

Tools available to women Judge in curbing harmful cultural practices against women.

▶ 5 tips

▶ Presentation by Hon Lady Justice Hellen Wasilwa



What are harmful cultural practices

- ▶ Harmful practices are defined in Article 1 of the Maputo Protocol as ‘all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.
- ▶ Harmful practices include a wide range of practices, including child marriage, female genital mutilation (FGM), widow inheritance (levirate), sororate marriage, breast ironing, force-feeding of women and girls, son preference, girls’ as well as boys’ initiation rites, child abduction, lips plates, trokosi, widowhood rites, acid attacks, stoning, honour killings, witchcraft rituals, virginity tests among others.

Contd harmful practices

- ▶ These practices persist where young girls and women have unequal access to health, education, employment and wealth. Culturally, women's position in society is shaped by persistent abuse, which has caused women's low status within the family and society, preventing them from escaping abuse and seeking legal protection.
- ▶ Cultural abuse such as domestic violence is justified as discipline, and instilled in girls from an early age. Further that women are deprived of reaching their full potential, as that would threaten men's safety, freedom and autonomy. These so-called moral practices persist and are consequently not questioned sufficiently. These harmful practices have enabled extensive violence against women.

What tools can Judges use to curb these harmful cultural practices at work place.

1. NATIONAL LAWS;

Constitution of Kenya

- ▶ **Article 2 (4)** of the Constitution of Kenya provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and the fact that any act or omission in contravention of the Constitution is invalid.
- ▶ **Article 14 (1) & (2)** guarantees equal citizenship rights for women, and in particular the direct applicability of the constitutional right of women to pass on Kenyan citizenship to their foreign spouses and children born outside of Kenya.
- ▶ **Article 27 (4)** prohibits direct or indirect discrimination, inter alia, on the basis of sex, pregnancy and marital status.

Contd tools

- ▶ **Article 27 (6)** allows the State to take legislative and other measures including affirmative action to redress disadvantage.
- ▶ **Article 7 (1)** of Schedule 6 provides that all law in force before the effective date of the new Constitution “shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution
- ▶ **Article 27 (8)** provides that not more than two-thirds of the members of elective or appointive bodies be of the same gender in newly established commissions crucial to the implementation of the new Constitution.

Contd tools

2.National statute such as the Employment Act

- ▶ The Employment Act, 2007 outlaws discrimination on the basis of sex and pregnancy and which provides for equal pay for work of equal value.

1. 3. REGIONAL AND INTERNATIONAL POLICY FRAMEWORK

- ▶ There are several regional and international human rights instruments that explicitly protect and promote women's rights against all harmful practices. They include;-

Contd regional and international policy framework

a) **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)**

- ▶ In 1979, the United Nations General Assembly adopted the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The Preamble to the Convention clearly outlined the various UN treaties that affirmed equality of rights between men and women and the inadmissibility of discrimination as well as the various resolutions, declarations and recommendations adopted by the UN and its agencies for promoting equality of rights between men and women. The preamble also recalled “that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

contd

- ▶ The preamble ends with the states parties' determination “to implement the principles set forth in the Declaration on the Elimination of Discrimination against women, and for that purpose, to adopt all measures required for the elimination of such discrimination in all its forms and manifestations.
- ▶ **Article 1**, defines “discrimination against women’ to mean 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 the political, economic, social, cultural, civil or any other field.

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- ▶ **Article 2** obliges state parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. The Convention reaffirms equality of human rights for all women and men in society and within the family. It also forces members to act against the social causes of women's inequality and eliminate laws, prejudiced stereotypes and practices impairing the well-being of women.
- ▶ **Article 2 (f)** enjoins States Parties to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.
- ▶ **Article 5(a)** provides that States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the inferiority or superiority of either of the sexes or on stereotyped roles for men and women”.

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- ▶ It is important to note that as of 2016, the CEDAW Committee has issued 34 general recommendations, including on the topics of violence against women (No. 19), women in conflict prevention, conflict and post-conflict situations (No. 30), harmful practices (No. 31), and women's access to justice (No. 33).

THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (MAPUTO PROTOCOL)

- ▶ This Charter defines harmful practices at **Article 1** as all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity". Fifteen years ago, the African Union adopted the Maputo Protocol to boost the protection of women. The protocol contains several innovative provisions to curb gender inequality.
- ▶ **Article 5** of the **Maputo Protocol** is titled 'Elimination of Harmful Practices' and it provides that states Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

Contd Maputo protocol

- i. creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- ii. prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them;
- iii. provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- iv. protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.



THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

- ▶ The [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#) was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976, after 35 States parties had ratified it.
- ▶ **Part 3, Article 6-15 of the ICESCR** aims to ensure the protection of economic, social and cultural rights including: Freedom from discrimination, Right to equality between men and women, Right to work(**Article 6**), Freedom to choose and accept work, Right to just and favorable conditions at work(**Article 7**), Right to form trade unions(**Article 8**), Right to strike, Right to social security(**Article 9**), Right of mothers to special protection before and after birth(**Article 10**), Freedom of children from social and economic exploitation, Right to an adequate standard of living(**Article 11**), Freedom from hunger, Right to health(**Article. 12**), Right to education (**Article. 13-15**) and Right to participate in cultural life (**Article. 15**)

INTERNATIONAL LABOUR ORGANIZATION(ILO)

- ▶ Among the fundamental ILO principles since its inception in 1919 are Non-discrimination and promoting equality. These principles are also an integral component of the ILO Decent Work Agenda that promotes decent and productive work for women and men in conditions of freedom, equity, security and human dignity.
- ▶ Five ILO Conventions have been designated as key instruments for achieving gender equality in the world of work: these instruments include; -

ILO CONVENTIONS CONTD

- ▶ **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**. It provides that member States are to declare and pursue proactively a national policy to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination. The prohibited grounds of discrimination enumerated include sex as well as race, colour, religion, political opinion, national extraction and social origin.
- ▶ **Equal Remuneration Convention, 1951 (No. 100)**, which specifically addresses the issue of equal remuneration for men and women for work of equal value.

ILO contd

Maternity Protection Convention, 2000, No. 183, and Recommendation No. 191 .

- 1) This convention provides that a woman shall be provided with the right to one or more daily breaks or a daily reduction of hours to breastfeed her child
- 2) The convention applies to all employed women
- 3) Also provides for maternity leave of upto 14 weeks at article 4
- 4) A woman is guaranteed a right to return to the same position after maternity leave
- 5)

contd

- ▶ **Workers with Family Responsibilities Convention, 1981, No. 156, and Recommendation No. 165.**
- ▶ This convention applies to both men and women with responsibilities in relation to their dependant children where such responsibilities restrict their possibilities for preparing for entering and participating in or advancing in economic activity
- ▶ Family responsibilities shall not form a valid reason for termination
- ▶ Can you be denied a promotion because of family responsibilities?
- ▶ Eg time set for training in evening?

Convention 190 violence and harassment convention, 2019

- ▶ Convention defines violence and harassment at work to refer to a range of unacceptable behaviors and practices, or threats thereof whether single occurrence or repeated that aim at, result in or are likely to result in physical, psychological, sexual or economic harm and included gender based violence and harassment
- ▶ the convention applies to all sectors whether private or public
- ▶ The convention envisages that each member state shall ensure measures are put in place including laws regulations and policies to ensure a right to equality and non discrimination in employment and occupation including for women workers as well as for workers and other persons belonging to one or more vulnerable groups or group situations of vulnerability

Case law

George Opiyo and 2 Others v Deputy County Commissioner Gem, & Another [2015] eKLR – In this case the petitioners George Opiyo, George Ochieng and John Okinyo challenged the constitutionality of the appointment of the second respondent – Pauline Apondi – as an assistant chief of Ulamba sub-location by the first respondent, the deputy county commissioner, Gem, Siaya County. The petition was brought for and on behalf of the people of Ulamba sub location, who were displeased and dissatisfied with the actions of the first respondent, who appointed the second respondent without any consultation. The basis of the petition was that the first respondent in appointment of the second respondent contravened Article 27 of the constitution, acted unprocedurally and was not fair. The appointment was not done in the best interests of the people of Ulamba sub-location as the sub-location was inhabited by numerous thugs, who caused the area to have ‘run away insecurity’ leading to loss of lives. Further, that the second respondent had always stayed out of Ulamba by staying in Sudan, and therefore was not well conversant with the area. Given the area’s large size, location and the nature of the work, which required both day and night patrols, the second respondent was not in a position to effectively perform the task needed: the terrain called for a stronger personality(a man) to manage it. The petitioners further alleged that the first respondent, throughout the appointing process of the second respondent as the assistant chief of Ulamba, did not consult and co-operate with the people of Ulamba and this denied them the right to access public services. As such, the right to security of the person as enshrined in the constitution had been violated by the first respondent, by appointing someone who was not principally qualified to handle the insecurity in Ulamba sub-location. The first respondent violated the principle of supremacy of the constitution in Articles 1 and 2, 6, 10, 20, 22, 23, 27 and 48.

Case law contd

- Whether the appointment of the second respondent was in accordance with the constitution and the law.
 - Whether the petition was premature, misconceived and lacked merit.
 - Whether the petition violated Article 27 of the constitution.
- ▶ **Holding.**
- ▶ The Court held that, the first respondent, in making the appointment of an assistant chief should be guided by the national values and principles set out in Article 10 of the constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability.

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- ▶ Upon evaluation of the evidence and considering the relevant provisions of the constitution and counsel submissions, due process and conformity with the constitution was complied with, as the second respondent emerged among the top in the selection process. The first respondent made appointment of the second respondent on the basis of clear constitutional criteria and complied with Articles 10 and 73 of the Constitution of Kenya, 2010. The second respondent, who was appointed to the position of assistant chief, met certain integrity and competence standards as set out under chapter 6 of the Constitution of Kenya. Inquiry was made with regard to the suitability of the second respondent under the provisions of the constitution by the first respondent assisted by a panel, which included members of public, who represented the public. The court therefore found that there was public participation.

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- ▶ As to whether the petition violated Article 27 of the Constitution of Kenya, the petitioners sought to discriminate against the second respondent on the ground of sex in her efforts to secure the job of assistant chief. **The petitioners portrayed the second respondent as weak, because she is simply a woman;** that she should not be offered the job because it was tedious in nature and in which one was expected to work during day and night. In the court's view, this was discrimination on the ground of sex; it was against human dignity and scornful to women and the second respondent. Further, the petition intended to ensure that women and men should not have the right to equal treatment, including the right to equal opportunities in economic, cultural and social spheres.

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- ▶ The Court further held that in constitutional references where a petitioner is seeking to enforce his purported violated constitutional rights, he should not be allowed to violate or breach and/or infringe the right of others or another so as to have his purported right enforced. The petitioners were in the court's view seeking to violate the constitutional rights of the second respondent by discriminating against her. The Discrimination at the Workplace by the petitioners violated the same constitutional provisions that they relied on to seek redress before the court. The petitioners should have realized that the second respondent had the right to equal treatment and the right to equal opportunities, as she was also protected by the same constitution as they were and should not be discriminated against by virtue of her gender or sex.

The Court found the Petition was without merits and dismissed it.

Case law

- i. Vishaka & Others v State of Rajasthan & Others 13th August, 1997, a decision by the Supreme Court of India.**
 - ▶ The issue for determination in this case were; Sexual harassment in the workplace, absence of legislation prohibiting sexual harassment in the workplace, discrimination, gang rape, gender equality, obligation of the state to protect women from sexual harassment in the workplace and the role of the court in addressing sexual harassment in the workplace

facts

- ▶ The petitioners in this case were various social activists and non-governmental organizations (NGOs). They were concerned with finding suitable ways for the realization of the true concept of 'gender equality' and the prevention of sexual harassment of women in the workplace through the judicial process and in the absence of legislation prohibiting sexual harassment in the workplace. Although the Government of India has an obligation to provide legal protection from sexual harassment in the workplace, there was no legislation in India prohibiting sexual harassment in the workplace. Following the brutal gang rape of a publicly employed social worker (Bhanwari Devi) in a village in Rajasthan in India, she, together with five women's organisations including Vishaka, filed a group suit under Article 32 of the Constitution of India against the government and others.

Issues for resolution

- ▶ In the petition, she sought the court's enforcement of the fundamental rights provisions relating to working women, namely: the right to equality (Art. 14), the right to practice one's profession (Art. 19(1)(g)), and the right to life (Art. 21). Other issues raised by the petition included: the fundamental right to non-discrimination (Art. 15), and India's international obligations under CEDAW Article 11, which requires the government to take all appropriate measures to eliminate discrimination against women in the field of employment, and CEDAW Article 24, which requires the government to adopt all necessary measures at the national level aimed at achieving the full realization of all the rights recognized in CEDAW.

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- ▶ The petition also questioned India's official commitment at the Fourth World Conference on Women in Beijing to, inter alia: formulate and operationalize a national policy on women which would continuously guide and inform action at every level and in every sector; to set up a Commission for women's Rights to act as a public defender of women's human rights; and to institutionalize a national level mechanism to monitor the implementation of the Platform for Action. In determining the petition, the court relied on the constitution and India's international obligations and held that the fundamental right to carry on any occupation, trade or profession depends on the availability of a safe working environment, free of sexual harassment, and the right to life means a life with dignity.

holding

- ▶ The court held that the responsibility of ensuring such safety and dignity through the enactment of legislation and creating mechanisms for its enforcement rested with the government. It further held that the workplace should be free of sexual harassment and, in the absence of legislation prohibiting sexual harassment in the workplace, the government of India was in breach of its international obligations to take legislative and other measures to protect women from violence and to prevent such violence from taking place. The court recognized the right to gender equality and held that such right includes legislating against sexual harassment in the workplace. Noting the absence of legislation on sexual harassment in the workplace, the court applied judicial creativity within the confines of the Constitution of India, and used this case to produce the first enforceable civil law guidelines on gender equality and non-discrimination in the workplace, and the right of working women to be free from sexual violence and harassment in both public and private employment.

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- ▶ The court directed that those guidelines were to be treated as a declaration of law in accordance with Article 141 of the constitution. The court further stated that the guidelines were to be treated as a declaration of law under Article 141 of the constitution, and were to be observed in order to enforce the right to gender equality and to prevent discrimination against women and sexual harassment in the workplace.
- ▶ This decision, prompted the government, in 2007, to introduce the long awaited Bill on Sexual Harassment in the Workplace. This case inspired other reformers in the region and, in 2009, the Supreme Court of Bangladesh – referring to the Vishaka case – recognised that, ‘the harrowing tales of repression and sexual abuse of women in their workplaces’ were due to failure on the part of the government to enact a sexual harassment law.

conclusions

- ▶ Tools are definitely available or women judges to use and apply to curb all these harmful sexual practices and other innovations such as
- ▶ **Work place arrangements**
- ▶ Flexible working schedules including work from home in this error of the digital technology
- ▶ Increase in wages
- ▶ Mentoring opportunities
- ▶ Training and career growth support
- ▶ Safe and inclusive environment
- ▶ Work life balance
- ▶ Networking opportunities
- ▶ Sensitization of men in changing roles and sharing chores

conclusions

- ▶ **And checking the following determinants;-**
 - Traditional practices assigning certain chores to women and men
 - Discriminatory tendencies at work which envisages women as incompetent in certain jobs building engineering, military, CEOs etc and relegated to secretaries, nurses, house helps, receptionists, teachers etc
 - Upbringing making women inferior to boy
 - unconscious discrimination at work due to certain prejudices ...
 - Duties at work which hinder women performing eg taking care of children family duties..can women carry work home

END

▶ Q AND A