

Human Rights, Culture and Religion: Application of the Maputo Protocol in East African Judiciaries

Presented By:

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High Court of Kenya

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Outline

- Context
- International provisions on women's rights
- Constitutional Provisions
- Key Concerns
 - Access to Justice
 - Equality Before the Law
 - Inclusion/non-discrimination
 - Human Dignity



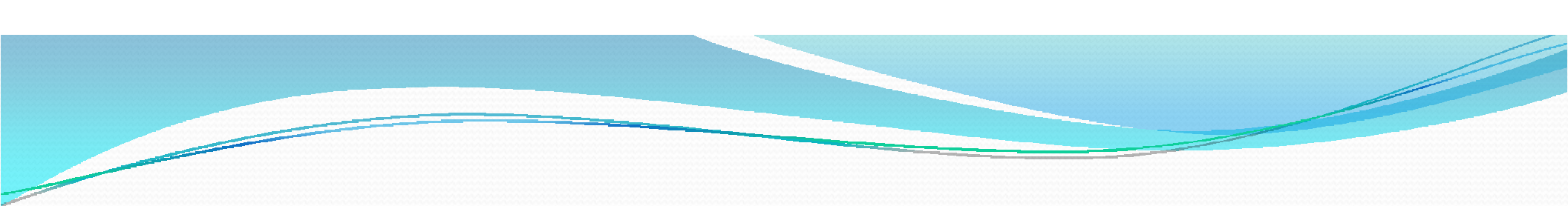
Context

- Patriarchal society
- Women's position in society
- Culture, religion, discriminatory against women
- Forced marriages
- Denied inheritance rights/property rights
- Wife inheritance
- Sexual/gender based violence against women
- Limited access to justice

Context

- **Supreme Court Advisory Opinion No. 2 of 2012 (Gender Representation case)**

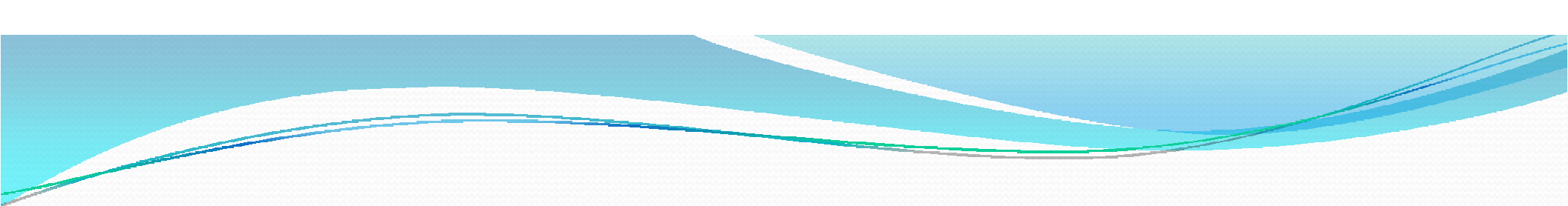
[47]“This Court is fully cognizant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society.



“Learned Counsel Ms. Thongori aptly referred to this phenomenon as “the socialization of patriarchy”; and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of “national values and principles of governance” [Article 10].”

Context

- Women as consumers of justice-
 - Within the criminal justice system as victims/witnesses/perpetrators;
 - As litigants in civil disputes;
 - Contact with justice system as victims of SGBV; matrimonial property disputes; property inheritance;

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- In relation to socio-economic rights-
 - Health care/reproductive health rights
 - housing
 - Water
 - sanitation

International Provisions on the rights of women

- UDHR- Article 2-Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- CEDAW-Article 1, 2
- Other provisions in ICCPR; ICESCR; ACHPR; the African Charter on the Rights and Welfare of the Child

Regional Provisions

- African Charter on Human and People's Rights
 - Intended to establish a regional human rights system within the African Union
 - Key concerns- the rights and freedoms of the people; liberation of Africa; end to colonialism;
 - Limited provisions on the rights of women:
 - Article 18 (3)- the rights of women provided for together with the rights of other vulnerable groups- children, , persons with disabilities, the elderly
 - Issues of specific concern for women unaddressed.

ACHPR provisions on women's rights:

- Article 18(3)

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.



Hence Maputo Protocol

- Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa
- adopted by the African Union on 11 July 2003 at its second summit in Maputo, Mozambique
- Seeks to address the political, social and economic rights of women and girls
- To supplement provisions of ACHPR

Maputo Protocol

- Article 2 of the Protocol calls upon state parties to undertake appropriate legislative, institutional and other measures to eliminate all forms of discrimination against women.
- Article 3 underscores the right of women to dignity;
- Article 4 life, integrity and security of the person;
- Protects the rights of women within marriage, upon the dissolution of marriage, protection of widows and their rights of inheritance.



Maputo Protocol

- Article 5 – protection of women from harmful cultural practices such as female genital mutilation (FGM) should therefore be eradicated.
- Article 9- Participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that women participate without any discrimination

Advantages for Kenya

- Article 2(5) and (6):
 - (5) The general rules of international law shall form part of the law of Kenya.
 - (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.
- Specific constitutional provisions in the 2010 Constitution that outlaw discrimination and guarantee to all regardless of race, sex, social status;

Constitutional Provisions

- Article 10-National values and principles of governance
- 10(2)(b) - **human dignity**, equity, social justice, **inclusiveness**, **equality**, **human rights**, **non-discrimination** and protection of the **marginalised**;
- Article 27-equality before the law and non-discrimination;
- Article 28-right to human dignity;

Application of International Covenants

- Courts in Kenya have made reference to international covenants in making decisions that have helped to advance the rights of women
- Most references/applications have been to CEDAW, ACHPR, UDHR, ECESCR, ICCPR
- There have been limited references to Maputo Protocol, This may be explained by the fact that it was signed and ratified by Kenya after the promulgation of the 2010 Constitution

Reference to ACHPR

- **Rono v Rono**, the Court of Appeal stated that African customary succession laws that disinherited women contravened Article 18 of the African Charter which Kenya had ratified without any reservation. The judge noted that Kenyan domestic law was insufficient in regard to this thus international human rights instruments that Kenya had ratified were necessary



Issues in Rono

- Whether customary law can be invoked to govern property relations even if the laws are prima facie infringing on the human rights of an individual;
- Whether international law was relevant for consideration of the matter.

Rono vs Rono

- On the second issue, the court noted: " As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two international human rights covenants: the Covenant on economic, social and cultural rights and the Covenant on civil and political Rights (both adopted by the UN General Assembly in 1966). In 1984 it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women....

Rono vs Rono

-“In the African context, Kenya subscribes to the **African Charter of Human and Peoples’ Rights**, otherwise known as the Banjul Charter (1981), which it ratified in 1992 without reservations. In Article 18, the Charter enjoins member States, inter alia, to: -
- “.....ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions.”

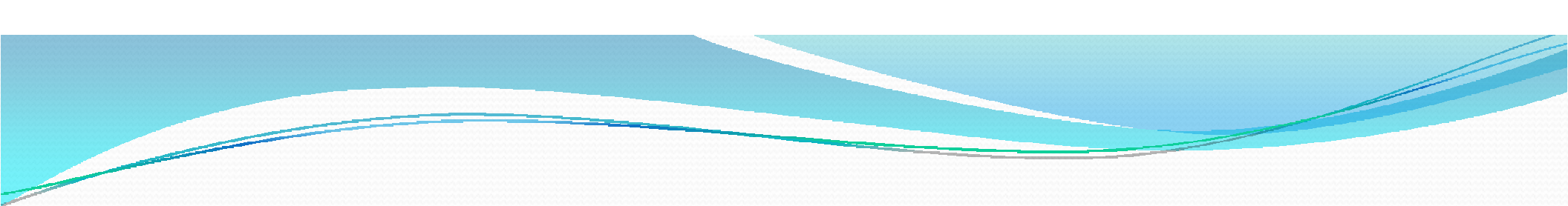


Rono vs Rono

- “It is within the proper nature of the judicial process and well established functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.”

Right to political participation

- **National Gender And Equality Commission v Independent Electoral And Boundaries Commission & another [2013] eKLR**
- Case related to the role and responsibility of the IEBC in the creation of party lists by political parties under Article 90 of the Constitution for the 2013 elections; whether IEBC had complied with its responsibility to supervise and conduct the election for special seats under Article 90
- Parties invoked international law instruments, including the ACHPR, Maputo;

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- 1. Article 7(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which obliges State parties to take all appropriate measures to eliminate discrimination against women in political and public life.
 - 2. **Article 9 of The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) that relates to women's right to participate in the political and decision making process.**
 - 3. African Charter on Elections, Democracy and Governance. Article 3(7) which provides that State Parties shall adopt legislative and administrative measures to guarantee the rights of women,

W.J & Another vs Astarikoh Henry Amukoa, AG and TSC

- Constitution not retrospective in application, but the right of children not to be subjected to any form of sexual or physical violence, the right to education, non-discrimination and the right to dignity, were guaranteed to children under the Children Act. These rights were also guaranteed under the **International Covenant on the Rights of the Child**, which had been domesticated through the Children Act.

CEDAW

- **Rose Mambo vs Limuru Golf and Country Club**- where the court found that certain by-laws enacted by the private members Golf Club were in violation of the provisions of CEDAW on non-discrimination. The court relied on the provisions of CEDAW and the ACHPR, as well as CEDAW General Recommendations Nos. 19 and 20, and the provisions of Article 27 of the Constitution, to find the impugned by-laws unconstitutional.

ACHPR-Cases of evictions/Right to Housing

- **Petition No. 356 of 2013 June Seventeenth Enterprises Ltd vs Kenya Airports Authority and Nairobi City Council** the Court considered **UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)** and stated:
- *34. These Guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48th Ordinary Session it adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights.*

Evictions

- *Accordingly, the African position on the right to housing can be understood from the African Commission on Human and Peoples' Rights case of The Social Economic Rights Centre & Centre for Economic and Social Rights v Nigeria, Com. No.155/96 (2001). In its judgment the Commission stated that; "Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight."*



Evictions

“Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a Court should consider before authorising forced evictions or demolitions is the impact on vulnerable and disadvantaged groups.”

Evictions

- *A Court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities"*

ECSR-Right to Housing

- **Petition No. 164 of 2011- Mitubell Welfare Society vs AG & Others**-Court relied on international provisions, including General Comments:
- 40. This country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy. However, as a member of the international community and a signatory to various United Nations treaties and conventions, it is bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of the Constitution make the general rules of international law and any treaty or convention that Kenya has ratified part of the law of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions as enunciated by The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 "The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments)."

Satrose Ayuma vs The Registered Trustees Of The Kenya Railways Staff Retirement Benefits Scheme-right to housing

- This right has also been recognised by a number of international human rights instruments such as The International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), The Convention on the Elimination of all Forms of Racial Discrimination (CERD), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. It has also been recognised by our regional treaty, The African Charter on Human and People's Rights and Kenya is a State party to all these Treaties and Convention.

Some Progress

- The position on evictions taken by the courts on eviction has been enacted into law by the Land Laws (Amendment) Act 2016 which, at section 98, amends the Land Act, No 6 of 2012, by inserting after section 152 provisions and guidelines on evictions, including the requirement for notice, which are in accord with international guidelines.

ICCPR, CEDAW, ACHPR

- High Court Petition No. 562 of 2012-Millicent Awuor Omuya & Another vs The Attorney General & Others-women detained in hospital for inability to pay maternity fees after giving birth. Court's view:

“As I understand it, the petitioners' argument is that by failing to act on the practice of detention of women who are unable to pay their medical fees in respect of maternity services, the government discriminates against women as it is fully aware that it is only women who seek the services of institutions such as the 5th respondent to give birth.

Millicent Awuor-detention in hospital

- In failing to recognize and curb the practice, the state was in breach of its express obligation under CEDAW, Article 12 of which requires state parties to ensure that women have adequate services related to reproductive health by requiring states to:
 - “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

Probably most problematic: women's reproductive rights

- **Article 14 Maputo Protocol which guarantees women the right:** to control their fertility; to decide whether to have children,, and the number and spacing of children; to choose any method of contraception; to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; to be informed on one's health status and the health status of one's partner and to have family planning education.

Kenya's Protocol Status

- Kenya ratified the Maputo Protocol in October 2010, about two months after the promulgation of the new Constitution
- It had two reservations on Article 10(3) and 14(2)(c) on the medical termination of pregnancy in cases of sexual assault, incest, rape, and where the life or health of the mother or foetus is in danger as a result of the pregnancy.

Pending Cases on Article 14

- Two cases pending before the High Court of Kenya at Nairobi which raise the issue of women's rights under Article 14(2)(c) of the Protocol: allegations of mistreatment and forced sterilization in private hospitals without her consent on account of her HIV status; one case that is yet to be determined on the question of safe abortions.
- The petitioners have cited the provisions of Article 43(1)(a) of the Constitution, the International Covenant on Economic, Social and Cultural Rights, the African Charter and the Maputo Protocol.

Conclusion

- Duty to advance/protect/promote the rights of women
- Bold and courageous in advancing rights if we are to transform society
- Remember that many major great changes in society were brought about by judicial decisions
- Remember we are/can be champions of human rights, democracy, and the rule of law.



Recommendations

- That we bear in mind possible hidden/cultural biases in judging
- That our training institutions undertake training of judicial officers in gender/on sensitivity to women's issues
- Training on /gender issues/international instruments/treaties relevant to our contexts and how to apply them.



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