

“160 Girls” Making Legal History: Overview of the Development and Implementation of a Strategic Equality Initiative to Achieve Legal Protection from Defilement for All Girls in Kenya

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Abstract

The “160 Girls” project is a legal initiative that aims to achieve justice and protection against defilement for all girls in Kenya. On October 11, 2012 (the first International Day of the Girl Child), a constitutional petition was filed in the High Court of Kenya on behalf of over 160 defilement victims from Meru—all girls between the ages of 3 to 17 years old. The petition argued that police failure to adequately respond to defilement cases has created a climate of impunity that perpetuates this violence, and that violates the girls’ rights guaranteed under domestic, regional and international human rights law. On May 27, 2013, the High Court ruled in the girls’ favour, ordering the Police Service to conduct prompt and effective investigations into each of the girls’ cases, as well as to take measures to fulfill their constitutional duties to comply with human rights standards in all cases of defilement.

The “160 Girls” case has made legal history in Kenya and has set the high water mark for girls’ rights internationally by recognizing the obligation of the Police Service to conduct proper investigations in cases of defilement, failing which it may be found in breach of domestic, regional, and international human rights law guarantees.

Background

The practice of rape and girls’ defilement in Kenya has reached epidemic proportions. Every 30 minutes a girl/woman is raped in the country.¹ Young girls are especially vulnerable: nearly 1 in 3 Kenyan girls under the age of 18 experience sexual violence;² and as many as 68% of school-aged children report having experienced sex under “coercive conditions”.³ 2010 national police statistics, revealed an average of over 200 cases of defilement reported every month in the country.⁴ Furthermore, recent media reports indicate that defilement incidents continue to rise.⁵

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¹ (24 November 2004). “Every 30 Minutes, a Woman is Raped”. *The Standard*. Retrieved from: <http://allafrica.com/stories/200411240964.html>.

² Violence against Children in Kenya: Findings from a 2010 National Survey. Summary Report on the Prevalence of Sexual, Physical and Emotional Violence, Context of Sexual Violence, and Health and Behavioral Consequences of Violence Experienced in Childhood. Nairobi, Kenya: UNICEF Kenya Country Office, Division of Violence Prevention, National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, and the Kenya National Bureau of Statistics, 2012.

³ Ruto, Sara Jerop. "Sexual Abuse of School Age Children: Evidence from Kenya." *Journal of International Cooperation in Education* 12, no. 1 (2009).

⁴ Kenya Police Service, "Annual Crime Report for the Year 2010", 19. <http://www.kenyapolice.go.ke/resources/Crime%20report%202010.pdf>

⁵ “Defilement on the Rise in Kiryandongo”. Kenya Star. 3 September 2013. Retrieved at:

The perpetrators include family members, caregivers, community members, and in some cases, even police officers. The epidemic of girl child rape leaves these young girls at increased risk of contracting HIV/AIDS, unwanted pregnancy, and multiple other short and long term physical and psychological health consequences.

While the *Sexual Offences Act*, 2006 prescribes stiff criminal penalties against defilement,⁶ the law has not adequately been enforced. As a general pattern, police have failed to conduct adequate criminal investigations into these crimes, resulting in a climate of impunity that has only served to perpetuate this violence. According to a 2009 survey of those who reported gender-based violence to Kenyan police, 52% said the police were “not helpful”; 39% said police were “reluctant to record statements”; 28% said they felt “humiliated and handled without courtesy and dignity”; and 20% said they were asked by police for bribes.⁷

The *equality effect* (an international non-profit organization that brings together leading human rights experts in Canada, Kenya, Malawi, and Ghana to conduct innovative legal work on women’s and girls’ human rights issues) initiated the “160 Girls” project in order to hold Kenyan police accountable for the enforcement of defilement laws and for meeting their duty to protect girls in Kenya from this egregious form of violence.

The *equality effect* commenced the “160 Girls” Kenya project in 2011 at the request of Mercy Chidi, the Director of the Meru-based children’s rights organization, Ripples International. Ripples operates the ‘Brenda Boone Tumaini Girls’ Rescue Centre’, which provides care and support for defilement victims in Meru. The initiative became known as the “160 Girls” project because at the time the project was launched, the Ripples had rescued over 160 defilement victims that needed access to justice; and these girls’ cases would become evidence in support of the legal initiative.⁸

Strategic Planning and Preparation for “160 Girls” Litigation Initiative

The *equality effect*’s “160 Girls” project team, which includes lawyers, academics, and activists from Kenya, Canada, Ghana, and Malawi, considered various options for addressing the widespread police failure in the handling of defilement cases. A team of legal experts from around the world assisted in the legal research in support of the “160 Girls” case; (all of these lawyers volunteered their time and donated more than \$3 million USD in pro bono hours towards the case). Ultimately it was decided that a constitutional petition would be brought against the State, arguing that its failure to enforce the laws meant to protect girls from rape amounted to a violation of their constitutional human rights. This avenue was seen as the strategy with the most

<http://www.kenyastar.com/index.php/sid/216800046/scat/faaba65027d16d8c>; “Teso People Complain of Rising Cases of Defilement”. The Kenyan Daily Post. 21 March 2013. Retrieved at: <http://www.kenyan-post.com/2013/03/teso-people-complain-of-rising-cases-of.html>; Korir, Leonard. “Rise in Defilement of Minors Worries Judiciary.” *The Standard*. 4 July 2012. Retrieved at: http://standardgroup.co.ke/?articleID=2000061083&story_title=rise-in-defilement-of-minors-worries-judiciary&pageNo=1.

⁶ *Sexual Offences Act*, 2006, s. 8.

⁷ *Status of Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province*. Nairobi: Institute of Economic Affairs - Kenya, 2009.

⁸ The 160 figure now stands at over 260 and continues to rise.

potential for widespread, systemic impact.

Collection of Evidence

Under the leadership of the *equality effect*'s legal team, social workers at the shelter in Meru systematically documented police failures to conduct proper investigations of defilement. In the end, 11 girls were included in the claim as the official claimants. The claim also included a 12th petitioner, Mercy Chidi/Ripples International, representing the remainder of the over 160 girls in Meru County whose cases similarly received inadequate police attention.

The “160 Girls” evidence submitted in the case included a “bundle” that was 502 pages in length, detailing the specifics of the police treatment of the girls’ defilement claims. The 11 girls included in the petition ranged in age from 5 to 15 years old, and had made complaints to the police about defilement at the hands of family members, caregivers, neighbours, employers, and in the case of one girl, a police officer. The Court took note of the documented police response in each case, which ranged from requests for money, interrogating the victims in a humiliating manner, refusing to investigate, refusing to gather and bring physical evidence to court, refusing to make arrests, and in some cases, even refusing to record the complaints at all.

For example, the Court was presented with the affidavit evidence of C.K., a 5 year old girl who had been raped by her uncle. When Ripples brought this incident to police attention, the police asked for money in order to intervene. Similarly, when 15 year old F.K became pregnant after being raped by her neighbour, police said they would have to wait until the baby was born before they would investigate or arrest the perpetrator.

In addition to providing the Court with affidavit evidence about the girls’ individual cases, expert reports on local and international policing standards were also submitted, as well as evidence outlining the harms sustained by the claimants as a result of both the defilement and the lack of proper police investigation.

The Court Case: Main Argument & Parties

The petition alleged that the Respondents had violated several of the girls’ rights under the Kenyan Constitution and other regional and international human rights treaties by failing to properly investigate defilement claims. These rights include the right to equality and freedom from discrimination, the right to security of the person, and the right to access justice.

In addition to the 12 petitioners (which included the 11 defilement victims and Ripples International), the following two leading Kenyan human rights organizations also intervened in the case: The Federation of Women Lawyers (FIDA) Kenya; and the Kenya National Commission on Human Rights (KNCHR). FIDA Kenya developed the systemic equality analysis that framed the legal arguments, and KNCHR developed the domestic human rights perspective. The *equality effect*, was not an intervener, provided analyses of international human rights law and other comparative jurisprudence, which were cited in the legal submissions.

The petition was brought against three respondents: The Commissioner of Police / Inspector General of the National Police Service, The Director of Public Prosecutions (DPP), and the Minister for Justice, National Cohesion & Constitutional Affairs.

The Court Decision

On May 27, 2013, the High Court of Kenya ruled in the girls' favour. In the decision,⁹ Makau J.A., began by dismissing the arguments of all 3 Respondents as having no merit. Turning to the girls' evidence and arguments, the Court accepted that the Respondents' inaction had created a climate of impunity for defilement, which rendered them indirectly responsible for the harms inflicted by the perpetrators:

“Police unlawfully, inexcusably and unjustifiably neglected, omitted and/or otherwise failed to conduct prompt, effective, proper and professional investigations to the said complaints. That failure caused grave harm to the petitioners and also created a climate of impunity for defilement as perpetrators were let free.”¹⁰

The Court also found the Respondents directly responsible for the psychological harms flowing from the mistreatment the girls received by the police, harms which were found to amount to violations of the girls' constitutional rights.

By way of remedies, the Court ordered the National Police Service to conduct “prompt, effective, proper and professional investigations” into each of the claimants' cases. Furthermore, as a systemic remedy with the potential to drive far-reaching changes in police practice, the Court ordered the Service to take measures to implement article 244 of the Kenyan Constitution.¹¹ This provision requires, among other measures, that the Police Service comply with human rights standards and train staff to respect these standards.

Significance of the Court Decision

The “160 Girls” decision has made legal history in Kenya, as well as in Africa and beyond; it has set the high water mark for girls' rights internationally. It should result in long-awaited access to justice for the claimants themselves, as well as changes in police practice that will benefit all 10,000,000 girls in Kenya. The decision recognizes the obligation on the Kenyan police to conduct proper investigations in cases of sexual abuse, and could easily be extended to apply to other forms of gender-based violence, as well as to other contexts internationally. International human rights guarantees have no geographical borders; and a key precedent set in one country may be used as a powerful advocacy tool by women and girls worldwide to address similar

⁹ *K. (A Child) through Ripples International as her guardian and Next Friend) & 11 others v. COMMISSIONER OF POLICE/INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE & 3 others* [2013] eKLR High Court at Meru, May 27th, 2013; Available online: <http://theequalityeffect.org/160girlshighcourt2013.html>

¹⁰ Ibid.

¹¹ *Constitution of Kenya*, 2010, art. 244.

human rights challenges.

The over 160 girls involved in the case have been empowered with the knowledge of the human rights they are owed, and with the knowledge that it is possible for them to hold their state accountable for these rights. As one of the girls has put it, they now “know what justice looks like” and have seen the results that can be achieved by having the courage to demand that justice.

The “160 Girls” case has received a very positive international response and a significant amount of international media coverage.¹²

The case has resonated with women and girls worldwide. Almost immediately after the High Court’s decision was rendered and picked up by the media, *the equality effect* was contacted by women in countries including the Democratic Republic of Congo, Somalia, Tanzania and Uganda, all hoping to achieve similar victories in their own countries. Other women’s rights organizations in Kenya are now relying on the “160 Girls” decision to bolster their advocacy initiatives.¹³

While it remains to be seen how this decision may end up being used as a precedent internationally, what is unequivocal is that the “160 Girls” victory marks a historic moment in the realization of the fundamental human rights of Kenyan women and girls; and the *equality effect* is committed to continue working with its Kenyan partners to ensure that the full effect of the Court’s order is achieved in Kenya.

More information about *the equality effect* and the ‘160 Girls’ project can be found at the following website: <http://theequalityeffect.org>

In addition, links to two videos about the ‘160 Girls’ project created by an award winning filmmaker can be accessed at the following links:

<http://theequalityeffect.org/the-equality-effect/>

<http://theequalityeffect.org/160-girls-video/>

¹² For example: Sally Armstrong. (June 4, 2013). “In Kenya, a Victory for Girls and Rights”. *The New York Times*. Retrieved from: http://www.nytimes.com/2013/06/05/opinion/global/in-kenya-a-victory-for-girls-and-rights.html?_r=0; Clar Ni Chonghaile. (August 2, 2013). “Court Orders Police to Serve and Protect”. *Good Governance Africa*. Retrieved from: <http://gga.org/stories/editions/aif-14-sex-rites-and-wrongs/court-orders-police-to-serve-and-protect>; Jake Edmiston . (May 31, 2013). “Canadians force Kenyan police to answer for ‘inexcusably’ neglecting reports of sexual abuse against girls”. *The National Post*. Retrieved from: <http://news.nationalpost.com/2013/05/31/kenyan-police-forced-to-answer-for-neglecting-reports-of-sexual-abuse/>; Catherine Porter. (June 13, 2013). “Chance meeting led to justice for rape victims”. *Toronto Star*. Retrieved from: http://www.thestar.com/news/insight/2013/06/13/chance_meeting_led_to_justice_for_rape_victims_porter.html; James Reinl. (June 23, 2013). “Kenyan sex abuse victims awaiting justice”. *Aljazeera*. Retrieved from: <http://www.aljazeera.com/indepth/features/2013/06/2013623115942808444.html>; Geoffrey York. (May 29, 2013). “Sexual-assault complainants in Kenya win legal victory against unresponsive police”. *The Globe and Mail*. Retrieved from: <http://www.theglobeandmail.com/news/world/sexual-assault-complainants-in-kenya-win-legal-victory-against-unresponsive-police/article12215047/>.

¹³ Clar Ni Chonghaile. (August 2, 2013). “Court Orders Police to Serve and Protect”. *Good Governance Africa*. Retrieved from: <http://gga.org/stories/editions/aif-14-sex-rites-and-wrongs/court-orders-police-to-serve-and-protect>.

