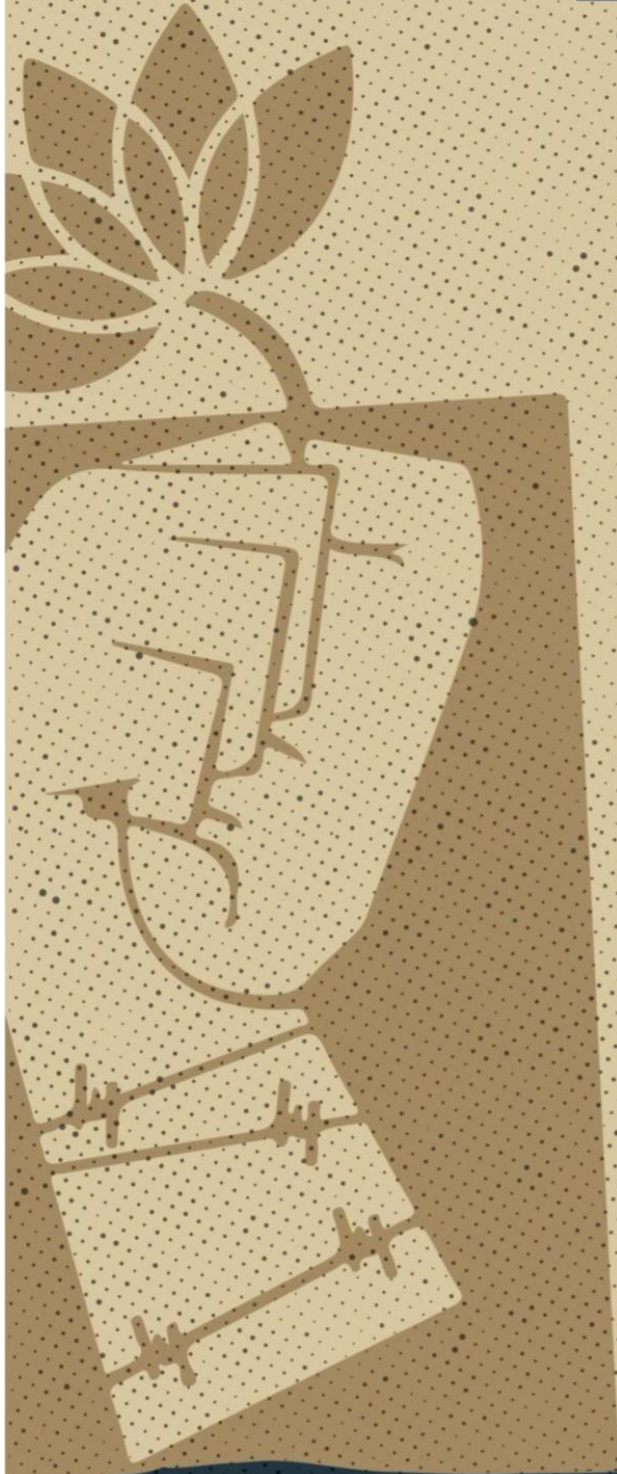




AMERICAN **BAR** ASSOCIATION

Center for Human Rights



# Monitoring Prosecutions under the Prohibition of FGM Act in Kenya

December 2024

# TRIALWATCH REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

## A. ABOUT

**The American Bar Association** is the world's largest voluntary association of lawyers and legal professionals and the national voice of the legal profession. It accredits law schools, provides continuing legal education, promotes policies and programs supporting the work of lawyers and judges, and works to improve the administration of justice and public understanding of the rule of law's importance, nationally and around the world. The Center has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries, including as an implementing partner for the TrialWatch initiative.

**TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Index evaluating countries' justice systems.

**Dr. Satang Nabaneh**, an award-winning legal scholar, educator and human rights practitioner, is the TrialWatch Expert. She currently serves as the Director of Programs and Assistant Professor of Practice at the University of Dayton Human Rights Center. Her research encompasses global human rights architecture, gender equality, sexual and reproductive health and rights, democratization, and constitution-making. She has worked for the Centre for Human Rights, the University of Pretoria, the Female Lawyers Association-Gambia (FLAG) and is a member of the Panel of Experts of the Initiative for Strategic Litigation (ISLA). In The Gambia, Dr. Nabaneh co-founded Think Young Women (TYW), which empowers young women through leadership, education, and advocacy, and founded Law Hub Gambia, a research institute dedicated to advancing legal knowledge and human rights. She is the author of *Choice and Conscience: Lessons from South Africa for a Global Debate* (PULP, 2023) and co-editor of *The Gambia in Transition: Towards a New Constitutional Order* (PULP, 2022) and *Sexual Harassment, Law and Human Rights in Africa* (Palgrave Macmillan, 2023). Her forthcoming edited volume is *Female Genital Mutilation in Africa: Politics of Criminalization* (PULP, 2024).

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### **Acknowledgments**

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**Orubah S. Ahmed**, Legal Program Manager at the Clooney Foundation for Justice, and **Abigail West**, from Morgan, Lewis & Bockius LLP, contributed to the report.

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# FORWARD



*By the Honorable Kembo Takam Gatsing Hermine, Member of the African Committee on the Rights and Welfare of the Child, African Union Special Rapporteur on Child Marriage and other Harmful Practices*

It is clear that laws alone are not sufficient. While essential, laws must be effectively implemented to translate into meaningful changes in people's lives. This report focuses on the implementation of such laws, providing valuable insights into the good, the odd, and the necessary changes required.

The good highlighted in this report is the commitment of Kenyan authorities to combat the issue of female genital mutilation (FGM). Additionally, the dedication of law enforcement officers who work tirelessly to present cases in court cannot be overlooked. This effort is particularly noteworthy considering that in many parts of Africa and beyond, there are either no laws against FGM or those laws are not enforced.

However, attempts to implement laws can sometimes lead to backlash because FGM is deeply rooted in certain customs and traditions, making it a normalized practice in some communities. A recent example can be seen in the failed initiative by some Gambian lawmakers to repeal the criminalization of FGM, which underscores the complexities of addressing issues that are culturally relevant to the definition of one's identity through legal means.

Proper legislation is crucial and serves as a starting point. Across the continent, the urgency of legislating against harmful practices cannot be overstated, as millions of girls are daily exposed to threats against their lives and bodily integrity. The outcome document from the 2nd International Conference on Female Genital Mutilation, held in Dar es Salaam, Tanzania, in October 2023, indicates that 29 out of the 31 countries globally where FGM is still prevalent are located in Africa. Laws are essential not only as a part of the strategy to eliminate FGM but also as a demonstration of a society's vision and the people's resolve in eradicating the practice.

But why do we legislate? The answer to this question is critical for the design and enforcement of our laws. Our aim is not only to eliminate a harmful practice but, more importantly, to protect the victims.

One concerning aspect is that the implementation of the PFGM Act has not necessarily contributed to the protection of victims. Protecting victims is essential. The report highlights instances where victims of FGM have been prosecuted instead of receiving support.

Criminalizing victims is not the path we should pursue. The Joint General Comment published in November 2023 by ACERWC-ACHPR offers guidance to State governments

on this issue. Defining free and informed consent for victims within a culturally restrictive environment raises many questions. Often, very few individuals advocate for their rights to bodily autonomy and the ability to choose whether to undergo such practices. Victims are frequently influenced by the cultural context that shapes their belief systems, which are often based on entrenched stereotypes. In these circumstances, is the consent to female genital mutilation (FGM) truly informed consent? This question is particularly relevant not only for adults but also for children, who are most in need of protection. We cannot conclude that they engage in such practices with a full understanding of the consequences and complete knowledge of what they entail.

Victims need protection, not prosecution. They require support services, including medical and psychosocial assistance, which should be readily available. There should be clear policy guidelines to ensure victim protection in the legal framework. We must make the changes recommended by the Joint General Comment, which encourages States to provide training and awareness for law enforcement, prosecution, and judicial officers on handling matters related to FGM. This training should include appropriate and gender-sensitive approaches to evidence gathering and preparation, ensuring the integrity, dignity, and safety of the girls and women involved.

As previously mentioned, the Joint General Comment recognizes that law alone cannot achieve substantial change. It advocates "...for reflection on measures that are specific to the peculiar socio-cultural and economic context in Africa, which addresses both the causes and drivers of FGM in the African context". It emphasizes the necessity for a comprehensive approach to effectively tackle FGM, extending beyond legal measures.

The report before us highlights critical issues regarding the implementation of the Prohibition of FGM Act. If Kenyan authorities and the people of Kenya embrace this report and its recommendations, it will undoubtedly pave the way for progress in other countries across our beloved continent.

In 2023, the African Union organized the 2nd Conference on FGM in Dar es Salaam to evaluate progress and promote the vision of achieving change within a generation.

Let us hope that the law, combined with education, social support and changed attitudes, will help us achieve transformative change, allowing future generations to uphold the progress of their predecessors.

**Kembo Takam Gatsing Hermine**

*Member of the African Committee on the Rights and Welfare of the Child, African Union  
Special Rapporteur on Child Marriage and other Harmful Practice*

# EXECUTIVE SUMMARY



Kenyan authorities and civil society have made great strides toward combating the practice of Female Genital Mutilation (FGM). This included the passage of the comprehensive Prohibition of Female Genital Mutilation Act (PFGM Act) in 2011, which criminalizes various offenses related to FGM.<sup>1</sup>

This report, prepared by the American Bar Association Center for Human Rights (ABA CHR) as part of the Clooney Foundation for Justice's TrialWatch initiative, examines prosecutions under the PFGM Act. The report finds that despite the Kenyan government's laudable goal to deter FGM, Kenya's PFGM law has been used to arrest, prosecute and convict victims of FGM themselves.<sup>2</sup>

The analysis in this report is based on the review of 68 criminal cases prosecuted under the Act: 44 cases before magistrates' courts and 24 cases before High Courts (ranging from 2013 – 2021). This involved in-person trial monitoring of 35 hearings from November 2022 – March 2023 and document analysis. In September 2024, a high-level convening attended by government actors, civil society advocates, lawyers, and practitioners in the movement to end FGM in Kenya was held to validate the findings.

**TrialWatch Expert Dr. Satang Nabaneh concludes:** Victims of FGM, including girls, should never have been prosecuted under the PFGM Act in Kenya. This glaring misapplication of the law not only undermines its intended purpose of protecting women and girls from this harmful practice but also deepens their trauma. The use of genital examinations as evidence without informed consent is a blatant violation of the accused's rights to privacy and bodily autonomy. Legislative amendments are urgently needed, along with a victim-centered approach that prioritizes the protection and rehabilitation of survivors. This approach must ensure justice and prevent the further victimization of those the law aims to protect.

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<sup>1</sup> Previously, FGM had only been prohibited under Section 14 of the now-repealed Children Act, which prohibited circumcision on minor girls only.

<sup>2</sup> This report will primarily use the term "victim" to reference FGM survivors who are being prosecuted in connection with their own case of FGM, as the term "survivor" is a broader term that may encompass all people who have undergone FGM, including cutters.

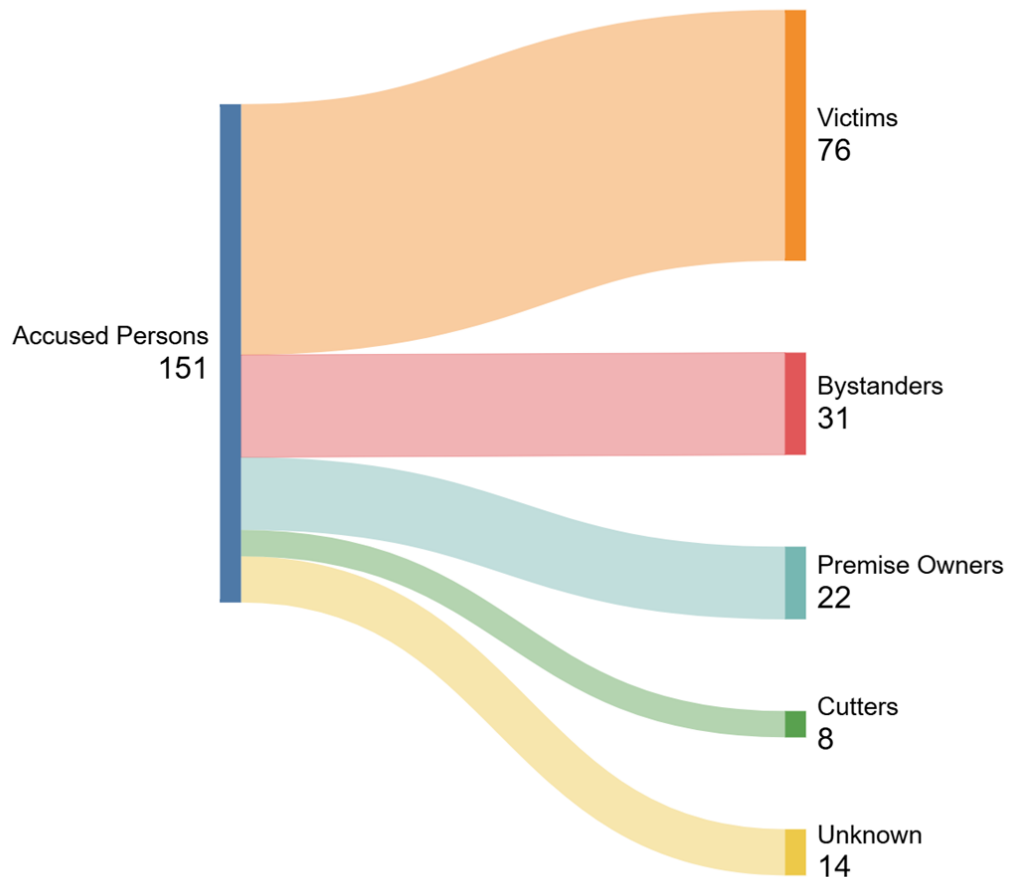


## A. KEY FINDINGS

### Profiles of the Accused: Who Gets Charged?

A total of 151 accused persons were identified across the 68 cases. There was enough information about 137 accused persons to divide them into the following four categories:

1. **Victims (55%):** 76 out of 137 accused persons were FGM victims who appeared to have undergone FGM in the case at hand.
  - a. 74 victims were those who had recently undergone FGM and were being charged in connection with undergoing FGM in the case at hand. This included 11 minors under the age of 18 (referred to as “girls” throughout the report).
  - b. The other 2 victims were charged with ‘procuring’ FGM on themselves at a date well before the prosecution; in one case, the victim stated that she had undergone the cut in 2000, when she was an 11-year-old girl – and years before the PFGM Act had even been passed.
2. **Cutters (6%):** Individuals who performed FGM were only a small fraction of those prosecuted (8 individuals).
3. **Premises Owners (16%):** Individuals who allegedly owned the property where FGM occurred, typically family members, made up 22 out of 137 accused persons. In at least 2 cases, premises owners were also made to undergo genital examinations, which showed that they had undergone FGM.
4. **Bystanders (23%):** Individuals who were either present in the residence during arrests, or were close relatives of the victims, comprised the second most numerous category, most frequently prosecuted for "failure to report" FGM.



Alarming, overall, 13 girl accused persons were identified, all below the age of 18. Eleven of the girls were FGM victims.

### Offenses and Charges: What Gets Charged?

The PFGM Act defines FGM and delineates the offenses that may be charged. The key offenses are as follows:<sup>3</sup>

- Section 19 – Offence of FGM (the performance of FGM, including by medical personnel)
- Section 20 – Aiding and abetting FGM (which includes ‘procuring’ FGM)
- Section 21 – Bringing a person to another country or into Kenya for the purpose of undergoing FGM
- Section 22 – Use of premises to perform FGM
- Section 23 – Possession of tools or equipment connected with performing FGM

<sup>3</sup> Prohibition of Female Genital Mutilation Act, No. 32 of 2011, 4 Oct. 2011, Articles 19, 20, 21, 22, 23, and 24 [hereinafter “PFGM Act”].

- Section 24 – Failure to report the commission of an offence of FGM

These provisions appear to carry a mandatory minimum sentence, as Section 29 imposes a penalty of “imprisonment for a term of not less than three years, or ...a fine of not less than two hundred thousand shillings, or both.” In practice, courts most frequently imposed a fine of two hundred thousand shillings (1500 USD) with imprisonment in default for non-payment of the fine.

This report found that “failure to report” under Section 24 of the PFGM Act was the most common charge, while “performing FGM” under Section 19 – a charge directly targeting those responsible for the procedure – was most infrequently charged.

FGM victims were most often charged with “procuring FGM” under Section 20 (aiding and abetting FGM) and “failure to report” under Section 24.

## **Evidence**

The evidence introduced in court by the prosecution centered around proving that FGM had occurred. In at least one-half of the cases (34 out of the 68), the results of genital examinations were introduced as evidence that FGM had occurred.<sup>4</sup> This means that in at least half of the cases in the dataset, genital examinations were performed on women and girls while they were in custody. There was no indication in the documentation (where documentation was available and reviewed) that fully informed consent was obtained.

## **Case Outcomes**

Nearly three-quarters of completed cases ended in a guilty verdict. Cases at the magistrates’ level in particular, where all of the cases were tried in the first instance, very rarely ended in acquittal (only one was identified). Many FGM victims were found guilty; the analysis identified 45 FGM victims, including 7 girl victims, who were found guilty (out of a total of 151 accused persons).

## **Sentencing**

Of the 35 cases that ended in conviction, over three-quarters involved the imposition of prison or the possibility of incarceration if a fine was not paid. FGM victims were among those ordered to pay a fine, or, in default, imprisonment. Out of the 21 cases that ended with possible imprisonment, 9 cases included FGM victims as accused persons, with an average sentence of nearly 3 years in default of non-payment of a fine; it is highly likely that some victims have been incarcerated due to failure to pay the fine. Some courts

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<sup>4</sup> It was not possible to determine if the results of genital examinations were introduced in 28 cases; thus, 34 cases in which genital exams were introduced as evidence is a minimum figure, and likely an undercount.

seemed to recognize that the accused were victims but still ordered the mandatory minimum, often alluding to the goal of deterrence.

## Access to Counsel and Legal Representation

In nearly half of the cases where documentation was available, accused persons did not appear to have legal representation at any point during proceedings (58 out of 68 cases had sufficient documentation to make a determination). This pattern was the same for accused persons who were FGM victims. Access to counsel was crucial to case outcomes; not a single case ended in acquittal when the accused did not have counsel.

## B. Core Concerns and International Human Rights Law

Kenya's current approach to prosecutions under the PFGM Act violates several key international human rights standards as well as Kenya's own constitutional guarantees.

- **Revictimization** – The prosecution of FGM victims in connection with their own FGM contravenes obligations under international and domestic law to protect victims. The ACERWC and ACHPR's Joint General Comment on FGM states that governments must "ensure that the framing of the law does not expose victims of FGM to prosecution, or otherwise characterize them as having participated in committing the crime."<sup>5</sup> In domestic law, the Victim Protection Act no.17 of 2014 requires authorities to "protect the dignity of victims through...preventing re-victimization in the justice process" and to "recognize and give effect to the rights of victims of crime."<sup>6</sup> The current practice of criminalizing FGM victims does not comply with these standards and instead, compounds the harm they have experienced.
- **Best interests of the child** – Girl victims were subject to genital examinations, often compelled to testify, and sometimes even prosecuted for being victims of FGM. This is a breach of the best interests of the child under international human rights law.
- **Right against self-incrimination and right to privacy** – Genital examinations were found to be regularly conducted after arrest and then used as evidence to sustain convictions – implicating the right against self-incrimination and the right to

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<sup>5</sup> Although General Comments are legally non-binding, they are extremely important for clarifying State Parties' obligations. African Committee of Experts on the Rights and Welfare of the Child (ACERWC) & African Commission on Human and Peoples' Rights (ACHPR), Joint General Comment on Female Genital Mutilation, June 2023, pg. 17, available at [https://www.acerwc.africa/sites/default/files/2023-11/Joint%20General%20Comment\\_ACHPR-ACERWC\\_on%20FGM%20%282%29.pdf](https://www.acerwc.africa/sites/default/files/2023-11/Joint%20General%20Comment_ACHPR-ACERWC_on%20FGM%20%282%29.pdf) [hereinafter "Joint General Comment on FGM"].

<sup>6</sup> Victim Protection Act, No. 17 of 2014, Part II, Section 3.

privacy. There is no evidence of valid consent to the exams.<sup>7</sup> Additionally, private health information was often publicly exposed in court.

- **Right to legal assistance and legal aid** – Over half of the accused persons were not represented. Authorities failed to ensure the accused – particularly vulnerable children and FGM survivors – access to legal assistance.
- **Foreseeability** – Article 24 of the PFGM Act (“failure to report the commission of the offence of FGM”) is being used to charge FGM victims, including girls or women who were children at the time, for failing to report their own incidence of FGM – an unforeseeable and apparently erroneous application of a mandatory reporting provision meant for third-party reporting.
- **Right to interpretation** – Interpretation during hearings was provided informally by court employees rather than trained interpreters, and official documents did not appear to be translated. This negatively affected the ability of the accused to mount a meaningful defense as many/some of them did not speak the language used in court.

## C. Recommendations

The extensive evidence in this report underscores the urgent need for Kenya to amend the PFGM Act to explicitly state that victims of FGM cannot be prosecuted under any circumstances. Kenya must adopt a victim-centered approach that prioritizes the protection and rehabilitation of survivors by providing comprehensive support services, ensuring access to justice, and implementing measures to prevent the criminalization of victims. Law enforcement and judicial officials require adequate training to differentiate between perpetrators and victims and to conduct prosecutions in a manner that respects human rights. It is imperative that Kenya reviews its practices to ensure that medical examinations in criminal investigations are fully compliant with international human rights standards, norms, and best practices. This includes obtaining informed consent, ensuring the presence of independent medical professionals, and protecting the confidentiality of medical information.

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<sup>7</sup> In the absence of evidence that there was informed consent for the genital examinations, and with the caveat that the exams were *most likely* conducted without properly informed consent and in the context of custody, it is possible that such genital exams constitute a form of cruel, degrading, and inhumane treatment that can rise to the level of torture. See *generally* Human Rights Watch, submission to the United Nations Committee against Torture on Tunisia, Apr. 5, 2016, available at <https://www.refworld.org/reference/annualreport/hrw/2016/en/109610>.

# INTRODUCTION



Female Genital Mutilation (FGM) is defined as any procedure involving partial or total removal of the external female genitalia, injury to the female genitals, or other harmful procedures to the female genitalia for non-medical purposes.<sup>8</sup> Despite views of its cultural significance in communities where FGM is practiced, FGM is a violation of the rights of women and girls and a form of gender-based violence, as recognized under international human rights standards.<sup>9</sup>

This report, which is based on a combination of in-court trial monitoring and document-based analysis, aims to address a gap in the understanding of cases brought to court under the PFGM Act in Kenya. It finds that, alarmingly, many victims of FGM – including girls – are themselves being subjected to criminal processes, with many convicted. Additionally, the report documents and analyses *how* these cases are prosecuted, finding violations of Kenya’s obligations under domestic and international law that cause further harm to the women and girls the PFGM Act is meant to protect.

In light of the recently published Joint General Comment on FGM of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child (Joint General Comment on FGM), the report closes with recommendations on how Kenya can reform the PFGM Act and its implementation to conform with international and regional best practices.

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<sup>8</sup> WHO, UNAIDS, UNDP, UNFPA, UNECA, UNESCO, OHCHR, UNHCR, UNICEF & UNIFEM, *Eliminating Female Genital Mutilation: An Interagency Statement*, June 16, 2008, pg. 1, *available at* [https://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](https://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf) (The typology of FGM includes type I, clitoridectomy, defined as “partial or total removal of the clitoris and/or the prepuce”; type II, excision, includes “partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora”; type III, infibulation, involves “narrowing of the vaginal orifice (introitus) with creation of a covering seal by cutting and appositioning [or sewing of] the labia minora and/or the labia majora, with or without excision of the clitoris”; and other forms of injury to the female genitalia are categorized as type IV, to include “pricking, piercing, incising, scraping, or cauterizing” the skin near the clitoris for non-medical reasons.)

<sup>9</sup> United Nations Office of the High Commissioner, *Women’s Rights are Human Rights*, 2014, *available at* <https://digitallibrary.un.org/record/787840?v=pdf>.

## METHODOLOGY



The findings in this report are based upon the examination of 68 criminal cases that invoked various sections of the Prohibition of Female Genital Mutilation Act (PFGM Act). Information on these 68 cases – which were drawn from magistrates-level courts in 3 jurisdictions<sup>10</sup> and 13 High Courts<sup>11</sup> – were collected using the following methods:

1. In-person trial monitoring was conducted at the Narok Law Court and the Murakan Mobile Court (which is within the jurisdiction of the Kilgoris Law Courts) in 18 ongoing cases between November 2022 – March 2023. These court stations were identified through a multi-step process that comprised a review of national-level data on prevalence rates and ‘hotspot’ counties where FGM is practiced<sup>12</sup> and a review of media reports from 2019-2022 on arrests and prosecutions under the PFGM Act, particularly of women and girl survivors of FGM.<sup>13</sup>

The monitoring team observed a total of 35 court hearings that were open to the public.

2. Review of available documentation in ongoing and completed cases in three trial-level law courts (Narok Law Court, Kilgoris Law Court, and Bomet Law Court) identified as having ongoing or recently concluded proceedings under the PFGM Act. The documents reviewed included:
  - P-3 forms - medical examination reports meant to record physical assault (used in these cases to record the results of genital exams on victims/survivors of FGM);

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<sup>10</sup> 14 cases from Narok, 14 cases from Kilgoris, and 16 judgments/court proceedings from Bomet.

<sup>11</sup> 24 Cases from High Court at Bomet, Embu, Kapenguria, Kericho, Kisii, Kitale, Marsabit, Meru, Migori, Nanyuki, Narok, Kericho, and Migori.

<sup>12</sup> The Kenya Demographic Health Survey provides national level data on the prevalence of female genital cutting/mutilation in the country. See Kenya National Bureau of Statistics, Ministry of Health/Kenya, National AIDS Control Council/Kenya, Kenya Medical Research Institute, National Council for Population and Development/Kenya, & ICF International, Kenya Demographic Health Survey, 2014, pgs. 333-334.

<sup>13</sup> A number of articles reported cases in Narok county. See Kiplangat Kirui, Police Arrest 10 Women for Undergoing FGM, The Star, Nov. 8, 2020, *available at* <https://www.the-star.co.ke/counties/2020-11-08-police-arrest-10-women-for-undergoing-fgm>; Charles Ronald, Two Sisters Who Circumcised Each Other Freed by Court, Dec. 31, 2019, Hivisasa, *available at* <https://hivisasa.com/posts/55300078-two-sisters-who-circumcised-each-other-freed>; Kenya News, “Narok Police Arrested Three Women for Allegedly Engaging in FGM”, June 1, 2021, *available at* <https://www.kenyanews.go.ke/narok-police-arrested-three-women-for-allegedly-engaging-in-fgm/>; Kenya News, 10 Women Arrested After Undergoing FGM, Nov. 9, 2020, *available at* <https://www.kenyanews.go.ke/10-women-arrested-after-undergoing-fgm/>. They also reported cases in Bomet county. Nation, Nine Women Charged With Undergoing FGM Cut in Bomet”, Nov. 25, 2019, *available at* <https://nation.africa/kenya/counties/bomet/nine-women-charged-with-undergoing-fgm-cut-in-bomet-226396>; Nation, 15 Women Charged in Bomet for Undergoing, Aiding FGM”, Nov. 27, 2019, *available at* <https://nation.africa/kenya/counties/bomet/15-women-charged-in-bomet-for-undergoing-aiding-fgm-227004>).

- charge sheets;
- official court proceedings (transcripts produced by the court); and
- judgments.

Not all types of documents were available for every case.

### 3. Review of 24 High Court judgments obtained from 13 jurisdictions.<sup>14</sup>

For each case, the age, gender and charges against each accused person were recorded, as well as interpersonal relationships between the victims and the accused, where apparent from the documents.

**Legal representation:** For cases monitored in person, it was clear whether the accused persons had legal representation. For cases where data was obtained through official court proceedings or judgments, accused persons who were represented typically had the names of their lawyers listed in these documents.

**Length of proceedings:** For completed cases, the length of proceedings was calculated from the date of arrest until the pronouncement of judgment. For ongoing cases, it was calculated from the date of arrest until the end of the monitoring period (March 2023).

Appendix I provides further information on data coding techniques employed to standardize the information obtained for each case and identify trends across cases.

## Limitations

As the average length of the trials spanned over several years, no trial was monitored from the beginning to the end. Thus, the study is limited in the sense that the full course of proceedings was not observed in-person. However, this limitation was mitigated by in-person observation of multiple trials at different stages, and an in-depth review of court proceedings and other official court documents.

In general, there were limitations in the ability to assess how long accused persons were held in pretrial detention. Trial courts granted bail based on the provision of a surety or guarantee, but it was unclear if accused persons were always immediately released after the granting of bail; as no official documents regarding release were available, this report relied on references in the court proceedings (transcripts) to determine if accused persons were released pretrial. However, it was not possible to definitively determine if accused persons remained detained or were released on bail in cases where court proceedings made no mention that surety had been provided. Additionally, in completed cases where

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<sup>14</sup> Bomet, Embu, Kapenguria, Kericho, Kisii, Kitale, Marsabit, Meru, Migori, Nanyuki, Narok, Kericho, and Migori.



only judgments were available, it was not possible to discern how long accused persons were in pretrial detention as most judgments did not include a procedural history.<sup>15</sup>

Findings are discussed in-depth in the “Findings” Section.

### **Validation of Findings**

On September 24, 2024, ABA CHR hosted a high-level convening attended by government actors, civil society advocates, lawyers, and practitioners in the movement to end FGM in Kenya, where the report’s findings and recommendations were presented and discussed by attendees. Feedback from the convening has been incorporated into this report.

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<sup>15</sup> The exception is one judgment in which the Court reduced the defendant’s sentence based on the period of remand (1 year).

## APPLICABLE INTERNATIONAL AND REGIONAL HUMAN RIGHTS STANDARDS



Kenya is party to numerous international and regional instruments that are relevant to FGM and fair trial rights. These include the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Cruel and Inhuman or Degrading Treatment or Punishment (CAT), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and the African Charter on the Rights and Welfare of the Child (ACRWC).

The Maputo Protocol, the African Charter on the Rights and Welfare of the Child, the CEDAW Committee's General Recommendation No. 14, the Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the Committee on the Rights of the Child on harmful practices, and the Joint General Comment on FGM, which provides specific guidance on State obligations regarding FGM, are particularly relevant and are discussed below.

### **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and General Recommendations No. 14 and No. 19**

Under Article 1 of CEDAW, discrimination is defined as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” FGM is an extreme form of gender-based violence.

Article 5 of CEDAW requires States Parties to “modify the social and cultural patterns of conduct ... with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

In 1990, the CEDAW Committee, which interprets the convention, issued General Recommendation No. 14, which called on States Parties to “take appropriate and effective measures with a view to eradicating the practice of female circumcision,” including collecting and disseminating information, supporting women's organizations that work on eliminating harmful practices, introducing trainings, and including strategies to eliminate harmful practices into national health policies – among other recommendations.<sup>16</sup>

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<sup>16</sup> CEDAW, General Recommendation No. 14: Female Circumcision, A/45/38 and Corrigendum (1990).

In 1992, the CEDAW Committee issued General Recommendation No. 19, which stated that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men,” including the right to the highest attainable standard of physical and mental health.<sup>17</sup>

**Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices<sup>18</sup>**

The Joint General Recommendation/Comment No. 31 and No. 18 provides that State Parties must prevent and eliminate harmful practices – including FGM – and provide legal protection for victims.<sup>19</sup> It calls for the establishment of a “well-defined, rights-based and locally relevant holistic strategy” that includes supportive legal and policy measures,<sup>20</sup> such as medical, psychological and legal support services for victims.

Although criminal law sanctions “must be consistently enforced in ways that contribute to the prevention and elimination of harmful practices, States Parties must also take into account the potential threats to and negative impact on victims.”<sup>21</sup> Thus, the best interests of the child and the protection of the rights of girls and women must be considered.

Regarding the mandatory duty to report that is common in anti-FGM legislation, the Joint General Recommendation/Comment states that the “individuals providing services for women and children, especially medical personnel and teachers, are uniquely placed to identify actual or potential victims of harmful practices. They are, however, often bound by rules of confidentiality that may conflict with their obligation to report the actual occurrence of a harmful practice or the potential for it to occur. This must be overcome with specific regulations that make it mandatory for them to report such incidents.”<sup>22</sup> It clarifies that mandatory reporting obligations apply to professionals and institutions working for and with children and women if they have reasonable grounds to believe that

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<sup>17</sup> CEDAW Committee, General Recommendation No. 19: Violence against women, A/47/38 (1992), paras. 1, 7.

<sup>18</sup> Although General Comments are legally non-binding, they are extremely important for clarifying State Parties’ obligations.

<sup>19</sup> CEDAW & CRC, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination Against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, U.N. Doc. CEDAW/C/GC/31/REV.1 - CRC/C/GC/18/Rev.1, May. 8, 2019, para. 7, 19 available at <https://documents.un.org/doc/undoc/gen/g19/134/42/pdf/g1913442.pdf> [hereinafter “Joint General Recommendation 31 & 18”].

<sup>20</sup> *Id.* at para. 33.

<sup>21</sup> *Id.* at para. 51.

<sup>22</sup> *Id.* at para. 49.

a harmful practice has occurred or may take place. Mandatory reporting responsibilities “should ensure the protection of the privacy and confidentiality of those who report.”<sup>23</sup>

### **African Charter on Human and Peoples’ Rights and its Protocol on the Rights of Women in Africa (Maputo Protocol)**

The African Charter on Human and Peoples’ Rights (Banjul Charter) guarantees every individual equal protection of the law.<sup>24</sup> It provides for the right to dignity while prohibiting cruel, inhuman and degrading punishment or treatment.<sup>25</sup> Article 18(3) mandates States to ensure the elimination of every form of discrimination against women and protection of the rights of the woman and child as stipulated in international declarations and conventions.

The Maputo Protocol prohibits all forms of female genital mutilation. Article 5 of the Protocol requires State Parties to eliminate harmful practices that “negatively affect the human rights of women, and which are contrary to recognized international standards.”<sup>26</sup> Under Article 5(b), State Parties are specifically required to prohibit “through legislative measures backed by sanctions ... all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them.” State Parties are also obligated to engage in awareness raising, provide services and support to victims of harmful practices, and protect women at risk of being subjected to harmful practices. Additionally, Article 8(f) mandates State Parties to take appropriate measures to ensure reform of discriminatory laws and practices in order to promote and protect the rights of women.

### **African Charter on the Rights and Welfare of the Child**

The African Children’s Charter prohibits harmful social and cultural practices; states are obligated under Article 21 to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child ...” Article 4(1) mandates a broader principle: that “the best interests of the child” be the “primary consideration” for all actions undertaken by States Parties that concern the child.

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<sup>23</sup> *Id.* at para. 55(j).

<sup>24</sup> African Charter on Human and Peoples’ Rights, (Banjul Charter), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 3(2).

<sup>25</sup> *Id.* at Article 5.

<sup>26</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The Maputo Protocol of 2003), African Union, July 11, 2003, Article 5 [hereinafter “Maputo Protocol”].

## ACERWC and ACHPR: Joint General Comment on Female Genital Mutilation

The ACERWC and ACHPR's Joint General Comment on Female Genital Mutilation (Joint General Comment on FGM), published in June 2023, provides more detailed guidance on the "scope and nature" of States Parties' obligations to eliminate FGM under the Maputo Protocol and the African Children's Charter, particularly under Article 5(b) of the Maputo Protocol and Article 21(1) of the African Children's Charter. The General Comment specifically states that "FGM violates the physical integrity of the victim, and undermines their dignity."<sup>27</sup>

The Joint General Comment on FGM underscores that victims of FGM should not be criminalized: it recommends that States Parties should "ensure that the framing of the law does not expose victims of FGM to prosecution, or otherwise characterize them as having participated in committing the crime. Legislation that targets victims risks unfairly criminalising people who are already victims."<sup>28</sup>

The Joint General Comment on FGM also addresses criminal justice responses to FGM, declaring that the principle of the best interests of the child and the principle of respect for bodily integrity must underlie any criminal justice response. In obtaining evidence in FGM-related crimes, "any action taken [by authorities] in this regard must respect the dignity of the child affected." State Parties should also "reform their laws related to standards and nature of evidence to recognise potential difficulty in obtaining evidence in FGM related crimes, due to the close connections that the victim might have with the perpetrators and the fact that the FGM is practised in private, which makes it difficult to track or obtain evidence of."<sup>29</sup>

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<sup>27</sup> Joint General Comment on FGM, para. 17.

<sup>28</sup> *Id.* at para. 37.

<sup>29</sup> *Id.* at para. 46.

# NATIONAL LEGAL FRAMEWORK



## The Constitution of Kenya, 2010

Article 2(1) of the Constitution of Kenya declares the Constitution as the supreme law of the Republic that binds all persons and all State organs at both levels of government. Article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution.

Chapter 4 of the Constitution of Kenya sets out a framework for the protection of rights and fundamental freedoms relevant to FGM and fair trial rights, including equality and freedom from discrimination,<sup>30</sup> human dignity,<sup>31</sup> freedom and security of the person,<sup>32</sup> the right to privacy,<sup>33</sup> the right to health,<sup>34</sup> children's rights,<sup>35</sup> access to justice,<sup>36</sup> the rights of an arrested person<sup>37</sup> and the right to a fair hearing.<sup>38</sup>

## The Prohibition of FGM Act of 2011 and Framework for Prosecution

The Prohibition of Female Genital Mutilation Act of 2011 prohibits the practice of FGM in Kenya. Section 2 defines FGM as “all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons ...”<sup>39</sup> It delineates the following offenses:<sup>40</sup>

- Section 19 – Offence of FGM (the performance of FGM, including by medical personnel):

(1) A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person commits an offence.

(2) If in the process of committing an offence under subsection (1) a person causes the death of another, that person shall, on conviction, be liable to imprisonment for life [...].

- Section 20 – Aiding and abetting FGM

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<sup>30</sup> Constitution of Kenya, 2010, Article 27.

<sup>31</sup> *Id.* at Article 28.

<sup>32</sup> *Id.* at Article 29.

<sup>33</sup> *Id.* at Article 31.

<sup>34</sup> *Id.* at Article 43(1).

<sup>35</sup> *Id.* at Article 53.

<sup>36</sup> *Id.* at Article 48.

<sup>37</sup> *Id.* at Article 49.

<sup>38</sup> *Id.* at Article 50.

<sup>39</sup> PFGM Act, Article 2.

<sup>40</sup> PFGM Act, Articles 19, 20, 21, 22, 23, 24, 25, and 29.

A person who aids, abets, counsels or procures—(a) a person to commit an offence under section 19; or (b) another person to perform female genital mutilation on that other person, commits an offence.

- Section 21 – Procuring a person to perform FGM in another country

A person commits an offence if the person takes another person from Kenya to another country, or arranges for another person to be brought into Kenya from another country, with the intention of having that other person subjected to female genital mutilation.

- Section 22 – Use of premises to perform FGM

A person who knowingly allows any premises, for which that person is in control of, or responsible for, to be used for purposes of performing female genital mutilation commits an offence.

- Section 23 – Possession of tools or equipment

A person who is found in possession of a tool or equipment for a purpose connected with the performance of female genital mutilation commits an offence.

- Section 24 – Failure to report the commission of offence of FGM

A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be, committed, fails to report accordingly to a law enforcement officer.

- Section 29 – Penalty for offences

A person who commits an offence under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both.

- Section 25 – Use of derogatory or abusive language

Any person who uses derogatory or abusive language intended to ridicule, embarrass or otherwise harm a woman for not undergoing FGM, or a man for marrying or supporting a woman who has not undergone FGM, commits an offence and shall be liable, upon conviction, to imprisonment for a term not less than six months, or a fine of not less than fifty thousand shillings, or both.

The Office of the Director of Public Prosecutions (ODPP)<sup>41</sup> has the power to investigate criminal conduct under the PFGM Act as well as the power of prosecution.<sup>42</sup> In 2021, the

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<sup>41</sup> The ODPP was established under Article 157 of the Constitution of Kenya of 2010.

<sup>42</sup> ODPP, Standard Operating Procedures Manual and Rapid Reference Guide on Prosecution of Female Genital Mutilation Cases, 2021, *available at* <https://odpp.go.ke/wp-content/uploads/2024/08/SOP-Manual->

ODPP released a Standard Operating Procedures Manual and Reference Guide on the prosecution of FGM cases (ODPP SOP on FGM), with the aim to “standardize and bring consistency in prosecuting FGM cases,” among other goals.<sup>43</sup> In addition to outlining prosecutors’ duties and best practices, the SOP on FGM outlines the elements that must be proven for each offense in the PFGM Act. The SOP on FGM also provides for diversion or plea bargains as alternatives to prosecution.<sup>44</sup>

Other relevant guidelines include the ODPP Decision to Charge Guidelines,<sup>45</sup> the ODPP Diversion Guidelines and Explanatory Notes,<sup>46</sup> the ODPP Plea Bargaining Guidelines<sup>47</sup> and the Prosecutor’s Guide to Children in the Criminal Justice System.<sup>48</sup>

The data collected for this report shows that the two provisions of the PFGM Act most commonly utilized are Article 24 (“failure to report commission of offence”) and Article 20 (“aiding and abetting FGM”).<sup>49</sup> The ODPP SOP on FGM expands on these provisions and outlines the charges that prosecutors may levy:

- 1) Section 24: A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be, committed, fails to report accordingly to a law enforcement officer.

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Rapid-Reference-Guide-on-Prosecution-of-FGM-Cases.pdf\_[hereinafter “SOP Manual Rapid Reference Guide on Prosecution of FGM-Cases”].

<sup>43</sup> *Id.* at Section E.

<sup>44</sup> *Id.* at Section K.

<sup>45</sup> ODPP, Guidelines on the Decision to Charge, 2019, *available at* <https://odpp.go.ke/wp-content/uploads/2024/08/Decision-to-Charge-Guidelines.pdf>.

<sup>46</sup> ODPP, Diversion Guidelines and Explanatory Notes, 2019, *available at* <https://odpp.go.ke/wp-content/uploads/2024/08/DIVERSION-GUIDELINES.pdf>.

<sup>47</sup> ODPP, Plea Bargaining Guidelines, 2019, *available at* <https://odpp.go.ke/wp-content/uploads/2024/08/ODPP-Plea-Bargaining-Guidelines.pdf>.

<sup>48</sup> ODPP, A Prosecutor’s Guide to Children in the Criminal Justice System, 2020, *available at* [https://odpp.go.ke/wp-content/uploads/2024/08/A-PROSECUTORS-GUIDE-TO-CHILDREN0AIN-THE-CRIMINAL-JUSTICE-SYSTEM.pdf\\_](https://odpp.go.ke/wp-content/uploads/2024/08/A-PROSECUTORS-GUIDE-TO-CHILDREN0AIN-THE-CRIMINAL-JUSTICE-SYSTEM.pdf_)

<sup>49</sup> Details on the most frequently charged offences can be found in the Findings section, below.



The ODPP SOP on FGM outlines the offense as follows:

Section	Preferred charge	Points to prove
Section 24	Failing to report the commission of FGM	<ul style="list-style-type: none"> <li>• Proof of knowledge that FGM was performed or was about to be performed</li> <li>• Proof that the accused never reported the act to any law enforcement officer</li> <li>• Identity of the victim</li> </ul>

2) Section 20: A person who aids, abets, counsels or procures –

(a) A person to commit an offence under section 19; or

(b) Another person to perform female genital mutilation on that other person, commits an offence.

The ODPP SOP outlines three different charges that can be applied under this provision:

Section	Preferred charge	Points to prove
Section 20(a)	Aiding, abetting, counselling or procuring FGM	<ul style="list-style-type: none"> <li>• Identity of perpetrator</li> <li>• Proof of any sort of assistance or advice for purposes of perpetuating FGM</li> <li>• Proof of aiding the accused, e.g. Monetary facilitation</li> </ul>
Section 20(a)	Procuring FGM on self	<ul style="list-style-type: none"> <li>• Proof of any sort of assistance or advice</li> <li>• Proof of facilitation, e.g. monetary payment etc.</li> </ul>
Section 20(b)	Aiding, abetting, counselling or procuring another person to perform FGM on another person	<ul style="list-style-type: none"> <li>• Proof of any sort of assistance or advice</li> <li>• Proof of facilitation, e.g. monetary payment etc.</li> </ul>

Significantly, the ODPP SOP appears to read into Section 20 the offense of procuring FGM on oneself – **an offense that is not apparent in the plain text of the law.**

### **Children’s Act, 2022**

The Children’s Act of 2022 contains additional protections for children. Section 23(1)(b) states that, “No person shall subject a child to female genital mutilation.” Section 9(1) prohibits discrimination against children. Section 8 underlines the State’s obligation to the best interests of the child.

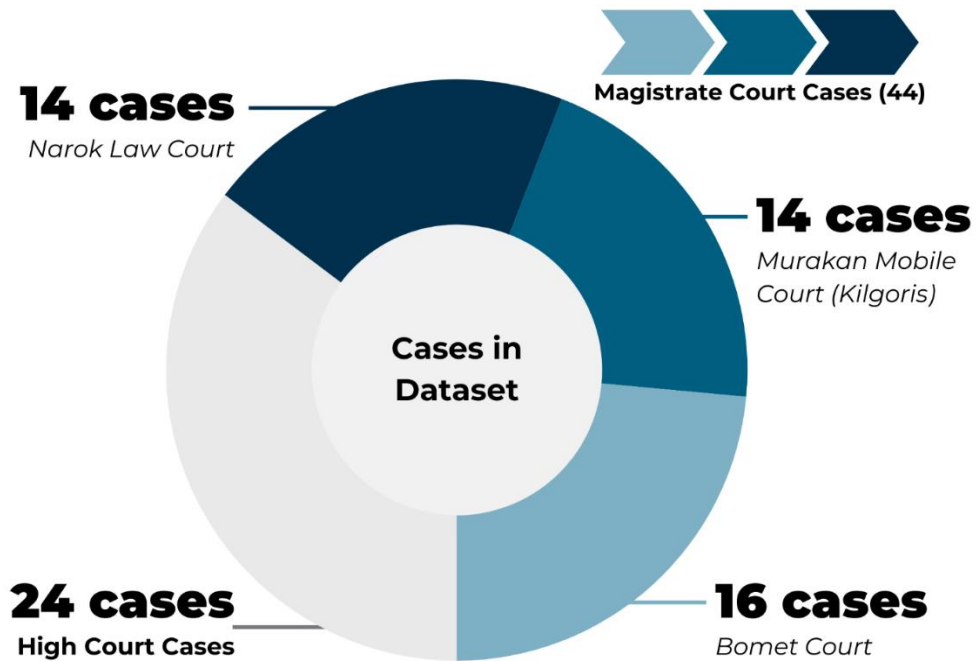
Additionally, Section 27(1) provides that “[n]o person shall subject a child to arbitrary or unlawful interference with his or her privacy, family or private affairs, or correspondence, or to attacks upon his or her honour or reputation.” This provision is particularly relevant to the issue of genital examinations conducted on girls.

# FINDINGS



For this report, a total of 68 court cases were analyzed: 44 cases before magistrate courts and 24 cases before High Courts.

- Magistrate Court Cases (44)
  - 14 cases from Narok law court: 11 cases monitored + 3 judgments;
  - 14 cases from the Murakan Mobile Court (Kilgoris): 13 cases monitored + 1 judgment and court proceedings;
  - 16 cases from Bomet, based on court proceedings and/or judgments.
- High Court Cases (24)



## A. Arrests: How do arrests occur?

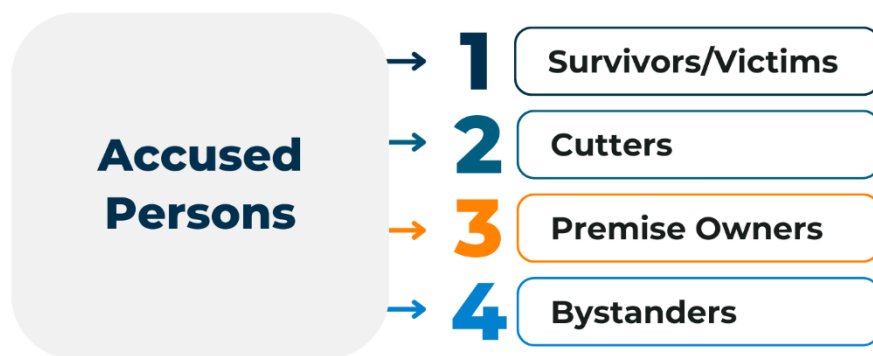
The data collected shows that many of the arrests occurred as part of sweeping night-time raids conducted by law enforcement after receiving a tip that FGM was about to be performed or had occurred. Law enforcement would then enter a house and arrest everyone on site. This usually resulted in criminal proceedings against multiple accused persons in one case, or multiple cases clustered together. Complainants were frequently

law enforcement officials, rather than women and girl victims of FGM.<sup>50</sup> Testimony by police officers at trial revealed that many of the officers learned ahead of time that FGM was about to be performed but waited until after it had occurred before conducting a raid and making arrests.<sup>51</sup>

In a few cases, the complainants were children who made a complaint to law enforcement and then became witnesses for the prosecution against their family members.<sup>52</sup>

## B. Profiles of the Accused: Who gets charged?

There were four main categories of accused persons in the dataset. A total of 151 accused persons were identified across the 68 cases. There was enough information about 137 accused persons to divide them into the following categories.<sup>53</sup>



**Category 1: Survivors/Victims:** These are accused persons, both girls and adults, who appeared to have undergone FGM. This was determined based on a review of court proceedings, monitoring notes, and judgments – in which a party stated that the accused person had undergone FGM – and P3 forms.

The study found that **over half of the accused persons who could be categorized were survivors/victims of FGM (76 out of 137, or 55% of categorized accused persons). Nearly all (74 victims) were those who had recently undergone FGM and**

<sup>50</sup> See, e.g., Charge Sheet, Narok Criminal Case No. E025 of 2021; Charge Sheet, Narok Criminal Case No. E091 of 2020 in which the indicated complainant was a law enforcement official.

<sup>51</sup> See, e.g., Court Proceedings, Bomet Criminal Case No. 3919 of 2019, pg. 7-8; Court Proceedings, Bomet Criminal Case No. 3951 of 2019, pg. 11-13; Court Proceedings, Bomet Criminal Case No. 3971 of 2019, pg. 7-8; Court Proceedings, Bomet Criminal Case No. E063 of 2020, pg. 8, Court Proceedings, Bomet Criminal Case No. 3918 of 2019, pg. 7-8; Court Proceedings, Bomet Criminal Case No. 3916 of 2019, pg. 5-6.

<sup>52</sup> Court Proceedings, Narok Criminal Case No. 26/2020; Court Attendance Form and Trial Monitor Notes, Narok Criminal Case No. E028 of 2021, Dec. 7, 2022.

<sup>53</sup> There was not enough information about 14 accused persons to categorize them.

were being charged in connection with undergoing FGM in the case at hand. This included 11 girls.

The other 2 victims were adults charged with “procuring FGM” on themselves on a date well before the prosecution. In one case, the victim stated that she had undergone FGM in 2000 when she was an 11-year-old girl – years before the PFGM Act had even been passed.

From the perspective of cases, 41% of all cases (28 out of 68) included one or more victims of FGM as accused persons.

Survivors were charged (apparently interchangeably) under two provisions: Section 20a (“aiding, abetting, or procuring FGM” on themselves) and Section 24 (“failure to report”).

**Category 2: Cutters:** This category of accused persons includes those who were alleged to have performed the FGM procedure on another person, irrespective of their medical background.

**Only 8 individual accused persons, or 6% of accused persons who could be categorized, were identified as the cutters** and charged accordingly.

They were charged under Section 19 (“perform[ing] FGM”) or under Section 24 (“failure to report”). There was no clear reasoning in the court materials as to why some alleged cutters were charged under Section 19 and others were charged under Section 24.

**Category 3: Premise Owners:** These were accused persons who allegedly owned the property or were in possession of the premises where the FGM incident took place. Accused persons in this category were often family members (typically mothers, aunts, or grandmothers) in cases where a survivor underwent FGM at their family home, but also included third-party owners.

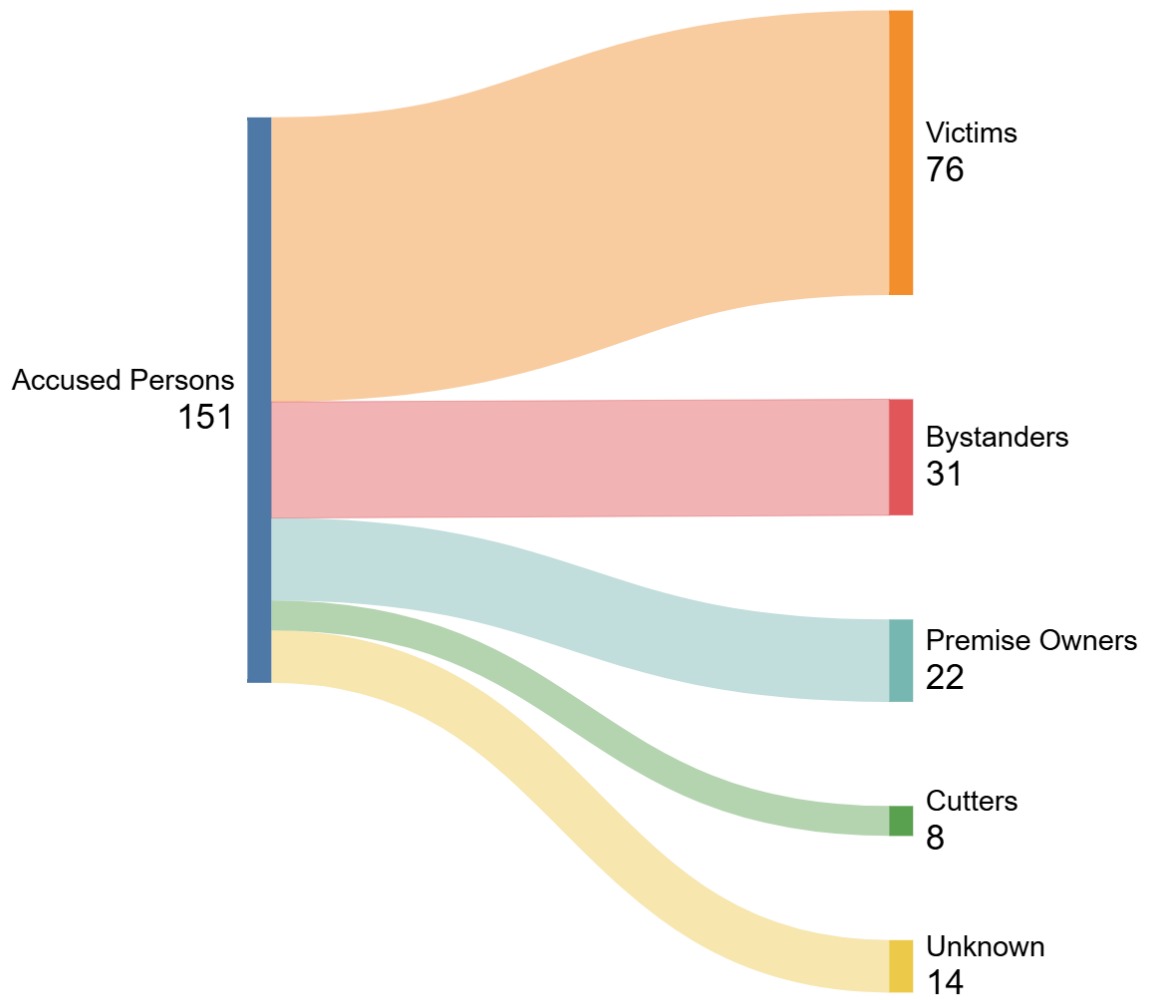
**22 out of 137 accused persons were premise owners, making up 16% of accused persons.**

Accused persons in this category were most often charged under Section 22 (“knowingly” allowing a premise which they were “in control of, or responsible for” to be used for FGM). However, in two cases, accused persons identified as premise owners were charged with violating Section 24 (“failure to report”).

**Category 4: Bystanders:** Accused persons in this category were individuals who were either present in the residence at the time the FGM was performed or were close relatives of the survivor of FGM. They are distinguished from Category 2 and 3 accused persons as they did not own the premises where FGM was conducted, nor was it apparent that they had undergone FGM themselves or performed it on others.

**Bystanders comprised the second most numerous type of accused person (31 out of 137, or 23% of accused persons who could be categorized).**

Bystanders were typically charged under Section 24 (“failure to report”) or Section 20(b) (“aiding, abetting or counseling another person to perform FGM”).



**Minors/Girls:** The data included **13 girls as accused persons across 5 cases**, all below the age of 18.<sup>54</sup> **11 of the girls who were accused persons were also victims of FGM.** 7 were charged exclusively with “failure to report” their own FGM, 3 were charged with both failure to report and “procuring FGM” under Section 20 of the PFGM Act (aiding and abetting FGM on their own person), and for 1 it was unknown. Additionally, 4 accused persons were FGM victims who were 18 or 19 years old when they were cut.

**Chiefs:** The study did not identify any chiefs or male community leaders among the accused persons.

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<sup>54</sup> This is a minimum number that the study was able to identify; it is possible there were additional minors whose ages were not reflected in the available documents.

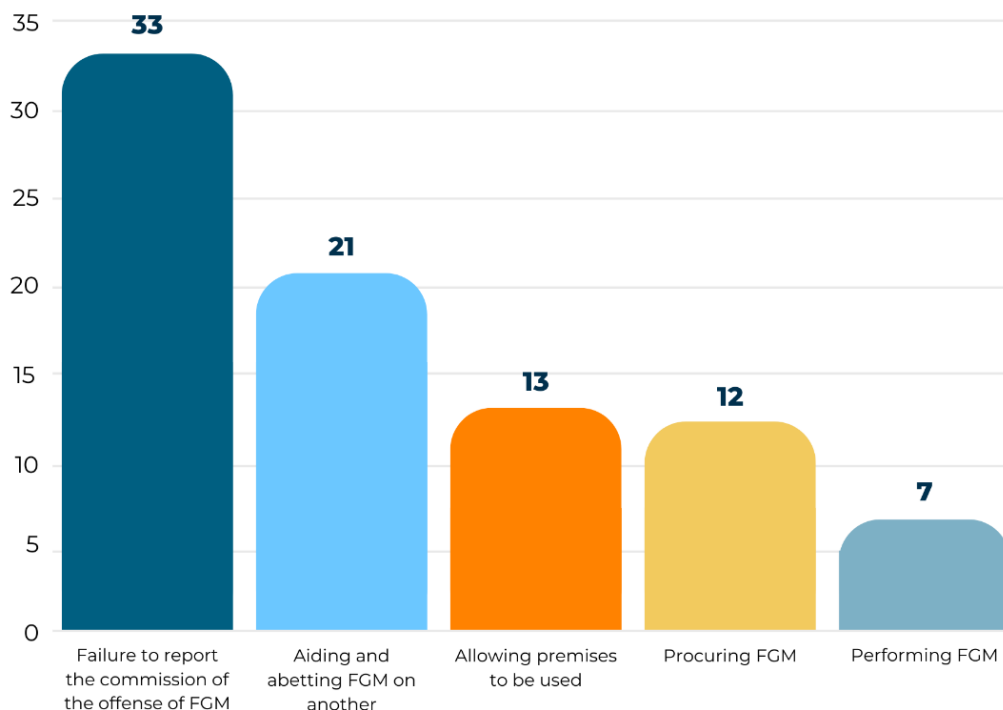
The Joint General Comment on FGM highlights the importance of the “differentiated nature of criminal culpability for each of the parties involved in the practice ... in particular ... the culpability of the perpetrator(s).” Although the text of the PFGM Act appears to differentiate criminal culpability by delineating different offenses – Article 19: Offence of FGM (i.e. “performing FGM”), Article 20: Aiding and abetting, Article 22: Use of premises, Article 24: Failure to report, etc. – in actual practice very few of the most direct perpetrators – i.e. cutters – are prosecuted as accused persons. Instead, half of all accused persons in the cases surveyed were themselves victims of FGM, including girl victims. The disproportionately low prosecution of direct perpetrators is also demonstrated in the low number of cases in which the offense of FGM (“performing FGM”) was charged (see below).

### C. Offenses: What gets charged?

Across the 68 cases in our dataset, the following offenses were charged:<sup>55</sup>

- Failure to report the commission of the offense of FGM (identified in 33 cases)
- Aiding and abetting FGM on another (21 cases)
- Allowing premises to be used (13 cases)
- Procuring FGM (12 cases)
- Performing FGM (7 cases)

Across the **68 cases in our dataset**, the **following offenses were charged**:



<sup>55</sup> The total number of offenses charged is greater than 68 because multiple offenses were charged in some of the cases.

Only 7 of the 68 cases, or only 1 out of every 10 cases, involved the offense of “performing FGM” – the provision that most directly criminalizes the act of committing FGM. On the other hand, “failure to report” – a broader and more ambiguous offense – was charged in almost half the cases (33 out of 68), followed by “aiding and abetting” (18 out of 68 cases).

Shockingly, accused persons who were victims of FGM were most often charged with “procuring FGM” (under Section 20(a), as delineated in the ODPP SOPs on FGM) and “failure to report” (primarily by failing to report their own cases of FGM). This contravenes the Joint General Comment on FGM’s guidance that a law should not “characterize [FGM victims] as having participated in committing the crime.”<sup>56</sup>

In several cases, accused persons who were parents to the FGM victim were charged with “failing to protect a child from harmful cultural rites” under Kenya’s Children’s Act<sup>57</sup> alongside “aiding and abetting” under the PFGM Act.<sup>58</sup>

## D. Bail and Bond Terms

Under Kenyan law, an arrested person has the right to be released on reasonable conditions of bail and bond.<sup>59</sup> According to national guidelines, bail or bond amounts should not be excessive; that is, they should not be far greater than is necessary to guarantee that the accused person will appear for their trial.<sup>60</sup>

In cases against women and girls accused of procuring FGM or failing to report the commission of FGM on themselves, bail and bond terms issued across the different courts were varied, despite similar profiles of the accused persons (rural and indigent). For example, courts set amounts at:

- Personal bond of Kes 50,000 (387 USD) with one surety of the same amount<sup>61</sup>
- Cash bail Kes 30,000 (232 USD)<sup>62</sup>
- Bond of Kes 100,000 (775 USD) with one surety of the same amount<sup>63</sup>
- Bond of Kes 200,000 (1550 USD) with 2 sureties of the same amount<sup>64</sup>

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<sup>56</sup> Joint General Comment on FGM, para. 37.

<sup>57</sup> Children’s Act, 2022, Section 14 as read with Section 20.

<sup>58</sup> See Narok Criminal Case No. 26/2020; Narok Criminal Case No. 290/2020.

<sup>59</sup> Constitution of Kenya, 2010, Article 49(1)(h).

<sup>60</sup> The Judiciary of Kenya, National Council on the Administration of Justice, Bail and Bond Policy Guidelines, Mar. 2015, pg. 9, *available at* [https://kenyalaw.org/kl/fileadmin/pdfdownloads/Bail\\_and\\_Bond\\_Policy\\_Guidelines.pdf](https://kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf).

<sup>61</sup> Court Proceedings, Kilgoris Criminal Case No. 652 of 2020, Jan. 13, 2021.

<sup>62</sup> Court Proceedings, Bomet Criminal Case No. 3949 of 2019, Nov. 26, 2019.

<sup>63</sup> Court Proceedings, Kilgoris Criminal Case No. E058 of 2021, Apr. 20, 2021.

<sup>64</sup> Court Proceedings, Narok Criminal Case No. E025 of 2021, Apr. 23, 2021 and Apr. 27, 2021.

- Bond of Kes 300,000 (2325 USD) with surety of the same amount, or personal bond of Kes 100,000 (775 USD) with two sureties<sup>65</sup>
- Bond of Kes 300,000 (2325 USD) with surety of the same amount.<sup>66</sup>

In some cases, bond and bail terms were reviewed, such as changing a bond of Kes 300,000 with a surety of the same amount to a personal bond of Kes 300,000.<sup>67</sup>

Minors received similar bond terms, such as a bond of Kes 100,000 with sureties of the same amount<sup>68</sup> and a personal bond of Kes 300,000 with 3 sureties of the same amount.<sup>69</sup> In one case, the girls charged were detained with other co-accused persons at the Naivasha Women's Prison before the Court reviewed and set bond terms.<sup>70</sup>

Other accused persons such as parents of victims of FGM received a bond term of Kes 100,000 with surety of the same amount,<sup>71</sup> bond of Kes 100,000 with surety of the same amount and cash bail of Kes 40,000.<sup>72</sup>

## **E. Evidence – Primarily Genital Examinations**

The evidence introduced in court by the prosecution centered around proving that FGM had occurred. In at least one-half of the cases (34 out of the 68), the results of genital examinations were introduced as evidence that FGM had occurred. **This means that in at least half of the cases in the dataset, genital examinations were performed on women and girls while they were in custody. There was no indication in the documentation that fully informed consent was obtained before the examinations took place.** This is likely an undercount, as it was not possible to determine if genital examinations had occurred and/or what evidence was introduced in 28 cases. This was because only partial documentation could be obtained for these cases, the cases were ongoing, and/or because the criminal revisions and High Court judgments did not mention evidence.

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<sup>65</sup> Court Proceedings, Narok Criminal Case No. E098 of 2020, Nov. 12, 2020.

<sup>66</sup> Court Proceedings, Narok Criminal Case No. E091 of 2020, Nov. 9, 2020 and Dec. 16, 2020.

<sup>67</sup> Court Proceedings, Narok Criminal Case No. E091 of 2020, Dec. 17, 2020.

<sup>68</sup> See Court Proceedings, Narok Criminal Case No. E091 of 2020, Nov. 9, 2020 and Dec. 16, 2020; Court Proceedings, Narok Criminal Case No. E201 of 2020, Dec. 16, 2020.

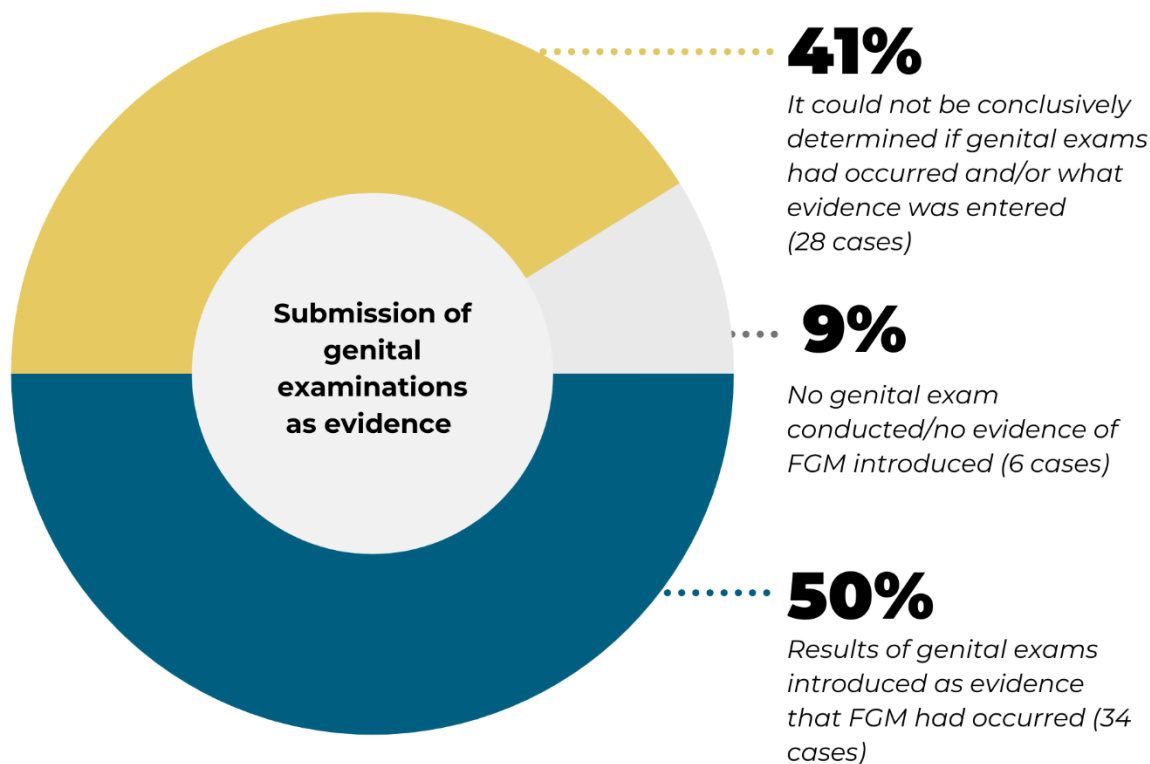
<sup>69</sup> Court Proceedings, Narok Criminal Case No. E098 of 2020, Nov. 23, 2020.

<sup>70</sup> Court Proceedings, Narok Criminal Case No. E091 of 2020, Nov. 19, 2020, Nov. 23, 2020, Dec. 16, 2020, Dec. 17, 2020.

<sup>71</sup> Court Proceedings, Narok Criminal Case No. 26 of 2020, Jan. 16, 2020.

<sup>72</sup> Court Proceedings, Narok Criminal Case No. 461 of 2020, Dec. 7, 2020.





The prosecution entered evidence that FGM had occurred in the form of:

- 1) P-3 forms;
- 2) Testimony of the arresting or investigating police officer, who testified that the accused person/victim was brought to a hospital immediately after arrest;
- 3) Testimony of a doctor or medical clinic personnel, who testified that the accused had been examined and found to have sustained FGM;
- 4) Testimony of the girl victim herself, who testified for or against her relatives. In at least two cases, the girl victim was not a cooperating witness and testified that she had “willingly” undergone FGM.<sup>73</sup>

In six cases, it appears unlikely that genital examinations were conducted; in these cases, the police officers testified that they arrested the accused, immediately took them into custody, and then filed charges but did not mention any examination taking place (unlike the aforementioned 34 cases). Instead, other evidence was adduced, such as clothes left

<sup>73</sup> See Narok Criminal Case No. 26 of 2020; Narok Criminal Case No. 290 of 2020; Narok Criminal Case No. E028 of 2021.

on the premises. **Notably, these six cases were all eventually withdrawn, suggesting that prosecutors heavily relied on genital examinations to achieve a conviction and did not think they were likely to sustain a conviction without one.**

Significantly, with respect to offenses charged under Section 20 (aiding and abetting FGM, including “procuring FGM”), the prosecution did not submit evidence to support the “points to prove” outlined in the ODPP’s own SOPS – proof of facilitation or proof of aiding the accused.<sup>74</sup> Instead, the prosecution focused solely on proving that FGM had occurred.

Although genital examinations were the main form of evidence, other evidence was adduced in several cases. Law enforcement officials testified about finding victims dressed in skin hides,<sup>75</sup> traditional attire for persons who had undergone FGM,<sup>76</sup> and/or beaded necklaces and *maasai chukas*,<sup>77</sup> ostensibly to give the Court information to infer that FGM was being conducted as part of a cultural practice. Notably, “possession of tools or equipment” under Section 23 of the Prohibition of FGM Act was not charged in these cases.<sup>78</sup>

On the other hand, accused persons typically presented no evidence or witnesses to testify on their behalf (in large part due to problems with access to counsel, discussed below), and relied on testifying in their own defense.

## **F. Case Outcomes**

Out of the 49 completed cases in the dataset, **nearly three-quarters (35 out of 49, or 71.4%) ended in a guilty verdict.** The remainder of the cases ended in acquittal, were withdrawn, or dismissed. Cases at the magistrate’s level very rarely ended in acquittal; in fact, the dataset includes only one acquittal before a magistrate’s court.

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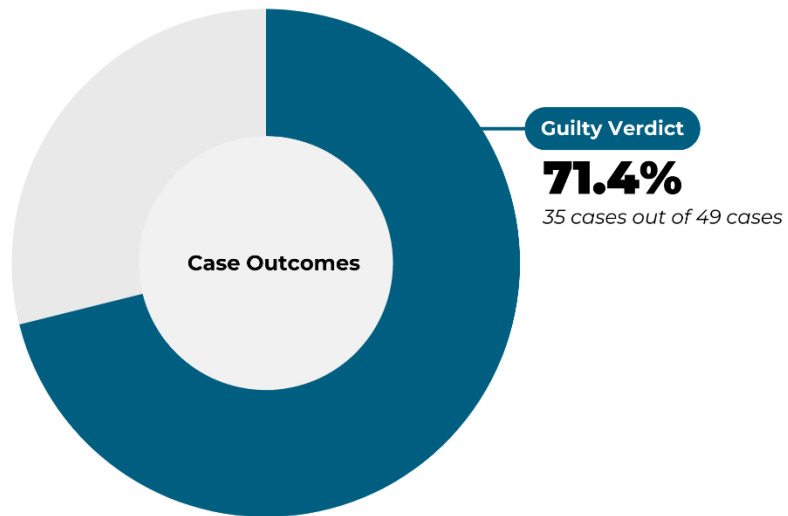
<sup>74</sup> See above, PFGM Act; SOP Manual Rapid Reference Guide on Prosecution of FGM-Cases.

<sup>75</sup> Judgment, Kilgoris Criminal Case No. 601 of 2020, pg. 2.

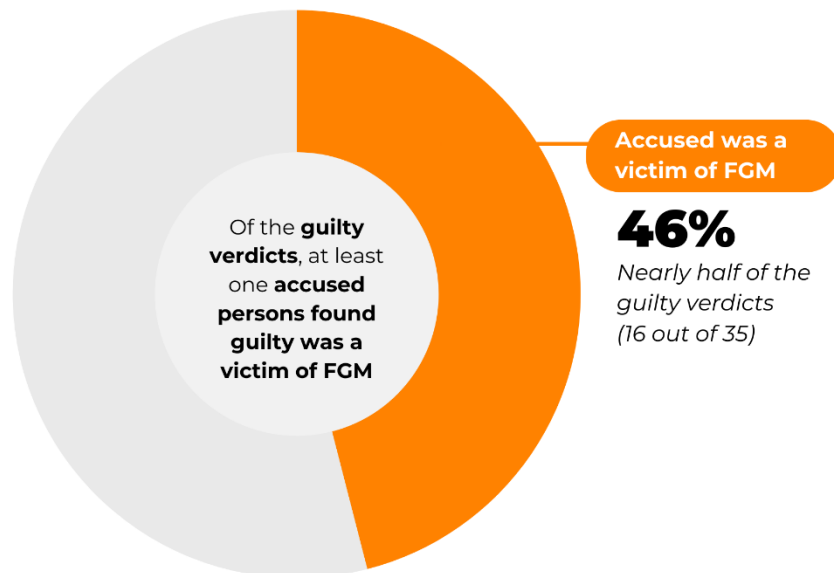
<sup>76</sup> Judgment, Kilgoris Criminal Case No. 600 of 2020, pg. 6.

<sup>77</sup> Court Proceedings, Bomet Criminal Case No. 3919 of 2019, Nov. 2, 2020.

<sup>78</sup> A person who is found in possession of a tool or equipment for a purpose connected with the performance of female genital mutilation, commits an offence. See PFGM Act, Article 23.



Notably, in nearly half of the guilty verdicts (16 out of 35, or 46%), at least one accused person found guilty was a victim of FGM. In the two other completed cases where a victim of FGM was among the accused persons, the charges were withdrawn.



With respect to individual accused persons, **none of the 77 accused persons who were victims of FGM were acquitted,**<sup>79</sup> while **45 were found guilty.** In the two aforementioned cases, charges were withdrawn against 8 accused persons; for the remainder of the accused persons, their cases were ongoing at the time of the completion of research. **Girls (who were accused persons) were also found guilty: 7 were found guilty and the other 6 were still in ongoing proceedings at the end of the monitoring period.**

<sup>79</sup> Across 28 cases where victims of FGM were prosecuted.

Although cutters appear to be prosecuted at a very low rate, they do appear to be *convicted* at high rates. Out of the 8 accused persons identified as cutters, 3 were found guilty and sentenced to prison and 1 was sentenced to time served. The other 4 cases were ongoing.

## G. Sentencing

Section 29 of the PFGM Act provides for a sentence of “imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both” for a conviction of any offense under the Act. On its face, the law does not prescribe different sentences for offenses of varying severity – for example, the arguably more severe offense of “performing FGM” falls under Section 29, in exactly the same way as “failure to report.” This appears out of step with the Joint General Comment on FGM, which states that legislation should recognize the “differentiated nature of criminal culpability for each of the parties involved in the practice ... in particular ... the culpability of the perpetrator(s).” The text of Section 29 does appear to allow courts to impose harsher, but not more lenient, sentences.

In practice, the courts mostly ordered a fine of two hundred thousand shillings and, in default for non-payment, a custodial sentence. This custodial sentence in default for nonpayment is not provided for in the PFGM Act, but is instead at the court’s discretion under the Kenya Penal Code.<sup>80</sup> Notably, the “court must be guided by the scale” noted in the Penal Code, according to which a court may only order a maximum of 1 year imprisonment where the fine defaulted on exceeds fifty thousand shillings.<sup>81</sup> Despite this limit, many courts appeared to treat the three years delineated in Section 29 as a mandatory minimum and issued sentences longer than 1 year for default of payment in most cases.

**Of the 35 cases that ended in conviction, 27 cases involved the imposition of prison sentences or at least the possibility of incarceration.** In 6 cases, the court outright ordered sentences of imprisonment with an average sentence of 5.7 years. In the other 21 cases, the court ordered a fine of 200,000 shillings and in default, imprisonment (most typically three years). **Notably, 9 cases involved one or more accused persons who were FGM victims in the case being prosecuted;** in other words, approximately one-third of sentences potentially requiring imprisonment were levied against FGM victims.

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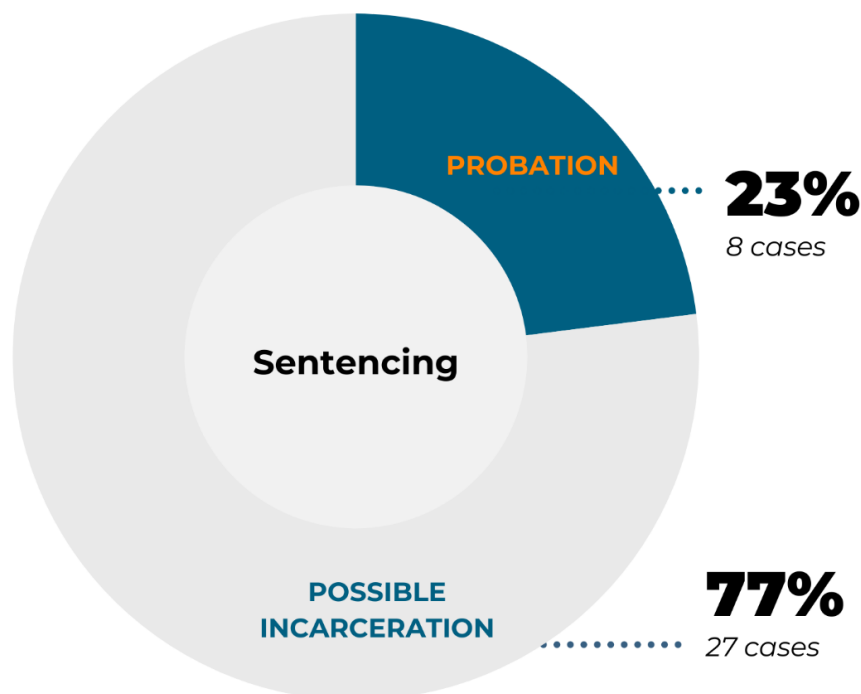
<sup>80</sup> Kenya Penal Code, 2010, Section 28(1)(c) (The court “may, in its discretion . . . direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced.”).

<sup>81</sup> See Kenya Penal Code, 2010, Section 28(2); Kenya Sentencing Guidelines, Gazette Notice No. 2970, Apr. 29, 2016, Section 11.11, *available at* <https://kenyalaw.org/kl/index.php?id=6275>.

There is a high likelihood that FGM victims who were indigent and were subjected to fines, and in default imprisonment, were incarcerated due to non-payment of fines.<sup>82</sup>

The average sentence imposed on cutters was 3.8 years, perhaps indicating the courts' willingness to impose harsher sentences on cutter defendants.<sup>83</sup>

**Probation was ordered in only 8 out of a total of 35 cases where defendants were found guilty (23% of convictions).** All cases where probation was ordered had defendants who were FGM victims; no cases where probation was ordered had cutter defendants.



**There appeared to be arbitrariness in sentencing.** Within the same court station, FGM victims convicted of an offense were given a sentence of imprisonment in some cases and probation in other cases without clear distinguishing reasons. Additionally, women

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<sup>82</sup> See Jean Galbraith et al, Poverty Penalties as Human Rights Problems, American Journal of International Law, 2023, 413 quoting Section 11.3 of Kenya Sentencing Guidelines, Gazette Notice No. 2970, Apr. 29, 2016 ("In Kenya, the practice of imposing unpayable mandatory fines for certain offenses has become enough of a problem that even Kenya's official sentencing guidelines note explicitly that '[t]here are many instances where the fines are in effect excessive and offenders end up serving imprisonment terms in default of payment. The guidelines further remark that 'even where the amount is minimal, indigent offenders are usually unable to pay and are imprisoned as a result.'"), available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2C4FFED59EFF533F6CD0CF97CB708E41/S0002930023000258a.pdf/poverty-penalties-as-human-rights-problems.pdf>.

<sup>83</sup> These averages exclude all cases where sentences were inapplicable or not available.

convicted of the same offence were sentenced to different lengths of probation, without any clear differentiating factors.

**Several courts appeared to acknowledge that incarceration was not in the best interest of FGM victims.** In one case, an accused person who had undergone FGM was sentenced to 3 years of probation, with the magistrate noting, “I have considered the charge, accused mitigation and pre-sentence report. I also take note that the accused was a victim of the crime and would benefit from counselling against outdated cultural practices.”<sup>84</sup>

In another case involving five women convicted of failing to report that they had undergone FGM, the court took a unique approach. When the prosecution objected to probation and argued for the maximum sentence to be imposed, the Court ordered the probation officer to seek the views of the community, including not only the chiefs, but also the village elder, investigating officer, church leaders and others within the community. Ultimately the Court stated the following:

The Court has considered the objections by the prosecution counsel in this case as well as the recommendations by the probation officer. The court is encouraged by the fact that the area chief ... is in the position of sensitizing his residents and that positive changes have been seen. He has indicated that the sensitization has been continuous and that it is bearing fruit with the residents and perpetrators having a change of attitude. The upcoming [sensitization activity] is specifically targeted at the offenders, and he has provided the court with minutes and photos of the baraza that was held.

With cooperation of the church leaders, the court is of the view that such joint efforts are more persuasive than a punitive custodial sentence. Should the offenders re-offend during the period of probation, then the probation officer must bring it to the court’s attention and the bond shall be cancelled.

Probation is also a valid sentence, and it is known to have better results and behavioural change where the offenders are receptive of change.

Change in culture and traditional belief are slow and gradual process and this court is willing to give the 5 accused a chance. The probation officer must strictly follow up on them by close monitoring and supervision. The accused are thus sentenced to serve three (3) years’ probation. They have the right of appeal 14 days.<sup>85</sup>

In a case where three women, who were unrepresented during the entire period of the proceedings, were convicted, the Magistrate sentenced them to two years of probation,

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<sup>84</sup> Court Proceedings, Bomet Criminal Case No. 3951 of 2019, June 19, 2023.

<sup>85</sup> Court Proceedings, Kilgoris Criminal Case No. 601 of 2020, July 21, 2022.

recognizing in the judgment that “[a]ccused persons herein were **victims** of Female Genital Mutilation. They themselves underwent the cut and by the time of their arrest, they had not made any efforts to make a report to any enforcement officer.”<sup>86</sup>

In a case involving a 17-year-old girl in Form 2, who was charged with procuring the services of FGM on herself, the girl pled guilty and was sentenced to a probation period of two years. The Court commented: “I have looked at the probation report. I am to strike a perfect balance between the subject self-destruction in life past and her future, especially the need to give her an opportunity to complete her education. I sentence the subject to serve a probation period of 2 years.”<sup>87</sup>

**Some courts held the view that the PFGM Act does not grant a court discretion in sentencing.**<sup>88</sup> In a case in Bomet, the accused stated, “I plead for leniency. I have 5 children who are depending on me, the youngest one being 9 months. I did not know it was a crime to undergo FGM, if the Court is lenient, I will go to the village and advocate against FGM.”<sup>89</sup> The magistrate acknowledged her remorsefulness but stated that the Act “doesn’t grant discretion with regards to sentencing” and “require[d] a mandatory minimum penalty.” He even denied a plea bargain earlier in the proceedings because of the need to restore public order,<sup>90</sup> imposing a fine of 200,000 shillings and in default, a *sentence of two years*. The *same magistrate* held in a different case that even though “the accused [is] remorseful,” the law provided a “mandatory minimum penalty” only this time imposing a fine, and in default *a sentence of three years*.<sup>91</sup> Thus, even though the plain reading of the law does not require incarceration in default of payment of the fine, courts clearly exercised their discretion in providing such default sentences of varying length, while claiming that they did not have a choice.

**Last, courts often alluded to the goal of deterrence.** For example, in a case where 14 women were charged and convicted of the offense of failing to report the commission of FGM (their own), the prosecutor asked the Court to impose stiff penalties, stating, “[T]he Accuseds are adults and were adults when the offence was committed. They had a choice not to have the Female Genital Mutilation performed on them. There is need for a stiff sentence to ensure the practice is eradicated. I pray for a stiff penalty.”<sup>92</sup> The Court concluded that it agreed with the recommendations of the prosecution: “The court concurs that in order to get to the root of deeply rooted cultural practices is to tackle it from the

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<sup>86</sup> Judgment, Kilgoris Criminal Case No. 679 of 2020, pg. 3 (emphasis added).

<sup>87</sup> Court Proceedings, Narok Criminal Case No. E201 of 2020, Dec. 22, 2020.

<sup>88</sup> See Bomet Criminal Case No. 3949 of 2019; Court Proceedings, Bomet Criminal Case No. 3950 of 2019, Dec. 15, 2021.

<sup>89</sup> Court Proceedings, Bomet Criminal Case No. 3950 of 2019, Dec. 15, 2021.

<sup>90</sup> Ruling, Bomet Criminal Case No. 3950 of 2019, July 13, 2021.

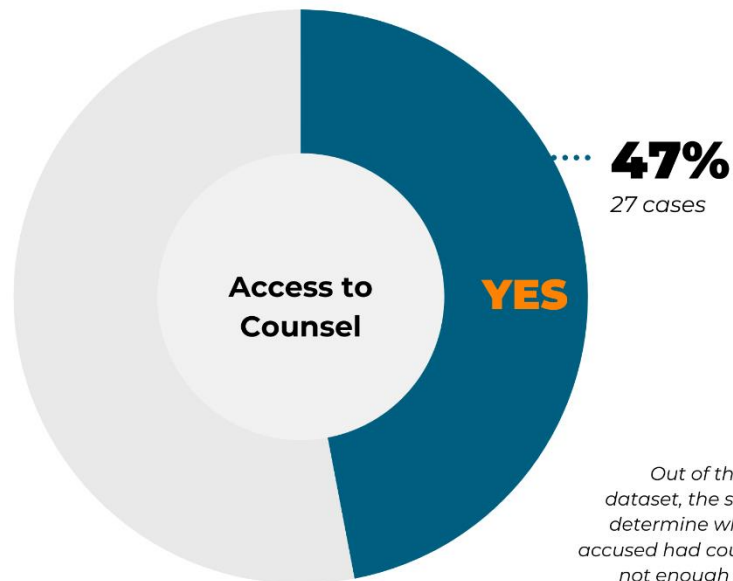
<sup>91</sup> Judgment, Bomet Criminal Case No. 3949 of 2019, Mar. 18, 2021.

<sup>92</sup> Judgment, Kilgoris Criminal Case No. 600 of 2020 pg. 8.

local grassroots levels. The Court thus sentences the accuseds in the hope that they will be ambassadors of Anti Female Genital Mutilation programme.”<sup>93</sup>

## H. Access to Counsel

Out of the 68 cases in the dataset, it was possible to determine whether or not the accused had counsel in 58 cases; not enough information was available in the other 10 cases. **Out of the 58 cases, the accused did not have counsel at all in nearly half the cases (27 cases, or 47%).**



*Out of the 68 cases in the dataset, the study was able to determine whether or not the accused had counsel in 58 cases; not enough information was available in the other 10 cases.*

**Out of the 24 cases where accused persons included FGM survivors and there was information on whether the accused had counsel, the accused did not have counsel in half of the cases (12 cases).**

**Accused persons were less likely to be represented at the trial level.** Out of 38 cases before a magistrate’s court, in only 10 cases did accused persons appear to be fully represented and in 9 cases partially represented.<sup>94</sup>

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<sup>93</sup> *Id.* at pg. 10.

<sup>94</sup> Partial representation means that counsel was present for only some of the proceedings/hearings.



Out of 38 cases before a magistrate's court, **accused persons were fully represented in 10 cases** and **partially represented in 9 cases**.



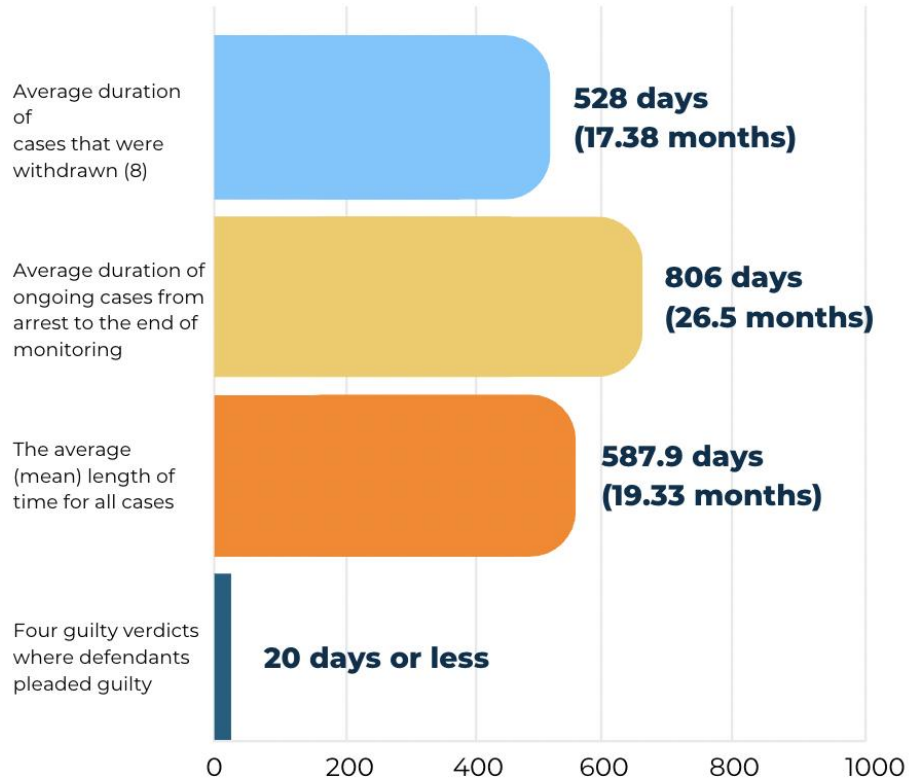
In none of the six cases observed at the Murakan Mobile court did accused persons appear to be represented. As such, accused persons at the trial level overall appeared to have lawyers representing them throughout the trial in only 22% of the cases. At the High Court level, appellants appeared to have lawyers in half of the cases (12 out of 24 cases).

**Access to counsel was crucial to case outcomes.** The only cases in the dataset that ended in acquittal (four) were cases where the accused were represented: in the 22 cases where accused persons were represented, 4 of the cases ended in acquittal and 1 was withdrawn by the prosecution – a 22% success rate. **On the other hand, not a single case at any level ended in acquittal when the accused did not have counsel.**

## I. Duration of Cases

In the dataset, criminal proceedings under the PFGM Act averaged 2-3 years. The average (mean) length of time for all cases was 19.33 months. However, this number is skewed low by the four guilty verdicts that were delivered in 20 days or less (in these cases, the accused persons all pled guilty). The average duration of ongoing cases – **26.5 months from arrest to the end of monitoring** – is perhaps a better indicator of the length of these proceedings. For the four cases that ended in acquittal, the average duration of these cases was 22.2 months. Even cases that were withdrawn by the prosecution stretched many months, averaging 17.38 months across eight cases.

In the dataset, **criminal proceedings under the PFGM Act averaged 2-3 years.**



In-person trial monitoring of 35 hearings/mentions and a review of court proceedings at the magistrate level indicate that hearings were frequently rescheduled and that delays were most often attributable to judicial authorities. The reasons for delays and adjournments included:

- The prosecution was unable to locate the police file (observed in four cases).<sup>95</sup> This led to at least one withdrawal of the prosecution under Section 87(a) of the Criminal Procedure Code.<sup>96</sup>
- Witness statements, P3 forms and charge sheets were not made available to the court by the prosecution.<sup>97</sup>
- Magistrates were away on official duties.<sup>98</sup>
- Magistrates were indisposed.<sup>99</sup>

<sup>95</sup> Court Proceedings, Bomet Criminal Case No. 3915 of 2019, Mar. 4, 2021; Court Proceedings, Bomet Criminal Case No. 3919 of 2019, May 13, 2021; Bomet Criminal Case No. E3935 of 2019; Court Proceedings, Narok Criminal Case No. E091 of 2020, Dec. 6, 2021.

<sup>96</sup> Court Proceedings, Bomet Criminal Case No. 3915 of 2019, Apr. 29, 2021.

<sup>97</sup> Court Proceedings, Narok Criminal Case No. E098 of 2020, Nov. 24, 2021.

<sup>98</sup> Court Proceedings, Narok Criminal Case No. E201 of 2020, Feb. 24, 2022; Court Proceedings, Narok Criminal Case No. 461 of 2020, Feb. 22, 2022, Sept. 29, 2022, Oct. 27, 2022.

<sup>99</sup> Court Attendance Form, Narok Criminal Case No. E201 of 2020, Feb. 15, 2023, pg. 2.

- Police officers called as witnesses were unable to testify because they were busy with other tasks.
- Prosecution witnesses were unavailable to testify.<sup>100</sup> This led to at least two withdrawals of prosecution under Section 87(a) of the Criminal Procedure Code, including for lack of sufficient evidence to secure a conviction.<sup>101</sup>
- Accused persons in pre-trial detention were not brought to the court and the detention facility did not have technological services to assist them to attend court through video conference.<sup>102</sup>

Authorities also attributed delays to the broader political context. In one case in Narok, the court cited political tensions following the August 2022 general election in delaying a scheduled hearing.<sup>103</sup> In several other cases in Narok, hearings were rescheduled when judicial officers were unavailable while election petitions were being prioritized.<sup>104</sup>

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<sup>100</sup> Court Proceedings, Bomet Criminal Case No. 3919 of 2019, Jan. 28, 2021; Court Proceedings, Bomet Criminal Case No. 3971 of 2019, Mar. 29, 2021.

<sup>101</sup> Court Proceedings, Bomet Criminal Case No. 3919 of 2019, July 6, 2021; Court Proceedings, Bomet Criminal Case No. E1213 of 2022, May 30, 2023 (In this case, the accused was charged with possession of FGM tools contrary to Section 23 of the PFGM Act).

<sup>102</sup> Court Proceedings, Narok Criminal Case No. E091 of 2020, Nov. 19 and 23, 2020, Dec. 16 and 17, 2020.

<sup>103</sup> Court Proceedings, Narok Criminal Case No. E091 of 2020, Aug. 20, 2022.

<sup>104</sup> Court Proceedings, Narok Criminal Case No. E201 of 2020, Nov. 12, 2022; Court Proceedings, Narok Criminal Case No. 26 of 2020, Sept. 19, 2022; Trial Monitor Notes, Court Attendance Form, Narok Criminal Case No. E025 of 2020, Dec. 9, 2022.

# ANALYSIS OF CORE CONCERNS



## A. Revictimization

The Joint General Comment on FGM requires States Parties to “ensure that the framing of [anti-FGM legislation] does not expose victims of FGM to prosecution”; “legislation that targets victims risks unfairly criminalizing people who are already victims.” This report’s findings indicate that the PFGM law and the current practice of prosecution under the law – in which over half of all accused persons in the dataset are themselves victims of FGM – directly contravenes key principles in the Joint General Comment on FGM.

The Joint General Comment on FGM also requires States Parties to provide “survivor-centered support” in order to meet their obligations for the elimination of FGM. This includes by “facilitat[ing] the training and sensitization of . . . prosecution and judicial officers on handling matters related to FGM, including appropriate and gender-sensitive approaches to evidence gathering and preparation, which safeguard the integrity, dignity and safety of the girls and women involved.”<sup>105</sup> States must also “reform their laws related to standards and nature of evidence” to ensure that the dignity of the child is respected and take into account the fact that the victim may have “close connections . . . with the perpetrators . . .”<sup>106</sup>

The Joint General Recommendation/Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices posits that while criminal law sanctions must be consistently enforced in ways that contribute to the prevention and elimination of harmful practices, States Parties must also take into account the potential threats to and negative impact on victims.<sup>107</sup>

In domestic law, the Victim Protection Act no.17 of 2014 – which was established to give effect to Article 50(9) of the Constitution of Kenya – is meant to “protect the dignity of victims through ... preventing re-victimization in the justice process” and to “recognize and give effect to the rights of victims of crime.”<sup>108</sup> Section 2 defines a victim as “any natural person who suffers injury, loss or damage as a consequence of an offence.” It further describes a vulnerable victim as “a victim who, by **age, gender**, disability or other special characteristics as may be prescribed by regulations, may require the provision of special justice and support.”<sup>109</sup>

Kenya’s current practice of prosecutions under the PFGM Act contravenes its obligations under international and domestic law to protect victims. As a baseline matter, the

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<sup>105</sup> Joint General Comment on FGM, para. 45.

<sup>106</sup> Joint General Comment on FGM, para. 46.

<sup>107</sup> Joint General Recommendation 31 & 18, para. 50.

<sup>108</sup> Victim Protection Act, No. 17 of 2014, Part II, Section 3.

<sup>109</sup> *Id.* at Part I, Section 1.

interpretation and application of Section 20 – which criminalizes a “person who aids, abets, counsels or procures – (a) A person to commit an offence under section 19; or (b) Another person to perform female genital mutilation on that other person” – appears to add an offense that is not in the plain text of the law – **the offense of procuring FGM on oneself**. This offense, which is delineated in the ODPP SOP on Prosecuting Offences under the PFGM Act,<sup>110</sup> directly contravenes international best practices for prosecuting FGM. The Joint General Comment on FGM states that authorities must “ensure that the framing of the law does not expose victims of FGM to prosecution, or otherwise characterize them as having participated in committing the crime” because “[l]egislation that targets victims risks unfairly criminalizing people who are already victims.”<sup>111</sup> Although Section 20 of Kenya’s PFGM Law is similar to the Model FGM Law developed by 28 Too Many and the Thomson Reuters Foundation – “A person commits an offence if that person aids, abets, counsels or procures (a) another person to commit any of the offences described in Article 2; or (b) a Female to perform Female Genital Mutilation upon herself and is aware, suspects or has reason to suspect that these acts will occur”<sup>112</sup> – the Model Law’s Explanatory Note expressly states that the article “does not make it an offence for a Female to carry out FGM on herself, given the risk of (i) criminalizing the victim, and (ii) deterring the victim from reporting FGM in case she is accused of performing FGM on herself.”<sup>113</sup> Instead, the current framing of the law – and its application – routinely exposes victims to prosecution and conviction.

More broadly, victims of FGM were frequently charged with the offense of “failure to report” (discussed below in the section “Misapplication of failure to report”). Whether under this provision or Section 20, prosecution of victims of FGM is a violation of Kenya’s obligations to protect victims under international and domestic law.

FGM is widely recognized as having serious and negative psychological effects on the affected women and girls.<sup>114</sup> Rather than providing “support to girls . . . who experience FGM, includ[ing] . . . legal and judicial support . . . ,” Kenyan authorities appear to be punishing and revictimizing these women and girls through the criminal justice system.<sup>115</sup> As described in the findings section, over half of the accused persons in the cases analyzed were identified as FGM victims. The FGM victims identified as being prosecuted for their own cases of FGM had to endure being arrested, having their genitals examined under compulsion (see, Right to Privacy, below) and the tedious, lengthy process of attending court, which often included traveling long distances and waiting for long periods

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<sup>110</sup> SOP Manual Rapid Reference Guide on Prosecution of FGM-Cases, Section O: Offences and Elements.

<sup>111</sup> Joint General Comment on FGM, para. 37.

<sup>112</sup> Thomas Reuters Foundation & 28 Too Many, FGM Model Law, Mar. 2023, Article 3(1), *available at* [https://www.fgmcri.org/media/uploads/Law%20Reports/EU%20Law/model\\_law\\_v1\\_\(march\\_2020\).pdf](https://www.fgmcri.org/media/uploads/Law%20Reports/EU%20Law/model_law_v1_(march_2020).pdf).

<sup>113</sup> *Id.* at pg. 28.

<sup>114</sup> See Sarah O’Neill & Christina Pallitto, The Consequences of Female Genital Mutilation on Psycho-Social Well-Being: A Systematic Review of Qualitative Research, *Qualitative Health Research*, June 8, 2021, pgs. 1738–1750, *available at* <https://journals.sagepub.com/doi/10.1177/10497323211001862>.

<sup>115</sup> Joint General Comment on FGM, at para. 43.

of time – all while physically recovering from recently undergoing FGM. It appears that FGM victims/survivors – who are often the most vulnerable – are being prosecuted in part because it is ‘easier’ to prove charges against them, as opposed to more direct perpetrators: cutters and powerful community leaders who perpetuate the social norms that drive the continuation of the practice of FGM.

The study identified nine cases where one or more accused persons who were FGM victims faced potential imprisonment. For most of the accused persons, who come from indigent backgrounds, the mandatory minimum fine - 200,000 shillings (1550 USD) - is likely an astronomical sum that would be very difficult for them to pay. Thus, it is highly likely that some FGM victims have been incarcerated (due to failure to pay the fine), based on charges stemming from their own incidences of FGM. Additionally, all who are convicted, even those sentenced “only” to probation, must live with a criminal record, which could have substantial consequences if they face any future charges.

The study also found that victims were frequently compelled to testify – often as criminally accused persons – and thus had to relive their experiences of FGM in court. The experience of being treated as an accused person compounds preexisting harm and subjects victims to secondary trauma. At the same time, trial monitors did not observe psychosocial support services available to victims in court.

## **B. Best Interests of the Child**

Article 3(1) of the Convention on the Rights of the Child states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>116</sup> Similarly, Article 4(1) of the African Charter on the Rights and Welfare of the Child provides that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”<sup>117</sup> In their Joint General Comment on FGM, the ACERWC and the ACHPR also emphasized that States must “ensure that all actors . . . are aware and respect the principle when dealing with children” and that the child’s best interests “override[] any other competing considerations . . .”<sup>118</sup>

With respect to the involvement of children in justice processes, the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes emphasize that the

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<sup>116</sup> Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 Nov. 1989, Article 3(1) [hereinafter “CRC”].

<sup>117</sup> Organization of African Unity, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 1990, Article 4(1) [hereinafter “ACRWC”].

<sup>118</sup> Joint General Comment on FGM, para. 9.

dignity and privacy of every child must be respected and protected, and that the best interests of the child must be given primary consideration.<sup>119</sup>

Domestic law also requires authorities to prioritize the best interests of the child. The Constitution of Kenya states that “[a] child’s best interests are of paramount importance in every matter concerning the child.” The Children Act of 2022 details the State’s obligations regarding the well-being of children. Section 8 states: “1) In all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies – (a) the best interests of the child shall be the primary consideration ... 2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration ...”

During in-person trial monitoring, monitors observed actions by courts of law and other state actors that contravened the best interests of the child victims (see below). Further, 13 children were prosecuted under the PFGM law, including 12 who were victims of FGM. In Case No. E098/2020 in Narok, for example, a seventeen-year-old FGM victim and six other accused persons were charged with procuring FGM on themselves and failing to report FGM.<sup>120</sup> In Case No. E201/2020, a girl was charged with procuring FGM on herself.<sup>121</sup>

Like other victims of FGM, girl victims appear to be subjected to genital examinations as a matter of course (see, below, Right against Self-Incrimination and Right to Privacy), and without fully informed consent. This is particularly alarming, given the invasive nature of the exam and the vulnerability of children. The United Nations Model Law and Commentary on Justice in Matters involving Child Victims and Witnesses of Crime, which was developed to assist states in adapting their legislation to the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, states that child victims or witnesses should be subject to medical examinations “only when absolutely necessary.”<sup>122</sup> Moreover, examinations should only occur if a) a parent or guardian is present (unless the child decides otherwise); and b) written authorization for a medical examination has been provided by the court, senior police officer or the prosecution, with reasonable grounds for why the examination is necessary.<sup>123</sup>

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<sup>119</sup> ECOSOC, United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, U.N. Doc. Resolution 2005/20, July 22, 2005.

<sup>120</sup> Narok Criminal Case No. E098 of 2020.

<sup>121</sup> Narok Criminal Case No. E201 of 2020.

<sup>122</sup> UNODC & UNICEF, Justice in Matters Involving Child Victims and Witnesses of Crimes, Model Law and Related Commentary, (2009), Article 14(1), available at [https://www.unodc.org/documents/justice-and-prison-reform/Justice\\_in\\_matters...pdf](https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf).

<sup>123</sup> *Id.* at Article 14(1).

Furthermore, in some cases, girl victims were compelled to testify against their own family members. Understandably, this put them in a difficult position; they were often reluctant to implicate their relatives and testified that they “chose” to undergo FGM. Under the United Nations Model Law, the concept of protection of child victims includes “the protection of children not willing or not able to testify or provide

*Monitor’s observations:* A 13-year-old witness (who was 11 at the time she underwent FGM), took the stand as a prosecution witness. She appeared visibly afraid and intimidated. When asked by the prosecutor to state her name, the victim gave a false name and did not appear willing to testify. As the girl appeared agitated, the prosecutor asked the witness to stand down and the session was adjourned. The next day, the girl testified in a closed court session. In her testimony, in an apparent attempt to absolve her parents, she stated that she had “willingly” sought to undergo FGM without the knowledge of her parents.

information and child suspects or perpetrators who have been victimized ... or forced to act illegally or who have done so under duress.”<sup>124</sup> Moreover, the Model Law states that a child “shall not be required to testify in the justice process against his or her will.”<sup>125</sup>

Although Kenyan law recognizes the criminal culpability of children from the age of twelve,<sup>126</sup> the decision to prosecute girl victims of FGM, compel girls to testify, and the subsequent impact of criminal proceedings on girls as victims and witnesses are incompatible with the best interests of these children, which must be “the primary consideration” in all actions concerning children.<sup>127</sup>

Many accused persons were also mothers and had other children in their care. The study observed that in at least some instances, accused persons were arrested and detained pre-trial with their children; in other cases, mothers were separated from their children while in pre-trial detention. Additionally, girls who were accused persons and girls who were witnesses also had their schooling interrupted when compelled to regularly travel to court, which was often very far from their homes. Thus, the prosecutions also had various negative effects on the children of accused persons.

## C. Right Against Self-Incrimination

Article 14(3)(g) of the ICCPR provides that “[i]n the determination of any criminal charge against him, everyone shall be entitled”—among other “minimum guarantees”—“not to be compelled to testify against himself or to confess guilt.”<sup>128</sup> With respect to children specifically, Article 40(4) of the Convention on the Rights of the Child requires States

<sup>124</sup> *Id.* at Preface.

<sup>125</sup> *Id.* at Article 20(5).

<sup>126</sup> Children Act, 2022, Section 221(1).

<sup>127</sup> ACRWC, Article 4(1).

<sup>128</sup> UN General Assembly, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Article 14(3)(g) [hereinafter “ICCPR”].



Parties to guarantee that every child accused of a criminal charge should “not ... be compelled to give testimony or to confess guilt.”

Regional human rights law describes similar protections against self-incrimination. Concerning children, Article 17(2)(c) of the African Charter on the Rights and Welfare of the Child requires States Parties to ensure that “every child accused of infringing the penal law . . . shall not be compelled to give testimony or confess guilt.”<sup>129</sup> The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the “Luanda Guidelines”) provides general guidance; Section 4(c) states that “all persons under arrest” shall be afforded “[t]he right to silence and freedom from self-incrimination.”<sup>130</sup> Section 9(b) states that “[t]he right of persons undergoing questioning to remain silent shall be respected at all times. It shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling or inducing him or her to confess, to incriminate himself or herself, or to testify against another person.”<sup>131</sup>

In assessing prosecutions under the PFGM Act, the analysis found that the majority of convictions were based upon a finding that the victim underwent FGM. In these cases, a genital examination was conducted shortly after arrest, and the results were recorded on medical forms (“P3 Forms”)<sup>132</sup> that formed the basis of the prosecution’s evidence. For example, in Case 600/2020 in Kilgoris, the court expressly relied on the P3 Forms in convicting fourteen victims of FGM for failure to report FGM under the PFGM Act. In that case, a clinical officer testified that the victims were taken to a hospital to undergo genital examinations after their arrest, where “the P3 Forms were filed.”<sup>133</sup> Those forms were admitted into evidence, despite the accused persons’ refusal to provide sworn testimony.<sup>134</sup> In its judgment, the court concluded: “[f]rom the P3 Forms produced [a]s evidence, it is confirmed all of the accused has undergone Female Genital Mutilation . . . [t]here is therefore no doubt they were all aware of the exercise performed on them and must have known who performed the same.”<sup>135</sup> The court sentenced each of the FGM victims to three years of probation.<sup>136</sup>

Similarly, in Case 679/2020 in Kilgoris, the court convicted three FGM victims for failure to report FGM. There, the accused persons were arrested and taken to the hospital “for examination and P3 Form filling [sic]” after allegedly undergoing FGM.<sup>137</sup> Although the accused persons denied having undergone FGM, the court relied on their P3 Forms to convict them. It concluded: “clinical examination established that they all underwent the

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<sup>129</sup> ACRWC, Article 17(2)(v).

<sup>130</sup> ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), Apr. 28 to May 12, 2014, Section 4(c) [hereinafter “Luanda Guidelines”].

<sup>131</sup> *Id.* at Section 9(b).

<sup>132</sup> In every instance, these examinations were performed while the victim was in police custody.

<sup>133</sup> Judgment, Kilgoris Criminal Case No. 600 of 2020, Sept. 7, 2022, pgs. 3- 5.

<sup>134</sup> *Id.* at pg. 5.

<sup>135</sup> *Id.* at pg. 7.

<sup>136</sup> *Id.* at pg. 11.

<sup>137</sup> Judgment, Kilgoris Criminal Case No. 679 of 2020, Aug. 10, 2021, pg. 2.

cut. I find them guilty as charged and are convicted accordingly under Section 215 of the Criminal Procedure Code.”<sup>138</sup> It sentenced the victims to two years of probation.<sup>139</sup>

There is no evidence in the documentation that the women and girls were informed that the results of the genital examinations would be used against them in criminal proceedings. One woman who testified in the case against her stated, “*I don’t know what the doctor said or wrote.*”<sup>140</sup>

Although jurisprudence within the African human rights system has not squarely addressed whether relying on compulsory medical examinations in criminal proceedings violates the right against self-incrimination, the European Court of Human Rights (“ECtHR”) has held that obtaining evidence through compulsion, beyond just confessions, may violate the right against self-incrimination. Although not binding, this ECtHR jurisprudence has been deemed relevant by the Human Rights Committee for interpreting provisions of the ICCPR and is thus instructive. This jurisprudence is also applicable under Article 60 of the African Charter on Human and Peoples’ Rights, which requires the Commission to “draw from” other international instruments “adopted by the United Nations and African countries” and “take into consideration ... legal precedents and doctrine.”<sup>141</sup>

In *Jalloh v. Germany*, in which the ECtHR considered whether a forced medical intervention for the purpose of extracting evidence violated the right against self-incrimination, the Court delineated several factors to be taken into account: a. “the nature and degree of compulsion used to obtain the evidence; b. the weight of the public interest in the investigation and punishment of the offence in issue; and c. the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.”<sup>142</sup> The ECtHR found that the applicant’s right against self-incrimination was violated because the nature and degree of compulsion used to obtain the evidence “significantly interfered with his physical and mental integrity”; he was immobilized and chemical substances were administered through a tube in his nose, forcing him to vomit the evidence (drugs).<sup>143</sup> The Court noted that the experience “must have been humiliating for him.”<sup>144</sup> Additionally, the public interest in the conviction of a small-scale street drug dealer could not justify the bodily and mental interference; the existing procedural

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<sup>138</sup> *Id.* at pgs. 3-4.

<sup>139</sup> *Id.* at pg. 6.

<sup>140</sup> Court Proceedings, Bomet Criminal Case No. E063 of 2020, July 12, 2022.

<sup>141</sup> See also ACHPR, Purohit and Moore v. Gambia, Communication No. 241/2001, 2003, para. 48 (Stating that the Commission “is ... more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that ‘all human rights are universal, indivisible, and interdependent, and interrelated.’”).

<sup>142</sup> European Court of Human Rights, *Jalloh v. Germany*, App. No. 54810/00, July 11, 2006, para. 117.

<sup>143</sup> *Id.* at para. 118.

<sup>144</sup> *Id.* at para. 79.

safeguards were not sufficient because the applicant “could only communicate in fluent English”; and the evidence obtained was “decisive” in the applicant’s conviction.

Similarly, although *R.S. v. Hungary* did not explicitly address the right against self-incrimination in the context of compulsorily obtained physical evidence, the ECtHR in that case expressed doubt that an accused person in police custody can give free and informed consent. There, the applicant alleged that police officers’ “forcible taking of a urine sample in order to obtain evidence of a traffic offence” constituted inhuman and degrading treatment and interference with his physical integrity.<sup>145</sup> Refusing to find “free and informed consent by the applicant,” the ECtHR noted that the applicant’s “alleged consent had been given while he [was] . . . under the control of [] police officers.”<sup>146</sup> The applicant, being “in the hands of the authorities and in their complete control,” may have had no choice but to undergo the procedure.<sup>147</sup>

On a domestic level, the right against self-incrimination is guaranteed under the Constitution of Kenya), which provides that “[e]very accused person has the right to a fair trial, which includes the right to refuse to give self-incriminating evidence.”<sup>148</sup> The Kenya Court of Appeal at Mombasa issued a landmark judgment in a 2018 ruling that the use of forced anal exams to determine whether men engaged in same-sex intercourse (which is criminalized in Kenya) was unconstitutional.<sup>149</sup> In that case, appellants were arrested on suspicion of engaging in “gay activities” and subjected to anal examinations upon a court order.<sup>150</sup> Results from the examinations were used to convict the accused persons for “committing an indecent act” under the Sexual Offences Act.<sup>151</sup> The accused persons appealed, arguing that the anal examinations were nonconsensual and that their admission in criminal proceedings violated their right against self-incrimination.<sup>152</sup>

Without deciding the issue of consent, the Court of Appeal concluded that the “examinations and tests were illegally ordered and conducted” and that the “admission of the results in question by the subordinate court[] went against the appellants’ right against self-incrimination.”<sup>153</sup> Although the Court concluded that the court order authorizing the examinations was unlawful in its own right (because no proper basis existed for the order),<sup>154</sup> it expressed skepticism that the “alleged consent” by appellants “could qualify

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<sup>145</sup> European Court of Human Rights, *R.S. v. Hungary*, App. No. 65290/13, July 2, 2019, para. 4.

<sup>146</sup> *Id.* at paras. 65, 67.

<sup>147</sup> *Id.*

<sup>148</sup> Constitution of Kenya, 2010, Article 50(2)(l).

<sup>149</sup> Court of Appeal at Mombasa, Civil Appeal No. 56/2016, Mar. 22, 2018.

<sup>150</sup> *Id.* at para. 3.

<sup>151</sup> *Id.* at para. 4.

<sup>152</sup> *Id.* at para. 7.

<sup>153</sup> *Id.* at para. 33.

<sup>154</sup> *Id.* at para. 32 (The Court noted that “the appellants were not arrested in the act; there was no complainant; there was actually no reasonable explanation as to why they were suspected of having committed the offence” and thus, there was “no proper basis laid before the court to necessitate the impugned order being made.”).

as one which was given voluntarily by the appellants taking into account the pertaining circumstances.”<sup>155</sup> The Court held that the results of the examinations should be expunged from the criminal proceedings.<sup>156</sup>

Viewed in light of international and domestic jurisprudence, the use of evidence derived from genital examinations (that is, P3 Forms and accompanying testimony) to prosecute FGM victims contravenes their right against self-incrimination, particularly because the documentation indicates the examinations were likely conducted under compulsion and without proper consent.<sup>157</sup> In the aforementioned Case Nos. 600/2020 and 679/2020, for example, the accused persons were taken to the hospital for genital examinations immediately upon arrest. Even if accused persons acquiesced to those examinations, the fact that accused persons were in police custody when those examinations were performed weighs against a finding of informed consent. Indeed, in *R.S. v. Hungary*, the European Court of Human Rights refused to “conclude that there had been free and informed consent” where an accused person was catheterized to obtain a urine sample while “under the control of the police officers.”<sup>158</sup> Likewise, the Luanda Guidelines prohibit authorities from “taking undue advantage of the situation of a detained person for the purpose of compelling or inducing him or her... to incriminate himself or herself.” Although P3 Forms appear on their face to be non-incriminating, the fact that they are generated through compulsion by the authorities and then relied upon to convict violates accused persons’ right against self-incrimination.<sup>159</sup>

Analyzing the use of evidence derived from genital examinations under the factors outlined in *Jalloh v. Germany* also strongly suggests that FGM victims’ right against self-incrimination was violated. First, although “the nature and degree of compulsion used to obtain the evidence” was not as violent as in *Jalloh*, the genital examinations were conducted while the accused were in police custody, weighing against a finding of informed consent. Genital examinations are also extremely invasive and are a “significant interference with physical and mental integrity.” As in *Jalloh*, where the ECtHR commented on the “humiliation,” “pain” and “anxiety” the applicant endured, the FGM victims undergoing a genital examination almost certainly suffered a high degree of stress and shame, heightened by the fact that most had very recently undergone FGM and would thus be in a significant amount of pain. Second, there is arguably no public interest in convicting FGM victims (and is in fact a violation of Kenya’s obligations to protect

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<sup>155</sup> *Id.* at para. 32.

<sup>156</sup> *Id.* at para. 33.

<sup>157</sup> Additionally, in the absence of evidence that there was consent to the genital examinations, and with the caveat that the exams were *likely* conducted without properly informed consent and in the context of custody, it is possible that such genital exams constitute a form of cruel, degrading, and inhumane treatment that can rise to the level of torture. See *generally* Human Rights Watch, submission to the United Nations Committee against Torture on Tunisia, Apr. 5, 2016, available at <https://www.refworld.org/reference/annualreport/hrw/2016/en/109610>.

<sup>158</sup> European Court of Human Rights, *R.S. v. Hungary*, App. No. 65290/13, July 2, 2019, paras. 65, 67.

victims). Although some courts alluded to the goal of deterrence, there is no evidence that convicting FGM victims deters others from undergoing FGM. At the same time, the psychological impacts of non-consensual genital examinations are exceptionally high and disproportionate to a potential public interest in securing convictions for the sake of deterrence. Third, there are no appropriate safeguards for the use of genital examinations to obtain evidence; Kenya currently does not have guidelines around consent and confidentiality of genital examinations, and the analysis found no documentation of informed or written consent from the individuals who were examined. (See below, Right to Privacy). Last, as in *Jalloh*, the evidence adduced by the genital examinations was “decisive” in securing convictions under the PFGM Act. As the judgments in Case Nos. 600/2020 and 679/2020 illustrate, P3 Forms are a key piece of evidence underlying FGM victims’ convictions because they concern an essential element of the prosecution’s case: whether the victim underwent FGM. In convicting the accused persons in those cases, courts expressly relied on P3 Forms and testimony regarding victims’ genital examinations, indicating that that evidence “formed an integral or significant part of the probative evidence upon which the conviction was based.”<sup>160</sup> Indeed, in the six cases where the prosecution withdrew the charges, it appears that no genital examinations were conducted.<sup>161</sup>

For the reasons stated above, the use of evidence derived from genital examinations (i.e. P3 Forms) to prosecute FGM victims, without clear evidence of informed consent, contravenes victims’ right against self-incrimination.

## **D. Right to Privacy**

The right against self-incrimination, discussed above, overlaps with the right to privacy. Article 17 of the ICCPR proscribes “arbitrary or unlawful interference” with one’s privacy, family, home or correspondence and “unlawful attacks on [one’s] honour and reputation.”<sup>162</sup> Article 16 of the CRC mirrors this language, extending the protection against “arbitrary and unlawful interference” and “unlawful attacks on [one’s] honour and reputation” to children.<sup>163</sup>

The Human Rights Committee has found that compulsory medical examination can be a violation of the right to privacy. In Communication No. 1482/2006, the Human Rights Committee stated that “to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an

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<sup>160</sup> European Court of Human Rights, *Ibrahim and Others v. United Kingdom*, App Nos. 50541/08, 50571/08, 50573/08, 40351/09, Sept. 13, 2016, para. 274; See also *Kilgoris Criminal Case No. 600 of 2020*, Sept. 7, 2022; *Kilgoris Criminal Case No. 679 of 2020*, Aug. 10, 2021.

<sup>161</sup> See discussion under the section on Evidence at pg. 30.

<sup>162</sup> ICCPR, Article 17.

<sup>163</sup> CRC, Article 16.

interference with privacy.”<sup>164</sup> In that case, a German court had ordered the author to undergo a medical examination to assess her capacity to take part in legal proceedings. The Committee concluded that the court’s nonconsensual interference with the author’s privacy was disproportionate to the end sought, unreasonable, and arbitrary. Case law before the European Court of Human Rights also indicates the same. In *Pretty v. The United Kingdom*, the ECtHR noted that “the imposition of medical treatment, without the consent of a mentally competent adult patient, . . . interfere[s] with a person’s physical integrity in a manner capable of engaging the [privacy] rights protected” under the European Convention on Human Rights.<sup>165</sup> The “State’s imposition of compulsory or criminal measures . . . imping[es] on the private life of the applicant . . .”<sup>166</sup>

In the context of medical testing, the Office of the United Nations High Commissioner for Human Rights has unambiguously stated that “[t]he right to privacy encompasses obligations to respect physical privacy, including the obligation to seek informed consent” to medical testing. It has urged states to “protect the right to privacy” by “guarantee[ing] that adequate safeguards are in place to ensure that no [medical] testing occurs without informed consent.” Although these guidelines were developed to address HIV/AIDS testing, the underlying privacy principles apply with equal, if not greater, force to genital examinations, which are deeply intimate and invasive.

Regional human rights law provides similar guarantees. Article 10 of the African Charter on the Rights of the Child states that “[n]o child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.”<sup>167</sup> Further, although the African Charter on Human and Peoples’ Rights does not explicitly recognize the right to privacy, the African Commission has stated that “components of the right to privacy are . . . inferred within the African Charter on Human and Peoples’ Rights.”<sup>168</sup>

On a domestic level, the Constitution of Kenya provides every person with the right to privacy, which includes the “right not to have their person . . . searched” and “their family or private affairs unnecessarily required or revealed.”<sup>169</sup> The Kenyan Court of Appeal in the case involving compulsory medical examinations also found that such examinations contravene the right to privacy. The Court concluded that “[t]he right to privacy

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<sup>164</sup> United Nations Human Rights Committee (UNHRC), Communication No. 1482/2006, UN Doc. CCPR/C/93/D/1482/2006, para. 10.1, *available at* <http://hrlibrary.umn.edu/undocs/1482-2006.pdf>.

<sup>165</sup> European Court of Human Rights, *Pretty v. The United Kingdom*, App. No. 2346/02, Apr. 29, 2002, para. 63.

<sup>166</sup> *Id.* at para. 62.

<sup>167</sup> ACRWC, Article 10.

<sup>168</sup> ACHPR, Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, Apr. 21 to May 7, 2015, pg. 36, *available at* [http://caert.org.dz/official-documents/human\\_rights.pdf](http://caert.org.dz/official-documents/human_rights.pdf).

<sup>169</sup> The Constitution of Kenya, 2010, Article 31.

particularly, not to have one's privacy invaded by an unlawful search of the person . . . extend[s] to a person not being compelled to undergo a medical examination."<sup>170</sup>

Notwithstanding the above protections and as discussed above, Kenyan authorities regularly subjected FGM victims to genital examinations after arrest, with no indication in the documentation that the authorities obtained their consent. Indeed, the analysis found that FGM victims were subjected to genital examinations upon the request of arresting officers in at least half of the cases in the dataset (as described earlier, this is highly likely to be an undercount) but found *no documentation of written consent*. In every documented instance that a genital examination was conducted, the examinations were performed while the victim was in custody. There is no evidence that victims were empowered to withhold consent or that they were informed of the potential consequences of the examinations. In fact, as discussed above, it is highly unlikely that free and fully informed consent could be given in a situation where someone is in custody.<sup>171</sup>

For example, in Case No. 461/2020 in Narok, a fourteen-year-old FGM victim was arrested and immediately brought to a hospital by the police after undergoing FGM.<sup>172</sup> At the hospital, a genital examination was performed. The nurse who conducted the examination later testified against the victim in court, describing the girl's genitalia in detail. Similarly, in Case No. 652/2020 in Kilgoris, police officers arrested multiple individuals on suspicion of having undergone FGM. After detaining them overnight, police officers took them to the hospital, where genital examinations were performed. As in Case No. 461/2020, a clinical officer provided detailed testimony regarding the victims' genital examinations.

Also concerning is that, in at least one case, law enforcement appeared to have conducted the genital examination. In Case No. E063/2020 in Narok, an assistant chief police officer provided sworn testimony indicating that he "checked [the accused's] private parts... she had undergone FGM. She was bleeding and it was from the cut." This is doubly problematic because the officer was a) not a licensed medical professional and b) as a baseline matter, did not have valid consent. The victim was convicted of violations of the PFGM Act and sentenced to three years of imprisonment.

The lack of valid informed consent obtained in genital examinations conducted in the course of prosecutions under the PFGM Act also contravenes healthcare guidelines. World Health Organization guidelines require healthcare professionals to obtain "valid consent" from a woman who has undergone FGM "before ... conducting a genital examination," including explaining what the medical professional is about to do.<sup>173</sup> This

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<sup>170</sup> Court of Appeal at Mombasa, Civil Appeal No. 56/2016, Mar. 22, 2018, para. 27.

<sup>171</sup> See, e.g., European Court of Human Rights, *R.S. v. Hungary*, App. No. 65290/14, July 2, 2019.

<sup>172</sup> Court Proceedings, Narok Criminal Case No. 461 of 2020, July 4, 2022.

<sup>173</sup> See WHO, *Care of Girls & Women Living with Female Genital Mutilation: A Clinical Handbook*, Apr. 30, 2018 [hereinafter "A Clinical Handbook"]; See also WHO, *Female Genital Mutilation: Integrating the*

principle reflects a key tenet of genital autonomy and the right of patients to determine what happens to their own bodies.<sup>174</sup> Explicit consent has been endorsed globally, and the US Department of Health and Human Services recently issued guidelines requiring written consent for genital/pelvic examinations.<sup>175</sup>

As recognized by the ECtHR, “the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person . . . the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”<sup>176</sup> All persons are entitled to such personal autonomy and should be empowered to withhold consent to medical services like genital examinations. Kenyan authorities’ pattern and practice of subjecting FGM victims to non-consensual medical examinations while in custody contravenes victims’ right to privacy.

Additionally, authorities regularly failed to protect the identity of victims or take any measures to protect private health information from being publicly exposed. The ECtHR has held that “the protection of personal data, particularly medical data, is of fundamental importance” to the right to respect for privacy.<sup>177</sup> Relatedly, the African Commission on Human and Peoples’ Rights has also stated that victims of “ill-treatment” should have the privacy and confidentiality of information about their health protected at all times.<sup>178</sup> In the cases at hand, victims’ names and other personal identifying information appear unredacted in court documents, along with testimony and other evidence that explicitly identifies victims as having undergone FGM. These court documents often contain sensitive health information about these victims, including detailed descriptions of their genitalia and medical examinations. Prosecution witnesses also testified about sensitive medical information in open court. For example, in Case No. 461/2020, the mother of a fourteen-year-old FGM victim was arrested and charged with aiding and abetting FGM.<sup>179</sup> The nurse who performed a genital examination on the girl testified about the examination in open court, describing the girl’s genitalia and medical treatment.<sup>180</sup> The practices around how authorities handled victims’ sensitive health information contravene international standards on the protection of private health information.

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Prevention and the Management of the Health Complications into the Curricula of Nursing and Midwifery. A Student’s Manual, 2001, UN Doc. WHO/FCH/G-WH/01.4 WHO/RHR/01/17, pgs. 58, 71, 84.

<sup>174</sup> A Clinical Handbook, pg. 55.

<sup>175</sup> U.S. Department of Health and Human Services, Revisions and Clarifications to Hospital Interpretive Guidelines for Informed Consent, Apr. 1, 2024, *available at* <https://www.cms.gov/medicare/health-safety-standards/quality-safety-oversight-general-information/policy-memos-states/revisions-and-clarifications-hospital-interpretive-guidelines-informed-consent>.

<sup>176</sup> European Court of Human Rights, *Pretty v. The United Kingdom*, App. No. 2346/02, Apr. 29, 2002, para. 61.

<sup>177</sup> European Court of Human Rights, *Case of M.S. v. Sweden*, App. No. 74/1996/693/885, Aug. 27, 1997, para. 41.

<sup>178</sup> ACHPR, General Comment No. 4 on the ACHPR: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), Feb. 23 to Mar. 4, 2017, para. 30.

<sup>179</sup> Narok Criminal Case No. 461 of 2020.

<sup>180</sup> Court Proceedings, Narok Criminal Case No. 461 of 2020, July 4, 2022, pg. 4.



## E. Right to Counsel and Legal Assistance

Article 14(3)(d) of the ICCPR states that everyone facing a criminal charge has the right to “legal assistance ... and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” The Human Rights Committee has explained that “[t]he availability or absence of legal assistance often determines whether or not a person can ... participate in [the relevant proceedings] in a meaningful way.”<sup>181</sup> In *Anthony Currie v. Jamaica*, the Human Rights Committee held that Article 14(3)(d) requires legal aid to be provided “in the determination of a criminal charge where the interests of justice so require.”<sup>182</sup> The Human Rights Committee has stated that key factors for the “interests of justice” determination include “the gravity of the offense” and “the existence of some objective chance of success at the appeals stage.”<sup>183</sup> For instance, the Committee did not find a violation of the right to legal aid where the penalty for trespassing was merely a small fine,<sup>184</sup> instead of imprisonment.

The UN Principles on Access to Legal Aid in Criminal Justice Systems state that legal aid should be provided to anyone who is “detained, arrested, suspected of, *or charged with a criminal offence punishable by a term of imprisonment*”<sup>185</sup> and that judicial authorities bear the responsibility “to ensure that those who appear before them who cannot afford a lawyer or who are vulnerable are provided access to legal aid,”<sup>186</sup> noting that “[c]hildren should have access to legal aid under the same conditions or more lenient conditions than adults.”<sup>187</sup> Similarly, the CEDAW committee has stated that the provision of free or low-cost legal aid is “crucial” to ensuring access to justice for women.<sup>188</sup>

Article 7(1)(c) of the African Charter similarly enshrines “the right to defence.” The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the AchPR, elaborate on the right to legal assistance encompassed by Article 7(1)(c): “The accused ... has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment ... if he or she does not have sufficient means to pay for it.” In criminal matters, the “interests of justice”

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<sup>181</sup> Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, para. 10.

<sup>182</sup> Human Rights Committee, *Currie v. Jamaica*, U.N. Doc. CCPR/C/50/D/377/1989, Mar. 31, 1994, para. 13.2.

<sup>183</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, para. 38; Human Rights Committee, *Z.P. v. Canada*, U.N. Doc. CCPR/C/41/D/341/1988, Apr. 11, 1991, para. 5.4.

<sup>184</sup> Human Rights Committee, *Lindon v Australia*, U.N. Doc. CCPR/C/64/D/646/1995, Nov. 25, 1998, para. 6.5.

<sup>185</sup> UNODC, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3, para. 20 [hereinafter “UN Principles”] (emphasis added).

<sup>186</sup> *Id.* at paras. 20, 23.

<sup>187</sup> *Id.* at para. 22.

<sup>188</sup> CEDAW, General Recommendation No. 33 on Women’s Access to Justice, CEDAW/C/GC/33, Aug. 3, 2015, para. 36.

is determined by the seriousness of the offence and the severity of the sentence.<sup>189</sup> Meanwhile, the AchPR has emphasized that free legal aid should be extended to individuals “charged with *any crime* who cannot afford to pay the cost of being represented by a lawyer.”<sup>190</sup> Additionally, Article 8(a) of the Maputo Protocol requires that women and girls be provided “effective access [...] to judicial and legal services, including legal aid.” The African Charter on the Rights and Welfare of the Child also requires States Parties to ensure that every child accused of a crime “be afforded legal and other appropriate assistance in the preparation and presentation of his defence.”<sup>191</sup>

Domestically, Kenya’s Legal Aid Act of 2016 establishes a legal aid service for persons who are indigent and a citizen of Kenya, a child, or another enumerated criteria.<sup>192</sup> When an accused person is presented unrepresented before the court, the Legal Aid Act requires the court to “promptly inform the accused of his or her right to legal representation”; inform the accused of the right to have an advocate assigned “if substantial injustice is likely to result”; and then inform the Legal Aid Service to provide aid to the unrepresented accused.<sup>193</sup>

This analysis found that nearly half of accused persons charged under the PFGM Act were not represented, almost certainly because they could not afford counsel. Because offenses under the PFGM Act carry the possibility of a minimum three-year term of imprisonment – a severe deprivation of liberty – the accused were entitled to free legal assistance under the international and regional standards delineated above. Additionally, many of the accused persons were also part of vulnerable groups entitled to additional protection; half of the accused were survivors of FGM, and 13 accused persons were children.<sup>194</sup> These cases would appear to be exactly the types of cases where the “interests of justice” required access to legal assistance. Kenyan authorities failed to ensure that all the accused had access to legal aid, violating their right to counsel and specifically, their right to legal assistance.

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<sup>189</sup> ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle G-H: Legal Aid and Legal Assistance, *available at* <https://africanlii.org/akn/aa-au/statement/guidelines/achpr/2003-05/principles-and-guidelines-on-the-right-to-a-fair-trial-and-legal-assistance-in-africa-2003/eng@2003-05-29>.

<sup>190</sup> International Commission of Jurists, Pre-Trial Rights in Africa: A Guide to International Human Rights Standards, Sept. 2016, pg. 38, *available at* <https://www.icj.org/wp-content/uploads/2016/10/Africa-Pretrial-rights-Publications-Reports-Thematic-reports-2016-ENG.pdf> (emphasis added).

<sup>191</sup> ACRWC, Article 17(2)(c).

<sup>192</sup> Legal Aid Act, 2016, para. 36.

<sup>193</sup> *Id.* at para. 43.

<sup>194</sup> See *e.g.*, Narok Criminal Case No. E201 of 2020 (The minor/girl was not represented by counsel. She pled guilty and was sentenced to two years of probation).

## F. Article 24 “Failure to Report” and the Principle of Foreseeability

Article 24 of the PFGM Act criminalizes the failure to report an incident of FGM: “A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be, committed, fails to report accordingly to a law enforcement officer.” The analysis found that prosecutors routinely charged women and girl victims of FGM with “failure to report the commission of FGM,” *including their own cases of FGM*, under this provision. In Kilgoris, for example, 36 women and girls were charged with this offense in 8 separate cases.<sup>195</sup> Although courts appeared to recognize that these women and girls were victims, criminal culpability was still attributed to FGM survivors. In one judgment in which three women were convicted and sentenced to two years’ probation, the magistrate noted that “the accused persons herein were victims of Female Genital Mutilation. They themselves underwent the cut and by the time of their arrest, they had not made any efforts to make a report to any enforcement officer.”<sup>196</sup>

Based on High Court jurisprudence, the Kenyan authorities’ decision to prosecute women and girl FGM victims for “failure to report” their own incident of FGM appears to be an erroneous and unexpected application of the mandatory reporting requirements in Article 24, contravening the principle of foreseeability and more broadly, the principle of legality. The ECtHR has provided guidelines for assessing the foreseeability of a criminal law provision: that it should be assessed from the point of view of the individual at the time of the act,<sup>197</sup> and that the interpretation by courts must be consistent with the essence of the offence and reasonably foreseen at the time of the act.

In *KL v Republic* [2016] eKLR, in which a conviction under Article 24 was appealed, the High Court sought to comprehend the legislative intent behind the duty to report the commission of the offense of FGM and derived its purpose as: “To make the law enforcement officer who is unaware, aware, so that he or she can take steps to avoid its commission or conclusions if it is in the process, and to bring the culprits to book. It is not reporting for the sake of merely doing so. The legal duty to report does not therefore arise where the information is already within the knowledge of law enforcement officer, as it

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<sup>195</sup> Kilgoris Criminal Case No. 652 of 2020 (3); Kilgoris Criminal Case No. 653 of 2020 (3); Kilgoris Criminal Case No. E055 of 2021 (1); Kilgoris Criminal Case No. E056 of 2021 (1); Kilgoris Criminal Case No. E058 of 2021 (1); Kilgoris Criminal Case No. 725 of 2020 (4); Kilgoris Criminal Case No. 579 of 2020 (3); Kilgoris Criminal Case No. 590 of 2020 (3); Kilgoris Criminal Case No. 600 of 2020 (14); Kilgoris Criminal Case No. 679 of 2020 (3).

<sup>196</sup> Judgment, Kilgoris Criminal Case No. 679 of 2020, pg. 3.

<sup>197</sup> See, e.g. European Court of Human Rights, *Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97, and 44801/98, Mar. 22, 2001, paras. 77-78; European Court of Human Rights, *Jorgic v. Germany*, App. Nos. 74613/01, July 12, 2007, paras. 111–113.

was the case herein.”<sup>198</sup> The High Court observed that the accused were not legally obligated to report the commission of the offense of FGM on themselves because the police already knew about the event.<sup>199</sup>

The Court further took issue with the wording of the offense, noting that the lack of a criminal intent requirement (‘mens rea’) rendered the offense “vague and difficult to apply to real varied situations,” with the potential to encroach civil freedoms.<sup>200</sup> The Court stated that if the elements of the offense for the failure to report the commission of the offense of FGM were to be applied strictly, the same would occasion injustice to an accused person<sup>201</sup> and concluded it was “probably ... time the Attorney General should have Section 24 of the [PFGM Act] relooked to ensure justice to those charged under it, or have it deleted altogether.”<sup>202</sup>

A review of comparative “failure to report” provisions in other jurisdictions also suggests that the duty to report is not meant for FGM victims but is intended for third-parties such as medical personnel and other professionals. Under Section 5B of the UK Female Genital Mutilation Act 2003 Act,<sup>203</sup> health and social care professionals and teachers in England and Wales are required to report to law enforcement any ‘known’ cases of FGM among minors that they identify in the course of their professional work.<sup>204</sup> A similar guidance framework exists in Australia, which mandates that health professionals must report FGM incidences to the Department of Human Services.<sup>205</sup> In the Netherlands, the Mandatory Reporting of Domestic Violence and Child Abuse Code similarly requires

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<sup>198</sup> *KL v. Republic*, High Court of Kenya at Kapenguria, Criminal Appeal No. 18 of 2016, Nov. 3, 2016, pg. 3, *available at* <https://new.kenyalaw.org/akn/ke/judgment/kehc/2016/1113/eng@2016-11-03>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at pgs. 2-3.

<sup>201</sup> *Id.* at pg. 2.

<sup>202</sup> *Id.* at pg. 3.

<sup>203</sup> As read with the UK Serious Crime Act (2015), and elaborated in the UK, Multi-agency Statutory Guidance on Female Genital Mutilation, July 2020, *available at* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1016817/6.7166\\_HO\\_FBIS\\_BN\\_O\\_\\_Leaflet\\_A4\\_FINAL\\_080321\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1016817/6.7166_HO_FBIS_BN_O__Leaflet_A4_FINAL_080321_WEB.pdf). See Female Genital Mutilation Act, 2003; *see also* UK Serious Crime Act, 2015; UK Government, Statutory Guidance: Multi-Agency Statutory Guidance on Female Genital Mutilation, July 30, 2020, *available at* <https://www.gov.uk/government/publications/multi-agency-statutory-guidance-on-female-genital-mutilation/multi-agency-statutory-guidance-on-female-genital-mutilation-accessible-version>.

<sup>204</sup> See UK Home Office & Department for Education, Mandatory Reporting of Female Genital Mutilation: Procedural Information, Jan. 22, 2020, *available at* <https://www.gov.uk/government/publications/mandatory-reporting-of-female-genital-mutilation-procedural-information>; *see also* Malik et al., Mandatory Reporting of Female Genital Mutilation in Children in the UK, *British Journal of Midwifery*, 2018.

<sup>205</sup> South Australian Perinatal Practice Guideline Female Genital Mutilation, 2019, pg. 8, *available at* [https://www.sahealth.sa.gov.au/wps/wcm/connect/04961e804ee46be5bc81bdd150ce4f37/Female+Genit+al+Mutilation\\_PPG\\_v4.0\\_25.10.18.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-04961e804ee46be5bc81bdd150ce4f37-p4bHvDe](https://www.sahealth.sa.gov.au/wps/wcm/connect/04961e804ee46be5bc81bdd150ce4f37/Female+Genit+al+Mutilation_PPG_v4.0_25.10.18.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-04961e804ee46be5bc81bdd150ce4f37-p4bHvDe).

professionals such as doctors, teachers and youth-institution staff to report and respond to any signs of mistreatment, including FGM.<sup>206</sup>

In light of the above, the application of Article 24 to FGM victims themselves was likely unforeseeable, particularly to the women and girls themselves.

## **G. Right to Interpretation**

As part of its fair trial guarantees under Article 14, the ICCPR states that all persons charged with a criminal offense should “have the free assistance of an interpreter if [they] cannot understand or speak the language used in court;” The CRC also requires States Parties to provide the free assistance of an interpreter if a child cannot understand or speak the language used.<sup>207</sup>

At the regional level, the African Charter on the Rights and Welfare of the Child includes the right to interpretation. In Article 17(c)(ii), the Charter states, a child “shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter.”<sup>208</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa offers detailed guidance on the right to interpretation,<sup>209</sup> advising that “the right to an interpreter applies to written as well as oral proceedings. The right extends to translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.”<sup>210</sup>

The Kenyan Constitution guarantees an accused person the right to an interpreter at the time of arrest, to be informed of the reason for the arrest, the right to remain silent and the consequences of not remaining silent in a language they understand.<sup>211</sup> Furthermore, during criminal proceedings, an accused person has the right to the assistance of an interpreter without payment if the accused cannot understand the language used in the trial.<sup>212</sup>

The analysis for this report found that interpretation was required in the vast majority of cases. In Bomet, all hearings were interpreted from English. In 3 out of 16 cases, the

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<sup>206</sup> See Veilig Thuis, Make a Report: The Domestic Violence and Child Abuse Reporting Code, *available at* <https://veiligthuisz.nl/en/melding-maken-de-meldcode/>

<sup>207</sup> CRC, Article 40 (vi).

<sup>208</sup> ACRWC, Article 17 (c)(ii).

<sup>209</sup> ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle N: Provisions Applicable to Proceedings Relating to Criminal Charges, *available at* [http://hrlibrary.umn.edu/research/ZIM%20Principles\\_And\\_G.pdf](http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf).

<sup>210</sup> *Id.* at Principle N, 4(d).

<sup>211</sup> Constitution of Kenya, 2010, Article 49(1)(i)-(iii).

<sup>212</sup> *Id.* at Article 50(2)(m).

hearings were interpreted from English to Kiswahili,<sup>213</sup> while the rest were interpreted from English to Kiswahili to Kipsigis. The responses from accused persons were in Kipsigis.<sup>214</sup> In Narok and Kilgoris<sup>215</sup> proceedings were typically interpreted from English to Kiswahili to Kipsigis,<sup>216</sup> English to Kipsigis,<sup>217</sup> or English to Kiswahili.<sup>218</sup> Live interpretation was provided by court staff, most often by the court clerk/court assistant.<sup>219</sup> Professional interpreters were not observed to be available.

Researchers who have conducted research on interpretation in magistrates' courts in Kenya have concluded that most individuals who provide interpretation are not specifically trained as interpreters and are underqualified, potentially undermining fair trial rights and access to justice.<sup>220</sup>

Further, although proceedings were observed to be consistently interpreted, trial monitors observed that some accused persons, particularly those who were unrepresented, did not appear to understand the substantive legal process enough to challenge State evidence or mount a defense. Thus, while the words may have been interpreted, the meaning of proceedings was not interpreted in a manner where accused persons could mount a meaningful defense.

Additionally, court documents appeared to only be in English. All the judgments collected for this report were in English. It is unclear whether requests were made by the accused persons to be given judgments or rulings in their own language under Rule 170 of the Criminal Procedure Rules, or even if they were made aware of this right in order to exercise it. It was also observed that critical court documents such as the charge sheet and P3 forms were in English. If forms were not translated for accused persons, this could be a violation of the right to translation in the context of criminal proceedings.

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<sup>213</sup> Bomet Criminal Case No. 3971 of 2019, Bomet Criminal Case No. 3969 of 2019, Bomet Criminal Case No. 3970 of 2019.

<sup>214</sup> Bomet Criminal Case No. 3918 of 2019; Bomet Criminal Case No. 3916 of 2019; Bomet Criminal Case No. 3915 of 2019; Bomet Criminal Case No. 3919 of 2019; Bomet Criminal Case No. E063 of 2020; Bomet Criminal Case No. E612 of 2021, Bomet Criminal Case No. 3949 of 2019; Bomet Criminal Case No. 3950 of 2019; Bomet Criminal Case No. 3951 of 2019, Bomet Criminal Case No. 3952 of 2019, Bomet Criminal Case No. 3935 of 2019.

<sup>215</sup> Kilgoris Criminal Case No. E058 of 2021; Kilgoris Criminal Case No. E057 of 2021; Kilgoris Criminal Case No. 652 of 2020.

<sup>216</sup> Narok Criminal Case No. E021 of 2020.

<sup>217</sup> Narok Criminal Case No. E098 of 2020.

<sup>218</sup> Narok Criminal Case No. E091 of 2020; Trial Monitor Notes, Kilgoris Criminal Case No. 725 of 2020.

<sup>219</sup> It is common practice that the clerk who understands English, Kiswahili and mother tongue is expected to offer interpretation to the Court among their other duties. See Wangui Rachel Brenda, Training as a Minimum Requirement to Improve Court Interpretation in Kenya: A Case Study of Milimani Chief Magistrate's Court, University of Nairobi, (Dec. 2015), pg. 3, available at [https://erepository.uonbi.ac.ke/bitstream/handle/11295/94827/Wangui\\_Training%20as%20a%20minimum%20requirement%20to%20improve%20court%20interpretation%20in%20Kenya%3A%20a%20case%20study%20of%20Milimani%20chief%20magistrate%E2%80%99s%20courts.pdf?sequence=1](https://erepository.uonbi.ac.ke/bitstream/handle/11295/94827/Wangui_Training%20as%20a%20minimum%20requirement%20to%20improve%20court%20interpretation%20in%20Kenya%3A%20a%20case%20study%20of%20Milimani%20chief%20magistrate%E2%80%99s%20courts.pdf?sequence=1).

<sup>220</sup> *Id.* at pgs. 18 and 88–89.

In the constitutional case of *Kenga Hisa v Republic* [2020] eKLR, the High Court referenced a European Court on Human Rights decision, *Hacioghu v. Romania*, outlining fundamental principles of the right to interpretation in the ECHR that mirrors articles in the Kenyan Constitution:

The court reiterates that paragraph 3(e) of Article 6 states that every accused person has the right to the free assistance of an interpreter. That right applies not only to oral statements made at the trial hearing but also to documentary material and the pretrial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements.<sup>221</sup>

The Court in *Hisa* inferred that the right to interpretation and translation (and right to information under Article 35 of the Constitution) underlies fair trial rights throughout the criminal process.

Without translated documents, accused persons who could not read English would not have had adequate materials to prepare for trial, potentially undermining their right to “adequate ... facilities for the preparation of his defence,” guaranteed under Article 14(3) of the ICCPR. A judgment in a language accessible to the accused person is also critical to their ability to appeal a conviction.

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<sup>221</sup> *Kenga Hisa v Republic*, KEHC 7058 (KLR) (Quoting European Court of Human Rights, *Hacioghu v Romania* App. No. 2573 of 2003, Jan 11, 2011, para 88), available at <https://new.kenyalaw.org/akn/ke/judgment/kehc/2020/7058/eng@2020-03-10>.

## CONCLUSIONS AND RECOMMENDATIONS

### Dr. Satang Nabaneh concludes:

The analysis of 68 cases (44 cases before magistrates' courts and 24 cases before High Courts) prosecuted under the Prohibition of Female Genital Mutilation (PFGM) Act in Kenya reveals a troubling trend: the criminalization of survivors of Female Genital Mutilation (FGM). This finding directly undermines the very intended purpose of the legislation, which is to protect women and girls from this harmful practice.

A significant percentage of the accused individuals were identified as victims themselves, often girls who had recently undergone FGM. This overzealous application of the law not only fails to address the root causes of FGM but also exacerbates the trauma experienced by victims. As highlighted in the forthcoming edited volume, *Female Genital Mutilation in Africa: Politics of Criminalization* (Pretoria University Law Press, 2025), anti-FGM laws can be effective tools for addressing this practice, but they must be implemented carefully. Moreover, the use of genital examinations as evidence that a survivor has undergone FGM, often without informed consent, raises serious concerns about the rights of the accused, particularly their right to privacy and bodily autonomy. The prosecution of bystanders and premises' owners, who may have been coerced or unaware of the illegal nature of the practice, further highlights the unintended consequences of the Act.

Furthermore, the lack of access to legal representation for many accused persons, including FGM victims, highlights systemic failures in ensuring fair trials. The practice of charging individuals with "failure to report" FGM, particularly in cases where the accused are themselves victims, is a misapplication of the law that further compounds the harm and militates against 'reporting'.

From an international human rights perspective, there are several legal instruments, including CEDAW, the Maputo Protocol, CRC, ACRWC and ICCPR that protect victims of FGM from any forms of victimization, prosecutions and discrimination, and call on States to protect the dignity and privacy of survivors.

The criminalization of victims of FGM directly contradicts international human rights law's imperative to protect victims of violence and abuse. By prosecuting individuals who have undergone or suffered the debilitating consequences of FGM, the state is not only failing to provide them with justice and support but also inflicting additional harm and trauma. The prosecution of victims can also deter them from coming forward to report crimes or seek justice. This can have a chilling effect on efforts to eradicate FGM and can perpetuate a cycle of violence, victimization, silence and impunity.

International human rights law requires states to take all necessary measures to prevent and combat violence against women and girls, including FGM. This obligation includes providing comprehensive support services to survivors, such as medical care,



psychological counseling, and legal aid. Criminalizing victims undermines these efforts and sends a message that they are not deserving of the state's protection, including girls.

The CRC and the African Children's Charter, ratified by Kenya, mandate that the best interests of the child must be the foremost consideration in all actions involving the child, regardless of who undertakes them. States are obligated to ensure that all stakeholders, including parents and guardians, understand and uphold this principle when engaging with children. Subjecting girls to genital examinations, and who are frequently forced to testify, and in some cases, even faced prosecution – raise serious doubts as to whether their best interests were being safeguarded. The child's best interests should take precedence over any competing factors, such as cultural, social, or religious norms, or even the interests of the parents.

Generally, the practice of conducting genital examinations on individuals accused of FGM, without their informed consent, constitutes a serious violation of international human rights law. This practice infringes upon the fundamental rights to privacy, bodily integrity, and freedom from cruel, inhuman, or degrading treatment. Under international human rights law, individuals have the right to be free from arbitrary interference with their privacy, family, home, or correspondence. Genital examinations, particularly when conducted without consent, can be considered a form of invasive medical procedure that violates this right.

Furthermore, the use of such examinations as evidence in criminal proceedings raises concerns about the right against self-incrimination. By subjecting individuals to medical examinations, authorities may be compelling them to provide evidence against themselves. This practice is incompatible with the principle of a fair trial and the presumption of innocence. The public disclosure of sensitive medical information, such as the results of genital examinations, also further undermines the right to privacy. Such disclosures can have significant negative consequences for individuals, including social stigma and psychological harm.

## **Recommendations to the Kenyan State**

Although the enactment of the PFGM Act is a significant step in the Kenyan government's efforts to combat FGM, the current implementation of the law – as demonstrated in this report – fails to ensure that FGM survivors are protected. The arrest and prosecution of FGM victims revictimizes them and violates their rights.

In order to comply with Kenya's obligations under domestic and international law to ensure the dignity, privacy and safety of women and girls, Kenyan authorities should center FGM survivors in all actions. Recognizing that social pressure and norms are driving women and girls to undergo FGM, authorities should ensure compliance with the Victim Protection Act and consider how and when criminal justice responses are employed. Criminal justice responses should be revised accordingly so that the safety and well-being of FGM victims are prioritized above all else.

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Therefore, Kenyan authorities may wish to consider the following recommendations.

**To the National Police:**

- Provide specialized training on handling FGM cases in districts with high prevalence rates. Training should include gender-sensitive and victim-centric approaches on identifying and referring FGM victims to support services as well as evidence-gathering techniques.
- When reporting numbers of arrests made and referred for prosecution under the PFGM Act, require disaggregated numbers of who have been arrested.
- Divert FGM victims to appropriate support services and alternative justice systems instead of arresting them.

**To the Office of the Director of Public Prosecutions:**

- Withdraw all existing prosecutions against FGM victims.
- Review and revise SOPs on prosecutions under the PFGM act to avoid criminalizing FGM victims and children.
- Apply existing guidelines on diversion to FGM victims. Direct FGM victims to the appropriate support services and alternative dispute mechanisms instead of bringing them through the criminal justice system.
- Provide specialized training on handling FGM cases in districts with high prevalence rates. Training should include gender-sensitive and victim-centric approaches on prosecution and referral pathways.

**To Legislators:**

- Amend the law to provide specific language that FGM victims cannot be charged under the law under any circumstance.
- Review Article 24 of the PFGM Act - "Failure to report" and specify in whom the duty lies to report.
- Provide for differentiated culpability in sentencing provisions, in line with the Joint General Comment on FGM.

**To the Ministry of Health:**

- Develop guidelines around consent and confidentiality for genital examinations.

**To the Judiciary:**

- Consider creating or utilizing specialized courts to adjudicate cases involving FGM, where a specialized cohort of justice actors specifically trained to handle these types of cases would help ensure more gender-sensitive and victim-centric processes, and to ensure enhanced support services are more readily available.

- Provide training to judges in high-incidence areas to reject evidence that has been obtained in violation of constitutional rights.
- Quash all sentences against FGM victims.

**To Civil Society:**

- Support authorities in increasing access to support services, pro-bono legal assistance, and/or legislative reform.

**To the National Council on the Administration of Justice:**

- Coordinate efforts to strengthen access to legal aid for FGM victims to ensure fair representation in court.
- Coordinate further efforts to reform implementation of the PFGM Act.

# APPENDIX I: DATA CODING TECHNIQUES

To standardize the information obtained for each case and identify trends across cases, the data was coded under 4 broad categories as detailed below:

## A. Basic Case Details:

- First, this included specifying the jurisdiction and court for each case.
- Second, the outcome of each case was noted; cases were first coded as ongoing or completed, and then for completed cases, the outcome was noted as guilty, withdrawn or acquittal.
- Third, the length of proceedings of each case was coded. Since there was a mixture of ongoing and completed cases, for uniformity, in cases that had been concluded the length of proceedings was calculated from the date of arrest till the pronouncement of judgment and for ongoing cases, from the date of arrest till the end of monitoring period, which was March 2023.

## B. Parties:

- The number of accused persons for each case could be found through court monitoring, charge sheets, judgments and court proceedings. All accused persons were categorized into four categories according to their roles as gleaned from documentation available and monitoring; victims of FGM, cutters or those who performed FGM, those accused of owning the premises where FGM took place, and bystanders. There are 14 defendants/8 cases in which the specific roles of the accused persons cannot be determined from the available documents.
- Where a child under the age of 18 had undergone FGM and was made part of the proceedings as an accused person, they were coded as a minor accused person. Where a child under the age of 18 had undergone FGM in a case, they were coded as a minor victim of FGM. Both these determinations were made by examination of P-3 forms, court monitoring notes, official court proceedings or judgments.
- For each individual accused person, the following was noted: the age, gender, charge against them, any conviction and sentence, as well as any relationship to other co-accused and/or victims. This information was not available for every defendant.
- Legal Representation: For cases monitored in person, it was clear whether the accused persons had legal representation. For cases where data was obtained through official court proceedings or judgments, accused persons who were represented typically had the names of their lawyers listed in these documents. For those who did not have a lawyer, it was noted if they were representing themselves in court proceedings. The following codes were used: fully represented, partly represented (where midway the lawyer left proceedings, and the defendant did not have counsel), and no lawyer throughout the proceedings.

- The number of accused persons for each case could be found through court monitoring, charge sheets, judgments and court proceedings. All accused persons were categorized into four categories according to their roles as gleaned from documentation available and monitoring; victims of FGM, cutters or those who performed FGM, those accused of owning the premises where FGM took place, and bystanders. There are 14 defendants/8 cases in which the specific roles of the accused persons cannot be determined from the available documents.
- Where a child under the age of 18 had undergone FGM and was made part of the proceedings as an accused person, they were coded as a minor accused person. Where a child under the age of 18 had undergone FGM in a case, they were coded as a minor victim of FGM. Both these determinations were made by examination of P-3 forms, court monitoring notes, official court proceedings or judgments.
- For each individual accused person, the following was noted: the age, gender, charge against them, any conviction and sentence, as well as any relationship to other co-accused and/or victims. This information was not available for every defendant.
- Legal Representation: For cases monitored in person, it was clear whether the accused persons had legal representation. For cases where data was obtained through official court proceedings or judgments, accused persons who were represented typically had the names of their lawyers listed in these documents. For those who did not have a lawyer, it was noted if they were representing themselves in court proceedings. The following codes were used: fully represented, partly represented (where midway the lawyer left proceedings, and the defendant did not have counsel), and no lawyer throughout the proceedings.

### **C. Evidence/Genital Exams:**

- Genital Exams: Where P-3 forms were available for the defendant and/or where the testimony of the police officer/medical officer/the defendant themselves indicated in the monitoring or court transcript that they had been examined by a doctor for FGM, this was coded as meaning that there was a genital exam conducted.
- Where it was specifically written that the defendant did not have a P-3 form or was not examined by a doctor for a genital exam, this was coded as a case where there was no genital exam – in all of those cases the prosecution actually withdrew the case.
- Where no such information was mentioned at all, this was coded as unknown.

### **D. Law and Judgment:**

- For each case, the sections of PFGM Act that were used were coded. This information was available for all cases although not available for each defendant.

- For each completed case where a guilty verdict had been given by the court, the sentence was also noted; this was coded as imprisonment, a fine, imprisonment in default of the fine, probation, or multiple categories, etc.
- Notable comments and observations from the judgments and court proceedings were noted for qualitative analysis.

## APPENDIX II: CASE EXAMPLES



Case number	Accused persons	Nature of offense	Outcome (at the end of the monitoring period)
1	Victim 1 girl	<ul style="list-style-type: none"> <li>○ Procuring FGM C/S 20(A) As Read with Section 29 of PFGM Act.</li> <li>○ Failing To Report Commission of FGM on herself C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	Convicted and sentenced to 2 years of probation)
2	Victims 8 adults 2 girls	<ul style="list-style-type: none"> <li>○ Procuring FGM C/S 20(A) As Read with Section 29 of PFGM Act.</li> <li>○ Failing To Report Commission of FGM on themselves C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	
	Others 2 adults (married couple, wife is alleged to be the cutter)	<ul style="list-style-type: none"> <li>○ Use of Premises to Perform FGM</li> <li>○ Failing To Protect a Child from Harmful Cultural Rites C/S 14 As Read with Section 20 Of the Children's Act.</li> </ul>	
3	Victims 5 adults 1 girl	<ul style="list-style-type: none"> <li>○ Procuring FGM C/S 20(A) As Read with Section 29 of PFGM Act.</li> <li>○ Failing To Report Commission of FGM C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	
	Others 1 adult (mother of 2 adult victims)	<ul style="list-style-type: none"> <li>○ Failing To Report Commission of FGM C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	
4	Victims 1 adult	<ul style="list-style-type: none"> <li>○ Procuring FGM C/S 20(A) As Read with Section 29 of PFGM Act.</li> <li>○ Failing To Report Commission of FGM C/S 24 As Read with Section 29 Of the PFGM Act. (On herself as well as her minor sister)</li> </ul>	
	Others 4 adults (mother, aunt, maternal and paternal grandparents)	<ul style="list-style-type: none"> <li>○ Use of Premises to Perform FGM (mother)</li> <li>○ Failing To Report Commission of FGM C/S 24 As Read with Section 29 Of</li> </ul>	

		<p>the PFGM Act. (Mother, aunt, one grandparent)</p> <ul style="list-style-type: none"> <li>○ Performing FGM (cutter)</li> </ul>	
5	Victims 14 adults	<ul style="list-style-type: none"> <li>○ Failing To Report Commission of FGM on themselves C/S 24 As Read with Section 29 Of the PFGM Act</li> </ul>	<ul style="list-style-type: none"> <li>○ Convicted and sentenced to 3 years of probation</li> </ul>
6	Others 5 adults (including 1 homeowner and 4 persons present in the home during the arrest)	<ul style="list-style-type: none"> <li>○ Failing To Report Commission of FGM on themselves C/S 24 As Read with Section 29 Of the PFGM Act</li> <li>○ Failing To Report Commission of FGM C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	<ul style="list-style-type: none"> <li>○ Convicted and sentenced to 3 years of probation</li> <li>○ Convicted and sentenced to 3 years of probation</li> </ul>
7	Victims 3 adults	<ul style="list-style-type: none"> <li>○ Failing To Report Commission of FGM on themselves C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	<ul style="list-style-type: none"> <li>○ Convicted and ordered to pay a fine of Kenya Shillings 200,000 each or serve 3 years in prison</li> </ul>
8	Victims 3 adults	<ul style="list-style-type: none"> <li>○ Failing To Report Commission of FGM on themselves C/S 24 As Read with Section 29 Of the PFGM Act.</li> </ul>	<ul style="list-style-type: none"> <li>○ Convicted and sentenced to 2 years of probation</li> </ul>