

Chapter 2

Definitions of Violence Against Women

2.1 Introduction

This chapter of the bench book sets out the definition of violence against women (VAW) in the context of international, regional, sub-regional and national legislation. It discusses the various ways in which such violence manifests itself in the lives of women and girls and how it amounts to discrimination, denying women the right to equality in all spheres of life, including marriage; property ownership and inheritance; land rights; and education and employment. Relevant human rights standards (international, regional and sub-regional) are discussed with reference to case law, and how the judiciary can apply human rights standards to address VAW. It discusses the cost implications of violence for the judiciary and law enforcement agencies that respond to VAW.

The obligations of the state to protect women from violence through the exercise of due diligence to prevent, protect, investigate, prosecute and punish acts of VAW is also discussed in the context of international, regional and sub-regional human rights law and instruments, national constitutions and legislation, as well as case law. Measures to address and eliminate VAW are discussed in the context of national legislation, national policy instruments and country reports submitted by states to the **Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)** Committee, among other measures taken by individual states.

2.2 Definition of VAW under international law Instruments

The international law definition of VAW is contained in the **UN General Assembly Declaration on the Elimination of Violence against Women (DEVAW)**.¹ This is the first United Nations (UN) document that exclusively addresses the issue of VAW, and it provides critical leadership in the global effort to combat VAW.

The Declaration defines VAW as:

*any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or in private life*²

2.2.1 Eight core incident types of VAW

For uniformity, the *Judicial Bench Book* adopts the incident types/case definitions listed below that reflect the United Nations' current recommended good practice for classifying gender-based violence (GBV) incidents. Overall, the eight core incident types of VAW³ have been listed and defined as follows:

1. **Rape/defilement:** any form of non-consensual sexual intercourse. This can include the invasion of any part of the body with a sexual organ and/or the invasion of the genital or anal opening with any object or body part.
2. **Sexual assault:** any form of unwanted sexual contact/touching that does not result in or include penetration (i.e. attempted rape). This incident type does not include rape, where penetration has occurred.
3. **Physical assault:** physical violence that is not sexual in nature. Examples include hitting, slapping, cutting, shoving, honour crimes of a physical nature (not resulting in death), etc.
4. **Psychological abuse:** name-calling, threats of physical assault, intimidation, humiliation, forced isolation (i.e. by preventing a person from contacting their family or friends). For the purposes of the incident recorder, this category includes all sexual harassment defined as: unwanted attention, remarks, gestures or written words of a sexual and menacing nature (no physical contact).
5. **Economic abuse:** money withheld by an intimate partner or family member, household resources (to the detriment of the family's well-being), prevented by one's intimate partner from pursuing livelihood activities, a widow prevented from accessing an inheritance. This category does not include people suffering from general poverty.
6. **Forced marriage:** the marriage of individuals against their will (includes 'early marriage').
7. **Female genital mutilation/cutting:** cutting healthy genital tissue.
8. **Other GBV:** This category should be used only if any of the above types do not apply. In the context of this bench book, this category includes: domestic violence; exploitation; trafficking in women; forced prostitution; violence perpetrated or condoned by the state, wherever it occurs; sexual slavery; sexual harassment (including sextortion – demands for sex in exchange for job promotion or advancement or higher school marks or grades); trafficking for the purpose of sexual exploitation; forced exposure to pornography; forced pregnancy; forced sterilisation; forced abortion; forced marriage; virginity tests and incest.

2.2.2 The connection between VAW and discrimination

The CEDAW Committee, which monitors compliance by the various state parties to CEDAW, has made a connection between ‘discrimination’ as defined in Article 1 of the Convention and VAW. The Convention defines discrimination against women to mean:

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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Connecting VAW and discrimination, the CEDAW Committee in **General Recommendation No. 19**⁴ on violence against women, has incorporated VAW in its interpretation of the CEDAW definition of ‘discrimination.’ The CEDAW Committee has identified GBV as a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality of men and women.⁵ These rights and freedoms include: the right to life;⁶ the right to equality;⁷ the right to liberty and security of person;⁸ the right to equal protection under the law;⁹ the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;¹⁰ the right to equality in the family;¹¹ the right to equality in marriage, during the marriage and at its dissolution; the right to the highest standard attainable of physical and mental health;¹² the right to work and to just and favourable conditions of work;¹³ among other fundamental rights and freedoms.

Consequently, in **Comment No. 6** of the General Recommendation, the CEDAW Committee has defined ‘gender-based violence’ (GBV) to mean, violence which is:

... directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.¹⁴

The CEDAW Committee makes an important connection between ‘discrimination’ as defined in Article 1 of the Convention¹⁵ and ‘gender-based violence’, and has made it clear that all forms of VAW fall within this definition. The definition of ‘discrimination’ contained in Article 1 of CEDAW therefore includes GBV. The CEDAW Committee elaborates on the definition of ‘discrimination’ by stating that:

Gender-based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international

*law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention.*¹⁶

This definition brings the issue of VAW within the terms of the Convention (CEDAW) and the international legal norm of non-discrimination on the basis of sex.

The preamble to the Declaration affirms that VAW is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men. It identifies such violence as one of the crucial social mechanisms by which women are forced into a subordinate position compared with men and therefore an obstacle to the achievement of gender equality, development and peace. This constitutes a violation of the rights and fundamental freedoms of women.¹⁷

Some groups of women particularly vulnerable to violence include: women belonging to minority groups; indigenous women; refugee women; migrant women; women living in rural or remote communities; destitute women; women in detention institutions; female children; women with disabilities; elderly women; and women in situations of war, internal and armed conflict.

The Commission on the Status of Women (CSW) of the Economic and Social Council (ECOSOC), as the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women, has adopted the DEVAW definition of VAW and noted the economic and social harm caused by such violence.¹⁸

2.3 Definition of VAW under regional human rights instruments

The **Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa** has adopted the CEDAW Committee definition and defines 'Violence against Women' to mean:

*... all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm including the threat to take such acts or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace times and during situations of conflict or of war.*¹⁹

By way of comparison, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Convention of Belem do Para) or the Inter-American Convention, also adopts the CEDAW Committee definition, identifies the various places where such violence takes place and elaborates the various manifestations of such violence. It defines VAW thus:

Violence against women shall be understood to include physical, sexual and psychological violence: that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the work place, as well as in educational institutions, health facilities or any other place; and that is perpetrated or condoned by the state or its agents regardless of where it occurs.²⁰

2.4 Definition of VAW under national laws

Kenya, Rwanda, Tanzania and Uganda are signatories to CEDAW and various regional and international legal instruments that promote gender equality and condemn discrimination and VAW. This renders the internationally acceptable definitions of VAW applicable in these jurisdictions. While overall there is no national legislation which specifically deals with VAW comprehensively, there are various legislations that define and address the various manifestations of violence suffered by women.

2.4.1 Kenya

Statutory law in Kenya does not contain a definition of VAW. However, the **Protection Against Domestic Violence Act, 2015**²¹ recently enacted by parliament, specifically addresses domestic violence. In section 3, the Act gives an elaborate definition of violence and the various acts that constitute such violence, while section 4 gives a wide range of relationships constituting a ‘domestic relationship’ to which the Act applies.

Section 3 of the Protection against Domestic Violence Act defines ‘violence’ as:

An abuse that includes; child marriage, female genital mutilation (FGM), forced marriage and forced wife inheritance, interference from in laws, sexual violence within marriage, defilement, virginity testing and widow cleansing; damage to property; depriving the applicant of or hindering the applicant from access to or a reasonable share of the facilities associated with the applicant’s place of residence; emotional or psychological abuse; Physical, sexual, verbal and economic abuse, intimidation, incest, harassment, stalking and emotional or psychological abuse, forcible entry into the applicant’s residence where parties do not share the same residence and any other conduct against a person, where such conduct harms or is likely to cause imminent harm to the safety, health or well-being of the person.

Section 4 provides that:

for purposes of the Act, a person shall be deemed to be in a domestic relationship if the person; is married or has previously been married to that other person; has been in a marriage with the other person which has been dissolved; has a child with that other person or has a close personal relationship with the person; is or has been engaged to get married to that person; is a family member of that other person or is living in the same household with that person.

2.4.2 Rwanda

VAW is not specifically defined in any statute in Rwanda. However, **Law No. 59/2008 of 2008 on Prevention and Punishment of Gender-Based Violence** defines GBV in Article 2.1 as:

any act that results in a bodily, psychological, sexual and economic harm to somebody just because they are female or male, and that results in the deprivation of freedom and negative consequences, which is exercised within or outside the household.

2.4.3 Tanzania

Statutory law in Tanzania does not contain a definition of VAW, nor that of GBV.²² In lieu of a definition contained in a domestic law, the provisions of the international and regional human rights instruments that Tanzania has signed provide guidance on what VAW or GBV entail. The legal protection is primarily in the Penal Code, as amended by the **Sexual Offences Special Provisions Act, 1998 (SOSPA)** and the **Law of Marriage Act**.

The SOSPA was enacted as an Act to amend several written laws to make provision regarding sexual and other offences and to further safeguard the personal integrity, dignity, liberty and security of women and children. However, it does not contain a definition of VAW or of domestic violence.

Box 2.1 Offences that constitute violence against women – Tanzania Penal Code

- (a) Rape and attempted rape, defilement of idiots and imbeciles;
- (b) Abduction of women under 16 years of age, gross indecency between persons;
- (c) Sexual exploitation of children, defilement by husbands of women under the age of 15 years;
- (d) Sexual harassment and grave sexual abuse, sextortion, procuring women and girls for prostitution, trafficking in persons;
- (e) Indecent assault on women;
- (f) Common assault and assault causing actual bodily harm.

The SOSPA criminalises various forms of GBV including rape, sexual assault and harassment, prostitution, female genital cutting and sex trafficking, while the Law of Marriage Act, section 66, prohibits a spouse from inflicting corporal punishment on the other spouse. However, the law does not define ‘corporal punishment’ and is also silent on economic deprivation. Cases of VAW by intimate partners are dealt with as ordinary criminal offences under the Penal Code,²³ as amended by the SOSPA.

2.4.4 Uganda

There is no definition of VAW in the law in Uganda. However, the **Domestic Violence Act, 2010** defines domestic violence. ‘Domestic violence’ is defined in section 2 to include economic abuse and a wide range of other behaviours. It constitutes any act or omission of a perpetrator which:

- (a) harms, injures or endangers the health, safety, life, limb, or well-being, whether mental or physical, of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse;
- (b) harasses, harms, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security;
- (c) has the effect of threatening the victim or any person related to the victim by any conduct mentioned in paragraph (a) or (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the victim.

‘Domestic relationship’ is defined in section 3 to mean: ‘a family relationship, a relationship similar to a family relationship, or a relationship in a domestic setting that exists or existed between a victim and a perpetrator’.

The definition of ‘economic abuse’ under the Act includes:

- (a) deprivation of all or any economic or financial resources to which the victim is entitled under any law or custom, whether payable under an order of a court or otherwise or which the victim requires out of necessity including, but not limited to:
 - (i) household necessities for the victim and his or her children, if any;
 - (ii) property, jointly or separately owned by the victim; or
 - (iii) payment of rent related to the shared household and maintenance.
- (b) disposal of household effects, alienation of assets whether movable or immovable, shares, securities, bonds or similar assets or property in which the victim has an interest or is entitled to use

- by virtue of the domestic relationship or which may be reasonably required by the victim or his or her children or any other property jointly or separately held by the victim; and
- (c) prohibiting or restricting access to resources or facilities which the victim is entitled to use or enjoy by virtue of the domestic relationship, including access to the shared household.

The **Domestic Violence Act, 2010**²⁴ specifically addresses domestic violence. The application of this legislation is broad and extends to a variety of family and domestic relationships, thereby promising protection for women victims of violence.

2.5 Manifestations of violence against women in East Africa

Article 2 of the *Declaration on VAW* identifies the various manifestations of VAW in three broad categories. These include, but are not limited to:

- (a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation (FGM), and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; and
- (c) physical, sexual and psychological violence perpetrated or condoned by the state wherever it occurs.

VAW is a cycle of abuse that manifests itself in many forms throughout women's lives (see Table 2.1) and may be perpetrated either by the family, strangers or the community. At the very beginning of her life, a girl foetus may be the target of sex-selective abortion or female infanticide in cultures where son preference is prevalent. In infancy, a girl child is not spared this violence. She may suffer malnutrition due to denied access to certain foods and often nutritious foods such as eggs, which in certain cultures should not be eaten by women. Some of the violence suffered in childhood and adolescence includes female genital mutilation (FGM) and other harmful traditional practices such as child marriages, thereby denying the girl child the right to education. At this point in their lives, girls may be subjected to sexual harassment and abuse, including defilement, incest, sexual harassment in the workplace and trafficking in persons, among other forms of violence.

Table 2.1 Summary of life phases of violence against women

Life phases	Types of violence
Pre-birth	Battering during pregnancy, denial of medical services, coerced pregnancy, rape during war, conflict or riots or caste rapes, sex-selective abortion e.g. abortion of female foetuses
Infancy	Differential access to food and medical care for girl infants (death from malnutrition), emotional and physical abuse, female infanticide and trafficking
Childhood	Child marriages, commercial sexual exploitation, differential access to food, medical care and education, female genital mutilation and other forms of harmful traditional practices, honour killings, incest, sexual abuse, human trafficking
Adolescence	Acid crimes, dating and courtship violence, female genital mutilation and other forms of harmful traditional practices, forced marriage, commercial sexual exploitation, honour killings, rape, sexual abuse in the workplace or other public places, sexual harassment, human trafficking, discrimination in ownership and inheritance of property, including land
Adult period	Abuse by strangers and intimate partners, acid crimes, dowry harassment, harassment/murders, economic violence, forced marriage, commercial sexual exploitation, rape, honour killings and other harmful traditional practices, domestic violence, including marital rape, psychological abuse, human trafficking, stalking, sexual harassment, sexual harassment in the workplace, and denial of ownership and access to property/land and inheritance rights and forced widow inheritance
Old age	Abuse of widows and elder women, denial of shelter or food, loss of economic control, widowhood rituals/forced wife inheritance, rape, forced homelessness, denial of access to land, denial of property ownership and inheritance rights, destruction of personal effects and murder
Cross-cutting ages	Emotional and physical abuse of females, female infanticide, FGM and other forms of harmful traditional practices, commercial sexual exploitation, sexual harassment and abuse, psychological abuse and honour killings

Adapted, with modification, from UN Office on Drugs and Crime (2010), *Hand Book on Effective Police Responses to Violence against Women*, Criminal Handbook Series, United Nations, New York, page 16.

In the adult phase of their lives, women and girls suffer domestic violence, including dowry harassment; sexual and economic abuse by spouses/intimate partners and strangers; incest; and marital rape, assault and battery by spouses/ intimate partners and family members, which may end up in the death, physical or psychological maiming of the victim.

The government can perpetrate VAW through state agents in places of confinement or detention (prisons and police stations), and even in refugee

camps hosting women displaced as a result of war or internal conflict. Such violence can be physical (assaults), psychological (humiliation, verbal abuse and insults, threats of violence and injury, denial of food) or sexual (rape and threats of rape and defilement of the girl child).

Persons in positions of authority in private institutions like schools and hospitals can also perpetrate VAW. Such violence includes rape and sexual harassment, including sexual harassment in the workplace, among other places. The case of *Onesphory Materu v Republic*²⁵ (*Tanzania*) demonstrates how the police can subject women held in police custody to sexual violence.

The government can also perpetrate VAW through laws and policies which promote gender stereotypes, inequality and discrimination.

Such laws and policies deny women equality in many areas, including ownership and inheritance of property/land, marriage, division of matrimonial property at the end of marriage, access to justice and equal protection of the law. International trafficking and violence against migrant workers are some of the other forms of violence suffered by women, which are on the increase in the world.²⁶ The 2014 *Global Report on Trafficking in Persons* by the UN Office on Drugs and Crime (UNODC) shows that one in three known victims of human trafficking is a child – a 5 per cent increase compared to the 2007–2010 period; girls make up two out of every three child victims and, together with women, account for 70 per cent of overall trafficking victims worldwide.²⁷ A particularly vulnerable group is that of displaced women and women in armed conflict situations, who suffer sexual violence including rape.

In times of war and internal conflict in any country, women and children, especially girls, are more vulnerable than before and become easy targets for sexual and gender-based violence (SGBV). In such times, camps for refugees and internally displaced persons are established to provide refuge for the vulnerable, and to generally provide food, water, shelter and other necessities. Conditions in these settings can be extremely difficult, leaving women and children open to abuse and human rights violations. The most common abuses are rape, defilement of children and other sexual and gender-based violence perpetrated against women by men, including law enforcement agents who misuse their power and take advantage of the very people that they are supposed to protect, subjecting them to all manner of sexual violence. Some displaced male residents in the camps are also a threat to women's safety in those camps. They too perpetrate SGBV against displaced women and children by raping or coercing women and girls into providing them with 'sexual services' in exchange for their 'protection'. Apart from exposing women to HIV/AIDS and other sexually transmitted diseases, such rape could result in unwanted pregnancies and death arising from failed abortions.

In old age, women continue to suffer violence. Such violence includes: rape, forced homelessness and denial of property rights, denial of access to property, and abuse of widows by forcing them to undergo cultural widowhood rituals like forced inheritance by a male relative of a deceased husband. This exposes widows to HIV/AIDS and other sexually transmitted diseases (STDs). Killing by burning of elderly women suspected to be witches is another form of violence experienced in old age; this is prevalent in the Kisii region of Kenya and in some parts of Tanzania.

It is not possible to come up with a comprehensive list of all the manifestations of violence against women, as the list continues to grow with the emergence of new forms of violence such as stripping women naked for 'public indecency' (such as wearing trousers and short or tight dresses). New technologies also continue to generate new forms of violence, such as internet or mobile telephone stalking, among other forms of violence.

2.6 Statistics of prevalence of VAW in East Africa

Statistics collected over the years show that VAW, in the various forms in which it manifests, is prevalent in East Africa.²⁸

2.6.1 Kenya

According to the Kenya Demographic and Health Survey, 2010 (KDHS), 45 per cent of women aged 15–49 years reported having experienced either physical or sexual violence, with 7 per cent having experienced sexual violence alone while 14 per cent had experienced both physical and sexual violence.²⁹ A similar survey carried out in the year 2014³⁰ found that physical violence was more prevalent than sexual violence, and women were more likely to experience physical violence committed by their spouse/intimate partner than men. The survey further found that women from the Western, Nyanza and Nairobi regions of Kenya reported higher levels of physical and sexual violence committed by a spouse/partner, as opposed to women in other regions. Approximately 50 per cent had experienced physical violence as opposed to 12 per cent in the North Eastern region. Thirty-eight per cent (38 per cent) of married women aged 15–49 reported having experienced physical violence committed by their husbands/partners, as opposed to 9 per cent of married men in the same age bracket who reported that they had experienced violence committed by their wife/partner. It also found that about 14 per cent women and 4 per cent men had reported having experienced sexual violence committed by a spouse/partner.³¹

According to the survey, FGM was almost universal in the North Eastern region of Kenya, at 98 per cent, compared with Nyanza at 32 per cent, Rift

Valley at 27 per cent, the Eastern region at 26 per cent and the Western region registering the lowest prevalence at 1 per cent. However, the survey found that the practice of FGM is on the decline in the country, because the 1998 KDHS had found that 38 per cent of women were reported to have been circumcised as opposed to 32 per cent in 2003, 27 per cent in 2008–2009 and 21 per cent in 2014.³²

2.6.2 Rwanda

VAW and GBV are prevalent in Rwanda, as is the case in other parts of East Africa. The Rwanda Demographic and Health Survey, 2010 (RDHS) reported that two in five women (41 per cent) reported that they had suffered from physical violence at least once since they were 15 years old.³³ One in five women (22 per cent) had suffered from sexual violence sometime in the past. In all cases, the perpetrators of the violence, whether physical or sexual, were the husband or partner. A baseline study conducted by Rwanda Men's Resource Centre (RWAMREC) in 2013 revealed the following:

- women constitute the majority of victims of spousal murder (59.7 per cent), while men are the majority among spousal poisoning (81.1 per cent) and suicide (67.2 per cent);
- women and girls are six times more at risk of GBV compared with men and boys;
- sexual abuse, physical assault and economic deprivation are the most dominant forms of GBV in Rwanda;
- rape/sexual violence in general and deprivation from resources are higher in rural settings (respectively 58.2 per cent and 10.2 per cent) than in urban areas (54.7 per cent and 9 per cent respectively);
- conversely, physical assault and insults and intimidations are slightly higher in urban areas than in rural ones; in terms of place, acts of GBV among adults are at 83.2 per cent and 51 per cent for children in domestic settings;
- the level of child abuse in the street significantly increases – from 1.9 per cent among adults to 26.5 per cent among children; and
- in the majority of cases, GBV is perpetrated by intimate partners (41.4 per cent) and neighbours (21.2 per cent).³⁴

2.6.3 Tanzania

Cases of VAW and girls in Tanzania are widespread. The 2010 Tanzania Demographic and Health Survey (TDHS) revealed that 45 per cent of women aged 15–49 years reported having experienced either physical or

sexual violence.³⁵ The survey further found that one in every two married women aged 15–49 years reported having experienced one or a combination of emotional, physical and sexual violence at the hands of their current or former husbands,³⁶ while four in every ten men agreed that wife beating was justified.³⁷ Older women in Tanzania experience witchcraft-related violence and abuse,³⁸ and research by the government and non-governmental organisations (NGOs) working on human rights issues found that witchcraft-related killings targeting older women were on the increase in Tanzania.³⁹ The killing of people with albinism and thereafter sale of their body parts is another form of violence that has emerged affecting both men and women.

Cultural practices and attitudes which condone VAW pose a challenge in preventing the abuse.⁴⁰ Girls and women in some parts of Tanzania suffer FGM, despite the prohibition of the practice by the **Sexual Offences Special Provisions Act, 1998**.⁴¹ The Act prohibits the practice of FGM for girls under the age of 18 years. However, since it does not prohibit FGM for persons above the age of 18 years, FGM can be justified for adult women, who may be subjected to the practice in the name of tradition.

2.6.4 Uganda

In Uganda, violence against women and girls is prevalent in some areas. The Uganda Demographic and Health Survey (UDHS) of 2011 provides credible nationwide data showing that 50 per cent of women and 55 per cent of men aged 15–49 years have experienced physical violence at least once since the age of 15 years, while 27 per cent and 22 per cent respectively reported having experienced physical violence within the 12 months preceding the survey.

Concerning sexual violence, 28 per cent of women and 9 per cent of men aged 15–49 years reported having experienced sexual violence at least once in their lifetime. Overall, six out of ten married women and four out of ten married men aged 15–49 years reported having received emotional, physical or sexual violence from a spouse, while among married women and men who had experienced spousal violence (physical or sexual), 37 per cent and 26 per cent respectively had reported it to the authorities.⁴² The practice of FGM is prevalent among the Pokot and Sabinu communities in Uganda.

2.7 Consequences of violence against women

The most crucial consequence of violence against women and girls (VAWG) is the denial of fundamental and human rights, as set out in international human rights instruments as well as national constitutions and legislation. The Beijing Declaration and Platform for Action adopted at the Fourth World Conference (BPfA) (1995)⁴³ affirmed that VAW is both an impediment to

the full enjoyment by women of their human rights and a manifestation of the historically unequal power relations between men and women. The BPfA identified the prevention and eradication of such violence as critical to the achievement of the goals of gender equality, development and peace.

VAW has a significant impact on sustainable development by imposing costs and consuming resources. Goal number five (5) of the 2030 Agenda for Sustainable Development seeks to achieve gender equality and empower all women and girls by, among other things, eliminating all forms of VAWG in the public and private spheres.

The CEDAW Committee, which monitors how various countries have implemented the Convention,⁴⁴ has contributed significantly to the recognition that VAW is a human rights violation. Since the definition of discrimination in CEDAW Article 1 includes VAW,⁴⁵ such violence is therefore a violation of the right of women to non-discrimination. It denies them equality in many spheres of life – social, economic and political. Such inequality often manifests itself in many areas, including marriage, particularly in the area of division of matrimonial property, unequal inheritance rights by women, and unequal land rights.

2.7.1 VAW and property

In matrimonial property disputes – where property acquired during the subsistence of a marriage is registered in the sole name of the husband or in the joint names of the spouses, without indicating the shareholding – women have had the uphill task of proving the basis of their claim to such property. This was in the case in Kenya with *Kivuitu v Kivuitu*,⁴⁶ where the subject property purchased during the subsistence of the marriage had been registered in the joint names of the two spouses without indicating the shareholding. The Court of Appeal of Kenya decided the case at a time when there was no legislation governing matrimonial property. The court held the view that if a husband acquires property from his salary or business and registers it in the joint names of himself and his wife, without specifying any proportions, the courts must take it that such property being a family asset is owned in equal shares. The other members of the court were in agreement, and the wife was awarded a 50 per cent share in the disputed property.

Women are denied the opportunity to inherit the property of their deceased parents. If the subject property is land, sons invoke tradition to discriminate against and disinherit their sisters, arguing that according to tradition sons inherit their fathers' land, while daughters are expected to leave the community and get married and thus inherit from their husbands. Several succession cases demonstrate this position – for example, *the estate of Lerionka Ole Ntutu*⁴⁷ and others reproduced later in this bench book,

whereby courts have had to pronounce on customary and other laws which deny daughters the right to inherit their father's land.

2.7.2 VAW and physical/bodily integrity

When violence takes the form of physical assaults, it results in injuries ranging from bruises and fractures to chronic disabilities – such as partial or total loss of hearing or vision and limbs. Some victims are subjected to burns arising from acid attacks or hot water, or may be struck using steel objects leading to death or permanent disfigurement.

Violence sometimes results in the death of victims and is therefore a violation of the victim's right to life and security of person guaranteed by the Universal Declaration of Human Rights (UDHR Art. 3), subsequent human rights treaties, as well as national constitutions and legislation. Apart from sexual violence, rape and defilement exposing victims to HIV/AIDS, such violence can lead to unwanted pregnancies and the dangerous complications arising from illegal abortions. In the case of domestic violence, women in violent relationships are less able to use contraceptives or negotiate safe sex. They therefore run a high risk of contracting sexually transmitted diseases including HIV/AIDS, which may be passed on to the unborn child.

VAW leads to far-reaching physical and psychological consequences. Although physical injury represents only a part of the negative health consequences on the women, it is among the more visible forms of violence. This form of violence also has adverse effects on the mental health of women victims.

Severely abused (battered) women are more likely to suffer stress and stress-related diseases, such as post-traumatic stress syndrome, panic attacks, depression, sleeping and eating disturbances, low self-esteem and hypertension, among other complications. Some women suffer acute depression, but are not able to escape from the violent relationship and end up committing suicide;⁴⁸ others end up killing their abusers when they can no longer withstand violence.⁴⁹ Unfortunately, women who are processed through the criminal justice system as offenders/accused persons cannot get justice because substantive and procedural criminal law is gender blind and the women are judged according to male standards and expectations. The two main defences available to perpetrators of homicides – provocation and self-defence – are based on male behavioural practices. Consequently, court decisions and pronouncements often indicate that the guardians of justice (judicial officers) have little insight into what a woman considers a serious threat to her life, nor the extent to which certain actions provoke a reasonable woman. Nevertheless, there is evidence that judicial officers the world over are progressively gaining insight into the need to mainstream gender into

judicial processes and the effect of integrating women's experiences into the adjudication process, even when women are before court as 'the perpetrators' of violent crime.

Box 2.2 Anieta Natasha Ferreira & Others V S [2004] 4 All Sa 373

Facts

The appellant, together with two others were found guilty of killing her husband – Mr Parkman – when the deceased was lying drunk on a couch. The appellant had hired two men who would kill Mr Parkman for money. The men killed Mr Parkman by strangulation using their hands while the appellant waited in another room.

The circumstances under which the appellant killed her husband were that she had continuously suffered gross mental, physical and sexual abuse during the lifetime of her relationship with her husband. Two weeks before the murder, the appellant had been assembled before 15 black labourers of the deceased and was told to remove her underwear and expose her genitals to the labourers. She refused to oblige to the instruction of her deceased husband. He shouted verbal abuse at her – '*You are so useless that not even blacks want to have sex with you*'. Following this event, her husband raped her later that evening and further threatened to hire black men to rape her if she ever tried escaping from him again.

During the trial, on behalf of the appellant, two employees from the Centre for the Study of Violence and Reconciliation in Johannesburg gave expert and factual evidence to the effect that on the facts presented to them (the experts), they considered that the first appellant's reaction to the deceased's abuse, including her decision to have him killed, fitted a well-known pattern of behaviour of abused intimate partners. In accordance with that pattern, the mind of the abused partner is eventually so overborne by maltreatment that no realistic avenue of escape suggests itself other than homicide.

The trial judge convicted the appellant on her own plea of guilty and sentenced her to life imprisonment in accordance with the Criminal Law Amendment Act, which is to the effect *inter alia* that a court shall sentence a person it has convicted of murder to imprisonment for life unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The trial judge found that: i) the murder was premeditated, and ii) that there were no substantial and compelling circumstances in which a lesser sentence other than life imprisonment could be imposed.

The appellant appealed to the Supreme Court of South Africa against the sentence.

Issue on appeal:

- Whether there was in existence substantial and compelling circumstances in the facts presented to court to warrant a lesser sentence than that of life imprisonment.

The Supreme Court of Appeal criticised the trial judge's interpretation of the expression 'substantial and compelling circumstances' in sentencing the appellant to life imprisonment. The court stated that the circumstances envisaged by the expression need not be exceptional, but must provide 'truly convincing reasons' or 'weighty justification' for imposing less than life imprisonment, or they must induce the conclusion that the prescribed sentence would in the particular case be unjust or disproportionate to the crime, the offender and the legitimate needs of society.

Based on the above interpretation, the Appeal Court found that on the facts that were presented before the trial judge, there existed substantial and compelling circumstances that warranted a lesser sentence than that of life imprisonment. The facts and evidence that were pivotal for the finding of the Appeal Court were that:

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- The appellant had been subjected to a grossly abusive seven-year intimate relationship by the deceased. She had no way of escape as every time she tried to escape, the deceased would trail her and bring her back to his house and punish her. The court found that the sum total of the sexual, physical and moral torture, together with the threat of exposing her genitals to labourers, had an influence on the appellant's state of mind.
- The court further found as a fact that a proper analysis and understanding of the evidence shows that what the first appellant subjectively did feel and what she experienced and eventually did conformed to a victim's behaviour in response to grave abuse to a similar pattern of abused partners.
- The court emphasised that the court ought to understand the subjective state of mind of such an abused partner.

The court held *inter alia* that:

- There are substantial and compelling circumstances which would make the prescribed sentence unjust in the case of the first appellant.

The sentence of life imprisonment was reduced to six years' imprisonment.

Ratio decidendi: A history of grave abuse by an intimate partner is a mitigating factor in arriving at an appropriate (and just) punishment for the abused partner who has killed her abuser.

Lessons learnt: The court admitted and considered the evidence of expert witnesses on the effect of abuse, in adjudicating a domestic violence case. This is a clear message that domestic violence is not an exclusively legal issue, and a harsh sentence would not serve justice.

Uganda V NA, MSK-CR-AA-132/2013, High Court of Uganda at Masaka

Facts

The accused was charged with the offence of murder contrary to s.188 of the Penal Code Act of Uganda. The 18-year-old accused person had murdered her father, who she claimed had repeatedly sexually abused her for over three years. The accused's reports of the abuse to her mother and relatives did not yield any action. Instead, the family decided to conceal the accused's continued abuse.

At trial, the accused pleaded guilty to the offence.

During sentencing, the convict – to mitigate her sentence – informed the court of her father's recurrent sexual abuse, as well as her family's concealment of her ordeal.

In sentencing the accused, the trial judge held that:

- Whereas the convict had committed an unlawful act, she had for all intents and purposes been the victim in the circumstances. Though the deceased had a moral obligation to protect the convict, he had instead continually abused her, thereby transforming from protector to perpetrator.
- The state and its agencies had equally failed in their international and constitutional obligations to protect the convict, and in those circumstances the convict was deserving of empathy and support rather than punishment as she has to carry psychological scars for life.

Contribution to jurisprudence/point to note:

- Realising that a harsh sentence would not serve justice in the case, the court exercised its discretion and gave the accused a lenient sentence because, although she was before court as a perpetrator of violence, her violent act was in reaction to the extreme abuse she suffered at the hands of the deceased.
- In arriving at an appropriate sentence, the judge placed this case within a broader context recognising that 'her violence' was not an exclusively legal issue.

Box 2.3 Uganda v Jackline Uwera Nsenga, High Court of Uganda at Kampala, Criminal Session Case No 312 Of 2013

Summary of facts

Jackline Uwera Nsenga (accused) was charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of offence were that the accused on the 10th day of January 2013, with malice aforethought, caused the death of one Nsenga Juvenal, her husband. The accused denied the charges and the prosecution called 13 witnesses in a bid to prove its case.

The evidence was as follows. On the night of 10th January 2013 at about 09.00pm, the accused returned to their residence in Bugolobi, where she parked her car outside the gate and waited. She pressed the bell and her husband, Juvenal Nsenga (hereinafter referred to as 'the deceased'), came to open the gate. It was during the process of opening the gate that the accused's car knocked it open and overran the deceased. The deceased was then dragged on the rough surface of the driveway for a distance of 10.3 metres. He sustained multiple injuries on his body. Immediately after the incident, the accused sought assistance from some people to put the deceased into the same vehicle and delivered him to Paragon Hospital in Bugolobi. About five hours later, Nsenga was pronounced dead at the said hospital. Given the marital acrimony between the deceased and accused, it was the prosecution's contention that the accused intentionally knocked down the deceased, hence the charge of murder.

In her defence, the accused presented evidence from five witnesses. The defence case was that although the accused admitted to overrunning her husband with the car she was driving, she didn't intend to kill him. It was her testimony that the car simply jerked and ended up knocking him down. The couple had been married since 1994 and blessed with two children.

Issues and resolution

The prosecution discharged, beyond reasonable doubt, the burden of proving that there was death; the death was unlawful; the death was caused with malice aforethought; and that the accused person participated in or caused the death of the deceased. Evidence of the state of the accused and deceased's marriage was adduced in proving malice aforethought.

The court declined to find that the state of their matrimonial relationship was a manifestation of the ordinary wear and tear typical in marriages. There were very grim marital problems that had gone on for over ten years, had become chronic and life-changing, leading the accused person's search for solutions including counselling with family members and prayers, among other interventions. The conduct of the accused, before, during and after knocking down Nsenga, offered corroboration to the deceased's dying declaration that the accused knocked him down with the car.

Conviction

The accused was found guilty and convicted, as charged, of the offence of murder contrary to section 188 and 189 of the Penal Code.

Sentence

The accused, seeking the lenience of court, stated that she was a first time offender, had two children and was remorseful. Before sentencing her to a period of 20 years in prison, the court noted the fact that the accused person had not enjoyed her marriage, especially in the last ten or so years. The couple had two children and the accused was the surviving parent. If the maximum penalty as prescribed in respect of the offence was to be imposed, the children would suffer even more than any of the affected persons in this whole situation. The court further noted that violence results in physical injury, psychological trauma, and at times death, as in the present case, and yet the consequences can cross generations and truly last a lifetime for the family and society at large. These components of society remain traumatised by the

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gruesome murder, regardless of the degree of the generation of the marital relationship. The court was of the view that the accused should have sought a lawful, legally acceptable way of bringing her frustrations to an end. This was a family matter that got out of hand; the message is that violence must be stopped. Couples are strongly advised to seek guidance and help from family members, friends and relevant institutions to help resolve their differences.

Ratio decidendi

In proving malice aforethought, reliance can be placed on circumstantial evidence for a conclusion that an accused person bore an intention to kill.

Contribution to gender jurisprudence/Point to note

In sentencing the accused, the judge took into account the fact that the accused had maternal duties and that a long sentence would adversely impact on her children.

Intimate partner violence which leads a woman into killing her husband/partner is likely to result in incarceration of the woman. Where the woman is a mother of young children, this has grave consequences for the young children. To understand the impact of parental (and in this case a mother's) incarceration, one must consider the gender roles and responsibilities in a particular society and must understand the nature of family arrangements prior to incarceration. In East Africa, women are the primary caretakers of small children and, as a result, the social costs created by a woman's imprisonment, and its negative impact on the children's well-being and development are immeasurable. The children she leaves behind are often subjected to enormous suffering. Sometimes such women are forced to go to prison with their very young children; some women are imprisoned when pregnant and give birth while in prison. The psychological and physical effects on a child behind bars cannot be underestimated.⁵⁰ Therefore, in arriving at an appropriate sentence, a judicial officer may have to take such issues into consideration.

2.7.3 VAW and health

The continuation of harmful practices perpetuated by culture and tradition has serious health consequences for the sexual and reproductive health of women and girls.⁵¹ Such practices deprive women and girls of the right to enjoy the highest standards possible of good health. Examples of such practices include FGM, sexual exploitation, abortion and compulsory sterilisation. They constitute violence that is gender specific, all suffered by women because they are women and which puts women's health and lives at risk.⁵²

The complications arising from female genital mutilation range from severe psychological trauma to death due to excessive bleeding. The practice exposes women to the risk of contracting HIV/AIDS and has serious consequences

for the reproductive health of women. Child survivors of FGM become victims of early and forced child marriages and their right to life, education, the highest possible standards of good health, to choose a spouse and enter into marriage of their own free will are all violated by this kind of violence. Child marriages result in early and unwanted pregnancies, with related complications posing life-threatening risks and death of victims.

Domestic violence limits women's access to family planning, an intervention that can decrease maternal mortality, reducing women's exposure to pregnancy and pregnancy-related health risks.

VAW violates the right of women not to be subjected to torture or other cruel, inhuman or degrading treatment, which is guaranteed by the UDHR (Art. 5) and subsequent human rights conventions and has been incorporated in the bill of rights of the constitutions of many Commonwealth member countries, including Kenya, Uganda, Rwanda and Tanzania.

A report prepared by UNIFEM in 2010⁵³ revealed that violence limits the ability of women to protect themselves from HIV/AIDS. Furthermore, women living with HIV/AIDS are often the targets of abuse and stigma. Young women are at particularly high risk of HIV/AIDS and GBV. The report found that young women represented approximately 60 per cent of all the 5.5 million young people in the world who were living with HIV/AIDS in 2010, and that women were two to four times more likely than men to become infected with HIV during intercourse, with rape increasing this risk by limiting condom use and causing physical injuries.⁵⁴ Studies from Tanzania and Rwanda suggested that women who have experienced partner violence were more likely to contract HIV/AIDS than those who have not. Women and girls living in poor urban areas and slums are vulnerable to physical and psychological violence and are twice as likely as men to experience violence.⁵⁵

2.7.4 VAW and equality in the workplace

VAW in the workplace manifests as sexual harassment, which is an obstacle to the realisation by women of the right to equality in employment. This is because equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.⁵⁶ The CEDAW Committee has defined 'sexual harassment' to include:

such unwelcome sexually determined behaviour as physical contact, and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions.

Such actions, the Committee noted, can be humiliating and discriminatory – particularly when the victim has reasonable grounds to believe that her

Box 2.4 Vishaka & Ors v State of Rajasthan & Ors on 13 August 1997 Supreme Court of India

This petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. The immediate cause for the filing of petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. However, the petition was brought as a class action.

The petition was brought with the aim of focusing attention towards sexual harassment in the workplace and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all workplaces through judicial process, to fill the vacuum in existing legislation.

The incident reveals the hazards to which a working woman may be exposed and the levels to which sexual harassment can degenerate. In the absence of legislative measures, it is important to find an effective alternative mechanism to fulfil this felt and urgent social need.

Each such incident results in violation of the fundamental rights of 'gender equality' and the 'right of life and liberty'. It is clear violation of the rights under Articles 14, 15 and 21 of the Constitution of India. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women.

objection to sexual harassment would disadvantage her in connection with her employment, recruitment or promotion and when it creates a hostile working environment.⁵⁷

2.7.5 VAW and equality in the family and enjoyment of family life

During the 8th session in 1989,⁵⁸ the CEDAW Committee affirmed the obligation of states parties to 'protect women from violence of any kind occurring within the family, at the work place or in any other area of social life'.⁵⁹

The prevalence of family violence in the various forms in which it is manifested – including rape, various forms of sexual assault, mental and other forms of violence perpetuated by traditional practices, attitudes and the abrogation by men of their family responsibilities – puts women's health at risk and impairs women's ability to participate in family and public life on a basis of equality with men. These also violate women's right to equality in the family and in marriage. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such practices and prejudices are used to justify gender-based violence as a form of protection or control of women, and yet the effect of such violence on the physical and mental integrity of women is to deprive them of equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.⁶⁰

Some traditional practices may not in and of themselves qualify to be defined as VAW. However, they perpetuate women's inferior status in the family and indirectly contribute to or result in VAW. Examples of such cultural practices are polygamy and bride price.

One of the ways in which polygamy exposes women to violence is the tension between the wives arising from, among other things, competition for often-scarce family resources. It is not unheard of for co-wives to physically fight each other and sometimes this results in the death of the antagonists. Sometimes the intra-gender tension also leads to abuse of the child of a co-wife, at times culminating in the child's death.⁶¹

Polygamy is legally recognised as a form of marriage in Kenya (the Marriage Act, 2014), Tanzania (the Marriage Act, 1971) and Uganda (the Customary Marriage [Registration] Act, 1973). However, in Rwanda, polygamy is prohibited.

In Article 16(c) of CEDAW state parties are obliged to ensure that men and women enjoy the same rights and responsibilities during marriage and at its dissolution. In General Recommendation No. 21, the CEDAW Committee emphasised the principle of equality in marriage and family relations as provided for in the Convention.

The Committee has declared the practice of polygamy as a custom that perpetuates discrimination against women and is a sign of unequal status in family and marriage relations. Such a marriage contravenes a woman's right to equality with men and can have serious emotional and financial consequences which violate the constitutional rights of women. Polygamy also breaches the provisions of Article 5 of the Convention, which provides that state parties shall take appropriate measures to eliminate stereotyping, prejudices and discriminatory cultural practices.

Furthermore, the CEDAW Committee, in its Joint General Recommendation/General Comment No. 31 on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices, characterised the practice of polygamy as a harmful practice, often justified by invoking sociocultural and religious customs and values. In light of this, the Committee in its general observations has called upon state parties to implement measures aimed at eliminating polygamy, as called for in the Committee's General Recommendation No.21 on equality in marriage.

It is worth noting, however, that in Kenya until 2014 – when the Marriage Act which formally recognised polygamy as a marriage was enacted – polygamy was a mere cultural practice and not a recognised form of marriage.

Similarly, the payment of bride price as a cultural practice is not prohibited in the four nation states of Kenya, Tanzania, Rwanda and Uganda, although

the CEDAW Committee has expressly categorised bride price as a harmful practice.

In reaction to state party reports on elimination of discrimination against women in Kenya, Tanzania, Rwanda and Uganda, the CEDAW Committee observed as follows:

- Kenya: CEDAW/C/KEN/CO/6 at paragraph 22 – state party ought to address the prevalent practice of payment of bride price.
- Tanzania: CEDAW/C/TZA/6 – the Committee is concerned about the persistent practice of bride price, which perpetuates discrimination.
- Rwanda: CEDAW/C/RWA/CO/6 – state party should implement comprehensive measures directed to change the widely accepted attitudes and practices of women's subordination and the stereotypical roles applied to both sexes.
- Uganda: CEDAW/C/UGA/4-7 – CEDAW Committee observed that although some efforts had been made by Uganda, it expressed concern that no steps had been taken to eliminate the practice of bride price in the country.

In general, the CEDAW Committee called upon state parties to eliminate the negative cultural value and practice of bride price.

Box 2.5

In Uganda, the customary practice of bride price was declared not unconstitutional by the Supreme Court in *MIFUMI (u) Ltd & others v Attorney General & Kenneth Kakuru*.⁶² However, the demand for return of the bride price following divorce was declared unconstitutional by the court. We have found it pertinent to reproduce in bulk the substantial aspects of this decision below:

Facts of the case

MIFUMI, an NGO, together with 12 others, petitioned the Constitutional Court challenging the constitutionality of the custom of paying bride price as a precondition to contracting a valid customary marriage.

The petitioners *inter alia* contended that the payment of bride price by men leads them to treat their wives as mere possessions. This, they claimed, perpetuates inequality between men and women, which is prohibited by Article 21(1) and (2) of the constitution. The petitioners further contended that the demand for bride price by parents of a young woman to be married portrays her as an article in a market for sale and amounts to degrading treatment, which is prohibited by Article 24 of the constitution. They thus requested the Constitutional Court to declare the custom and practice of demanding and paying – and also of demanding a refund of the bride price at the dissolution of a customary marriage – unconstitutional.

The respondents opposed the petition. They denied that the custom and practice of paying bride price and its refund upon the dissolution of a marriage was unconstitutional. The respondents argued that the

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custom is protected by Article 37 of the constitution, which accords all Ugandans the right to enjoy and practice their culture.

The Constitutional Court, with one member of the court, Justice Twinomujuni, JA, (RIP) dissenting, dismissed the petition, holding that the marriage custom and practice of paying bride price and demanding refund of the same were not unconstitutional.

Dissatisfied with the decision, the appellants lodged an appeal to the Supreme Court. The relevant grounds for purposes of our analysis were that:

- i. The learned justices of the Constitutional Court erred in law when they failed to make a declaration that the demand for and payment of bride price fetters the free consent of persons intending to marry or leave a marriage, in violation of Article 31(3) of the constitution.
- ii. The learned justices of the Constitutional Court erred in law when they declined to declare the demand for a refund of bride price unconstitutional, despite their finding as a matter of fact and law, that the practice undermines the dignity of a woman contrary to Article 33(6) of the constitution and may lead to domestic violence.

The appellants requested *inter alia* for declarations that the custom and practice of demanding and paying bride price as a necessary condition for a valid customary marriage is unconstitutional and equally that the custom of demanding for a refund of bride price as a condition for the valid dissolution of customary marriage is unconstitutional.

Tumwesigye JSC, who wrote the lead judgement of the majority, was inclined to the second respondents' argument that there are many more husbands who give bride price, but who do not use it as a justification for inflicting violence and abuse on their wives. Therefore, while acknowledging that there may be some husbands who might use it as a justification to batter and abuse their wives, it is often used more as a pretext than the actual reason, this cannot constitute sufficient justification for denying the enjoyment and practice of the custom to people who cherish it as is provided for under Article 37 of the constitution. He thus held that:

It is my view that payment of bride price in customary marriage is overrated by the appellants as a significant factor in the promotion of inequality and violence against women. I would therefore, decline to grant the declaration prayed for by the appellants that the custom and practice of demand of bride price promotes inequality and violence in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution.

Nevertheless, it is important that in parts of the country where men are abusing this custom which the population as a whole seem to cherish, the Government together with local governments, should pass regulations which should be strictly enforced to stop this abuse.

As to whether bride price fetters the free consent of persons intending to marry, he held: 'The Constitutional Court did not err in holding that payment of pride price does not fetter the parties' free consent to enter into marriage'.

The court declined to grant a declaration that the custom and practice of demand for payment of bride price fetters free consent of persons intending to marry, thereby violating Article 31(3) of the constitution.

Whether the learned justices of the Constitutional Court erred in law when they held that it was not essential to declare the practice of demand for refund of bride price unconstitutional, the court held:

The custom of refund of bride price devalues the worth, respect and dignity of a woman. I do not see any redeeming feature in it. The 2nd respondent stated in his submissions that it is intended to avoid unjust enrichment. With respect, I do not accept this argument. If the term 'bride price' is rejected because it wrongly depicts a woman as a chattel, how then can refund of bride price be accepted? Bride price

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constitutes gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refunded.

Apart from this, the custom completely ignores the contribution of the woman to the marriage up to the time of its break down. Her domestic labour and the children, if any, she has produced in the marriage are in many ethnic groups all ignored. I respectfully do not agree with the suggestion proposed by the 2nd respondent that when the marriage breaks down, a woman's contribution should be subjected to valuation, taking into account the length of the marriage, the number of children the woman has produced in the marriage, etc., on the basis of which the refund should be determined.

She is not property that she should be valued. It is my view that refund of bride price violates Article 31(1) which provides that 'men and women of the age of eighteen and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution'.

It is also my view that refund of bride price is unfair to the parents and relatives of the woman when they are asked to refund the bride price after years of marriage. It is not likely that they will still be keeping the property ready for refund.

The effect of the woman's parents not having the property to refund may be to keep the woman in an abusive marital relationship for fear that her parents may be put into trouble owing to their inability to refund bride price or that her parents may not welcome her back home as her coming back may have deleterious economic implications for them.

Furthermore, if marriage is a union between a man and a woman, it is not right that for customary marriage to be legally recognised dissolution should depend on a third party satisfying the condition of refunding bride price failure of which the marriage remains undissolved.

It is my firm view that the custom of refund of bride price, when the marriage between a man and a woman breaks down, falls in the category that is provided under Article 32(2) of the Constitution which states: 'Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any marginalized group to which clause (1) relates or which undermine their status, are prohibited by this Constitution'.

I would, therefore, declare that the custom and practice of demand for refund of bride price after the breakdown of a customary marriage is unconstitutional as it violates Articles 31(1)(b) and 31(1). It should accordingly be prohibited under Article 32(2) of the Constitution.

On whether bride price promotes inequality in marriage, it is my finding that it does not. I would, therefore, decline to grant the declaration prayed for by the appellants that the custom of bride price promotes inequality and violence in marriage, thereby violating Article 21(1)(2) and (3) of the Constitution. And secondly on the issue of whether bride price fetters the free consent of persons intending to marry, it is my finding that the Constitutional Court did not err in holding that payment of bride price does not fetter the parties' free consent into marriage. I would, accordingly, decline to grant a declaration that the custom of bride price fetters the free consent of persons intending to marry, thereby violating Article 31(3) of the Constitution.

In the partial dissent decision of Dr Kisaakye JSC, she agreed with the majority decision of the court, declaring the custom of refund of bride price as a condition precedent to the dissolution of a customary marriage unconstitutional. However, she also found that the payment of bride price in its self was unconstitutional.

She found the practice of demanding for any 'gifts' by the parents of the girl intending to marry and their payment, which 'gifts' in essence form the bride price and the making of the payment of these gifts a condition precedent to a valid customary marriage, unconstitutional.

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Kisaakye, JSC (supra) considered that although Article 37 of Uganda's constitution grants Ugandan citizens the right to enjoy and practice their culture, the practice of payment of bride price was not such practice envisaged to be upheld by the constitution. She held that:

Article 37 does not, in my view, validate all customs and cultural practices practiced by the different tribes and ethnic groups in Uganda. Rather, it is only those customs and cultural practices that meet the Constitutional test that are preserved under this Article. The net effect of the provisions cited above, in my view, is that the only customs and cultural practices that were permitted under the Constitution of Uganda to be enjoyed, practiced, professed, maintained and promoted under Article 37 are those cultural practices and customs that meet the constitutional standards laid out in the above provisions.

This is evidenced by various provisions of the Constitution. These include Objective XXIV of State Policy, which provides as follows: 'Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life'.

It should also be noted that Article 45 of the Constitution also provides that the rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms that are specifically mentioned in the Constitution shall not exclude those which were not specifically mentioned therein.

Apart from Article 45 of the Constitution, it should also be remembered that Uganda is a signatory to all the major human rights Conventions which require it to put in place laws and measures that prevent discrimination and the perpetuation of inequality.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides but one example of such Convention imposing obligations on Uganda to take action in line with the prayers made in this Petition. Under Article 2 (f) of this Convention, Uganda as a state party condemned discrimination against women in all its forms, and agreed to: 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

Uganda also made specific undertakings under the CEDAW Convention to tackle discrimination occurring at the time of contracting a marriage under Article 16(1)(b), which provides as follows: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same right freely to choose a spouse and to enter into marriage only with their free and full consent'.

Lastly, under Article 16 (1)(c) of the CEDAW Convention, Uganda is also obligated to ensure that women enjoy equal rights and responsibilities during marriage. It provides thus: 'States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights and responsibilities during marriage and at its dissolution'.

In my view, the learned majority justices of the Constitutional Court erred in law and fact when they failed to consider the constitutional challenges to bride price as alleged by the Petitioners vis a vis the cited constitutional provisions.

She noted that Ugandans seeking to practice their culture would still be able to voluntarily exchange marriage gifts before, during or after the contracting of the customary marriage between the groom to be and his wife or her parents or relatives and vice versa. That such a voluntary exchange of gifts is permissible under Art. 37 and therefore not unconstitutional.

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As to whether payment of bride price promotes inequality in marriage, she held as follows:

Article 31(1)(b) of the Constitution guarantees 'equal rights for men and women at and in marriage, during marriage and at its dissolution'.

Furthermore, the payment of bride price is also inconsistent with inter alia Article 21 of the Constitution because only one party to the marriage is obligated to pay bride price. It therefore discriminates between man and woman on the grounds of sex, yet under Article 21 of the Constitution, all persons are equal before and under the law and a person shall not be discriminated against on the ground of sex, among others.

Bride price also promotes inequality in marriage in as far as the custom only subjects men to paying bride price. This also runs contrary to clear provisions of Articles 21 and 31, which provides for men and women to have equal rights in marriage, during marriage and its dissolution; as well as Article 33 which provides for women to have full and equal dignity with men.

In conclusion, I find, for all the reasons given in this judgement, that the majority Justices of the Constitutional Court erred in law and fact when they dismissed the petition against the payment of bride price and its refund at the contracting and dissolution of marriage respectively, as conditions precedent to the contracting of a valid customary marriage and the dissolution of customary marriage among various tribes in Uganda.

I find that the majority Justices of the Constitutional Court also erred in law and fact when they held that bride price means the same thing for all the different cultures in Uganda and failed to find that bride price is commonly practiced in Uganda by all cultures.

I also find that the majority Justices of the Constitutional Court erred when they found and held that they could not take judicial notice of the custom and practice of paying bride price.

I also find that the majority Justices of the Constitutional Court erred when they failed to find that the payment and refund of bride price promotes inequality in marriages and that it is one of the causes of domestic violence in customary marriages.

Lastly, I also find that the majority Justices of the Constitutional Court erred when they declined to issue the declaration on the undesirable effects of bride price on the basis that these could be remedied by other laws and means other than declarations.

I would accordingly allow this appeal and make the following declarations:

- (a) The voluntary exchange of gifts at marriage or during marriage between the groom to be and his wife to be and/or her parents and relatives and vice versa is not unconstitutional.*
- (b) That the custom and practice of demand of bride price by a woman's parents or her relatives from her husband to be as a condition precedent to a valid customary marriage practiced by several tribes in Uganda is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.*
- (c) The payment of bride price, as a condition precedent for the validity of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.*
- (d) That the custom and practice of demand for refund of bride price as a condition precedent to a valid dissolution of a customary marriage is inconsistent with Articles 2, 21(1) & 2, 31(1)(b); 31(3), 32(2), 33(1), and 33(4) of the Constitution.*
- (e) That the payment of bride price as a condition precedent to a valid customary marriage and of its refund as a condition precedent to the dissolution of a customary marriage which has been demanded for by a woman's parents and/or relatives undermines the dignity & status of women and is therefore inconsistent with Article 32(2), 33(1) and (4), and 21(1) & (2) of the Constitution.*

2.7.6 The economic costs of VAW

Costs of VAW are widespread throughout society. Every recognisable effect of violence has a cost, whether it is direct or indirect. The types of costs can be categorised as follows: direct, indirect, tangible and intangible, borne by individuals, including victims, perpetrators or other individuals affected by violence, by the government at all levels (including the judiciary and other law enforcement actors) and by society in general.

Direct and tangible costs of violence are actual expenses paid, representing real money spent as a result of violence. Examples are the taxi or bus fare to a hospital or salaries for staff in a shelter or GBV recovery centre. Indirect tangible costs have monetary value in the economy, but are measured as a loss of potential. Examples of such costs are lower earnings and profits resulting from reduced productivity and loss of personal income as a result of absenteeism from work as a result of violence.

Direct intangible costs result directly from the violent act, but have no monetary value. Examples include pain and suffering, and the emotional effects of the loss of a loved one through a violent death. The last category comprises the indirect intangible costs resulting indirectly from the violence that have no monetary value. Examples of such cost include the negative psychological effects on children who witness violence.

The United Nations⁶³ has identified the economic costs as follows:

- Costs imposed on the justice system include: policing, court trials, penal costs and related costs such as victim compensation, administering community sentences and organisations that support the incarcerated; labour (employees who work for the justice system), capital (buildings for police, courts and penal institutions) and material inputs (gasoline for police vehicles or food provided to prisoners). A lot of time is taken by law enforcement officials (the police) off their policing duties to respond to reports of violence and the financial cost involved includes the money spent on building the capacity of the police to respond to VAW. A lot of time is spent on court trials of cases involving VAW and the supervision of probation sentences where these are awarded by the court. The requirement for separate police units dedicated to VAW and the establishment of family and other courts dedicated to cases of VAW can involve the construction of buildings for specialised courts, police units and penal institutions, the payment of salaries to those who work in these institutions and the cost of food for perpetrators of violence serving prison terms.
- Direct health costs in the community include short-run and long-run healthcare in doctors' offices, clinics of all types and hospitals,

including those also paid by the victim through out-of-pocket costs for such things as healthcare services, medications, prosthetics, elective surgeries and alternative health services. Indirect health costs are mostly borne by the individuals. They include such things as reduced longevity, the effects of poor health on lifestyle choices and reduced mobility affecting the ability to participate in public life. These are also included in the personal cost category. Health costs can be multiplied throughout society, such as the spread of HIV/AIDS among women who are compelled by the threat of violence to have sex with infected partners or to participate in prostitution.

- Social services include social welfare agencies helping abused women, abusive men and their children. Any time an individual accesses any public service as a result of VAW, a cost is incurred. The service may be provided through a church, community centre, social worker, religious leader or private agency.
- Education costs can include the added demand for special education services related to behavioural problems and learning disabilities in children who witness abuse at home, as well as school programmes with the aim of reducing violence against girls. Training programmes for women to re-enter the workforce after leaving abusive partners are also included. An indirect cost is the reduced earning capacity of women and girls who have reduced educational attainment as a consequence of violence.
- Business costs include lost time at work and reduced attention, the time co-workers spend covering for absent workers, the time the victim may spend in the restroom or on the phone with friends or family, actual time the victim may need to take off work, administrative time spent processing time off, administrative costs for the search and training of a replacement employee if the victim leaves the job, administration costs for programmes or policies designed to help support victims, lost profits from decrease in output and the increase in overtime payments to other workers who cover for absentee workers. There are additional costs to the business sector beyond the lost productivity reflected in the victim's earnings. Costs to the firm can also include the administrative costs of processing harassment suits or union grievance procedures for violence occurring in the workplace. On a broader scale, VAW lowers their earning potential, which results in lost tax revenue from reduced output and income and consequently lower gross national product (GNP).
- Victims spend a great deal in direct out-of-pocket costs for transportation, childcare, alternative therapies, replacing destroyed

belongings, relocation and medications. These expenditures greatly affect household consumption, skewing it away from the goods and services that would be chosen in the absence of violence. Reduced income stems from time off work, lower productivity while at work, quitting or lost promotions and generally having a more marginal labour force attachment. Another indirect cost borne by victims and their families is the loss of unpaid household production. When a woman is injured or emotionally upset, she performs less of her household responsibilities. Finally, the household faces costs if the victim leaves the abusive household and loses the economies of scale derived from sharing one domicile. That is, more work is required to produce the same level of output in two households than in one.

- Intangibles are very difficult to cost. A few examples include the fear that women harbour as a result of abuse; pain and suffering or the loss of life; and second-generation effects of violence. The costs of VAW are borne by individuals, families, communities and societies as a whole. Individuals pay out-of-pocket expenses and their families experience a change in their consumption choices as a result. Individuals and their families also bear the burden of reduced income, reduced savings and loss of household output. Communities cover the costs of private services provided by the local agencies, such as churches or volunteer workers in crisis centres. Municipal, state or provincial, and national governments bear the costs of public services offered within their jurisdictions, as well as supporting private initiatives through granting programmes. The exact services provided by each level of government depend on the country, its history and its political culture. Overall, the entire economy and the whole national society are affected by the monetary and non-monetary losses resulting from VAW.

The intangible cost is emphasised in *Uganda v Jackline Uwera Nsenga*, in which case the court observed that violence results in physical injury, psychological trauma and at times death – as was in the present case – and yet the consequences can cross generations and truly last a lifetime for the family and society at large. In *Uganda v NA*, in which case the accused (a victim of VAW) was convicted on her own plea of guilt for having killed the father who had sexually abused her for more than three years, the judge noted that the accused (‘the convict’) deserved empathy and support rather than punishment, as she had to carry the psychological scars of the abuse for life.

In some Commonwealth member countries, the economic costs of VAW have been quantified and compiled in a publication by KPMG, details of which are set out in Table 2.2.⁶⁴

Table 2.2 Table of costs of VAW in some Commonwealth member countries

Member state	Year of publication	Costs (US\$)	GDP (%)	Type of violence
Canada	2011	6.9 Billion	0.39	Intimate partner violence (IPV)
United Kingdom	2008	22.8 Billion	0.85	Domestic violence (DV), IPV
Australia	2009	14.7 Billion	1.1	VAW, IPV
South Africa	2014	17.6 Billion	1.3	GBV
Bangladesh	2010	1.8 Billion	2.05	DV

Notes

- 1 General Assembly Resolution 48/104 of 20 December 1993 (UN General Assembly 1993).
- 2 Declaration on Elimination of Violence against Women, Art. 1 (ibid.).
- 3 United Nations Inter-Agency Standing Committee; Establishing-Gender-based-Standard-Operating-Procedures-SOPs-for-Multi-sectoral-and-Inter-organisational-Prevention-and-Response-to-Gender-based-Violence-in-Humanitarian-Settings-ENGLISH. Also available with UNHCR (2005) under the title *Guidelines for Gender-based Violence Interventions in Humanitarian Settings Focusing on Prevention of and Response to Sexual Violence in Emergencies*.
- 4 CEDAW (1994), Comment No. 6.
- 5 Ibid, at page 1, paragraph 1.
- 6 Universal Declaration of Human Rights, article 3 (UN General Assembly 1948); and International Covenant on Civil and Political Rights, Article 6 (UN General Assembly 1966a).
- 7 International Covenant on Civil and Political Rights, Article 26.
- 8 Universal Declaration of Human Rights, Article 3; International Covenant on Civil and Political Rights, Article 9.
- 9 Ibid, Article 7.
- 10 Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Article 7; and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN General Assembly 1984).
- 11 Universal Declaration of Human Rights, Article 16; CEDAW (1979), Article 16.
- 12 International Covenant on Economic, Social and Cultural Rights, Article 12(1) (UN General Assembly 1966b).
- 13 UDHR, Article 23, CEDAW, Art. 11.
- 14 CEDAW (1994), at page 1, General Comment No. 6.
- 15 CEDAW Resolution No. 34/180.
- 16 CEDAW (1994), General Comment No. 7.
- 17 The Preamble of the *Declaration on Elimination of Violence Against Women*, paragraphs 5,6,7 (UN GA 1993).
- 18 Commission on the Status of Women (2013).
- 19 African Union (2003), *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)*, Article 1(j).
- 20 Article 2 of the Convention of Belem Do Para.

- 21 Special issue, Kenya Gazette supplement.
- 22 USAID, Gender-Based Violence in Tanzania: An Assessment of Policies, Services, and Promising Interventions, available at: <http://www.mcdgc.go.tz/data/PNADN851.pdf>
- 23 United Republic of Tanzania (revised 2002), Chapter 16.
- 24 Republic of Uganda (2010), Domestic Violence Act, No. 3. The preamble states that it is an Act to provide for the protection and relief of victims of domestic violence, to provide for the punishment of perpetrators of domestic violence; to provide for the procedure and guidelines to be followed by the court in relation to the protection and compensation of victims of domestic violence; to provide for the jurisdiction of court; to provide for the enforcement of orders made by the court; to empower the family and children court to handle cases of domestic violence and for related matters.
- 25 Court of Appeal of Tanzania, Criminal Appeal No. 334 of 2009.
- 26 United Nations (2006), page (iii).
- 27 <http://www.unodc.org/documents/data-and-analysis/glotip/Tip2014-Press-release-Eng.pdf>
- 28 United Nations, Violence against Women, available at: http://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_chapter6_t.pdf
- 29 Kenya National Bureau of Statistics (KNBS) and ICF Macro (2010).
- 30 Kenya National Bureau of Statistics (2015), *Kenya Demographic Health Survey 2014*, pages 58–60.
- 31 Ibid, pages 58–60.
- 32 Ibid, pages 61–62.
- 33 Rwanda Demographic and Health Survey (2010), available at: <https://dhsprogram.com/pubs/pdf/FR259/FR259.pdf>
- 34 Rwanda Men's Resource Centre (2013), Baseline study on GBV, available at: http://www.rwamrec.org/IMG/pdf/baseline_study_on_gbv_may_2013-_rwamrec.pdf
- 35 United Republic of Tanzania National Bureau of Statistics and ICF Macro (2010), *Tanzania Demographic and Health Survey 2010*, at page 275.
- 36 Ibid, page 279.
- 37 Ibid, page 253.
- 38 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Consideration of reports submitted by states parties under Article 18 of the Convention, combined 4th, 5th and 6th periodic reports, Tanzania, Concluding Observations, para 76.
- 39 Kijo, H and others (eds.) (2014), page 35. See also Human Rights Watch interview with Mary Massay, Executive Director, Commission for Human Rights and Good Governance (CHRAGG), Dar es Salaam, 15 April 2014. See also Help Age International (2011).
- 40 Office of the Director of Poverty Reduction and Economic Management Network, Africa Region, World Bank, (2004).
- 41 An Act to amend several laws written, making special provisions in those laws with regard to sexual and other offences to further safeguard the personal integrity, dignity, liberty and security of women and children.
- 42 Uganda Demographic and Health Survey (2011), at p239.
- 43 Fourth World Conference on Women (1995), Beijing Declaration and Platform for Action (adopted by 189 countries), Beijing, 4–15 September 1995.
- 44 CEDAW (1979).
- 45 CEDAW (1994), General Comments No. 6 and 7.
- 46 *Kivuitu v Kivuitu*, Civil Appeal No. 26 of 1985, reported in (1991) 2 KAR 241.
- 47 In the Matter of the Estate of Lerionka Ole Ntutu, in the High Court of Kenya, sitting at Nairobi, HC Succession Case No. 1263 of 2000, available at www.kenyalaw.org. Also see *Ndewawosia d/o Ndeamtizo v Emanuel s/o Malasi* 1968 HCD No. 127, Tanzania (PC) Civil Appeal 80-D-66, 10/2/68.
- 48 UN Children's Fund (UNICEF) (2000), page 9.
- 49 Tibatemwa-Ekirikubinza, L (1999).
- 50 Ibid.
- 51 CEDAW Committee, General Recommendation No. 14 (9th session, 1990).

- 52 General Recommendation No. 14, para 22–23.
- 53 UNIFEM (2010), CEDAW Committee, General Recommendation No. 14 (9th session, 1990), *The Facts: Ending Violence against Women and the Millennium Development Goals*.
- 54 Ibid.
- 55 Ibid.
- 56 CEDAW (1994), para 17, commenting on CEDAW Article 11.
- 57 Ibid, commenting on Article 11, para No. 18.
- 58 CEDAW Committee (1989).
- 59 CEDAW Committee (1989), citing CEDAW, Articles 2, 5, 11, 12 and 16 in support.
- 60 CEDAW (1994), paragraph 11, commenting on CEDAW Articles 2(f), 5 and 10(c).
- 61 Tibatemwa-Ekirikubinza, L (1999).
- 62 Constitutional appeal No. 2 of 2014.
- 63 United Nations, *Economic Costs of Violence Against Women*, available at: <http://www.un.org/womenwatch/daw/vaw/expert%20brief%20costs.pdf>
- 64 KPMG, *Too Costly To Ignore – The Economic Impact Of Gender-Based Violence In South Africa*, available at: <https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Too%20costly%20to%20ignore-Violence%20against%20women%20in%20SA.pdf>