

**UNIVERSITY OF NAIROBI**

**FACULTY OF LAW**

**DOMESTIC VIOLENCE IN KENYA: FACTORS THAT INFLUENCE THE RISE  
OF DOMESTIC VIOLENCE IN KENYA AND THE EXTENT TO WHICH THE  
LAW IS ENFORCED TO PROTECT SUCH VICTIMS.**

**A DISSERTATION SUBMITTED IN PARTIAL FULLFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF  
LAWS (LL.B) OF THE UNIVERSITY OF NAIROBI.**

**SUBMITTED BY: NDEGWA CAROLINE WAMBUI**

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**SUPERVISED BY: JUSTICE NANCY BARAZA**

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**NAIROBI**

**2014**

**DECLARATION**

I, **CAROLINE WAMBUI NDEGWA**, declare that this dissertation is my original work and has not been submitted and is not currently being submitted for award of a degree in any other institution.

**CAROLINE WAMBUI NDEGWA**

**DATE**



17/07/2014

This dissertation has been submitted for with my approval as a University of Nairobi Supervisor.

**JUSTICE NANCY BARAZA**

**DATE**

## DEDICATION

*To my loving family for the support they offered me throughout the entire period I was conducting this research.*

*To all the people who have suffered and are still suffering from domestic violence and to those who have dedicated their lives to stop this vice.*

## ACKNOWLEDGEMENT

*First and foremost I thank the Almighty God, who has given me strength and health to which I was able to do this research paper*

*I thank Justice Nancy Baraza, my supervisor, for the guidance she provided by taking her time from her busy schedule to read my work and provide constructive criticism.*

*I also thank my loving parents for the unwavering support they offered me during this period especially when I felt like giving up, they always kept me going.*

*Lastly I wish to acknowledge my friends who gave me moral support and helped in editing this work.*

## **ABBREVIATIONS**

GBDV-Gender Based Domestic Violence

CEDAW- Convention Against All Forms Of Discrimination Against Women

DEVAW-Declaration On The Elimination Of All Forms Of Violence Against Women

FIDA- Federation of Women Lawyers

## **TABLE OF STATUTES and INTERNATIONAL INSTRUMENTS**

The Kenyan Constitution 2010

The Penal Code (cap 163)

Matrimonial Causes Act

Convention Against All Forms Of Discrimination Against Women

Declaration On The Elimination Of All Forms Of Violence Against Women

The African Charter on Human Rights

The Universal Declaration on Human Rights

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## Chapter 1

### INTRODUCTION

Domestic violence is defined as any incident of threatening behaviour, violence or abuse whether psychological, physical, sexual, financial or emotional between adults who are or have been intimate partners or family members, regardless of gender or sexuality.<sup>1</sup>

Domestic violence is usually perpetuated by one partner against another in an intimate relationship such as marriage. It occurs in many forms, including physical assault, sexual abuse; emotional abuse, economic deprivation etc. In the past few years there has been a rise of cases of domestic violence in Kenya. It has gone to the extent that some of the cases being reported involve murder whereby one of the spouses kills the other spouse and their children and then commits suicide due to a disagreement or a fight at home.

The murder of a wife by the husband is known as femicide. Femicide is usually perpetrated by men, but sometimes female family members maybe involved. Femicide differs from male homicide in specific ways. For example, most cases of femicide are committed by partners or ex-partners, and involve ongoing abuse in the home, threats or intimidation, sexual violence or situations where women have less power or fewer resources than their partner.<sup>2</sup>

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<sup>1</sup> [www.domesticviolencelondon.nhs.uk](http://www.domesticviolencelondon.nhs.uk)

<sup>2</sup> Understanding and Addressing Violence Against Women by World Health Organization

This case study is supposed to look at the implementation of the legislation governing domestic violence in Kenya and whether the law is fully enforced so as to protect and provide justice to the victims involved. It also seeks to look at any shortcomings which hinder enforcement of the law and which reforms should be implemented so as to curb any such shortcomings.

## **1.2 STATEMENT OF THE PROBLEM**

What are the shortcomings that hinder enforcement of the law and which reforms should be implemented so as to curb any such shortcomings. To what extent is the law enforced and implemented so as to stop the rise of domestic violence by providing justice to victims of domestic violence.

## **1.3 JUSTIFICATION OF THE STUDY**

This study is justified on the basis that there are many cases of domestic violence being reported every day and there exists a lot of literature concerning this issue but the Kenyan Government has failed to enact legislation which will expressly deals with domestic violence. In Kenya there is no act which expressly deals with domestic violence therefore forcing us to rely on other statutes such as the Penal Code.

## **1.4 RESEARCH QUESTION**

Are the laws in Kenya effective in curbing the vice of domestic violence?

Does the lack of a specific act which would expressly deal with domestic violence lead to the rise of domestic violence in the country?

### **1.5 RESEARCH METHODOLOGY**

The method used to gather information for this paper will be library and internet based. The library research will critically examine and analyse factors leading to rise of domestic violence and why curbing the problem is proving to become an issue.

It will also seek to understand why at this age and time, domestic violence has become prevalent. Internet research will enable me to find out the statistics concerning this topic through researches that were carried out by other people.

### **1.6 HYPOTHESIS**

This research proceeds on the presumption that the law on domestic violence in Kenya is never taken seriously, its enforcement is a huge struggle thus leaving a gap in the system.

### **1.7 STATEMENT OF OBJECTIVES**

The main objective of this research paper is to discuss the gap left in the law governing domestic violence and the need for enactment of a specific law to deal with that issue.

The specific objective of the paper is to discuss the shortcomings that hinder enforcement and implementation of laws governing domestic violence.

## **1.8 THEORETICAL FRAMEWORK**

This research is going to look at the Feminist Theory.

### **1.8.1 Feminist Theory**

Feminist theory is one of the major contemporary sociological theories, which analyses the status of women and men in society with the purpose of using that knowledge to better women's lives.<sup>3</sup> Feminism can be defined as a recognition and critique of male supremacy combined with efforts to change it. Feminism gives voice to and describes the collective condition of women as such, so largely comprised as it is of all women's particularities. It uncovers the laws of motion of a system that keeps women in a condition of imposed inferiority. It has located the dynamic of the social definition of gender in the sexuality of dominance and subordination, the sexuality of inequality: sex as inequality and inequality as sex.<sup>4</sup>

As sexual inequality is gendered as man and women, gender inequality is sexualized as dominance and subordination. The social power of men over is seen through laws that purport to protect women as part of the community, laws that announce their intent to remedy that inequality but do not, like the sex equality law. This law derives its authority from reproducing women's social inequality to men in legal inequality, in a seamless web of life and law.<sup>5</sup>

Feminist theory in domestic violence emphasises gender and power inequality in opposite-sex relationships.

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<sup>3</sup> [www.sociology.about.com/od/Sociological-Theory/a/Feminist-Theory.htm](http://www.sociology.about.com/od/Sociological-Theory/a/Feminist-Theory.htm)

<sup>4</sup> Catharine A. MacKinnon: Toward Feminist Theory of the State at 242

<sup>5</sup> Ibid.

It focuses on the societal messages that sanction a male's use of violence and aggression throughout life, and the proscribed gender roles that dictate how men and women should behave in their intimate relationships.<sup>6</sup> It sees the root causes of intimate partner violence as the outcome of living a society that condones aggressive behaviours perpetrated by men, while socialising women to be non-violent.<sup>7</sup> Under the feminist theory women are seen as victims of patriarchal authority within the home, an authority frequently asserted through the use of physical, psychological and sexual violence without societal sanctions or repercussions.<sup>8</sup>

Proponents of feminist theory acknowledge that women can also be violent in their relationships with men; however, they simply do not see the issue of women abusing men as a serious social problem, and therefore, does not deserve the same amount of attention or support as violence against women.<sup>9</sup>

Within feminist thought, there is agreement that women suffer as a result of gender inequality and that radical change is needed, but there are differences of opinion about the causes of gender inequality and what can or should be done to bring about the radical change necessary to meet women's needs.

Radical feminist and liberal feminist perspectives have been, and continue to be, the predominant influences in feminist scholarship and reform efforts in responding to domestic

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<sup>6</sup>Pence and Paymer, 1993 Education groups for men who batter. London: Springer

<sup>7</sup>[www.scotland.gov.uk/Resource/Doc/925/0063072](http://www.scotland.gov.uk/Resource/Doc/925/0063072)

<sup>8</sup> Leigh Goodmark: A Troubled Marriage, Domestic Violence and the Legal System at 3

<sup>9</sup> Kurz, D. (1997). No: Physical Assaults by male partners: A major social problem. In M. R. Walsh (Ed.), *Women, men, & gender: Ongoing debates* (pp. 222-246). New Haven: Yale University Press.

violence, with "socialist", or class-race-gender, feminist perspectives emerging at a later point and, to some degree, in response to critiques from minority-group feminists.<sup>10</sup>

Within radical feminist theory, domestic violence is understood as a consequence of patriarchal power and the assertion of "male privilege" within the family.<sup>11</sup> Radical feminism focuses on the theory of patriarchy as a system of power that organizes society into a complex of relationships based on an assumption of "male supremacy" used to oppress women. It views patriarchy as dividing rights, privileges and power primarily by gender, and as a result oppressing women and privileging men.<sup>12</sup>

Radical feminism aims to challenge and to overthrow patriarchy by opposing standard gender roles and the male oppression of women, and calls for a radical reordering of society.<sup>13</sup>

This feminist theory supports the notion that domestic violence is a culturally supported male enterprise and that female violence is defensive and reactive.

When women are instigators, in this view it is a pre-emptive attack strike aimed at instigating an inevitable male attack.<sup>14</sup> In contrast, male violence is not similarly contextualised and is always attributed to a broader social agenda.

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<sup>10</sup> Pence and Paymar 1993

<sup>11</sup> *Ibid*

<sup>12</sup> [www.womenshistory.about.com/od/feminism/g/radicalfeminism.htm](http://www.womenshistory.about.com/od/feminism/g/radicalfeminism.htm)

<sup>13</sup> Lambert M. Surhone, Miriam T. Timpledon, Susan F. Marseken, *Radical Feminism: Feminism, Patriarchy, Systems Theory, Second-wave Feminism, Cultural Feminism, Liberal Feminism, Socialist Feminism, Marxist Feminism, Sex-positive Feminism, Reproductive Rights*

<sup>14</sup> Bograd 198; Dobash et., al 1992

## **1.9 LIMITATIONS**

The limitations on this study is that most of the materials found mostly deal with violence against women and not a balance of domestic violence between both men and women.

Therefore this paper mostly talks about domestic violence on the woman.

## **1.10 LITERATURE REVIEW**

Domestic violence has been studied before therefore this paper is not the whistle blower.

There are books which have been written concerning this issue.

### **1.10.1 KIVUTHA KIBWANA: LAW AND THE STATUS OF WOMEN IN KENYA**

This book covers status of women in Kenya and how the law caters for them. It has also discusses the issue of domestic violence and how the law is governing this problem. The book states that domestic violence is violence directed against intimates, those who have a special relationship to and whom one owes a special duty of care.

It goes on to state that domestic violence is often perpetrated in private and can go unnoticed for a long time. It is seen to be hidden violence.<sup>15</sup>

The book explains how women invest much time dealing with male violence, which the time could be used productively. Abusive women are forever fearful and insecure leading to an enduring sense of inequality. Threat of violence keeps them suspended in fear, unsure of themselves and vulnerable.<sup>16</sup>

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<sup>15</sup> Kivutha kibwana, Law and The Status of Women In Kenya at 169

<sup>16</sup> Kivutha kibwana, Law and The Status of Women In Kenya at 174

In Kenya there is no specific act which deals with domestic violence expressly. The book states that section 250-253 of the Penal Code which covers Assaults do not cover spousal assault as a special category of assault which should attract an enhanced punishment as compared to other assaults.

Section 139-140 of the Penal Code deals with punishment for offences involving violence. This section reveals that punishment for offences involving violence against women is not severe enough to deter the offenders who have a habit of committing such offences.<sup>17</sup> Lack of severe punishment leads to judicial officers who enforce the law against such crimes have taken cue from such feeble punishments to in practice treat offenders very leniently.

#### **1.10.2 FEDERATION OF WOMEN LAWYERS ANNUAL REPORT 2006: WOMENS RIGHTS A MIRAGE OF REALITY**

Violence against women has been called the most pervasive yet least recognized human rights abuse in the world.<sup>18</sup> This report mainly expounds on how general violence has profound effects either directly or indirectly on a woman's reproductive health.

It also states that violence perpetuates male power and control over women. Often there is silence and denial of the seriousness of health consequences of abuse.<sup>19</sup>

The report claims that women with a history of partner violence may not be able to negotiate condom use with their partner. This leads to high risks of contracting a disease if their partner is cheating.

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<sup>17</sup> Kivutha kibwana, Law and The Status of Women In Kenya at 176

<sup>18</sup> [www.unfo.org/culture/rightshtm](http://www.unfo.org/culture/rightshtm)

<sup>19</sup> Federation Of Women Lawyers Annual report 2006 ,Women Rights A Mirage Of Reality at 31



Sexual Violence at any age is destructive and causes psychological turmoil. Sexual abuse causes women to tolerate abusive relationships which lead to secluding of one self. Abused women who experience violence may be in partnerships with older men who have a high likelihood of infecting them with HIV. Violence or fear of violence deters women from seeking testing. If they test positive they will not disclose their status hence delay in their access to treatment. Women who test positive for HIV are vulnerable to violence from their partners as well as discrimination within their families and communities.

The report further states that there is no provision in the law which criminalizes domestic violence. This forces women to rely on customary law which give husbands the rights to chastise or correct their wives with physical punishment whenever necessary.

The report recommends that Kenya needs to initiate laws that establish institutional mechanisms for maintaining women status and adjudicating complaints concerning gender violence, gender discrimination and problems that face women due to cultural beliefs. The Kenyan government needs to domesticate Convention Against All Forms Of Discrimination Against Women (CEDAW) so that there can be ample provisions governing domestic violence.

### **1.10.3 CYNTHIA GRANT BOWMAN: WOMEN AND LAW IN SUBSAHARAN AFRICA**

This book mainly deals with statistics of domestic violence in Sub-Saharan countries in Africa. The book states that domestic violence is a major threat to women's health throughout Africa.

It lays down statistics of international surveys which show the percentages of reported physical abuse on women by a male partner from 1986-1993. The percentages are as follows Kenya 42%, Tanzania 60%, Zambia 40%.<sup>20</sup>

The book states that even though domestic violence is a serious problem, official statistics are difficult to obtain because of the widespread silence about spouse abuse.

The fact that hitting and other violent behaviour or discipline may not be regarded as "beating" that falls into the category of unacceptable domestic violence also affects the rates of reporting. This creates problems not only for gathering accurate statistics on the amount of domestic violence but also for early interventions that may have a chance of changing patterns and saving of the relationships before they are completely destroyed.<sup>21</sup>

The fact that domestic violence is rarely reported makes it look like there is no urgency in creating a legislation which will expressly deal with the issue. Enactment of a specific act addressing violence in the family would send out a clear message to the public at large and all state functionaries in particular that the state will not tolerate violence against women and that it will take the necessary action against any offender.

Absence of such a law has left the society questioning the state's stand on the issue of domestic violence and whether violence in the private sphere is the same as violence in the public sphere.<sup>22</sup>

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<sup>20</sup> Cynthia Grant Bowman, *Women and Law in Sub-Saharan Africa* at 455

<sup>21</sup> Cynthia Grant Bowman, *Women and Law in Sub-Saharan Africa* at 456

<sup>22</sup> Cynthia Grant Bowman, *Women and Law in Sub-Saharan Africa* at 429

The state's ability to uphold women's rights is reflected in the content of the laws, but also in how the laws are interpreted and administered. In Kenya there is no law governing domestic violence therefore it seems like the state is not keen to uphold women rights.

#### **1.10.4 DR PATRICIA KAMERI MBOTE: VIOLENCE AGAINST WOMEN IN KENYA; AN ANALYSIS OF LAW, POLICY AND INSTITUTIONS**

This study mainly analysis the law, policies and institutions governing violence against women in Kenya. It explains the types of violence against women and the causes of such violence. The report gives the legal framework on domestic violence in Kenya both nationally and internationally. The legal framework of domestic violence nationally includes; The Constitution, Penal Code, Matrimonial Causes Act. The international legal framework on domestic violence includes; Declaration On The Elimination Of All Forms Of Violence Against Women (DEVAW), Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) The African Charter on Human Rights, The Universal Declaration on Human Rights.<sup>23</sup>

This report will help me in my study because it also talks about the gaps in the law which lead to rise of violence against women. The gaps in the law are like for instance the Penal Code's provisions are not as wide to encompass all incidences of violence against women especially where they leave the definition of offences to courts that take a narrow view. The state is also hesitant to prosecute cases involving domestic violence and sexual harassment as it is difficult to prove. Penalties imposed by the penal code for the offences on violence are insufficient to deter perpetrators of these crimes.

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<sup>23</sup> Dr. Patricia Kameri Mbote, Violence Against Women In Kenya: An Analysis of Law Policy and Institutions 2000-1 at 5-8

Victims have to pursue this matter through the civil justice systems leading to most of them opting out. They therefore remain unrecompensed as there is also no machinery for making reparation to the victims.<sup>24</sup> There is also the Protection Of Women Against Violence Bill 2012 which is yet to be passed. In the past years there have been such bills but they were never passed. This is another shortcoming in the legal framework which leads to the rise of domestic violence. The report also states the institution structures which deal with domestic violence such as the courts, police force, chiefs, elders etc.

### **1.11 CHAPTER BREAKDOWN**

The paper will consist of four chapters starting with **chapter one** being the proposal, which will have a broad overview of domestic violence.

**Chapter 2** will analyze causes of domestic violence in Kenya and factors leading to the rise of domestic violence.

**Chapter 3** will contain the shortcomings and gaps found in the legal framework dealing with domestic violence. It will also look at why there is lack of enforcement and implementation of specific laws to deal with domestic violence.

**Chapter 4** will be the conclusion of the research with recommendations of how domestic violence should be dealt with in Kenya.

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<sup>24</sup>Dr Patricia Kameri Mbote, Violence Against Women In Kenya: An Analysis of Law Policy and Institutions at 2000-1 24

## Chapter 2

### FACTORS AND CAUSES WHICH LEAD TO THE RISE OF DOMESTIC VIOLENCE IN KENYA.

In this chapter we are going to look at the various the causes and factors which lead to the rise of domestic violence in Kenya.

Domestic violence has been a long standing problem in Kenya. The recent past has however, seen an increase in the number of domestic violence cases where men have also become victims.<sup>25</sup> There is no one single factor to account for violence perpetrated against women. More women are coming forward because they are aware that violence is wrong and that it is more than just physical. More believe that it is acceptable to walk away from an abusive situation.<sup>26</sup>

#### **2.1 Cultural Ideologies**

Cultural ideologies both in industrialised and developing countries provide legitimacy for violence against women in certain circumstances. Historical traditions in the past have sanctioned the chastising and beating of wives.<sup>27</sup>

Kenyan Culture does not view domestic violence as a crime. That is why Kenya has such a high prevalence of domestic violence and sexual offences against women.<sup>28</sup>

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<sup>25</sup> Make Every Woman Count ([www.makeeverywomancount.org](http://www.makeeverywomancount.org))

<sup>26</sup> Patricia Nyaundi, Executive Director Federation of Women Lawyers Kenya (FIDA): [www.voanews.com/content/cases-of-domestic-violence-increase-in-kenya-86691287/113574.html](http://www.voanews.com/content/cases-of-domestic-violence-increase-in-kenya-86691287/113574.html)

<sup>27</sup> Domestic Violence Against Women and Girls, Innocent Digest No. 6 of 2000

Several complex and interconnected institutionalised social and cultural factors have kept women particularly vulnerable to the violence directed at them; all of them are manifestations of historical unequal power relations between men and women.<sup>29</sup>

Deeply engrained beliefs about gender roles and marriage have also encouraged the practice.

In a patriarchal society domestic violence is actually recognised as a way of disciplining one's wife.<sup>30</sup> In fact, even the society prepares you as a woman to anticipate this discipline. It is deeply inculcated in many peoples' minds.<sup>31</sup> Traditionally, patriarchal domination was the norm and men were recognised as having a right to 'chastise' their wives. Domestic 'chastising' in the historical context was only regulated in that the husband was not allowed to cause physical impairment that would disable the woman from performing her functions in the home.<sup>32</sup>

A battered woman had very few forms of redress available to her. Sometimes she could only choose between returning to her natal home or reporting the matter to elders of the community and hope that they would address the matter. Female members of households were also subject to male supremacy, which could be enforced through violence.<sup>33</sup> The physical punishment of wives has been particularly sanctioned under the notion of entitlement and ownership of women.<sup>34</sup>

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<sup>28</sup> Anne Njogu- Centre for Rights Education and Awareness : [www.voanews.com/content/cases-of-domestic-violence-increase-in-kenya-86691287/113574.html](http://www.voanews.com/content/cases-of-domestic-violence-increase-in-kenya-86691287/113574.html)

<sup>29</sup> Domestic Violence Against Women and Girls, Innocent Digest No. 6 of 2000

<sup>30</sup> The Effects of Domestic Violence In The Family in Kenya Association of Professional Counselors Conference Safari Park 7th – 9th September 2010

<sup>31</sup> Ibid.

<sup>32</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>33</sup> Ibid.

<sup>34</sup> Domestic Violence Against Women and Girls, Innocent Digest No. 6 of 2000

Male control of family wealth inevitably places decision-making authority in male hands, leading to male dominance and proprietary rights over women and girls.<sup>35</sup> The concept of ownership, in turn, legitimises control over women's sexuality, which in various law codes has been deemed essential to ensure patrilineal inheritance. Women's sexuality is also tied to the concept of family honour in many societies.<sup>36</sup>

Women are construed to be passive and submissive and are supposed to accept violence as a woman's estate. Such ideologies link her identity and self-esteem to her relationship to her father, husband or son.<sup>37</sup>

The impact of culture on the full realisation of human rights for women is addressed under Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which advocates for the elimination of harmful practices and requires states parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women.<sup>38</sup>

Among the Luo for instance, women are regarded as children who must be 'disciplined' all the time or 'reminded' of the position they occupy in the home.<sup>39</sup> Among the Digo, a husband may compel his wife to 'have an affair' with another man in order that he may be caught and fined

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<sup>35</sup> Ibid.

<sup>36</sup> The Effects of Domestic Violence In The Family in Kenya Association of Professional Counselors Conference Safari Park 7th – 9th September 2010

<sup>37</sup> Dr. Patricia Kameri Mbote, Violence Against Women In Kenya: An Analysis of Law Policy and Institutions 2000-1

<sup>38</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>39</sup> Ibid.

so that the husband will then have made money to spend on drink. Refusal of the woman to do this can lead to a thorough beating or even divorce.<sup>40</sup>

In Nyanza province, where traditions and customs are largely the reference point for spousal relationships, women suffer all forms of violence by virtue of being accorded low status in society. Women are often beaten as reassurance that their husbands still love them.<sup>41</sup>

Women have been conditioned through cultural code to accept that a man who does not beat them up once in a while does not recognise them as their spouses or worse still, as women.<sup>42</sup>

Wife inheritance is a major cause of Gender Based Domestic Violence affecting women living in Nyanza. If a woman refused to be inherited by her husband's brother she would be threatened, mistreated and also beaten so that she can agree to the arrangement.<sup>43</sup>

A major reason as to why men perpetrate violence against women is the custom of bride wealth payment.<sup>44</sup> People in Kenya believe that any 'properly' married man will have parted with several cattle, sheep and goats. These livestock are considered a symbol of status and of great commercial value not only to grooms family who part with the bride price for the bride, but also the recipient family as well. Hence, if the man is disobeyed by his wife, what comes to mind is the number of livestock he has paid to the wife's parents. In that case, he may resort to violence, believing that it is his right to discipline his wife as his wealth.<sup>45</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> Muhoroni Aids Awareness and Counseling Services (MAACS): [www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Domestic-Violence-in-Kenya.pdf](http://www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Domestic-Violence-in-Kenya.pdf).

<sup>42</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>43</sup> Muhoroni Aids Awareness and Counseling Services (MAACS): [www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Domestic-Violence-in-Kenya.pdf](http://www.womankind.org.uk/wp-content/uploads/2012/03/FIDA-Kenya-Report-on-Gender-Based-Domestic-Violence-in-Kenya.pdf).

<sup>44</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>45</sup> *Ibid.*



It is usually seen as not a 'big deal' for a man to beat his wife in the eyes of the larger community. It is worth noting that the whole 'bride wealth business' is exclusively a male dominated economic transaction.<sup>46</sup>

Polygamy is also another issue under social-cultural factors. When a man marries a younger wife he will snap at any provocation by the older wife. This may lead him to beat her up and perpetrate violence against her.<sup>47</sup>

During the Colonial rule the British legal system, which was imposed, also contained facets that cast women as subordinate to men within the family. The man was, for instance the head of the household and therefore the owner of the family property.<sup>48</sup> Further, the law recognised the conjugal rights of the man to a far greater degree than those of women and did not recognise the concept of rape within marriage. Moreover, the introduced legal system did not make provision for dealing with violence against women as a special problem within or outside marriage.<sup>49</sup>

The government made an attempt to address some manifestations of this problem in 1966. It set up a Commission on the Law of Marriage and Divorce whose terms of reference included among other things, looking into the status of women in the society<sup>50</sup>. The Commission considered the problem of wife beating to be pertinent to the issue of status and after examining it, proposed a Bill, which would have criminalised wife battering.

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<sup>46</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>47</sup> The Advocates for Human Rights, Polygamous Marriages: [www.stopvaw.org/polygamous\\_marriages](http://www.stopvaw.org/polygamous_marriages)

<sup>48</sup> Government of Kenya, Report of the Commission on Marriage (1970)

<sup>49</sup> Dr. Patricia Kameri Mbote, Violence Against Women In Kenya: An Analysis of Law Policy and Institutions 2000-1

<sup>50</sup> Government of Kenya, Report of the Commission on Marriage (1970)

The Parliament which was dominated by the male gender rejected the Bill and justified the practice of wife battering as an inherent traditional right of an African. This meant that a woman who was a victim of domestic violence had to rely on the general criminal law.<sup>51</sup>

This has also happened in recent times where several proposed bills which were to deal with domestic violence expressly have been rejected by parliament. The most recent one is the Protection Against Domestic Violence Bill 2012 which is yet to be passed into law as it awaits approval from the Members of Parliament. Looking closely at Kenya's Parliament, it is dominated by the male gender which does not feel the urgency to pass such a law. They are men who have been raised with the same culture therefore making them believe that in the traditional culture, it is okay for a man to discipline a disrespectful woman.

This was demonstrated by Nairobi's County governor Evans Kidero who slapped the Women Representative for Nairobi County Rachael Shebesh.<sup>52</sup> This is because he felt she was disrespecting him in his office by the way she was addressing him in front of people including journalists who were present. This incidence demonstrates that Kenya's very own leaders have the same cultural ideologies.

Women who have been sexually or domestically abused are often too scared by the stigma attached to the crime to tell their families, let alone report their attacks to relevant authorities.

Stigma is such a big issue in many cultures.

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<sup>51</sup>Supra 26

<sup>52</sup>[ntv.nation.co.ke/news2/topheadlines/raw-video-kidero-slaps-shebesh](http://ntv.nation.co.ke/news2/topheadlines/raw-video-kidero-slaps-shebesh)

Women and girls blame themselves and fear that they will be ostracised from society if they admit to being raped or defiled. They often feel like outcasts if they do so.<sup>53</sup>

## 2.2 Socio-Economic Factors

Some socio-economic factors, which have overwhelmingly influenced occurrence of Gender Based Domestic Violence, include factors related to poverty and the deep-seated gender inequalities and inequities.<sup>54</sup>

Lack of economic power and economic independence by women is a major cause of domestic violence as it prolongs their vulnerability and dependence.<sup>55</sup> Women are discriminated against, as they are not economically empowered to adequately meet their own basic needs and therefore take charge of their sexuality and livelihoods. This situation predisposes them to mistreatment in key aspects of their lives, which impinge on their status in society including the control over their reproductive rights, health and destiny. In the family institution, historical power relations are often played out. While the family is a source of positive nurturing and caring values it also doubles up as a social institution where labour is exploited, male sexual power is often violently expressed and where socialisation that disempowers women takes place. In any event it is in this environment where female sexual identity is often created.<sup>56</sup> Studies have shown that a woman who is economically independent will be able to separate or divorce her abusive partner with more ease than a woman who is economically dependent on her partner.

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<sup>53</sup> Kenya: Sexual and Domestic Violence Prevalent, [www.irinnews.org/fr/report/56856/kenya-sexual-and-domestic-violence-prevalent](http://www.irinnews.org/fr/report/56856/kenya-sexual-and-domestic-violence-prevalent)

<sup>54</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>55</sup> Dr. Patricia Kameri Mbote, Violence Against Women In Kenya, An Analysis of Law Policy and Institutions 2000-1

<sup>56</sup> Ibid.

This is because most of them worry as to how they will provide for themselves and their children and also the desire to keep their family intact. This dilemma influences their decision to continue staying with the abusive partner.<sup>57</sup>

Another factor which attributes to the rise of this ugly vice is the low levels of knowledge and awareness on their rights and how to claim and /or protect them. This low level of knowledge and awareness however, in most instances, is mostly identified as affecting more women than men.<sup>58</sup> According to research conducted by FIDA Kenya women are indeed, less exposed and literate than men. By virtue of such ignorance amongst majority of women, they are less empowered to assert their position in the family.<sup>59</sup>

The link between violence and lack of economic resources and dependence is a circular one. On the one hand, the threat and fear of violence keeps women from seeking employment, or, at best, compels them to accept low-paid, home-based exploitative labour. And on the other, without economic independence, women have no power to escape from an abusive relationship. Lack of economic resources underpins women's vulnerability to violence and their difficulty in extricating themselves from a violent relationship.<sup>60</sup> In modern day life a woman who is economically empowered will not stay in an abusive relationship. Women who are in abusive relationships when asked why they are still with their abusive partners, the reason they

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<sup>57</sup> Schuler S.R., Hashemi S.M., Riley A.P., and Akhter S., Credit Programs, Patriarchy and Men's Violence against Women in Rural Bangladesh, Soc. Sci. Medicine Volume 43, No 12, pp 1729- 1742, 1996.

<sup>58</sup> KYRGYZSTAN: Tradition and lack of awareness fuel domestic violence : [www.irinnews.org/report/70543/kyrgyzstan-tradition-and-lack-of-awareness-fuel-domestic-violence](http://www.irinnews.org/report/70543/kyrgyzstan-tradition-and-lack-of-awareness-fuel-domestic-violence)

<sup>59</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

<sup>60</sup> Scholar ET Al 1996

give is that they cannot be able to provide for their children adequately as their father would. Therefore, they have to endure the pain and suffering for the sake of their children.<sup>61</sup>

The reverse of this argument is that, women's increasing economic activity and independence is viewed as a threat which leads to increased male violence. This is particularly true when the male partner is unemployed, and feels his power undermined in the household. Therefore by dominating and exacting violence on his partner assures him that he is still in control and has power over his partner.<sup>62</sup>

Alcoholism is also another factor which leads to the rise of domestic violence in Kenya.<sup>63</sup> Excessive consumption of alcohol and other drugs has also been noted as a factor in provoking aggressive and violent male behaviour towards women and children.<sup>64</sup>

Florence Wanjiku lived that life for 10 years with her husband, an alcoholic. She describes one drunken night. *"He went to the kitchen, grabbed the wooden spoon, came with it, started beating me up the way you beat a little child, using a stick or something. But unfortunately he hit me so hard it broke on my scalp and my scalp got a cut. It was so deep that I had to be stitched eight stitches around here,"* she said.<sup>65</sup> Reported cases, like Wanjiku's, are on the rise in Kenya.<sup>66</sup>

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<sup>61</sup> Karen L. Bune, Understanding the dynamics of domestic violence, March 5<sup>th</sup> 2007

<sup>62</sup> Innocent Digest Domestic Violence Against Women And Girls No.6 - June 200

<sup>63</sup> National Coalition Against Domestic Violence, Domestic Violence and Substance Abuse

<sup>64</sup> The Effects of Domestic Violence In The Family in Kenya Association of Professional Counselors Conference Safari Park 7th – 9th September 2010

<sup>65</sup> Voice of America, Cases of Domestic Violence Increase in Kenya: [www.voanews.com/content/cases-of-domestic-violence-increase-in-kenya-86691287/113574.html](http://www.voanews.com/content/cases-of-domestic-violence-increase-in-kenya-86691287/113574.html)

<sup>66</sup> Ibid.

### 2.3 Lack of a Strong Legal Framework

Lack of legal protection, particularly within the sanctity of the home, is a strong factor in perpetuating violence against women. Until recently, the public/private distinction that has ruled most legal systems has been a major obstacle to women's rights.<sup>67</sup>

In many countries violence against women is accentuated by legislation, law enforcement and judicial systems that do not recognise domestic violence as a crime. The challenge is to end impunity for the perpetrators as one means of preventing future abuse.<sup>68</sup>

Investigations by Human Rights Watch have found that in cases of domestic violence, law enforcement officials frequently reinforce the batterers' attempts to control and demean their victims.<sup>69</sup> Even though several countries now have laws that condemn domestic violence, "when committed against a woman in an intimate relationship", these attacks are more often tolerated as the norm than prosecuted as laws. In many places, those who commit domestic violence are prosecuted less vigorously and punished more leniently than perpetrators of similarly violent crimes against strangers.<sup>70</sup>

In Kenya there is no law that specifically prohibits domestic violence. There is no law that has been specifically tailored to deal with domestic violence as a crime. This forces women to rely on customary law which give husbands the rights to chastise or correct their wives with physical punishment whenever necessary.

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<sup>67</sup> Innocent Digest Domestic Violence Against Women And Girls No.6 - June 200

<sup>68</sup> Ibid.

<sup>69</sup> The Human Rights Watch Global Report on Women's Human Rights, New York, 1995.

<sup>70</sup> Ibid.

The Legal framework includes; The Kenyan Constitution 2010, The Penal Code Cap 163, Matrimonial Causes Act etc. The international legal framework on domestic violence includes; Declaration On The Elimination Of All Forms Of Violence Against Women (DEVAW), Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) The African Charter on Human Rights, The Universal Declaration on Human Rights.

The rights of a person not to be subjected to physical abuse are protected and guaranteed in the tenets of our constitution.<sup>71</sup> As far as protection against violence against women and girls is concerned, the Constitution does not provide for it explicitly. What it does provide for however is protection from inhuman treatment or torture or any other form of degrading punishment.<sup>72</sup> This applies to both men and women. There is a blanket provision protecting every person not just women from discrimination either by law itself or in effect.<sup>73</sup>

The Penal Code Chapter 63 of the Laws of Kenya is currently the law under which most cases of domestic violence are prosecuted. The Penal Code is however inadequate with regard to protection where violence is imminent to the potential victim or their children. It thus fails to recognise the differentiated dimensions of domestic violence and only comes into effect after the victim has been violated which may sometimes be too late.

Similarly, in cases where domestic violence is ongoing, the Penal Code fails to provide for the removal of the abuser from the home environment so as to minimise the effects of violence.<sup>74</sup>

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<sup>71</sup> Make Every Woman Count : [www.makeeverywomancount.org](http://www.makeeverywomancount.org)

<sup>72</sup> The Kenyan Constitution 2010 Article 28

<sup>73</sup> The Kenyan Constitution 2010 Article 27

<sup>74</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya

Under Matrimonial Causes Act, it offers for divorce or separation in cases of cruelty within the marriage. The courts have widely interpreted cruelty as a ground for divorce and may be used to mean psychological violence, physical violence, sexual violence or even economic violence within the marriage.

The law falls short of the needs of women in this regard by only punishing the actual offence but does not give the victim an option of getting out of an abusive marriage.<sup>75</sup> This will prove to be difficult as many women will not be able to opt out of the marriage as they are not economically empowered and are not financially stable to be able to support themselves and their children.<sup>76</sup>

We shall look further on this issue of the Kenyan Legal framework on domestic violence in chapter 3 where I shall be discussing Laws governing Domestic Violence in Kenya and gaps left in the system.

#### **2.4 Political- legal Factors**

The existing legal and political structures in Kenya do not attempt either directly or indirectly, to deal with these aspects, particularly where it concerns domestic violence.<sup>77</sup> These factors include among others those that relate to poor policy implementation and inappropriate legal attention to the issues that underlie widespread gender-based inequities and inequalities which tend to tie intimately with poor family relationships.

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<sup>75</sup> Ibid.

<sup>76</sup> Scholar ET AI 1996

<sup>77</sup> Federation of Women Lawyers (FIDA) KENYA, Gender Based Domestic Violence in Kenya



Existing political and legal structures are unable to adequately address even the least complicated forms of Gender Based Domestic Violence at the individual, community or national level.<sup>78</sup>

Work of solving domestic violence cases has largely been left to traditional community structures to deal with.

If Kenyan Members of Parliament were to pass the Protection Against Domestic Violence Bill, it would prove a major step in dealing with this vice called domestic violence.

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<sup>78</sup> Ibid.

## Chapter 3

### SHORTCOMINGS AND GAPS FOUND IN THE LEGAL FRAMEWORK DEALING WITH DOMESTIC VIOLENCE.

This chapter will look at shortcomings and gaps found in the legal framework dealing with domestic violence and at why there is lack of enforcement and implementation of specific laws to deal with the vice.

Lack of legal protection, particularly within the sanctity of the home, is a strong factor in perpetuating violence against women.<sup>79</sup> By the 1990s, attention had begun to be paid in most African countries as to the high levels of domestic violence that accompanies the life of a woman in Africa. Activists groups in most African countries have made efforts to use the legal system to attack this problem; they have lobbied for passage of domestic violence laws and established organisations that counsel abused women, offer legal assistance, and in some instances give domestic violence training to government personnel.<sup>80</sup>

In Kenya there are no comprehensive laws that deal expressly with domestic violence as such. Parts of domestic violence have been dealt with, in other laws in Kenya, but the issue has not had a law devoted to itself. There is no provision in the law that criminalises domestic violence.<sup>81</sup> The most common form of domestic violence in Kenya is physical abuse.<sup>82</sup>

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<sup>79</sup> Domestic Violence Against Women and Girls, Innocent Digest No. 6 of 2000

<sup>80</sup> Cynthia Grant Bowman, Women and Law in Sub-Saharan Africa.

<sup>81</sup> The ugly face of domestic violence in Kenya, and laws against it: [www.glad2bawoman.com](http://www.glad2bawoman.com)

<sup>82</sup> Law and Domestic Violence :[www.the-star.co.ke/news/article.../law-and-domestic-violence](http://www.the-star.co.ke/news/article.../law-and-domestic-violence)

As there is no statute which expressly deals with domestic violence, the following statutes have provisions which deal with the matter.

Nationally it includes; The Constitution, Penal Code and Matrimonial Causes Act. There is a proposed bill which is yet to be passed that will expressly deal and prohibit domestic violence. It is called, The Protection Against Domestic Violence Bill, 2012.

If this bill is passed by parliament, Kenya will move a mile in diminishing this vice called Domestic Violence.

Domestic Violence is also addressed by international laws which have been ratified by Kenya. The international legal framework on domestic violence includes; Declaration On The Elimination Of All Forms Of Violence Against Women (DEVAW), Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) The African Charter on Human Rights, The Universal Declaration on Human Rights.

The fact that domestic violence is rarely reported makes it look like there is no urgency in creating a legislation which will expressly deal with the issue. Enactment of a specific act addressing violence in the family would send out a clear message to the public at large and all state functionaries in particular that the state will not tolerate violence against women and that it will take the necessary action against any offender.<sup>83</sup>

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<sup>83</sup> Cynthia Grant Bowman, Women and Law in Sub-Saharan Africa at 429

## 3.1 NATIONAL LAWS

### 3.1.1 The Kenyan Constitution 2010

The Constitution of Kenya 2010 envisages Chapter V, which is the Bill of Rights. The Bill of Rights is the blanket provision, which safeguards the rights of men and women alike.<sup>84</sup>

The rights of a person not to be subjected to physical abuse/ domestic violence are protected and guaranteed in the tenets of our constitution. Article 28 of the Constitution, it provides that person has inherent dignity and the right to have that dignity respected and protected.

Article 27 talks about Equality and freedom from discrimination.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) The state shall not discriminate directly or indirectly against any person on any ground, including race sex pregnancy marital status, health status, ethnic or social origin colour, age, disability, religion, conscience, belief culture dress language or birth.

Article 27 (6) provides that ; To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. This subsection enshrines the fact that it is our constitutional right for a statute to redress the vice of domestic violence.

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<sup>84</sup> The Constitution of Kenya 2010, Chapter 5; Bill of Rights.

The nonexistence of such a law shows us that individuals who suffer domestic violence are discriminated against in terms that no law has been passed to expressly deal with Domestic Violence. The victims don't have a solid foundation to deal with their grievances in the manner that is required.

Neither the Constitution nor other national legislation contains a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, thereby failing to provide a basis for tackling issues of discrimination in all spheres.<sup>85</sup>

Article 29 further provides that every person has the right to freedom and security, which includes the right not to be

- Deprived of freedom arbitrarily or without just cause,
- subjected to any form of violence from either public or private sources;
- subjected to torture in any manner, whether physical or psychological;
- Subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner.

As far as protection against violence against women and girls is concerned, the Constitution does not provide for it explicitly.

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<sup>85</sup> Situation of Violence against Women and Children in Kenya: Implementation of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

What it does provide for however is protection from inhuman treatment or torture or any other form of degrading punishment. This applies to men and women alike.<sup>86</sup>

### 3.1.2 The Penal Code

The Penal Code Chapter 63 of the Laws of Kenya is currently the law under which most cases of domestic violence are prosecuted. This law provides for offences such as murder, attempted murder, grievous harm and assault among others.<sup>87</sup>

Section 234 provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.<sup>88</sup>

Section 237 provides that any person who unlawfully wounds another; or unlawfully, and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by, any person, is guilty of a misdemeanor and is liable to imprisonment for five years.<sup>89</sup>

Section 250 provides that any person who unlawfully assaults another is guilty of a misdemeanor and, if the assault is not committed in circumstances for which a greater punishment is provided in the penal code, he/she will be liable to imprisonment for one year.

Section 251 thereof also provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.<sup>90</sup>

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<sup>86</sup> Federation of Women Lawyers (FIDA) Kenya , Gender-Based Domestic Violence In Kenya

<sup>87</sup> Ibid.

<sup>88</sup> The Penal Code Cap 163

<sup>89</sup> Ibid.

<sup>90</sup> The Penal Code Cap 163

This simply means that, physical assault, even if it happens in a family setting, is a criminal offense punishable under the law. The punishment will differ depending on the severity of the assault on the victim. The punishments prescribed for the offenses could tear down a family unit, for instance if a husband or wife is imprisoned for a long period of time. This should therefore seek to deter parties to a marriage to avoid physical abuse and confrontation as a means of solving their family disputes, as it is a criminal offense.<sup>91</sup> Section 250-253 of the Penal Code which covers Assaults do not cover spousal assault as a special category of assault which should attract an enhanced punishment as compared to other assaults.<sup>92</sup>

The Penal Code is inadequate with regard to protection where violence is imminent to the potential victim or their children. It thus fails to recognise the differentiated dimensions of domestic violence and only comes into effect after the victim has been violated which may sometimes be too late. Similarly, in cases where domestic violence is ongoing; the Penal Code fails to provide for the removal of the abuser from the home environment so as to minimise the effects of violence.<sup>93</sup>

Sections 139-140 and 250 -253 of the Penal Code deals with punishment for offences involving violence. These sections reveal that punishment for offences involving violence against women is not severe enough to deter the offenders who have a habit of committing such offences. Under section 250 a person who is found guilty of assault is jailed for only five years. The punishment for assault should be severe so as to deter people from committing this offence.

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<sup>91</sup> Law and Domestic Violence : [www.the-star.co.ke/news/article-28336/law-and-domestic-violence](http://www.the-star.co.ke/news/article-28336/law-and-domestic-violence)

<sup>92</sup> Kivutha Kibwana, Law and The Status of Women In Kenya

<sup>93</sup> Federation of Women Lawyers (FIDA) Kenya , Gender-Based Domestic Violence In Kenya

Punishment that is not severe leads to offenders being treated very leniently by judicial officers who enforce the law against such crimes. This is because such crimes are not taken seriously.<sup>94</sup>

### **3.1.3 The Matrimonial Causes Act**

In Kenya domestic violence occurs mostly within marriages and may be in the form of physical abuse, marital rape, psychological and economic abuse.<sup>95</sup> Under The Matrimonial Causes Act, relief is granted to the victim in the form of separation or divorce from the perpetrator of cruelty through violence. Separation is granted on the grounds of cruelty which the courts have widely interpreted cruelty as a ground for divorce and may be used to mean psychological violence, physical violence, sexual violence or even economic violence within the marriage.<sup>96</sup>

This Act only remedies people who are married therefore if the victim is not married to the perpetrator of the violence he/she cannot seek help from this Act.

Another challenge is that many women who are in abusive marriages find it hard to get out of such a marriage due to economic dependency and the social expectations. Many women rely on their husband to support them financially and provide for their children. If they get out of such a marriage they will have no one to rely on, thus rendering them unable to provide for their children. This is the main reason you will find a woman will prefer to stay with her abusive spouse rather than opt out of such a marriage.<sup>97</sup>

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<sup>94</sup> Cynthia Grant Bowman, *Women and Law in Sub-Saharan Africa*

<sup>95</sup> Federation of Women Lawyers (FIDA) Kenya, *Gender-Based Domestic Violence In Kenya*

<sup>96</sup> Dr. Patricia Kameri Mbote, *Violence Against Women In Kenya: An Analysis of Law Policy and Institutions 2000-1*

<sup>97</sup> Karen L. Bune, *Understanding the dynamics of domestic violence*, March 5<sup>th</sup> 2007



The law falls short of the needs of women in this regard by only punishing the actual offence but does not give the victim an option of getting out of an abusive marriage.<sup>98</sup>

### **3.1.4 The Subordinate Courts (Separation and Maintenance) Act**

The Subordinate Courts (Separation and Maintenance) Act- Sections 3 (1) c provides that; any woman may apply to the court for an order or orders of separation or divorce under this act on grounds that her husband has been guilty of persistent cruelty to her or her children or of willfully neglecting to provide reasonable maintenance for her or her children whom he is legally liable to maintain.

### **3.1.5 The Protection Against Domestic Violence Bill 2012**

This Bill is the most recent Bill constructed to deal with domestic violence expressly. Violence in this Bill is defined as abuse derived from cultural, customary and religious practices, damage to property, defilement, depriving the applicant of or hindering the applicant from access to or a reasonable share of the facilities associated with the applicant's place of residence, economic abuse, emotional or psychological abuse, forcible entry into the applicant's residence where the parties do not share the same residence, harassment, incest, intimidation, physical abuse, sexual abuse, stalking, verbal abuse, or any other abusive behaviour towards a person, where such conduct harms or may cause imminent harm to the safety, health, or well-being of the person.<sup>99</sup>

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<sup>98</sup> Federation of Women Lawyers (FIDA) Kenya , Gender-Based Domestic Violence In Kenya

<sup>99</sup> The Protection Against Domestic Violence Bill 2012, section 3 (1)

Domestic violence in this Act is defined as, “Domestic violence, in relation to any person, means violence against that person, or threat of violence or of imminent danger to that person by any other person with whom that person is, or has been, in a domestic relationship.”<sup>100</sup>

Physical abuse is defined as “any act or threatened act of physical violence towards the applicant.”<sup>101</sup>

The object of this Act is to prevent violence in domestic relationships by, recognising that domestic violence, in all its forms, is unlawful behaviour, and ensuring that, where domestic violence has occurred, there will be effective legal protection for its victims.<sup>102</sup>

Effective legal protection is enforced by;

- Empowering the courts to make certain orders to protect victims of domestic violence
- Ensuring that access to justice is as speedy, inexpensive and simple in accordance with the law,
- Providing appropriate programmes, for persons who are victims of domestic violence,
- Providing programmes that have the primary objective of stopping or preventing domestic violence
- Providing effective sanctions and enforcement in the event that a protection order is breached and
- Providing shelter for victims of domestic violence.

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<sup>100</sup> The Protection Against Domestic Violence Bill 2012, section 3 (2)

<sup>101</sup> The Protection Against Domestic Violence Bill 2012, section 2

<sup>102</sup> The Protection Against Domestic Violence Bill 2012, section 6

The court is given the mandate to provide for protection orders under section 10 of the Bill where it provides that, “a person who is or has been in a domestic relationship with another person may apply to the court for a protection order in respect of that other person.”<sup>103</sup>

Effective legal protection will also be achieved by ensuring that access to justice which is a constitutional right will be speedy, inexpensive and simple in accordance with the law. Appropriate programmes that have the primary objective of stopping or preventing domestic violence will be provided for persons who are victims of domestic violence. The act also aims to provide effective sanctions and enforcement in the event that a protection order is breached and provide shelter for victims of domestic violence.<sup>104</sup>

The Court may, direct the parties to participate in counselling and conciliation programmes including those provided by religious institutions and any suitable cultural programmes subject to their satisfaction that these programmes will not in any way undermine the objects of the Act or the values and principles of the Constitution. Counselling provided shall be aimed at ensuring respect for the law prohibiting domestic violence, the promotion of a protective environment for all within the family and the promotion of harmonious domestic relations between and among the parties.<sup>105</sup> This will be a major step as couples will determine the root of the problem in their relationship and be able to sort it out. It will also help in reducing the number of divorce cases caused by domestic violence.

If parliament was to approve this Bill and pass it as a statute, levels of domestic violence in Kenya will reduce tremendously.

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<sup>103</sup> The Protection Against Domestic Violence Bill 2012, section 10 (1)

<sup>104</sup> The Protection Against Domestic Violence Bill 2012, section 6

<sup>105</sup> The Protection Against Domestic Violence Bill 2012, section 16

This is due to the fact that domestic violence shall be criminalised and the perpetrators shall not be able to hide behind the veil of customary laws. Women who are subjected to domestic violence by their partners shall be able to come out of the closets and report to the authorities as they know they will receive help as per the Act.

### **3.2 INTERNATIONAL REGIME ON DOMESTIC VIOLENCE**

There are international laws too, which demand countries to hone in on domestic violence in order to decrease its occurrence. However, these are not substantial enough as they need to be domesticated into the national laws for them to become effective.

#### **3.2.1 The Universal Declaration of Human Rights**

The Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights.<sup>106</sup>

In this Declaration it provides that everyone is entitled to all the rights and freedoms set forth in Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>107</sup>

It also continues to say that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>108</sup>

The non-discrimination clause in Article 2 read together with Article 3<sup>109</sup> and Article 5<sup>110</sup> mean that any form of violence against women which can be construed as threat to her life, liberty or

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<sup>106</sup> The Universal Declaration of Human Rights Article 1

<sup>107</sup> The Universal Declaration of Human Rights Article 2

<sup>108</sup> The Universal Declaration of Human Rights Article 5

serenity of person or which constitutes torture or cruel, inhuman or degrading treatment is not in keeping with the spirit and purport of the UHDR and is therefore, a violation of the international obligations of member states.<sup>111</sup>

### **3.2.2 The Convention on the Elimination of All Forms of Discrimination against Women**

Convention on the Elimination of All Forms of Discrimination against Women is an international bill of rights for women as it sets out practices regarded to be discriminatory and lists actions to be taken to remedy this situation. Many of the anti- discrimination clauses contained in it provide the basis for the protection of women from violence.<sup>112</sup>

Discrimination is defined as “...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in their political, economic, social, cultural, civil or any other field”.<sup>113</sup>

Gender-based violence is defined as violence directed against a woman because she is a woman or which affects women disproportionately.

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<sup>109</sup> Everyone has the right to life, liberty and security of person.

<sup>110</sup> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

<sup>111</sup> Federation of Women Lawyers (FIDA) Kenya, Gender-Based Domestic Violence In Kenya

<sup>112</sup> Dr. Patricia Kameri Mbote, Violence Against Women In Kenya: An Analysis of Law Policy and Institutions 2000-1

<sup>113</sup> The Convention on the Elimination of All Forms of Discrimination against Women, Article 1

It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.<sup>114</sup> The definition of discrimination therefore necessarily includes gender-based violence.

### **3.2.3 The Declaration on the Elimination of the Violence against Women**

The Declaration on the Elimination of the Violence against Women (DEVAW) deals exclusively with violence against women. In this Declaration violence against women is defined as “any act of gender-based violence that results in, or is likely to result in: physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether owing in public or private life”.<sup>115</sup>

The Declaration urges states to condemn violence against women and not to invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. It continues to state that states should pursue by all appropriate means and without delay a policy of eliminating violence against women.<sup>116</sup>

### **3.2.4 The African Charter on Human and People’s Rights**

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.<sup>117</sup>

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<sup>114</sup> U.N. Convention for the Elimination of Discrimination against Women (1992)

<sup>115</sup> The Declaration on the Elimination of the Violence against Women Article 1

<sup>116</sup> The Declaration on the Elimination of the Violence against Women Article 4

<sup>117</sup> African Charter on Human and Peoples' Rights :[www.achpr.org/instruments/achpr/](http://www.achpr.org/instruments/achpr/)

The charter states that “The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>118</sup>

The African Union through the African Charter on Human and People’s Rights makes provisions for states to ensure the elimination of every form of discrimination against women and to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>119</sup>

The charter provides that human beings are inviolable and that every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.<sup>120</sup> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment are prohibited by the charter.<sup>121</sup>

Kenya as a party to the African Charter on Human and People’s Rights should adhere to Article 1, 4 and 5 of the charter by adopting legislative measures on the issue of domestic violence and giving effect to them thus showing their recognition of the rights, duties and freedoms enshrined in the Charter.

Despite the fact that Kenya has ratified these international instruments, many of them have not been incorporated into Kenyan Law.

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<sup>118</sup> African Charter on Human and People’s Rights, Article 1

<sup>119</sup> African Charter on Human and People’s Rights, Article 18 (3)

<sup>120</sup> African Charter on Human and People’s Rights, Article 4

<sup>121</sup> African Charter on Human and People’s Rights, Article 5

The only way an international convention can become part of Kenyan Law is through a Bill or Motion passed by Parliament making it an Act of the Parliament of Kenya thus incorporating it into domestic law.

Citizens will not be able to enjoy rights and freedoms guaranteed by these international instruments as they have not yet been incorporated into Kenyan Law. Precedents set by Kenyan courts show that they recognise the international instruments but they are reluctant to apply those laws in local situations due to the fact that there is no legislation which clearly adopts those international instruments.<sup>122</sup>

Therefore, despite Kenya's willingness uphold international law to women's human rights instruments very little has been done to ensure that Kenya's domestic law conforms to international standards in respect of women's human rights.<sup>123</sup>

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<sup>122</sup> Dr. Patricia Kameri Mbote, *Violence Against Women In Kenya: An Analysis of Law Policy and Institutions 2000-1*

<sup>123</sup> Federation of Women Lawyers (FIDA) Kenya , *Gender-Based Domestic Violence In Kenya*



## CHAPTER 4

### CONCLUSIONS AND RECOMMENDATION

#### **4.1 Conclusion**

Violence against women and girls continues to be a global epidemic that subjects women to physical, emotional and economical torture. It is one of the most pervasive of human rights violations, denying women and girls', dignity, self-worth, and their right to enjoy fundamental freedoms.<sup>124</sup> It is clear from the previous chapters that a lot needs to be done to deal with Domestic Violence. It is imperative that Bills such as The Protection Against Domestic Violence Bill 2012 should be passed into law.

Enactment of a specific act addressing Domestic violence would be a clear message to the public at large, especially the perpetrators of the said violence that the state will not tolerate violence against women and that it will take the necessary action against any offender. By enacting such a Bill we can say as a society that we have moved a mile in fighting the ugly vice called Domestic Violence.

#### **4.2 Recommendations**

Women need to be empowered by being educated, being offered employment opportunities and through legal literacy. Empowering women will significantly reduce levels of domestic violence as they will be able to support themselves after coming out of an abusive relationship.

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<sup>124</sup>Social Inclusion Research Fund (SIRF) SNV, Nepal, Violence Against Women (Root causes and Consequences)

Women should be educated on their rights. Educating and sensitising women about their rights will enable them to know their rights as women and be able to seek for help from the relevant authorities.

The Government needs to provide shelters for victims of Domestic Violence that are run in accordance with the values and principles of the Constitution. Children need to be identified as victims of domestic violence, and their safety has to be ensured. Appropriate programmes should be developed by the community and the state to assist children to recover from the violence and abuse they have suffered and/or witnessed. This requires ensuring the safety of their mothers and making childcare facilities available to women in shelters.

Forms of communal control should be created and maintained so that domestic violence becomes a society's problem. This is to ensure that it does not remain a woman's problem. Creating awareness about the impact of domestic violence on communities conveys the importance of preventing such violence against women and children.

The local community therefore needs to be sensitised about domestic violence and be encouraged to condone it in its midst. The local community may offer their support in preventing domestic violence by reporting any incidences to the police and help in sheltering the victims in their homes.

Police officers have the mentality that domestic violence is an issue which they cannot interfere, as it is a family affair. They are usually of the opinion that it should be sorted out in the home. Therefore they should be trained in family related and domestic violence matters as it will enable them to understand the victims and be able to help the more efficiently.

In Kenya Domestic Violence should be recognised as a crime on its own. The laws which are in existence fail to recognise the different dimension of domestic violence. There should be effective enforcement of existing laws. The Kenyan government needs to domesticate Convention Against All Forms Of Discrimination Against Women (CEDAW) so that there can be ample provisions governing domestic violence.

Finally there is need to ensure the promulgation of the Protection Against Domestic Violence Bill 2012. This is because the Bill defines domestic violence and recognises the different dimensions of domestic violence. The Bill seeks to prevent to domestic violence by providing effective legal provisions for its victim and to guarantee protection to all family members against domestic violence. The Bill also covers intimate partner violence which does not exist in the other laws such as The Penal Code.

It now falls on the government to implement domestic violence legislation that reflects a two-prong response to the problem; one that holds victimisers unconditionally accountable for their criminal acts and results in sentences that reflects the seriousness of the crime, and that which jointly addresses the human rights and unique needs of the victims.

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#### **PENDING BILLS**

The Protection Against Domestic Violence Bill 2012

#### **INTERNET SEARCHES**

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