

SEXUAL REPRODUCTIVE HEALTH RIGHTS IN SOUTH AFRICA

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Abstract: This study analyses the promotion and protection of sexual and reproductive health rights (SRHR) in South Africa and highlights lessons for Kenya. South Africa is the only African country to comprehensively liberalise and institutionalise SRHR through constitutional guarantees, progressive legislation, and detailed policy frameworks. Core statutes such as the National Health Act, Domestic Violence Act, Choice on Termination of Pregnancy Act, and the Promotion of Equality and Prevention of Unfair Discrimination Act safeguard women's bodily autonomy, access to healthcare, and protection from gender-based violence. These legal provisions are reinforced by national strategies including the Adolescent SRHR Framework, Contraception and Fertility Planning Policy, and the Strategic Plan for Maternal, Newborn, Child and Women's Health. Together, they have reduced maternal mortality, teenage pregnancy, and HIV prevalence while expanding contraception, emergency care, and comprehensive sex education. South Africa's judiciary has further entrenched SRHR by interpreting domestic laws in line with international human rights standards and ensuring progressive realisation despite resource constraints. In contrast, Kenya's restrictive abortion provisions, weak enforcement mechanisms, and cultural practices continue to undermine SRHR, increasing unsafe abortions, maternal mortality, and rights violations. The study concludes that Kenya can strengthen its legal and policy framework by repealing restrictive provisions, training healthcare providers, expanding infrastructure, and integrating SRHR education and information technologies. Lessons from South Africa show that coordinated efforts by government, judiciary, and community actors are essential to realising women's SRHR and reducing preventable morbidity and mortality.

Keywords: Sexual and Reproductive Health Rights, South Africa, Kenya, Legislative and Policy Framework, Maternal Health and Gender Equality.

1. INTRODUCTION

The analyses the sexual reproductive health rights in South Africa as the only country that has embraced and liberalised it in Africa and proceeds to ventilate into its institutional, legal and policy framework for their promotion and protection and concludes with the lessons that Kenya would learn from them to realize the rights for its women.

2. SOUTH AFRICAN LEGISLATIVE FRAMEWORK ON SRHR

The Republic of South Africa has progressively advanced on promoting and protecting sexual and reproductive health rights for their women and it is the only country that has so far implemented the legal protection of SRHR in Africa.¹An analysis of its legislative, policy and institutional development towards the promotion and protection of SRHR is undertaken as hereunder:-

¹ Cooper D and others, 'Ten years of democracy in South Africa: documenting transformation in reproductive health policy and status' [2004] *Reproductive Health Matters*, 70-85

The Constitution²

South Africa enshrined SRHR in the Constitution where everyone has access to health care services and sexual reproductive health care.³ According to the South Africa researches and surveys conducted throughout South Africa before the promulgation of its constitution, indicated that women suffered in asserting their SRHR hence encouraged its development through various stakeholders and actors in the implementation and monitoring of their socioeconomic rights.⁴

The Constitution affirms the democratic ideals, values of human dignity, equality and freedoms through respect, protection, promotion, and fulfilment of the Bill of Rights subject to some limitations.⁵ It provides for equality before the law and equal protection and benefit of the law,⁶ the right of access to both health care and reproductive health care services,⁷ food, water and social services⁸ and the human dignity.⁹ It further provides for the freedom and security of individuals¹⁰ the right of everyone to have bodily and psychological integrity, the right to make personal decisions that concern one's reproduction, security, and control over one's body and the right against being a subject of medical or scientific experiments without an individual's informed consent.¹¹

The SRHR rights work together with equality since no one is to discriminate unfairly any person on grounds such as gender, sex, sexual orientation, pregnancy, or marital status.¹² Women are guaranteed the right to access information held by the state or any other person that is required for the exercise or protection of any of their rights including SRHR.¹³

Section 181 of the Constitution established the Commission for Gender Equality:

To ensure for the achievement of the constitutional and democratic ideals under Chapter 9 and was to monitor, investigate research, educate, lobby, advice, and report on gender equality through promotion of respect, protection, development, and its attainment.¹⁴ The right to sexual reproductive health requires the state, therefore, to take reasonable and progressive legislative, administrative and any other measures within its available resources to realize them because the State has a constitutional duty to comply with the obligations imposed on it to ensure that all women in South Africa attain the SRHR.¹⁵

National Health Act¹⁶

It is a piece of legislation that provides for the regulation of the health sector in South Africa.

It provides for:

² Act No. 108 of 1996 Laws of South Africa

³ id sect. 27(1) (a)

⁴ Pettifor AE and others, „Young people's sexual health in South Africa: HIV prevalence and sexual behaviours from a nationally representative household survey.' [2005] *PMID*: 16135907, 1525-1534

⁵ n(301) Sect. 7(1)-(3)

⁶ (n301), Sec 9 It includes the full and equal enjoyment of all rights and freedoms without direct or indirect discrimination on grounds such as gender, sex, sexual orientation, pregnancy etc. this provision is very exclusive because in essence it also relates to women.

⁷ (n301)

⁸ (n301) 27 (1) (b) and (c)

⁹ (n301), Sec.10

¹⁰ id, Sec.12

¹¹ id, sec.12(2)

¹² id Sec. 27(1)

¹³ id, Sec 32

¹⁴ Id, Sec. 186

¹⁵ id Sec 27(2)

¹⁶ No. 61 of 2003 Laws of South Africa

A health system that is uniform throughout the Republic of South Africa by taking into account the obligations imposed by the Constitution and other legislation in the country about the health services and provisions affecting the sexual and reproductive health. It does obligate the state to take reasonable legislative steps and other measures within its available resources to achieve the progressive realization of the rights for the people of South Africa to have access to health care services including emergency medical treatment.¹⁷

The Act, in its objectives, recognises that:

The rights of vulnerable groups that include the SRHR of women by providing for their protection, respect, promotion, and be fulfilled.¹⁸It provides equitable and effective health care services in the whole country and empowers municipalities“ appropriate health care services to all people including women.¹⁹The municipalities are also empowered to transfer patients to other health facilities that will provide treatment in case the establishment is unable to provide the necessary treatment and care²⁰that is also essential to women“s SRHR during emergency treatment cases.²¹

The Act gives special protection to people in need of emergency medical treatment by stipulating that:

The public or private health care provider, health care worker or health care establishment should not refuse anyone emergency medical treatment.²²

The Domestic Violence Act²³

It affords protection from abuse to victims of domestic violence by introducing measures for their elimination. This protection is directed to a vulnerable group of people who include women from domestic violence.²⁴

The Act defines domestic violence to mean:

Physical, sexual, emotional, verbal and psychological, economic abuses that include intimidation, harassment, stalking, and damage to property, entry into the complainants“ residence without consent whereby the parties do not share the same residence as well as controlling or abusive behaviour towards the complainant.²⁵Engaging in any act of domestic violence is also a crime. It further provides that any person complaining about domestic violence should require assistance and get information about his rights.²⁶

The Act recognises that domestic violence is a criminal act and a matter that is against the society and, therefore, should protect the victims of such domestic violence among the married and unmarried women and children and extends its usefulness to those in relationships or living together as lesbians. It also protects mothers who live in fear of their sons including those who share the same living space and hence reducing the gender-based violence in South Africa.

The Choice on Termination of Pregnancy (CTOP) Act²⁷

It came into operation after the Government repealed the restrictive and inappropriate provisions of the Abortion and Sterilization Act.³²⁷It came into operation to promote reproductive rights and also to extend and afford freedom of choice

¹⁷ id (preamble)

¹⁸ id, Sec, 2(c) (iv)

¹⁹ id, Sec.32

²⁰ id, Sec. 44

²¹ (n301) Sec. 27(3)

²² ibid

²³ Act No 116 of 1998

²⁴ id Sec 2

²⁵ ibid

²⁶ id, Sec.3

²⁷ Act No 92 of 1996

to the women as ²⁸enshrined in the Constitution the right to choose whether they want to have an early, safe, and legal termination of pregnancy according to their beliefs.²⁹This is after the recognition that the Constitution protects the rights of persons to make decisions concerning reproduction and security in and control over their bodies. The state has the duty and responsibility to provide reproductive health to all in safe conditions. It makes the right of choice to the people to exercise it without fear or harm. The decision to have children is also fundamental to women's physical, psychological, and social health. The provisions for accessing reproductive health care for family planning, contraception, termination of pregnancy, sex education and counselling programme services.³⁰

The Act provides for the circumstances under which pregnancy undergoes termination upon request of a woman during the first 12 weeks of the gestation period of her pregnancy.

If from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that the continued pregnancy would pose a risk of injury to the woman's physical or mental health, or if there is a substantial risk that the foetus would suffer from a severe physical or mental abnormality or that, the pregnancy resulted from rape or incest; or that the pregnancy would significantly affect the social or economic circumstances of the woman or, after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy would endanger the woman's life or would result in a severe malformation of the foetus; or would pose a risk of injury to the foetus.³¹

The Act further states that:

Such termination will only suffice if it is by a medical practitioner or registered midwife with the consent of the pregnant woman or in case of situations involving minors, the medical practitioner or registered midwife shall advise the minor to, consult with parents, guardians, family members or friends before the pregnancy is terminated.³²Such termination can be allowed only if a request is sought from the woman seeking it from a medical practitioner or a registered mid-wife after being informed of her right to take such a termination.³³The surgical termination performances are in such circumstances done in facilities designated by the Minister of Health³⁴as long as there exist counselling before and after such termination is undertaken.³⁵Any person who is not a medical practitioner or a registered midwife who has not completed the prescribed training course cannot perform the termination of a pregnancy. Anyone preventing lawful termination of a pregnancy or obstructs access to a facility for the termination of pregnancy shall be guilty of an offence and liable to a fine or to a term of imprisonment for a period not exceeding 10 years. Failure to comply with section 7 of the Act for the notification and keeping of records of birth shall attract for a fine or to imprisonment for a period not exceeding six months.³⁶

This provision is intended to ensure that the SRHR for the women is promoted, protected, and respected during the termination of pregnancy.

The Promotion of Equality and Prevention of Unfair Discrimination Amendment Act³⁷

It prohibits unfair discrimination and promotes the achievement of equality.³⁸

²⁸ Act No 2 of 1975

²⁹ (n322) sec.3

³⁰ id(n322) Para 3- 5 of the Preamble

³¹ (n 326), Sec 2(a-c)

³² id Sec 5

³³ id sec. 6

³⁴ id Sec. 3

³⁵ id, Sec. 4

³⁶ id, Sec.10 (2)

³⁷ Act No 52 of 2002

³⁸ Id, Sect (8) and (9) It broadens equality to include the full and equal enjoyment of rights and freedoms as stated in the Constitution.

Its objectives are to ensure the equal enjoyment of all rights and freedoms of all persons and promote equality by preventing unfair discrimination and prohibiting the advocacy of hatred based on factors such as race, gender, religion, or ethnicity. This legislation enhances the attainment of the right to sexual reproductive health for the women in South Africa. The Act provides for the prohibition of unfair discrimination on grounds of gender³⁹ and gender-based violence, female genital mutilation, discrimination on the ground of pregnancy. It checks the limitations to women accessing social services and benefits to health and access to opportunities without discrimination based upon sexual orientation. It prohibits any policy or conducts that unfairly limit women's access to SRHR.

The Equality Courts hear and determine matters of Prevention of Unfair Discrimination.⁴⁰ This was for instance decided in the case of the *Head of Department (H.O.D), Department of Education, Free State Province v. Welkom High School & another; Head of Department, Department of Education, Free State Province v. Harmony High School & another*⁴¹ where it was held that:

The HOD had no powers to formulate policies that are unconstitutional for a particular school by instructing school principals not to follow policies even if they were *prima facie* violating the constitutional principles though it respected the scheme of powers under the School Act.

The case encourages the State to change the attitudes of the duty-bearers and align their policies with fundamental rights and freedoms to support pregnant women learners and those who have given birth to complete their education. This will encourage those policies in promoting gender equality, sexual reproductive health rights and other human rights that promote progressive steps in eliminating the pattern of bias and discrimination against pregnant young mothers and instead support them, as a matter of right, to achieve their fullest potential in school.³⁴¹

3. POLICY FRAMEWORK OF SRHR IN SOUTH AFRICA

This part delves into the study of the Policies and Strategies that South Africa has adopted to ensure that SRHR to women are achieved by promoting and protecting them and further discusses on how the judiciary has progressively managed and ensured that these objectives are realized for the women.

The National Adolescent Sexual and Reproductive Health Rights (ASRHR) Framework Strategy (2014-2019) 342

The government of South Africa advances sexual reproductive health rights for the adolescent that includes the distinct and purposely acknowledged and undeserving youth group needs through the strategy document.³⁴³

The document addresses that:

The gaps and deals with the challenges facing the youth who are in pursuit and fulfilment of their SRH rights.³⁴⁴ It uses a multi-stakeholder,³⁴⁵ multi-sectorial approach³⁴⁶ and a human rights approach³⁴⁷ to address the gaps by aligning itself with the Constitution³⁴⁸ and guiding principles from various international treaties and conventions.³⁴⁹ It promotes the quality of life and offers the right to choose whether and when to have children. It promotes the rights of women and men to exercise their sexuality free of violence and coercion; their rights when they are seeking the pleasures of their own but with respect for other people's rights and the right to protect their fertility. It promotes the right of access to modern techniques on preventing, diagnosing, and treating sexually transmitted infections. These mandates are very

³⁴² See <https://www.health-e.org.za/wp-content/uploads/2015/11/National-Adolescent-Sexual-and-Reproductive-Health-and-Rights-Framework-Strategy-pdf.pdf> Accessed on 06 June 2018

³⁴³ This includes adolescents with disabilities, the lesbians, gays, bi-sexual, transgender, queer and intersex adolescents within South Africa.

³⁴⁴ It is formulated after a review on three documents namely the (National Report on Factors Associated with Teenage Pregnancy in South Africa (2014), Background Resource Document on the State of ASRH&R in South Africa (2012), Report on Consultative Workshop with Stakeholders on ASRH&R (2012) which identified gaps and issues of ASRH&R

³⁹ id, Sect 8

⁴⁰ (n336), Chap 4, sec 16-23

⁴¹ (CCT 103/12) [2013] ZACC 25, 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) ³⁴¹ ibid

345 All at the national, provincial and local regions

346 This includes collaborating with schools, hospitals, and clinics, traditional leaders, community-based organizations, family, caregivers, the community, and government.

347 This includes having and promoting awareness campaigns to promote teenage sexual rights and to change those traditional, religious, and modern norms that violate their rights.

348 See generally the Bill of Rights

349 United Nations Convention on the Rights of the Child (1989); International Conference on Population and Development Program of Action (1994); Platform for Action of the Fourth World Conference on Women (United Nations, 1995); Millennium Development Goals (2000); Maputo Plan of Action (MPOA) on the Continental Policy Framework Strategy on Sexual and Reproductive Health and Rights (2006); Convention on the Rights of Persons with Disabilities (2006); Resolution 2012/1 on „Adolescents and Youth“ adopted at the 45th UN Commission on Population and Development (2012); Colombo Declaration on Post 2015 Youth Agenda; and Addis Ababa Declaration on Population and Development in

Africa beyond 2014

important and to achieve them, the policy provides for explorations of various methodologies so that comprehensive sexual education can reach the adolescent and youth both at the local, community, and national level.⁴²

The ASRHR Framework Strategy comprises of five priorities in achieving SRHR that includes the following:

- a. Increasing the coordination, collaboration, information and knowledge sharing on ASRHR activities amongst stakeholders;
- b. Developing innovative approaches to comprehensive SRHR information, education, and counselling for adolescents;
- c. Strengthening ASRHR service delivery and support for various health concerns;
- d. Creating effective community support networks for adolescents; and
- e. The women formulated evidence-based revisions of legislation, policies, strategies, and guidelines on ASRHR.⁴³

The policy served as a useful and beneficial instrument meant to transform the youth into great assets for the country by reducing teenage pregnancies, declined levels of maternal mortality amongst young mothers; increased levels of educational attainment, decreased HIV levels amongst young people etc. in South Africa.

National Contraception and Fertility Planning Policy and Services Delivery Guidelines (2012) and National Contraception Clinical Guidelines

This document re-prioritises contraception and fertility planning in South Africa with an emphasis on dual protection. The policy necessitates the presence of changes in the technologies of contraceptives as well as its very high turnover rate. The National Contraception and Fertility Planning Policy Guideline and the National Contraception Clinical Guidelines recognized the position that providence of contraception to women and enabling them to make choices about their fertility is a basic component in ensuring the realization of their right to sexual reproductive health. The policy aligns itself to guidelines of international trends based on contraception technologies and research to national priorities for purposes of

⁴² This is by encouraging intergenerational dialogues amongst adolescent, parents, and faith-based organizations to bridge the gap on empowering these groups on how to deal with discussions around issues of sexuality. It also states that campaigns intensified and they should encompass the need to improve standards within the provision of health care services ensures the rights of the adolescent are respected, protected, and fulfilled within an environment free of discrimination based on sex, HIV-status, sexuality, sexual orientation, or gender identity. This is achievable through increasing service delivery on SRHR to all adolescent and youth in both urban and rural areas.

⁴³ See the National Adolescent Sexual and Reproductive Health and Rights (ASRH&R) Framework Strategy (2014-2019) Accessed through <https://www.health-e.org.za/wp-content/uploads/2015/11/National-Adolescent-Sexual-and-Reproductive-Health-and-Rights-Framework-Strategy-pdf.pdf> on 7th May 2016

family planning. It intends to make it broader and incorporate fertility management that is allinclusive of pregnancy prevention and planning conception and be able to promote contraception and integration choices and methods of quality contraceptive services with other health services as well as advocating for the strengthening of more specialised services and referral clinics in South Africa.

This policy is crucial to women in accessing safe and effective contraception requirement that is a critical element of their health. It enables women to make choices about their fertility and empowers by offering them better economic and social opportunities that enable them to enjoy birth spacing of their children and improve them to thrive physically and emotionally. It also enables the involvement of men in the promotion of the SRHR for the women and hence encourages shared responsibility in their roles as partners and parents.

National Condom Policy and Management Guidelines (2011)

The policy has an objective of promoting condom use to reduce the sexual transmission of HIV and STIs and to extend the distribution of both male and female condoms to all public places.⁴⁴ The policy aims to align itself with other policies and legislation and it contains strategies that implement and remove logistical and socio-cultural barriers that restrict condom access and use.⁴⁵ It also enhances awareness by promoting condom use through national mass media advertisements by use of both governmental and non-governmental organizations to ensure that a large section of the masses get the information possible in the condom uses, its advantages and purposes to promote and protect the SRHR for the women in South Africa. This policy has helped to reduce the incidents of sexually transmitted diseases among women and many women can have a healthy attainable healthy living free from diseases that have further promoted their standards of living and SRHR through their implementations and fulfilment.

SRHR Strategy: Fulfilling our Commitments: 2011-2021 and Beyond⁴⁶

It is a strategy founded to define comprehensive sexual and reproductive health and rights in South Africa. It includes all the aspects that are present in providing a culture of sexual and reproductive rights as well as all the factors and aspects involved in the promotion, prevention, diagnosis, treatment, care, and management concerning sexual and reproductive health. The policy states the essential sexual reproductive health services that the government has committed to providing as well as the government's commitments to fulfilling sexual reproductive health rights.

Strategic Plan for Maternal, New Born Children, and Women's Health (MNCWH) and Nutrition in South Africa 2012-2016⁴⁷

It is a strategic plan for maternal, new-born children and women health and nutrition initiated by the South Africa government to reduce the Maternal Mortality Ratio (MMR), Neonatal Mortality Rate (NMR), Infant Mortality Rate (IMR), and Child Mortality Rate (CMR). The vision of this Strategic Plan was to:

Have accessible, caring, high-quality health and nutrition for women, mothers, new-borns, and children is intended to achieve through mobilizing the necessary financial and human resources a reduction on the maternal, neonatal, infant and child mortality rates. Concerning Women's Health Initiative, the policy gave priority and provides for an increase in the access to contraceptive services including but not limited to pregnancy confirmation and emergency contraception, improved coverage of cervical screening and follow-up mechanisms, post-rape care, youth-friendly counselling and reproductive health services at health facilities and through health services.

⁴⁴ Accessed through [https://www.google.com/search?q=National+Condom+Policy+and+Management+Guidelines+\(2011\)+of+south+africa&oq=National+Condom+Policy+and+Management+Guidelines+\(2011\)+of+south+africa&aqs=chrome..69i57j8716j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=National+Condom+Policy+and+Management+Guidelines+(2011)+of+south+africa&oq=National+Condom+Policy+and+Management+Guidelines+(2011)+of+south+africa&aqs=chrome..69i57j8716j0j7&sourceid=chrome&ie=UTF-8) on 16 February 2019. These places include the institutions of higher learning, single-sex hostels, workplaces, taverns, hotels, clubs, transport hubs, and spaza shops etc.

⁴⁵ The strategies include better social marketing of condoms, training of HCPs to improve knowledge, attitudes and skills in SRH, and enhancing the training of CHWs and peer educators in basic sexual health.

⁴⁶ Accessed through <http://www.agenda.org.za/wp-content/uploads/2012/09/SRHR-Fulfilling-our-Commitments.pdf> on 16 February 019

⁴⁷ Accessed through <https://extranet.who.int/nutrition/gina/sites/default/files/ZAF%202012%20MNCWHstratplan.pdf> on 16 February 2019

Its key strategies for implementation include:

Addressing inequity and social determinants of health, strengthening the capacity of the health system and human resource capacity to deliver Maternal, New-born, Child, and Women's Health (MNCWH). It advocates for community-based health care, where MNCWH services in full integration with PHC and HIV services. It also promises to tackle the social determinants of health by targeting under-resourced districts.

The policy incorporates with it, the strategy of the Campaign for Accelerated Reduction of Maternal Mortality in Africa (CARMMA), an African Union Commission and UNFPA initiative to reduce maternal mortality in the Africa region.

CARMMA aims to:

Intensify and accelerate the reduction of maternal and child morbidity and mortality through the implementation of evidence-based interventions necessary to improve maternal health and child survival. CARMMA promotes the enhancement of comprehensive sexual and reproductive health rights services and focusing mostly on family planning.⁴⁸

This policy has greatly reduced the high rates of maternal mortality and morbidity in South Africa and has led to their increased good lives including their infant children. There is now an increased level of awareness due to efforts of the NGO and various self-help groups and through the state and mobilisation campaigns at the central and state government levels. The policy has so far managed to address nutritional inequalities to all parts of districts of South Africa that are under-resourced. It has also managed to strengthen the health systems through functioning health systems in those district levels and has reduced mortality and morbidity amongst women, new-borns and children. The policy has further managed to include key stakeholder for their support and accessed more resources mobilization to bridge the shortfall in funding. Finally, the strategic plan has managed to ensure training institutions are also involved in the training of sufficient numbers of health care workers, with appropriate skills.⁴⁹

Justiciability of SRHR in South Africa

South African courts have strengthened the protection of SRH and this is through the interpretation of the domestic legislation and its implementation by the state. It has drawn sustenance from international human rights instruments and jurisprudence i.e. the United Nations (UN) instruments like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) etc. Some landmark cases decided by the courts in South Africa on the SRHR will help in this study to assess their role and impact in protecting, promoting, and implementing this right in South Africa.

In the case of *Alix Jean Carmichele v. The Minister for Safety and Security and the Minister of Justice and Constitutional Development*⁵⁰ the issue was whether:

The concept "wrongfulness" in the law of delict safeguards the rights of women as a constitutional duty. The applicant sued the state for damages resulting from a brutal attack and attempted rape in violation of her SRHR by a man who was awaiting his trial but the state recommended for his release without the option of bail that was an omission instead of opposing the grant of bail to the accused. The plaintiff averred that the state ought to have prosecuted the accused under the interim Constitution that guaranteed her rights to life, equality, dignity, freedom and security of the person and privacy since it was its duty to do so. The High Court in dismissing her stated that the plaintiff failed to establish whether the state did not owe her any obligations as sought and she appealed to the Supreme Court of Appeal (SCA) that held that the state had no legal duty of care towards her and hence could not be entitled to damages.

Aggrieved by the decision of the Supreme Court, the appellant sought leave to appeal to the Constitutional Court noted that:

⁴⁸ See Campaign on Accelerated Reduction of Maternal and Child Mortality through http://www.kznhealth.gov.za/family/CARMMA_South_Africa_Strategy.pdf accessed on 6 November 2019.

⁴⁹ Supra (n255)

⁵⁰ (2001)ZACC 22;2001(4) SA 938(CC)

Courts have a general duty to develop the common law when the law deviates from the spirit, purport and objective of the Bill of Rights that include SRHR.⁵¹ The case obligates the state to prosecute gender-based violence and discrimination against women when their SRHR is violated.

In *Soobramoney v Minister of Health (Kwazulu – Natal) case*,⁵² the plaintiff was suffering from diabetes and ischaemic heart disease that was to cause him a stroke. The condition of his kidneys became irreversible, and was in the final stages of chronic renal failure and urgently needed regular renal dialysis to prolong his life and as a result, sought such treatment from the renal unit in the state hospital that allowed a limited number of patients. He sought redress from the court since the hospital failed to provide him with the treatment due to the limited available resources to do so.

The court held inter alia that:

It was upon the state to ensure that access to healthcare including SRHR alongside housing, food, water, and social security (socio-economic rights) was resource dependant to be attained progressively.⁵³

The Supreme Court arrived at similar reasoning in the case of *S v Makwanyane and another*⁵⁴ where the issue of purposive approach was applied to protect the Bill of Rights and ensure that the rights were progressively fulfilled despite the scarcity of resources. The purposive approach, therefore, meant that the SRHR could apply due to its historical context by establishing comprehensive and coherent programs capable of facilitating its realisation *mutatis mutandis* as was further noted by court in the case of the *Government of the Republic of South Africa and Others, v Grootboom and Others*.⁵⁵

In the *Minister of Health and Others v Treatment Action Campaign and Others*,⁵⁶ the South African government sued by the plaintiffs⁵⁷ for failure to provide anti-retroviral drug called nevirapine in the public health sector that was meant to reduce the risk of mother to child transmission of HIV in hospitals and clinics.

The Constitutional Court held that:

The State had the obligation to devise and implement its available resources so that it progressively realises the rights of the pregnant women and their new-born children and to access services to combat mother to child transmission of HIV. The progressive realisation had to include measures for counselling and voluntary testing of HIV for pregnant women who are positive to be sensitised on options to reduce the risk of mother-to-child transmission and making appropriate treatment to them.⁵⁷

In the context of the *Treatment Action Campaign and Others case*, the women's sexual and reproductive health rights are to be protected, respected and promoted by the judiciary. In the *Christian Lawyers Association of South Africa v Minister of Health*,⁵⁸ the applicants asked the Pretoria High Court to declare the Choice on Termination of Pregnancy Act 72 of 1996 unconstitutional because it conflicted with section 11 of the Final Constitution of South Africa

No. 108 of 1996 that guarantees the right to life. In rejecting the plaintiff's assertion, the court stated that:

The foetus had a right to life under section 11 of the Constitution. In 2001, the Christian Lawyers Association launched another action against the Choice on Termination of Pregnancy Act again and argued in for an amendment imposing restrictions on a minor's choice to have an abortion through the consent of the parent and the court held it as unconstitutional since the SRHR of the minor would be infringed.⁵⁹

⁵¹ (n301), Sec 7 and 27

⁵² 1998 (1) All SA 268 (CC) (1) [2002] ZACC 15; 2002 (10) BCLR 1033 (CC)

⁵³ (n301), Sec. 27

⁵⁴ 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)

⁵⁵ [2000] ZACC 19; 2000 (11) BCLR 1169 (CC)

⁵⁶ (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

⁵⁷ (n301) sec.27(1) and (2)

⁵⁸ 1998 (4) SA 1113 (T), 1998 BCLR 1434 (T)

⁵⁹ See *Christian Lawyers Association of South Africa v Minister of Health and others* 2005(1)SA(T), 2004(10)BCLR1036(T)

In *Ntsele v. MEC for Health, Gauteng Provincial Government*³⁶⁸ the defendant was held liable for the brain damage suffered by the plaintiff for infringement of her right to the highest attainable standard of health. The court held that:

The defendant negligently failed to provide her and her child reasonable reproductive health care with reasonable skill and diligence and due thereby sustaining brain damage due to the deprivation of oxygen during the process of birth contrary to the provisions of Section 27 of the constitution.³⁶⁹

Despite the many drawbacks on cultural, economic, and social challenges in South Africa due to the high-level teenage pregnancy rates,³⁷⁰ vaginal testing and drying,³⁷¹ rape³⁷² etc., its legislation, policies and national guidelines managed to reduce maternal deaths and high morbidity rates through the progressive realisation for the highest attainable standards of health.³⁷³ These legislation and policies led to a reduction in HIV/AIDS and improved on privacy and dignity for the women who enjoyed it without discrimination.³⁷⁴ South Africa further ensured that its programs and plans are community-based by linking SRHRs to ICT in rural and peri-urban areas and spaces in the country for women.³⁷⁵ It increased access to integrated SRHR services in all those key population areas³⁷⁶ and advocated for male involvement and participation and increased advocacy and support for a range of multiple

368 ZAGPJHC 208; [2013] 2 All SA 356 (GSJ)

369 See (n300)Sec. 27

370 Siv Gustafsson and Seble Worku., "Teenage Motherhood and Long-Run Outcomes in South Africa," (2007) *Tinbergen Institute Discussion Paper TI 2007-024/3*, Amsterdam: University of Amsterdam

371 See C. Zama., "Virgins-Only Bursary" (2016) *Drum*, February 2016

372 Temmerman M, Khosla R, Say L., 'Sexual and Reproductive Health and Rights: A Global Development, Health, and Human Rights Priority.' [2014] *The Lancet* 384, 9941

373 Id (n301) Sec. 7, 12 (2) and Sec 27

374 (n301) Sec. 10

375 Linda Waldman and Marion Stevens, 'Sexual and Reproductive Health Rights and Information Communications Technologies: A Policy Review and Case Study from South Africa' [2015] *Institute of Development Studies Brief Supporting Evidence Report* 113

Cf **Mom Connect**-which is a free service cell phone, based health service launched by the Department of Health to provide free antenatal health care information, register as many pregnant women as possible, and provide information and advice on pregnancy. See more on <http://www.southafrica.info/services/health/momconnect.htm#.Vt1S431961u>

See also Cell Life Project innovative use of cell phone technology for HIV/AIDS. It gears towards providing affordable solutions on healthcare, through communication, information, and logistics.

376 (n354)

prevention technologies to strengthen integration and convergence between SRH commodities and HIV.⁶⁰

Lessons for Kenya

Like South Africa, Kenya can promote and fulfil the reproductive health choices for the woman through legislative, policy and institutional framework that will be managed by skilled service providers. It can ensure that it guarantees everyone the right to bodily and psychological integrity, which includes the right to decision making concerning reproduction; to security in and control over his or her bodies; and not to be subjected to medical or scientific experiments without their informed consent.⁶¹

⁶⁰ *ibid*

⁶¹ Constitution(n301), sec.12(2)

Kenya should ensure it puts in place legislative and policy framework for SRHR that the constitutional provision of 2010 intended to women in making decisions about their reproduction guaranteed like that one of South Africa. The Kenya Penal Code's section 158160 restrict women rights to choices concerning their reproduction and security over their bodies in having an abortion should be repealed instead of resorting to illegal abortion to assert the right resulting to their deaths.

Kenya should have SRHR legislation enacted alongside the available policies that will introduce structural and institutional changes in the country for the women. The Act will guarantee protection and ensure free choices for women SRHR on how and when to conceive and bear children. The Act if passed will guarantee confidentiality, information, and provide complaint procedures to actualize their rights including Vitro-fertilization.

The legislation will be under scrutiny by independent oversight bodies that will work in consultation with other relevant stakeholders to ensure that SRHR is realised. It will also regulate the National, County, and private institutions in provisions of the rights. Kenya will achieve these rights by ensuring that it has amended its abortion laws, delimit, and reduce increased high morbidity and mortality rates experienced by women due to illegal abortions and related complications that will ultimately enhance reproductive justice to all.

4. FINDINGS

From the study, the Constitution of Kenya 2010 recognises the highest attainable standard of health and emergency medical treatment under Article 43(1) (a) and (2).⁶²The Constitution further recognises the international human rights law under its Article 2(5) and (6).⁶³From the study, however, Kenya has not undertaken significant progressive steps to realise the SRHR for the women despite the promulgation of the new Constitution of 2010 by recognising SRHR to date. There are impeding statutes limiting the realization of the SRHR that are still existing in Kenya like the Penal Code that penalises abortion,⁶⁴the Female Genital Mutilation Act that though prohibits the female genital mutilation, the women are still undergoing circumcision under the influence of culture in some communities.⁶⁵Other practices like marital rapes and child marriages still exist despite the available Sexual Offences Act⁶⁶and

Children's Acts⁶⁷respectively that prohibit the practice.

Kenya's Institutional failures to protect women from violations increase their maternal mortality and morbidity rates because of fear of arrest and prosecution when exercising their

SRHR, the women because of fear resort to procuring backstreet abortions to avoid arrests by the police.⁶⁸The policies for safeguarding SRHR for the women in Kenya lack effective mechanisms for implementing the alleged violations through the administrative interventions for timely and affordable judicial appeals to enforce them and provide remedial measures for appropriate relief and compensation.

In the rural areas, the medical practitioners are scarce than urban centres and they often have limited training. The SRHR services provided by quarks often violate the women's rights contrary to the Maputo Protocol and ICCPR and against the definition provided by the Committee of Experts on Constitutional Review Report on who qualifies to be a medical practitioner in Kenya.⁶⁹The women are discriminated by male spouses on financial and material support impeding timely medical treatment and care.⁷⁰ The poor infrastructure, resource distribution, and rudeness of health care providers affect

⁶² (n13)

⁶³ (n29)

⁶⁴ (n16)

⁶⁵ (n23)

⁶⁶ (211)

⁶⁷ (n27)

⁶⁸ Nyamu's Case (n 203)

⁶⁹ (n 33)

⁷⁰ (n379)

negatively to the women patients in Kenya⁷¹as was observed in the case of *M.N.N v Attorney General*.⁷² Due to these impediments, the study recommends the following:-

5. CONCLUSION

South Africa is the most progressive and comprehensive proponent in Africa in human rights recognition.⁷³ Sexual reproductive health and rights as observed in this chapter are under promotion, safeguard, and protection by the Constitution of the Republic of South Africa. The SRHR are also well managed and maintained by legislation, policies, and provided proper guidelines by the state that is an indication of the country's commitment to ensure the progressive realization of women's sexual and reproductive health. The government ensures of South Africa ensures women's sexual reproductive health right is protected and promoted with the collaboration and coordination of other stakeholders like NGOs, churches and SelfHelp Groups.

6. RECOMMENDATIONS

Compensation Mechanisms to Victims of SRHR

The study proposes a compensation mechanism by a coordinated legal and administrative system to punish the perpetrators of women's SRHR. The mechanism will curb the malpractices in the medical facilities and other agencies through coordinated policies and remedial measures for compulsory monetary compensatory rewards and offers of open public apologies to coerce them to be vigilant in performing their duty to women patients.

Training of Health Workers

The health care providers should undergo training, be on regular in-service courses to equip them with knowledge so that they become transparent, humane to patients and wear badges for identification purposes while handling them. The training will provide them useful information skills, family planning and the delivery services and be able to consult patients whenever necessary to safeguard their privacy and dignity enshrined in Article 5 of the Banjul Charter and Article 3 of Maputo Protocol respectively.

Legalize and Reduce Incidents of Unsafe Abortion in Kenya

The government should ensure that the women seeking post-abortion care and emergency abortion services do receive necessary medical treatment in all the medical facilities. The Penal Code provisions for criminalising abortion under sections 158-160 in Kenya should be amended.⁷⁴The amendment once effected will enable Articles 26(4) and 43(1) (a) and (2) of the Constitution to be applicable and help reduce the high mortality and morbidity rates among women and youths in Kenya.⁷⁵

Women Empowerment and Infrastructural Improvements

The women should be empowered by providing free medical care when they are seeking treatment to alleviate the high rate of unnecessary deaths during their SRHR services. The empowerment of women can be promoted by ensuring that all counties are equipped with more medical facilities and mobile clinics to alleviate the existing scarcity. The registration of midwives to render services for women seeking SRH and mobile phone communications for services through the Department of Health to provide women with antenatal health care information on pregnancy should be increased and prioritised to render free advice to women when pregnant as was done in South Africa.⁷⁶Kenya should implement the women's economic independence and empowerment since the majority of them are illiterate and poor so that they do not

⁷¹ (n 242)

⁷² (n272)

⁷³ id (n301)

⁷⁴ (n23)

⁷⁵ (n16).

⁷⁶ (n 354)

over-rely upon their spouses for monetary assistance whenever they seek medical attention. Women should be self-reliant and be undergoing training when making reproductive health choices and decisions to enable them to consult the health providers in time and by the state as it happened in South Africa.⁷⁷ The men spouses should also be part of the family planning programmes together with their wives, embrace contraceptive use, and allow their wives seek abortion services in cases of need and emergencies and instil confidence by promoting, enhancing, and assisting them in protecting sexual reproductive health rights.⁷⁸

Intensifying SRHR Awareness Campaigns

The awareness campaigns and mobilization around SRHR should be undertaken to sensitise the women against unwanted pregnancies and sexually related ailments that affect them through the media, the school curriculum programs, and all related media outlets. The campaigns will enlighten society against discriminating women who are asserting their SRHR and will also instil confidence and make them feel free to seek timely medical help without fear of victimization and reprimands.⁷⁹ The awareness campaigns should involve the churches for a wider approach to reach many people of various faiths and to enable them to preach on issues of sex and safe sex as well make the community aware of the remedial actions to deal with issues of sexual reproductive health rights like abortion, HIV, rape etc. The NGOs, women groups, and Self-help groups should also commit the State in promoting the SRHR for the benefit of all the women as in South Africa. The awareness campaigns will help reduce maternal deaths and morbidity rates brought about by cultural malpractices emanating from FGM, marital rape, early child marriages, and others that hinder the progressive realization of SRHR. These groups should assist in seeking redress on behalf of the victims of SRHR like those of the Republic of South Africa.³⁹⁷

Introducing Sexual Reproductive Health Curriculum in Schools

Introduction of Sexual reproductive health curriculum in the primary, secondary and university levels to educate learners against the culture of violence against women, marital rape, female genital mutilation and other SRHR issues. This programme will sensitize the youth about their SRHR to prevent their future abuses. SRHR books, journal and more authors should be motivated to carry out more research in the field and their works are integrated with Information, Communication and Technology (ICT) to reach many people. The legislation and policies on SRHR should link the ICT for implementation in the rural and peri-urban centres in Kenya as was successfully done in South Africa to access large populations and support a range of multiple prevention technologies to strengthen integration and convergence between SRH commodities and HIV.

The Role of the Judiciary and States Accountability

Extensive uses of international jurisprudence on the SRHR in deciding complex cases in Kenya where there is lack of available legislation by the courts and further create precedents through them to guide the Kenyan judges in interpreting the national laws. This will promote progressive jurisprudence in Kenya as it happened like in South Africa.⁸⁰ The preamble of the Universal Declaration of Human Rights at paragraphs 6 and 7 refers to the character of human beings and governance where the corporate social responsibility is crucial in realising the SRHR and that should involve all companies and individuals in ensuring that they protect the society.⁸¹ Involving companies and cooperate world would contribute to enhancing sexual reproductive health rights for the greater sustainability and performance for their development through the implementation of their annual budgets for the women.

⁷⁷ (n 336) Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 laws of South Africa

⁷⁸ See Chapter 4 of this dissertation on National Contraception and Fertility Planning Policy and Services Delivery Guidelines(2012) and National Contraception Clinical Guidelines

⁷⁹ See Chapter 4 of this dissertation on the priorities Awareness Campaigns on SRHR for its Women on National Adolescent Sexual and Reproductive Health Rights Framework Strategy 2014-2019 in South Africa. 397 (n377)

⁸⁰ Fons Coomans, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006, edn, Oxford, Intersentia, Antwerp)

⁸¹ (n129)

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