

HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION 122 OF 2013

COVAW, ICJ-K, IMLU, PHR & Others – VS- THE AG, DPP & Others

FAQS

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1. What is this case about?

A group of individuals and civil society organizations are filed a petition in the Constitutional and Human Rights Division of the High Court of Kenya seeking to compel the Government of Kenya to address the SGBV that occurred during the 2007/2008 post-election violence. This is High Court Constitutional Petition 122 of 2013. The petitioners claim that the government failed to properly train and prepare police to protect civilians from sexual violence while it was occurring. In its aftermath, the police refused to document and investigate claims of Sexual and Gender Based Violence (SGBV), leading to obstruction and miscarriage of justice.

Furthermore, the government hospitals denied emergency medical services to victims at the time, and failed to provide necessary care and compensation to address their suffering and harm. Ultimately, the petitioners want the government to publicly acknowledge and apologize to the victims for their failure to protect the rights of Kenyans; to provide appropriate compensation, including psycho-social, medical, and legal assistance to the victims; to investigate the sexual violence and prosecute those who are responsible; and to establish a special team with some international staff within the Department of Public Prosecutions to ensure that such investigations and prosecutions are credible and independent.

2. What type of case is this?

It is a constitutional case. As such, it seeks to establish that the Government of Kenya violated the repealed and current Constitution, as well as international treaties to which Kenya is a party and international norms. **It is not a criminal case seeking criminal penalties against the government officials who failed in their duties.** However, the petition does ask the court to find that the post-election sexual violence rises to the level of crimes against humanity and that, as a result of that finding, the government was and is obligated to investigate these international crimes and prosecute them wherever the evidence permits.

3. When was the case filed?

The case was filed by the petitioners on 20 February 2013.

4. What was the nature of the sexual violence described in the petition?

Perpetrators targeted women and girls, in particular, for sexual and gender-based violence, including rape, defilement, gang rape, forced pregnancy, deliberate transmission of HIV or any other life threatening sexually transmitted disease, sexual assault, and other indecent acts. **However, while the vast majority of sexual crimes were committed against women and girls, men, too, were subjected to SGBV including forced circumcision, sodomy, and genital amputations.**

5. Who committed it?

State actors and non-state actors targeted women and girls, in particular, for sexual violence. State actors consisted of members of the Kenya Police Service, Administrative Police, General Service Unit, and other state security agents, collectively referred to in the case as “police.” However, non-state actors also perpetrated SGBV, including ordinary citizens and members of organized gangs and outlaws groups.

6. When and where did the SGBV happen?

In the period following the announcement of election results on December 30, 2007, until March 2008, the petitioners and many others suffered SGBV. The offences took place in different parts of Kenya. The petitioners in this case experienced SGBV in Kibera, Kericho and Naivasha.

7. Who is bringing the case?

Eight individuals, survivors of SGBV, and four Kenyan NGOs that assist victims and promote human rights, have come together to file the petition. Among the individual petitioners are six women and two men.

8. Who is this case against?

The petitioners are holding responsible the following officials:

- The Attorney General
- The Director of Public Prosecutions
- The Independent Policing Oversight Authority Chairperson
- The Inspector-General of the National Police Service
- The Minister for Medical Services*
- The Minister for Public Health and Sanitation*

**these cabinet positions may no longer exist, but were in existence at the time of the violations and at the time of the filing of the suit in February 2013. The successive Cabinet Secretary will be responsible.*

9. What, exactly, are the petitioners claiming?

The petitioners are claiming that the Government of Kenya failed them, and the Kenyan people, in the following ways:

- By failing to take appropriate measures to prevent the SGBV following the 2007 elections, including failing to train police forces, and to plan and prepare proper policing policy, operations, and command structure
- By tolerating the SGBV and failing to discipline and supervise those police involved in SGBV
- By failing to protect victims from SGBV perpetrated by non-state actors, and by failing to intervene when either state or non-state actors committed SGBV
- By failing to provide emergency medical services to victims of SGBV
- By refusing to mount prompt, independent, impartial, effective, and public investigations of unlawful acts by the police
- By failing to redress the serious human rights violations committed by police during the post-election violence through compensation, restitution, medical and psychosocial services, public apologies, and other reparations to the survivors and victims' families.

10. What law do the petitioners say that the government violated?

The petitioners claim that certain Kenyan laws and both the repealed and the new Constitution of Kenya, read in conjunction with international treaties to which Kenya is a party, create legal obligations that the Government of Kenya has failed to meet. In particular, the laws violated, through the government's action or inaction, include:

- The Kenyan Constitution, both repealed and present, which included or includes the right to life, the prohibition of torture, inhuman and degrading treatment, the right to a remedy, the right to security of the person, and the right to effective remedy, among other provisions;
- Kenyan laws including the Police Act, the Criminal Procedure Code, the International Crimes Act, and various other acts governing the police and policing, among others;
- International treaties to which Kenya is a party, including the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, the Convention on the Elimination on All Forms of Discrimination Against Women, the International Convention on the Elimination of Racial Discrimination, the African Charter on Human and Peoples' Rights, the Rome Statute of the International Criminal Court, and the Treaty of the East African Community.

11. How has the Kenyan government failed in its legal obligations?

The laws listed above require the Kenyan government, including its various relevant bodies such as the police, the Attorney General, the DPP, and others, to take a wide range of action to protect the Kenyan people from SGBV by taking appropriate preventative action (including, for example, police training and oversight) and ameliorative action in case SGBV occurs nonetheless. The government failed both to take all necessary measures to prevent the police and other non-state actors from committing acts of sexual violence and, once those occurred, to properly investigate and prosecute offenders. Finally, the SGBV targeted a large number of civilian victims and amounted to crimes against humanity. Under both national and international law, the Kenyan government has an absolutely duty to investigate and prosecute such crimes, and utterly failed to do so.

12. Why did the petitioners have to bring this case?

Despite repeated private requests and public calls, both domestic and international, for investigations and prosecutions of police and non-state actors committing SGBV against civilians during the election-related violence, the Government of Kenya has failed to launch credible, timely, and impartial investigations. Consequently, the petitioners and other Kenyans who suffered SGBV during the post-election period have been unable to obtain justice.

13. Have the Respondents responded to the Petition?

The respondents did not respond to the petition for almost one year after it was filed. On several occasions, the case was listed before the Honourable Judge Lenaola, and orders were made against the respondents to file their responses to the petition within fourteen days. The respondents continuously ignored those orders. The case was then listed for a full hearing on 21 January 2013, almost a full year after it had been filed. On the morning of the hearing, the AG and the DPP filed and served the petitioners with their responses in court. The hearing has not finally begun with the evidence of one expert witness opening the case. The matter continues and next comes before the Court on 23, 24 and 25 April 2014.