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FGM... let's end it.

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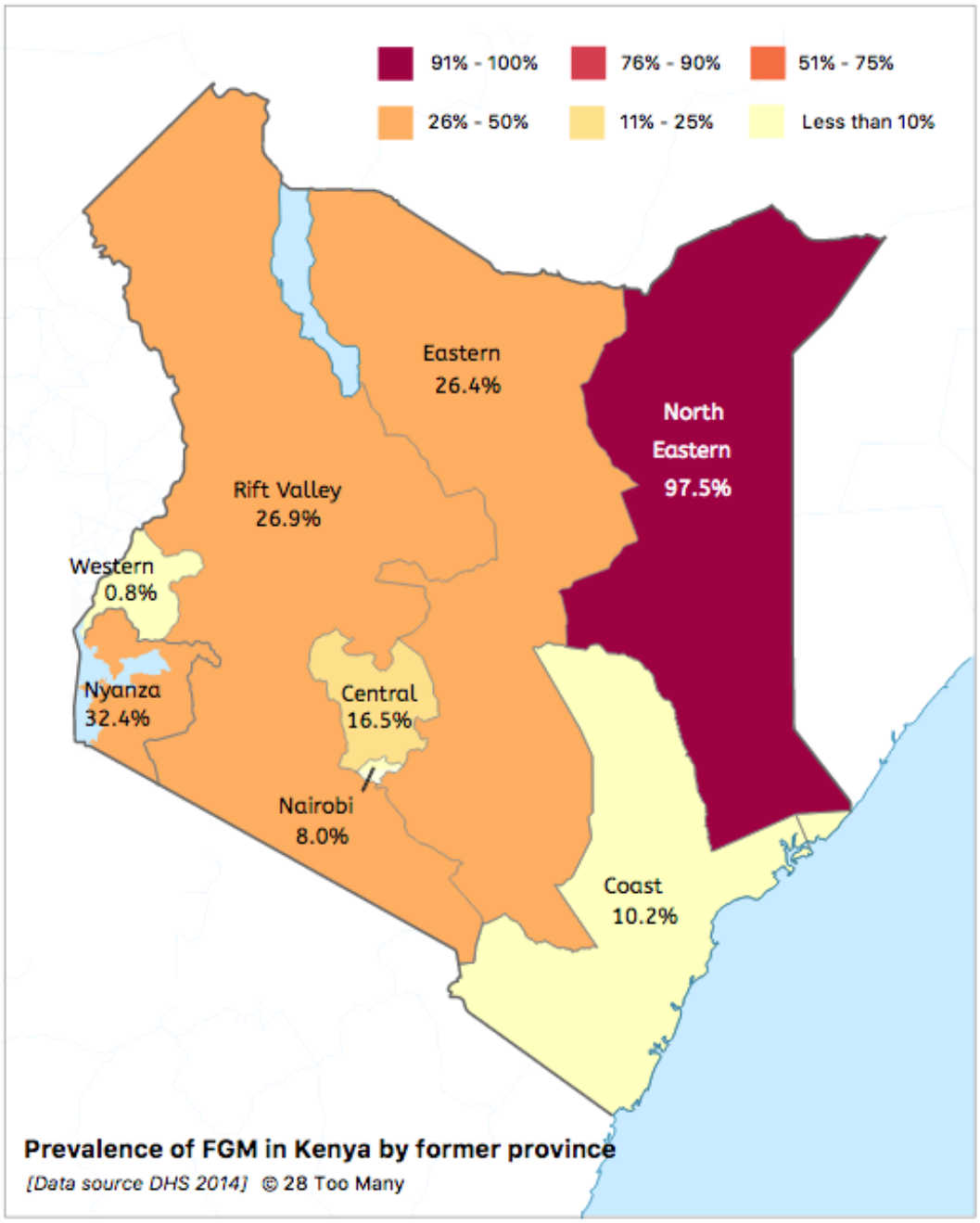
KENYA:

THE LAW AND FGM/C

May 2018

In Kenya, the prevalence of FGM/C in women aged 15–49 is 21%.

The region with the highest prevalence is in the north-east.



- 42.6% of women aged 15–49 who have undergone FGM/C were cut between the ages of 10 and 14.
- 'Cut, flesh removed' is the most common type of FGM/C practised.
- 80.5% of FGM/C on women aged 15–49 was carried out by 'traditional circumcisers'.
- 92.5% of women and 88.8% of men aged 15–49 believe that FGM/C should be stopped.

Source of data: Kenya National Bureau of Statistics, Ministry of Health, Kenya National AIDS Control Council, Kenya Medical Research Institute, Kenya National Council for Population and Development and The DHS Program, ICF International (2015) *Kenya Demographic and Health Survey 2014*. Rockville, MD: ICF International. Available at **http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf**.

*For further information on FGM/C in Kenya see **https://www.fgmcri.org/country/kenya/**.*

Domestic Legal Framework

Overview of Domestic Legal Framework in Kenya	
The Constitution explicitly prohibits:	
✓	Violence against women and girls
✓	Harmful practices
X	Female genital mutilation/cutting (FGM/C)
National legislation:	
✓	Provides a clear definition of FGM/C
✓	Criminalises the performance of FGM/C
✓	Criminalises the procurement, arrangement and/or assistance of acts of FGM/C
✓	Criminalises the failure to report incidents of FGM/C
✓	Criminalises the participation of medical professionals in acts of FGM/C
✓	Criminalises the practice of cross-border FGM/C
✓	***Government has a strategy in place to end FGM/C***

What is The Law Against FGM/C?

An overview of the international and regional treaties signed and ratified by Kenya can be found in Appendix I of this report.

Kenya has a mixed legal system comprising English common law, Islamic law and customary law. The country has a quasi-federal structure with two distinct but interdependent tiers of government at national and county levels. **The Constitution of Kenya (2010)**[1] assigns health policy and all criminal law to the national government. National law supersedes any laws made at the county level and also applies when there is no county legislation on a matter.[2]

Although the **Constitution** does not explicitly refer to FGM/C, **Article 29(c)** provides the right not to be 'subjected to any form of violence' or **(f)** 'treated or punished in a cruel, inhuman or degrading manner'. **Article 44(3)** states that 'a person shall not compel another person to perform, observe or undergo any cultural practice or rite'. In addition, **Article 53(d)** protects every child from 'abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment . . .'

The Prohibition of Female Genital Mutilation Act, 2011 (FGM Act 2011),[3] which came into effect on 4 October 2011, is the principal legislation governing FGM/C in Kenya. It is a federal act and criminalises all forms of FGM/C, regardless of the age or status of a girl or woman.

What The Law Covers

The FGM Act 2011 is a comprehensive piece of legislation that established the Anti-Female Genital Mutilation Board and sets out the offences and punishments for FGM/C in Kenya.

Article 2 of the FGM Act 2011 clearly defines FGM as 'all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons', and includes **(a)** clitoridectomy, **(b)** excision and **(c)** infibulation (with accompanying definitions of each). The only exceptions are a 'sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose'; the law does not, however, define the meaning of 'therapeutic' in this context.

Part IV (Articles 19–25) of the FGM Act 2011 outlines the criminal offences related to the following aspects of FGM/C:

- **Article 19** – the performance of FGM/C, including by medical practitioners;
- **Article 20** – procuring, aiding and abetting the practice of FGM/C;
- **Article 21** – procuring a person to perform FGM/C in another country;
- **Article 22** – allowing the use of premises for FGM/C;
- **Article 23** – the possession of tools and equipment for the purposes of FGM/C;
- **Article 24** – failure to report awareness of FGM/C to a law enforcement officer, whether the procedure is in progress, has already occurred or is planned; and
- **Article 25** – the use of derogatory or abusive language against a woman for having not undergone FGM/C (or against a man for marrying or supporting that woman).

Consent is not a defence to the crime of performing FGM/C in Kenya; nor is it a defence to argue that the person charged thought such consent had been given **(Article 19 [6])**.

The FGM Act 2011 also allows any law enforcement officer, under **Article 26**, to enter any premises for the purposes of ascertaining whether it is connected to any violation of the law around FGM/C.

In addition, the following Kenyan laws address FGM/C.

- **The Children Act 2001 (revised 2016),[4] states in Article 14:**

  > No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.

  A child is defined as anyone under 18 years of age.

  Article 119(1)(h) of the Children Act also provides for a Children's Court to issue a protection order if the child 'being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health.' The application must be made by a qualified person, defined under **Article 113(2)** as the child, the parents, guardian or relative of the child, or the Director of Children's Services or authorised officer.

- **The Protection Against Domestic Violence Act (2015)**[5] defines domestic violence under **Article 3(a)(ii)** to include 'female genital mutilation' and under **Article 19(1)(g)** it provides the facility to set up protection orders covering potential victims against engagement, or threats to engage, 'in cultural or customary rites or practices that abuse the protected person'.
- Finally, Kenya's **Penal Code (revised 2014)**[6] under **Article 4** outlaws the deliberate infliction of 'grievous harm', which includes 'any permanent or serious injury to any external or internal organ, membrane or sense'.

Medicalised FGM/C

FGM/C in Kenya continues to be carried out predominantly by traditional circumcisers, for 74.9% of girls aged 0–14 and 83.3% of women aged 15–49.[7] There has been some concern over the increasing medicalisation of FGM/C in Kenya in recent years, however, with claims that it has risen up to as much as 41% in some areas, and that medical professionals are performing FGM/C in homes, hospitals or temporary 'clinics' during school holidays.[8] Although the most recent Kenyan Demographic and Health Survey (2014) is based on a small sample of women and girls, it does suggest that 14.8% of women aged 15–49 and 19.7% girls aged 0–14 have been cut by a medical professional. Of these, most are carried out by a nurse/midwife. A study in 2016 suggested that Kenya is third in the world for cases of medicalised FGM/C.[9]

Anyone who performs FGM/C, including those who are under the supervision of a medical professional or a midwife, commits a criminal offence under **Article 19(1) of the FGM Act 2011**, although there are two exceptions under **Article 19(3)**:

(a) Surgical operations performed by a medical practitioner that are necessary for the person's physical or mental health. However, necessity cannot be determined based on a person's culture, religion, custom or other practice.

(b) Surgical operations performed by a medical practitioner, midwife or medical student in training, on those who are in any stage of labour or have just given birth, for purposes connected with the labour or birth.

FGM/C is not specifically identified as an offence under the **Medical Practitioners and Dentists Act (revised 2012)**[10], but under **Article 20(1)** disciplinary proceedings may be brought against a medical practitioner who commits an offence under the Penal Code or engages in 'any infamous or disgraceful conduct in a professional respect', which will result in removal from the medical register or cancellation of their licence. Similarly, the **Nurses Act (revised 2012)**[11] does not specifically address FGM/C, but a nurse may be removed from the register if found guilty of misconduct by the Nursing Council of Kenya.

Cross-Border FGM/C

In some countries where FGM/C has become illegal, the practice has been pushed underground and across borders to avoid prosecution. Kenya shares borders with other countries where the existence and enforcement of anti-FGM/C laws varies widely, including Somalia, South Sudan, Tanzania and Uganda. The movement of families across borders to perform FGM/C remains a complex challenge for the campaign to end FGM/C. Women and girls living in border communities are particularly

vulnerable; for example, the Pokot and Sabiny communities on the western border with Uganda, and the Kuria community on the southern border with Tanzania.

According to media reports, during the December 2011 'cutting season' in Kenya, families and traditional circumcisers from the Kuria community took girls over the border to cut them in Tanzania.[12] This followed the enactment of the FGM Act in 2011 and was a reaction to the new law being implemented. Movement between Kenya and its neighbouring countries has continued since, and it can be in either direction. Recent reports, for instance, suggest an increasing trend for married women from Uganda to be taken across the border into Kenya to be cut in secret.[13]

Articles 21 and 28(1) of the FGM Act 2011 criminalise cross-border FGM/C by stating that it is an offence for any citizen or permanent resident of Kenya to 'take another person from Kenya to another country, or arrange for another person to be brought into Kenya from another country' for the purposes of FGM/C. **Article 28(2)** further qualifies that a person may not be convicted of the offence if such a person has already been acquitted or convicted in the country where the offence was committed.

Penalties

Article 29 of the FGM Act 2011 establishes criminal penalties for all offences set out in **Articles 19–24** as follows:

- imprisonment for a minimum of three years; and/or
- a fine of at least 200,000 shillings (US$1,953).[14]

If the FGM/C procedure results in death, **Article 19(2)** states that the maximum sentence is life imprisonment.

Under **Article 25**, the use of derogatory or shaming language is subject to punishment of a minimum of six months' imprisonment or a fine of at least 50,000 shillings (US$488), or both.

Regional FGM/C Law

In 2016 the East Africa Community (which includes Kenya, South Sudan, Tanzania and Uganda) enacted the **East African Community Prohibition of Female Genital Mutilation Act** (*EAC Act*)[15] to promote cooperation in the prosecution of perpetrators of FGM/C through harmonisation of laws, policies and strategies to end FGM/C across the region. The EAC Act aims to raise awareness about the dangers of FGM/C and provide for the sharing of information, research and data.

The EAC Act defines FGM at **Article 2** as 'all procedures that involve partial or total removal of the external female genitalia, or other injury to the female organ for non-medical reasons' and sets out its objectives in **Article 3,** which include **(a)** prohibiting FGM/C as a 'trans-national crime' across member states, **(b)** setting minimum penalties for FGM/C, **(c)** establishing institutions to foster co-operation and **(d)** developing and harmonising policies, laws, strategies and programmes to prosecute offenders, prevent FGM/C and provide services to victims and girls at risk of FGM/C.

The content of the regional law is similar to the Kenyan FGM Act 2011 and sets out the following penalties in **Part II (*Female Genital Mutilation and Related Offences*)**:

- **Article 4(1)** – performance of FGM/C carries a punishment of a minimum of three years' imprisonment;
- **Article 4(2) & (3)** – 'aggravated' FGM/C carries a punishment of imprisonment for life. 'Aggravated' FGM/C occurs if the procedure results in the death or disability of the victim, or if she is infected with HIV, or if the perpetrator is a parent, guardian or health worker;
- **Article 10** – anyone using derogatory or abusive language or ridiculing a woman (or her male partner) for undergoing or not undergoing FGM/C will be imprisoned for a minimum of six months;
- **Article 11** – imprisonment for a minimum of three years or a fine of not less than US$1,000, or both, applies to anyone procuring, aiding or abetting the practice of FGM/C (under **Article 5**), participating in cross-border FGM/C (under **Article 6**), using premises for FGM/C (under **Article 7**), possessing cutting tools or equipment (under **Article 8**) or failing to report FGM/C that has taken place, is taking place, or is planned (under **Article 9**).

Further protective measures are set up in **Article 12**, which states that compensation may be sought from the perpetrator for the victim of FGM/C, and in **Article 13,** under which, if EAC state members are satisfied that a girl or woman is at risk of undergoing FGM/C, they may issue protection orders.

Part IV (*Miscellaneous Provisions*) of the EAC Act requires member states to adopt comprehensive anti-FGM/C laws and include in their national budgets resources to protect women and girls from FGM/C, provide support services to victims, and undertake public-education and sensitisation programmes on the dangers of FGM/C. A regional database on cross-border FGM/C will be established, supported by an exchange of criminal intelligence, training of key personnel and strengthening of cross-border security. Finally, the law states at **Article 16,** 'This Act shall take precedence over other Partner State laws to which its provisions relate' (i.e. the penalties may be higher than those that currently exist in member states).

Implementation of The Law

Cases

While some arrests have been made and cases brought to court in Kenya since the FGM Act 2011 was introduced, generally, implementation of the national law and its enforcement remain a challenge. This is largely due to a lack of resources, difficulties reaching remote rural areas and the limited capacity of law-enforcement agents.[16] Evidence suggests that judges are often reluctant to respect the statutory minimum custodial sentence provided by the law, and sentences are routinely being reduced or quashed on appeal.

Between 2011 and 2014, of the 71 cases reported in Kenya, 16 resulted in convictions, 18 in acquittals and four were withdrawn. In 2014, the remaining 33 cases were still pending.[17] The most recent report published by the UNFPA-UNICEF Joint Programme listed 75 cases brought to court and ten convictions in Kenya during 2016.[18]

Some examples of cases include the following.

- In 2015, HM was found guilty of abetting FGM/C carried out on a 12-year-old girl and sentenced to three years' imprisonment and a fine.[19] On appeal, her sentence was reduced to one year. The judge stated that this was more reasonable as it was her first offence.
- In 2015, BHK was found guilty of aiding FGM/C carried out on a ten-year-old girl and sentenced to three years' imprisonment and a fine.[20] On appeal, the custodial sentence was set aside and replaced with a fine, which, if not paid, would result in one year's imprisonment. The grounds for this were that she was a first-time offender.
- In 2014, PRN was prosecuted for performing FGM/C on two girls.[21] She was acquitted of one count (on a girl of 16 years of age) but sentenced to seven years' imprisonment on the second count, which was on a girl of 11 or 12 years of age. Her appeal was dismissed on the grounds that FGM/C on this second girl was involuntary.
- In 2013, LCN was found guilty of being aware of the offence of FGM/C being committed on her daughter.[22] She was sentenced to a fine, in default of which she would serve three years' imprisonment. On appeal, the court held that the prosecution's evidence against the appellant was not satisfactory to meet the threshold required in establishing beyond reasonable doubt that an offence had been committed, and the conviction was quashed.
- In 2012/13, SMG and RAM were found guilty of failing to report FGM/C and being involved in the practice on their 16-year-old daughter. They were sentenced to four years' imprisonment.[23] On appeal, they were set free because of a procedural error by the trial court.

There is a lack of information regarding any cases brought to court of FGM/C performed by medical practitioners in Kenya. One case that was reported involved a woman who was cut after giving birth at a private hospital in Nairobi in 2005. Although police were informed, no arrest took place.[24]

Relevant Government Authorities and Strategies

Part II of the FGM Act 2011 established the Anti-Female Genital Mutilation Board (the *Anti-FGM Board*) and sets out its functions under **Article 5** as follows:

(a) design, supervise and coordinate public-awareness programmes against FGM/C;

(b) advise government on matters relating to FGM/C and the implementation of the law;

(c) design and formulate a policy on the planning, financing and coordinating of all activities relating to FGM/C;

(d) provide technical and other forms of support to institutions, agencies and other anti-FGM/C bodies;

(e) design programmes aimed at the eradication of FGM/C;

(f) facilitate resource-mobilisation for anti-FGM/C programmes and activities; and

(g) perform such other functions as may be assigned by any written law.

Further to this, the **FGM Act 2011** requires under **Article 27** that necessary measures be taken by the Government of Kenya to **(a)** protect women and girls from FGM/C, **(b)** provide support services to victims of FGM/C and **(c)** undertake public education and sensitise the people of Kenya on the dangers and adverse effects of FGM/C. The most recent themes and strategies for tackling FGM/C in Kenya are set out in the Anti-FGM Board's **Strategic Plan (2014–2018)**.[25] A telephone helpline was also set up in 2014 by the anti-FGM/C prosecution unit.

In 2008, Kenya was one of the first countries to become part of the **UNFPA-UNICEF Joint Programme to end FGM**. In partnership with the Anti-FGM Board and the Office of the Director of Public Prosecution, it has supported programmes and services that include reviewing the National Policy to end FGM, implementing guidance for prosecutors on how to handle FGM/C cases, supporting the 'mobile courts' initiative to take the legal process closer to the community[26] and targeting sensitisation campaigns in communities where cross-border FGM/C takes place.

Civil Society Observations

Kenya has a strong network of non-governmental organisations working on programmes to end FGM/C and partnering with the UN Joint Programme and various government departments, including the Ministry of Health and the Ministry of Public Service, Youth and Gender. Available data suggests a gradual trend towards lower prevalence among younger women in Kenya in response to these government and civil-society efforts.[27]

However, there remain many concerns among members of civil society about the limited effectiveness and implementation of the Kenyan law, and they urge the Government to consider a number of ongoing issues as follows.

- The Government should involve the practising communities in the drafting of laws, so responsibility and understanding is forged at a local level.
- Awareness of the content and meaning of the FGM Act 2011 remains very low in many rural communities. Dissemination needs to be improved.
- The law has not been translated into local languages, and the language used in the law is not easy to understand.
- The law is still not being fully implemented (the Office of the Director of Public Prosecution has little capacity to investigate, it is suggested), and there have been few successful prosecutions to date. Many communities are therefore still performing FGM/C in secret or finding strategies to avoid detection (for example, by performing FGM/C a few hours after birth).
- There is a conflict of interest where judges themselves come from practising communities, and further training is needed to tackle this.
- More generally, both the judiciary and police need more training on how to handle FGM/C cases, and more support and funding is needed from the county governments.
- Girls may not be aware that FGM/C is a crime, they may be too young to report the practice, or they do not want to report their parents or wider family members to the police.

- Where FGM/C is reported, witness protection can also reportedly be weak, thus deterring women and girls from testifying. Some women and girls also avoid seeking subsequent medical care for fear of detection.
- Uncut women and girls are not just vulnerable to verbal abuse; they can also be shunned by society and excluded from family activities and community events.
- All professions should be aware of the law and their responsibilities in responding to women and children affected by or at risk of FGM/C.
- Medicalised FGM/C is increasing at an alarming rate in some parts of Kenya, and the law is not proving effective in bringing the perpetrators to court. Increased monitoring of health professionals in areas of high risk is needed, and legal measures must be strengthened in the case of a medical professional being found guilty, including a provision for potential decertification from the profession.
- Collecting evidence is an ongoing challenge and there is no proper monitoring and reporting framework for FGM/C cases in Kenya.

In addition, there has been recent discussion over the FGM Act 2011 failing to address those women in Kenya who agree to FGM/C because of intense pressure from society. Where uncut women have been ostracised from their community and then subsequently agree to FGM/C in desperation, to gain acceptance, they are at risk of being arrested for aiding and abetting or failing to report the practice under the current legislation. A recent case reported in the media involved three women (aged 21, 29 and 30) who were arrested for having undergone FGM/C in Nakuru County in December 2017.[28] In court, the women claimed that they had only undergone FGM/C to fit into society, and that they had suffered ridicule and isolation from other women in the community and were considered 'unclean'.[29] They were charged with practising, adding and abetting FGM/C, along with one of the women's husbands. It is argued, therefore, that the law needs further clarification to exempt all victims of FGM/C from prosecution, including those who submit to the practice due to extreme societal pressures.[30]

An alternative argument is also being presented in Kenya at the time of writing, following a petition initially filed in July 2017 by a Dr Tatu Kamau. The case began in the High Court of Machakos in January 2018, when Dr Kamau argued that the FGM Act 2011 is unconstitutional, that adult women should have the right to choose whether to be cut or not, and, if they do so choose, should subsequently have access to 'the best medical care' available.[31] Anti-FGM/C activists are urging for this case to be dropped, but it is currently still proceeding through the courts.

Conclusions and Suggestions for Improvement

Conclusions

- The FGM Act 2011 in Kenya is one of the most comprehensive laws against FGM/C in Africa. It clearly defines 'FGM' and criminalises the performance, procurement, and aiding and abetting of all forms of the practice. Both medicalised FGM/C and cross-border FGM/C are criminalised and punished under this legislation.
- The FGM Act 2011 also addresses the failure to report FGM/C, the use of premises for FGM/C, the possession of cutting tools and the use of derogatory language against uncut women. Kenya's position is further strengthened by the EAC Act and its obligation to implement the law and coordinate prosecution of FGM/C across the region.
- To date, the FGM Act 2011 has not been strictly enforced, and few successful cases have been brought to court since the legislation was introduced. Many sentences are routinely being reduced or quashed on appeal. Huge challenges remain to raise awareness of the law and train all key actors to handle FGM/C cases appropriately.
- The establishment of the Anti-FGM Board is an indication of the Government's concern to eliminate FGM/C, and there is a wide network of non-governmental organisations and anti-FGM/C activists working in communities across Kenya. There remain concerns, however, that the law is not achieving all it could to protect women and girls from societal pressures to be cut, and there are ongoing challenges to the legislation and its content from those who continue to support the practice.

Suggestions for Improvement

National Legislation

- The law could be further strengthened in relation to medicalised FGM/C, to clearly define and strictly punish any member of the medical profession who performs, attempts to perform or assists FGM/C in any location or premises, whatever the age of the woman or child.
- The law should clearly define what is meant by a 'genuine therapeutic purpose' to ensure that all forms of FGM/C are clearly criminalised and there are no potential loopholes.
- The law needs to clearly protect all victims of FGM/C; women and girls who are pressured by society into agreeing to FGM/C should not be subject to criminalisation and further punishment under the law.
- As well as protection from abusive language, uncut women and girls (and their families) should also be protected by the law from actions that exclude them from society, including from family events and community activities.
- Laws need to be made accessible to all members of society and easy to understand in all local languages.

Implementation of the Law

- Adequate monitoring and reporting of FGM/C cases in Kenya would improve efficiency and inform policy-makers, the judiciary, the police, civil society and all those working to implement and enforce the law.
- Anti-FGM/C programmes should disseminate clear, easy-to-understand and accurate information around the law.
- It would be beneficial to focus on further strengthening partnerships across borders, as set out under the EAC Act, where illegal activity continues to take place.
- Increased involvement of local and religious leaders in education around the law, including their responsibilities and the importance of the law in protecting women and girls in their communities, would also be beneficial.
- Judges and local law enforcers need adequate support and training around the law and should be encouraged to fully apply the sentences provided for by the legislation.
- Tribunals could be encouraged to make sure any prosecutions relating to FGM/C are clearly reported, including through local media such as community radio, and made available in local languages.
- Increased support and protection for victims and witnesses in FGM/C cases is needed.
- All professions need training around the law and their responsibilities to respond to women and girls who are affected by or at risk of FGM/C.
- Where literacy rates are low, information around the law needs to be made available through different media channels and resources.
- Mandatory reporting of instances of FGM/C by medical staff in hospitals and health centres could be considered.
- Where these are currently unavailable and a need is identified, appropriate protection measures (for example, the provision of safe spaces) should be put in place for girls at risk of FGM/C.

Appendix I: International and Regional Treaties

KENYA	Signed	Ratified	Acceded	Reservations on reporting?
International				
International Covenant on Civil & Political Rights (1966) (*ICCPR*)			✓ 1972	
International Covenant on Economic, Social & Cultural Rights (1966) (*ICESCR*)			✓ 1972	
Convention on the Elimination of All forms of Discrimination Against Women (1979) (*CEDAW*)			✓ 1984	
Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (*CTOCIDTP*)			✓ 1997	
Convention on the Rights of the Child (1989) (*CRC*)	✓ 1990	✓ 1990		
Regional				
African Charter on Human & Peoples' Rights (1981) (*ACHPR*) (Banjul Charter)		✓ 1992		
African Charter on the Rights and Welfare of the Child (1990) (*ACRWC*)			✓ 2000	
African Charter on Human and Peoples' Rights on the Rights of the Women in Africa (2003) (*ACHPRRWA*) (Maputo Protocol)	✓ 2003	✓ 2010		

'**Signed**': a treaty is signed by countries following negotiation and agreement of its contents.

'**Ratified**': once signed, most treaties and conventions must be ratified (i.e. approved through the standard national legislative procedure) to be legally effective in that country.

'**Acceded**': when a country ratifies a treaty that has already been negotiated by other states.

#NOFGM

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Cover image: africa924 (2009) *MAASAI MARA, KENYA – JULY 13: Maasai mother with her child on circa July 13, 2009 in Maasai, Kenya. The woman wears traditional jewelry forgings of small colored beads.* Shutterstock photo ID: 72189754.

Please note that the use of a photograph of any girl or woman in this report does not imply that she has, nor has not, undergone FGM/C.

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