

LEGAL FRAMEWORK ON PROVISION OF SAFE
ABORTION IN KENYA
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1. Introduction

The legislative framework of every country remains an important pillar in the promotion of rules, order and direction within communities, health systems and governments. In the context of safe abortion, it is extremely important for medical providers to abide by the laws, policies and directives that are enshrined in the Constitution and other legal documents including their own medical codes of conduct.

Prior to 2010, abortion in Kenya remained largely criminalized and stigmatized with the end result being imprisonment of women and medical providers who offered safe abortion services. This narrative, however, changed with the promulgation of the Constitution that now allowed for safe abortion on a wide array of circumstances, and similarly complemented by county laws that are increasingly emerging to allow for safe abortion. In an effort to recognize the challenges and shortages of specialized health care professionals in Kenya, the 2010 Constitution moved beyond specialist doctors to involve a wider range of health workers as an increasingly important public health strategy to address unsafe abortion. In the final report of the Committee of Experts on Constitutional Review, the drafters of the Constitution recognized that implementation of Article 26 (4) was not limited to doctors only but extended to nurses, clinical officers and midwives. This has now been cemented with the enactment of the Health Act, 2017 which under Section 6(2) clarifies that “a trained health professional” shall refer to a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that procedure.

The Health Act, 2017, further defines “health” as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Read together with Article 26 (4) of the Constitution, this section thus allows women to access safe abortion services for a wide range of health related reasons. Notably though, due to inadequate sensitization on these constitutional gains, law enforcement officers have continued to harass, extort and arrest medical providers even when the circumstances allow a woman to qualify for safe abortion services. As demonstrated by ENM vs Republic, these cases however often fail to secure convictions and almost always end up with the prosecution seeking adjournment or eventually withdrawing the case.

There is therefore dire need to sensitize doctors, prosecutors and the police on the current legal framework on abortion and how to uphold the laws, human rights and professional codes of conduct. The deliberations below are organized into five subsections, each of which can be used separately to elaborate and meet the specific legal needs of a medical professional, law enforcement officer, academic or legal counsel seeking information of the regulatory framework on safe abortion in Kenya.

2. LAWS AND POLICIES ON SAFE ABORTION

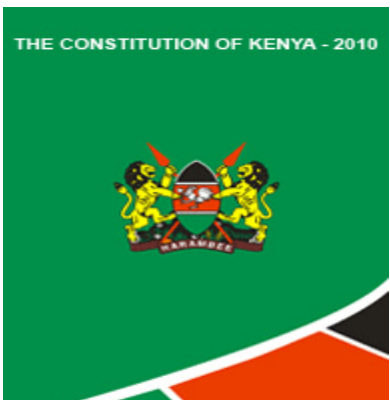
In Kenya, there are several categories of laws and policies that support the overall right to reproductive health. In this same scope, there are also several laws, guidelines and codes of ethics that regulate, criminalize or advance the provision of safe abortion and post abortion care. These laws include:

- a. The Constitution of Kenya – 2010;
- b. The Penal Code;
- c. The Ministry of Health’s National Guidelines on the Management of Sexual Violence 2014;
- d. Ministry of Health’s National Guidelines for quality obstetrics and perinatal care;
- e. Ministry of Health Circular on Post-Abortion Care dated 7 June 2013;
- f. The Code of professional conduct and discipline for doctors, 6th edition (MPDB 2012);
- g. The Code of professional conduct for clinical officers (2012); and
- h. Standards of Nursing education and practice, Code of Ethics and Conduct and Scope of Practice for Nurses in Kenya;

In accordance with the provisions of Article 2(5) of the Constitution, regionally and internationally, there are also several laws and policies that regulate safe abortion practices. These include:

- i. The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol);
- j. General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa;
- k. WHO Safe Abortion: Technical and Policy Guidance for Health Systems Second Edition 2012
- l. WHO Guidelines on Health worker roles in providing safe abortion care and post-abortion contraception
- m. The International Federation of Gynecology and Obstetrics (FIGO) initiative for the prevention of unsafe abortion.

2.1 CONSTITUTIONAL PROVISIONS ON ABORTION



The Constitution of Kenya 2010 provides for the right to the highest attainable standard of reproductive health under the following provisions:

Article 43(1)(a) which states the right of “ *Every person to the highest attainable standard of health, which includes the right to health care services, including reproductive health care*”

Article 43(2): “A person shall not be denied emergency medical treatment”

Access to safe abortion is regulated more specifically under Article 26 (4): “Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law”

For purposes of safe abortion, the final report of the Committee of Experts on Constitutional Review, 2010, defined a ‘trained health professional’ to include a doctor, nurse, midwife or clinical officer. This definition does not however extend to pharmacists/chemists. This definition has also been reiterated in the Health Act, 2017.

According to Article 26(4), there are four broad indications on when a medical provider can perform a safe abortion. These are:

- Where there is danger to the life of the mother;
- Where there is danger to the health of the mother; Health, as defined in the Health Act, 2017 is a complete state of physical, mental and social well being and not merely the absence of disease. This indication is also well enunciated in the case of *Rex vs Bourne* which nuanced circumstances that would make a woman a mental wreck including rape.
- If there is need for emergency treatment of any kind; and
- If allowed by any other written law. Besides enabling laws such as the Health Act 2017, this includes any other laws, policies, guidelines passed in Kenya or international treaties ratified by the state. It need be noted that Under the Ministry of Health’s National Guidelines on Management of Sexual Violence 2014, rape survivors are allowed safe termination of pregnancy.

It is also critical to note that the Constitution, 2010, allows a singular provider to form an opinion on access to safe abortion. The law does not require the provider to seek the opinion of a second provider. Aware of the Human Resource limitations that exist in marginalized regions in Kenya, this is progressive as compared to the previous practice prior to 2010 where medical practitioners were compelled to seek the opinion of a senior health practitioner or psychiatric review of the patient before allowing safe abortion.

It is further noteworthy that pursuant to Article 32 of the Constitution, freedom of religion, thought, opinion and belief remains a human right. The law thus does not compel a medical provider to offer safe abortion services. Where a provider indicates a conscious objection, ideally, they must undertake effective and timely referral. However, in emergency situations such as ectopic pregnancies, or post abortal care, a medical provider is compelled to perform safe abortion to save the life of the woman. Post abortion care is classified as a lifesaving emergency medical treatment.

2.2 ADDITIONAL LAWS IN KENYA THAT REGULATE ABORTION

2.2.1 The Health Act 2017

The Health Act 2017 defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

Section 6(1) of the Act is instructive on abortion matters as it provides:

Every person has a right to reproductive health care which includes—

(c) access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.

Section 6(2) thereafter defines “a trained health professional” to refer to a health professional with formal medical training at the proficiency level of a medical officer, a nurse, midwife, or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid license from the recognized regulatory authorities to carry out that procedure.

The Act also demands that any procedure carried out shall be performed in a legally recognized health facility with an enabling environment consisting of the minimum human resources, infrastructure, commodities and supplies for the facility.

2.2.2 The Penal Code

The Penal Code criminalizes the procurement of unsafe abortion under sections 158- 160 which state as follows:

Section 158 ‘Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years’

Section 159 ‘Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony and is liable to imprisonment for seven years’

Section 160 ‘ Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years’

It is however noteworthy that the Penal Code also allows a trained health professional to provide safe abortion services if performed in ‘**good faith and reasonable care**’ under Section 240 which states as follows:

‘A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.

It is noteworthy that in practice, law enforcement officers have largely used Section 158 of the Penal Code to ambush, threaten, harass, extort and entrap medical providers who offer safe abortion, even when a woman qualifies under the law.

It is further noteworthy that the Constitutional case filed by *FIDA Kenya & others v The Attorney General*, Petition 266 of 2015 seeks to challenge t

2.2.2 County laws

Kakamega, Makueni and Kilifi Maternal Child Health laws

In 2017, Makueni County enacted a Maternal Newborn Child Health Act which recognizes termination of pregnancy. Section 6 of the Act allows for termination under a wide array of circumstances including rape, foetal abnormality as well as mental incapacity to appreciate the pregnancy. Section 7 of the Makueni law recognizes further that the statement of a woman who has been sexually assaulted is sufficient proof of the allegation.

Interestingly, Kilifi County also passed a Maternal Newborn Child Health Act which restricts access to safe termination of pregnancy only to emergency situations.

The Kakamega Maternal Child Health and Family Planning Act of 2017 more notably does not include any provisions that regulate termination of pregnancy. In the absence of this, the national law remains the guiding principle.

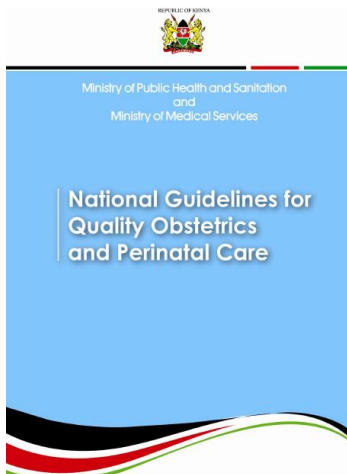
2.2.3 Ministry of Health National Guidelines on Management of Sexual Violence, 2014



These National Guidelines (3rd edition), have been designed to give general information about management of sexual violence in Kenya. They focus on the need to avail quality services that addresses medical, psychosocial, legal needs of a survivor of sexual violence in both stable and humanitarian contexts.

Page 78 of the Guidelines recognizes that one of the rights that a survivor of sexual violence has is the right to termination of pregnancy and post abortion care.

2.2.4 Ministry of Health National Guidelines for quality obstetrics and perinatal care



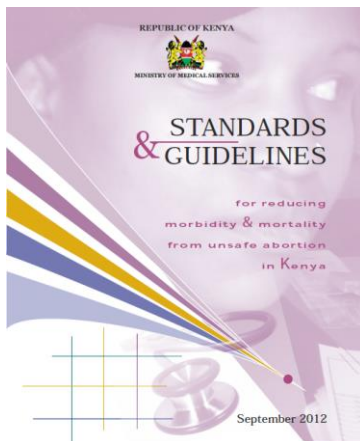
These Guidelines recognize abortion as a leading cause of maternal mortality. The Guidelines further recognize that among the six pillars of Maternal and Newborn Health in Kenya is post-abortion care. They define Post-abortion care as the care given to a woman who has had an unsafe, spontaneous or legally induced abortion.

The Guidelines regulate Post Abortion Care (PAC) to include the following components:

- Emergency treatment of complications from a spontaneous or unsafe induced abortion
- Family planning counseling and services,
- Access to comprehensive reproductive health care, including screening and treatment for STI, RTIs and HIV/AIDS; and
- Community education to improve reproductive health and reduce the need for abortion

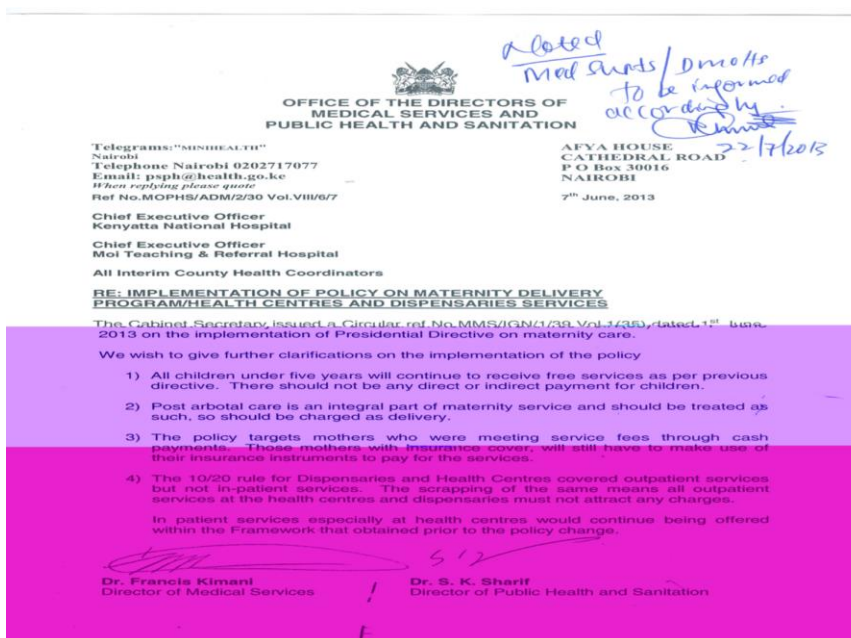
It is worth noting that as of October 2018, the Ministry of Health had developed draft Post Abortion Care Guidelines: A pocket guide for health care providers which is anticipated to be reviewed and validated within the year.

2.2.5 Ministry of Health Policies, Standards and Guidelines on the Reduction of Maternal Mortality in Kenya



In 2012 the Ministry of Health launched Standards and Guidelines for the reduction of maternal morbidity and mortality from Unsafe Abortion. These Guidelines were however withdrawn in December 2013 and are currently under review. The withdrawal of the Guidelines sparked a constitutional question courtesy of the FIDA Kenya & others Vs AG, Petition 266 of 2015 that is currently before a five-judge bench. The case is set back to court on 4th December 2018.

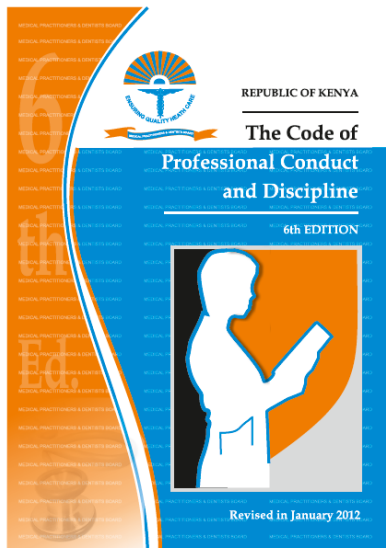
2.2.6 Ministry of Health Directive on Post- Abortion care – 7 June 2013



On 7 June 2013, following the Presidential Directive on free maternity services, the then Directors of Medical Services, Public Health and Sanitation issued a joint Circular directed to all County Health Coordinators, Kenyatta National Hospital and Moi Teaching and Referral Hospital indicating that post abortal care is an integral part of maternity services and should be charged as would a delivery. This Directive means that PAC services are to date administered free of charge in all public facilities.

2.2.6 Professional Codes of Conduct and Discipline

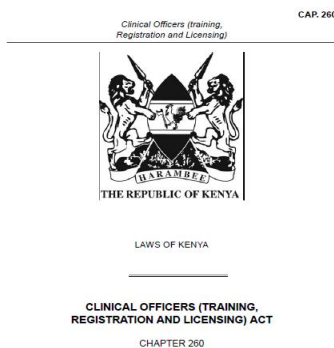
a) *The Code of professional conduct and discipline for doctors, 6th edition (MPDB 2012)*



Chapter 4 of the Code states that the Constitution does not permit termination of pregnancy on demand and is allowed if in the opinion of a medical practitioner there is need for emergency treatment or the life or health of the mother is in danger, or if permitted under any other written law. In applying this Code, the following shall be undertaken:

- ✓ Non judgmental counseling
- ✓ Complete and accurate reports of each case
- ✓ Proper referral where services are unavailable

b) *The Code of professional conduct for clinical officers (2012)*



Revised in April 2012, Section 3 of the Codes states that Termination of pregnancy is not permitted “*unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law*”

A clinical officer who otherwise terminates pregnancy outside Article 26(4), abuses his/her professional privileges and is liable to disciplinary action.

The Code also states that denial of emergency treatment contrary to Article 43 (1)(a) and 43(2) of the Constitution will result in disciplinary action to the clinical officer’. Emergency medical treatment under the Constitution is read to include post abortion care.

c) *Standards of Nursing education and practice, Code of Ethics and Conduct and Scope of Practice for Nurses in Kenya.*

In 2012, The Nursing Council of Kenya developed regulatory tools for nurses in Kenya including:

- Standards of Nursing education and practice for nurses in Kenya, 2nd edition

- Code of Ethics and Conduct for Nurses in Kenya, 2nd Edition
- Scope of Practice for Nurses in Kenya, 3rd Edition

The Scope of Practice for Nurses identifies the category of nurses to provide comprehensive abortion care, manage medical conditions that may complicate pregnancy, childbirth and puerperium. The Scope of Practice for nurses also mandates nurses who have undertaken training in accident and emergency nursing to provide effective care for patients at all times.

MINORS AND ABORTION

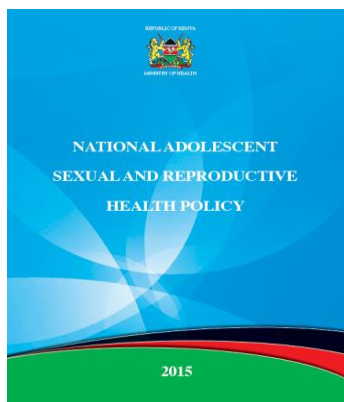


Article 260 of the Constitution defines a child as an individual who has not attained the age of eighteen years.

The legal ability of minors (children under 18 years) to consent to a range of sensitive health care services, including sexual and reproductive health care remains widely contested in Kenya. Generally, it is acknowledged that while parental involvement in minors' health decisions is highly desired, minors often refuse to present themselves to clinics if forced to be accompanied by their parents or guardians.

In Kenya, the law however recognises that there are certain circumstances when minors can consent to their treatment. For instance, under Section 14 of the Kenyan HIV Prevention and Control Act, the law allows minors to consent to certain medical services including HIV testing by stating that *'any child who is pregnant, married, a parent or is engaged in behaviour which puts him or her at risk of contracting HIV may, in writing, directly consent to an HIV test'*

For purposes of sexual and reproductive rights, it is important to consider the following:



- Ideally, in the case of a pregnant minor, decisions on safe abortion should be after consultation with the minor's parents, guardian or such other persons with parental responsibility over the said minor, provided that the best interest of the minor shall prevail;
- The Constitution recognises under Article 53(2) that a child's best interests are of paramount importance in every matter

concerning the child;

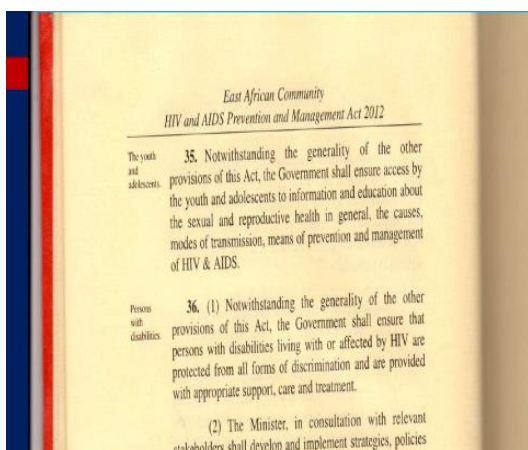
- Although the concept of 'best interest' is not legally defined, it rests on the principle of beneficence (doing good). This means trying to determine what decision will be most likely beneficial, taking into account all relevant factors. Both the Minor's guardian and her physician owe her a legal duty to act in her best interests taking into consideration factors such as her age, desire to return to school, nature of the sexual encounter and if forceful, conducive home setting, gestational period of pregnancy, whether the operation is therapeutic etc;
- Where the Parent/Guardian is suspected to be responsible for the pregnancy, parental consent should not be a barrier to the access of services;
- At all times, the provider should establish the accurate age of the child and assess their evolving capacity/ maturity to be able to make an informed decision and express a reasonable preference; At all times, all medical information shared by the minor must be documented, preferably in the child's own handwriting;



COUNSELLING

- Minors require individual, non-judgmental counselling and support to assist them make the best possible decision upon being given all possible options. Despite being Minors, they still accrue the right to privacy and confidentiality and their files must be kept safely. Where possible, initials may be used to deduct their names.

- Makueni Maternal Newborn Child Health Act allows adolescents to access contraception, other than condoms, if they have high chances of being exposed to sexual intercourse. This position complements the National Ministry of Health/ NASCOP Adolescents Package of Care 2015, which recognises that Adolescents can utilize several methods of contraception including condoms, injectables and Intra-Uterine Devices.



East African Community HIV and AIDS Prevention and Management Act 2012 under section 35 requires all EAC states to ensure access by the Youth and adolescents to information and education on sexual and reproductive health in general.

Worth also noting that in the case of *Gillick v West Norfolk and Wisbech Health Authority and Department of Health and Social Security* the question for determination before the court was whether a doctor could lawfully give contraceptive advice or treatment to a girl under the age of 16 without the consent of the girl's parents. The approach adopted by the majority of the court in that case seems to have taken into consideration the peculiar life experiences of young women seeking sexual health services. Rather than the conservative and restrictive approach of the minority in that case, the majority took a more realistic approach by examining the incidence of teenage pregnancy among young women in the country and the need to address such a challenge. According to the majority, rather than imposing a blanket restriction on a girl under 16 from consenting to sexual health treatment, the important consideration should be whether such a girl has the maturity to understand the nature of treatment being provided and the implications of such treatment.