

Policy Brief



RIGHT HERE
RIGHT NOW

June 2019

Implementing Maputo Protocol Key to Ensuring Well-Being of Girls and Women

*Something Needs To Change
Right Here Right Now*

Background

The African Charter on Human and Peoples' Rights is the African human rights instrument developed to promote and protect human rights and fundamental freedoms in Africa.

The Charter provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa popularly referred to as the "Maputo Protocol" is one such protocol. Maputo Protocol¹ is binding document that provides for rights to women including to health and reproductive rights.

It was adopted in **Maputo, Mozambique on July 11, 2003**. A total of **51 African states** have signed with 36 signing and ratifying the protocol.

Kenya signed and ratified the Protocol in October 2010 thus making it part of the laws of Kenya in line with **Article 2(5) & (6)** of the Constitution of Kenya 2010 which states that the general rules of international law shall form part of the

law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya.

The Protocol² defines "discrimination against women" as any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

However, when ratifying the Protocol, Kenya placed a reservation on **Article 14(2)(c)** of the Protocol³ which provides for 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 the life of the mother or the foetus.

Article 26 of Maputo Protocol requires states to fully implement the Protocol at national level including by allocating budgetary resources and reporting on measures undertaken for the full realisation of the rights to the Commission.

Situation of Abortions in Kenya

The Incidence and Complications of Unsafe abortion in Kenya⁴ study by the Ministry of Health and the African Population and Health Research Centre, 2013 revealed that about **465,000 abortions** occurred in Kenya in 2012 translating into one of the highest national abortion rates globally.

The study showed that about **120,000 women** received care in health facilities for complications from unsafe abortion, and that more than three-quarters (**77.2%**) of those treated had moderate or severe complications.

Almost half of those who accessed the post abortion care services were young people below the age of **25** demonstrating how disproportionately affected young people are.

Coincidentally, How To Abort and How To Conceive were among the most asked question online in 2012 according to Google Zeitgeist.⁵

1 <http://www.achpr.org/instruments/women-protocol/>

2 <http://www.achpr.org/instruments/women-protocol/>

3 <http://www.achpr.org/instruments/women-protocol/ratification/>

4 https://www.guttmacher.org/sites/default/files/report_pdf/abortion-in-kenya.pdf

5 <https://trends.google.com/trends/yis/2012/KE/>

Case study on the violation of the right to safe abortion care⁶

"In December 2013, while most Kenyan school children were out for the holidays, one 14-year-old Kenyan girl found herself in a desperate situation. After being coerced by an older man into her first sexual relationship, she discovered she was pregnant and feared she would be blamed and rejected by her family if she were to reveal her condition.

Living away from home in order to attend a good school, Wanjiku turned to a friend, an older girl, for advice on how to end the pregnancy. The older girl knew someone nearby who could help. This is how Wanjiku found herself doing what hundreds of thousands of women in Kenya are forced to do each year: seeking abortion care from an unqualified provider.

Two days after seeking an abortion from a "doctor" in the backroom of a local pharmacy, she began vomiting and bleeding heavily. She was taken to a hospital where she was found to be experiencing kidney failure. After she was stabilized, she was detained by the hospital because her mother—a poor tea picker—could not pay the hospital bills. There, Wanjiku was forced to sleep on a mattress on the floor, where her health again deteriorated. Wanjiku unfortunately succumbed to these complications.

Wanjiku (JMM) was the petitioner in Petition 266 of 2015 challenging the withdrawal of the 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya. On 12th June 2019 the High Court in Nairobi ruled that JMM's rights were violated and awarded her compensation. JMM died in June 2018. Born on 5th February 2000, she was just 18 years of age.

Policy and Legal Environment in Kenya

The Constitution of Kenya 2010, in Article 26 (4) permits abortions when 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.

In addition, Article 43 (1) (a) guarantees every individual the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. Further in 43 (2) it guarantees the rights of all individuals to emergency medical treatment.

However, these constitutional provisions are severely violated as many girls and women are exposed to severe complications that lead to injuries and even death.

The Ministry of Health developed and launched the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya (S&Gs) in 2012. However, these Guidelines were unprocedurally withdrawn barely a year later and was followed by a memo prohibiting training of health care providers on Comprehensive Abortion Care. The result has been the increase in unsafe abortions. In a landmark ruling⁷ on 12th June 2019, the High Court ruled that the decision to withdraw the 2012 Standards and Guidelines and Training was unjustified, discriminatory, was prejudicial to the and violated the rights of women and adolescent girls of reproductive age.

6 <https://www.reproductiverights.org/feature/keep-wanjiku-safe>

7 <https://www.judiciary.go.ke/press-summary-petition-266-of-2015/>

Accountability Mechanisms Observations on Kenya

In its Concluding Observations⁸ to Kenya in 2017 following their review, the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) Committee noted with concern the high maternal mortality rates due to unsafe abortions blaming the restrictive and unclear legal framework on abortion leads women to seek unsafe and illegal abortions and called on Kenya to amend the Penal Code to decriminalize abortion and legalize it, at least, in cases of rape, incest, severe fetal impairment and risk to the health or life of the pregnant woman in line with the Maputo Protocol. The committee also called on Kenya to ensure access to high-quality post-abortion care, especially where complications arise from unsafe abortions, and reinstate the Standards for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya of 2012.

Due to the timeliness of the issue, the Committee further called on Kenya to provide written information on the steps taken to implement the above recommendation in two years.

The Africa Commission on Human and People's Rights has also expressed concerns on the maternal mortality situation in Kenya emanating from unsafe abortions. In their concluding observations⁹ following the states review in 2016, the commission called on Kenya to fast track the Law on Safe Abortion and resolve some of the obstacles impeding the passing of the law by sensitizing religious leaders on the consequences of unsafe abortion and finalizing the draft Guidelines on Safe Abortion. This has clearly not been acted on and the statistics of unsafe abortions, complications, injuries and deaths continue to soar.

Whereas Kenya needs to submit reports indicating the legislative and other measures undertaken for the full realisation of the rights in their reports to the Commission, it is yet to submit one on Maputo Protocol.

We Therefore Call Upon The State (Kenya) to:

1. Withdraw the reservation on Maputo Protocol **Article 14 (2) c** and fully implement the Protocol to ensure women's rights including reproductive rights.
2. Implement Court Order in **Petition 266 of 2015** and release, disseminate, popularize and resource the Policy, Standards and Guidelines for The Reduction of Maternal Mortality and Morbidity that provide clinical guidance to health care providers on the skills and indications for provision of safe abortion care in accordance with the Kenyan Constitution
3. Improve access to comprehensive youth friendly services as per the National Guidelines on Adolescent and Youth Friendly Services by increasing resource allocation to youth friendly services.
4. **Repeal Sections 158 and 159** of the Penal Code that criminalizes seeking and providing abortion
5. Strengthen access to Comprehensive Sexuality Education for all young people to enable young people make informed choices about their sexuality.

Acknowledgment

This policy brief was developed by the **Network for Adolescent and Youth Africa** as part of **Right Here Right Now Kenya**.

The Right Here Right Now Kenya is a platform of 15 organizations working on Sexual and Reproductive Health and Rights of young people in Kenya.

