



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS



STANDARD OPERATING PROCEDURES MANUAL AND RAPID REFERENCE GUIDE ON PROSECUTION OF FEMALE GENITAL MUTILATION CASES



COURTESY: UNICEF/Holt



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COURTESY: UNFPA KENYA

FOREWORD



Female Genital Mutilation (FGM) is a harmful cultural practice meted upon girls and women worldwide. In Kenya, many communities practice it on misguided harmful cultural and religious beliefs. These practices are forms of violence against girls and women, which lead to violation of their rights, including the right to life and the right to protection from abuses hence their disempowerment. The harmful consequences of FGM justified the move to outlaw the practice.

Whereas the Constitution acknowledges that Kenya is rich in cultural diversity, it prohibits harmful cultural practices. As a result, Parliament enacted The Prohibition of Female Genital Mutilation Act, 2011, to outlaw FGM and safeguard against violating a person's mental or physical integrity through its practice.

Similarly, international and regional legal instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Plan of Action for the Elimination of Harmful Traditional Practices, and the Maputo Protocol seek to eradicate all forms of gender-based violence, including FGM.

The ODPP has taken deliberate steps in the fight against FGM by developing these SOPs, whose main objective is to standardize and bring consistency and efficiency in investigating and prosecuting FGM cases.

These SOPs and Rapid Reference Guide, assist the prosecutor in deciding to charge, the evidence required, the conduct of the trial and how to handle victims and witnesses in the prosecution of FGM and related crimes. They also highlight fostering better collaboration, cooperation, and coordination among stakeholders involved in the fight against FGM. It is my hope therefore that this will develop and enhance essential skills and thereby empower prosecutors to carry out their tasks as per international best practices.

These SOPs and Rapid Reference Guide should be used as the basis for addressing disparities in the investigation and prosecution of FGM cases. I hope that the successful conviction of FGM cases will ultimately lead to the prevention and eradication of FGM, hence promoting the rights of girls and women and fostering full realization of their potential.

A blue ink signature of Noordin M. Haji, written in a stylized, cursive script.

NOORDIN M.HAJI, CBS, OGW
DIRECTOR OF PUBLIC PROSECUTIONS

ACKNOWLEDGEMENT



These Standard Operating Procedures (SOPs) and Rapid Reference Guide for the prosecution of Female Genital Mutilation (FGM) cases have been developed pursuant to Article 157 of the Constitution of Kenya, the National and International Legal Framework, the National Prosecution Policy, the Excellence Charter and the ODPP Guidelines on the Decision to Charge, that seeks to eradicate Female Genital Mutilation and other harmful cultural practices.

On behalf of the Office of the Director of Public Prosecutions (ODPP), I acknowledge the contribution of our internal and external stakeholders for their invaluable input throughout the process. Their views, critique, and contributions enriched the development of this document.

I recognize and convey my sincere gratitude to the ODPP management, under the able stewardship of Mr. Jacob Ondari, OGW, (formerly of ODPP), Ms. Jacinta Nyamosi, OGW, (Ag. DDPP) and Ms. Tabitha Ouya, OGW, (SADPP) for their direction and personal commitment in steering the development of this document.

I also make special mention of the critical role and unwavering dedication of the members of the ODPP Anti FGM Unit led by the Chairperson, Ms. Caroline Karimi (SPPC). Other members are Mr. Meroka Riechi (SPPC), Ms. Jemimah Aluda (formerly of ODPP), Ms. Naomi Atina (PC), Ms. Gertrude Kiilu (PC), Ms. Mercy N. Nyaroita (PC), Ms. Teresia Wanjiku Karanja (PC), Musa Sere (Statistician) Ms. Rosemary Mukiri (PS) and Michael Suter (CO).

Lastly, this document could not have been a success without the vital partnership and sponsorship of the United Nations Population Fund (UNFPA), to whom I convey our sincere gratitude.

To all who contributed either directly or indirectly to the successful preparation of this document, I expect to have you all on board in the implementation process. I hope that these Standard Operating Procedures and Rapid Reference Guide will contribute immensely to ensuring effective, efficient, and expeditious dispensation of justice and eliminating Female Genital Mutilation in this great Republic.

A handwritten signature in blue ink, consisting of stylized, overlapping loops and lines.

JACINTA NYAMOSI, OGW

Ag. DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

SECTION A: ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
BPFA	Beijing Declaration and Platform for Action
CPC	Criminal Procedure Code
CEDAW	The Convention on the Elimination of All forms of Discrimination against Women
CAT	The Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment (CAT, 1984)
DEVAW	Declaration on the Elimination of Violence Against Women
DPP	Director of Public Prosecutions
FGM	Female Genital Mutilation
ODPP	Office of the Director of Public Prosecution
ICCPR	The International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
KDHS	Kenya Demographic Health Survey
PRC	Post Rape Care Form
SOP	Standard Operating Procedure
UDHR	Universal Declaration on Human Rights
UNCRC	United Nations Convention on the Rights of the Child
VDPA	Vienna Declaration and Programme of Action

SECTION B: DEFINITIONS¹

Authorized officer – means a police officer, an administrative officer, a children’s officer, an approved officer, a chief appointed under the Chiefs’ Act (Cap. 128), a labour officer or any other officer authorised by the Director for the purposes of this Act.

Alternatives to prosecution – means cases where a prosecutor has sufficient evidence to charge an offender, but prosecution may not be the best course of action. In such cases, a prosecutor may decide not to charge and instead refer the offender to a different institution or form of penalty. Examples are: administrative remedies and asset forfeiture & confiscation.

Child – means any human being under the age of eighteen years.

Early marriage – means marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation.

Female Genital Mutilation (FGM) – comprises all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons.

Harmful practice – means all behaviour, attitudes and/ or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.²

Investigating officer- means any person authorized by an Investigative Agency to undertake criminal investigations.

Law enforcement officer – includes a police officer, a member of the National Government Administration Officer, a children’s officer, a probation officer, a gender and social development officer and a cultural officer.

Liaison officer – means the Prosecution Counsel appointed by the ODPP to act as a contact person for the stakeholders in the counties.

Medical practitioner - means a person registered as a medical practitioner under the Medical Practitioners’ and Dentists’ Act (Cap. 253).

Offence - means an act, attempt or omission punishable by law, and includes a regulatory offence.

Place of safety– means any institution, hospital or other suitable place the occupier of which is willing to accept the temporary care of a child.

Prosecutor - means the DPP and any other person exercising the delegated powers of the DPP under Article 157(9) of the Constitution.

Support services - includes the provision of shelter, medical services, legal education, training of service providers and advocates against FGM, and the provision of psychosocial support.

Tools- equipment for a purpose connected with the performance of FGM.

¹ Definition as per the various Acts; Children Act, Prohibition of FGM Act, National Government Coordination Act, Victim Protection Act, the ODPP Act and the Criminal Procedure Code

² Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

Victim of a crime – a natural person who suffers injury, loss or damage as a consequence of an offence.

Vulnerable victim - means a natural person who suffers injury, loss or damage as a consequence of an offence, and who, due to age, gender, disability or other special characteristics may require the provision of special justice and support.

Vulnerable witness -means a person who has made a statement or has given or agreed to give evidence in relation to an offence or criminal proceedings in Kenya or outside Kenya, and requires protection on the basis of an existing threat or risk

Witness – means a person who has made a statement or has given or agreed to give evidence in relation to an offence or criminal proceedings in Kenya or outside Kenya.

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SECTION D: INTRODUCTION

1. FGM is a form of gender-based violence practiced against women and girls of all ages,³ which leads to their disempowerment and violation of their rights. It is a harmful cultural practice and is deep-rooted in the communities that practice it. The Kenya Demographic and Health Survey, (2014), reports that about 9.3 million girls and women in Kenya have been subjected to FGM.⁴
2. Communities that practice FGM do so for various reasons including myths and misconceptions, as a prerequisite for marriage, a transition from childhood to womanhood and that it controls a woman's sexual desire, thus help to preserve virginity and prevent promiscuity.⁵
3. FGM is viewed as a social norm in the communities that practice it.⁶ Any community members who refuse to comply or have a contrary opinion draws hostility and is punished or ostracized.
4. There are four types of FGM, each with varying degrees of clitoral and genital skin removal and health complications.⁷ (Refer to Table 7).
 - Type 1: Clitoridectomy -This is the partial or total removal of the clitoris or the prepuce.
 - Type 2: Excision -This is the partial or total removal of the clitoris or the prepuce and the labia minora, with or without excision of the labia majora.
 - Type 3: Infibulation -This is narrowing the vaginal orifice with the creation of a covering seal by cutting and positioning the labia minora and labia majora with or without excision of the clitoris.
 - Type 4: Others -This is the pricking, piercing, incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice or cutting of the vagina; introduction of corrosive substances or herbs into the vagina to cause bleeding or to tighten.
5. In Kenya, all harmful cultural practices, including FGM, have been prohibited. These practices have been identified and covered in various pieces of legislation that provide sanctions against those who engage and promote them.⁸
6. Article 157 of the Constitution of Kenya establishes the ODPP. The Constitution grants the DPP powers to institute and undertake criminal proceedings against any person before any court except the court-martial regarding any offence alleged to have been committed.

3 According to the KDHS 2014, there is evidence of a trend to circumcise girls at younger ages. 46% of circumcised women age 15-19 were circumcised at age 5-9, as compared with 17% of circumcised women age 45-49. While there is overlap in these categories, Muslim women are much more likely to be circumcised at age 5-9 (65 %) than women from other religious groups, as are Somali women (73%). Urban women are more likely to be circumcised at age 5-9 (34%) than rural women (24%). About 78% of women in urban areas are circumcised by age 14, compared with 69 percent of those in rural areas. Women in the Coast region were most likely to have been circumcised when they were less than age 5 (22%).

4 The prevalence of FGM in the ethnic groups in Kenya is: Somali 93.6%, Samburu 86.0%, Kisii 84.4%, Maasai 77.9%, Embu 30.7%, Meru 30.7%, Kalenjin 27.9%, Taita/Taveta 22.3%, Kikuyu 14.6%, Kamba 10.7%, Mijikenda/Swahili 2 %, Turkana 1.7% and Luhya 0.4%,
5 Eradicating Female Genital Mutilation, Resource Book by Kenya Anti-FGM Board Pg. 12-13

6 One of the key findings in the KDHS 2014, is that 11% or less of women and men believe that the practice of female genital cutting is required by their community or their religion or that the practice should continue.

7 Eradicating Female Genital Mutilation, Resource Book by Kenya Anti-FGM Board Pg. 16

8 The Legislation includes but is not limited to the Constitution of Kenya (2010), the Prohibition of FGM Act, the Children Act, and the Protection against Domestic Violence Act.

7. The Constitution empowers the DPP to direct the Inspector General of Police to investigate any information or allegation of criminal conduct, including investigations into FGM offences.
8. In realization of Article 157 of the Constitution, the Office of the Director of Public Prosecution Act, 2013 was enacted. It confers upon the DPP further powers to formulate policy documents, review them, and direct an investigative agency to investigate⁹.

SECTION E: OBJECTIVE

9. The primary objective of these SOPs is to provide general principles that prosecutors should adhere to in prosecuting cases of FGM and other harmful cultural practices. The standards should conform to the Guidelines on the Decision to Charge¹⁰.
10. In particular, these SOPs seek to:
 - (i) Standardize and bring consistency in prosecuting FGM cases
 - (ii) Ensure prosecutors are aware of and protect the rights of victims and witnesses of FGM cases during the trial
 - (iii) Guide prosecutors and law enforcement officers to adhere to the national, regional and international laws when handling FGM cases
 - (iv) Enhance effective and efficient cooperation, collaboration and coordination between the ODPP and stakeholders
 - (v) To educate and sensitize the general public on matters related to FGM

SECTION F: LEGAL FRAMEWORK ON THE PROHIBITION FEMALE GENITAL MUTILATION

INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights (UDHR) (1948)

11. It provides a broad foundation for the protection of women against harmful practices. Article 1 provides that, “all human beings are born free and equal in dignity and rights.” Article 3 states that, “Everyone has the right to life, liberty and security of person.” Under Article 5, “No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment.”

The International Covenant on Civil and Political Rights (ICCPR) (1966)

12. ICCPR prohibits discrimination based on sex and mandates State Parties to, “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.” In addition, it protects

⁹ Section 5 (c) of the ODPP Act
¹⁰ ODPP Guidelines on the Decision to Charge, 2019, and National Prosecution Policy

individuals from, torture or cruel, inhuman, or degrading treatment, and arbitrary or unlawful interference with their privacy (Article 7, ICCPR).

United Nations Convention on the Rights of the Child (UNCRC) (1989)

13. Article 19 of the UNCRC requires States to ban all forms of violence against children, while Article 24(3) stipulates, “State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” In particular, they are obliged to respond appropriately to prevent the inducement or coercion of a child to engage in any unlawful sexual activity and to prevent the abduction, the sale or trafficking in children for any purpose or in any form.

The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) (1979)

14. CEDAW calls for an end to all forms of gender-based discrimination, including against girls, and defines all forms of violence against women (and girls) as a form of discrimination. Its underlying philosophy is that, “discrimination against women violates the principles of equality of rights and respect for human dignity,” and constitutes an obstacle to the full realization of women’s potential. Article 2(f) requires State Parties, “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against women.”
15. Article 16 provides for eliminating discrimination against women in all matters relating to marriage and family relations. Specifically, it states, “The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

The Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment (CAT, 1984)

16. CAT defines torture as, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” FGM may also constitute torture under international law due to the severe mental and physical pain and suffering it imposes on women and girls.

Declaration on the Elimination of Violence Against Women¹¹(DEVAW)

17. Article 2 defines violence against women, in part, as: “(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, non-spousal violence and violence related to exploitation, FGM and other traditional practices harmful to women.” Article 4 provides that States should condemn violence against women and not invoke any custom, tradition or religious consideration to avoid their obligations for its elimination.

11 The General Assembly’s landmark Declaration on the Elimination of Violence Against Women, 20th December, 1993

Plan of Action for the Elimination of Harmful Traditional Practices¹²

- 18.** The United Nations Sub-Commission on the Promotion and Protection of Minorities adopted a Plan of Action for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children. It recognizes that, “Violence against women, including FGM, wife-burning, dowry-related violence, rape, incest, wife battering, female feticide and female infanticide, trafficking and prostitution, is a human rights violation and not only a moral issue. These acts have serious negative implications on the economic and social development of women and society, and are an expression of the societal gender subordination of women.”

Vienna Declaration and Programme of Action (VDPA)

- 19.** The Programme¹³ calls for the eradication of any conflicts that may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.¹⁴ In addition, it also urges States to repeal existing laws and regulations and remove customs and practices that discriminate against and cause harm to the girl child.¹⁵

Beijing Declaration and Platform for Action (BPFA) (1995)¹⁶

- 20.** The Declaration recognized that girls are often subjected to various forms of violence and harmful practices such as female infanticide and prenatal sex selection, incest, FGM and early marriage, including child marriage.¹⁷ The Platform requires that, “any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated.”¹⁸

25th United Nations International Conference on Population and Development, 2019

- 21.** Commitment Category 5(a) of the 25th ICPD Conference commits to zero sexual and gender-based violence and harmful practices, including zero child, early and forced marriage, as well as zero FGM; and elimination of all forms of discrimination against all women and girls, to realize all individuals’ full socio-economic potential.

REGIONAL INSTRUMENTS

The Protocol to the African Charter on Human and Peoples Rights on the rights of women in Africa (The Maputo Protocol)

- 22.** It guarantees comprehensive rights to women, including the right to dignity, right to life, right to education, right to a positive cultural context, improved autonomy in their health and reproductive health decisions, and an end to FGM.
- 23.** Under Article 5, State Parties shall prohibit and condemn all forms of harmful practices, which negatively affect women’s human rights and which are contrary to recognized international standards.

¹² UN Sub-Commission on the Promotion and Protection of Human Rights, 22nd July, 1994
¹³ The Vienna Declaration and Programme of Action of the World Conference on Human Rights (1993)
¹⁴ Section II (B)(3) (Paragraph 38)
¹⁵ Paragraph 49
¹⁶ This Declaration was made during the Fourth World Conference on Human Rights, 1995
¹⁷ Paragraph 39
¹⁸ Paragraph 224

African Charter on the Rights and Welfare of the Child (ACRWC)

- 24.** The ACRWC defines a child as a human being below 18 years. It recognizes the child's unique and privileged place in the African society and that the African child needs protection and special care. It also acknowledges that children are entitled to freedom of expression, association, peaceful assembly, thought, religion and conscience.
- 25.** Article 21 addresses the protection of the child against harmful social and cultural practices. It urges State Parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child. In particular, those customs and practices prejudicial to the health or life of the child, and those customs and practices discriminatory to the child on the grounds of sex or other status.
- 26.** In addition, child marriage and the betrothal of girls and boys shall be prohibited. Effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

African Youth Charter (2006)

- 27.** Under Article 20, State Parties are obliged to take the recommended steps to promote and protect the morals and traditional values recognized by the community such as eliminating all traditional practices that undermine women's physical integrity and dignity.
- 28.** In addition, Article 23 requires State Parties to enact and enforce legislation that protects girls and young women from all forms of violence, FGM, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography.
- 29.** Lastly, State Parties shall take all appropriate steps to eliminate harmful social and cultural practices that affect the welfare and dignity of youth. In particular, customs and practices that harm the health, life or dignity of the youth, and customs and practices that are discriminatory to youth based on gender, age or other status.¹⁹

NATIONAL LEGISLATION

The Constitution of Kenya, 2010

- 30.** Article 2 (5) of the Constitution recognizes that International Conventions ratified by Kenya are applicable as law within Kenya's jurisdiction. Consequently, International Conventions that address the rights of women and girls, victims, and witnesses are applicable in the absence of a comprehensive Kenyan law or with Kenyan laws.
- 31.** Article 10 (2) (b) provides for the right and protection of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
- 32.** Article 25 (a) provides that the right of freedom from torture and cruel, inhuman, or degrading treatment or punishment shall not be limited.
- 33.** Article 44 (3) states that a person shall not compel another person to perform observe or undergo any cultural practice or rite.

19 Article 25 of the Charter

34. Article 53(1) (d) specifically states that every child has a right to be protected from abuse, neglect, harmful cultural practices, inhuman treatment and punishment and hazardous or exploitative labor.
35. Article 159(3) provides that although traditional dispute resolution mechanisms shall be promoted in resolving disputes, they shall not be used in a way that: “(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.”

Prohibition of FGM Act, No. 32 of 2011

36. The Act prohibits the practice of FGM and other related offences. It also provides safeguards against violation of a person’s mental or physical health through the practice of FGM.

The Children Act, No. 8 of 2001

37. The Act addresses the rights, best interest, and welfare of all children. Regarding harmful cultural rites, Section 14 prohibits anyone from subjecting a child to FGM, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, and dignity or physical or psychological development. Further, authorized officers are mandated to rescue and protect children at risk or who have undergone FGM.

Protection Against Domestic Violence Act, No. 2 of 2015

38. The Act provides for the protection and relief of victims of domestic violence and abuse. Some abuses include child marriage, FGM, forced marriage, forced wife inheritance, interference from the in-laws, sexual violence within marriage, virginity testing, psychological abuse and widow cleansing.

Penal Code, Cap 63

39. The Penal Code establishes the criminal law code by outlining criminal offences and prescribing penalties. Some of the charges against perpetrators of FGM are murder, grievous harm, and assault.

Sexual Offences Act, No. 3 of 2006

40. The Act makes provisions for sexual offences, their definition, prevention, and the protection of all persons from harm and unlawful sexual acts. It prohibits any person from forcing another person to engage in a sexual act for cultural or religious reasons.
41. The Act also protects vulnerable witnesses under Section 31. The prosecutor can apply to the court to have a witness declared a vulnerable witness and subsequent protection measures applied during trial.

Victim Protection Act, No. 17 of 2014

42. The Act gives effect to Article 50 (9) of the Constitution, whereby it protects victims of crime and abuse of power. It provides better information, support services, reparation, and compensation to the victim. It also offers special protection for vulnerable victims.
43. The Act also outlines victims’ rights in criminal proceedings, including being informed in advance of the evidence by the prosecution, being present and participating during the trial, giving their views during plea bargaining, and providing for victim impact statements before sentencing.

Counter-Trafficking in Persons Act, No. 8 of 2010

- 44.** This Act provides for the offences relating to trafficking of persons especially women and children, which include trafficking in persons and acts that promote trafficking for purposes of FGM.²⁰

SECTION G: DUTIES OF A PROSECUTOR

- 45.** Upon receipt of an investigation file from an investigating officer, the prosecutor shall:
- (i) Decide whether to charge based on the two-stage test or the threshold test
 - (ii) Select appropriate charges
 - (iii) Recommend areas to cover where there is insufficient evidence
 - (iv) Decide not to charge where there is insufficient evidence
- 46.** With regards to victims of crime:
- (i) The prosecutor shall take the victim's interest into account when making any decision²¹
 - (ii) The prosecutor shall keep the victim informed of the progress of the case throughout the criminal proceedings
- 47.** Upon receipt of a file from the investigative authority, the prosecutor must ensure that:
- (i) The file has been thoroughly reviewed, and that all relevant witnesses have recorded statements
 - (ii) Where the victim has been assessed and established as a vulnerable witness, the prosecutor shall make an application for various protective measures
 - (iii) Protection and care files are opened for child victims where necessary
 - (iv) Where a minor is involved, a birth certificate, notification of birth, an immunization record, baptismal card, or an age assessment report is availed as proof of age
 - (v) Medical examination has been undertaken on the victim, and a duly filed P3 form, PRC forms, treatment notes and any other medical supporting documents have been supplied
 - (vi) All the exhibits to be used in the case are correctly preserved
- 48.** The prosecutor shall obtain all information relevant to the bail/bond proceedings from the investigating officer, victim, or authorized officer, and present it to the court to ensure that the decision to grant or deny bail to the accused is taken with the best interest of the victim in mind.

²⁰
²¹

Section 3 and 4 of the Act
The interests of the victim may be obtained directly or from reports from any of the authorized officers

- 49.** The prosecutor shall conduct a pre-trial meeting with the witnesses to:
- (i) Explain the prosecutor's role as defined by the ODPP Act and the National Prosecution Policy
 - (ii) Explain the court processes, procedures and roles of the various parties during the trial
 - (iii) Prepare the witnesses for their testimony
- 50.** The prosecutor, before or during the trial and upon consultation with the investigating officer or premised on the sentiments of the witnesses, may liaise with the Witness Protection Agency to propose protection for the witnesses.

SECTION H: PROSECUTION GUIDED INVESTIGATION

- 51.** A prosecutor may be engaged in investigations to guide the investigating officer on the legal aspects to be covered during investigations. The prosecutor will offer advice that may include:
- (i) Collection, handling and preservation of evidence
 - (ii) Aspects of inquiry to be covered
 - (iii) Admissibility of evidence
 - (iv) Identification of victims and the witnesses that require protection and making the relevant applications to ensure their protection
 - (v) Possible offences to charge
 - (vi) Establish the need for international cooperation where necessary, e.g. by applying for Mutual Legal Assistance and Extradition proceedings
 - (vii) Evidential and legal consequences of investigative methods, e.g. search and seizures, the conduct of an identification parade and recording confessions
 - (viii) Potential need for expert evidence
 - (ix) Identification and arrest of the suspect
 - (x) Consideration of bail and bond
 - (xi) Possible legal applications (interlocutory, miscellaneous applications)
- 52.** The prosecutor and the investigating officer shall regularly conference to discuss the progress of investigations.

SECTION I: INTERNAL PRE-TRIAL PREPARATION

- 53.** During the internal pre-trial conference, the prosecutor and the investigating officer shall agree on:
- (i) The evidence and witness to be relied upon
 - (ii) Any ancillary application such as custodial orders and bail
 - (iii) Witness protection
 - (iv) Modalities of disclosure of evidence
 - (v) Give direction on outstanding evidence
 - (vi) Alternative to prosecution e.g. plea-bargaining and diversion
- 54.** Advice may include all matters listed in Section H above.

SECTION J: CONDUCT OF INVESTIGATIONS AND BEST PRACTICE

- 55.** The investigating officer shall be guided by the following best practices in conducting investigations of FGM cases.
- (a) **Securing of Exhibits**
- The investigating officer shall:
- (i) Receive an inventory of all exhibits recovered by the first officer at the scene of the crime and ensure proper chain of custody is maintained
 - (ii) Secure the scene of the crime, recover the exhibits, and prepare an inventory. In case any other officer is the first person at the crime scene, the investigating officer shall ensure they have recovered and secured the exhibits from this person and keep an exhibits chain of custody memo
 - (iii) Ensure that the exhibits are properly labeled and kept in separate bags, kits, envelopes or containers to prevent contamination and ensure proper chain of custody
 - (iv) Determine exhibits that require expert examination, complete the Exhibit Memo Form and forward them to the appropriate expert examining institution without delay
 - (v) Promptly collect the expert report together with the exhibit from the expert and keep them in safe custody until their production in court
 - (vi) Ensure that the Scenes of Crime Officer processes the photographs taken, provides a Certificate of Authenticity and ensure they are available for trial
 - (vii) Make the necessary application to the trial court for the release of an exhibit to an interested party

(b) Recording Statements from the Suspect

- (i) At the time of arrest, the investigating officer shall inform the suspect of their rights under the Constitution²² and caution them appropriately before inviting them to consider making a formal statement
- (ii) In case a suspect makes any voluntary verbal statement during arrest, the investigating officer shall record that statement
- (iii) If any confession is to be relied upon, it must have been obtained in accordance with the Evidence Act²³ (Confession Rules 2009)

(c) Fingerprints

- (i) The investigating officer shall ensure that fingerprints for all suspects arrested in relation to FGM and related offences are taken
- (ii) The investigating officer should inform the prosecutor and produce any previous conviction records for the suspect at the earliest opportunity

(d) Witness Statements

- (i) The telephone number, residential or work address of witnesses shall NOT be recorded *within the body* of the witness statement unless it is relevant to the commission of the offence. This is to avoid witness interference by the accused and their accomplices
- (ii) The privacy and confidentiality of a child victim shall be protected by use of initials of the name of the child²⁴
- (iii) Contact details of the witnesses should be recorded in a separate document within the police file and should not be supplied to the accused
- (iv) In taking a witness statement, the officer must ensure all the ingredients of the offence are covered

(e) Bail/ Bond

- (i) The investigating officer and prosecutor must be guided by the Bail and Bond Policy in deciding whether to object to a bail/bond application
- (ii) The investigating officer should disclose any information that will guide the prosecutor during the bail/bond hearing
- (iii) Where a prosecutor intends to oppose bail/bond, the investigating officer must swear an affidavit to oppose the bail/bond before plea taking

²² Article 49

²³ Cap 80 Laws of Kenya

²⁴ Section 76 Children Act; Standard Operating Procedure for Prevention and Response to Gender Based Violence in Kenya -National Police Service

- (iv) The prosecutor and the investigating officer shall consider the victims views and inform them of their right to present their views to court²⁵

(f) Charges

- (i) The investigating officer shall propose charges from the evidence gathered in investigations
- (ii) The prosecutor shall draft the appropriate charge
- (iii) The privacy and confidentiality of the child shall be protected by use of initials of the name of the child

SECTION K: ALTERNATIVES TO PROSECUTION

56. Where there is sufficient evidence to prefer a charge, but the prosecution may not be in the public interest, the prosecutor may consider alternatives to prosecution.

57. Diversion

When making a diversion decision, the provisions of the ODPP Diversion Policy and Guidelines, 2019, shall guide the prosecutor to:

- (i) Consider diversion of eligible FGM cases
- (ii) Decide to divert as early as possible after the offender has been arrested
- (iii) Determine whether there is sufficient evidence to support the charge, public policy reasons to initiate prosecution, and the offender has made a clear and liable admission that they committed the offence
- (iv) Consider a diversion option which endorses eradication of FGM and harmful cultural practices

58. Plea Bargain

The Criminal Procedure Code,²⁶ the ODPP Plea Bargaining Guidelines, 2019, and other relevant laws shall guide the prosecutor to:

- (i) Ensure the evidential, public interest and threshold tests as set out in the ODPP Guidelines on the Decision to Charge, 2019, are met in respect of each charge
- (ii) Openly, reasonably, fairly, and in the interests of the administration, command public and judicial confidence.

²⁵ Section 9 of the Victim Protection Act and Clause 4.2.6 of the Bail and Bond Policy Guidelines (2015)
²⁶ Section 137(A – O) of the Criminal Procedure Code

SECTION L: CONDUCT OF THE CASE IN COURT

a) On Bail/Bond

- 59.** The prosecutor shall oppose bail/bond in all cases where the perpetrator is the parent/guardian or close relative of the child victim.
- 60.** Where bail is not opposed, the prosecutor shall consider conditions that may be attached to the bail/bond and accordingly notify the investigating officer.
- 61.** When bail is granted and there are compelling reasons²⁷ to challenge the decision by the court, the prosecutor shall:
- (i) Immediately notify the court of the intention to revise the decision
 - (ii) Seek a stay of orders of release of the suspect pending revision
 - (iii) Seek revision/review of the decision

(b) On Pre-Trial Conference

- 62.** Where a plea of not guilty is entered, the prosecutor shall request a pre-trial conference to:
- (i) Set a timetable for disclosure of evidence and notify if any further evidence is to be obtained and served
 - (ii) Disclose the number of witnesses to be called and their availability
 - (iii) Inform the court of potential difficulties in proceedings on the anticipated trial date
 - (iv) Inform the court where a court visit is required to view an exhibit or the scene of the crime
 - (v) Confirm the requirement for expert witnesses and seek admission/agreement if possible
 - (vi) Address any issues relating to the legal representation of the accused
 - (vii) Alert the court on issues regarding forfeiture, recovery of assets and any other ancillary orders that may be sought post-conviction

(c) Trial

- 63.** The prosecutor shall:
- (i) Give priority to child, vulnerable and expert witnesses
 - (ii) Call only relevant witnesses to testify and disclose the reasons for leaving out any witness
 - (iii) When dealing with vulnerable and intimidated witnesses, the prosecutor may:

²⁷ Article 49(1)(h) of the Constitution; ODPP Bail and Bond Policy, 2015

- Refer the witness to the Witness Protection Agency
 - Make an application before the court to have proceedings heard in camera, or for the use of a witness protection box depending on the circumstances of the case²⁸
 - Alter the sitting arrangement in court to safeguard vulnerable and intimidated witnesses
 - Make an application for the appointment of an intermediary where necessary
- (iv) Ensure that all exhibits are marked and produced
- (v) Make an application for use of video conferencing where appropriate
- (vi) Oppose unnecessary applications and adjournments

(d) Orders Post-Conviction

- 64.** Where forfeiture is sought, the prosecutor must stipulate the specific state agency to which any such asset is to be forfeited.
- 65.** The prosecutor should recommend compensation to the victim.²⁹
- 66.** The prosecutor shall apply to suspend the bond/ bail terms given to the accused pending sentence.

(e) Sentencing Hearing

- 67.** The prosecutor shall:
- (i) Ensure that a Victim Impact Statement is filed³⁰
 - (ii) Submit on aggravating and mitigating factors during the sentencing
 - (iii) Present the previous conviction records of the accused, if any

(f) Rights of Victims/ Witnesses

- 68.** Pursuant to the Victim Protection Act and any other relevant laws, a victim shall have the right to be:
- (i) Informed about the judicial and trial processes as well as the rights and responsibilities of witnesses
 - (ii) Informed about the progress of investigations being conducted by police (except where such disclosure might jeopardize the investigation)
 - (iii) Advised on the charges preferred against the accused, any amendments to such charges and the reasons for such amendments, and where appropriate, the reasons for charges not being preferred
 - (iv) Advised on the reasons for accepting a plea bargain or the termination of the case

²⁸ Section 17 of the Victim Protection Act and Section 31 of the Sexual Offences Act

²⁹ Refer to the sections 23 - 25 of the Victim Protection Act and section 176 Criminal Procedure Code on compensation

³⁰ Section 12 of the Victim Protection Act

- (v) Dealt with in an empathetic, respectful and reassuring manner with due regard to the victim's situation, rights and dignity at all times
- (vi) Allowed to present a Victim Impact Statement to the court
- (vii) Informed of the outcome of criminal proceedings and their implications
- (viii) Protected from unnecessary contact with the accused and defence witnesses during the trial
- (ix) Accorded privacy and confidentiality by all actors involved in the criminal justice system

SECTION M: LIAISON BETWEEN AUTHORITIES

- 69.** The prosecutor shall strive to ensure cooperation, collaboration, and coordination with state and non-state actors in the prevention, investigation, prosecution, and protection of witnesses or victims in FGM related cases.
- (i) The ODPP will ensure that a prosecution counsel is appointed as a liaison officer in each county office. The liaison officer will act as a contact person for the stakeholders in the counties
 - (ii) The investigating officer will bear responsibility for ensuring contact is made with the liaison officer to arrange a physical meeting, teleconference or request for written advice depending on the circumstances of the case
 - (iii) The liaison officer will endeavour to liaise with key stakeholders in addressing challenges in prosecution of FGM cases and will work with existing referral networks³¹ for better coordination and maintain a contact register of stakeholders
 - (iv) The liaison officer shall contact the focal person from the relevant investigative agencies and other stakeholders as soon as practically possible
 - (v) The liaison officer shall maintain an updated data record of all FGM related cases being prosecuted or otherwise finalised

SECTION N: RELEVANT LEGISLATION ON FGM, HARMFUL CULTURAL PRACTICES AND INCIDENTAL OFFENCES

- 70.** It is the prosecutor's responsibility to draft appropriate charges in relation to offences committed under the following laws:
- (i) Prohibition of Female Genital Mutilation Act, No. 32 of 2011
 - (ii) Children Act, No. 8 of 2001

³¹ National Anti-FGM steering committee at the county level

- (iii) Sexual Offences Act, No. 3 of 2006
- (iv) Protection Against Domestic Violence Act, No. 2 of 2015
- (v) Counter Trafficking in Persons Act, No. 8 of 2010
- (vi) Basic Education Act, No. 14 of 2013
- (vii) Penal Code, Cap 63

SECTION O: OFFENCES AND ELEMENTS

Table 1: Points To Prove of Offences under the Prohibition of Female Genital Mutilation Act, No. 32 of 2011

S/No.	Section	Preferred Charge	Points To Prove
1.	Section 19(1)	Performing FGM	- Act of FGM - Identity of the perpetrator - Possession of FGM paraphernalia, e.g. tools, etc. - If accused is training or is a trained/ registered medical practitioner, avail documents of proof
2.	Section 19(2)	Causing death by performing FGM	- Act of FGM - Identity of perpetrator - Actual cause of death as per post mortem - Causation or remoteness of death
3.	Section 20(a)	Aiding, abetting, counselling or procuring FGM	- Identity of perpetrator - Proof of any sort of assistance or advice for purposes of perpetuating FGM - Proof of aiding the accused, e.g. Monetary facilitation
4.	Section 20 (a)	Procuring FGM on self	- Act of FGM on self - The perpetrator is an adult
5.	Section 20(b)	Aiding, abetting, counselling or procuring another person to perform FGM on another person	- Proof of any sort of assistance or advice - Proof of facilitation, e.g. monetary payment etc.
6.	Section 21	Procuring a person to perform FGM in another country other than Kenya	- Proof of travel - Prove intention of the travel was to perform FGM - Medical report to show that FGM took place

S/No.	Section	Preferred Charge	Points To Prove
7.	Section 22	Permitting one's premises to be used in performance of FGM	- Proof of ownership or possession or control of premise - Knowledge that the premise was used to perform FGM - FGM was performed - Tools/paraphernalia/ equipment (if traceable)
8.	Section 23	Possessing tools used to perform FGM	- Possession of relevant tools/paraphernalia - That the tools were for purposes of performing FGM
9.	Section 24	Failing to report the commission of FGM	- Proof of knowledge that FGM was performed or was about to be performed - Proof that the accused never reported the act to any law enforcement officer - Identity of the victim
10.	Section 25	Using abusive or derogatory language on persons who have not undergone FGM or on men who have married or supporting women who have not undergone FGM	- Actual abusive word/derogatory word - Translation to English where appropriate - Intention to offend or embarrass
11.	Section 28	A Kenyan citizen or a permanent resident commits an offence under section 19 in another Country	- Proof of citizenship or permanent residence - Act of FGM - Jurisdiction within which the act of FGM was committed

Table 2: Points To Prove of the Offences under the Penal Code, Cap 63

S/No.	Section	Preferred Charge	Points To Prove
1.	Section 203 as read with section 204 of the Penal Code	Murder	- Proof of death - Malice aforethought - Actus Reus
2.	Section 205 as read with 206 of the Penal Code	Manslaughter	- Proof of death - Actus Reus
3.	Section 234	Grievous Harm	- Victim - Proof of maim or permanent injury to any external or internal body organ

Table 3: Points To Prove of the Offences under The Basic Education Act, No. 14 of 2013

S/No.	Section	Preferred Charge	Points To Prove
1.	Section 30	Failure to take a child to school	- Age of the child - Absence of a school enrolment registration - Reason for denying the child education is to execute a harmful cultural practice

Table 4: Points To Prove of Offences under the Counter-Trafficking in Persons Act, No. 8 of 2010

S/No.	Section	Preferred Charge	Points To Prove
1.	Section 3	Trafficking in Persons	- Recruitment, transportation, transferring, harbouring or receiving another person for exploitation - Exploitation elements include the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, and giving payments or benefits to obtain the consent of the victim of trafficking in persons; or child marriage
2.	Section 5	Promotion of trafficking in persons	- Knowledge of the act of trafficking - Ownership or control of the premise or vessel - Permitting use of the premise to further the act of trafficking - The act of trafficking
3.	Section 7	Facilitating entry into or exit out of the country	- Proof of knowledge - Proof of the act of facilitating, aiding or abetting the exit or entry of persons - Proof of movement from one country to another

Table 5: Points To Prove of Offences under The Sexual Offences Act, No. 3 of 2006

S/No.	Section	Preferred Charge	Points To Prove
1.	Section 3	Rape	- Act of penetration - Lack of consent - Intention and unlawful act - Genital organs involved - Proof of threat, force, intimidation or coercion or intoxication
2.	Section 4	Attempted rape	- Attempt to penetrate - Lack of consent - Intention and unlawful act - Genital organs involved - Proof of threat, force, intimidation or coercion
3.	Section 5	Sexual Assault	- Unlawful act - Penetration - Use of body part/ object - Manipulation of the body part/ object - Genital organ involved
4.	Section 8	Defilement	- The age of the victim - Identification - Act of penetration - Genital organs involved
5.	Section 11	Indecent Act	- Intentional and unlawful act - Contact with a body part - Genital organ involved - Exposure or display of pornographic material
6.	Section 20, 21 and 22	Incest	- Relationship with the victim - Act of penetration - Genital organs involved
7.	Section 29	Cultural and religious sexual offences	- Use of force - Sexual act - Act of directing others to perform the sexual act - Cultural or religious reasons

Table 6: Points To Prove of the Offence Under The Children Act, No. 8 of 2001

S/No.	Section	Preferred Charge	Points To Prove
1.	Section 14 and section 20	Subjecting a child to harmful cultural rites	- Specific harmful cultural practice - Age of the child
2.	Section 127(1) (a)	Causing a child to need care and protection	- Act wilfully and knowingly committed - Age of the child - Proof of duty of care - Harmful cultural practice

SECTION P: SAMPLE CHARGES UNDER THE RELEVANT ACTS

1. Prohibition of Female Genital Mutilation Act, 2011

Section 19 has two offences - performing an act of FGM and performing an act of FGM causing death.

Section 19

Scenario One

Section 19(1)

Offence: Performing Female Genital Mutilation contrary to section 19(1) as read with Section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at **ZZZ** Location near Obel Village, **(drafted to be specific on the area the offence was committed)** within Kajiado County, performed the act of Female Genital Mutilation on one **XXXX**. **(If a minor, state the age)**

Scenario Two

Section 19 (1) and 19 (2)

Offence: Performing Female Genital Mutilation and causing death contrary to Section 19(1) as read with Section 19(2) of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 12th of April 2014, at **ZZZ** Location at **(drafted to be specific on the area offence was committed)** KMQ area, within Kajiado County, performed Female Genital Mutilation on one **XXXX** occasioning severe bleeding that resulted in the death of the said **XXXX**. **(If a minor, state the age)**

Section 20

Offence: Aiding and abetting/procuring/counselling **(Delete as appropriate)** Female Genital Mutilation contrary to section 20 as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, aided and abetted/counselled/procured (*Delete as appropriate*) **YYYY** to perform Female Genital Mutilation on one **XXXX** (*If a minor state the age or state if adult*), by... (*Put specific acts that the accused persons did to aid and abet the said offence*).

Section 20(a)

There are two scenarios involved charges against a person who has undergone FGM under this section.

Scenario One

Offence: Procuring Female Genital Mutilation contrary to section 20(a) as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, **procured** **YYY** to perform Female Genital Mutilation on her person.

Scenario Two

Offence: Procuring Female Genital Mutilation contrary to section 20(a) as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, procured (**caused**) an act of Female Genital Mutilation to be performed on her person.

Section 21

There are two scenarios under this section.

Scenario One

Offence: Procuring a person to perform FGM from another country contrary to section 21 as read with section 29 of the Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, being a Kenyan Citizen took **XXXX** from Nairobi to Makaa Village, within Moshi District in the Republic of Tanzania, where Female Genital Mutilation was performed on the said **XXXX**.

Scenario Two

Offence: Procuring a person to perform Female Genital Mutilation in another country contrary to section 21 as read with section 29 of the Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, being a Kenyan Citizen brought **YYY** from country **ZZZ** (**specify the country**), to Thika sub-county, within Kiambu County, in the Republic of Kenya, where Female Genital Mutilation was performed on one **XXXX**. (*If minor, state the age*).

Section 22

Offence: Use of premises to perform Female Genital Mutilation contrary to section 22 as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, in Kajiado South sub-county within Kajiado County, allowed the premises for which he was in control of or responsible for, namely Boma, to be used for purposes of the performance of Female Genital Mutilation on **XXXX**.

Section 23

Offence: Being in possession of tools connected with the purpose of performing Female Genital Mutilation contrary to section 23 as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, was found in possession of tools namely **(specify the tools found e.g. surgical/ razor blades/needle, a pair of gloves)** for purposes connected with the performance of Female Genital Mutilation on one **XXXX**. **(If a minor state the age)**.

Section 24

Offence: Failure to report the commission of the offence of Female Genital Mutilation, contrary to section 24 as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, while being aware that an offence of Female Genital Mutilation has been committed/was being committed/was to be committed **(Delete as appropriate)** failed to report to the police or any other law enforcement agency.

Section 25

There are two scenarios under this section.

Scenario One

Offence: Using abusive or derogatory language on a woman who has not undergone Female Genital Mutilation contrary to section 25 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, used abusive and derogatory words to wit **(specify the abusive words in verbatim in the language used and translated in English)** that were intended to embarrass and ridicule **XXXX** for not having undergone Female Genital Mutilation.

Scenario Two

Offence: Using abusive or derogatory language on a person who has married/ is supporting **(delete as appropriate)** a woman who has not undergone Female Genital Mutilation contrary to section 25 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, used abusive and derogatory words to wit **(specify the abusive words in verbatim in the language used and translated in English)** that were intended to embarrass and ridicule **XXXX** for marrying/ supporting **(delete as appropriate)** a woman who has not undergone Female Genital Mutilation.

Section 28

Offence: Performing Female Genital Mutilation outside Kenya's jurisdiction contrary to section 28(1) as read with section 29 of the Prohibition of Female Genital Mutilation Act, 2011.

Particulars: **AB**, on 16th April 2014, being a Kenyan Citizen/ Permanent Resident (*delete as appropriate*) while in country **ZZZ**, performed Female Genital Mutilation on one **XXXX** (*if it caused death, provide particulars*)

2. The Penal Code

Section 234

Offence: Grievous harm contrary to section 234 of the Penal Code.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, intentionally and unlawfully did (*provide particulars of the grievous harm occasioned*) to **XXXX** by performing Female Genital Mutilation.

Section 203 as read with section 204 of the Penal Code

Offence: Murder contrary to Section 203 as read with section 204 of the Penal Code.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, murdered **XXXX**.

Section 205 as read with 206 of the Penal Code

Offence: Manslaughter contrary to Section 205 as read with 206 of the Penal Code.

Particulars: **AB**, on 16th April 2014, at Olobel Village, within Kajiado County, unlawfully killed **XXXX**.

3. Sexual Offences Act, 2006

Section 3

Offence: Rape contrary to Section 3 (1) (a) (b) as read with section 3 (3) of the Sexual Offences Act.

Particulars: **AB**, on 28th December 2013, at Olobel Village, in [**particulars withheld**] sub-county within Kajiado County, intentionally and unlawfully caused your penis to penetrate the vagina (**or name other genital organs**) of **XXXX** without her consent.

Section 5

Offence: Sexual Assault Contrary to Section 5(1) (a) as Read with Section 5 (2) of the Sexual Offences Act No 3 of 2006.

Particulars: **AB**, on 8th August 2014, at [**particulars withheld**] in Kabarnet Division, within Baringo County, did intentionally and unlawfully penetrate (*state the genital organ*) of **R.W.M** (*Use initials of the name of the minor*) a minor aged 5 years using (*specify the body part or object used*) in contravention of the Act.

Section 6

Offence: Indecent act contrary to Section 6(a) of the Sexual Offences Act No.3 of 2006.

Particulars: **AB**, on 8th August 2014, (*insert the period*) at **[particulars withheld]** area in Kilifi County, within Coast Province, unlawfully touched the (*state the part*) of the complainant **R.W.M**

Section 8 (*different subsection depending on the age of the minor*)

Offence: Defilement contrary to Section 8(1), as read with 8 (2) or (3) or (4) of the Sexual Offences Act.

Particulars: **AB**, on diverse dates between 2nd December 2011 and 3rd January 2012, at **[particulars withheld]** area in Kilifi County, intentionally and unlawfully caused penetration of genital organ namely (*exact genital organ*) into the genital organ, namely (*exact genital organ*), of **R.W.M** a girl aged (*insert age*).

Section 20

Offence: Incest contrary to Section 20 (1) of the Sexual Offences Act, 2006 (SOA).

Particulars: **AB**, on 11th January 2014, at **[particulars withheld]** Village, Kitui County, intentionally and unlawfully penetrated, with his penis, the vagina of **R.W.M**, who was to his knowledge his step-daughter (*state exact relation*) aged (*state the age*).

4. Counter - Trafficking in Persons Act

Section 3

Offence: Trafficking in Persons contrary to section 3 (1) as read with section 3 (5) of the Counter - Trafficking in Persons Act 2010.

Particulars: **AB**, on 16th January 2014, in Malindi, Kilifi County, received another person, namely **YYY** (if a minor, namely **R.W.M** aged thirteen years), for (*specify the type of exploitation committed on the minor as defined in Section 2 of the Act*) through giving benefit to obtain the consent of another person namely (*state the name of the person who was given the benefit*) having control or authority over **YYY** (*if, child R.W.M*)

Section 5

Offence: Promotion of trafficking in persons contrary to section 5 of the Counter -Trafficking in Persons Act 2010.

Particulars: **AB**, on 16th April 2014, at Olobel Village, Kajiado County, knowingly permitted/ leased being the owner/occupier/or in control of (*delete as appropriate*) thereof, use of your house/building/premises/ vessel (*delete as appropriate*) for (*state purpose of trafficking, e.g. promoting child marriage of R.W.M*).

Section 7

Offence: Facilitating/ aiding or abetting **(delete as appropriate)** the exit out of the country/entry into the country **(delete as appropriate)** of a person contrary to section 7 of the Counter -Trafficking in Persons Act 2010.

Particulars: **AB**, on 16th April 2014, at Olobel Village, Kajiado County, knowingly facilitated/ aided/ abetted **(delete as appropriate)** the entry or exit from Country **ZZZ** at international/local airport/territorial boundaries/seaports **(delete as appropriate)** for **(state the purpose, e.g. child marriage of R.W.M.)**

5. Basic Education Act

Section 30

Offence: Failing to take a child to school contrary to Section 30 (2) as read with section 30 (3) of Basic Education Act.

Particulars: **AB**, on diverse dates between **(state period)** at Olobel Village, in Isinya Sub County within Kajiado County, being a parent/ guardian to **R.W.M**, failed to take the said minor to school, thereby denying her right to basic education.

6. The Children Act

Section 14

Offence: Subjecting a child to harmful cultural rites contrary to section 14 as read with section 20 of the Children Act No.8 of 2001.

Particulars: **AB**, on 16th April 2016, at Olobel Village, within Kajiado County, willfully and unlawfully being parents/guardians **(any relation)** to **R.W.M**, a child aged 14 years, subjected the said **R.W.M** to **(state harmful cultural practice, e.g. FGM, beading, early marriage etc.)**

Section 127(1) (b)

There are two scenarios to this section.

Scenario 1

Offence: Cruelty to a child/neglect of a child contrary to section 127(1) (a) of the Children's Act No. 8 of 2001.

Particulars: **AB**, on 16th April 2016, at Olobel Village, in Isinya Sub County within Kajiado County, being a parent/ guardian **(any relation)** to **R.W.M**, a minor aged **(state age)**, willfully **(assaulted/ill-treated/exposed/abandoned)** the said **R.W.M** by **(name the act)**, an act that caused **(suffering/injury)** to her health.

Scenario 2

Offence: Cruelty/neglect of a child contrary to section 127(1) (b) of the Children's Act No. 8 of 2001.

Particulars: **AB**, on 16th April 2016, at Olobel Village, in Isinya Sub County within Kajiado County, being a parent/ guardian (**any relation**) to **R.W.M**, a minor aged (**state age**), caused **R.W.M** to be a child in need of care and protection by (**e.g. Subjecting her to undergo FGM/early marriage/ failing to take her to school/beading etc.**)



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Table 7: Types of FGM

Type	Description	Diagram
Type 1: Clitoridectomy	This is the partial or total removal of the clitoris or the prepuce.	
Type 2: Excision	This is the partial or total removal of the clitoris or the prepuce and the labia minora, with or without excision of the labia majora.	
Type 3: Infibulation	This is narrowing of the vaginal orifice with the creation of a covering seal by cutting and positioning the labia minora and labia majora with or without excision of the clitoris.	
Type 4: Others	This is the pricking, piercing, incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice or cutting of the vagina; introduction of corrosive substances or herbs into the vagina to cause bleeding or for purpose of tightening.	

1 The green sections represent the cut part

REFERENCES

1. Declaration, V. (1993). The Vienna Declaration and Programme of Action of the World Conference on Human Rights.
2. UN. (1994). UN Sub Commission on the Promotion and Protection of Human Rights.
3. Declaration, B. (1995). Beijing Declaration and Platform for Action Fourth World Conference on Women.
4. African Union. (1999). African Charter on the Rights and Welfare of the Child. Addis Ababa, Ethiopia.
5. African Union. (2003). Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.
6. Kenya Anti-FGM Board. Eradicating FGM, Resource Book
7. Republic of Kenya. (2001). Children Act 2001. Nairobi: National Council for Law Reporting.
8. Republic of Kenya. (2006). Sexual Offences Act. Nairobi: Nairobi: Government Printers.
9. Republic of Kenya. (2008). Evidence Act. Nairobi: Nairobi: Government Printers.
10. Republic of Kenya. (2010). Constitution of Kenya 2010. Nairobi: Government Printer.
11. Republic of Kenya. (2010). Counter-Trafficking in Persons Act. Nairobi. National Council for Law Reporting.
12. Republic of Kenya. (2012). Prohibition of FGM Act, 2011. Nairobi: Government Printer.
13. Republic of Kenya. (2012). Penal Code. Nairobi: Government Printer.
14. Republic of Kenya. (2013). National Government Co-ordination Act. Nairobi: Government Printer.
15. Republic of Kenya. (2014). Victim Protection Act. Nairobi: Government Printer.
16. Republic of Kenya. (2014) Kenya Demographic and Health Survey. Kenya National Bureau of Statistics.
17. National Police Service: Standard Operating Procedure for Prevention and Response to Gender Based Violence In Kenya
18. The Bail and Bond Policy Guidelines (2015)
19. ODPP Guidelines on the Decision to Charge, 2019
20. ODPP Plea Bargaining Guidelines
21. ODPP Diversion Policy and Guidelines
22. ODPP National Prosecution Policy
23. United Nations. (2017). Harmful Traditional Practice of Female Genital Mutilation Must End. <https://www.voanews.com/a/united-nations-female-genital-mutilation-must-end/3708326.html>.



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