June 18, 2013

**160 Girls Litigation Successful in Kenya**

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**Cases Commented on:**

*C.K. et al v The Commissioner of Police et al*, Petition No. 8 of 2012, High Court of Kenya (May 27, 2013)

On May 27, 2013, J.A. Makau of the High Court of Kenya granted judgment for the petitioners in a constitutional claim challenging the failure of the Kenyan police to conduct prompt, effective, proper and professional investigations into complaints of sexual abuse against girls (known as "defilement" under Kenyan law). I have had the privilege of working as part of the volunteer legal team for this case over the last couple of years, under the auspices of a small but mighty NGO called the Equality Effect. The Equality Effect (E2) consists of lawyers, academics, and activists primarily from Canada, Ghana, Kenya and Malawi who use domestic and international human rights laws to challenge women's and girls' inequality, including gender-based violence. This post will describe the claim and the process leading to it, and the decision and its implications in Kenya and beyond.

E2 commenced the 160 Girls project a couple of years ago at the request of Mercy Chidi, Director of the Tumaini Centre, a shelter in Meru, Kenya operated by Ripples International that provides housing and support for girls from the surrounding area who have suffered defilement. The project team participated in two meetings in Kenya in 2011 and 2012 where about 20 of us worked intensively over a period of one week stretches to develop the legal strategy and then frame the arguments and supporting documentation required for the case. We also considered the possibility of a civil claim and private prosecutions, but ultimately decided on a constitutional claim as the strategy that had the most potential for systemic impact, and that would allow the new *Constitution of Kenya, 2010* to be tested (see here). Article 2(5) of the *Constitution* provides that "The general rules of international law shall form part of the law of Kenya," so a constitutional claim also enabled us to use international human rights norms to underpin our case.

In terms of gathering evidence, social workers at the Tumaini Centre documented police failures to conduct proper investigations of defilement, and the cases of 11 girls were included in the claim as representative of a larger number of girls whose cases received inadequate police attention in Meru County (originally 160 girls but now over 200). The 11 girls included in the petition ranged in age from 5 to 15 years old, and had made complaints to the police about defilement at the hands of family members, caregivers, neighbours, employers, and in the case of one girl, a police officer. Some of the girls became pregnant as a result, some contracted sexually transmitted diseases, and some sustained physical injuries requiring surgery. In all of the cases, the girls had reported or attempted to report the incidents to the police, and the police variously responded by asking for fuel money, interrogating the victims in a humiliating manner,

neglecting to gather, process and bring to court physical and other supporting evidence, refusing to arrest the alleged perpetrators, and refusing to take some girls' complaints at all. This resulted in further harm to the girls, both psychological and in some cases physical (e.g. police caused delays in some girls receiving medical treatment, and refused to respond when the girls and their families were threatened as a result of filing defilement complaints).

In addition to providing affidavit evidence about the girls' individual cases, we also presented reports from experts on local and international policing standards, and on the harms sustained by the girls as a result of both the defilement and the lack of proper investigation. Ripples International was the 12th Petitioner in the case, and two organizations were granted party status: The Federation of Women Lawyers (FIDA) – Kenya and the Kenya National Commission on Human Rights. We worked closely with lawyers from both organizations to try to ensure that the case would have broad systemic impact for all women and girls in Kenya.

The claim was brought against three respondents: The Commissioner of Police / Inspector General of the National Police Service, The Director of Public Prosecutions, and the Minister for Justice, National Cohesion & Constitutional Affairs. The petition – which was filed on October 11, 2012, the International Day of the Girl Child – alleged that the respondents had violated several of the petitioners' rights under the *Constitution of Kenya, 2010* by failing to properly investigate defilement claims. More specifically, we alleged violations of the following articles of the *Constitution*: article 21, which provides for the state's fundamental duty "to observe, respect, protect, promote and fulfill the rights and fundamental freedoms" guaranteed in the *Constitution*; article 27, which guarantees equality and freedom from discrimination on grounds including sex and age; article 28, which recognizes the right to human dignity; article 29, which guarantees security of the person and the right not to be subjected to any form of violence, torture or cruel, inhuman or degrading treatment; articles 48 and 50, which provide for access to justice and the right to a fair trial; and article 53(1)(d), which guarantees the right of children "to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour."

The claim also alleged that the police failures violated local and international policing standards, as well as international human rights norms including those in the *Universal Declaration of Human Rights*, *The International Covenant on Civil and Political Rights*, *The Convention on the Elimination of All Forms of Discrimination Against Women*, *The Convention on the Rights of the Child*, and the *African Charter on Human and Peoples Rights*. On a systemic level, we argued that the police inaction had created a climate of tolerance and impunity that allowed perpetrators to continue to commit acts of violence without fear of legal consequences, contrary to the girls' rights under the *Constitution* and international law. We relied on authorities from international and regional human rights bodies to support these arguments, including the Inter-American Commission on Human Rights decision in *Jessica Lenahan (Gonzales) et al v United States*, which I blogged on here.

In spite of several adjournments, the respondents did not file substantive defences to the claim. The 1st and 3rd respondents filed grounds of opposition on March 6, 2013 arguing that the petition was "incompetent and bad in law" against them, and that the court lacked the jurisdiction to grant the relief sought. They also argued that the petition trivialized constitutional remedies, claiming the girls had not exhausted all available avenues before filing their petition. The 2nd respondent filed a replying affidavit on January 17, 2013 averring that the Director of Public Prosecution had directed the Inspector-General of the National Police Service to investigate the complaints. The 2nd respondent also alleged that the girls had not reported their complaints of

defilement to the police, and argued that it was wrongfully enjoined to the petition. At an appearance on April 30, 2013, the respondents were given a final opportunity to file written submissions, and Makau J.A. informed the parties that he was going to deliver judgment at the next hearing date on May 27, 2013.

In his decision, Makau J.A. began by dismissing the arguments of all 3 respondents. In response to the 1st and 3rd respondents, he noted that articles 22 and 23 of the *Constitution* provided the High Court with jurisdiction to consider the claims, which the petitioners were entitled to bring forward. The 1st and 3rd respondents' other arguments were found to have no merit, and because they did not contest the petitioners' affidavits, the facts alleged were taken as true (at pp 15-16). As for the 2nd respondent, Makau J.A. noted that the Director of Public Prosecution's direction only dealt with 2 of the 11 petitioners, and had not been followed up by the Inspector-General. There was no evidence that any action had been taken on any of the petitioners' claims, and the allegation that the girls had not actually reported the defilements to the police was, "strange enough," not supported (and indeed seems contradictory to the averred direction to investigate). There was no basis for the 2nd respondent's argument that it was wrongly enjoined to the claim (at pp 16-17).

Turning to the petitioners' claims, Makau J.A. found as facts that the girls had been victims of defilement, that their complaints were reported to police, and that the police had "unlawfully, inexcusably and unjustifiably neglected, omitted and/or otherwise failed to conduct prompt, effective, proper and professional investigations to the said complaints" (at p 19). Although the perpetrators were directly responsible for many of the harms suffered by the girls, the Court accepted our argument that the respondents' inaction had created a climate of impunity for defilement, which rendered them indirectly responsible for the harms inflicted by the perpetrators. The respondents were also directly responsible for the psychological harms flowing from the mistreatment the girls received by the police (at pp 20-21). The Court recognized that "the petitioners had to flee and seek protection and safety from the 12th petitioner" and that the police inaction led to "psychological damage experienced by the petitioners arising from their alienation from family, schools and their own communities" (at p 21).

These harms were found to amount to violations of the girls' constitutional rights under all of the articles raised by the petition. Judge Makau's decision does not go into detail with respect to each aspect of the claim, so I will focus here on the highlights.

In support of his finding that the police inaction violated article 21 of the *Constitution*, the Court cited *Van Eeden v Minister of Safety and Security*, [2002] 1 ZASCA 132, where the Supreme Court of Appeal of South Africa held that the state was responsible for allowing a serial rapist to escape from police custody, as well as *Lenahan*, above, where the US government was found to have breached a duty of due diligence to protect children from the harms of domestic violence (at pp 22-23). The Court held that "once a report or complaint is made it is the duty of the police to move with speed and promptly, commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally…" The violation of the girls' equality rights under article 27 of the *Constitution* was found to be supported by the *Convention on the Elimination of All Forms of Discrimination Against Women*, as well as decisions of the European Court of Human Rights, Inter-American Court of Human Rights and Constitutional Court of South Africa. These sources provide that sexual abuse and other forms of gender-based violence amount to sex discrimination, as do state failures to investigate claims involving such violence. Makau J.A. also held that the police failure to follow Kenyan laws including the *Sexual Offences Act, 2006* and the *Police Act*

deprived the petitioners of equal protection and benefit of the law, contrary to article 27 (at pp 26-27). Articles 48 and 50 were found to obligate the state "to ensure access to courts is not unreasonably or unjustifiably impeded and in particular where there is legitimate complaint, dispute or wrong that can be resolved by the courts or tribunals" (at p 30). Judge Makau held that the police failure "to conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners complaints, and demanding payments as preconditions for assistance ... violated petitioners right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair and in public hearing" (at p 31). The state's particular duty to protect children from abuse, codified in article 53 of the *Constitution*, as well as the state's duty to ensure proper investigations of such abuse, were found to be supported by commentary from the UN Committee on the Rights of the Child as well as case law.

In addition, Makau J.A. found that the police had failed to meet Kenyan and international policing standards, leading to a violation of article 244 of the *Constitution of Kenya, 2010*, which provides that the National Police Service shall "strive for the highest standards of professionalism and discipline among its members," "prevent corruption and promote and practice transparency and accountability," "comply with constitutional standards of human rights and fundamental freedoms," and "train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity."

By way of remedies, Makau J.A. granted a declaration that the petitioners' constitutional rights as indicated above were violated, as well as their rights under the *Universal Declaration of Human Rights*, *The Convention on the Rights of the Child*, the *African Charter on the Rights and Welfare of the Child* and the *African Charter on Human and Peoples Rights.* The Court also granted orders of mandamus directing the 1st respondent, its agents, delegates and/or subordinates "to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilement and other forms of sexual violence" and "to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this Petition" (at 34). The Court declined to grant 3 other orders sought by the petitioners: 2 further orders of mandamus directing the 3rd respondent to formulate a National Policy Framework under the *Sexual Offences Act, 2006* and to implement the guidelines from the Reference Manual on the *Sexual Offences Act*, and an order directing the respondents to regularly appear before the Court to report on its compliance with the implementation of the orders. No reasons were given for declining to make these orders. The petitioners were granted costs against the 1st and 2nd respondents jointly and severally.

This case is clearly an important legal victory for the girls. After the decision was released, Mercy Chidi's reaction was to state that now the girls will know what justice looks like. The Tumaini Centre may need to remain vigilant to ensure that the police do follow up on the girls' complaints, and of course it may now be too late to gather some of the evidence that would have supported their complaints, but this is still an important aspect of the victory. More broadly, the decision recognizes the obligation on the Kenyan police to conduct proper investigations in cases of sexual abuse, and could easily be extended to apply to other forms of gender-based violence. Beyond Kenya, the case complements burgeoning international case law, including the *Lenahan* decision as well as others from the Inter-American system, the European Court of Human Rights, and domestic courts such as the Constitutional Court of South Africa. These decisions recognize state obligations to use due diligence to investigate and prosecute gender-based violence, failing which the state will be in breach of domestic and international protections of women's and girls' rights to equality and security of the person. The 160 girls case builds on these decisions by

recognizing the access to justice implications of such failures as well. Access to justice remains a problem in cases of gender-based violence world-wide, including in Canada, as the recent Missing Women Commission of Inquiry highlighted. There have been victories in Canada too, most notably in the Jane Doe case, which found the Toronto police liable in negligence and in breach of the *Charter* for failing to warn women about a serial rapist in their neighbourhood (see *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487, 160 DLR (4th) 697 (ONSC), cited in the petition but not the decision). The 160 girls case reinforces the message to police forces everywhere that their duties cannot be disregarded in cases involving violence against women. Police will be held responsible where their inaction causes harm to women and girls, particularly when they create "climates of impunity" that allow gender-based violence to continue.