



Coalition on Violence Against Women

## ADVOCACY BRIEF

December 2020

# Sexual and Gender Based Violence and Justice for Intellectually Challenged Women and Girls in Kenya

## Challenging the Constitutionality of Discriminative Clauses in the Penal Code and in the Evidence Act

### 1 What is the issue?

Section 146 of the Penal Code<sup>1</sup> and Section 125(2) of the Evidence Act<sup>2</sup> have discriminatory provisions against Persons with Intellectual Disabilities and specifically in how they describe such persons and in their provisions for sentencing in relation to defilement and sexual assault. These provisions affect especially women and girls with intellectual challenges (ICWGs) in their pursuit of justice when they are sexually assaulted. While the Evidence Act allows for ICWGs to testify in a court of law, it uses derogatory language to describe them. Specifically, COVAW considers the two sections unconstitutional for the following reasons:

- **They use discriminatory, demeaning and offensive language against persons living with intellectual disabilities and impede equal protection** for persons with intellectual disabilities contrary to Section 11 of the Persons with Disabilities Act,<sup>3</sup> the Victim Protection Act and Articles 25, 27, 35, of the Constitution. The said provisions also contravene Articles 4, 5, 7, 13 and 34 of the Convention of the Rights of Persons with Disability<sup>4</sup> which requires state parties to ensure equal and effective legal protection against discrimination for persons with disabilities on all grounds.
- As currently drafted, the penalty provided for under Section 46 of the **Penal Code for defilement of persons with intellectual disabilities provides a lesser sentence for the similar offences** provided in the provisions of Sections 8 (1), 8 (2) 8 (3) and 8 (4) and other provisions of the Sexual Offences Act.<sup>5</sup>
- **The two sections are contrary to Article 25 and Article 27 (4) of the Constitution of Kenya, 2010** which provide for non-discrimination irrespective of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability.

Section 146 of the Penal Code is classified as crime against morality under Chapter 15 of the same Act whereby the chapter has been highly mutilated by a raft of amendments after the enactment of the Sexual Offences Act No. 3 of 2006 leaving out section 146 without justification

1. Chapter 63 Laws of Kenya

2. Chapter 80 Laws of Kenya

3. Section 11 of the Persons with Disabilities Act, No. 14 of 2003 provides that the government shall take steps to the maximum of its resources with a view to achieving the full realization of the rights of persons with disabilities

4. Ratified by Kenya on 9<sup>th</sup> April 1979

5. Sections 8 (1), 8 (2), 8 (3) and 8 (4) of the Sexual Offences Act, No. 3 of 2006 provide for the offence of defilement of a child. The sentencing of perpetrators is based on the age of the minor as follows: the defilement of a child aged 11 years or less accrues a sentencing of imprisonment to life; the defilement of a child between the age of 12 and 15 years accrues an imprisonment of a term not less than 20 years; and the defilement of a child aged 16 and 18 years accrues the imprisonment accrues a sentencing of a term not less than 15 years.

**Section 146 of the Penal Code provides that;**

*“Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.”*

**Section 125 (2) of the Evidence Act, states that;**

*“a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”*

The ordinary English definition of the word **“idiot”** and **“imbecile”** as used in the language of Section 146 of the Penal Code refers to a foolish or stupid person with an extreme intellectual disability and to a fool or a person with moderate intellectual disability respectively.

The ordinary English definition of the word **“lunatic”** as used in the language of Section 125 (2) of the Evidence Act, refers to a person with a severely disordered state of mind. Although the above terms were initially intended to be used as adjectives classifying the range of abilities of individuals, terms developed a life of their own and have been used over the years as **nouns** with the terms taking number of meanings none of which are polite and are currently considered abusive, demeaning and derogatory. Respectful and dignified terms ought to be used while making reference to persons with intellectual and mental disabilities akin to a “person with mental disorder” that is in use in the Mental Health Act.<sup>6</sup>

## **2 Background**

Intellectual disabilities as neurodevelopmental disorders that begin in childhood and are characterized by intellectual difficulties as well as difficulties in conceptual, social, and practical areas of living. The onset of these deficits starts during childhood. Disability in Kenya was and still is viewed by some members in society as a curse, taboo and a burden. Persons with disabilities are often concealed from the public and subjected to physical and psychological abuse due to ignorance, poverty and lack of awareness. The Kenya National Bureau of Statistics Data from the 2019 Census over 900,000 Kenyans live with a form of disability, with over 200,000 Kenyans suffering from mental or intellectual disabilities.<sup>8</sup>

A 2020 Baseline Survey conducted by COVAW revealed that there was increased vulnerabilities for women and girls with intellectual disabilities. The prevalence of Sexual and Gender Based Violence against women and girls with intellectual disabilities is highest in Nairobi at 41% followed by Narok at 40% whereas Kiambu County had the lowest at 38.3%.<sup>9</sup> The Kenya Mental Health Policy<sup>10</sup> acknowledges that persons with mental disorders often have their human rights violated, because of stigmatization and discrimination. The policy acknowledges that many persons with mental disorders are subjected to unhygienic and inhumane living conditions, physical and sexual abuse, neglect, as well as harmful and degrading treatment practices in health facilities.

7. Chapter 248 Laws of Kenya

8. Status of Disability in Kenya: Statistics from the 2019 Census, Development Initiatives, 2020

9. Project Baseline Report: Status of Sexual and Gender Based Violence on Intellectually Challenged Women and Girls in Nairobi, Narok & Kiambu Counties; Coalition on Violence Against Women-Kenya, February 2020,24

10. Kenya Mental Health Policy 2015-2030, Ministry of Health, August 2015, 2

In the past 4 years, COVAW has supported 13 cases of sexual violence against Intellectually Challenged Women and Girls (ICWGs) through the provision of COVAW Pro bono lawyers who act as victim counsel for the survivors. Out of these, 4 have been concluded and 1 case dismissed. ICWGs face numerous challenges while participating in investigations and court proceedings. Victim participation during investigation is limited due to limited capacity of law enforcement agents to properly investigate crimes against intellectually challenged victims due to inadequate communication skills with intellectually challenged persons. In court, there are more barriers in accessing justice due to lack of awareness among members of the judiciary on how to support and communicate with intellectually challenged persons as witnesses. COVAW notes that ICWGs are a vulnerable group in the community and to enhance awareness on their rights against Sexual and Gender Based Violence (SGBV), COVAW has continuously conducted community dialogue forums engaging the community, caregivers and ICWGs in Nairobi, Kiambu and Narok Counties. Between 2019 and 2020, COVAW reached 9,855 community members and out of these, 378 were persons with intellectual disabilities.

### 3 The impact of the discriminative provisions

COVAW is concerned that the discriminative clauses in section 146 of the Penal Code and section 125 (2) of the Evidence Act that when applied serve as an impediment to justice and also perpetuate a culture of violence, stigma and discrimination against persons with intellectual disabilities and others living with the neurodevelopmental disorders. The continued existence of the stated sections in law means that the rights of persons with intellectual disabilities cannot be realized and their dignity will not be protected by the law. Differential treatment on the basis of disability and a culture of violence, stigma and discrimination against persons with intellectual disabilities and others living with the neurodevelopmental disorders. The continued existence of the stated sections in law means that the rights of persons with intellectual disabilities cannot be realized and their dignity will not be protected by the law. Differential treatment on the basis of disability and a culture of violence, stigma and discrimination through the continued use of the demeaning and derogatory words of “imbecile”, “idiot”, and “lunatic” within the law will continue as long as section 146 of the Penal Code and Section 125 (2) of the Evidence Act are still in operation.

Notably, perpetrators of sexual violence against intellectually challenged persons charged and convicted under section 146 of the Penal Code will continue receiving a lesser sentence as compared to a similar offence charged under Sections 8 (1), 8 (2) 8 (3) and 8 (4) and other provisions of the Sexual Offences Act, No. 3 of 2006. This enhances discrimination against intellectually challenged persons who are survivors of sexual violence.

### 4 Key Asks

COVAW is interested in contributing to long-term and strategic changes in the policies, laws and practices that relate to ICWGs and SGBV in particular. While awareness raising on discriminative clauses continues to be done extensively, access to justice for ICWGs will remain compromised so long as the clauses in questions remain. COVAW alongside 2 other Petitioners have filed **Constitutional Petition No. 390 of 2020**<sup>11</sup> challenging the constitutionality of section 146 of the Penal Code and section 125 (2) of the Evidence Act and is **seeking:**

- A declaration that section 146 of the Penal Code is unconstitutional in as far as it refers to persons living with intellectual disabilities as “idiots” and “imbeciles”, stripping them of their dignity contrary to Article 25 (a), 27, 28, 29 (f) of the Constitution.

- A declaration that section 125 (2) of the Evidence Act is unconstitutional in as far as it refers to persons living with intellectual disabilities as "lunatics" contrary to Articles 27, 28, 29, 43 (1) (a) of the Constitution.
- A declaration that Sections 146 Penal Code, Cap 63, and Section 125 (2) of the Evidence Act, Cap 80 discriminates on the basis of disability by using demeaning words and fails to recognize intellectual disability as a health issue contrary to Article 27 (4), Article 43 (1) (a) and Article 54 (1) (a) of the Constitution.
- An order that the said provisions be amended, modified, repealed or abolished for being in contravention with Articles 24, 25 (a), 27, 28, 29 (f), 43 (1) (a), 48, 53, 54 and 56 of the Constitution and the Convention on the Rights of Persons with Disabilities.
- An order directed to the Office of the Attorney General and Kenya Law Reform to implement the amendment/modification/repeal or ensure abolishment of provisions of sections 146 of the Penal Code and 125 (2) of the Evidence for being in contravention of Articles 24, 25 (a), 27, 28, 29 (f), 43 (1) (a), 48, 53, 54 of the Constitution and the Convention on the Rights of Persons with Disabilities.

The court granting the above prayers will be a step towards enhancing the realisation of the various fundamental freedoms and liberties for persons with mental disabilities in Kenya. Doing so will ensure respect and protection of these rights with the benefit Kenyans and enable every person to enjoy their freedoms to the greatest extent possible.

As COVAW continues to challenge the constitutionality of provisions in the Penal Code and Evidence Act, it invites all persons of goodwill including government institutions to deliberately invest in skills and support systems for intellectually challenged persons and enhance awareness on the rights of this vulnerable group including their protection against Sexual and Gender Based Violence.

### Interested in partnering?

Change is rarely the attribute of a singular action or organization. Partnership is key in strengthening advocacy initiatives. We call on interested parties or individuals who are committed to the rights of ICWGs and in eliminating SGBV to reach out to us to explore how we can work together.

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