reported to police (compensation), charged (rights to notification) or preceded through sentencing (e.g., impact statements, incarceration and sex offender registration).

Examination of self-reports by physicians, nurses, police officers, and survivor/victims about the statements made or actions taken during rape care reveal that perceptions of their helpfulness differed (e.g., Campbell, 2005). Whereas these groups of service providers rated their behavior as very supportive, survivor/victims frequently did not. The presence of an advocate beginning in the emergency room resulted in some improvement in survivor/victims' experiences compared to survivor/victims without advocates. However, even with an advocate present more than half of survivor/victims still felt bad about themselves, guilty, depressed, anxious, violated, disappointed, distrustful, and reluctant to seek further help (Campbell, 2006). Despite efforts to sensitize a variety of personnel in the systems that respond to sexual violence, there is inherently some element of shame and degradation in the process; the justice system is adversarial by design. Survey responses showed that 46% of survivor/victims were dissatisfied with police interviews (Monroe et al., 2005). Likewise, interactions with prosecutors were negatively experienced. Prosecutors are tasked with proving that the accused is guilty, which often causes survivor/victims to feel as if they must prove they were raped. Most survivor/victims who participated in trials before juries in the US believed rapists had more rights, the system was

unfair, their statutory victims' rights were not implemented, and they weren't given enough information or control over handling their case (Frazier & Haney, 1996). The conclusions are supported by recent findings in Germany, even though rape trials in that country are not by jury and an extensive victim/survivor support system is in place (Orth & Maercker, 2004). Likewise, results are similar in South Africa where special prosecution units for sexual assault and rape courts are utilized (Walker & Douw, 2006). These authors' data fail to support the objectivity and ability of specialized prosecutors and courts to reduce re-traumatization

Survivor/victims who pursue civil cases also frequently fail to achieve satisfaction of their primary goals. Civil justice involves two types of cases, tort and non-tort. A *tort* case involves an assertion of wrongful actions and available sanctions take the form of monetary recovery. *Non-tort* cases seek remedy for problems such as immigration matters, wrongful termination, education disruption, or denied medical benefits. In civil actions an entirely new set of legal obstacles comes into play compared to criminal justice (Bublick, 1999; 2006). Furthermore, attorneys are unmotivated to pursue most tort cases because most offenders are not wealthy enough from attorney's perspectives, as compensation is contingent on the amount of money awarded in a settlement or judgment. And even if received, settlements virtually universally exclude any acknowledgement of wrong-doing by the offender (Bublick, 2006; Des Rosiers, Feldthusen, & Hankivsky, 1998; Herman, 2005). Where non-tort legal representation could be of assistance, few attorneys will work with survivor/victims of sexual assault because they are often unable to afford the hourly fees that are charged (Seidman & Vickers, 2005). Civil attorneys also observe that many survivor/victims have problems that the civil justice system cannot resolve.

### **2.3.2 Criminal justice system**

Currently, the criminal justice system is the primary institution available for responding to sexual offences, yet this system is underused and largely ineffective at prosecuting cases (Daly & Bourhours, 2009). Extensive changes have been made to sexual assault law and procedures over the past forty years, and there has been increasing emphasis on responding to the needs of victim/survivors of sexual assault (and crime victims more broadly) within criminal justice systems. This has been demonstrated through, for example, the introduction of victims' rights

charters; the provision of specialist victim support services, and governments investing money into reforms aimed at improving support for and responsiveness to the needs of victim/survivors of sexual assault. However, research indicates that reforms have not translated into significant change at an operational level (Heenan & McKelvie, 1997; Jordan, 2004; Lievore, 2003, 2005; Stubbs, 2003; VLRC, 2001, 2003, 2004). Reporting rates remain low, attrition rates are high (Lievore, 2003; Daly & Bourhours, 2009) and victim/survivors continue to report experiencing the justice system's procedures, particularly trials, as re-traumatizing and re-victimizing (Heath, 2005; Koss & Achilles, 2008; Orth & Maercker, 2004; Taylor, 2004). The limited success of these reforms arguably may be attributed to their restricted focus. Indeed, key problems underlying prosecuting cases of sexual assault have not been addressed, including problems with the design of the legal system (particularly adversarial processes) for responding to the justice needs of the victim/survivors, as well as evidentiary issues that result from perpetrator strategies and power disparities that underlie sexual offending (Clark & Australian Centre for the Study of Sexual Assault [ACSSA] Team, 2010; Cossins, 2000, 2006a, 2006b).

Victim/survivors are placed in a central yet compromised position within the criminal justice system, and two interrelated aspects facilitate this. First, there is the nature of sexual assault - it regularly occurs in private, the victims themselves are often the only witness, there are generally long delays before disclosure, there is rarely any physical evidence and the case often centres on issues of credibility. Secondly, the entrenchment throughout society of misconceptions and stereotypes about victim/survivors (for example, that women and children routinely lie and fantasize about sexual assault, and that women are responsible for their own victimization) infiltrates the justice system. Together, these aspects pose a unique set of challenges to the traditional processing of cases.

Given victim/survivors' poor experiences with system procedures and the poor likelihood of securing a conviction against a sexual offender, the idea of victim/survivors obtaining a sense of justice from the criminal justice system appears remote, even in the face of significant substantive law and procedural reforms. Yet the criminal justice system is customarily considered the primary institution for responding to such crimes. Reforms need to move beyond

focusing on reducing victim trauma within current system structures, and towards addressing how the system can be responsive to victim/survivors' individual justice needs.

## **2.4 Legislations and Policy Implementation Challenges**

Despite the existence of policies, legislative reforms, plans and programmes, gender disparities still exist in legal, social, economic and political levels of participation in decision making, as well as access to and control of resources, opportunities and benefits. Overall, the implementation of policies and laws has been slow; a situation attributed to gaps in the laws, delayed enactment of gender related legislation and lack of comprehensiveness in content of the same laws, for example, the Sexual Offences Act and the Children Act. These gaps have already been referred to in the various laws discussed above (Judith, 2005).

### **2.4.1 Inadequate resources**

Lack of and/or inadequate resources, both human and financial have led to watered down efforts in terms of dealing with SGBV. Resources, especially manpower and fiscal, are needed to deal with cases of SGBV are more prevalent. This is because there is need to disseminate information through organisation of workshops, training programmes and sponsoring gender-related courses in schools in order to create awareness on the highlights and consequences of SGBV and available redress mechanisms to the entire community. This cannot be done where the resources are either limited or are not there completely (Capelon, 2004).

### **2.4.2 Lack of Monitoring and Evaluation (M&E) framework**

There lacks a proper mechanism in place to follow up on the implementation processes. The projects and programmes on the ground need to be constantly monitored and evaluated in order to ensure that policy implementation agencies do not veer off the right course. The consequence of absence of or ineffective monitoring and evaluation frameworks is that the projects and/or programmes risk not achieving the intended goal or waning along the way (Clark and Goldblatt, 2007).

### **2.4.3 Socio-cultural issues**

Socio-cultural biases which favour men over women and the girl child have consistently continued to frustrate the implementation of the legal framework. Traditionally, women have been viewed as lesser beings than men. This means that the man can do whatever he wishes to the woman given that he 'bought' the woman through payment of bride price (Combrink, 2010). Violence has thus been condoned and accepted as a socio-cultural norm within the society. This has greatly frustrated the implementation of legislation and policies.

### **2.4.4 Judicial Decisions**

Despite legislation and programmes addressing SGBV, there are still some inconsistencies in terms of judicial actions. Women also are not aware of their rights, and that enforcing such rights is thus a huge challenge (Cornwal, 2001). Attempts to come up with gender sensitive legislation have received inadequate support due to traditional cultures and practises as well as a male-dominated parliament which is gender insensitive and un-responsive. Marital rape remains a source of controversy within sexual violence legislation and court's interpretation of the same. Grounded in traditional notions of women as property, customary laws in many countries have long defined sex within marriage as necessarily consensual, FIDA, (2012) leading to the 'conceptual impossibility' of a man raping his wife. This conception underlies the 'marital rape exception' that still exists in many jurisdictions. Indeed, the 'defence of marriage' remains a legal defense in at least 53 countries, including Kenya. However, many local courts continue to grapple with the task of defining the act of rape, determining whether marital rape can and/or should be criminalized, and clarifying where consent ends and force begins. National sentencing practices in SGBV cases vary greatly, and thus have been subject to criticism on several grounds. Despite these challenges, the jurisprudence of sexual violence continues to evolve to better acknowledge and redress the horrific experiences of victims (French, 2002).

In comparison, the South African SGBV jurisprudence, with the help of the courts, has become much more developed than that of Kenya. This became especially more pronounced with the coming into effect of a new constitutional dispensation in South Africa which sought to promote the rights of women in all relational spheres. For instance, South Africa has legislation enacted the Domestic Violence Act to deal with domestic violence. The Court in the case of *Omar v The*



*Government of the Republic of South Africa and Others* noted that the Act serves an important social and legal purpose in addressing the scourge of domestic violence and South Africa's obligations under the Constitution and international law to combat domestic violence. The Bill of Rights under the South African Constitution has been emphasized repeatedly in judgments recently handed down by the Constitutional Court. In *Fraser v Children's Court, Pretoria North and Others*, the Constitutional Court confirmed this: There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised (Friedan, 2003).

The Supreme Court of Appeal in the matter of *Van Eeden v. Minister of Safety and Security* held that the appellant was owed a duty by the respondent, the state, to take reasonable measures to stop an escaped serial rapist from harming her. The Supreme Court of Appeal upheld an appeal by a young woman (appellant) who sought damages from the state (Karmen, 2010). Her action was based on the state's breach of its duty of care towards her, following her sexual assault, rape and robbery by a known dangerous criminal who had escaped from police custody.

The court held that it was the duty of the state to protect people against violent crime and that the police had a duty of care towards the victim. The court further held that the state was obliged to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of the person. The court also held that the state was obliged by international law to protect women against violent crime and that in the light of these imperatives a special relationship between the plaintiff and the defendant was not required for the duty of care to exist. The Court declared that the conduct of the police was wrongful and the State (as employer of the police) was liable to the plaintiff for such damages as she was able to prove. This shows that South Africa is far ahead compared to Kenya in terms of how the give effect to international human rights law by upholding the principle of due diligence (Kibwana, 2006).

The Kenyan courts have recently adopted this approach in protecting the rights of women as was observed in *C.K. (A Child) & 11 others vs. The Commissioner of Police & 2 others* where the petitioners had sought the assistance of the court to declare that the effect of the respondents, that is the police, failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement violated the petitioners' fundamental rights and freedoms (Laurel, 2008).

“Having considered the evidence in the petitioners' affidavit and the petition herein, the relevant articles in the Constitution of Kenya, (2010), the general rules of international law, treaty or convention ratified by Kenya and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners complaints of defilement and other forms of sexual violence infringes on the petitioners fundamental rights and freedoms, under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1) (d) of the Constitution of Kenya, 2010”. While this case provided a positive starting point in terms of protecting the rights of both women and children against sexual and gender-based violence, a lot still needs to be done to be up to standard as what is happening in South Africa.

#### **2.4.5 Legal Illiteracy**

In recent years, the focus of literacy has changed from an emphasis on levels of schooling to a focus on functional skills. Most lay people are not alive to the realities of the legal environment. Knowledge of the law is power and helps in self realization. Laird Hunter suggests that people who use the legal system must be able to guide themselves through a process that they understand and, at appropriate places along the way, they are able to recognize that they have a legal right or responsibility, so as to enable them to exercise or assume it (Merry, 2009). Legal literacy also involves the ability to recognize when a problem or conflict is a legal one and when a legal solution is available; know how to take the necessary action to avoid problems, and where this is not possible, how to help themselves appropriately; know how and where to find information on the law, and be able to find information that is accessible to them, know when and how to obtain suitable legal assistance; have confidence that the legal system will provide a remedy, and understand the process clearly enough to perceive that justice has been done (Meyersfeld, 2010).

Where people are not alive to their rights, this becomes a good breeding ground for all forms of injustices. Women become the biggest victims as they are more vulnerable to abuse by men. It is through awareness of the laws and the objectives served by them that citizens, particularly marginalized or underprivileged groups, can obtain the benefits that law seeks to offer them.

Taking into consideration the present scenario, issues like empowerment of women and making them aware of their rights, which they can use to fight injustices, become a distant dream in the absence of legal literacy. Lack of awareness and education are the main causes for injustices being meted out to the marginalized populations, especially women (Odhiambo, 2001).

In 1995 the Fourth United Nations World Conference on Women was held in Beijing with the object of achieving equality for women in various walks of life. The conference adopted the BPFA which emphasized the need for access to free or low-cost legal services, including legal literacy, especially focusing on women living in poverty (Roman, 2006). It also noted that women's poverty was connected to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance, limited access to education and support services and women's minimal participation in the decision-making process. Legal literacy programmes have also been credited with helping women to understand the link between their rights and other aspects of their lives, and in demonstrating that cost-effective initiatives can be undertaken to help women obtain those rights (The 7th Periodic Report of the Government of the Republic of Kenya, 2010).

## **2.5 Theoretical Framework: Feminist Theory of Justice**

Feminist explanations locate the cause of this crime within society. They suggest that the crime of rape and sexual assault is a crime of power. Rape and sexual assault is an abuse of power, which: is a result of unequal power between perpetrator and victim; reinforces the inequality of power in this relationship; and reinforces the inequality of power between men and women. Feminist theory focuses on the wider picture of women living in a society which is dominated by men. Rape and sexual assault is seen as one of the ways in which men enact their dominance in a violent way over women, children and other men. It rejects ideas that rape results from sexual attraction or from the way victims/survivors dress or behave.

When looking at our society, and indeed, globally, men are in the most powerful positions in social, political, legal, economic, military and religious institutions. The dominance of men leads to patriarchal societies in which men make the rules and the laws. These rules and laws are structured in ways that uphold the status quo and thus the powerful positions of men. As a result, there is systemic and structural discrimination of women and other vulnerable and marginalized

groups in society. These inequalities lead to increased vulnerability and negative social, economic and health outcomes for marginalized and disadvantaged groups. In regards to rape and sexual assault, this means increased vulnerability to become a victim/survivor of rape or sexual assault and to disadvantages when dealing with health, legal and other social systems.

Currently, few rape victim-survivors receive justice, which is highlighted by the low national conviction rate of approximately six per cent. Women disproportionately suffer the harms of rape and the injustices of the legal system, as rape is a gendered problem it is a form of violence perpetrated by men against women in the majority of cases feminists have been arguing for justice for rape victim-survivors since tackling the problem of sexual violence was prioritized in the 1970s. Many feminists have turned to the criminal law to address rape because crimes are understood to be the most serious forms of wrongdoing, which are not only harmful to the individual victim but also to society in general, and because criminalization and punishment are symbolically powerful in condemning and proscribing wrongdoing.<sup>9</sup> Viewing the criminal law in this way, many feminists have argued for changes in the legal definition of rape so that it better reflects and captures women's lived experiences, and for prison sentences which reflect the severity of rape and will punish perpetrators accordingly.

In addition, arguments for improvements in the criminal justice process have commonly been made, as victim-survivors are often treated with hostility and disbelief within a system which marginalizes their needs and interests.<sup>11</sup> Indeed, over the past few decades there have been gains made in relation to both substantive law and procedural rules and policies. For example, the marital rape exemption was abolished in 1991, and legislation has been enacted which restricts the admissibility of sexual history evidence. And yet, what the criminal law promises that is protection of actual and potential victim survivors, and legal recognition and punishment of rape it continually fails to deliver.

The conviction rate remains at a constant low, and there has been little significant systematic improvement in the treatment of rape victim-survivors in the criminal justice system. Severely punished. Others, however, are concerned with the reliance on the criminal law and carceral punishment, in particular with the unintended alliance or association with an increasingly punitive crime control agenda and neo-liberal state Given the limited improvement in the criminal justice system to date and the drawbacks of relying on the criminal law, some feminists

have suggested looking beyond the criminal law and criminal justice system. Also taking this position and exploring the unconventional responses of restorative justice and tort law, the thesis contributes to the small body of scholarship which is developing and challenging the general presumption of many criminal justice and feminist legal scholars that justice for victim-survivors equates to retributive justice.

### **2.5.1 Relevance of the theory to this study**

This theory is relevant to this study because it recognises that all human rights are universal, interrelated, indivisible, and interdependent and are inherent in all human beings. It acknowledges that sexual and reproductive rights cannot be realised without the realisation of other broader human rights, for example, the right to information, privacy and confidentiality and education. Furthermore, a human rights-based analysis may reveal capacity gaps in legislation, institutions, policies and voice. Legislative capacities may need to be strengthened to bring national laws into compliance with treaty obligations. Institutional reforms may be needed to improve governance, strengthen capacities for budget analysis and provide people with effective remedies when human rights are violated (Collins 2000).

This study shall use a human rights based approach framework to assess the extent to which the government of Kenya is fulfilling sexual and reproductive health rights and how it has set its priorities to improve service delivery through various policies and legislations that meet international standards. Further the human rights based framework will assist in establishing how an enabling policy and legal framework helps to protect and victims from sexual violence. It will also help identify the gaps in the access and utilisation of policy and legal frameworks of SRH services and information by vulnerable and disadvantaged groups (McCall, 2005).

“Capacity gap” analysis: human rights approach has been widely used in capacity gap analysis where serious attention is given to the capacities of rights-holders to access information, organize, advocate policy change and obtain redress. In this connection the assessment rightly recognize the role of civil society organizations and reviewed their capacities. It is therefore vital for the realization of economic and social rights, as well as being necessary for deeper gender analysis. A human rights-based approach integrates international human rights standards and principles in development activities, including women’s human rights and the prohibition of sex discrimination (DFID, 2005)

## **CHAPTER THREE**

### **METHODOLOGY**

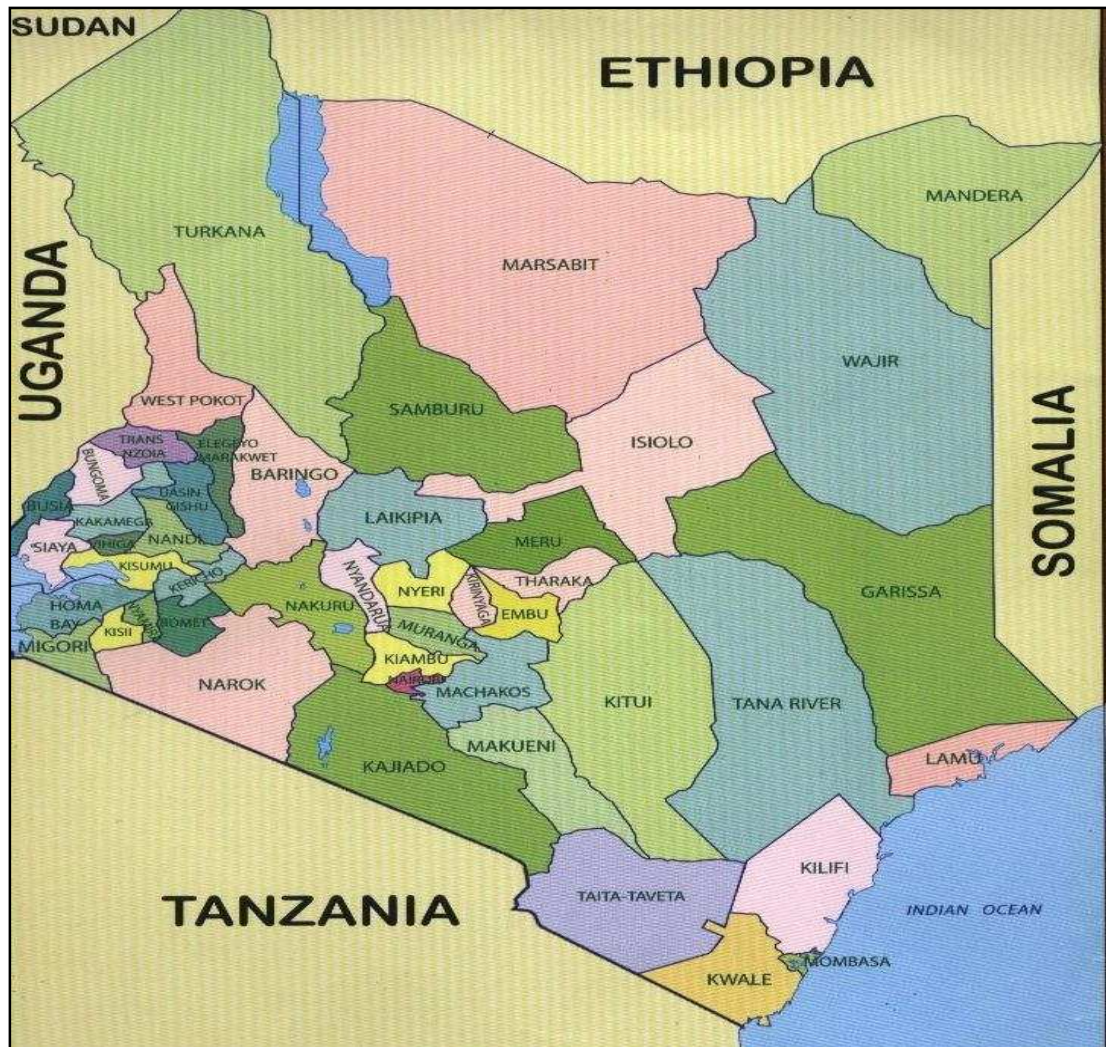
#### **3.1 Introduction**

This section describes the research methodology that was used in this study. It explains the research design, target population, sampling procedures, sample size, data gathering instruments, and analysis procedures. The ethical considerations for this study are explained in the last section of this section.

#### **3.2 Research site**

Kibera is one of the largest slums in Africa with an average population of approximately more than nine hundred thousand people (Umande Trust, 2010). The slum stands on a 2.5 square kilometers and is roughly five kilometers away from the city center. In 1912, Kibera was a settlement in a forest outside Nairobi; as a result of World War I, it became a resettlement area for Nubian soldiers returning from service. The colonial government then, allowed settlements to grow and opened gates to other tribes from across the country. Lack of reliable data on population and growth parameters on Kibera slums has led to disagreements on the size of the slums as one of the largest in the continent. UN-Habitat puts the total population at between 350,000 to one million. International Housing Coalition estimates the population to more than half a million people, while experts on urban slums give an estimate of more than 800,000 people. Government statistics on the total population of Kibera slums to around 200,000 people [KNBS, 2010]

Map 1: Counties of Kenya

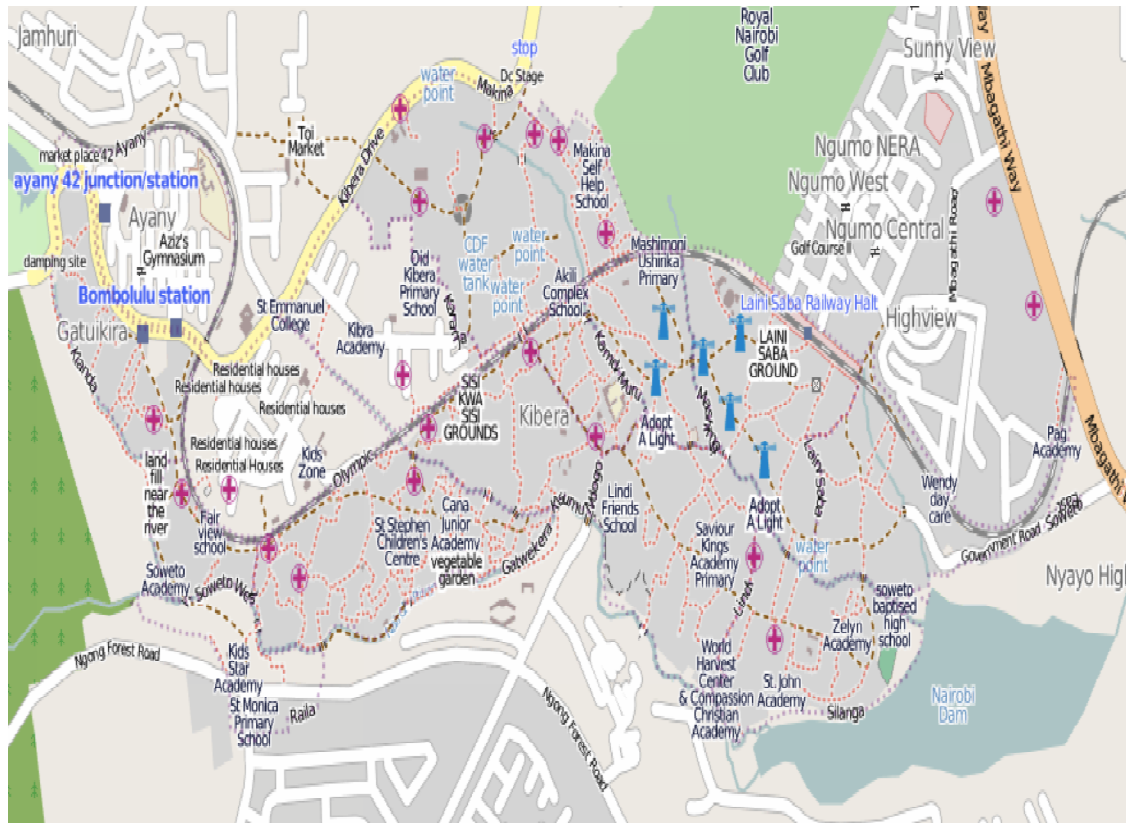


Source:

[https://www.google.co.ke/search?q=kenya+contituencies+map&tbm=isch&tbo=u&source=univ&sa=X&ei=ZKhsUoHIFKGe0QXm\\_IDICA&ved=0CCgQsAQ&biw=1](https://www.google.co.ke/search?q=kenya+contituencies+map&tbm=isch&tbo=u&source=univ&sa=X&ei=ZKhsUoHIFKGe0QXm_IDICA&ved=0CCgQsAQ&biw=1)

Kibera slum is within Nairobi County of Kenya. **Kibera** is a division of Nairobi Area, Kenya, and neighborhood of the city of Nairobi, 5 kilometers from the city centre. Kibera is the largest slum in Nairobi, and the largest urban slum in Africa.

**Map 2: Map of Kibera Slums**



Source: <http://www.flickr.com/photos/albertkenyaniinima/6574588143/>

The Kibera is within the city of Nairobi in Kenya. There are approx 1.2 million slum dwellers in the Kibera in an area of 2.5 square kilometres. 75% of the population of Kibera are under the age of 18 and 100,000 children living here are orphaned. It is the biggest slum in Africa and the slum environment is degrading and dehumanizing, characterized by abject poverty, corruption, periodic violence and contagious diseases due to environmental pollution.

### **3.3 Research design**

The study used descriptive exploratory design to collect qualitative and quantitative data to establish the factors that inhibit sexual violence survivors from accessing legal justice in Kibera slums of Nairobi County. This research design is deliberately selected for this study because it allows for in-depth scrutiny into the issue.



### **3.4 Study population**

The study population encompassed of women who have experienced or witnessed gender based violence within Kibera. The unit of analysis were mainly the individual woman aged 18 years and above.

### **3.5 Sample Population and Sampling procedure**

The sample population consisted of 50 respondents. This sample is considered suitable based on the fact that it shall be strengthened by qualitative methods such as narratives, Key informant interviews and focus group discussions. Since sexual violence is a sensitive issue random sampling were used for sampling. To reach the first informants the researcher went through institutions such as hospitals, district gender officer and the police. This enhanced contact with reported cases after which the reported cases since the study only look at the reported cases.

### **3.6 Data collection methods**

#### **3.6.1 Questionnaires**

A structured questionnaire with both open and closed-ended questions was used for gathering both qualitative primary data. Respondents were asked a set of questions touching on their background information, sexual violence, action taken and obstacles faced. This exposed the factors inhibiting the realization of justice for sexual violence survivors.

#### **3.6.2 Focus group discussions**

Focus Group Discussions (FGDs) comprised of representatives from civil society organization(s), youth leaders, persons with disabilities, women leaders, and religious leaders, the police and the district gender officers. Focus group discussions helped in gathering group information about the sexual violence and factors that limit access to justice for the sexual violence survivors. A focus group discussion guide based on the study objectives was used. Participants discussed the forms of sexual violence, their causes, the action they have taken against sexual violence and the factors that limit access to justice for the survivors of sexual violence.

### **3.6.3 Key informant interviews**

The key informants were purposively sampled based on their expert knowledge and general experience on sexual violence. A key informant guide was used to facilitate the gathering of data on sexual violence. The key informants were the chief of the area, government representatives and council representatives.

### **3.6.4 Narratives**

This study also uses narratives from individual who are survivors of sexual violence and they provided stories about their live experiences. The narratives are expected to reveal versatile insights about feelings, sentiments, desires, thoughts, and meanings of the individuals who are survivors of sexual violence. According to Randolph (2007), narrative research is the study of a single individual and his or her life experiences.

### **3.6.5 Sources of secondary data**

Secondary sources such as books journal articles, periodicals and online publications shall be used to provide literature on the state of sexual violence in Kenya.

### **3.7 Data analysis and presentation**

Once data are collected, they are organized systematically under various themes. Both qualitative and quantitative data analysis techniques were applied in this study. Qualitative information collected from key informants and focus group discussions were transcribed, analyzed thematically, and presented in a narrative form (Kombo & Tromp, 2011). The Statistical Package for the Social Sciences (SPSS) was used to analyze quantitative data, which was then to be presented using both graphical and statistical techniques.

### **3.8 Ethical considerations**

Before the interviews are conducted, a statement of consent was read to all subjects in the study, they were asked for their informed consent to voluntarily participate in the study. Research on sexual violence was put the following ethical issues into consideration. Before going for the fieldwork, a research permit from the Commission for Science, Technology and Innovation at the Ministry of Education was sought. In addition, permission to be away from the Institute of

Anthropology, Gender and African Studies, University of Nairobi, was requested. Before conducting oral interviews, an explanation was made about the intent for doing the research. Interviews were only to be carried out with the respondents that were voluntarily accepted to participate in the research. The information provided by the respondents remains confidential. Similarly, personal information of the respondents was not divulged. The findings of this study were used for academic purposes only.

Respondents signed the informed consent form which summarizes the aims of the study and the possible risks of being a subject. Privacy and confidentiality- any were not connected to the respondents who gave them. Assure and reassure of confidentiality. Right of participation- freedom of choice in participation or taking part was considered.

## CHAPTER FOUR

### DATA ANALYSIS AND INTERPRETATION

#### 4.1 Introduction

This chapter provides an analysis of data collected from the field. The results have been presented in tables, figures and content delivery to highlight the major findings. They are also presented sequentially according to the research questions of the study. The raw data was coded, evaluated and tabulated to depict clearly the factors inhibiting the realization of legal justice for sexual violence survivors in Kibera slums. Questionnaires were distributed to 50 respondents and only 45 were returned fully completed. This constituted a response rate of 90%. According to Mugenda Mugenda (1999), a response rate of more than 80% is sufficient enough for the study.

#### 4.2 Demographic Characteristics

The study targeted women since they are the ones who are mainly affected by sexual violence in the slums. It was found that Women and girls in Nairobi's slums live under the constant threat of sexual violence, leaving them often too scared to leave their houses. The study sought to find out other demographics about the women in Kibera slums which include age, marital status, educational level and what they did for a living. The results are analyzed in the sections below.

##### 4.2.1 Distribution of Age Group

The respondents were asked to disclose their age. The table below shows the study finding on the distribution of age of respondents.

**Table 4.1: Distribution of Age Group**

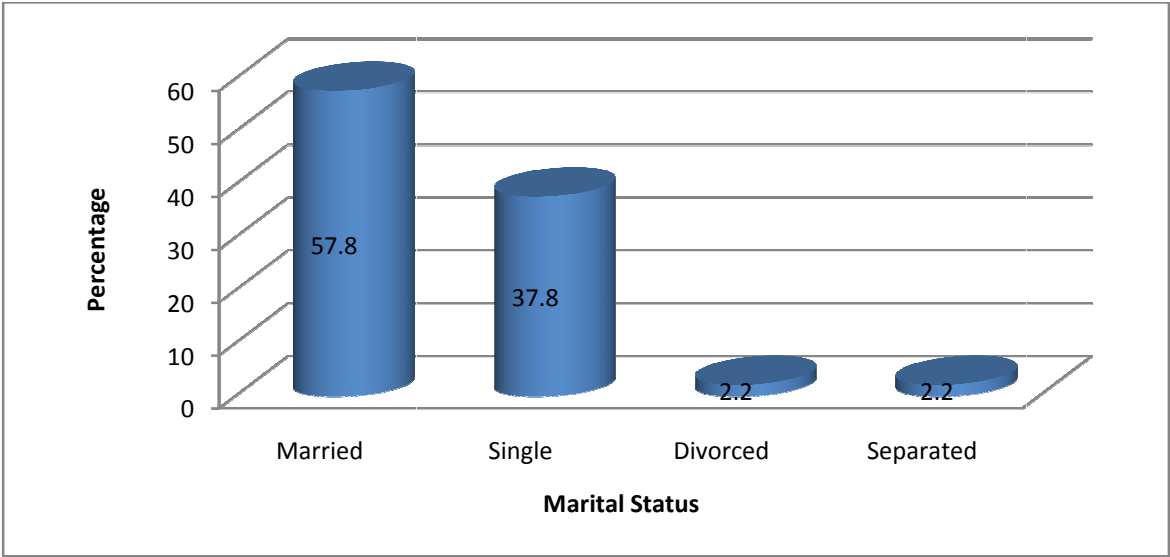
<b>Age bracket</b>	<b>Frequency</b>	<b>Percentage</b>
18-20	1	2.2
21-30	23	37.8
31-40	17	51.1
41-50	3	6.7
51-60	1	2.2
<b>Total</b>	<b>45</b>	<b>100</b>

The study shows that majority (51.1%) of the respondents were in the age bracket of 31-40 years. Those in the age bracket 21-30 followed with 37.8 percent. Those aged 41-50 were 6.7percent, while age bracket 15-20 and 51-60 were very few since each bracket had a 2.2 percent. This shows that the respondents were well distributed in terms of age and there were representatives from all age groups in the study.

### 4.2.2 Marital Status

The respondents were asked about their marital status. The figure below shows the study findings.

**Figure 4.1:** Marital Status

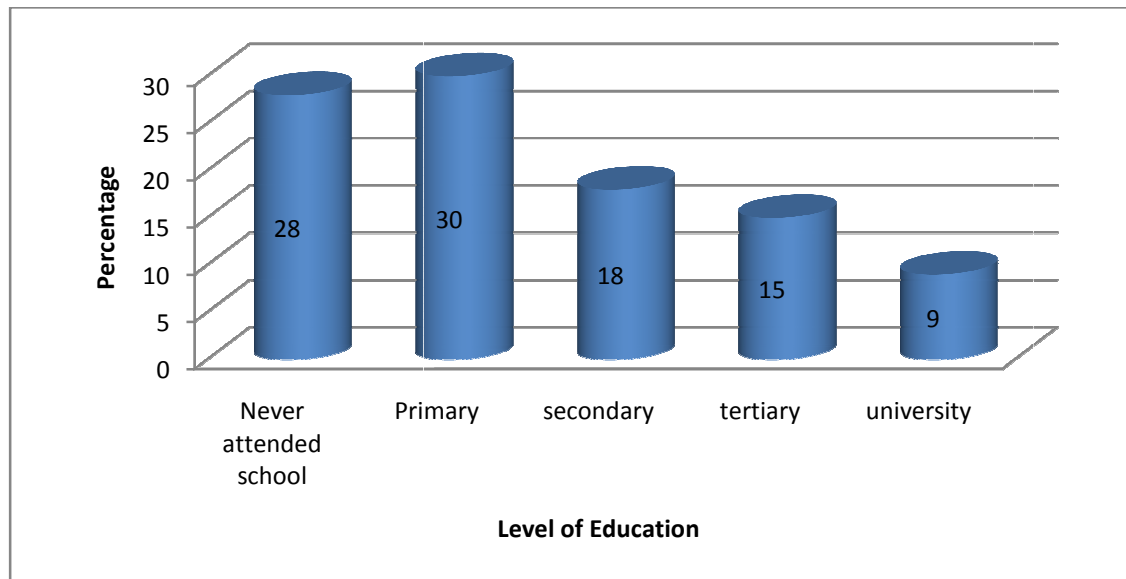


The study found that majority of the respondents 57.8 percent who participated in this study were married followed by singles 37.8 percent whilst divorced and separated formed the least number 2.2 percent each.

### 4.2.3 Level of education

The respondents were asked to indicate their level of education. Figure below shows the study findings on the respondents level of education.

**Figure 4.2: Level of education**

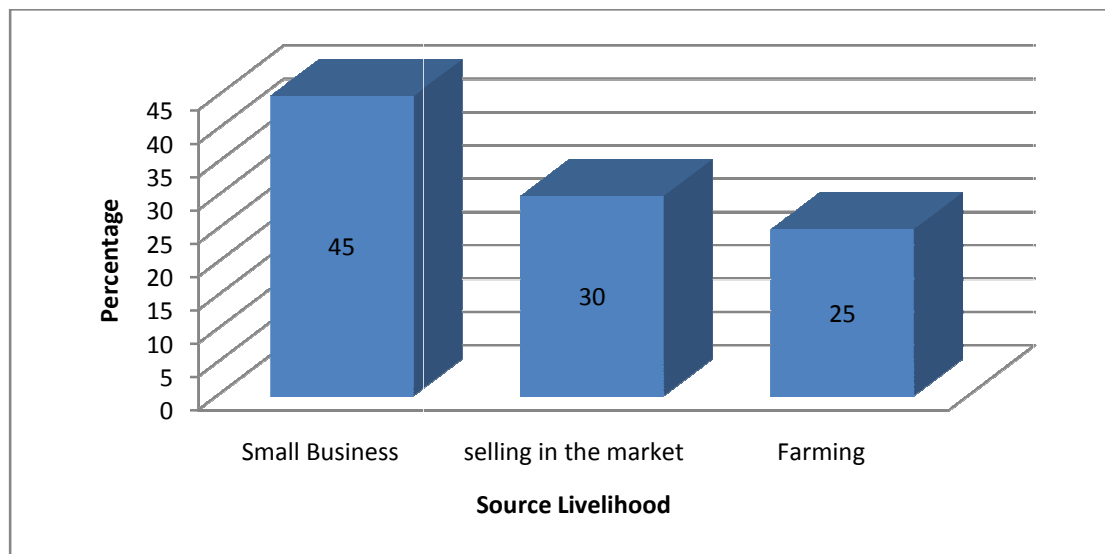


The result shows that majority 30% of the women interviewed in Kibera slums had attained education up to primary school. This was followed by 28% who had not attained education at all, 18% had gone up to secondary school, 15% had gone up to tertiary levels while 9% had gone up to the university level.

#### **4.2.4 Source of livelihood**

The participants were asked to indicate their source of livelihood. The Figure below shows the study findings.

**Figure 4.3: Source of Livelihood**



Results show that majority 45% of the participants indicated that their source of livelihood is by doing their own business, 30% source of livelihood is by selling in the market while 25% source of livelihood is by farming.

### **4.3 Forms of sexual violence**

#### **4.3.1 Sexual Violence Definition**

The respondents were asked to define what they understood by sexual violence. The findings show that the respondent's defined rape as defined physically forced or otherwise coerced penetration. Others defined it as any behaviour perceived to be of a sexual nature which is unwanted and takes place without consent or understanding. They continued to say that Sexual violence can include other forms of assault involving a sexual organ, including coerced contact between the mouth and penis, vulva or anus.

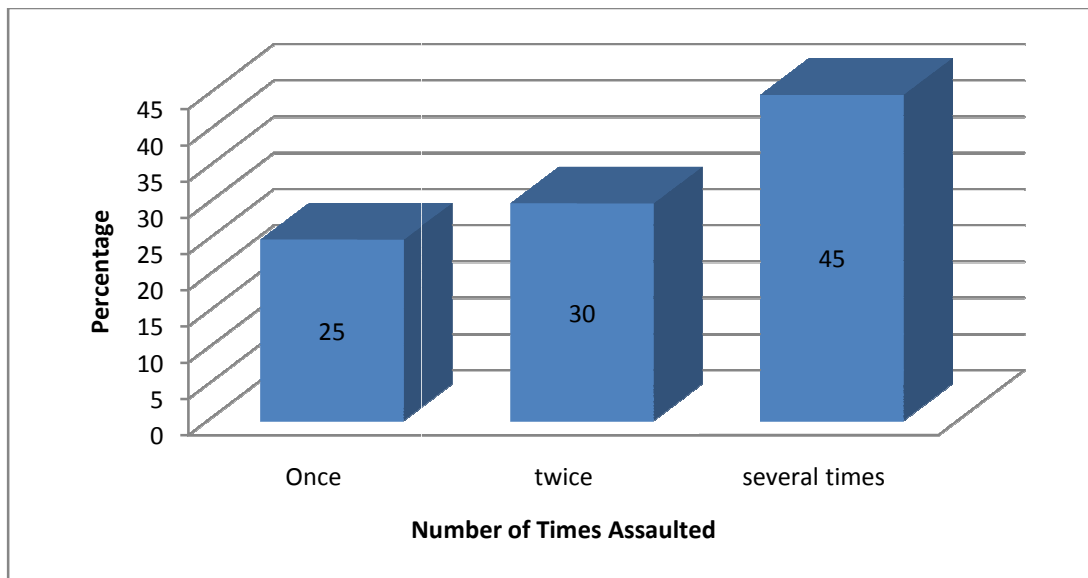
The interviews revealed that sexual violence is as a result of structural gender violence and of socio-cultural patterns that discriminate against women. The structural gender violence is the product of a system that justifies male domination on the grounds of women's supposed biological inferiority. The system and the violence it breeds can be traced to the family, and spreads throughout the social, economic, cultural, religious and political order, rendering the entire apparatus of the State and society as a whole incapable of ensuring women's exercise of their human rights. Socio-cultural patterns are reflected in sexual violence, promote it, and send a

message of control and power over women. They continued to say that the socialization process and cultural practices that discriminate against women play a key role in compounding the violence and discrimination against women and creating the perception that it is the natural order of things. They thus become the principal means by which that violence is bred.

#### 4.3.2 Number of Times they have Experienced Sexual Violence

The respondents were asked to indicate the number of times they had gone through sexual violence. The figure below shows the results.

**Figure 4.4: Number of Times they have Experienced Sexual Violence**



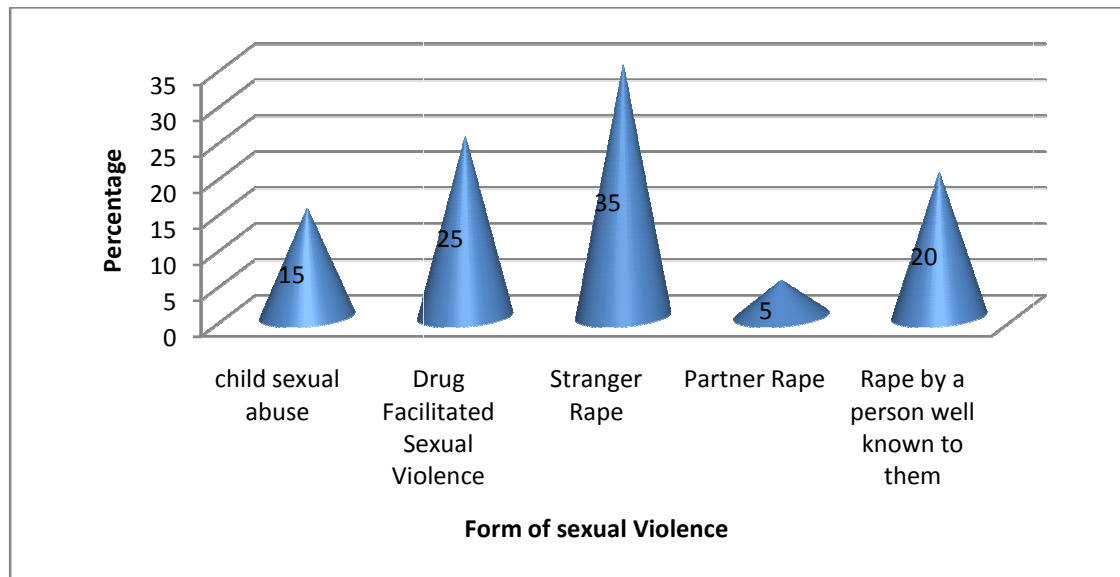
The study found that majority of the respondents had undergone sexual violence several times as indicated by 45%. Followed by 30% those who had undergone sexual violence twice while 25% of the respondents had undergone sexual violence several once.

#### 4.3.3 Type of Sexual Violence

The respondents were asked to show the kind of sexual violence that they had undergone through. The following figure shows a summary of the responses.



**Figure 4.5: Type of Sexual Violence**



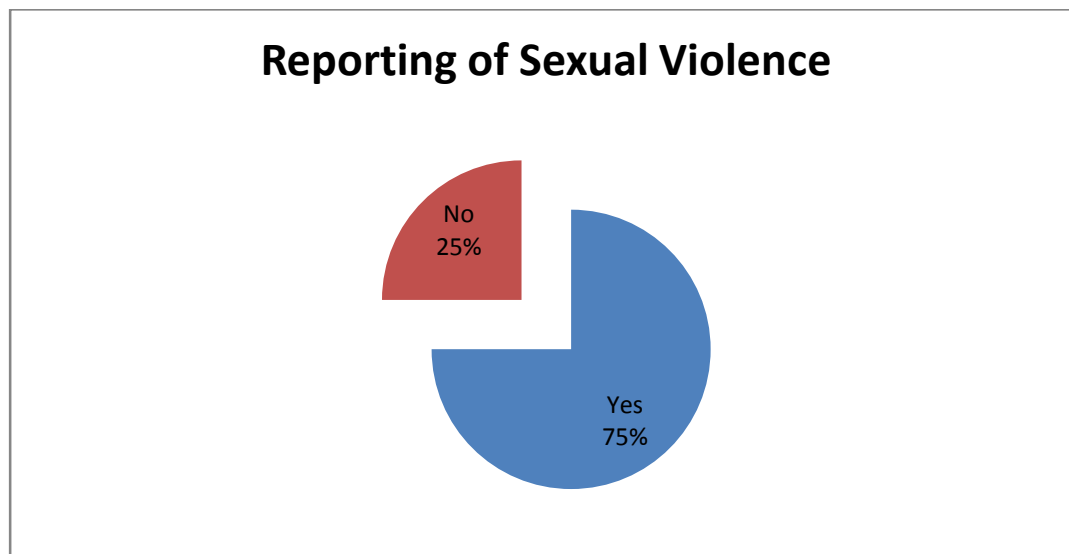
The findings in the figure above show that majority 35% of the respondents were raped by a stranger. This was followed by 25% those who underwent a rape that was drug facilitated. 20% were raped by a person well known to them, 15% were raped when they were children while 5% had partner rape.

#### **4.4 Attempts to deal with sexual violence**

##### **4.4.1 Reporting of Sexual Violence Immediately**

The respondents were to indicate whether they reported the sexual violence. The following figure shows a summary of the responses.

**Figure 4.6: Reporting of Sexual Violence Immediately**

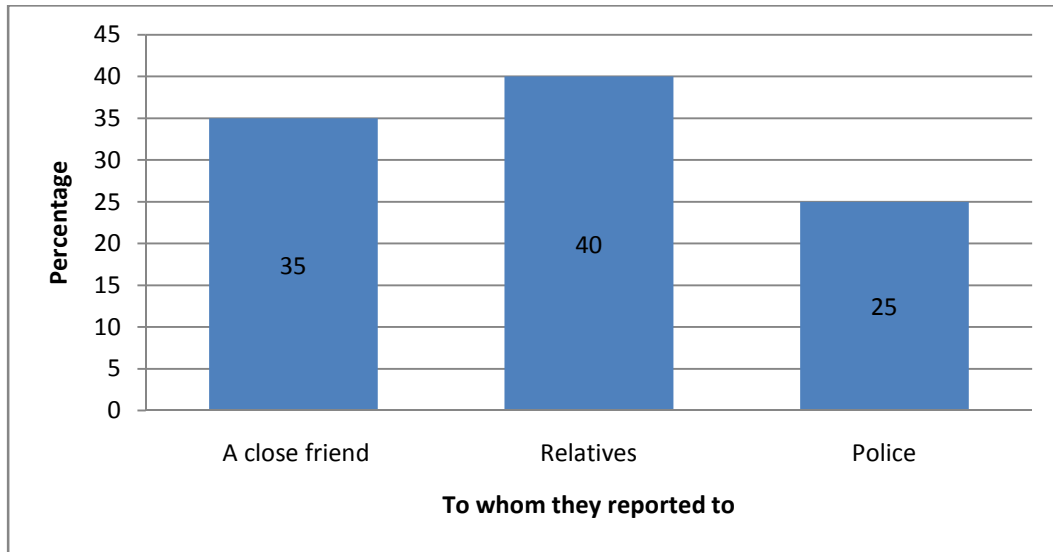


The results show that 75% of the respondents reported immediately they were assaulted while 25% indicated that they did not report immediately of the sexual violence they underwent through. Reasons that victims gave for not reporting included: fear of retaliation from the rapist; feelings of shame and embarrassment; a belief that the rape was a minor incident and not a police matter; and a concern that police and prosecutors would question their veracity and credibility. Interviews revealed that there is severe problem of under-reporting and failure to file complaints of incidents involving sexual violence, because victims fear stigmatization by their communities and reprisals on the part of the assailant. They do not believe that the justice system can offer a prompt and effective remedy and are fearful of the discriminatory treatment to which the judicial system may subject them if they file complaints.

#### **4.4.2 To whom they reported to**

The respondents were asked to show whom they first reported to after the sexual assault.

**Figure 4.7: To whom they reported to**

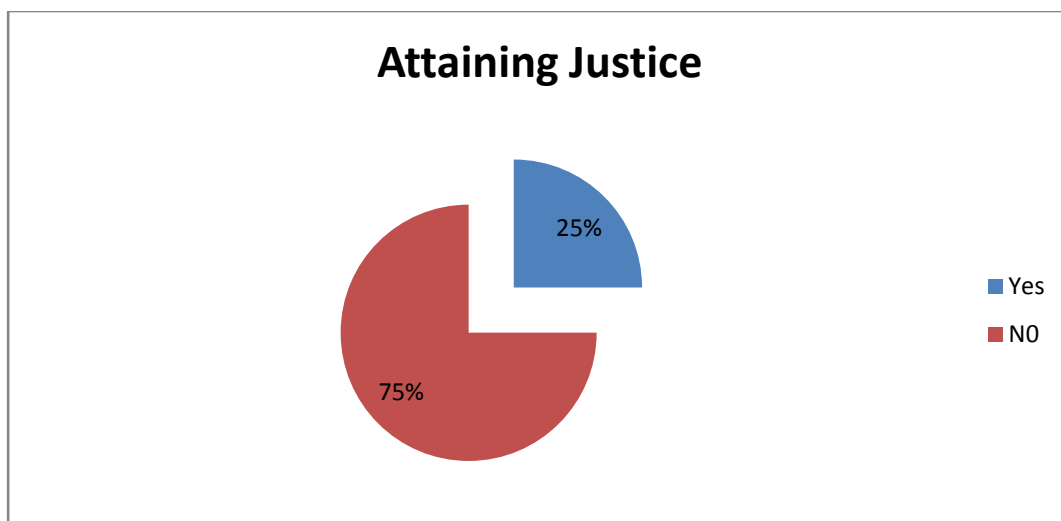


The findings show that majority 40% of the respondents first told their relatives. 35% indicated that they first told their closes friend while 25% first told the police. Others indicated that they went for help from their local leaders; others went to a legal representative while other reported to the closes NGO in the area.

#### **4.4.3 Attaining Justice**

The respondents were asked to show whether they attained justice.

**Figure 4.8: Attaining Justice**



The respondents were asked to indicate whether they attained justice and findings show that majority 75% indicated that they did not attain justice while 25% indicated that they attained justice.

Interviews revealed that the police and other state institutions are reluctant to intervene and enforce restraining orders against aggressors, especially in a family context. The phenomenon of sexual violence is still perceived as a private matter, even though it is formally recognized as a public problem and a human rights issue both at the domestic and international levels.

#### **4.5 Factors that hinder sexual violence victim from accessing legal justice**

##### **4.5.1 The process of Accessing Justice**

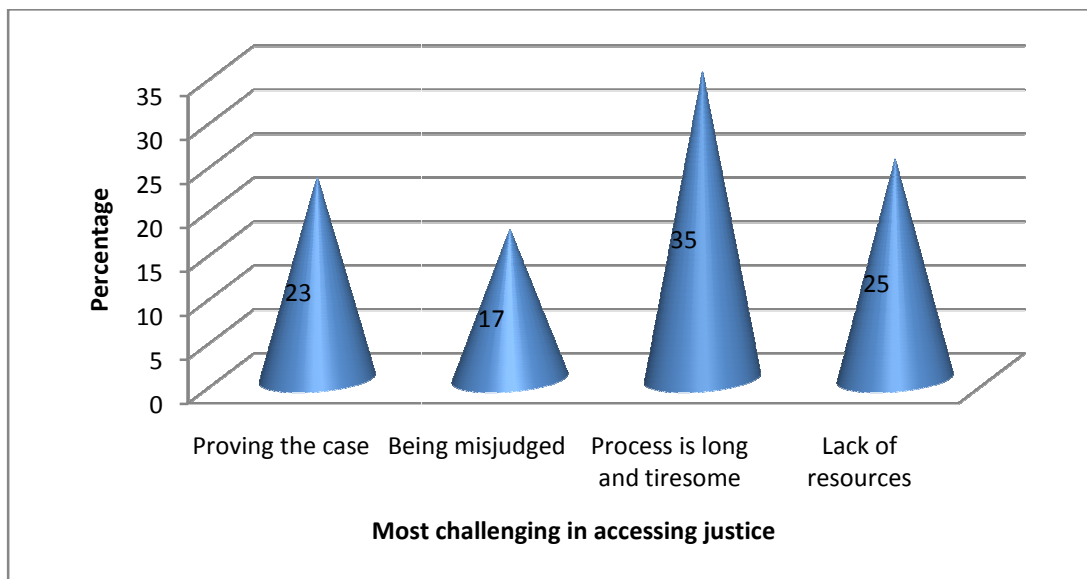
The reports show that majority of respondents indicated that the process begins with the police, who decide whether a crime has occurred, the amount of investigative resources to devote to identifying the suspect, whether to make an arrest of an identified suspect and, if so, the charges to file, and whether to refer the case to the prosecutor. These gatekeeping decisions, which largely determine the fate of the case, do not necessarily produce the outcome of arrest and successful prosecution that the victim expected.

They continued to say that the process continues with the prosecutor, who makes the decision to file charges or not and who prosecutes the case if charges are filed. Research reveals that prosecutors' charging decisions in sexual assault cases are strongly influenced by legally relevant factors such as the seriousness of the crime, the offender's prior criminal record, and the strength of the evidence in the case.

##### **4.5.2 Most Challenging in Accessing Justice**

The respondents were asked to indicate the most challenging thing in accessing justice.

**Figure 4.9: Most Challenging in Accessing Justice**



The results show that majority 35% of the respondents indicated that the process is long and too much time consuming, 25% of the respondents indicated that they lacked resources. 23% indicated that proving the case was difficult while 17% indicated that the most challenging thing in accessing justice was being misjudged.

The interviews showed that individual women have different capacities to negotiate the criminal justice system. Their needs are likely to vary in intensity and nature over time and across situations, such as immediately post-assault, or just prior to the first court appearance. In crisis situations, where a report has been made to police immediately following the assault, women are likely to be in shock, may be unable to think clearly, or may not fully understand the implications of their choices. At this time their personal needs, such as the need to feel safe, may conflict with the needs of the police investigation, such as collecting forensic evidence. Some women experience victimization through attitudes such as disbelief and victim-blaming, which they may encounter from a range of criminal justice personnel at different times in the process.

The focus group discussions revealed that challenges include police decisions to charge or not charge a suspect and prosecutors' decisions to proceed with or discontinue prosecution. Other critical times are related to court appearances, when women are confronted by media attention, the prospect of facing the offender, reliving the sexual assault, cross-examination, potentially being discredited in public and not guilty verdicts.

The interviews revealed that discriminatory socio-cultural patterns and stereotypes about women's role in society prevent and obstruct proper enforcement of existing laws and that result in discriminatory treatment of victims when they turn to the organs of justice.

#### **4.5.3 Ways to Ensure Justice Attained**

Justice can be ensured through restorative options which include sharing circles, victim-offender dialogue, victim impact panels, community reparation boards, circles of support, sentencing circles, conferencing with juveniles and adults, and restorative discipline in educational settings. It was found that victim-sensitive justice capable of responding to these needs would involve processes that respect survivor/victims as autonomous persons, individualize both their needs and the appropriate community responses including avenues for offender accountability, censure, and material reparation if desired, protect physical safety, reduce potential reabuse, and maximize offender fulfillment of commitments.

#### **4.4.4 Why sexual assault matters drop out of the criminal system**

The interviews revealed that given the limited resources of the criminal justice system, reported sexual offences are not automatically subject to prosecution. Cases that enter the criminal justice system are continually reassessed by various decision-makers to determine which cases should be prosecuted in the public interest. These assessments are impacted by legal and extralegal factors relating to the victim, the defendant and the case.

The interviews revealed given the nature of sexual assault and the fact that most cases come down to word against word, lack of evidence is the primary reason cited by police and prosecution agencies for not charging suspects or not proceeding to prosecution. Victim credibility is an important consideration in assessing the prospects of conviction in any criminal matter.

From a legal perspective, credibility is not the same as believability and prosecutors may take into account the way a jury is likely to view a woman in assessing her credibility. This is a contentious issue in sexual assault cases, given social stereotypes around 'real rape' and 'genuine' victims. Some cases drop out of the system when victims are unwilling to proceed.

The focus discussions revealed that survivors' decisions are shaped by a range of social and personal factors, including lengthy delays in the process and wanting to put the matter behind them, threats from the offender or his supporters, lack of social support, and encouragement to withdraw from legal officials. Victim withdrawal from the criminal justice process does not mean that the assault did not occur.

## CHAPTER FIVE

### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

This chapter presents summary of findings as discussed in chapter four and interpretations of the data analysis, conclusions and recommendations based on the findings.

#### 5.2 Summary of Findings

The findings show that rape is physically forced or otherwise coerced penetration. It is also any behavior perceived to be of a sexual nature which is unwanted and takes place without consent or understanding. Sexual violence can include other forms of assault involving a sexual organ, including coerced contact between the mouth and penis, vulva or anus. Women are at increased risk of sexual violence, as they are of physical violence by an intimate partner, when they become more educated and thus more empowered. Women with no education were found to be much less likely to experience sexual violence than those with higher levels of education

The findings show that given the complex effects of sexual violence and abuse, it is perhaps unsurprising that many people choose not to disclose what has happened to them. It is estimated that only few of serious sex offences against people are reported to the police and of the total number of rape offences that are reported, fewer of the cases result in an offender being convicted of this offence. This means that a majority of survivors do not seek help or get the support they need. When survivors have tried to access support, it has not always been available. The findings show that survivors of sexual assault who report the crime and are willing to cooperate with police and prosecutors as the case moves forward may confront criminal justice officials who are skeptical of their allegations and who question their credibility. The process begins with the police, who decide whether a crime has occurred, the amount of investigative resources to devote to identifying the suspect, whether to make an arrest of an identified suspect and, if so, the charges to file, and whether to refer the case to the prosecutor.

Sexual violence and abuse can be prevented and the Regional Strategy should include measures to tackle prevention and risk issues; and the Strategy must promote structured co-operation between the statutory and voluntary sectors to maximize the effective use of resources and



expertise. Consent is the central issue in almost all rape trials. Of the cases that go to court, most commonly sexual penetration is admitted and the issue to be decided is whether it was rape, as the victim claims, or whether it was consensual intercourse, as the accused claims. The prosecution must prove beyond reasonable doubt that the victim was not consenting and that she effectively communicated that fact to the accused in such a way that he could not have honestly believed she was consenting. The survivor in the rape trial is commonly implied to be a liar, an hysterical or even vicious jilted lover, a woman known by the accused to be of the type who could be expected to consent to his advances or an immature person who acquiesced in or even enjoyed a consensual act but who later feared the consequences of her actions. These scenarios require the defense to show the victim as a person of low intelligence or of low moral fibre whose story should not be believed.

### **5.3 Conclusion**

Rape laws which do not specifically exclude the application of sexist, discriminatory, and ill-informed attitudes and beliefs in determining outcomes of sexual assault cases tacitly condone rape, condemn women to suffer in silence, and perpetuate and compound this harm consequent on a sexual assault. Law and education play a fundamental role in challenging assumptions and stereotypes surrounding sexual assault

The study concludes that while Kenya has formally and legally recognized that violence against women is a priority challenge, the judicial response to the problem has fallen far short of its severity and prevalence. While acknowledging efforts by the government to adopt a framework of laws and policies to address violence against women, it said that the gap between the availability of certain remedies in law and their implementation in practice is still very wide. This leaves the victims with a sense of insecurity, defenselessness and mistrust in the administration of justice. The impunity that attends these crimes merely perpetuates violence against women as an accepted practice in Kenyan society, in contempt of women's human rights.

### **5.4 Recommendation**

The study recommends that it is time the law and the community recognized the nature of and the true repercussions of sexual assault on victims and that both respond appropriately to women

who have endured a horrific violation of their very being and ensure that the legal process is accessible and as least traumatic as possible. It is time that victims/survivors are treated with sensitivity and respect by the legal system and the community and, more fundamentally, it is time their voices are heard and their experiences believed. There is no doubt that law does inform community attitudes, and it is vital in the area of sexual offences that it also educates police, judges, juries and makes dramatically and emphatically clear to men what sexual behavior will be tolerated and what will not.

The study recommends that the justice system should not rely solely on criminalization and penal strategies. Increasing criminalization and penalization will not help most victims. Greater attention should be given to responses that are more socially inclusive and re-integrative of offenders. Mechanisms should be considered to encourage more *admissions* to offending in legal or non-legal settings. Such admissions need not necessarily to be tied to *convictions* for sexual offences.

The study finally recommends a lift on the bans on sexual offence eligibility for informal justice mechanisms. Although informal justice mechanisms, such as conferences or mediation, are used in some jurisdictions for admitted youth and adult offenders, policy-makers are wary of supporting them because they may appear to be 'too lenient'. However, the trade-off is not between a 'more' or 'less serious' response, but between any response and none at all. Careful introduction of justice mechanisms can be monitored and researched; and from this, an evidence base can be built, enhancing access to justice.

### **5.5 Suggestion for Further Studies**

The study finally recommends that another study need to be done to recommend strategies to be put in place to reduce sexual violence in the slums in Kenya.

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## APPENDICES

### APPENDIX 1: SURVEY QUESTIONNAIRE

My name is ..... I am a postgraduate student in gender and development studies at the University of Nairobi. At present, I am doing a project on the factors inhibiting access to justice for sexual violence survivors in Kibera. Therefore, I am requesting you to share with me your experiences on sexual violence in this area.

#### Section A: Demographic information of the respondent

1. Gender

Male ( )                      Female ( )

2. Age

18-25 years ( ) 26-35 years ( ) 36-49 years ( ) 50 years and above ( )

3. Marital status

Single ( ) Married ( ) Divorced ( ) widowed ( ) separated ( )

4. Education Level

Never attended school ( ) Primary ( ) secondary ( ) university ( ) tertiary ( ) other (specify).....

5. What do you do for a living?

#### Section B: Forms of sexual violence

7. What do you understand by the term “sexual violence”?

8. What forms of sexual violence do you know of?

#### Section C: Attempts to deal with sexual violence?

9. Have you or any of you relative / friend experienced sexual violence?

If yes above, what form of violence? By who?

What action did she/ he/ you/ take (probe report to the police, make noise, told friends)

Did he/ she attain justice?

If not what obstacles did you face?

**Section D: factors that hinder sexual violence victim from accessing legal justice**

10. Did you seek legal help?

If yes from who?

If no why?

How was the process of accessing justice?

What was most challenging in accessing justice?

What do you think should be done to make justice accessible?

## **APPENDIX 2: FOCUS GROUP DISCUSSION GUIDE**

### **Introduction**

My name .....I am a postgraduate student in gender and development studies at the University of Nairobi. At present, I am doing a project on factors that inhibit sexual violence survivors from accessing legal justice in Kibera slums of Nairobi County. Therefore, I am requesting you to share with me your experiences on food security in this area.

1. What are the main livelihood activities for people in this community?
2. What do you understand by the term sexual violence?
3. Is sexual violence experienced in this area?
4. Can you say that which forms of sexual violence are common in this area
5. Do you know of people in this area who have experienced sexual violence?
6. How do community members make sure that sexual violence survivors have adequate access to justice? (probe)
7. Do women and men have equal chance of being sexually violated?
8. Are there places you can report sexual violence cases?
9. Are there any challenges associated with accessing legal justice?
10. How do you overcome these challenges?
11. Can you recommend what should be done to enhance access to justice for sexual violence survivors?



## **APPENDIX 3: INTERVIEW GUIDE**

### **Introduction**

My name is ..... I am a postgraduate student in gender and development studies at the University of Nairobi. At present, I am doing a project on the factors inhibiting access to justice for sexual violence survivors in Kibera. Therefore, I am requesting you to share with me your experiences on sexual violence in this area.

Name .....

➤ Sex.....

➤ Age .....

➤ Designation

1. What do you understand by the term sexual violence?
2. How do sexual violence survivors deal with the situation?
3. What steps do sexual violence survivors take?
4. Would you consider this region to be prone to sexual violence? (Explain)
5. Are there people in this area who experienced sexual violence? (probe Issues what forms)
6. What steps have these people taken?
7. What obstacles do people in this area experience in dealing with sexual violence?