

International
Campaign
for Women's
Right to Safe
Abortion

International Campaign for Women's Right to Safe Abortion

CAMPAIGN REPORT

The law, trials and imprisonment for abortion in Kenya



Photo: [KELIN](#) A photo taken from the 2016 #Justice2Health forum

This report summarises the law and policy on abortion in Kenya and cases of trials and imprisonment for abortion between 2004 and 2017.

by Alice Finden, Researcher, International Campaign for Women's Right to Safe Abortion, 28 April 2017

The law, trials and imprisonment for abortion in Kenya

by Alice E Finden
28 April 2017

This report summarises the law and policy on abortion in Kenya and cases of trials and imprisonment for abortion between 2004 and 2017.

“Laws that criminalise abortion but without concomitantly articulating clearly the grounds for lawful abortion... unduly deter healthcare providers from providing health services to women even where abortion is lawful. Equally, such laws create misperceptions about abortion as conduct that is criminal at all times.”
(Charles Ngwena)¹

The above quote sums up perfectly the unresolved state of abortion law in Kenya, and the resulting limited access to safe abortion in the country. Abortion is spoken to by the 1970 Penal Code which criminalises it, and the 2010 Constitution which makes exceptions to this criminalisation. The lack of clarity and transparency with regard to the circumstances in which abortion is legal greatly contributes to Kenya's high maternal mortality ratio from complications of unsafe abortion.

Articles 158-160 of the Kenyan Penal Code criminalises abortion.² Article 158, “Attempts to procure abortion”, states that: “Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.”

Article 159 in similar language applies these conditions to “any woman with child” and makes her liable to seven years’ imprisonment, while anyone who unlawfully supplies “drugs or instruments to procure abortion” is liable to three years’ imprisonment.

In 2010, the legal position was changed through passing of the new Constitution through a referendum, which permitted abortion in certain circumstances. Article 26(4), of the new Constitution reads: “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.”³

According to Dr. John Nyamu, a highly respected obstetrician-gynaecologist and executive director of Reproductive Health Services in Nairobi: “Before the constitutional law reform, most health care workers were afraid of talking about [abortion] openly. Abortion was never performed in government hospitals unless the

¹ Ngwena C. Reforming African abortion laws to achieve transparency: arguments from equality. African Journal of International and Comparative Law 2013;21(3):398-426. DOI: <http://dx.doi.org/10.3366/ajicl.2013.0070>.

² Kenya Law. Kenyan Penal Code, Articles 158-60. 2012 (revised edition). <http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2063>. [15 March 2017]

³ National Council for Law Reporting with the Authority of the Attorney General. The Constitution of Kenya, Laws of Kenya, [Article 26\(4\). 2010. p.23](http://www.icla.up.ac.za/images/constitutions/kenya_constitution.pdf). http://www.icla.up.ac.za/images/constitutions/kenya_constitution.pdf. [15 March 2017]

life of the woman was in real danger”.⁴ It was hoped that the Constitutional reform would provide an opening to amend the criminal law further, a step anticipated in its wording.

In 2010 Kenya also ratified the Maputo Protocol, which in Article 14(2C) calls on States Parties to "take all appropriate measures to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or life of the mother or the foetus".⁵ This too should have opened the door to law reform on these grounds. Indeed, ratification would have led to the country being required to implement this reform. However, Kenya put reservations on Article 14(2C) and therefore does not need to comply with it. It is worth noting, however, that the National Guidelines on Management of Sexual Violence in Kenya do permit abortion in cases of rape or defilement.⁶

Standards and Guidelines

Unfortunately, the lack of guidance on how the 2010 change in the Constitution should be implemented meant that both women and health care providers remained uncertain of the circumstances in which abortion was legal. At that time, the only guidance available was the government's post-abortion care trainer's manual, which was confusing and contradictory. For example, it stated on the same page: "The law permits abortion only for the preservation of the woman's life" and "In Kenya, induced abortion is illegal".⁷ Hence, one year after the Constitution was amended, Ipas Kenya expressed concern that none of the country's health regulatory bodies had reviewed their guidelines on abortion to align them with Article 26(4) of the Constitution.⁸ However, in 2012 there was a revision of codes of ethics and scope of practice for medical doctors, nurses and clinical officers to allow for certain circumstances for safe abortion.⁹

According to data collected for a 2010 report by the Center for Reproductive Rights Kenya (the Center), there were around three court cases every week in which women were charged with having an illegal abortion. This number was believed to be higher for Nairobi.¹⁰ Further, 10 out of 20 cases examined by their researcher had

⁴ Fjerstad M. "It was worth the sacrifice": Kenya's Dr. John Nyamu on why he spent a year in prison. Rewire, 3 December 2012. <https://rewire.news/article/2012/12/03/it-was-worth-sacrifice-kenyas-dr-john-nyamu-on-why-he-spent-year-in-prison/>. Re-printed in: <http://www.safeabortionwomensright.org/wp-content/uploads/2016/04/Abortion-in-the-criminal-law-exposing-the-role-of-health-professionals2c-the-police2c-the-courts-and-imprisonment-internationally-for-28-September-2013.pdf>. [15 March 2017]

⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Article 14 (2C) Health and Reproductive Rights. 2003. <http://www.achpr.org/instruments/women-protocol/#14>. [15 March 2017]

⁶ National Guidelines on Management of Sexual Violence in Kenya. Ministry of Public Health & Sanitation, Ministry of Medical Services. 2009 (2nd edition) p. 56 http://www.endvawnow.org/uploads/browser/files/national_guidelines.pdf [28 March 2017]

⁷ Center for Reproductive Rights. In harm's way: the impact of Kenya's restrictive abortion law. New York: 2010. p.37. http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay_2010.pdf.

⁸ Ngwena. Op cit, ref 1, p.12.

⁹ Fjerstad M. 2012. Op cit, ref 4.

¹⁰ Center for Reproductive Rights, 2010. Op cit, ref 7, p.68.

involved schoolgirls, some of whom were minors.¹¹ The majority of women arrested for an abortion-related crime were given probation rather than imprisonment; however, those who could not afford to pay bail remained in remand (for an average of one year).

In 2011, the Ministry of Health set up a working group that included NGOs who supported safe abortion in Kenya to draft guidelines on abortion provision in line with the constitution. The guidelines – *Standards and Guidelines on Reducing Maternal Mortality and Morbidity from Unsafe Abortion* – were published in September 2012¹² and included up-to-date guidance from the 2012 WHO Safe Abortion Guidance.¹³ They were widely considered to be a forward-looking, comprehensive document. They stated that “termination of pregnancy is lawful, provided it is performed by a trained and skilled health professional within the confines of the law”.¹⁴

The Ministry of Health also issued a curriculum for the training of mid-level providers, including nurses and midwives. According to Ruth Owino, a nurse at Bungoma referral hospital in Bungoma, this had a direct effect on the number of women and girls who started coming to clinics: “You just walked to outpatient and asked for the service, and then the service was provided.”¹⁵ This change lasted just over a year.

Abruptly, in December 2013, USAID, who fund much of Kenya's family planning provision, warned that anyone receiving US aid should not attend an upcoming government meeting, because the *Standards and Guidelines* were on the agenda. The next day, the Ministry of Health withdrew the *Standards and Guidelines*, arguing that there was a need for wider stakeholder consultation on some of the contents of the document. They also halted the safe abortion training programme.¹⁶ These actions were a consequence of restrictions imposed under United States foreign aid policy (the Helms Amendment), which led to all work towards promoting safe abortion in the country by USAID-funded institutions to stop, which is operative to this day. This happened under President Obama, who did nothing about it.

Two months later, in February 2014, the Ministry wrote a letter instructing all healthcare providers to halt safe abortion trainings and to stop stocking Medabon, the packet of combined medical abortion pills that doctors were giving women in the first trimester. “Abortion on demand is illegal,” the letter said, so “there is no need of training health workers on safe abortion or importation of drugs for medical abortion.”^{17,18}

¹¹ Center for Reproductive Rights, 2010. Op cit, ref 7, p.69.

¹² *Standards and Guidelines for Reducing Morbidity & Mortality from Unsafe Abortion in Kenya*. Nairobi: Kenya Ministry of Medical Services; 2012. [Weblink not found]

¹³ Safe Abortion: Technical and Policy Guidance for Health Systems. Geneva: World Health Organization; 2012. http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf. [15 March 2017]

¹⁴ *Standards and Guidelines*. Op cit, ref 12, p.11.

¹⁵ Bassett L, Naughton J. Africa: Instruments of Oppression. Washington, DC: Pulitzer Center on Crisis Reporting; 3 December 2015. <http://pulitzercenter.org/reporting/africa-instruments-oppression>. [15 March 2017]

¹⁶ Ibid, Bassett, Naughton. 2015.

¹⁷ Ibid, Bassett, Naughton. 2015.

¹⁸ Kisakye F. Africa: Dangerously expensive – youths opt for costly unsafe abortions. AllAfrica, 29 April 2016. <http://allafrica.com/stories/201604290492.html>. [15 March 2017]

With such abrupt changes in such a short window of time, it was inevitable that confusion reigned once more among health care providers and those seeking an abortion as to what was and was not legally permissible.^{19,20} There have been reports since 2014 that some police officers and authority figures used the lack of guidance as a means for bribery. Many doctors who are still providing abortions have had to pay out bribes to police officers who would otherwise charge them with illegal abortion (See the legal case of EM, p.10). However, many providers in Kenya have stopped providing abortions altogether,²¹ while the number of people who provide clandestine abortions for a fee has probably risen to take their place.

Given the many repercussions of the withdrawal of the *Standards and Guidelines*, a petition was filed in June 2015 in the Kenyan High Court against the Attorney General, the Ministry of Health and the Director of Medical Services of Kenya on behalf of the following – the Federation of Women Lawyers (FIDA) Kenya, two community human rights mobilisers, an adolescent rape survivor who suffers from kidney failure and other complications of an unsafe abortion, and on behalf of all Kenyan women of reproductive age who were denied access to safe abortions. The petition is supported by The Center.²² The petition calls on the government to restore safe abortion training and reintroduce guidelines clarifying when a legal abortion can be provided.²³ Whereas the hearing of the petition had been set for 15 December 2016 by a three judge bench; however, due to a changing over of judges, the case was postponed. A 5 judge bench has now been arranged to hear this case in May 2017 for directions on how to proceed. This will be a procedural appearance in court where they will then be given a hearing date. (Personal Correspondence with the Center, 2 February 2017 and 24 March 2017)

A month later, in July 2015, over 71 organisations in Kenya and Ethiopia sent an open letter to US President Barak Obama, disputing the imposition of the Helms Amendment. Evelyne Opondo, regional director for Africa at the Center, said: "In Kenya these deaths and injuries can and must be prevented. Yet for decades, the United States' implementation of the Helms Amendment has kept critical funding from local organizations that could help Kenyan women get the essential reproductive health services they need."²⁴

The US Helms Amendment continues to prohibit the use of US foreign assistance for safe abortion, and now in 2017, the Mexico City Policy (commonly known as the Global Gag Rule) has also been reimposed yet again. On 3 April the US State

¹⁹ Cleeve A, Oguttu M, Ganatra B, et al. Time to act – Comprehensive abortion care in East Africa. *Lancet* 2016 Sept;4(9):e601-e602. DOI: [http://dx.doi.org/10.1016/S2214-109X\(16\)30136-X](http://dx.doi.org/10.1016/S2214-109X(16)30136-X).

²⁰ Griffith ST. Why are women in Kenya still dying from unsafe abortions? *Open Democracy*, 20 January 2014. <https://www.opendemocracy.net/5050/saoyo-tabitha-griffith/why-are-women-in-kenya-still-dying-from-unsafe-abortions>. [15 March 2017]

²¹ Bassett, Naughton. 2015. Op cit, ref 15.

²² Kenyan Women Denied Safe, Legal Abortion Services [press release]. Center for Reproductive Rights, 29 June 2015. <https://www.reproductiverights.org/press-room/kenyan-women-denied-safe-legal-abortion-services>. [15 March 2017]

²³ Kenya in court after botched abortion injures raped 15-year-old. *The News Grid*, 1 July 2015. <http://thenewsgrid.blogspot.co.uk/2015/07/kenya-in-court-after-botched-abortion.html>. [15 March 2017]

²⁴ Kisakye, 2016. Op cit, ref 18.

Department issued a letter to the US Senate Foreign Relations Committee announcing it will no longer fund the UN Population Fund (UNFPA) which provides maternal and child health services in more than 150 countries worldwide.²⁵ The UNFPA country programmes fund is one of the largest in Kenya and so its withdrawal will most likely be disastrous. Teresa Omondi-Adeitan of FIDA Kenya told us "UNFPA is currently one of our largest donors. Though our current activities under the fund are not on maternal health, we are funded to stop FGM and end early child marriage in target counties in Kenya. I believe the US ban will gravely affect our next funding if not the current funds"

Consequences of unsafe abortion

Social, health and legal repercussions of unsafe or clandestine abortion for women in Kenya are often disastrous. Kenya had a high maternal mortality ratio in 2012, of which a large proportion (as many as one third of deaths) was due to complications of unsafe abortion. In the same year that the *Standards and Guidelines* were published, there were nearly 465,000 induced abortions in Kenya, among whom nearly 120,000 women received care for complications of unsafe abortion in healthcare facilities – 45% of those under the age of 19 experienced severe complications. About 49% of all pregnancies were unintended and 41% of unintended pregnancies ended in an abortion.^{26,27}

A combination of social stigma around abortion and lack of awareness of legality due to poor guidance means that abortions are pushed further underground, despite being permitted by the law. In order to combat this, the 2015 petition specifically represented a 15-year-old girl known as "JMM" who became pregnant after being defiled and sought an unsafe abortion.²⁸

In December 2014, JMM's guardian, PKM, received a call from a relative informing her that JMM was vomiting and bleeding heavily at a local clinic where she was seeking treatment. JMM had admitted to clinic staff she obtained an unsafe abortion and she was sent to various hospitals for post-abortion care. Devastatingly, JMM now has chronic kidney disease and will have to receive dialysis regularly until she can get a kidney transplant. Following this case, local organisation the Trust for Indigenous Culture and Health (TICAH) started a petition calling for the reinstatement of the *Standards and Guidelines*.²⁹

Sadly, JMM's story is not a rare one. In the process of writing this paper we came across reports of two separate deaths from unsafe abortion in Kenya within three

²⁵ UNFPA . Statement by UNFPA on U.S. Decision to Withhold Funding. UNFPA 4 April 2017. <http://www.unfpa.org/press/statement-unfpa-us-decision-withhold-funding> [11 April 2017]

²⁶ Mohamed SF, Izugbara C, Moore AM, et al. The estimated incidence of induced abortion in Kenya: a cross-sectional study. *BMC Pregnancy & Childbirth* 2015;15(185). DOI: [10.1186/s12884-015-0621-1](https://doi.org/10.1186/s12884-015-0621-1).

²⁷ For a summary of the findings, see *Women's Lives Matter: Key Findings of a National Study: Incidence and Complications of Unsafe Abortion in Kenya*. African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute; 2013. <https://www.guttmacher.org/sites/default/files/pdfs/pubs/FB-abortion-in-Kenya-2013.pdf>.

²⁸ Kenyan Women Denied Safe, Legal Abortion Services [press release]. Center for Reproductive Rights, 29 June 2015. Op cit, ref 22.

²⁹ Petition organised by TICAH Kenya. Tell Kenya's Director of Medical Services to Take a Stand Against Unsafe Abortion. Avaaz Community Petitions. 21 June 2015. https://secure.avaaz.org/en/petition/President_Uhuru_Kenyatta_KeepWanjikuSafe [21 March 2017]

days of each other. On 13 March 2017, “Elizabeth”, a 16 year old girl was found by her mother lying in the corridor of her home in Kisumu County, half dead, vomiting and bleeding profusely from complications of an unsafe abortion. She was rushed to the hospital and eventually received emergency treatment. However, it was too late – her uterus had to be removed because infection had damaged it completely. She later died in the hospital while still undergoing treatment.³⁰

On 16 March the proprietor of a clinic in Kayole, Nairobi County, was arrested after a woman died in his clinic, the Faith Medical Clinic. She is alleged to have gone there the evening of 14 March, to terminate a pregnancy. She was found lying dead on one of the clinic’s benches the next morning. She was 30 years old and the mother of four children.³¹

According to a report by Kenya National Commission on Human Rights (KNCHR), unsafe abortion is said to be “rampant among adolescents and youth, especially in universities and other technical colleges.”³² To avoid exposure, stigma, and arrest if they attend a public or private clinic, many women and girls resort to unsafe abortion. A female student leader from Nairobi University said “... fetuses are collected from dustbins in universities... most girls do not seek safe abortion services, including post-abortion care, as they fear being known to have aborted.”³³ The lack of ability to confide in others, or seek bona fide medical help is especially worrying among youth because of the high rates of abortion complications they experience when they cannot pay for safe care.

Professor Charles Ngwena, a renowned scholar on sexual and reproductive health rights, corroborates the above, stating “even where the law permits abortion, adolescents are more likely than their adult counterparts to delay or avoid accessing safe abortion services due to ignorance about pregnancy or availability of safe, legal services, and above all, the desire to conceal the pregnancy from the family and continue with school, and lack of means or capacity to afford, on their own, the cost of safe abortion services. Lack of youth-friendly sexual and reproductive health care services, and uncertainty among providers whether minors can legally access abortion services without the involvement of their parents, serve as additional barriers to access.”³⁴

Cases of imprisonment for abortion

No up-to-date record of the details or number of people charged, arrested and/or imprisoned for abortion in Kenya seems to exist. However, we have received details through various contacts and channels of a number of individual legal cases, both closed and ongoing, as described below.

³⁰ Oliech MO. Grief as a 16-year-old girl dies after procuring an unsafe abortion in Kisumu. Africa Alive. 13 March 2017 <http://africaalive.co.ke/grief-16-year-old-girl-dies-procuring-unsafe-abortion-kisumu/> [15 March 2017]

³¹ Cherono S. Woman dies while procuring abortion in Nairobi clinic. Daily Nation. 16 March 2017. <http://www.nation.co.ke/counties/nairobi/Woman-dies-procuring-abortion-Nairobi-clinic/1954174-3851990-dehip7/> [17 March 2017]

³² Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality? Nairobi: Kenya National Commission on Human Rights; 2012. http://www.knchr.org/Portals/0/Reports/Reproductive_health_report.pdf. [15 March 2017] p.110.

³³ Ibid. Kenya National Commission on Human Rights. 2012. p.110.

³⁴ Ngwena C G. 2013. Op cit, ref 1 p.9.

1. Dr. John Nyamu and two others, criminal case 81 of 2004 (case was dismissed for lack of evidence)

In 2004 there was a crackdown on clinics providing illegal abortions in Kenya. Dr. Nyamu's clinic was raided and the remains of 15 stillborn babies, initially described as aborted fetuses, which had been planted were then "found" along a major road, with their paperwork that had been stolen from the clinic. Dr. Nyamu and two of his staff were charged with two counts of murder, rather than any abortion-specific offences, and they spent a year in remand awaiting trial. DNA analysis found that there was no link between the stillborn babies and the clinic. When the case came to court, it was ruled as improper, the charges were dropped, and all three were released. Today, and since the withdrawal of the 2012 *Standards and Guidelines*, such crackdowns are still happening to others. Dr. Nyamu continues to provide abortions which he considers to be within the grounds permitted in the law, but he is still regularly harassed by the police.³⁵

Dr. Nyamu's prosecution galvanised the creation of the Reproductive Health and Rights Alliance (RHRA) Kenya. Formed in July 2004, the RHRA was formed by a group of comprised of medical, legal, women's and human rights advocates with the aim of contributing to the prevention and reduction of the high number of maternal deaths and disabilities caused by unsafe abortion. It advocates for laws and policies that permit access to safe abortion services in Kenya.³⁶ It is housed at Planned Parenthood Global. The member organisations of RHRA in 2007 were: Africa Woman, Centre for the Study of Adolescents, Coalition on Violence Against Women, Family Health Options Kenya, FIDA-Kenya, IPPF Africa Regional Office, Kenya Human Rights Commission, Kenya Medical Association, Kenya Obstetrics and Gynaecological Society, National Nurses Association of Kenya, Planned Parenthood Global, individual activists, and representatives from law firms.³⁷

Dr. Nyamu's case opened a window to the public "to realize the terrible toll of unsafe abortion in Kenya".³⁸ He since sued the government for malicious prosecution and subsequent confinement for one year in remand prison. He was given a hearing date for this case in August 2015; however, the case was not heard. Since then, Dr. Nyamu has been provided with a "mention date" of 25 May 2017 for the purpose of the court setting another hearing date, which he thinks might be in September 2017.³⁹

2. According to the Kenya National Commission on Human Rights, a 40-year-old woman was held in Murang'a police station in 2011 for allegedly having had an abortion. She was said to have terminated the pregnancy by swallowing

³⁵ Bassett, Naughton. 2015. Op cit ref 15.

³⁶ <http://www.soawr.org/content/reproductive-health-and-rights-alliance-rhra-0>. [17 March 2017]

³⁷ Crichton J. Mock Trial on Abortion. 26 June 2007.

<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwj60K6ZzbrRAhWoLcAKHfPoBMoQFggmMAI&url=http%3A%2F%2Fwww.realising-rights.org%2Fdocs%2FAbortion%2520Tribunal%2520Nairobi%2520June07.doc&usq=AFQjCNHMVKke92VhB7COpn131uRqpYbBog>. [15 March 2017]

³⁸ Fjerstad M. 2012. Op cit, ref 4.

³⁹ Personal communication with Dr. Nyamu, 17 March 2017.

some chemicals. She was locked in a cell in the police station and died there after developing complications.⁴⁰

3. DK & another. Case no. 4469, 2013 (case dismissed)

DK, a health professional, and another person were charged in 2013 with "attempting to procure an abortion", contrary to Section 158 of the Penal Code. According to witness statements, the police organised someone (who was not pregnant) to pose as a patient wanting an abortion. Whilst the examination was taking place, the police stormed into the clinic and arrested the accused persons.

Lawyers from the Legal Support Network attended court in May and objected to the laxity of the Prosecution, who attended with neither the police file nor the witness. The lawyers further applied for the case to be dismissed. The magistrate dismissed the case for want of prosecution under Section 202 of the Criminal Procedure Code (Personal communication, Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), 12 October 2016).⁴¹

4. JN. Case no. 546, 2013-present

JN is a doctor whose clinic was stormed by police on 8 December 2013, claiming that an illegal abortion was taking place. JN was treating a pregnant patient at the time; however, JN did not administer any abortion drugs or otherwise attempt to carry out an abortion for the woman. The patient, her mother, and JN were arrested. The patient was discharged the following day (and thereafter had an abortion on 12 December). JN was charged in Kilifi Magistrates Criminal Court on 11 December 2013 with "intent to procure an unlawful miscarriage through the use of Misoprostol contrary to Section 158 of the Penal Code" (Personal communication, KELIN, 12 October 2016).

JN is being represented by a Legal Support Network lawyer and has attended hearings throughout 2016. JN's case was scheduled to continue being heard in court on 6 February 2017 but was postponed until 28 February due to the lack of a witness in the case. On 28 February the case did not proceed yet again. The prosecution was given the last adjournment by court as they did not have their witnesses. The case will be heard on 3 April 2017. (Personal communication, KELIN, 8 February 2017 and 22 March 2017).

5. Edna Achilla, Case no. 3651 of 2013⁴²

In 2013, 21-year-old Edna Achilla (reported in the media as 17-years-old) was arrested by the police and charged at Makadara law courts under the penal code for an attempt to have an abortion. The court then set her bail at Kshs 20,000 (~\$193) which was raised by FIDA Kenya. She was then released but bound to attend court. Edna is from Mathare slum where she was earning the equivalent of \$50 a month as house help.

⁴⁰ Kenya National Commission on Human Rights. 2012. Op cit, ref 32. p.110.

⁴¹ The Legal Support Network is a group of pro-bono lawyers who are housed at KELIN with funding from the Reproductive Health and Rights Alliance.

⁴² Mudiwa L. Slum girls of Kenya take a stand. Irish Medical Times, 10 January 2014. <http://www.imt.ie/features-opinion/slum-girls-of-kenya-take-a-stand-10-01-2014/>. [15 March 2017]

According to information from our sources, Edna was frog marched to the nearby Chief camp with a crown that assaulted her and called her names. She was made to carry a basin full of blood with the fetus. The media covered this story and it made headlines in all news outlets. The magistrate had already formed an opinion upon her first appearance in court because of the news coverage, asking “aren’t you the girl I watched on news the other day?”.

Edna’s case has since stalled since the main prosecution witness and the person accused of providing an abortion both passed away. She was discharged based on the lack of evidence resulting from these deaths.

(Personal communication with KELIN, 22 March 2017 and with FIDA Kenya, 10 April 2017).

6. EM. Case no. 2020, 2015 (case dismissed)

EM is a medical professional who advised a patient who had been inquiring as to the abortion services available at her clinic, to arrange an appointment. During the examination of the patient, police stormed the clinic, arrested EM and confiscated her licences and manual vacuum aspiration kits.

EM was charged on 1 December 2015 with the offence of attempting to carry out abortion, contrary to Section 158 of the Penal Code which provides: “Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.”⁴³

EM was released on bail of Kshs 50,000. It was later confirmed that the “patient” had been working in collaboration with the police and a second accomplice, who was kept on setting up the accused “to teach her a lesson”. The case did not proceed on various dates throughout 2016, as the Complainant was unable to attend court. The case was finally dismissed by the court under section 87A of the Criminal Procedure Code. EM has now applied for reimbursement of her bond of Kshs 50,000 and all the professional equipment that was taken from her clinic during the raid (Personal communication, KELIN, 12 October 2016 and 8 February 2017).

7. Jackson Namunya Tali. Case no. 75, 2009-2017⁴⁴

Jackson Namunya Tali is a nurse who operated a primary-level medical clinic up to 2009. In 2009, he received a patient, Christine Atieno, who he testified came to his clinic “while bleeding in pregnancy” and sought medical help following a botched abortion she had had elsewhere. He said she had been bleeding for eight days following the abortion before she came to his clinic. He admitted to “administering some form of treatment.” The court heard that he did not have the skills to treat her

⁴³ This section of the Penal Code originates from the British Offences against the Person Act 1861 and was imposed on Kenya and other British colonies as part of the colonial past.

⁴⁴ Kangaude G, Rwehumbiza A. Court convicts nurse over abortion related death: States must be held accountable. Legal Grounds III, Case 5. 2015. http://www.law.utoronto.ca/utf1_file/count/documents/reprohealth/lg-05-tali-abortion-kenya.pdf. [15 March 2017]

and that he was taking her for "more advanced treatment" from his clinic in Gachie, 15km west of Nairobi, to a hospital, but she had died before they reached the hospital. Although the government Pathologist testified that he was unable to find the cause of the death, the Court found that there was direct and circumstantial evidence that the immediate cause of death was bleeding that resulted in anaemia due to interference with the pregnancy. Although there was no direct evidence that Tali was the person who had "interfered with the pregnancy", the Court still held that he had caused her to develop complications, and that she had died as a result. He was charged with aggravated murder under Sections 203 and 204 of the Penal Code of Kenya, and sentenced to death. Tali's defense was that he did not commit aggravated murder but was trying to save her life and that the botched abortion had taken place elsewhere. He did not, however, produce a patient record to substantiate his claim that she was already bleeding and anaemic upon arrival at his clinic.^{45,46}

In a 2015 analysis of the case, Godfrey Kangaude, Executive Director of the Malawi Law Society, and Annagrace Rwehumbiza, researcher/legal advisor at TAMASHA in Tanzania, state that this case provides "a micro-picture of the silent pandemic of unsafe abortion prevalent in most countries in Africa that have laws and policies that restrict access to safe abortion". They highlight the worrying fact that the conviction was for "murder with malice aforethought", despite his intention to assist the woman. They further state that because of the lack of transparency of the legality of abortion in Kenya, the woman who had died "had no way of knowing whether she would have qualified for a legal abortion to preserve her health".⁴⁷

Their analysis concludes: "At the micro-level, health providers bear the responsibility for abortion complications. At the macro-level, however... the unsafe abortion epidemic is linked not to malicious intentions of abortion providers, but to lack of access to safe abortion due to restrictive law and policies that are also not implemented in a transparent manner... The significance in this case therefore lies in its overshadowing of the macro-picture. The Accused and others like him may be held responsible for the deaths of girls and women from unsafe abortion. However, it is the government that should ultimately be held responsible for these deaths, due to preventable abortion complications."

In 2015 a group of Nairobi-based civil society organisations got together to support Tali to file an appeal, coordinated by the Africa Network for Medical Abortion (ANMA) Kenya. The Center now represents his case. Jackson Tali's lawyers filed for bail pending the appeal but this was denied by the High Court. At the beginning of 2017, the court promised Tali a date on priority since he has been in prison for such a long time now. (Personal communication, Dr. Nyamu, 21 March 2017, and Evelyne Opondo, 24 March 2017). However, the appeal was postponed more than once until the case was finally heard.

On 19 October 2017, a three-Judge bench of the Court of Appeal of Kenya set him free and declared: "On the whole we are far from satisfied that the offence of murder was proved beyond any reasonable doubt. All that was established was suspicion

⁴⁵ International Women's Health Coalition. Unpublished report. Undated. Provided by Dr. Nyamu, 21 November 2016.

⁴⁶ Kangaude G, Rwehumbiza A. 2015. Op cit, ref 44. p.2.

⁴⁷ Kangaude G, Rwehumbiza A. 2015. Op cit, ref 44.

that the appellant may have had a hand in the death of the deceased, but mere suspicion, however strong, is never probative of an offence in our criminal justice system.”⁴⁸

Tali expressed regret that he had been made to spend eight years in jail for doing his duty according to his profession. He said the experience scared him, adding that he would not be in a hurry to go back to medical practice.⁴⁹

He also called on the Government to enact laws to govern safe abortions so that no one else has to go through what he experienced at Kamiti Maximum Security Prison. “The fact that I was charged and sentenced to death because of my work caused fear among nurses. People should realise we deal with human life and we should not be punished for what happens while we are performing our duties,” he said.⁵⁰

Evelyne Opondo, Senior Regional Director for Africa at the Center for Reproductive Rights said: “Finally, after eight years of fighting, Jackson Tali has the freedom he deserves.... Jackson Tali’s case underscores how abortion stigma leads to the persecution and wrongful imprisonment of health care providers.... The government must end the criminalization of health care providers and implement policies to ensure health care workers can offer women the reproductive health services they need.”⁵¹

Conclusions

The details of the few court cases we were able to obtain, which are only a smattering if indeed three cases per week continue to occur, indicate a massive failure of the justice system to deal with illegal abortion in a fair and just manner. Research into the extent of knowledge of abortion as a legal and public health issue among prosecutors, defense lawyers and judges, and their perspectives on the issues based on the knowledge they do have, would be an enormous help to civil society actors who support the right to safe abortion in Kenya.

Unless and until there is a major change in policy by the government of Kenya and an enormous improvement in the way the courts handle cases of illegal abortion and of unsafe abortion deaths that are due to complications, the situation regarding the deadly consequences of unsafe abortion and criminalisation of those who provide or seek abortion will not improve, however.

⁴⁸ Center for Reproductive Rights Nurse Acquitted in a Pregnancy Complications Case (Press Release). 19 October 2017. <https://www.reproductiverights.org/press-room/nurse-acquitted-in-a-pregnancy-complications-case>

⁴⁹ International Campaign on Women’s Right to Safe Abortion. Nurse Jackson Talia acquitted of murdering a woman who died from an unsafe abortion. 2017. www.safeabortionwomensright.org/kenya-nurse-jackson-talia-acquitted-of-murdering-a-woman-who-died-from-an-unsafe-abortion/

⁵⁰ Ogemba P. Nurse sentenced to death for procuring abortion set free. 20 October 2017. <https://www.standardmedia.co.ke/health/article/2001257859/nurse-who-spent-8-years-in-jail-over-abortion-released>

⁵¹ Center for Reproductive Rights. Nurse Acquitted in a Pregnancy Complications Case (Press Release). 19 October 2017. <https://www.reproductiverights.org/press-room/nurse-acquitted-in-a-pregnancy-complications-case>

The possibility of the *Standards and Guidelines* being re-published soon, especially with the USA's reimposition of the Global Gag Rule and the ban on UNFPA funding, is slight, unless funding for Kenya's family planning programme can be found from elsewhere.

The case of Jackson Namunya Tali, who has finally been released after eight years in prison waiting for his appeal to be heard, is a particularly egregious example of the failure of both the State and the justice system to serve justice and protect the right to a fair trial. Cases like Tali's are not rogue cases of individual violence, but are cases of horrific deaths allowed for by the structural negligence of the state. No one else, to our knowledge, has ever been sentenced to death in relation to an unsafe abortion death, even though there are cases in El Salvador and elsewhere of women being given long prison terms for "homicide".⁵² Such trials reflect exactly what Kangaude and Rwehumbiza describe – that they are due to the “lack of access to safe abortion due to restrictive law and policies that are also not implemented in a transparent manner.”⁵³

The outcome of the Court of Appeal case exonerating Jackson Tali has demonstrated the strength of Kenyan legal, human rights and women's rights advocates who did not give up the fight, and whose efforts will have an influence in the many other countries in Africa where similar struggles are taking place.

Acknowledgements

Many thanks to Saoyo Tabitha Griffith, Kevin Mwangi and the staff at KELIN; Evelyne Opondo and Esther Waweru (formerly) of the Center for Reproductive Rights Kenya; Teresa Omondi-Adeitan of FIDA Kenya; and Jedidah Maina of TICAH Kenya for contributing information for and reviewing this paper, and Emma Bowa of ANMA Kenya for contributing information. And thanks to Dr. John Nyamu of the Reproductive Health Network and Edwine Okuta of Youth Alliance for Leadership and Development in Africa (YALDA) for help and guidance in the research process. Edited by Marge Berer.

We need your help

We want to keep these reports as updated and as comprehensive as possible. If you have any more information regarding the above cases, or new cases that have come to light, please contact: news@safeabortionwomensright.org

⁵² Bougher K. Sentenced to 40 Years After a Miscarriage, Maria Teresa Rivera May Have Chance to Go Free. Rewire. 10 May 2016. <https://rewire.news/article/2016/05/10/sentenced-40-years-miscarriage-maria-teresa-rivera-may-have-chance-to-go-free/> [21 March 2017]

⁵³ Kangaude G, Rwehumbiza A. 2015. Op cit. re 44.