



## **THE SEARCH FOR JUSTICE BY VICTIMS OF SEXUAL AND GENDER BASED VIOLENCE**

**Presentation at the 20th Annual Judges Conference, Speke Resort Munyonyo by Hon Lady Justice Henrietta Wolayo, Judge High Court of Uganda on 24<sup>th</sup> January 2018**

### **Introduction**

This paper discusses the substantive law on gender based violence, challenges faced by women and girls in accessing justice in the criminal justice process whether as victims or witnesses or perpetrators. The purpose will be to trigger recommendations for legal and administrative reforms coming from distinguished participants.

### **Article 4 of DEVAW**

Imposes on states the obligation to develop penal laws, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.

Women who are subjected to violence should be provided with access to mechanisms of justice, and to just and effective remedies for the harm that they have suffered.

Sexual violence is one form of gender based violence. Violence can also be physical or psychological and occurs within the family, the community or in the state during times of war.

Gender based violence is a wide topic but in this paper I focus on sexual and physical violence that translates into penal offences.

### **Substantive law**

At international level, Article 4 of DEVAW imposes an obligation on States to condemn violence against women and to refrain from invoking any custom or tradition to avoid the obligation to protect women from such violence.

### **The Maputo Protocol to the African charter for human and people's rights on rights of women**

In addition to reiterating CEDAW and DEVAW principles, article 4 of the protocol confers on women the right to life, integrity and security of the person and calls on states to punish perpetrators of violence against women.

Article 14 confers on women the right to health, sexual and reproductive rights. I.e. the right to control their fertility among other rights.

### **The Uganda Constitution**

Article 33 (1) Proclaims the right of women to be accorded full and equal dignity of the person with men.

Article 32 (2) laws, cultures, customs and traditions which are against the dignity of women are prohibited.

In summary international law and our Constitution prohibit all forms of gender based violence and as state actors we have to duty to punish it when it is proved in cases before us.

Yet in spite of these laws, there are still challenges in the administration of the law in gender based violence cases. These cases manifest mainly as criminal cases under the Penal Code Act and other laws like Domestic Violence Act, Prohibition of Female Genital Mutilation Act, Prohibition of Trafficking in Persons Act, and the Employment Act.

### **Challenges faced by women in the criminal justice process**

Although the Criminal justice process provides legal relief to victims of sexual violence, women and girls face a number of challenges in accessing justice both at pre-trial stage, during trial and post-trial.

In pre –trial stage, compromises are struck between adult relatives of the victim and suspect in pre-trial stages and even during trial. (For instance the victim is made to disappear). Other witnesses like the police investigator are available but the key witness is not available. How does a court convict on the basis of a police statement by the victim without her only? There is need to reflect on this dilemma.

Accessing competent medical personnel in rural areas to recover medical evidence.

During trials, the reluctance of girls and women to testify in public has been addressed by the practice of chamber proceedings or clearing from the

courtroom members of the public. Also in some courts, video links have been installed so the girl testifies away from the courtroom.

In defilement cases, girls are reluctant to testify against the perpetrators if they are related. There is also the intimidation and threats from the family members and fear of where to return after the trial.

And what orders can the court give as tangible reparation to the victim? The Trial on Indictment Act provides for compensation but most of the convicts are peasants with no property to their name.

The question of corroboration in sexual offences was resolved by the case of **Uganda v Matovu** where the High court held that the requirement the trial court must warn itself and the assessors that there must be corroboration was discriminatory against women because in other offences, corroboration is not strictly mandatory. I hasten to add that corroboration so still very good evidence in all cases whether sexual in nature or not.

In post trial, the girls and women require counselling and specialised psychological support but this is not available so they testify and that is the end of the matter.

### **Women as perpetrators**

The defence of provocation evolved from a male perspective and requires that the perpetrator must be provoked in the heat of the moment for the offence to translate into manslaughter. Yet many women will put up with psychological and physical abuse for long periods until one act that would not

provoke an ordinary man provokes her to kill. Is it time for us to adopt the battered woman syndrome?

### **Long waiting period for women on remand**

The first in first out principle in cause listing is unfair to women because they wait for years to be listed. This is because the number of women who commit violent crime is very low and therefore they have to wait until their turn. I am happy the Hon. Principal Judge has permitted registrars to skip this rule for women awaiting trial in prison so as to have at least some women on the cause list.

This is a much needed intervention because many have children with them in prison.

The other challenge is the tendency of the state to routinely charge women without evidence of complicity in the crime with their husbands. So you find this couple incarcerated for years yet they have left children with their unwilling relatives. At the end of the day, the woman is acquitted on no case to answer. I suspect the women are charged because they are not compellable witnesses but does that make them accomplices when there is no evidence?

There is need for state attorneys to be more sensitive when charging women jointly with their husbands.

Therefore there is need for more gender specific interventions in the criminal justice process to address challenges faced by women and girls.

At the same time, let's carefully evaluate evidence in defilement cases because some are framed for different reasons.

## **Gaps in the Legal Definition of Rape.**

The **International Criminal Tribunal for Rwanda (ICTR 96-4-T) Prosecutor v Jean Paul Akayesu** case gives insights into the definition of rape. The court in that case observed that there is no international law definition for rape while national jurisdictions define it in terms of body parts, i.e., and non-consensual sexual intercourse. Our penal code calls it carnal knowledge. The word carnal is defined by the Cambridge Advanced learners Dictionary as 'relating to the physical feelings and wants of the body.'

The court while critiquing the traditional definition of rape held that it's a form of aggression which cannot be captured in a mechanical description of objects and body parts. The court went on to hold that

*'Rape is used for purposes of intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.'*

I find this a useful approach in understanding what's going on in the mind of a perpetrator and the physical and psychological harm suffered by the victim.

With respect to defilement, the same approach may be useful especially in terms of destruction of the girl's educational prospects, and loss of value addition through education among other losses and damage.

Indeed very few of the victims above 14 years who have testified before me are in school. 90% dropped out of school after the defilement. It is the much younger victims who continue with their education.

Understanding the mental element in sexual offences is still a challenge in my view because the penal code only deals with the actus rea. How then will a

judicial officer determine the gravity of the offence if we do not take account of the mental element as applied by the Akayesu case?

### **Domestic Violence Act 2010**

This Act addresses violence within the family setting and provides remedies for victims.

This law is rarely invoked and yet potentially, it has the capacity to nip marital disputes in the bud before they escalate into violence crime.

The challenge with enforcement of this Act is the unwillingness of victims to testify against the offending spouses or to invoke protective provisions of the Act. Remedies such as interim protection order, protection order and orders to vacate provide much needed relief.

### **Dowry related violence**

**In Const. Appeal No. Mfumi V AG** the Supreme Court held that refund of dowry requirement under customary marriages demeans a woman's dignity and is unconstitutional, another milestone in the fight for gender equity. However, this is another area where women suffer emotional and psychological violence because men insist they are still married due to non-refund of dowry. The question is: how is a customary marriage dissolved post Mfumi case?

### **Sexual violence in war time**

In times of war, women and girls are more vulnerable than before and become easy targets for sexual and gender based violence. Conditions in the refugee camps are difficult which leaves women and girls open to sexual abuse and

exploitation. There is need for JLOS actors in these areas to work together to protect rights of women and girls.

### **Conclusion**

I will conclude by drawing your attention to resource books on the law of gender equality all of which are by our own scholars and jurists from the region.

These include Commonwealth Judicial bench book on violence against women, Gender bench book, and Politics of putting asunder edited by Dr. Maria Nassali and Divorce case book by Hon. Lady Justice Bossa

I THANK YOU FOR YOUR ATTENTION.