



APPRAISING KENYA'S CHILDREN ACT FROM SEXUAL AND REPRODUCTIVE HEALTHCARE RIGHTS PERSPECTIVES

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Abstract

Sexual and reproductive health rights (SRHR) are critical to the growth and development of children. Yet, they are often the least considered during the legislation on children matters. When introducing children's SRHR, the discourse tends to be divisive. The conservatives and progressives pull towards opposite directions. An assessment of the extent to which the Children Act safeguards SRHR for children, thus, becomes significant for two reasons. First, it illuminates the safeguarded children's SRHR in the Act for public sensitization and awareness. An informed public stands to benefit from the safeguarded children's SRHR under the statute. Secondly, the review spotlights the SRHR gaps in the Act. Subsequent amendments to the Children Act, if any, can address the missed marks. Identifying the lacunas also provides courts with the opportunity to interpret and develop them in a manner that maximizes the enjoyment of children's SRHR. Significant also is Kenya's SRHR policy context that predated the Children Act, which can provide a critical gauge in appraising the Children Act, even though statutes are binding and override the policies. Kenya has formulated such SRHR policies to discharge its international SRHR obligations. Finally, the Constitution and international human rights framework provide a critical tool in appraising the Children Act.

1. Introduction

The Constitution not only safeguards plethora of rights for all persons but also protects the rights of specific vulnerable groups.¹ These vulnerable groups include children.² It provides for rights specific to their vulnerability. These include the child's rights to naming and nationality; free and compulsory education; basic nutrition, care and shelter; protection from abuse, harmful practices and violence; parental care and protection; detention rights and best interest principle.³ The Children Act was

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¹ The Constitution of Kenya, 2010

² Article 21(3) of the Constitution

³ Article 53 of the Constitution



enacted within this constitutional context.⁴ It enforces Article 53 of the Constitution.⁵ The Children Act repealed another legislation that preceded it.⁶ The Children Act of 2001 (repealed) had been operational for two decades. This historical background also informed the formulation of the new legislation. The new Children Act sought to address the emerging socioeconomic and political realities concerning children.

True to its preamble, the Children Act safeguards a broad array of rights to be enjoyed by children.⁷ This article lumps them up in three forms. The first form consists of constitutional rights copy-pasted from the Bill of Rights. These include the best interest of the child principle, non-discrimination, education, religion, and assembly rights. The second form consists of novel rights. These rights are not explicit in the Constitution. They include children's rights to; name and nationality, non-separation from parents, survival and development, and intersex children's rights. The third form consists of protective rights. These rights create offences when breached. They include rights to freedom from child abuse, harmful cultural practices, exposure to drugs and torture.

A number of reviews have been authored since the Children Act came into force.⁸ Most reviews postulate that the Children Act bolsters the safeguarded children's rights. Some reviews fault the Act for eroding parental authority and entrenching intersex rights. The reasons advanced against the Act are not unconvincing. And so, these diametrically opposed reviews reflect the push-and-pull that characterizes policy formulation, legislation and case adjudication on children's sexual and reproductive rights (SRHR). This article also finds a dearth of literature reviews on the Children Act from SRHR perspectives. The few reviews available focus only on the intersex child's rights.⁹ Again, this phenomenon reflects the societal apathy toward children's SRHR. Yet the whole gamut of SRHR is integral to the growth and development of children. A conservative approach that relegates children's SRHR results to negative outcomes. Against this background, the article explores the extent of children's SRHR safeguards in the Children Act. It engages the Act not only through the Constitutional muster, international human rights norms and Kenya's SRHR policy framework but also with scholarly publications from SRHR experts. Whilst this explorative appraisal appreciates that

⁴ The Children Act, No. 29 of 2022

⁵ The Long title of the Children Act sets out the objectives in twofold. It enforces Article 53 of the Constitution, and Care and Protect children in conflict with the law

⁶ Under section 249(1) of the Children Act, it repeals the Children Act, 2001 (No. 8 of 2001)

⁷ Sections 5 - 28 of the Children Act

⁸ The Children Act was assented to by the President on 6th July 2022 with a commencement date of 26th July 2022

⁹ John Chigiti. 2022. *The Children Act, 2022: The Long Winding Journey Towards the Legal Recognition and Registration of Intersex Children in Kenya*.



the Children Act overrides these policies and academic works, it finds them useful tools for engaging the Act. Besides, sometimes, these policies reflect Kenya's response to its international human rights obligations that include SRHR. Illuminating the children's SRHR safeguards in the Act sensitizes the public to promote and protect them. Highlighting some SRHR gaps in the Act might also inform subsequent amendments. Finally, the courts can note and interpret the gaps, in light of constitutional and international human rights framework, to maximize the enjoyment of children's SRHR.

To appraise the Children Act from the SRHR perspective, the article focuses on five thematic areas. First, it reviews the Children Act in light of children's right to comprehensive sexual education. Secondly, it appraises the Act in the context of children's rights to safe abortion and contraceptives. Third, it analyses the Act in regard to children's sexuality rights. Fourth, the article assesses children's right to protection from harmful practices under the Act. Finally, the article critiques the definition of a child's age for creating confusion in age computation in sexual offences cases and conflict with pregnant women's rights. Admittedly, these thematic areas are not exhaustive. However, they can reasonably form a basis to gauge how the lawmakers and policy experts have appreciated children's SRHR in Kenya. They can also provide reasonable measures of taking stock of the children's SRHR safeguarded in the Act for enjoyment and also identify gaps to be addressed through subsequent amendments or judge-made law.¹⁰

2. Children's Right to Comprehensive Sexuality Education

Comprehensive sexual education entails the provision of timely, relevant and accurate holistic information and skills relating to SRHR to avoid negative health outcomes.¹¹ It seeks to improve the sexual and reproductive health of adolescent children using its multifaceted approaches.¹² There is growing consensus that most of the sexual and reproductive health challenges that adolescent children experience, ranging from early marriages, sexual abuse, high rates of sexually transmitted infections (STI) and diseases, unintended pregnancies to unsafe abortions, often result from failure to provide comprehensive sexual education to them.

¹⁰ In common law jurisdictions, judge made laws refer to body laws made by judicial officers through their decisions (precedents)

¹¹ Sidze, E.M. Stillman, M. Keogh, S. Mulupi, S. Egesa, C.P. Leong, E. Mutua, M. Muga, W. Bankole, A. and Izugbara, C. 2017. *From paper to practice: sexuality education policies and their implementation in Kenya*.

¹² UNESCO. 2018. *International Technical Guidance on Sexuality Education: An Evidence-informed Approach. Revised Edition*. Paris: UNESCO.



Statistics on these reproductive and sexual health challenges point to a grim reality. An example is child marriages, which have only reduced from 28% to 22.9% from 1993 to 2014.¹³ It is deducible that the current child marriage figures cannot be drastically different based on the past trend of decrease rate. Another sad reality relates to the adolescent HIV prevalence rate which is 4% in Kenya.¹⁴ Yet, the rate of adolescent children having knowledge about HIV prevention stands at 44% nationally.¹⁵ The adolescent pregnancy rate, too, is still high at 15% from 18% in a whole decade.¹⁶ Alarming, 17% of maternal mortality in Kenya results from conducting unsafe abortions among women.¹⁷ Adolescent children encounter negative consequences of unsafe abortion, including maternal deaths, as a result of unintended pregnancies and lack of access to safe abortion services.¹⁸ These challenges hamper the adolescent children's ability to achieve their full potential.¹⁹ It is imperative that the government formulates robust policy and legislative framework to anchor comprehensive sexuality education to improve the sexual and reproductive health lifestyle of adolescent children.

Kenya's constitution has laid a rights-based framework to address these challenges both directly through enjoyment of the children's rights and indirectly through legislative and policy framework that corresponds to constitutional spirit, purpose and values. For instance, Article 53(1)(b) and (c) provide the child's right to free and compulsory basic education and healthcare. Apart from these child-specific rights, the Constitution also safeguards every person's right to access information and socio-economic rights (highest attainable standard of health, healthcare services, reproductive healthcare and education) under Articles 35 and 43, respectively. These constitutional rights provide the best repertoire to enhance comprehensive sexual education directly and through policy and legislation.

To its credit, Kenya's comprehensive sexual education on children police program is robust. A chronological survey of these policies suffices before delving into the Children Act. In 2004, Kenya

¹³ Ikamari, Lawrence. 2023. *Regional Variation in Early Marriage in Kenya*. Journal of African Population Studies

¹⁴ Mwaniki, S.W. Kaberia, P.M. Mugo, P.M. et al. 2023. *HIV prevalence and associated risk factors among young tertiary student men who have sex with men (MSM) in Nairobi, Kenya: a respondent-driven sampling survey*. *AIDS Res Ther*.

¹⁵ KNBS and ICF. 2023. *Kenya Demographic and Health Survey 2022. Key Indicators Report*. Nairobi, Kenya, and Rockville, Maryland, USA: KNBS and ICF.

¹⁶ Ibid, KDHS (2023)

¹⁷ Mutua, M.M. Manderson, L. Musenge, E. Achia, T. 2018. *Policy, law and post-abortion care services in Kenya*

¹⁸ Ushie, B.A. Izugbara, C.O. Mutua, M.M. et al. 2018. *Timing of abortion among adolescent and young women presenting for post-abortion care in Kenya: a cross-sectional analysis of nationally-representative data*. *BMC Women's Health*

¹⁹ Keogh, S.C. Leong, E. Motta, A. Sidze, E. Monzón, A.S. and Amo-Adjei, J. 2021. *Classroom implementation of national sexuality education curricula in four low-and middle-income countries*. *Sex Education*, 21(4), pp.432-449



adopted the policy whose objective was to provide young people with knowledge and skills to lead effective lives.²⁰ This broad objective reasonably should include comprehensive education on young people's sexuality. In the same year, it also formulated another policy that integrated life skills and HIV/AIDS education into the curricula of all levels of schools, which must be rights-based.²¹ Again, this policy provides a good avenue in discussing young people's sexuality while educating them on STDs. Later, another policy that sought to ensure that children are assisted in positive life skills and values in school was formulated.²² It is logical to argue that this policy entailed packaging sexual education to children in a positive sense. In 2015, the government further adopted a more progressive policy on sexual and reproductive rights for adolescents.²³ The policy advocates for bolstering guidance to adolescents on their SRH status as a prelude to their realization of their full potential in national development. Notably, the policy improved on the then existing Adolescent Sexual and Reproductive Health of 2003 that had advocated for interdisciplinary approach to provide integrated and quality reproductive healthcare services. The Children Act was enacted within this SRHR policy context. One would expect that the Children Act emerging from this context would benefit from these policies that had been formulated to seal the legislative gaps created by the repealed Children Act. Existing policies are often formulated to address societal problems which legislation had not fully addressed. So, the policies discussed above were attempting to address the SRHR gaps in the Children Act of 2001 (repealed). Furthermore, sometimes policies such as the ones in this context are formulated to respond to state's international law obligations.²⁴ The subsequent statutes can draw inspiration from evidence-based policies drafted by experts. However, as it should be pointed out, there was a mismatch between the existing policies on children's comprehensive sexual education and the new Children Act. The existing policies were supposed to legislative process of enacting the Children Act of 2022.

When enacting the Children Act, the legislature apparently turned a blind eye to several children's policies that had identified the existing legislative gaps in comprehensive sexual education for children. It failed to entrench explicit provisions on comprehensive sexual education. The Act provides for the right to free and compulsory basic education but leaves discretion to cabinet secretaries to formulate

²⁰ The Ministry of Education. *A Policy Framework on Education and Training: Reforming Education and Training in Kenya*. 2004.

²¹ The Ministry of Education. *The Education Sector Policy on HIV and AIDs in Kenya of 2004*, First Edition (Revised in 2013)

²² The Ministry of Education. *The National School Health Policy in Kenya of 2009*, First Edition (Revised in 2018)

²³ The Ministry of Health. *The National Adolescent Sexual and Reproductive Health (ASRH) Policy*, 2015

²⁴ Ganjiki, Wayne 'Effective Drafting for Effective Legislation: Utilising Thornton's Five Stages of Drafting in Papua New Guinea' 2016, LLM Dissertation, University of London



and implement relevant policies.²⁵ It beats logic why Parliament failed to explicitly embed comprehensive sexual education within the compulsory basic education rights instead of leaving it to the policies, which have already been recommended for its legislation.

Despite the SRHR gaps exposed above, all is not lost as the Children Act safeguards the children's right to information on the reproductive healthcare.²⁶ The right information on sexual and reproductive health intersects with the child's right to basic compulsory education for three reasons. First, the Act does not state where the children can access the information. Schools, rather than health care institutions, are the best place for reproductive healthcare information for children. One reason for this claim is that schools have relatively child-friendly health settings.²⁷ Another reason is when the claim is considered in light of the Kenya's policies that have adopted two-prong models to provide SRH services, that is, Youth Centres (YCs) and Integrated Health Services (HIS). YCs are very few in the country. For instance, only 34% of health facilities have one YCs in Kenya, which has about 8.1 adolescents.²⁸ The final reason is that boys have developed negative attitudes that YCS and HIS facilities are for women and girls.²⁹ While the YCS and HIS facilities (healthcare facilities) may have encouraging youth-sensitive set-ups, schools have wide reach and equally provide children with a friendly environment for comprehensive sexual education. In any case, some scholars have advocated for the use of existing government structures.³⁰ With the reasons elucidated herein, there are no plausible reasons why schools cannot be used to promote comprehensive sexual education rights to children. Secondly, comprehensive sexual education is implicit in the information on reproductive healthcare. Thirdly, human rights are interdependent and indivisible. The children, thus, can exercise the right to information on sexual and reproductive health in the context of free and compulsory basic education in schools.

²⁵ Section 13 of the Children Act, 2022

²⁶ Section 16(3) of the Children Act, 2022

²⁷ Lina Jaruseviciene, *et al* 'Primary healthcare providers' views on improving sexual and reproductive healthcare for adolescents in Bolivia, Ecuador, and Nicaragua' (2013) *Global Health Action*

²⁸ Pamela Godia, *et al* 'Sexual reproductive health service provision to young people in Kenya; health service providers' experiences' (2013) *BMC Health Serv Res 13*

²⁹ Pamela Godia, *et al* 'Young people's perception of sexual and reproductive health services in Kenya' (2014) *BMC Health Serv Res 14*

³⁰ Pamela Godia 'Sexual reproductive health service provision to young people in Kenya; what is the best model?' (2012) Doctor of Philosophy thesis, University of Liverpool



3. Children's Rights to Safe Abortion and Contraceptives

The hue and cry on the national healthcare service's failure to curb adolescent pregnancies, childbirth and sexually transmitted infections predates two decades.³¹ Adolescent pregnancy and childbearing cause birth complications (maternal injuries and mortality), early marriage, intimate partner violence and mental health issues among adolescent girls.³² While advocating for adolescents' access to contraception and safe abortion in Africa, Kangaude *et al* make the following observations.³³

First, adolescent access to safe abortion and contraceptive services continues to remain a pressing issue in Africa. Secondly, Africa has restrictive laws, policies and hospital practices that deter adolescents from accessing contraceptives and safe abortion even when the pregnancy would risk their life or health. This observation, though may be slightly distinguishable in Kenya's context. Article 26(4) of the Constitution permits trained health professionals to conduct abortion on emergency treatment when pregnancy endangers the mother's life and health and where written law(s) allow it. While this constitutional provision is progressive, apparently, it retains the restrictions that Kangaude *et al* were pointing out. For instance, the three permissive grounds for abortion exclude access to abortion for sexual offense victims. Parliament has not expanded the grounds to permit abortion on such grounds despite the existing constitutional window to do so.³⁴ It is only the High Court which has interpreted Article 26(4) to envisage abortion on grounds of defilement and rape.³⁵ But at the same time, it has faulted the Article for elevating fetus life above the matter and instead interpreted the provision more liberally through privacy rights perspectives. The final observation Kangaude *et al* make is that African governments should apply the international human rights law to allow adolescents to decide about their sexual and reproductive health care, and have full and unencumbered access to them. The scope of their study may have been broader, but it still paints Kenya's picture. For instance, it is apparent that section 16 of Children Act which is couched in absolute terms restricts children's access to contraceptives and abortion provisions. The children can only access these services through third party consents.³⁶

³¹ Cook, R. Dickens BM. 2000. *Recognizing adolescents' 'evolving capacities' to exercise choice in reproductive healthcare*. International Journal on Gynecology and Obstetrics. 13-21.

³² UNFPA. 2022. *Motherhood and Childhood: the Untold Story*.

³³ Godfrey, K. Catriona, M. Ernestina, C. and Tamara, F. 2022. *'Integrating child rights standards in contraceptive and abortion care for minors in Africa'* (2022) International Journal of Gynecology and Obstetrics

³⁴ Jane Wambui *'Implementing reproductive health and abortion provisions in the Kenya Constitution 2010'* Journal of Humanities and Social Science, 2018

³⁵ *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others* [2019] eKLR

³⁶ Section 16 of the Children Act



Tragically, such statutory restriction is at variance with the evidence on the ground. Generally, the society expects or assumes that adolescents do not engage in sex. However, research findings depict a contrary picture.³⁷ First, more than a third of Kenyan adolescents (41% of boys and 37% of girls) have engaged in sexual intercourse, and about a fifth of adolescents are sexually active. Secondly, the contraceptive usage among adolescents is relatively low. Nearly all sexually active adolescents do not want to get pregnant. Yet, 52% have unmet needs for family planning. Even with married adolescents, 62% of them do not want to get pregnant but still have unplanned births at 59%. Finally, HIV/AIDS still remain a cause for concern among adolescents. However, only about 50% have comprehensive knowledge about sexually transmitted diseases. This grim reality warrants government intervention.

The Constitution provides a framework to address the above issues affecting children. As discussed earlier, Articles 35, 43 and 53 of the Constitution accord them reproductive healthcare rights, which include access to contraceptive information and services. It permits girl children to access safe abortion, but it poses a danger to them. Article 26(4) allows the expansion of abortion grounds through written laws. Articles 2(4) and 20(3) also decree for enactment, interpretation and development of laws in conformity with the constitution and in manner that maximizes the enjoyment of rights. The Children Act could be as well have been one of such laws. But as shall be pointed out shortly, it fell short of this expectation in some ways. It should have followed not only the constitutional path but also the path existing policies have sought to take and recommended for statutory enactments. The government has formulated a number of policies with far-reaching content that complies with the above constitutional provisions on children's access to contraceptives and safe abortion. A brief survey in that regard suffices.

In 2005, the Ministry of Health formulated guidelines that recommend a minimum package of youth-friendly SRH services for all clinic-based, youth centre and school-based programs.³⁸ The healthcare facilities ought to extend safe abortion and contraceptive access to adolescent children as a minimum package. In 2015, *the Adolescent Sexual and Reproductive Health (ASRH) Policy* was adopted to promote realization of adolescents' full potential in national development through enhancing their SRH status. Earlier in 2013, the Ministry of Health had formulated and withdrawn "*Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya*" which attempted to liberalize access to

³⁷ Sidze, E.M. Stillman, M. Keogh, S. Mulupi, S. Egesa, C.P. Leong, E. Mutua, M. Muga, W. Bankole, A. and Izugbara, C. 2017. *From paper to practice: sexuality education policies and their implementation in Kenya*.

³⁸ The Ministry of Health. 2005. *The National Guidelines for Provision of Adolescent Youth-Friendly Services in Kenya* (revised in 2018).



safe abortion and contraceptives to adolescents. The withdrawal, together with access to abortion rights, was challenged in the High Court.³⁹The 5-judge bench made important pronouncements on access to abortion rights. First, abortion is permitted as an exception. Secondly, the health of the mother includes physical, emotional, mental and psychological (and it is a ground for abortion). Third, the existing laws on sexual offences permit abortion. Finally, victims of sexual offences are entitled to an abortion. The decision can be appreciated in the context of another High Court decision that declared sections 158, 159 and 160 of the Penal Code that criminalize abortion as unconstitutional.⁴⁰ One expected parliament to remove restrictions on adolescents' access to safe abortion and contraceptives based on the above constitutional provisions, court decisions and policy documents. But it did not. While the academic contributions policies and court decisions rank lower than legislation and the Constitution, they provide persuasive guidance on legislation or good tools to evaluate a statute. And indeed, section 16 of the Children Act did codify the children's rights to information on matters of sexual and reproductive health care and services. However, the section introduced three claw-backs on the section that threw a spanner to the works.

First, section 16(1) of the Act has a *proviso* that reproductive health services to children shall be subject to the express consent of the parent or guardian. It has been noted that third-party authorizations and parental consent have been used to deter adolescents from accessing safe abortion.⁴¹ It is incompatible with the child's autonomy rights to sexual and reproductive healthcare Article 24 of the Convention on the Rights of the Child.⁴² Sure, there is merit in arguments that parental authority is necessary in children's affairs like access to contraceptives, and eliminating it erodes parental rights to a child's authority, responsibility and custody. However, this article objects the absolute manner in which it is couched. The drafters may have benefited from persuasive decision UK's House of Lords.⁴³ In the majority decision, the judges developed jurisprudence worthy emulating. Health provider ought to start from the premise that parental authority is necessary for an adolescent patient who wants access to reproductive healthcare services, with exceptions in emergency situations, court orders and where there is evidence of parental neglect or abandonment. If there is no parental authority (outside

³⁹ *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* [2019] eKLR

⁴⁰ *SOS V CWRL & 4 Others* [2021] eKLR

⁴¹ World Health Organization. 2022. *Abortion Care Guideline*.

⁴² UN Committee on the Rights of the Child (CRC). *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15

⁴³ *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1984] Q.B. 581



exceptions), the healthcare provide must explain to the adolescent patient the need to involve the parent, and if the patient declines to involve parents for consent, the healthcare shall make clinical judgment on whether to allow the patient to access the sexual and reproductive healthcare service; particularly where the patient may regardless engage in sexual activity with negative outcomes. Of course, this article is not advocating for Kenya to copy-paste this approach. The article's argument is that it is unreasonable to couch proviso for parental consent for children access to sexual and reproductive healthcare in absolute sense. For instance, what if it a court order that decreed the child to access contraceptive or the child's parent(s) is irresponsible or negligent? The proviso should have not only provided exceptions but also other permissive circumstances.

Secondly, section 16(4) introduces the 'age-appropriateness' phrase to access to reproductive healthcare information and services. Again, the drafters must be commended for not capping appropriateness to age number. However, such a phrase poses a risk of abuse. Health providers may introduce an age limit for information which may be absolute and exclusive. The danger with such an approach is that it often fails to appreciate the evolving capacities of children, which is on a case to case basis. Some children can be the same age but have different understanding and appreciation of sexual and reproductive healthcare services. Introducing absolute age caps has an implicit discrimination effect on different children. A more flexible phrase should have been adopted in the sub-section. This would enable healthcare providers to allow adolescents' access to '*appropriate information*' in a manner that appreciates individual maturity level and involvement in decision-making according to one's evolving capacities.⁴⁴

Finally, while entrenching the right to age-appropriate information that affirms human dignity in human relationships, the drafters introduce conjunctive rider. It must '*promote sexual risk avoidance*'. For sure, there is no apparent faulty in the objective and wording of the phrase. The instinctive drive of humankind, to use Jeremy Bentham's theory, is to maximize pleasure and avoid pain. Sexual risk avoidance is paramount to adolescents. However, it should be noted that society has always presented sex to adolescents from a negative perspective. This inculcates in them negative perceptions and imagination of sexual experiences that are incompatible with the adolescent child's right to survival and development as envisaged under Article 6 of the United Nations Convention on the Rights of the Child. In other words, the impugned phrase in the section should be interpreted in a manner that does promotes adolescent child's access to safe abortion and contraceptives, and not restrict their access.

⁴⁴ Coughlin, KW. 2018. *Medical Decision-Making in Paediatrics: Infancy to Adolescence*. Paediatric Child Health



Apart from the claw-back clauses on children's access to contraceptives and abortion, the Children Act depicts also disconnect with the policy documents. While policies are explicit and unrestrictive on access to contraceptive services for children, the Children Act is relatively implicit and restrictive. This is unfortunate since the statutes are binding when contrasted with the policies. For instance, it fails to use contraceptives as used explicitly by the police and hides under the broad phrase 'reproductive healthcare services.' Since the Constitution had safeguarded its broad meaning, the Act ought to have specified what reproductive healthcare services and provisions it provides for even in one instance. Still, the term reproductive healthcare services should have been defined under section 2. Finally, the Children Act drafters may have improved it had they been persuaded by or improved on the language used in the policy documents since policies are formulated by experts based on evidence considered and international best practices.

The thematic area has ringed an alarm on soft spots in the Children Act that can risk abuse or misinterpretation to constrict adolescent children's access to safe abortion and contraceptives. However, the silver lining is that if interpreted in good faith, liberally and in the context of human rights, the provisions can enhance children's rights information and access to sexual and reproductive healthcare and services.

4. Children's Sexuality Rights

The ASRH Policy approaches sexuality from three perspectives.⁴⁵ First, it is conceptualized as human aspects of sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Secondly, it is constructed as experiences and expressions in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. It does not need to exhibit all of these dimensions experiences, or expressions. Finally, sexuality is an influence of the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual aspects. This study notes that this conceptual definition has been adopted by most government policies relating to reproductive healthcare it has discussed.

Children's sexuality is depicted in many ways, including intersex. The Children Act recognizes intersex children without any condition. This development is highly commendable considering Kenya's legal and historical context. For the longest period, the law did not recognise intersex persons.⁴⁶ Statutes and regulations on wide spheres of life and development, including birth and death registration,

⁴⁵ Supra, n 23

⁴⁶ Supra, n 9



marriage, prison and custodial confinement, citizenship and migration, business and taxation did not recognise them. Apparently, the non-legal recognition deprived them of the enjoyment of human rights in their status. Whilst the society recognised intersex persons, it degraded them as hermaphrodites and subjected them to stigma, segregation, discrimination and neglect.⁴⁷ The Universal Declaration of Human Rights (UDHR) entrenches the right to recognise persons, including an intersex identity.⁴⁸ The law should recognise all kinds of persons and facilitate their enjoyment of human rights. This claim is premised on equality and non-discrimination rights safeguarded under Articles 27, 2 (non-discrimination) and 3 (equal treatment) of the Constitution of Kenya, the African Charter on Human and People's Rights; and of the African Charter on the Rights and Welfare of the Child respectively. The prohibition against discrimination grounds in these provisions includes 'sex.' Yet, 'sex' refers to the biological categorization of an individual male, female or intersex.⁴⁹ Furthermore, arguments have been advanced based on the drafting language of these provisions that are inclusive (use of 'all persons' and 'every individual' and inexhaustive (use of 'other status' or 'includes'), all kinds of persons include sexual identities or sexual orientation.⁵⁰ The Human Rights Committee has observed that non-discrimination on the grounds of 'sex' includes sexual orientation.⁵¹ The African Commission on Human Rights has also adopted the interpretation that non-discrimination grounds under Article 2 include sexual orientation.⁵² Kenya recognised intersex persons through the Persons Deprived of Liberty Act in 2014. However, the recognition was conditional on a competent medical practitioner certifying that the person is intersex.⁵³ This conditional recognition is apparently un-dignifying. It constitutes to a claw-back on recognition rights. In 2017, intersex persons were recognised under the Police Standing Orders. Save for requiring them to be put in separate facilities from men and women, the rules did not define intersex persons. It meant that the then-existing statutory conditional recognition applied.⁵⁴ In 2019, the intersex persons were counted as 1,524 in Kenya's total population during the national census

⁴⁷ *Supra*, n 9

⁴⁸ Article 6 of the Universal Declaration of Human Rights

⁴⁹ Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27

⁵⁰ *Ibid*, n 49

⁵¹ *Toonen v Australia*, Communication No. 488/1992,

⁵² *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Decision, 245 of 2002, para 17

⁵³ Section 2 of Persons Deprived of Liberty Act, 2014

⁵⁴ National Police Service, Police Standing Orders, 2017; chapter 15.4



exercise.⁵⁵ This was yet recognition and was considered a win.⁵⁶ In 2022, the Children Act introduced unconditional recognition of intersex persons. It signalled the climax. The Act defines them as children with congenital conditions in which the biological sex characteristics cannot be exclusively categorised in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent before, at birth, in childhood, puberty or adulthood.⁵⁷ The Children Act did not stop at the recognition point. It proceeded to safeguard and impose duties towards the realisation of intersex children's rights. It obligates the Registrar of Births to take measures ensuring there is correct documentation and registration of intersex children at birth.⁵⁸ It amends the Births and Deaths Registration Act to allow the register to capture details of an intersex child and intersex person.⁵⁹ The Act further obligates the prison service to detain intersex children at different facilities from male and female children.⁶⁰ It then obligates the Inspector General to have separate child protection units for intersex children at police stations.⁶¹ Again, these sections must be understood in the public interest litigation context of in which they were conceived and born.

In 2011, the High Court held that the government infringed the rights of an intersex convict (the petitioner) through strip searches conducted by the prison wardens that exposed the petitioner to inhuman and or degrading treatment because of the petitioner's peculiar circumstances.⁶² The three-judge Bench reasoned that exposing the petitioner's ambiguous genitalia in the presence of other persons was cruel and brought ridicule and contempt to the petitioner, and more so when it was not clear whether the petitioner was being searched by officers of the same sex as required.⁶³ It is observable that the High Court only agreed with the petitioner and parties supporting it on the only single limb of prayer and argument out of about ten reliefs sought backed by argument. In 2014, the High Court ordered the government to collect and keep data on intersex persons; the status of a statute regulating the place of intersexual as a sexual category and guidelines and regulations for corrective surgery for intersex persons; and to register the births to intersex person (the petitioner).⁶⁴

⁵⁵ KNBS. 2020. *The 2022 Kenya Population and Housing Census*

⁵⁶ George, R. Rivett, J. Samuels, F. and Dwyer, E. 2021. *Intersecting Exclusions; displacement and gender-based violence among people with diverse sexualities and gender identities in Kenya*

⁵⁷ Section 2 of the Children Act, 2022

⁵⁸ Section 7(3) of the Children Act, 2022

⁵⁹ The 6th schedule of the Children Act, 2022

⁶⁰ Section 26(3) of the Children Act, 2022

⁶¹ Section 64(3) of the Children Act, 2022

⁶² *R.M v Attorney General & 4 others [2010] eKLR*

⁶³ *R.M case*, par 167 - 168

⁶⁴ *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR*



The Children Act factored in issues raised in the public interest litigation as evidenced in the two High Court decisions when drafting the sections highlighted above to eliminate human rights barriers that intersex children encounter. Applauding their recognition in the Children Act, Chigiti identifies some of these barriers.⁶⁵ For instance, intersex persons did not access birth and death registrations because the law did not recognize them. Equally, the incarceration facilities disregarded their vulnerabilities and needs when in conflict with the law. Finally, intersex children often were subjected unnecessarily to corrective surgeries. These barriers infringed on their rights to equality and non-discrimination, dignity, bodily integrity, privacy and nationality as enshrined under Articles 27, 28, 29 and 53 of the Constitution.

Innovatively, the Children Act constructs and safeguards intersex rights exclusively for intersex children. It provides that an intersex child shall have the right to be treated with dignity and to be accorded appropriate medical treatment, special care, education, training and consideration as a special need category in social protection services.⁶⁶ This approach is laudable for three reasons.

One reason is that it appreciates their minority status in the country that needs special protection. The official government records show that intersex persons were less than 2,000 in about 50 million population of Kenya. However, an earlier survey by Kenya National Human Rights Commission had approximated intersex population to be between 129,000 and 215,000.⁶⁷ The difference may have resulted fearing to disclosing their intersex status during the national census as opposed to an informal survey by a constitutional agency that fights for their rights. Whichever the statistics one relies on, it is clear that intersex persons are a minority.

Another reason is that the package of intersex children 'stand-alone' or independent rights lays the foundation for enjoying other rights as children in different contexts of growth, survival and development. In the court proceedings context, the judicial officers are thus obligated to make orders that consider the intersex children's physical, physiological and emotional vulnerabilities.⁶⁸ In determining whether a child is in need of care and protection, the judicial officers are obligated to consider the possibility of the child being subjected to intersex genital mutilation or discriminatory

⁶⁵ Supra, n 9

⁶⁶ Section 21 of the Children Act, 2022

⁶⁷ Kenya National Commission on Human Rights. 2018. *Equal in dignity and rights: protecting the rights of intersex persons in Kenya*. Nairobi: KNCHR

⁶⁸ Section 95(2)(b) of the Children Act, 2022



treatment and abuse.⁶⁹ In the context of adoption, single men and women are now allowed to foster intersex children.⁷⁰

The final reason is that packaging intersex children's rights as independent rights invite the law to protect and address their needs in a special way. An example is the protection from harmful cultural practices. Indeed, the Children Act protects intersex children from removing or changing their organs except without the advice of a medical geneticist.⁷¹ It is a punishable offence to contravene the section.⁷² These provisions are also an obligation to protect based on human rights guarantee. This article further argues that the section ought to have introduced the consent by intersex children for removal or change of organs, subject to their evolving capacities. A permanent change of body organs is a far-reaching act that must involve the child's view and consent, depending on the child's age and maturity in decision-making. The section's silence takes away intersex children's participation in their life-changing decisions, particularly where they can understand and decide. While the article does not suggest a uniform approach to the involvement of intersex children in such decision-making, Kenya can draw comparative lessons from other jurisdictions. The Colombia Constitutional Court has stressed the need for child consent rather than exclusive parental consent in corrective surgery for intersex children.⁷³

Finally, the Children Act safeguards the children's right to non-discrimination. It outlaws discrimination of children based on the grounds of age, origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, health status, pregnancy, social, political, economic or other status, race, disability, tribe, residence or local connection or any other status.⁷⁴ This section is couched in a similar manner as Article 27(4) of the Constitution. Recognition of intersex children is one way to promote non-discrimination since, for a long time they have been shut from legal recognition. Listing 'sex' as non-discriminative ground and couching the section in a non-exhaustive manner is also another way to cushion intersex children from being discriminated based on their sexuality or sexual orientation. The Supreme Court of Kenya has held that the prohibited grounds for discrimination

⁶⁹ Section 114(i)(z) of the Children Act, 2022

⁷⁰ Section 174(2) of the Children Act, 2022

⁷¹ Section 23(f) of the Children Act, 2022

⁷² Section 23(2)(3) of the Children Act, 2022

⁷³ In *Sentensia No.54-337/99 (the Ramos case)*, the court held that it would be wrong for anyone to give consent for sex change other than the child.

⁷⁴ Section 9(1) of the Children Act, 2022



under Article 27(4) of the Constitution include sexual orientation.⁷⁵ The Supreme Court's decision on non-discrimination flows with international human rights norms and jurisprudence. Further to the international human rights charters discussed earlier, Articles 2(1) and 26 of the International Covenant for Civil and Political Rights safeguard the right to non – discrimination and equality before the law. Finally, as observed earlier, transsexuality is a sexual identity that is protected under non-discrimination grounds of sex or sexual orientation.

Towards this end, it can be concluded that the Children Act has highly commendable provisions regarding children's sexuality. But some of the gaps identified above and arguments advanced can enhance the application and interpretation of the Act to promote the child's best interest, participation, survival and development and non-discrimination in their sexual and reproductive health.

5. Children's Rights to Protection from Harmful Cultural Practices

Harmful cultural practices constitute the greatest impediments to children's SRHR. They are discriminatory practices committed often for long periods of time to the point that they are considered acceptable by the society.⁷⁶ These harmful practices are perpetuated mainly by social and cultural institutions. International human instruments obligate states to eliminate harmful cultural practices pursuant to Articles 2(f), 5, and 21 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and African Charter on the Rights and Welfare of the Child (African Children Charter) respectively. The Children Act dealt extensively with these harmful cultural practices. It constructed the children's rights to protection from harmful cultural practices against children from a prohibitory perspective. The Act prohibits any person from subjecting a child to these practices: forced circumcision (boys); female genital mutilation; child marriage; virginity testing; girl child beading; organ change or removal for intersex children without medical geneticist's advice; and other cultural or religious rite, custom or practice that is likely to negatively affect the child's life, health, social wellbeing, dignity, physical, emotional or psychological development.⁷⁷ It creates an offence for persons who contravene this provision.⁷⁸ The Children Act further obligates judicial officers to consider the customs and practices of the community to which

⁷⁵ *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ)*

⁷⁶ <https://www.unicef.org/protection/harmful-practices>

⁷⁷ Section 23(1) of the Children Act, 2022

⁷⁸ Section 23(2)(3) of the Children Act, 2022



the child belongs to ensure that the child easily integrates while not subjected to harmful cultural practices.⁷⁹ The two spotlighted provisions are commendable in children's SRHR for two reasons. First, the obligation imposed on the courts by the Act to consider customs and practices of the child's community invites the judiciary to the fight to eliminate harmful cultural practices that deprive children's rights, including SRHR. It calls the judicial officers to be perceptive and analytical. It invites them to be active rather than passive in judicial proceedings and decision-making. It further supplements the Victim Protection Act (VPA) of 2014, which seeks to protect vulnerable victims, by providing them with better information and support.⁸⁰ In Kenya's adversarial court system, the judicial officers have often adopted passive posture in bid to appeal as neutral umpires. Adversarial trials re-victimizes the child victims of sexual offences, exposing them to traumas than before testifying in court.⁸¹ The tragic story of Lindsay Armstrong from Scotland depicts the picture of the adversarial court system.⁸² The minor was a rape victim. The perpetrator was charged in court. During the cross-examination, Ms Armstrong was asked by the defence counsel to raise the underwear exhibit - before a courtroom and the entire world - and to read out the words on the panty: '*Little Devil*.' She committed suicide after this courtroom incident. She suffered double embarrassment. The accused's conviction did not matter. She ended her life. Had the court been proactive during the proceedings, it would have cushioned the defilement victim minor from being un-dignified and ridiculed. This incident occurred in the past and miles away from Kenya, but it still reflects the tragic effects of our adversarial court system. Kenya's adversarial justice system was borrowed from the United Kingdom where this incident happened. Section 95(g) of the Children Act presents judicial officers with the opportunity to deconstruct the traditional concept of the adversarial court system by being active, analytical and sensitive to the children's socio-economic and cultural realities that hamper enjoyment of their SRHR during children's court proceedings.

Secondly, the Children Act presented an objective and symmetrical mien in the fight to eliminate harmful cultural practices against both girl and boy children. But it also takes objectivity to point out where these very cultural structures oppress boy children. The society often disregards the children's consent in their sexual and reproductive healthcare. Male circumcision and female genital cutting

⁷⁹ Section 95(2)(g) of the Children Act, 2022

⁸⁰ Long title of Victim Protection Act spells out the scope of the statute

⁸¹ Scholastica Omondi 'An Evaluation of Child Sexual Abuse Trial Procedure in Kenya' (2014) Journal of Research in Humanities and Social Science

⁸² Kang'ara, S. Okello, D. Makhoka, K (edits). 2021. '*Men should be Feminists, even if it is Hard Work*' in *The Beacons of Judiciary Transformation: Selected Speeches, Writings and Judicial Opinions by Chief Justice Willy Mutunga*. Sheria Publishing House



(FGM/C) serve as examples. There is consensus that FGC is unacceptable and illegal to the girl child. For adults, the discourse is ongoing in the contexts of consent, medicalization and cultural imperialism. Those supporting adult FGM/C perceive it as beneficial aesthetically, hygienically and health-wise.⁸³ Secondly, it is applauded for its positive cultural values.⁸⁴ Secondly, FGM/C bestows women's bargaining power in their marriages and grants women full femininity.⁸⁵ Thirdly, adult FGM proponents perceive some FGM forms as less invasive as some African FGM forms resemble type (IV).⁸⁶ Fourth, they argue that criminalizing adult FGM is cultural imperialism, racist and discriminating.⁸⁷ Finally, they argue for its medicalization since communities will still practice FGM.⁸⁸ Medicalization would mitigate the harm. Those against adult FGM/C counter as follows. First, FGM practice is harmful. It has short-term and long-term consequences.⁸⁹ Secondly, sociocultural pressure negates consent and choice. Third, women are vulnerable to FGM victims through cultural sanctions.⁹⁰ Fourth, FGM depicts past gender discrimination that calls for women's protection.⁹¹ Finally, autonomy and cultural rights are not absolute. The High Court has adopted these counter-arguments and declined to decriminalize consensual adult FGM/C since it is a culturally harmful practice.⁹² The decision remains good law. Whilst male circumcision is permissive and for medical reasons, the boy child's consent is often missing since it is constructed as a cultural rite. Introducing consent under the Act to male circumcision enhances the boy child's autonomy, privacy and participation in his sexual and reproductive healthcare.

The article observes two faults in this thematic section. One fault relates to the punishment of persons subjecting children to culturally harmful practices in the Children Act, which is at variance with other statutes. Under the Children Act, subjecting a girl-child to FGM/C attracts *not more than 3 years in jail*

⁸³ F Ahmadu & T Kamau 'Kamau vs The Attorney General and Others: Problems and Prospects in Kenya's 2021 High Court Ruling to Uphold the Prohibition of Female Genital Mutilation Act 2011' a reply to 'The prosecution of Dawoodi Bobra women' by Richard Shweder (2022) 12 (1) Global Discourse 29

⁸⁴ Ibid, n 77

⁸⁵ K Moore et al 'The Synergistic Relationship between Health and Human Rights: A Case Study Using Female Genital Mutilation' (1997) 2(2) Health and Human Rights 137

⁸⁶ Ibid, n 77

⁸⁷ A Shahvisi 'FGM v. female cosmetic surgeries: why do they continue to be treated separately?' (2023) 35(3) International Journal of Impotence Research

⁸⁸ Ibid, n 79

⁸⁹ Sancho & Sonia (n 31 above) 1

⁹⁰ Par 135

⁹¹ Par 146-148

⁹² *Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (Constitutional Petition 244 of 2019) [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) (Judgment)*



or a fine of Kshs. 500,000/= and above or both if one is found guilty.⁹³ Under the Prohibition of Female Genital Mutilation Act, committing such an offence attracts *not less than 3 years in jail or fine of Kshs. 200,000/= and above or both* if one is found guilty.⁹⁴ Of course, the offences are different and the variation is minor. But the Children Act that addresses FGM performed on a girl-child ought to have had a harsher penalty compared to the FGM Act, which refers to FGM performed on any person. The other fault relates to the Children Act's failure to deal with sexual and gender-based violence (SGBV) against children in the context of harmful cultural practices. The prevalence of sexual and gender-based violence to children has persisted for decades. In 2004, the survey showed that 50% of children in Nairobi had been sexually harassed while 10% had been forced into sex.⁹⁵ In 2005, the prevalence of defilement cases capped at 27%.⁹⁶ In 2009, the Nairobi Women's Hospital data indicated that 55% of those violated were girls aged 0-15 years.⁹⁷ In 2010, defilement and rape of young adults was at 32% and young males at 18%.⁹⁸ In 2011, survivors approached the High Court to hold police accountable for their failure to act on reported cases of defilement.⁹⁹ In 2014, 14% of women reported to have experienced sexual violence.¹⁰⁰ Computing this against the entire population, about 2.6 females were sexually abused.¹⁰¹ In 2019, statistics found that 15.6% of girls and 6.4% of boys who are under 18 years in Kenya had experienced sexual violence.¹⁰² In 2020, the statistics showed that 13.5% of girls and 2.4% of boys experienced sexual violence before 17 years.¹⁰³ Other research in the same year showed trend changes. Initially, the victims of sexual violence were averagely 16 years.¹⁰⁴ It appears that that it shifted to victims' average age of 18 years during the Covid pandemic.¹⁰⁵ Regardless the

⁹³ Section 23(2) of the Children Act, 2022

⁹⁴ Section 29 of the Prohibition of Female Genital Mutilation Act, 2011

⁹⁵ Johnson, T. (2004). *The abuse of Nairobi School Children. Population communication Africa*. The Ford Foundation & CIDA/GESP. Nairobi.

⁹⁶ Ogwen, O. J. (2005). An Investigation on Child Abuse Among Selected Secondary Schools Students in Nairobi Province. Unpublished M.ed Thesis, Kenyatta University.

⁹⁷ Sara Jerop Ruto. 2009. *Sexual Abuse of School Age Children: Evidence from Kenya*. CICE Hiroshima University, Journal of International Cooperation in Education, Vol.12 No.1. 177-192

⁹⁸ The Violence Against Children Survey (VACS). Violence against Children in Kenya: Findings from a 2010 National Survey. Nairobi, Kenya. 2012

⁹⁹ *C K (A Child) through Ripples International as her guardian & next friend & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* [2013] eKLR

¹⁰⁰ KNBS and ICF. *Kenya Demographic and Health Survey 2014*. Rockville, USA and Nairobi, Kenya.

¹⁰¹ KNBS. *The 2009 Kenya Population and Housing Census*. 2010.

¹⁰² George, R. Rivett, J. Samuels, F. and Dwyer, E. 2021. *Intersecting exclusions: displacement and gender-based violence among people with diverse sexualities and gender identities in Kenya*. Literature review. London: ODI

¹⁰³ Ministry of Labour and Social Protection of Kenya Department of Children's Services. *Violence against Children in Kenya: Findings from a National Survey*. Nairobi, Kenya: 2019. (2019).

¹⁰⁴ Ibid, n 100

¹⁰⁵ Flowe H, Rockowitz S, Rockey J, Kanja W, Kamau C, Colloff M, et al. *Sexual and other forms of violence during the Covid-19 pandemic emergency in Kenya: patterns of violence and impacts on women and girls*. Zenodo. (2020) 1–26.



trend changes, it was apparent that sexual and gender-based violence survivors during the COVID-19 pandemic were mostly below 16 years.¹⁰⁶ In 2022, a demographic survey still found that 13% of women experienced sexual violence.¹⁰⁷ These statistics point to a grim reality for children.

Sexual and gender-based violence is a violation of the human rights of women and girls, men and boys.¹⁰⁸ It violates, among others, the child's right to torture, cruel, degrading and inhuman treatment, life, non-discrimination, dignity and security to person under Articles 25(a), 26, 27, 28 and 29 of the Constitution. It manifests in different forms including rape, defilement, harmful cultural practices (like female genital mutilation and early/forced marriages), forced-abortion, and sexual harassment, denying using contraceptives, forced prostitution and trafficking.¹⁰⁹ Victims of sexual violence often suffer from unwanted pregnancies, infection with STIs, including HIV and AIDS, numerous gynaecological complications, stigma, abandonment by their spouses, and psychosocial trauma.¹¹⁰

In the context of the discussed SGBV prevalence and the consequences, the Children Act of 2022 failed to contribute to the mitigation of the negative effects of harmful cultural practices. True, sections 4 to 29 of the Sexual Offences Act have addressed these problems through sexual offences, which include defilement, indecent touch, and child trafficking, among others. But there are aspects the Act did not address. One of such is where the defilement victim gets pregnant. If a child is presumed to lack the capacity to consent marriage or sex; it would be reasonable to extend the presumption to getting pregnant. The Constitution permits trained health professionals to approve abortion on emergency treatment, when pregnancy endangers the mother's life and health, and where written law(s) allow it.¹¹¹ Abortion on grounds of defilement is not explicitly permitted. This is despite being grounds under other international human rights instruments.¹¹² However, the provision opens a window to expand the grounds for abortion through statute by permitting abortion through other 'written laws.'¹¹³ Written statutes can expand abortion grounds beyond the three expressly stated in Article 26(4) of the Constitution. The government policies have already included defilement to

¹⁰⁶ Johnson K, Green L, Volpellier M, Kidenda S, McHale T, Naimer K, et al. The impact of COVID-19 on services for people affected by sexual and gender-based violence. *Int J Gynecol Obstetr.* (2020) 150:2857.

¹⁰⁷ KNBS and ICF. *Kenya Demographic and Health Survey 2022: Key Indicators Report.* Nairobi, Kenya and Rockville, USA.

¹⁰⁸ Kenya National Human Rights Commission. 2012. *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya.*

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Article 26(4) of the Constitution, 2010

¹¹² Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

¹¹³ Jane Wambui. 2018. 'Implementing reproductive health and abortion provisions in the Kenya Constitution 2010' *Journal of Humanities and Social Science*



grounds permitting abortion.¹¹⁴ Similarly, the High Court has borrowed from the Maputo Protocol.¹¹⁵ It is only parliament that has not codified it in act. The Children Act provided the best opportunity to promote children's SRHR through codifying defilement as permissive grounds to access to safe abortion in order in the context of mitigating the negative effects of harmful cultural practices. However, parliament failed to see it as an opportunity. It failed to understand its role as a social engineer to mitigate the negative impact of sexual and gender-based violence.

6. The Definition of Child's Age

The Children Act defines age as the '*actual chronological age of the child from conception*'.¹¹⁶ This definition creates confusion. It also defines a child, like the Constitution, as an individual who has not attained the age of eighteen. The confusion is two-prong.

First, does the child's number of years (age) predate birth? The definition suggests that when computing the child's age (number of years), the nine months ordinarily in the mother's womb ought to be counted. This definition is likely to create confusion in computing the age of minors in sexual offences, where age determines whether the charges are rape or defilement. Hypothetically, an accused charged with defiling a victim who is 17 years and 3 months as per the birth certificate can raise a legal challenge that the victim's actual chronological age from conception is 18 years (including the nine months as a fetus).

Second, the definition appears to treat a fetus as a child. This imputes that the child in the womb enjoys the rights in the Children Act. This article argues that 'fetus' and 'child' are different. While Article 26(1) and (3) of the Constitution protects fetal life, fetal life is not child and cannot enjoy the rights under the Children Act. Doing so elevates the fetus's life to that of the pregnant mother. This introduces a conflict between child rights and mother rights when seeking access to abortion.

It is noteworthy that the High Court has also faulted Article 26(4) phraseology that suggests the fetus's life equates to the mother's life.¹¹⁷ In comparative jurisdictions, courts, too, have taken the same approach. Nepal's Supreme Court has reasoned that the unborn owes its existence to the mother, and thus, its interests cannot supersede the mother's physical and mental well-being.¹¹⁸ South Africa's

¹¹⁴ *ASRH Policy (supra)*

¹¹⁵ *Fida Case (Supra)*

¹¹⁶ Section 2 of the Children Act, 2011

¹¹⁷ *SOS Case (Supra)*, 16

¹¹⁸ *Lakshmi Dhikta v Nepal (2009)*



Constitutional Court stressed that the foetus cannot be treated as an individual.¹¹⁹ Counting the age of a child from conception treats a foetus as an individual.

7. Conclusions

The above discussion has spotlighted the safeguarded children's SRHR in the Children Act. The objective is to sensitize and publicize children's SRHR for their enjoyment. Some of these include entrenching compulsory basic education rights; the child's right to SRHR information and services; recognition and protection intersex child's rights; and boy-child consent and participation circumcision decisions and prohibition of harmful cultural practices. It has also endeavoured to highlight some misses of the Act in relation to children's SRHR. These include failure to entrench comprehensive sexual education rights to children; erecting restrictions to children's right to access SRHR through third-party restrictions and ambiguous clauses that are prone to abuse; lowering the penalty for FGM offences; and introducing a problematic definition of 'child's actual age' that is prone to create confusion in computing age in sexual offences and women's access to safe abortion. The object of the study is three-fold. The first one is to provoke further discourse on the aspects of the Children Act that are spotlighted. Some approaches, as opposed to the ones adopted by this article that characterize academic discourse, can provide the bridge to these other objectives. That is, to prompt further review of the Children Act and inform subsequent amendments to promote children's SRHR. Before then, the courts too can develop and interpret the statutory ambiguities and misses to maximize the enjoyment of children's SRHR.

¹¹⁹ *Christian Lawyers Association of S.A and Others v Minister of Health and Others (1998)*



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