

**Sexual Reproductive
Health and**

Rights Laws & Policies

in Kenya



1

Sexual Offences Act {2006}

The Sexual Offences Act 2006 is an Act of Parliament with provisions on sexual offences, definition, prevention and the protection of all persons from unlawful sexual acts, and for connected purposes. The Sexual Offences Act consolidates all laws relating to sexual offences and repealed most of the provisions in the Penal Code relating to sexual offences. It also established a number of new sexual offences such as gang rape, sexual assault, sexual harassment, child pornography, and trafficking for sexual purposes among others.

The Act which commenced on 21st of July 2006 includes the following main features; Prescribes minimum sentences whose main aim is to limit discretion of the judicial officers; Prescribes high penalties geared at having a deterrent effect to the offenders

The Act has attendant within itself embodies and recognized by International Human Rights instruments and principles; Contains a provision that Juristic Persons could be held liable for criminal offences; It takes cognizance of gender based sexual crimes among others.

The main purpose of the Act is to;

Provide concise and better definitions for sexual offences

Provide such deterrent sentences as to result in reduction in the scale of offences

Provide for measures for assisting the survivors of sexual violence in terms of medical assistance Strengthen the State's commitment to eradicate the pandemic of sexual offences committed in the republic or elsewhere by its citizens etc.

2

Sexual Prohibition of FGM Act {2011}

The FGM Act is an Act of Parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes. The Act Provides for eight main offences namely; The general Offence of FGM, the offence of aggravated FGM, the offence of aiding and abetting FGM, the offence of procuring a person to perform Female Genital Mutilation in another country, offence of use of premises to perform FGM, the offence of being in possession of tools or equipment connected with FGM, the offence of failure to report commission of FGM and the offence of use of abusive language. The Act also establishes the

Anti- FGM Board which was officially established in 2013 with a mandate to design, supervise and co-ordinate public awareness programmes against practice of FGM and to generally advise the government on matters relating to FGM and the implementation of the ACT.

3

HIV and AIDS Prevention and Control Act {2006}

An Act of Parliament that provides measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counseling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes. The Act under Section 25 Establishes the HIV and AIDS Tribunal of Kenya which is the only HIV-specific statutory body in the world with the mandate to adjudicate cases relating to violations of HIV-related human rights. In 2015, the High Court of Kenya declared section 24 of the HIV and AIDS Prevention and Control Act unconstitutional. Section 24(1) of the Act requires a person aware of being HIV-positive to “take all reasonable measures and precautions to prevent the transmission of HIV to others” and to “inform, in advance, any sexual contact or persons with whom needles are shared” of their HIV-positive status. Subsection (2) prohibits “knowingly and recklessly, placing another person at risk of becoming infected with HIV”. Focusing solely on the absence of a definition for “sexual contact”, the Court held that it is impossible to determine what acts are prohibited. Further, given that section 24 places no obligation on sexual contacts who have been informed of another’s HIV-status to keep that information confidential, the provision does not meet the standards for a justifiable limitation of the constitutional right to privacy.

4

Health Act {2017}

The Health Act is an Act of Parliament to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes. The ACT places specific obligations to the government and other entities in order to achieve The Kenyan Constitution (2010) Right to Health which recognizes the right of every person to the highest attainable standard

of health including the right to reproductive health and the right to healthcare services.

The main purpose of the ACT is to; place responsibilities and standards of health expected; defines rights and duties subsumed under the concept of health as a right and the obligations of the various entities and persons involved as either claimant, provider or guarantor of the right; defines public health facilities setting out the specific functions of the national and county governments in development and maintenance of public health facilities; establish the relevant institutional framework that will implement the law, identifying personnel that will make up the institutions while defining their roles.

5

National Adolescent Sexual & Reproductive Health Policy {2015}

Kenya has a rapidly growing population with the majority being young people below 20 years. This group also suffers some of the poorest reproductive health outcomes in the country including; STI infections, teenage pregnancies, early and forced marriages, new HIV infections, FGM, unsafe abortion, unmet need for contraceptives etc. This policy was therefore developed to address the SRH needs of adolescents and young people in Kenya to enhance the SRH status of adolescents in Kenya and contribute towards realization of their full potential in national development. The Policy intends to bring Adolescent Sexual and Reproductive Health and Rights issues into the mainstream of health and development. The Policy examines the prevailing social, economic, cultural and demographic context of sexual and reproductive health of adolescents including its implications for and consequences to their health and development.

6

National Guidelines for Provision of Adolescent Youth-Friendly Services in Kenya, {2016}

Despite poor reproductive health outcomes amongst adolescents and young people in Kenya, many are unlikely to seek reproductive health

services and when they do, they don't get the required services either due to the judgmental nature of health care providers, concerns around privacy and confidentiality, or low capacities of the health care system. Factors such as inadequate investment in: health infrastructure, training service providers on youth friendly service provision, deployment of service providers, commodities and supplies, awareness creation, monitoring and evaluation, as well as coordination have contributed to the poor health seeking behaviors of young people. Adolescents and Youth-friendly services (AYFS) are meant to help young people overcome barriers to access to quality sexual and reproductive health care services and therefore the goal of the guidelines is to improve availability, accessibility, acceptability and use of quality sexual and reproductive health services by adolescents and youth seeking services.

7

Return to School Guidelines {2019}

Despite the government's initiatives to promote quality and affordable education to all Kenyan children, access, retention, transition and completion remain a challenge and a concern. Although the number of learners enrolled in school has improved over the years, school dropout rates are significant, leading to low transition and completion rates and rising illiteracy levels. The guidelines are in line with the Basic Education Act (2013), which requires all children of school-going age to be in school. The Constitution of Kenya 2010 as well provides that every child has a right to free and compulsory basic education, and that the state shall take measures, including affirmative action programmes, to ensure that children access relevant education and training. The guidelines have a focus on learners who drop out of school for various reasons, such as; early pregnancies, drug and substance abuse, HIV and AIDS, Gender Based Violence, inhibitive cultural practices, child labor, special needs and disabilities. The guidelines state the roles and responsibilities of various actors in the education sector, including the school management, parents/guardians, the community and various government agencies and departments.

8

Return to School Guidelines {2019}

This policy provides a platform towards the realization of a comprehensive school health program in schools. The policy is guided by the Kenya's Vision 2030 which acknowledges that improved health and

more so to all learners is a critical driver to the achievement of this vision. The Constitution of Kenya, 2010 guarantees all learners the right to basic, compulsory and quality education; the highest attainable standard of health, clean and healthy learning environment, accessibility to reasonable standards of sanitation, free from hunger, to have adequate food of acceptable quality, clean and safe water in adequate quantities. The guiding principles of the policy include; Access to Health and Nutritional services, Access to water sanitation and hygiene, Access to education, Equality and non-discrimination, Access to information, Equity, Privacy and Confidentiality, Safety in schools, Privacy and Confidentiality.

9

Standards and Guidelines for the reduction of maternal morbidity & mortality from Unsafe Abortion {2012}

The Standards and Guidelines for the reduction of maternal morbidity and mortality from Unsafe Abortion was launched by the Ministry of health in 2012. The guidelines are meant to regulate quality of care across health facilities and as well guide quality of services to be provided by different cadres of health workers. The guidelines are also aimed at reducing maternal mortality by addressing the gap of absence of technical and policy guidelines for preventing and managing unsafe abortions to the extent allowed by the Kenyan law

The guidelines are strongly guided by the he Constitution of Kenya 2010 which provides for the right to the highest attainable standard of reproductive health under the following provisions: Article 43(1) (a) which states the right of "Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care" Article 43(2): "A person shall not be denied emergency medical treatment" Access to safe abortion is regulated more specifically under Article 26 (4): "Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law"

However, the guidelines were shortly withdrawn in 2013 which sparked constitutional questions from Civil Society Organizations. The Centre for Reproductive Rights in Kenya and the federation of Women Lawyers filed a case (FIDA Kenya & others Vs AG, Petition 266 of 2015) to challenge the decision to withdraw the guidelines. The guidelines were then reinstated in June 22nd 2019 after a court decision that found that the Director of Medical Services and the Ministry of Health had violated

the rights of Kenyan women and girls by arbitrarily withdrawing the guidelines, thereby creating uncertainty as to the status of legal abortion and discouraging medical providers from performing abortions for fear of criminal prosecution.

Regressive Laws and Policies:

There are also regressive laws and policies in reproductive health that are a barrier to access to quality reproductive health care, police the reproductive health choices of women and young people and discriminate upon individuals seeking certain reproductive health services. An example of these Laws and policies include;

The Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family is an anti-abortion declaration cosponsored by the governments of Brazil, Egypt, Hungary, Indonesia, Uganda, and the United States. It was signed by 34 countries including Kenya on October 22, 2020. The declaration is not binding but clearly states the stand of the countries that signed to it on the rights of women in their countries and access to comprehensive, quality Reproductive Health services including safe abortion. The declaration insists there is no international right to abortion and serves to accentuate existing gender and health inequities and to deny people access to essential health care, particularly marginalized people including; women, young people, the LGBTQA+ community.

The Mexico City Policy (Global Gag Rule) is a United States government policy that blocks U.S. federal funding for non-governmental organizations (NGOs) that provide abortion counseling or referrals, advocate to decriminalize abortion, or expand abortion services. When in effect, the Mexico City policy requires foreign non-governmental organizations to certify that they will not "perform or actively promote abortion as a method of family planning" with non-U.S. funds as a condition for receiving U.S. global family planning assistance and, as of January 23, 2017, any other U.S. global health assistance, including U.S. global HIV (under PEPFAR) and maternal and child health (MCH) assistance. In January 2021, President Joe Biden Officially rescinded the policy as has happened previously when democrat leaders came to power. The policy has however not been permanently removed and therefore chances are once another president comes to power, they still have the power of choice on whether to reinstate the policy again as in the past.

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