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July Update: The Burden of Proof for Sexual Violence Cases in Kenya, a Case Study



Survivor with her child together with the Rev. Dominic Misolo and the local priest in Siaya town. Tracking survivors in the community.

Dear friends & partners,

Imagine another year of health crisis and lockdown, the suffering that many families are enduring and how life is becoming unbearable. While the discovery of Covid-19 vaccines is great news globally, communities living in Kenya and other sub-Saharan Africa countries still cannot afford a smile because their governments cannot afford the vaccine for its vulnerable populations.

For this month's report, we intend to show the burden of proof with the impact of the COVID-19 pandemic and rising cases of sexual violence in Kenya and the sub-Saharan region. We intend to bring the reality of suffering and burden faced by women and girls in our context especially during this pandemic, focusing on our practical response to support survivors of sexual violence. Globally, study after study reveals how violence against women and girls is on the sharp rise due to COVID-19 pandemic lockdowns, perpetrators find it easy to abuse vulnerable women and girls and get away with it.

In June 2020 with support from two of our partner organizations (Imago Dei Fund & CBE International) after the first outbreak of the COVID-19 pandemic, we launched a new project called "**IFAGE SGBV Case Management & Referral Support Initiative**" to respond to increasing cases of sexual violence/rape, domestic violence, and teenage pregnancy in Siaya County in western Kenya region, through tracking and linking survivors of sexual violence with police and security personnel for legal justice and psycho-social support/healing. The idea came as a result of the huge number of cases of sexual violence that were being reported to our office on daily basis. The initiative aimed at tracking and linking survivors of sexual violence to timely legal support and healing. We trained and prepared key community leaders including local chiefs, faith leaders, community social workers, and village elders/grassroots security persons to understand the rising tides of sexual violence in order to take charge in tracking and reporting cases of sexual violence to relevant administrators, police and security offices for survivors' justice.

It is through this initiative with survivors that we continue to uncover the Burden of Proof in seeking legal justice and support for women and girls in the courts of law in Kenya.

Through cases we are following, the complainant's right (survivors) is always limited, as their basic responsibility is to report the case and present evidence. On the other hand, the accused (perpetrators) have more privileges from the very moment they enter police custody. The law permits perpetrators to be detained in police custody only for 24 hours thereafter they must be presented in court to answer for the charges. They can apply for court bonds and attend court hearings from home thereby giving them all privileges to interfere with evidence including intimidating the complainant (survivor).

One such particular case we are following is of a 13 years old girl who is allegedly mentally unstable who was raped/defiled and has already given birth out of that incident. The accused/defiler pleaded not guilty hence we had to seek for legal representative and request a court order for a DNA test.

Remember, it can take more than a month to receive the test results and yet the court can not allow an accused to remain in police custody for that long without being charged. The court gave us two weeks with several mentions as we wait for DNA results. If at all the defendant/accused had an advocate, then this would be his first chance to blow the case away since we have no right to keep the defendant in remand for long without being charged. The only way was for the court to grant him bond, or to go ahead the judge the case based on the eye witness. But in our case, we lacked one since the survivor reported the case to her mother three days after the rape/defilement, since the mother was far away attending funeral of a friend. This presented a huge challenge for the case.

In Kenya, the first step to take in case of rape or defilement is to report to the nearest police station within 24 hours of the incident and then seek for medical attention within that time-frame. Any report after 24 hours is treated as an afterthought, and because of ignorance and stigma around rape and sexual violence, most cases are always reported after 24 hours hence evidence are tempered with and the only evidence in case of pregnancy is the DNA test. The

majority of survivors don't report cases in time for different reasons in order to avoid social stigma i.e. she was not dressed properly, she provoked the man sexually, it was her fault for refusing to cooperate, society will judge me harshly and I will be an outcast, my boyfriend will leave me if I disclose this, my church advised me to forgive and forget, etc.

Another challenge is medical/hospital report which is also needed within the 24 hours of the incident. The survivor must be taken to a hospital for an examination in the presence of a female parent/relative and a female police officer, and here exists another challenge during the process especially when a female police officer or a parent/relative is unavailable. In the examination room, only females witnesses are allowed since it is a thorough physical examination of the survivor's private part (virgina). In case the father was the parent available he won't be allowed into the examination room hence this too can lead to a case being compromised.

The physical examination for the post-rape care form entails most activities that invade the survivor's privacy in the presence of her parents and some strangers (the doctor and the police officer) which is usually very uncomfortable and intrusive for the survivor because of the nature of the examination including using a torch to check bruises deep in their private parts. Most survivors refuse this kind of medical examination and therefore compromises the case since the survivor cannot be subjected to an examination without her consent.

Another challenge exists when a defendant/perpetrator pleads for a bond as the complainant gathers evidence, this is the time when the defendant can try to compromise the case by negotiating for payment with the survivor's relatives especially in case of incest, tampering with the evidence and even killing the witnesses. In most cases when the case has been compromised, the complainant/survivor is advised not to recognize the defendant positively at the court of law and what normally follows is the case being dismissed without any say.

Another issue is societal prejudice/shame and fear of isolation from society especially in cases of incest, most survivors fail to come clean due to the shame associated with the incidences especially when the culprit is a close

relative, either a father or brother, fear of negative reputation from the society, i.e according to our culture, you cannot marry a woman raped by her brother or father. The accused always tends to exploit this edge to compromise the case.

Witnesses are key to sexual violence cases but are always not reliable in most cases where the accused/defendant is released on bond. Some may corrupt the witnesses, threaten survivor, or even kill them. A challenge also exists when the witness is the sole breadwinner and cannot be protected alone while his/her family struggle for survival. There are no reliable systems to protect witnesses, and when threatened by the accused, witnesses refuse to testify against the perpetrator/defendant thereby compromises the case.

In Kenya, sexual violence cases drag and take long in court before the survivor gets justice due to the above mentioned challenges. Most survivors lose hope and give up. An example is where a victim was 17 years old when the defilement occurred, the case will drag until the victim is 18 or 20 years old. In most cases, the survivor would have moved on to marriage to cover the shame. The majority of young girls drop out of school after such incidences mostly due to societal prejudice hence their better option is marriage to the accused/rapist if not to another person.

Religious beliefs and cultural traditions are another challenging factor. Most survivors find it easy to report sexual violence to religious leaders for prayers and counseling without first reporting to police station. However, most/some of these faith leaders because of ignorance normally gives misleading advice like preaching forgiveness or just offering prayers for healing. Again culturally, once a girl starts her menstruation, she should never share a room with her parents. Girls as young as 10 years old are left unguarded at a grandmother's house or a kitchen house with no security at night deep in the villages. This increases the vulnerability of girls making them susceptible to rape and sexual violence. Here because of cultural beliefs, the parents themselves fail on their responsibility to secure their girls, and even to teach them sexual health matters since that is perceived culturally as a taboo and embarrassing topic.



Survivor and her child together with the perpetrator at the Government Chemist in Kisumu for a DNA test. IFAGE staff supervised.

Lessons Learnt and Way Forward

Through **IFAGE's SGBV Case Management & Referral Support Initiative** project, we have encountered huge challenges and gaps that still exist in seeking justice for survivors. These are noted as follows;

First, lack of protection for survivors of sexual violence during investigation and court proceeding is a challenge. Rape and defilement cases are like life/death sentences for accused/perpetrators and hence they work so hard to compromise survivors cases. Protection of survivors is therefore mandatory as they go through court and justice process. Kenya lack rescue homes/centers for survivors of sexual violence, and therefore survivors always become even more vulnerable after abuse and during the justice process/court proceeding. IFAGE is proposing support for grassroots organizations to establish local

rescue homes/centers, as a way of empowering women and girls in cases of sexual and gender-based violence (SGBV).

Secondly, the burden of proof for sexual violence cases is always very high and lies with the investigating police officers. There is a great need for cooperation between the police and the public/local community for trust and support for survivors. In Kenya, police officers are always considered an enemy of the people because during general political elections, police are used by the state to frustrate dissenting political voices and at times being used to shoot peaceful demonstrators. IFAGE is proposing community policing to bridge the gap between the police and the public for mutual trust and cooperation during an investigation of sexual violence cases and general security.

Again for sexual violence cases to succeed, the government needs to allocate more resources to the investigating police officers/department to facilitate expenses for vulnerable survivors. Truly speaking from our experience, Kenyan police has a huge challenge in facilitating SGBV cases due to limited or no funds at all hence most cases are left unfollowed. Our organization has on several occasions intervened in such cases especially for the vulnerable survivors to facilitate survivors for court cases which ought to be done by the police.

Thirdly, the community at large has little knowledge on how to respond to SGBV cases, i.e. reporting to the police station within 24 hours and seeking medical attention within the time frame. Many survivors find it easy to report these cases to their pastors and churches for counseling and prayers even before taking legal and medical actions. IFAGE is therefore proposing sensitization and awareness creation of the general public and community leaders to give the right information and to support survivors.

Finally, It is also important to have a gender desk at the main police station to strictly follow up SGBV cases and ensure proper channels of communication and procedures are followed with cases of sexual violence.

We are doing this great work because of support from friends like you. Thank you so much for your love and support.

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Sincerely,

**Rev. Domnic Misolo
& IFAGE Team**



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IFAGE International
Shalom House & Estate
P. O. Box 663 - 40100 Kisumu - Kenya
Bondo 40601
Kenya

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