



# The Law Should Work for Us

Assessing Gaps in Kenya's Regulatory Framework  
to Build a Safer Internet for Women and Girls

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## ABOUT



[Catherine Muya](#) is a 2020 Open Internet for Democracy Leader, as well as a lawyer and policy officer. As the digital rights lead at the Lawyers Hub Kenya she works to advance digital rights and data governance in sub-Saharan Africa through comprehensive policy engagement and advocacy. She has written on various issues including digital identity, data governance and elections in Africa. She helped convene the inaugural and second Africa Law Tech Festival in Kenya bringing together stakeholders from 20+ countries to discuss policy alternatives on Digital Rights. Working with a coalition of civil society, she has supported

strategic litigation on digital rights like Kenya's Digital ID petition against the implementation of a digital ID system without comprehensive privacy laws. She is a 2020 fellow of the Kenya School of Internet Governance and a member of the Internet Society. She holds a Bachelor of Laws Degree (with Honors) from the University of Nairobi. Additionally, she holds Professional Certification in Digital Identity from the Digital Frontiers Institute, South Africa. She further holds certification in Intellectual Property from the World Intellectual Property Office and the Korean Intellectual Property Office.



[The Open Internet for Democracy Initiative](#) is a collective effort from the [National Democratic Institute \(NDI\)](#), [Center for International Private Enterprise \(CIPE\)](#), and the [Center for International Media Assistance \(CIMA\)](#) connecting civil society, media, the local private sector, and political groups to preserve civic space online. The community consists of over 350 individuals and organizations from around the world, particularly the Global South, with a commitment to preserving an open, democratic internet. The Open Internet for Democracy Leaders Program empowers emerging leaders from across the globe to build their advocacy and

organizing skills to protect internet freedom. Open Internet Leaders are a unique cohort of global advocates from civic organizations, media, and the private sector who are passionate about protecting and promoting an open internet.

# EXECUTIVE SUMMARY

Several reports published by Civil Society Organizations (CSOs) in East Africa, have established the negative effects of online violence on women in Kenya. While this challenge persists, not only are legislative, institutional and administrative actions to deal with this menace lagging behind, but there is also limited awareness of existing measures on the populace currently.

With this in mind, as an [Open Internet Leader](#), I undertook a project to review Kenya's existing legislative framework for online violence to identify gaps and make recommendations to improve the government's ability to respond to this challenge. This report highlights the various forms and impacts of online violence drawn from country specific examples while consolidating existing research on the same. A review of the legislation shows Kenya has attempted to legislate against online violence, albeit inadequately.

The report also examines other legislation, such as national gender and mental health policies, and laws on telecommunications, the protection of children, sexual harassment, and penal laws. It reviews the progress of institutions such as the National Computer Incident Response Team- Coordination Centre (KE-CIRT/CC) set up to investigate cybercrimes. In summary, I found that:

1. Existing legislation does not adequately legislate against online violence and there is a need to revise existing laws and policies, including the [National Policy for Prevention and Response to Gender Based Violence](#), as well as laws on sexual harassment and child protection.
2. Lack of awareness about existing legislation, as well as both online and offline reporting mechanisms, leads to low reporting of online violence to both national authorities and platforms. For example, In the period between January - March 2021, the KE-CIRT received approximately 70 requests to investigate cases of online abuse compared to the 28,247,819 cyber incidents [reported to the agency](#).
3. KE-CIRT reports a lack of trained staff and high cost of equipment as one of the challenges facing digital forensics. There is a need to improve the number of adequately trained forensic examiners.
4. Respondents most vulnerable to online violence, such as those in minority communities or media were not aware of existing legislation, reporting mechanisms, or civil society initiatives dealing with online violence.
5. There is a need to increase and concentrate advocacy on digital safety programs and reporting mechanisms.

## Next Steps

While the report provides additional findings and recommendations, I believe we all have a part to play to realize a safer internet for all. To start, we should all be [active bystanders](#), standing up to harassers in strong or subtle ways, in order to reduce violence. Further, we can achieve more if we work together to amplify our advocacy initiatives, especially women in public spaces who are able to utilize their wide reach to amplify campaigns. Civil society campaigns should be informed by existing research and give priority to: creating awareness on reporting mechanisms, building safe communities for victims, training or publishing simplified information on cyber hygiene and advocating for legislative reform. Platform designers should prioritize safety and ensure reporting mechanisms are visible, and easily accessible.

Finally, I call on national human rights and gender institutions in Kenya to take more action against online violence by reviewing gender laws and policies, creating awareness and undertaking more activities to ensure we can all access a safer internet.

## Methodology

The following tools were employed in writing this research paper:

- Research questionnaires to conduct written interviews
- Secondary sources (such as the annual reports from the regulators in Kenya)
- Secondary sources (such as reports from independent institutions covering Kenya)

# UNDERSTANDING THE PROBLEM

*“I felt irritated and kept offline for some time, then I went and unfriended anyone who never made sense to my life online. I generally hated everything about social media.”*

*Article 19 & AMWIK, “Women Journalists Digital Security”*

Over the past decade, we have enjoyed a connected reality as social media has allowed us to traverse borders and rekindle and maintain relationships. Most importantly, it has amplified the voice and participation of women in all aspects of society, be it political, economic, or social-cultural in art, music, or tackling global issues such as climate change. A 2021 Internews report found that social media is now the primary source of news and information for Kenyans, surpassing traditional media like radio, television, and newspaper.<sup>1</sup> Despite high levels of social media use, online violence against women and girls is exacerbating gender-based violence against women, reinforcing negative stereotypes and driving women offline. Without swift action, online violence will widen the gender digital divide.

The UN defines violence against women as “any act of gender-based violence that results in or is likely to result in physical, social, or psychological harm or suffering to women, including threats of such acts, coercion, arbitrary deprivation of liberty whether occurring in private or public life.”<sup>2</sup> In online environments, acts of gender-based violence may include “cyber stalking; accessing or disseminating a woman’s private data (through hacking); identity theft or doxxing.”<sup>3</sup>

In East Africa, at least 28% of women and girls have experienced some form of online violence. Despite this, there is limited knowledge among the populace of laws or policies to deal with online violence.<sup>4</sup> In a study about online violence in East Africa conducted by the Ugandan-based civic technology organization, Pollicy, the majority of respondents from Kenya indicated that they would like to know about the laws and policies governing online violence, how to report cyber bullies, and how to ensure online safety.<sup>5</sup>

There is growing concern that in addition to lack of citizen awareness, there may not be efficient reporting and enforcement mechanisms or adequate legal or policy frameworks to deal with online violence. In light of this, this paper examines the adequacy of legislation and enforcement mechanisms in Kenya to address online violence, and makes recommendations to relevant stakeholders on their roles and responsibilities in ensuring online safety for women and girls.

<sup>1</sup> Internews, “The Kenya Media Assessment 2021” (March 2021) <[https://internews.org/wp-content/uploads/legacy/2021-03/KMARReport\\_Final\\_20210325.pdf](https://internews.org/wp-content/uploads/legacy/2021-03/KMARReport_Final_20210325.pdf)>

<sup>2</sup> UN General Assembly, Declaration on the Elimination of Violence Against Women, article 1 20December 1993, A/RES/48/104 < <https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx>>

<sup>3</sup> Zarizana Abdul Aziz, Due Diligence and Accountability for Online Violence (Association for Progressive Communications, July 2017) <<http://duediligenceproject.org/wp-content/uploads/2019/05/Paper-on-Due-Diligence-and-Accountability-for-Online-Violence-against-Women-make-this-active-link.pdf>>

<sup>4</sup> Pollicy, Alternate Realities, *Alternate Internets: African Feminist Research for a Feminist Internet* (Pollicy, August 2020) Kenyan Dataset accessible at < [https://drive.google.com/file/d/13-71aqDGzwLW3dOzt\\_zQ7LgBEKljG2MI/view?usp=sharing](https://drive.google.com/file/d/13-71aqDGzwLW3dOzt_zQ7LgBEKljG2MI/view?usp=sharing)>

<sup>5</sup> Pollicy Kenyan Dataset n5

## Forms of Online Violence

Drawing from an analysis of previous research and events in the country, the most common forms of online violence identified in Kenya include insults and trolling, sexual harassment, hacking, doxxing, and grooming.

### *Insults and Trolling*

Insults constitute 71% of the online violence faced by women on Twitter in Kenya. Insults include offensive name-calling expressed in English, Kiswahili or other local languages.<sup>6</sup> Insults are often coupled with trolling - the use of inflammatory, outrageous messages that touch on personal or emotional issues to elicit responses for the troll's amusement.<sup>7</sup> Female journalists often face this kind of online abuse when writing about political issues. One example is Catherine Amayi, a feminist writer and political commentator, who experienced trolling by followers of a male politician across multiple platforms after she published a blog questioning the actions of a politician in joking about rape. Trolls attacked her via email, her blog, Twitter, and Facebook, making no corner of the internet safe.<sup>8</sup>

Out of 850 Kenyan women interviewed by Pollicy in 2020, 28% of them (238 women) reported experiencing some form of online violence. Among these 238, 33.2% of them reported experiencing offensive name-calling.<sup>9</sup> Pollicy found that online trolling is on the increase, particularly targeting women in public spaces such as politics, art, and media.<sup>10</sup> While these reports focused largely on women in politics and public spaces, insults are a general form of violence experienced by women in Kenya regardless of their social affiliation. Insults and trolling can also be expressed as hate pages on social media like Facebook, Twitter hashtags, and memes.<sup>11</sup>

In another case, photos of a female plus-size model taken during her first photoshoot went viral, resulting in the creation of memes seeking to embarrass and shame her. For the model, the incident was emotionally devastating, and to date she is still unable to take photos.<sup>12</sup> This incident demonstrates how online violence causes women emotional harm and makes them self-censor on the internet.

### *Sexual Harassment*

Most forms of online violence such as trolling, name-calling, or bullying are often coupled with sexual harassment.<sup>13</sup> Feminist blogger Catherine Amayi was not only trolled for publishing her work, but she also received pictures of male genitalia in her inbox.<sup>14</sup> Pollicy also reports that at least 36% of the

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<sup>6</sup> National Democratic Institute, "Tweets that Chill: Analyzing online Violence against women in Politics" (NDI, 2019) <<https://www.ndi.org/sites/default/files/NDI%20Tweets%20That%20Chill%20Report.pdf>>

<sup>7</sup> James Hanson, 'Trolls and their Impact on Social Media' (University of Nebraska- Lincoln ) <<https://unlcms.unl.edu/engineering/james-hanson/trolls-and-their-impact-social-media>>

<sup>8</sup> Catherine Amayi, 'Online Bullying still on the Rise' (KICTANET, 06 July 2020) <<https://www.kictanet.or.ke/online-bullying-still-on-the-rise/>>

<sup>9</sup> Pollicy Kenyan Data Set n 5

<sup>10</sup> Pollicy, Alternate Realities, *Alternate Internets: African Feminist Research for a Feminist Internet* (Pollicy, August 2020)

<sup>11</sup> Women Journalists Digital Security n1

<sup>12</sup> Mwendwa Kivuva, 'When my plus size photo become a meme' (KICTANET, 22 July 2020) <<https://www.kictanet.or.ke/when-my-plus-size-photo-became-a-meme/>>

<sup>13</sup> Sexual Harassment is defined as unwanted sexual conduct on any digital platform and can be classified into non-consensual sharing of personal images, sexual bullying, exploitation, coercion, threats of sexual nature and unwanted sexualization where you receive unwelcome and unwanted sexual material.

Project deSHAME, 'Digital Exploitation and Sexual Harassment among Minors in Europe' Understanding, Preventing, Responding (Childnet International, December 2017)

<sup>14</sup> Catherine Nyamai n6

women who have experienced online sexual harassment have been exposed to unwanted sexual conduct.<sup>15</sup>

### Hacking

Hacking is defined as the use of technology to get illegal or unauthorized access to systems or resources like social media accounts or emails.<sup>16</sup> The aim is to either acquire personal information that will be used to embarrass, harass, or intimidate the person or to access personal accounts and use it to publish information aimed at embarrassing the owner or bringing the character to disrepute. A 2016 study by Article 19 Eastern Africa and the Association of Media Women in Kenya found that unauthorised access of accounts was the most prevalent form of online harassment among journalists in Kenya.<sup>17</sup>

### Online Public Shaming

Public shaming is aimed at embarrassing or disgracing somebody in a public fashion and can take various forms, such as doxxing. Doxxing (also known as dropping documents) is the act of publishing a person's personal information publicly online, often with malicious intent.

### Grooming

Cases of grooming particularly affect children regardless of gender,<sup>18</sup> and involve situations where a person intentionally develops a relationship with children with the aim of building their trust and exploiting them.<sup>19</sup> The law in Kenya does not specifically cover this offence. At the height of the pandemic in May 2020, the Kenya Child Protection Unit at the Directorate of Criminal Investigations identified grooming as a significant risk facing children at home.<sup>20</sup>

## Case Study: Kenya's COVID-19 Patient Zero

Brenda Ivy was dubbed Kenya's Patient Zero, being the first Kenyan resident to test positive for COVID-19 in March 2020. Upon her recovery, the Ministry of Health introduced Brenda to Kenyans via a public interview to share her personal story of dealing with the virus and the journey to her recovery including the medical care she received. To the surprise of many, what was intended as a public awareness exercise soon turned into a bitter experience that Brenda would have to live with.

Brenda was immediately trolled on Twitter by a large section of users who claimed that she was being used by the government to relay a public relations stunt. It began by pointing out inconsistencies with her stories, but quickly escalated to a personal sexual harassment attack on

<sup>15</sup> Pollicy n8

<sup>16</sup> Baker, Campbell & Burruto, *Understanding Technology Related Violence Against Women: Types of Violence and Women's Experiences* (Learning Network, Centre for Research and Education on Violence Against Women and Children, 2013) <<http://www.vawlearningnetwork.ca/our-work/briefs/briefpdfs/LB-06.pdf>>

<sup>17</sup> Article 19 & AMWIK, "Women Journalists Digital Security" <<https://www.article19.org/data/files/medialibrary/38757/Women-Journalist's-Digital-Security-Kenya-2016.pdf>> Women Journalist Digital Security n 1

<sup>18</sup> Mugambi Laibuta, 'Podcast: Protection of Children Online Part 2' (Mugambi Laibuta, 15 November 2020) <<https://www.laibuta.com/cyber-security/podcast-protection-of-children-online-part-2/>>

<sup>19</sup> Childnet International, 'Online grooming' (Childnet International) <<https://www.childnet.com/parents-and-carers/hot-topics/online-grooming>>

<sup>20</sup> Director of Criminal Investigations (@DCI\_Kenya, 4 May 2020) <[https://twitter.com/dci\\_kenya/status/1257327420388098051?lang=en](https://twitter.com/dci_kenya/status/1257327420388098051?lang=en)>



Brenda.<sup>21</sup> Using hashtags, Kenyans on Twitter challenged Brenda's narrative, pointing out inconsistencies with her duration of quarantine, time of arrival, treatment, and care received. Soon, a collective of Twitter users who purport to investigate and expose conspiracies online, turned to sexual harassment of Brenda. They searched her social media pages and released her previously posted images to show that she knew the second Covid-19 patient in the country. This quickly escalated, as the group released screenshots of her personal conversations and intimate images all over social media.<sup>22</sup>

This prompted a response from the Cabinet Secretary of the Ministry of Health, who condemned these actions and called for the prosecution of digital bullies. Soon after, popular female journalist and news anchor Yvonne Okwara showed support on live TV for the remarks by the Cabinet Secretary. Yvonne condemned the shameful response by Kenyans, but went a step further to say that Brenda's personal and sexualised attacks were largely attributed to her gender. *"At some point people on social media need to be accountable, attacks on Brenda are proportionately targeted at women, Brenda is being targeted as she is a woman and could easily sink into depression... It is ironic that Brenda could survive Covid-19 to suffer from depression."*<sup>23</sup>

Unfortunately following her remarks, Yvonne too was the subject of trolling coupled with sexualised comments and harassment. People used her name as a hashtag on Twitter to post sexualised memes aimed at attacking her body, to attack personal posts about her marriage, and to question her qualifications as a journalist. The effects of this harassment were not only felt by the subjects themselves but their relatives and friends. In a follow up interview, Brenda's parents expressed their disappointment and emotional distress in the online bullying of their daughter.<sup>24</sup>

In Brenda's case and many others, internet users could have acted as active bystanders by either liking supportive comments, posting deflecting comments or reporting offensive posts. Platforms also could have played a role to ensure that their reporting mechanisms are clearly visible and accessible to users. Authorities also could have stepped in to ensure legal formal reporting mechanisms are properly publicized so that users can utilize these platforms to report cases of online abuse.

## Groups at Risk of Online Violence

Any person, regardless of gender, can fall victim to online violence. Nevertheless, women are disproportionately affected by online violence, and will remain the focus of this paper, especially in Kenya where online activity mirrors offline conduct, and society's behaviour is largely patriarchal.

Between 2012-2014, the Association for Progressive Communications conducted a research project on Women's rights and Safety online in select countries including Kenya. The study found that these categories of women were most prone to online violence:<sup>25</sup>

<sup>21</sup> Hilary Kimuyu, 'Kagwe tells Police to arrest social media users for bullying Brenda' *NairobiNews* (Nairobi 3rd April 2020) <<https://nairobinews.nation.co.ke/editors-picks/kagwe-tells-police-to-arrest-social-media-users-for-bullying-brenda>>

<sup>22</sup> Pulse Live Kenya, 'Kenyans react to Brenda Cherotich's CORONAVIRUS Recovery' (April 2 2020) <[https://www.youtube.com/watch?v=PNxOM8P\\_RMM](https://www.youtube.com/watch?v=PNxOM8P_RMM)>

<sup>23</sup> Yvonne Okwara, 'Opinion on Brenda and Brian after the first CoronaVirus Recovery in Kenya' (CitizenTV, 3 April 2020) <<https://www.youtube.com/watch?v=i5X7BmLSB9E>>

<sup>24</sup> 'Stop bullying Brenda: Recovered patient's family speaks' (K24, 2 April 2020) <[https://www.youtube.com/watch?v=ziatH\\_n7k](https://www.youtube.com/watch?v=ziatH_n7k)>

<sup>25</sup> Association for Progressive Communication, *Technology Related Violence Against women* (Briefing Paper, June 2015) <[https://www.apc.org/sites/default/files/HRC%2029%20VAW%20a%20briefing%20paper\\_FINAL\\_June%202015.pdf](https://www.apc.org/sites/default/files/HRC%2029%20VAW%20a%20briefing%20paper_FINAL_June%202015.pdf)>

- Women in an intimate relationship whose partner had become abusive
- Survivors of physical assault, often from intimate partner abuse and rape
- Professionals with a public profile involved with a public profile

In addition to these groups of women, this paper looks into how online violence affects children and sexual minorities in Kenya. Over the past years online violence against children has presented itself in different forms including cyberbullying, grooming, or shaming, which can be perpetuated by adults or children themselves. While institutions such as the Communication Authority are making progress on addressing this issue, their efforts remain largely unknown. Moreover, there is a need to highlight the online challenges faced by sexual minorities in Kenya mostly because of the need to understand the prevailing legal and social environment that they are subjected to offline that translates online and may limit their right to free expression.

### *Women in Intimate Relationships*

Often this form of violence takes the form of revenge pornography, where a partner publishes intimate photos or films of their partner with malicious intent to harm them.<sup>26</sup> These intimate photos or videos are usually taken in the course of the relationship, and intended only to be seen by the two parties and not disclosed to other third parties.

### **Case Study: Roshanara Ebrahim**

Roshanara Ebrahim was crowned Miss World Kenya 2015 by Ashleys Kenya Limited and eligible to represent Kenya in the Miss World competitions in December 2016. On 28th July 2016, Roshanara's ex-boyfriend sent her nude pictures to Ashleys Kenya Limited claiming that she had taken nude photos in violation of her contract with the company and was not fit to hold the title Miss Kenya or represent Kenya in the upcoming Miss World competitions.<sup>27</sup> As a consequence of these photos, Ashleys Kenya terminated Roshanara's contract and she was deprived of her title as well as her opportunity to compete at the global competition.

Roshanara thus sued Ashleys Limited pursuant to her termination and her ex-boyfriend for breach of privacy. The court held that the question of termination was not a violation of constitutional rights but of a contract between the two parties. Where Ashleys found that she had breached it, they had power to terminate.

On the issue of violation of the right to privacy by her ex-boyfriend, the court held that every person has a right to privacy and taking of nude photos doesn't necessarily limit the right to privacy especially where they are not intended to be disseminated to third parties. Hence, when Roshanara took photos and selfies of her nude self, she didn't intend to share them with third parties or give consent of them. Further, the fact that her boyfriend with whom she was in an intimate relationship had access to these photos didn't make them any less private and she had reasonable expectation that they would be kept private. The court found that the act by the ex-boyfriend to share intimate photos of Roshanara with Ashleys Kenya Limited was a violation of her privacy and had exposed her to ridicule. As such, the court ordered her ex-boyfriend to pay Roshanara damages of 1 million Kenya shillings (approximately 10,000 USD.)

<sup>26</sup> Cambridge Dictionary, (Cambridge University Press, 2021)

<<https://dictionary.cambridge.org/dictionary/english/revenge-porn>>

<sup>27</sup> Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] e KLR, Petition 361 Of 2016

<<http://kenyalaw.org/caselaw/cases/view/129282/>>

This case established important legal principles in protecting the right to privacy. It recognises the intimacy of romantic relationships even among unmarried persons, knowing that couples share intimate details and intricacies about their lives while still expecting information to remain private. Today, with the Computer Misuse and Cybercrime Act, Roshanara's boyfriend would be charged with cyber harassment, nevertheless, this precedent is a welcome addition to privacy law and can be used by civil society in advocacy campaigns to create awareness on the need to respect privacy even within intimate relationships. Additionally, more needs to be done by relevant authorities such as the Communications Authority to create awareness about reporting mechanisms for cyber harassment that also helps victims in the prosecution of this crime.

### *Survivors of Assault and Gender-Based Violence*

In Kenya this often takes the form of women who come out as survivors of rape. When a particular culprit is identified, the allies of the culprit come out strongly to defend him, questioning the credibility of the victim, critiquing their stories to find loopholes, and even attacking the victims, questioning their physique or conduct.

Gender-based violence against women, including femicide, has been on the rise in Kenya.<sup>28</sup> Between 1st January and 2nd May 2019, Kenya reported 46 cases of femicide.<sup>29</sup> While femicide is already an issue of national concern, it is further disheartening to see reactions online, where people on social media troll the victim, which inflicts additional harm to the family of the deceased. Reporting mechanisms should be made more visible and accessible, and platforms could address this problem by building a community of active bystanders that are able to report offensive posts both on the platform and to relevant authorities. Active bystanders are users who notice acts of violence on the internet and take action against it.<sup>30</sup> An action can be as simple as liking a supportive comment or making a deflect post. It differs from content moderation which is how platforms regulate user generated content according to their rules and guidelines such as Facebook community standards or Twitter rules and policies.<sup>31</sup>

### **Case Study: Ivy Wangechi**

Ivy Wangechi was a medical student in her final year at the Moi University School of Medicine. She was murdered by a man who said that Ivy did not return his affection. Following her death, the internet was filled with memes of axes, making jokes about the killing and giving reasons why Ivy was responsible for her own death. Ivy's loved ones witnessed her become a trending hashtag full of harassment, trolling, and shaming.

Laws like the Data Protection Act are designed to enforce the rights of the living. Sigi and Ephraim

<sup>28</sup> World Health Organization, *Understanding and addressing violence against women* (WHO/RHR/ 12.38, 2012)

<[https://apps.who.int/iris/bitstream/handle/10665/77421/WHO\\_RHR\\_12.38\\_eng.pdf;jsessionid=2119D534F0B881120A3D4B1102EF9D8B?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf;jsessionid=2119D534F0B881120A3D4B1102EF9D8B?sequence=1)>

<sup>29</sup> Mwikali Mutune, 'Femicide Cases on the Rise in Kenya' (Akili Dada) <<http://akilidada.org/femicide-cases-on-the-rise-in-kenya/>>

<sup>30</sup> Clark, Rabun et al, 'Active Bystander Orientation' (Digital Library Federation, 30 October 2019) <<https://www.diglib.org/active-bystander-orientation/>>

<sup>31</sup> Besedo, 'What is content moderation?' (20 November 2020) <<https://besedo.com/resources/blog/what-is-content-moderation/>>

argue that digital death transcends natural death, and a person's digital life ought to be treated as a digital asset that can be inherited by their estate, giving a deceased person the ability to transfer legal rights.<sup>32</sup> The largest question is whether this allows a victim's surviving relatives to enforce their data protection rights posthumously. Additionally, given there are criminal sanctions for the offence of cyber harassment within the Cybercrimes Act, there is a need to evaluate if this could be prosecuted after a victim's death as well.

### *Professionals with a Public Profile*

This includes a large section of women in public spaces, women in media, activism and politics. Female journalists are often the subject of online violence affected by offensive speech or misuse of personal images. A report by Article 19 on online violence among women in media in Kenya shows at least 75% of the respondents have fallen victim to sexual harassment in the course of their work.<sup>33</sup> For some, this violence is influenced by the nature of things they report on like politics, sports, and sexuality.<sup>34</sup> While women in public spaces are more susceptible to online violence, it is important to recognise that online violence is an intersectional issue. This means that even among these women, some are additionally more vulnerable based on factors such as their marital status, sexual orientation, political beliefs, tribe, family relations, or other related grounds. Older female journalists who are unmarried have been ridiculed for their marital status.

### *Children*

Children are susceptible to online violence. In May 2020, the Child Protection Unit of the Directorate of Criminal Investigations stated that there was an increase in digital threats to children during the coronavirus pandemic in forms such as grooming, cyberbullying, sexting, sexual extortion, gambling, identity theft, producing explicit material and access to pornographic material. The National Center for Missing and Exploited Children reports that the number of cases of online child exploitation reported from Kenya to NCMEC in 2020 were 14,344, a significant increase from 12,788 in 2019.<sup>35</sup>

Cyberbullying of children is perpetrated by both adults and other children. #Ifikiewazazi was a trending national hashtag on Twitter aimed at exposing minors with immoral sexual conduct.<sup>36</sup> Photos and videos were shared on Twitter, Facebook, and other forms of private messaging like WhatsApp. The aim was to publicly identify, embarrass, and shame minors who were engaging in what was deemed 'immoral conduct.' No legal action was taken against those sharing photos of minors.

Today, the government has enacted legislation and taken certain mechanisms to protect minors. There is a lack of awareness among citizens on cyber bullying and how actions might constitute harm both online and offline. It is important to concentrate efforts by both civil society and national institutions such as the Ministry of Gender or the Communications Authority to create awareness of the effects of online violence and the mechanisms to report it.

<sup>32</sup> Mwanzia & Kenyanito, Speaking from the grave: death, data protection under Kenyan Law (The Star, 13th April 2021) <[https://www.the-star.co.ke/opinion/star-blogs/2021-04-13-speaking-from-the-grave-death-data-protection-under-kenyan-law/?utm\\_medium=Social&utm\\_source=Twitter#Echobox=1618299951](https://www.the-star.co.ke/opinion/star-blogs/2021-04-13-speaking-from-the-grave-death-data-protection-under-kenyan-law/?utm_medium=Social&utm_source=Twitter#Echobox=1618299951)>

<sup>33</sup> Article 19, 'HCR44: Action needed on violence against women journalists,' (Article 19, July 7, 2020) <https://www.article19.org/resources/hrc44-action-needed-on-violence-against-women-journalists/>

<sup>34</sup> Mora Obiria, 'Report finds kenyan women journalists face online harassments, makes recommendations' (International Journalists Network, 31 January 2019) <<https://ijnet.org/en/story/report-finds-kenyan-women-journalists-face-online-harassment-makes-recommendations>>

<sup>35</sup> NCMEC, 2019&2020 reports by Country <<https://www.missingkids.org/gethelpnow/cybertipline#overview>>

<sup>36</sup> Wandia, 'In the Aftermath of ifikie wazazi: Social Media, Safety and Consent' (Wandia 7th May 2018) <<https://tnwandia.com/2018/05/07/in-the-aftermath-of-ifikie-wazazi-social-media-safety-and-consent/>>

## Sexual Minorities

The constitution protects every person from discrimination against sex or sexual orientation, however, engaging in same-sex relations is generally illegal under section 162 of the Penal Code which criminalizes ‘carnal knowledge with any person against the order of nature’ and imputes a prison term of a culpable person to 14 years. Further, section 165 of the Penal Code criminalizes ‘indecent practices between males.’<sup>37</sup> Although Article 8 of the Constitution prescribes that Kenya has no state religion, majority of the citizens still ascribe to either Christianity, Islam, or Hinduism. As a result, many believe that same sex relations are illegal, and offend their culture and religion.<sup>38</sup> A study by Pew Charitable Trust found that 88% of Kenyans consider homosexuality unacceptable.<sup>39</sup>

Owing to the social stigma, the significance of digital spaces among sexual minorities to help them associate and freely express themselves is growing. Nevertheless, these spaces are also mediums of perpetrating violence through hateful and offensive speech. In September 2020, prominent media personality Anita Nderu faced online criticism after openly expressing her sexual orientation on Twitter, identifying with the LGBTQ community.<sup>40</sup> Additionally, members of the LGBTQ community who express themselves online at times face offline consequences. In a study on sexual rights and the internet in Kenya, one respondent revealed that her family found out about her orientation through her posts and photos online and sent her away from their home town to the city.<sup>41</sup> The Gay and Lesbian Coalition of Kenya highlight that despite Kenya's bill of rights that outlaws discrimination, Kenya's legislative and institutional framework fails to protect against discrimination on basis of sexual orientation, making it harder for these communities to report or deal with online abuse.<sup>42</sup>

## Effects of Online Violence

The Web Foundation reports that online violence can cause women and girls to self-censor either by directly being a victim of the violence or being a witness to the violence. One popular radio personality stated that she has been a victim of online violence on two occasions all which made her apprehensive about her posts and caused her to self-censor.<sup>43</sup> In addition to self-censorship, the threat of online violence hinders the participation of women in political life and public spheres. In their research, the National Democratic Institute (NDI) reported that online violence against women actively engaged in politics decreased their participation and presence online.<sup>44</sup> It also contributes to economic losses where women are not willing to show up for work.<sup>45</sup>

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<sup>37</sup> Adriaan van Klinken, ‘Homosexuality remains illegal in Kenya as court rejects LGBT petition’ ( *The Conversation*, 24th May 2019) < <https://theconversation.com/homosexuality-remains-illegal-in-kenya-as-court-rejects-lgbt-petition-112149>>

<sup>38</sup> Kamau Muiga, ‘African homophobia and the colonial roots of african conservatism’ ( *Africa Is a Country*, 20th June 2019) < <https://africasacountry.com/2019/06/african-homophobia-and-the-colonial-intervention-of-african-conservatism>>

<sup>39</sup> Global Information Society Watch, *Sexual Rights and the Internet* (APC & Hivos 2015) <<https://giswatch.org/sites/default/files/gw2015-kenya.pdf>>

<sup>40</sup> Article 19, Free Expression on sexual orientation, and gender identity is a human right (October 06 2020) <<https://www.article19.org/resources/kenya-free-expression-on-sexual-orientation-and-gender-identity/>>

<sup>41</sup> Ibid.

<sup>42</sup> GALCK, ‘Respect Human Rights despite sexual orientation’ (06 September 2017) <<https://www.galck.org/respect-human-rights-despite-sexual-orientation/>>

<sup>43</sup> K24 The Loop: Let's Talk Cyber Bullying (Youtube, 19th February 2021) <<https://www.youtube.com/watch?v=haBzGT99FpM>>

<sup>44</sup> NDI, Tweets that Chill, 21

<sup>45</sup> Article 19 & AMWIK n 1

# LEGAL AND POLICY FRAMEWORK

Noting that online violence is a serious challenge facing women and girls, this section examines the adequacy of the Kenyan legal and institutional framework to address it.

## Gender Policies

### *National Policy for Prevention and Response to Gender Based Violence 2014*

The policy recognizes emotional and psychological violence as a form of gender-based violence in Kenya. This includes verbal abuse, insults or humiliation, isolation, sexual harassment, and intimate partner violence. While these forms were identified from research in offline environments, they remain relevant to deal with online violence not only because of the effects of online violence to mental and psychological health, but also in the forms like insults which it is perpetrated.

The policy recognised challenges in dealing with GBV included: inadequate enforcement of legislation to curb GBV due to lack of policy framework, poor utilization of existing research to inform policy and programming, and limited coordination in prevention and response among stakeholders. Similar challenges ensue today with the need to revise legislation to regulate against online violence while maintaining media freedom and the need to upscale the capacity of relevant stakeholders to deal with online violence.

While Kenya's gender policies can, in a limited fashion, be extrapolated to protect against online violence, there is a need for a national framework on online violence. This framework should identify the role played by national human rights and gender institutions to protect against online violence.

### *National Policy on Gender and Development 2019*

Kenya's current national policy aims at realizing gender equality by eliminating all forms of discrimination and violence against women which are intersectional and deeply rooted in the country's patriarchal society.<sup>46</sup> It recognizes that despite high internet penetration, women still have less access to ICT technologies, and that there are cultural and social attitudes that limit their participation online, growing the digital divide. It also recognizes the need to deal with mental health involving sexual gender related violence (SGBV) issues and to improve the capacity of institutional dealing with SGBV. It recognises Kenya's responsibility to eliminate violence against women and girls in public and private life and can be achieved by strengthening capacity of relevant institutions to undertake effective and timely investigations and prosecution of SGBV-related offences.

Although online violence is not expressly mentioned within the policy, certain provisions could be expressed to include it. For example, policy which encourages women to take up science, technology, engineering, or mathematics (STEM) or political pursuits could directly impact the development of technologies that keep women safe online, or the development of gendered policies that address online violence contributing long-term solutions to the challenge of online violence. However, to fully ensure women and girls are protected from online violence, there is a further need for the government to undertake and publish national research on the effect of online violence on women and girls in Kenya and provide precise recommendations to policy and institutions to address this. There is also need to fund advocacy campaigns to raise awareness on online violence and reporting mechanisms, as well as to ensure investigating authorities have the resources and capacity for successful prosecution of cases of online violence.

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<sup>46</sup> Ministry of Public Service, Youth & Gender, 'National Policy on Gender and Development (Republic of Kenya, October 2019) <<http://www.parliament.go.ke/sites/default/files/2020-10/LABOUR%20RPT%20ON%20SESSIONAL%20PAPER%20NO%202%20OF%202019%20-%20NATIONAL%20GENDER%2026%20DEVT%20POLICY.pdf>>



## Mental Health Policy

As highlighted earlier, online violence has significant mental health impacts on the targeted individual or persons close to them. For a long time, Kenya did not have an adequate legislative or policy framework to deal with mental health. Following the promulgation of the constitution in 2010 that provides for the right to health, Kenya enacted its mental health policy.<sup>47</sup> The government also established a mental health taskforce that recommended the cabinet secretary responsible for health to declare mental illness a national emergency of epidemic proportions and the establishment of the mental health commission to advise and monitor the status of mental health in Kenya.<sup>48</sup> Regardless, much is still yet to be done to sensitize citizens on the importance of mental health or to reduce social stigma with accessing medical care. This may make it difficult for victims of online violence to seek mental health services.

During the COVID-19 pandemic, while online violence against women and girls increased, the Ministry of Health developed a comprehensive guide on mental health and psychological support to guide healthcare workers in the provision of mental health services during the pandemic.<sup>49</sup> This guide, however, failed to appreciate the needs of victims of online abuse, whose access to mental services was limited during a pandemic, at a time when health resources were strained.<sup>50</sup>

## The Constitution

The Constitution of Kenya provides that any treaties and conventions ratified by Kenya shall form part of Kenyan Law.<sup>51</sup> Kenya has ratified various treaties that guarantee fundamental rights and freedoms like the right to human dignity, free expression such as the African Charter on Human and People's Rights, International Convention on Civil and Political Rights and the Convention on Elimination of Discrimination Against Women. Cumulatively, these treaties and international human rights mechanisms provide for protection against online violence.

The Bill of Rights under Chapter 4 of the Constitution provides that every person has the right to have their inherent dignity protected and respected,<sup>52</sup> not have the privacy of the communications infringed or information relating to their private affairs unnecessarily revealed,<sup>53</sup> the right to free expression,<sup>54</sup> access information held by the state or private persons necessary for the enforcement of a right,<sup>55</sup> the right to associate,<sup>56</sup> and the right to assemble, demonstrate, picket, and petition.<sup>57</sup>

The Constitution guarantees children's right to protection from any form of abuse or violence, which includes online violence. The state has a responsibility to observe, respect, and promote the Bill of Rights as well as address the needs of vulnerable groups in society such as children, women, and

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<sup>47</sup> Ministry of Health, Kenya Mental Health Policy 2015-2030 (Government of Kenya, August 2015) <<https://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>>

<sup>48</sup> Wangari Ndirangu, 'Government should declare mental illness a national emergency, task force says' (Kenya News Agency, 8 July 2020) <<https://www.kenyanews.go.ke/government-should-declare-mental-illness-a-national-emergency-taskforce-says/>>

<sup>49</sup> Ministry of Health, 'A Comprehensive Guide on Mental Health and Psychosocial support during the Covid 19 Pandemic' (The Government of Kenya, April 2020) <<https://www.health.go.ke/wp-content/uploads/2020/04/Final-Comprehensive-Guide-on-Mental-Health-and-Psychosocial-Support-For-COVID-19-Pandemic-4.pdf>>

<sup>50</sup> Jaguga & Kwobah, 'Mental Health Response to the Covid 19 Pandemic in Kenya: a review' (2020) International Journal of Mental Health Systems <<https://ijmhs.biomedcentral.com/articles/10.1186/s13033-020-00400-8>>

<sup>51</sup> The Constitution of Kenya 2010, Article 2 (6) <<http://kenyalaw.org/kl/index.php?id=398>>

<sup>52</sup> Ibid Article 28

<sup>53</sup> Ibid Article 31

<sup>54</sup> Ibid Article 33

<sup>55</sup> Ibid Article 35

<sup>56</sup> Ibid Article 36

<sup>57</sup> Ibid Article 37

members of minority communities. The state cannot discriminate against any person based on any prohibited characteristic such as sex or sexual orientation. Therefore, the state must protect all vulnerable groups including sexual minorities from online violence.

On the limitations of rights, Article 24 of the Constitution provides a litmus test for what is a justifiable limitation to any of the aforementioned rights. The limitation is permissible if it is prescribed by law, for a legitimate aim, where there are no less restrictive means to achieve that purpose and there is a need to ensure that the enjoyment of an individual's right and freedoms do not prejudice the rights of others.

## Computer Misuse and Cybercrimes Act<sup>58</sup>

This is the only piece of legislation that specifically deals with online violence. Section 27 of the Act provides for the offence of cyber harassment and states:

*A person who, individually or with other persons, willfully communicates, either directly or indirectly, with another person or known to that person, commits an offence if they know or ought to know that their conduct:*

1. *Is likely to cause those persons apprehension or fear of violence to them or loss or damage on that person's property; or*
2. *Detrimentially affects that person; or*
3. *Is in whole or part, of an indecent or grossly offensive nature and affects the person.*

The section prescribes a penalty of up to 20 million Kenyan shillings (USD 2 million), 10 years imprisonment, or both for any person convicted of the offence of cyber harassment. Further, Section 27 allows a complainant or their intermediary to apply for an order restraining a person charged with cyber harassment from further engaging in that harassment either by themselves or with the help of others.

This section further empowers the court to issue an order to a service provider to disclose subscriber information in its possession for those accused of cyber harassment.

While this provision is necessary, it is vague and open to subjective interpretation. In addition, the Act does not define cyber harassment to provide more context or aid in interpretation. All these leave this provision open to interpretations that have a chilling effect on freedom of expression and might expose persons, particularly civil society and journalists, to arbitrary arrests.

### *Constitutionality of Section 27 of the Computer Misuse and Cybercrimes Act*

Section 27 has been the subject of two constitutional petitions that have impacted on its applicability and enforcement.

*Bloggers Association of Kenya v the Attorney General & 3 others; Article 19 & Other interested Party [2020] e KLR<sup>59</sup>*

This petition was filed in 2018 as soon as the Act was enacted and challenged the constitutionality of 26 sections of the Computer Misuse and Cybercrimes Act which included section 27 on the offence of cyber harassment. While the petition was being heard, the petitioners obtained conservatory orders to stay the coming into force of section 27, therefore the section did not come into force until February 2020 when the case was determined.

<sup>58</sup> The Computer Misuse and Cybercrimes Act

<<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf>>

<sup>59</sup> The High Court of Kenya, Petition 206 of 2019 <<http://kenyalaw.org/caselaw/cases/view/191276/>>



In this petition, the Bloggers Association contended that Section 27 was unconstitutional as it criminalizes free speech, on grounds that *have no proximate relationship* to Article 33 (2) of the Constitution of Kenya. Article 33 (2) provides that the right to free speech does not extend to: propaganda for war, incitement to violence, hate speech or advocacy for hatred that is discriminatory. The court disagreed with the petitioners and upheld the provision stating section 27 is necessary and justified to protect against socially harmful conduct. Additionally, the petitioners had failed to demonstrate there was an alternative provision in law to cater for the offence.

### Geoffrey Andare v AG & 2 others<sup>60</sup>

The court was called to determine the constitutionality of section 29 of the Kenya Information and Communications Act.<sup>61</sup> Section 29 created the offence of improper use of a licensed telecommunication system and provided that:

*A person who by means of a licensed telecommunication system-*

1. *Sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or*
2. *Sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person,*
3. *Commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings or imprisonment not exceeding 3 months or to both.*

The court questioned what amounts to grossly offensive, indecent, obscene, or menacing character and who determines which messages cause annoyance or needless anxiety to another person. It found that as no definition for these words were provided in the Act, the words were vague and open to subjective interpretation of the court. This offends the principle that legislation which limits fundamental rights and freedoms and creates penal offences needs to be clear and concise. Further, there is no presumption of constitutionality for legislation that seeks to limit rights and freedoms and thus it must meet the test under article 24. Owing to this, section 29 was declared unconstitutional.

This matter is now subject to appeal and while we await the final hearing and determination, the section is now in force and any person who commits the offence of cyber harassment can be charged and if found guilty, convicted.

### Senate of the Republic of Kenya and 4 others v Speaker of the National Assembly & another; Attorney General and 7 others (Interested Parties) [2020] e KLR<sup>62</sup>

In this case, the court held that the Computer Misuse and Cybercrimes Act is unconstitutional for violating the procedure for enacting legislation under article 110 of the Constitution. However, in light of the gravity of this determination the court allowed Parliament nine months (from October 29th 2020) to comply with procedural requirements failing to which the nullification took effect. Therefore, should the Kenyan Parliament fail to comply with this court directive, this Section would no longer be operative.

### The Penal Code<sup>63</sup>

The penal code prescribes criminal offences in Kenya. It creates an offence for: trafficking in obscene publications such as photographs that tend to corrupt morals,<sup>64</sup> threats to kill a person either directly or

<sup>60</sup> The High Court of Kenya, Petition 149 of 2015. <<https://cyrilla.org/api/files/1580902051559sxqbr6xxl9.pdf>>

<sup>61</sup> The Kenya Information and Communications Act. <<https://ca.go.ke/wp-content/uploads/2018/02/Kenya-Information-Communications-Act-1.pdf>>

<sup>62</sup> The High Court of Kenya, Petition 284 of 2019. <<http://kenyalaw.org/caselaw/cases/view/202549/>>

<sup>63</sup> Kenya Penal Code <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf>>

<sup>64</sup> Penal code 1948, s181

indirectly in writing or not,<sup>65</sup> and negligent Acts causing harm.<sup>66</sup> Although these provisions do not directly contain a digital element, they can be used to prosecute offences amounting to online violence where circumstances allow.

### *The Sexual Offences Act*<sup>67</sup>

This Act of Parliament makes provision for sexual offences to protect persons from unlawful acts of sexual nature. This Act provides for the offence of *indecent act with either a child or an adult*.<sup>68</sup> An indecent act is defined as an unlawful intentional act which causes exposure or display of pornographic material to any person against their will. In that sense, this offence can be used in cases of non-consensual pornography.

The act further provides for offences that are useful in the **online protection of children** including:

1. *the promotion of sexual offences with a child* - this involves the manufacture, supply, distribution of materials or articles to encourage a child to commit sexual acts.<sup>69</sup>
2. *child sex tourism* - this includes procuring travel arrangements for or on behalf of any person with the intention of committing sexual offences against a child irrespective of whether that offence is committed.<sup>70</sup> Earlier on we highlighted the online grooming of children where the perpetrator caused the children to travel to the coast with the intention of committing unlawful sexual acts with minors.
3. *child prostitution* - this involves the inducement of a child either via violence or other means to engage in indecent exhibition or show by means of print, advertising or other media;<sup>71</sup> and
4. *sexual communication with a child* - which involves an adult who communicates a child in a sexual manner or in a manner to induce the child to communicate sexually.<sup>72</sup>

The National Centre for Missing Children and Exploited Children (NCMEC) runs a cyber tip line to enable persons reporting any instances of online sexual exploitation of children. These including child sexual tourism, unsolicited obscene sexual material sent to a child, child pornography, and the online enticement for children of sexual acts. Trace Kenya is a non-governmental organization in Mombasa, Kenya that works to rescue and rehabilitate children at risk of commercial exploitation. While this legislation could be extrapolated to offer online protection to children, there is a need to review and revise the current text to bring it up to date with digital harms and increase adequacy of protection. This also supports the criminal law principle of legality that is a constitutional right in Kenya.

The Sexual Offences Act also prescribes for the offence of sexual harassment.<sup>73</sup> However, this offence is narrowly defined to relate only to unwelcome sexual advances or requests from persons in authority or positions of trust. It therefore cannot be easily expanded to deal with issues of online violence. The Employment Act also states that employers have a responsibility to provide employees with a safe work environment free of sexual harassment.<sup>74</sup> As stated earlier, women in media are at a higher risk of online violence, and therefore the responsibility of their employers to deal with sexual

<sup>65</sup> Ibid s223

<sup>66</sup> Ibid s244

<sup>67</sup> Sexual Offences Act <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_127528.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127528.pdf)>

<sup>68</sup> Ibid s11A

<sup>69</sup> Ibid s12

<sup>70</sup> Ibid s14

<sup>71</sup> Ibid s15

<sup>72</sup> Ibid s16A

<sup>73</sup> Ibid s23

<sup>74</sup> The Employment Act 2007 s 6 <[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EmploymentAct\\_Cap226-No11of2007\\_01.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EmploymentAct_Cap226-No11of2007_01.pdf)>

harassment should be expanded to include online violence that they suffer due to the nature of their work. In that case, the employer would be responsible to provide coping mechanisms such as access to mental health services for women in their employ.

### *The Children Act<sup>75</sup>*

This is an Act of Parliament that makes provision for the maintenance, care, and protection of children. The act prescribes that all children should be protected from all forms of abuse which include online violence. Where a child is a victim of abuse, they should be afforded appropriate treatment and rehabilitation.<sup>76</sup> Secondly, the Act requires children to be protected from all forms of sexual exploitation, inducement to engage in sexual activity, or exposure to obscene materials.<sup>77</sup> Finally, the Act reinforces that children have the rights to enjoy the rights prescribed under Kenyan legislation and international treaties such as the Convention on Rights of the Child. These rights include the right to have their privacy respected and this prohibits the sharing and distribution of images of minors.

### *The Kenya Information Communications Act<sup>78</sup>*

This act facilitates licensing of entities and overall regulation of the telecommunications industry. The act prescribes for offences on the irregular use of a telecommunication system including the publication of obscene material in electronic form. The Act also establishes the Communications Authority to regulate the ICT sector and protect consumers within the communication environment that includes online communications. This is important as the Communications Authority establishes the Cyber Security Incident Response Centre responsible for receiving and investigating reports of online violence.

### *Communications Authority of Kenya*

This is an independent commission established to regulate the communication sector. As part of its mandate the Authority is tasked with ensuring protection of consumer rights within digital communications and promoting development of the nation's cybersecurity framework.<sup>79</sup> To deliver this mandate, the authority has established the National Computer Incident Response Team- Coordination Centre (KE-CIRT/CC).

### *KE-CIRT/CC*

This is a multi-agency collaborative framework established to detect, prevent and respond to cyber threats. KE-CIRT has an online platform available to citizens to report cyber incidents including categories of online violence such as harassment, abusive content or intrusion attempts.<sup>80</sup> Once an incident is reported, the agency will determine the authenticity of the report and proceed to investigate in consultation with other investigative agencies. On the conclusion of investigations, the agency can recommend a matter for prosecution to the Director of Public Prosecutions or employ alternative ways to resolve the dispute.

In June 2021, KE-CIRT launched an online application available on both Google and Apple stores which allows users to get alerts, advisories and information on online safety as well as national sector statistics reports. The app also allows users to report cyber incidents with an additional option of reporting anonymously. According to the CA Director General, the launch of the mobile application

<sup>75</sup> Children Act 2001 < [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ChildrenAct\\_No8of2001.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ChildrenAct_No8of2001.pdf)>

<sup>76</sup> Ibid s13

<sup>77</sup> Ibid s15

<sup>78</sup> Kenya Information Communications Act <<https://ca.go.ke/wp-content/uploads/2018/02/Kenya-Information-Communications-Act-1.pdf>>

<sup>79</sup> Communications Authority of Kenya, 'What we do' <<https://ca.go.ke/about-us/who-we-are/what-we-do/#:~:text=This%20responsibility%20entails%3A,a%20national%20cyber%20security%20framework>>

<sup>80</sup> Communications Authority of Kenya, The National KE-CIRT/CC < <https://ke-cirt.go.ke/report-an-incident/> >

was informed by increased mobile internet penetration in Kenya with approximately 16.4 million subscribers.<sup>81</sup>

### Child Online Protection (COP)

Working with telecommunication companies, the Communication Authority has also established an interactive website known as 'Be a COP'<sup>82</sup> and a simple toolkit<sup>83</sup> to promote awareness among parents and children on child online protection and a means to report incidents of online violence involving children. The website uses interactive games to provide information on how to deal with cyberbullying, online fraud, internet addiction, and online solicitation of a minor.

KE-CIRT also publishes quarterly reports on the state of cybersecurity in the country highlighting the number of cyber incidents. In the period between January - March 2021, the agency received approximately 70 requests to investigate cases of online abuse compared to the 28,247,819 cyber incidents reported to the agency.<sup>84</sup> It also reports an increase in child online violence over the year 2020/2021. This includes an increase in personal identifiable information on social media sites, child online exploitation, cyberbullying and the download and uploads of indecent photos of children.

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<sup>81</sup> Mercy Wanjau, Speech at the launch of National KE-CIRT/CC app, (June 18 2021) <<https://twitter.com/CADirectorGen/status/1405773232515424259?s=20>>

<sup>82</sup> Communication Authority, #BeTheCOP <<https://cop.ke-cirt.go.ke/>>

<sup>83</sup> Communication Authority, 'A guide to child online protection' (Government of Kenya) <<https://ca.go.ke/wp-content/uploads/2019/06/COP-Booklet.pdf>>

<sup>84</sup> Communications Authority of Kenya, "National KE-CIRT/CC Cybersecurity Report for the period January to March 2021" <[https://ke-cirt.go.ke/wp-content/uploads/2021/04/Quarter-3-FY-2020-21-National-KE-CIRT-CC-Report\\_compressed-3.pdf](https://ke-cirt.go.ke/wp-content/uploads/2021/04/Quarter-3-FY-2020-21-National-KE-CIRT-CC-Report_compressed-3.pdf)>

# CHALLENGES OF DEALING WITH ONLINE VIOLENCE

Despite having a relatively robust legal framework dealing with online violence in Kenya, there are certain factors that make dealing with online violence and implementing legislation challenging.

## Lack of Awareness

The Communications Authority reports there is a lack of awareness on the regulation and reporting mechanisms for dealing with online violence in Kenya. From their statistics, cases dealing with online violence are extremely low when compared with reports of other cyber incidents such as malware, ransomware, and phishing.<sup>85</sup> The lack of reporting reduces the efficacy of implementing the law. This is true across East Africa as well. In Uganda, 95% of women surveyed reported that they were unaware of legislation or mechanisms to deal with online violence.<sup>86</sup>

There is a general misconception that there are no legal remedies to deal with online violence. Reporting to authorities who are unfamiliar with mechanisms to deal with online violence may cause one to be turned away, or to grow the illusion that online violence is not a serious crime. It also widens the justice gap by persuading other victims not to report, and may even cause victims to avoid using the internet, widening the digital divide. Additionally, many people are also unaware that they can report cases of online violence on the platform or website that they visit.

Therefore, while the Authority through KE-CIRT publishes infographics on cyber safety and has launched a mobile app to ease reporting and disseminate information, most of this information is available in English. There is a need to make information accessible in more languages, and also to ensure widespread dissemination through campaigns on radio and social media, as the overall goal is for these materials to ultimately reach internet users. Research shows that only 12% of cases of online violence against women are reported to the platforms where they occur.<sup>87</sup>

Civil society and the media are also taking steps to raise awareness, but these efforts need to be more visible to those who fall victim to online violence. Given that women in public spaces are more susceptible to online violence, including them in awareness campaigns will help reach wider public audiences and create awareness among these groups of women as well.

## Digital Forensics and Investigations

Digital forensics is the process of identifying, preserving, analyzing and documenting digital evidence to present it in a court of law.<sup>88</sup> Digital investigations and forensics may be necessary to obtain evidence for the prosecution of cybercrime like online violence. KE-CIRT however reports that their incident response does not focus on collection and preservation of data for investigations and prosecution but on containment of incidents to minimize harm and launch swift response and recovery.<sup>89</sup> Digital evidence is also extremely fragile and has to be treated with care in a bid to preserve its integrity. KE-CIRT reports a lack of trained staff and high cost of digital forensic equipment as one of the challenges facing digital forensics investigations. Therefore, vital evidence needed for prosecution of a crime may be unavailable, limiting access to justice. There is a need to improve the number of adequately trained forensic examiners so that justice may be pursued in court.

<sup>85</sup> Communication Authority Quarter 3 report n 67

<sup>86</sup> Pollicy, Alternate Realities, Alternate Internets: Feminist Research for a Feminist Internet: understanding online gender based violence across Africa < <https://medium.com/pollicy/alternate-realities-alternate-internets-feminist-research-for-a-feminist-internet-4fd979380fd3>>

<sup>87</sup> Ibid.

<sup>88</sup> Communication Authority Quarter 3 report n 67

<sup>89</sup> Ibid.

## Nature of Online Violence

Research shows that incidents of online violence can be amplified by online anonymity and wider publicity, as it is very easy to republish something online or make a trend, making dealing with online violence that much more difficult.<sup>90</sup> Although anonymity online is important to protect vulnerable persons such as sexual minorities, journalists, or human right defenders, anonymity should not be used to perpetuate violence. Further, due to anonymity, even where accounts are reported, the perpetrators can create new accounts and continue with harassment. Platforms are in a unique position to come up with verification or other models that restrict misuse of anonymity. In the UK, civil society organisations are working to develop policy proposals that guide social media platforms to address problems caused by anonymity.<sup>91</sup> While this is welcome, legislation must be carefully crafted so as not to negatively impact free speech and free media. Regulations should be flexible, only prescribing frameworks that require platforms to deal with anonymity but not prescribing the exact formula in which platform verification is exercised.<sup>92</sup>

## Media Influence

Insensitive rhetoric on national media platforms such as radio amplifies violent rhetoric and influences the harassment of women and girls both online and offline. Media personalities are in a unique position to influence a positive culture of online safety and inclusion. In Kenya, radio shows use social media to engage with their audience and promote their shows and likewise, trending topics on radio also find themselves as public discussion on social media. In March 2021, Radio Africa group dismissed three of its presenters who hosted a morning breakfast show after they used misogynistic rhetoric that implied women were to blame for gender-based violence.<sup>93</sup> It is important to note that while such talk was 'permissive' on airwaves, this was the first time swift action was taken by a private corporation, with corporate brands pulling adverts from the media house.<sup>94</sup> From this incident, media personalities could learn to use their public engagement for good by promoting messages that shun online abuse and influence their audience to do the same.

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<sup>90</sup> David Babbs, 'Academic Research about Online Disinhibition, anonymity and online harms (Clean up the internet, 18 October 2019) < <https://www.cleanuptheinternet.org.uk/post/some-useful-scholarly-articles-about-online-disinhibition-anonymity-and-online-harms>>

<sup>91</sup> David Babbs, 'How restricting the misuse of anonymity online could improve online discourse and reduce abuse and misinformation' (Cleanuptheinternet) < <https://docs.google.com/document/d/1m8P-jEd68iizgPBXpvg-ZJXE84IZOlyeIjvDEH28gl/edit>>

<sup>92</sup> Babbs, 'New year, new Internet, Why its time to rethink anonymity on social media (Open Democracy, 15 January 2020) < <https://www.opendemocracy.net/en/opendemocracyyuk/new-year-new-internet-why-its-time-rethink-anonymity-social-media/>>

<sup>93</sup> Wakerly Entertainment 'Homeboyz, Radio Africa sacks Shaffie Weru, DJ Joe Mfalme and Neville over insensitive Remarks' (Youtube, 28 March 2021) <<https://www.youtube.com/watch?v=ezUNUB84kys>>

<sup>94</sup> Winfrey Owino, 'HomeBoyz radio Africa fined sh 1Million by CAK for derogatory comments' (The Standard, 28th March 2021) < <https://www.standardmedia.co.ke/nairobi/article/2001407750/homeboyz-radio-fined-sh1-million-for-derogatory-comments>>

# RECOMMENDATIONS

## Policy and Legislation

1. Amend Section 27 of the Computer Misuse and Cybercrimes Act to legislate against online violence without imposing unnecessary limitations to free speech. An example is this definition proposed to parliament during the public participation exercise of the Computer Misuse and Cybercrimes Act:
  - a. *"cyberbullying" refers to the use of computer programmes, the internet or mobile technology to harass, intimidate, humiliate, torment, threaten or cause harm to another person.*<sup>95</sup>
2. Review of national legislation to ensure that online violence is properly addressed. This includes revision of the laws on sexual harassment, sexual offences, and child protection to properly legislate against online violence. An example is the inclusion of offences on revenge pornography and online grooming.
3. Revise gender and mental health policies and other state mechanisms to adequately deal with online violence.
4. The Ministry of Gender should enact a national policy on eradicating online violence, working in consultation with civil society and other government agencies. These policies should consider enforcement and reporting at national and subnational level.
5. The National Human Rights and Gender institutions in Kenya should undertake more advocacy on online violence. There is a need for national awareness campaigns on digital safety, legislation and reporting mechanisms.
6. Kenya must include a review of the processes and steps taken to deal with online violence at the universal periodic review.

## Civil Society

1. Focus synergies in advocacy around revision of existing Kenyan legislation to adequately cater for online violence.
2. Increase online and offline support mechanisms for the LGBTQ community who are victims of online violence.
3. Increase and concentrate advocacy on cyber hygiene, creation of awareness on cyber crime legislation, and strengthening enforcement mechanisms in Kenya. Generate cyber hygiene material in an easy and comprehensible format to engage the public.
4. Collaborate with other stakeholders such as the media and creatives to increase visibility of advocacy and awareness efforts around online violence.
5. Further engage stakeholders to develop recommendations for dealing with anonymity on social media platforms.

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<sup>95</sup> Mugambi Laibuta, Computer and Cybercrimes Bill 2017 Memorandum (Mugambi Laibuta, 12 February 2018) < <https://www.laibuta.com/constitution/computer-and-cybercrimes-bill-2017-memorandum/>>



## Citizens

1. Be *active bystanders* and contribute to a safer internet by breaking the silence on violence and showing support to victims. One should choose their most preferred method while ensuring their own safety online. For example, when you see an offensive post online, you could show support simply by:
  - a. Reporting the post as offensive to the platform, making a comment that calls out sexism,
  - b. liking a comment that either calls out the harassment or is supportive,
  - c. or unfollowing an offensive person.
2. Practice good cyber hygiene to improve your online security and protect your accounts and devices from being compromised. Some of the most important steps include:<sup>96</sup>
  - a. Set up two-factor verification on your accounts,
  - b. Use long, complex and unique passwords for both your accounts and devices (and save them in a password manager),
  - c. and keep your devices and software (including apps) regularly updated.

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<sup>96</sup> Chris Brook, "What is cyber hygiene? A definition of Cyber hygiene, Benefits, Best practices and more" (Data insider, 6 October 2020) < <https://digitalguardian.com/blog/what-cyber-hygiene-definition-cyber-hygiene-benefits-best-practices-and-more>>