

Sexual and Gender-Based Violence, Elections and Responsibilities

The disputed presidential elections of 2007 in Kenya elicits painful memories across the country. The elections saw widespread violence between December 2007 and the end of February 2008 including widespread sexual violence against women and girls mostly but also against men and boys. While the sexual violence meted out on civilians was less visible than the other forms of violence experienced in the county during that time, it was equally devastating, reinforced by the stigma that surrounds survivors of sexual violence and the fear of speaking out against the perpetrators, a significant number of whom were reported to have been law enforcement officers. The real numbers will never be known but the Commission of Inquiry into Post-Election Violence in its report popularly known as the Waki Report, indicated that at least 900 survivors of sexual violence were treated during this period with many more victims of sexual violence unable to seek treatment due to the state of lawlessness that had induced fear in them.

Accountability for the post-election violence (PEV) seemed elusive when the special tribunal under the International Crimes Division at the High Court which was supposed to pursue accountability for crimes committed during the elections period failed to take off. Further, the government of the day showed no willingness to initiate investigations into the crimes committed against its own citizens and ensure comprehensive redress. There indeed was little effort put into taking up and implementing the recommendations of the Truth Justice and Reconciliation Commission which included reparations for survivors.

On 20th February 2013, five years after the PEV, a consortium of civil society organizations that included the Coalition on Violence Against Women (COVAW) and three other organizations in the interest of the general public and many other survivors of election-related sexual violence, initiated a suit alongside six female and two male survivors of sexual violence suffered during the 2007 elections period. The survivors were drawn from different parts of the country including those that were perceived to be pro-government, a clear indication that the impact of violence, any form of violence spills over political divides and the biggest impact is borne by vulnerable and marginalized groups.

In the Constitutional Petition No. 122 of 2013 filed at the High Court in Nairobi, the petitioners in the case sought the Government of Kenya to publicly acknowledge and apologize to the petitioners and the entire Sexual and Gender Based Violence (SGBV) survivor population for their failure to protect the rights of Kenyans during the Post-Election Violence (PEV) period; Create a database of SGBV victims and survivors from the 2007/08 PEV who shall benefit from various forms of support and assistance; Provide appropriate compensation, including psychosocial, medical, and legal assistance to the victims;

Investigate the sexual violence that was meted on civilians during the PEV period and prosecute those who are responsible and, finally, to establish a special team within the Department of Public Prosecutions to ensure that such investigations and prosecutions are credible and independent.

The petitioners argued that the government failed to properly train the police to protect civilians from violence and to conduct proper investigations into the claims of the survivors including the failure to effectively document the crimes and gather evidence which prevented effective prosecutions leading to a miscarriage of justice. The government also failed to provide reparations, including access to medical and psychosocial services.

After the case was filed in 2013, the matter delayed in court for almost eight years caused by countless court hearing dates, mentions and adjournments all of which the survivors attended and gave evidence when required. During this period, expert witnesses also appeared in court and gave evidence. The case was transferred across six different judges over the years which further delayed the matter, with each judge requiring more time to familiarize themselves with the case. These delays came at the financial, physical, and emotional expense of the petitioners who were looking up to the court for redress and justice.

Seven years after the petition was filed in court, and thirteen years after the infamous elections of 2007, the High Court issued a landmark judgment on Petition 122 of 2013, on 10th December 2020, coinciding with the International Human Rights Day. It was a significant ruling, given the long and tedious journey the petitioners had walked. Sadly, these delays in judicial system have become a norm, frustrating many to abandon their pursuit of justice due to the emotional and financial strain that comes with the waiting.

The judgement found the Government of Kenya responsible for a "failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the 2007/2008 post-election violence." The court was in favour of four of the petitioners who reported being violated by the police. It found that their rights to life, protection from torture and ill treatment and right to security of the person and right to effective remedy had been breached due to the state's failure to protect them. As a result, the court awarded each of the four petitioners' general damages. However, the court took a different position with the other petitioners who had been attacked by private civilians and were not able to report the incidences of violence. The court did not find that the violence that took place in Kenya's post-election could have been foreseen and prevented due to "its sudden and drawn-out nature". Further, the court found that since the crimes were not initially reported by the victims, the police could not "be faulted for failing to investigate

and prosecute cases of violence which they did not know about." The court therefore did not consider the government's failure to investigate and prosecute once these cases became known to the authorities.

As a result, part of the findings of the court's judgment are in contention with some petitioners filing an appeal. "Almost 14 years later and justice has not been served for all survivors of the 2007/2008 PEV the government has forgotten the survivors and refused to recognize its failure in protecting us. The violence negatively impacted our lives and we still bear the scars to date," notes one of the 2007/2008 PEV survivors.

This case represents many facets of the political environment in Kenya. As the general elections of 2022 draw near, the responsibility by the Government of Kenya in protecting civilians remains and needs to be pronounced through making clear commitments to protect them from all forms of violence as they seek to exercise their democratic rights to peaceful, free and fair elections. The law enforcement agencies must uphold the rule of law and the judiciary must exercise impartiality and expedite timely justice in the unfortunate event that we end up with similar cases in court. Further, political parties must uphold non-violent approaches during the campaigns period and during the elections including ensuring that their members, including female aspirants, do not suffer harassment and violence within their party-of-choice structures. In fact, any serious political party should have in its manifesto a commitment to mitigate and respond to all forms of violence.

Finally, rights come with responsibilities and all Kenyans of goodwill are called upon to ensure that they respect the right of their family members, friends and colleagues to differ in the political choices that they make. These differences should never result in violence of any kind because violence, including gender-based violence, is harmful to all of and to the fabric that holds individuals, families and our country Kenya, together.

Happy International Human Rights Day.



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