

*African Grandmothers Tribunal—Seeking Justice at the Frontlines  
of the AIDS crisis*

***Kenya:  
Prostitution, Violence and  
Land Ownership***

***September 7, 2013***

Transactional sex and prostitution in Kenya are common. Recent studies suggest that between 5.5% and 6.9% of Kenyan woman have exchanged sex for money, gifts, or favours in the previous year.<sup>1</sup> While the nature of the sex trade is markedly heterogeneous, making generalizations difficult, several important factors are of significant humanitarian concern. A survey of the international human rights discourse reveals that engaging in the sale of sex places individuals at a significantly increased risk for both sexual and physical violence as well as HIV infection<sup>2</sup>. While these risk factors are common to the sex trade generally, risks for those engaging in prostitution in Kenya are compounded by several social and legal factors unique to the Kenyan situation. These factors include a booming sex tourism industry (including child prostitution), the stigmatization of prostitution and widespread acceptance of violence against sex workers, a legal infrastructure that criminalizes only the supply side of the prostitution industry, and the largely extrajudicial enforcement of anti-prostitution laws. This situation is exacerbated by economic pressures which have contributed to mass urbanization following Kenya's independence in 1964 as well as the HIV/AIDS epidemic which has left many AIDS orphans and widows with few opportunities in the formal economic sector.<sup>3</sup>

### **The Legal Landscape: International Obligations**

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Kenya has international obligations which serve to shape domestic policy and to engage the Kenyan state in an international aspirational dialogue centered on addressing the needs of

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<sup>1</sup> Jerry Okal *et al*, "Sexual and physical violence against female sex workers in Kenya: a qualitative inquiry" (2011) 23:5 Aids Care 612 at 612 [*Sexual Violence*]; Chimaraoke Izugbara, "Hata Watufanyeje, Kazi Itaendelea: Everyday negotiations of state regulation among female sex workers in Nairobi, Kenya" in Susan Dewey ed, *Policing Pleasure: Sex Work, Policy and the State in a Global Perspective* (New York University Press, 2011) 115 at 118.

<sup>2</sup> It is estimated that between 40%-88% of sex workers are infected with HIV/AIDS in Kenya. The figure is between 6%-8% for the general population. Okal *et al*, *supra* at 119.

<sup>3</sup> *Ibid* at 118-119.

marginalized populations. The *Convention on the Rights of the Child*,<sup>4</sup> ratified by Kenya in 1990, and the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>5</sup> ratified by Kenya in 1984, contain important provisions requiring Kenya to address the root causes of sexual exploitation within and across its borders; they further call for social and legal infrastructure to be put in place to support the victims of the sex trade industry. Of particular import is article 34 of the *CRC*, which contains the following provision:

#### **Article 34**

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States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;

Additionally, article 6 of the *CEDAW* requires that, “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

Both conventions provide mechanisms for the evaluation of state party compliance in the form of concluding observations, issued on a semi-annual basis. Included in these reports are recommendations aimed at ameliorating the state party’s ability to fulfill the conventions’ mandates. Areas of particular concern are emphasized and successes are identified. In the most recent *CEDAW* report pertaining to Kenya, issued in 2011, the Committee acknowledges success in implementing the new *Trafficking in Persons Act*<sup>6</sup> while reiterating its concern “at the persistence of trafficking and sexual exploitation of women and girls and the role of sex

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<sup>4</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 [CRC].

<sup>5</sup> *Convention on the Elimination of all Forms of Discrimination Against Women*, 3 September 1981, 1249 UNTS 13 [CEDAW].

<sup>6</sup> *The Counter Trafficking In Persons Act, 2010* (Kenya), No 8 of 2010 [Counter Trafficking In Persons Act].

tourism.”<sup>7</sup> The Report draws particular attention to the role of poverty in contributing to the prevalence of prostitution as a means of economic survival and derides Kenya’s legal position regarding the sale of sex, which criminalizes only prostitutes and does not sanction those attempting to purchase sex.

### **The Domestic Legal Landscape: State Laws and Municipal Bylaws**

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Kenya’s domestic legal landscape is rapidly being transformed. Important recent changes to Kenya’s legal systems as they relate to prostitution and the sex trade include the adoption of the *Kenya Children Act* in 2002,<sup>8</sup> the *Kenya Sexual Offences Act* in 2006<sup>9</sup> and the *Counter-Trafficking in Person’s Act*,<sup>10</sup> which came into force in 2010 but has not yet been fully implemented and cannot yet be used to prosecute offences. *The United States Department of State, 2012 Trafficking in Persons Report* identifies that, as of June 19, 2012, a national plan of action with regard to the trafficking in persons has been drafted but not approved by the Kenyan cabinet.<sup>11</sup> Taking steps to fully implement this National Action Plan would represent a significant step towards addressing the transnational component of the Kenyan sex trade. Perhaps most significantly, on August 4, 2010, Kenyans voted in a historic referendum to adopt a new constitution.<sup>12</sup> Article 2 of the new Kenyan Constitution establishes constitutional supremacy, subordinating customary and religious law in the realm of personal law, thereby eliminating the ambiguity that existed in previous constitutional documents. This development, coupled with the

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<sup>7</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Kenya*, 5 April 2011, CEDAW/C/KEN/CO/7, 4.

<sup>8</sup> *The Children Act* (Kenya), No 8 of 2001, rev 2007 [*Children Act*].

<sup>9</sup> *The Sexual Offences Act* (Kenya), No 3 of 2006 [*Sexual Offences Act*].

<sup>10</sup> *The Counter-Trafficking in Persons Act* (Kenya), No 8 of 2010 [*Counter-Trafficking in Persons Act*].

<sup>11</sup> *United States Department of State, 2012 Trafficking in Persons Report - Kenya*, 19 June 2012, available at: <http://www.refworld.org/docid/4fe30cbbc.html>.

<sup>12</sup> Celestine Nyamu Musembi, Patricia Kameri-Mbote & Winfred Kamau, “Kenya’s Constitution of 2010: Enhanced Prospects for Gender Equality?” (report undertaken on behalf of UNIFEM (part of Un-Women)).

new equality and anti-discrimination provisions as well as section 21(3), which identifies women as a category of vulnerable groups, may provide a constitutional grounds for challenge to existing anti-prostitution by-laws and criminal code provisions which have the effect of disproportionately targeting women.<sup>13</sup>

The following are key provisions within the new pieces of legislation as they relate to the sex trade:

*The Children Act*

Article 15

A child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity and exposure to obscene materials.

*Sexual Offences Act*

17. Any person who -

- (a) intentionally causes or incites another person to become a prostitute; and
- (b) intentionally controls any of the activities of another person relating to that person's prostitution; and does so for or in expectation of gain for him or herself or a third person, is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

18.

(1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -

- (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or

(b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

(2) A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

*Counter-Trafficking In Persons Act*

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<sup>13</sup> *The Constitution of Kenya* (Kenya), 2010, s21(3).

Part IV establishes a counter trafficking in persons advisory committee, charged with submitting an annual report and such other functions necessary for the full implementation of the act.

21. The Advisory Committee shall submit to the Minister and to the National Assembly, an annual report of the policies, programmes and activities relating to the implementation of this Act.

Municipal by-laws also play an important role in policing the sex trade in Kenya. For example, in Nairobi, by-laws grant law enforcement officials and The Anti-Prostitution Force of the Nairobi City Council (*Kanjo*) the power to arrest persons for “loitering for the purposes of prostitution,” while in Kisumu, an urban coastal city and sex-tourism hub, the police are empowered by local by-laws to arrest women for loitering while dressed in certain prohibited ways.<sup>14</sup> The ambiguities inherent to Kenya’s national anti-prostitution laws and the wide grant of power associated with urban by-laws result in very few charges of prostitution; instead, individuals are most often charged with loitering or vagrancy.<sup>15</sup> This is likely due to legal vagueness with regard to what actually constitutes the sale of sex under Kenya’s criminal code. Municipal bylaws, on the other hand, are much more easily enforced and offer a much wider grant of power to law enforcement officials. The result of this application of the law is that it is sex-trade workers, who already exist on the margins of society, must bear the brunt of coercive arm of the state. Pimps, brothel owners, and those seeking to exchange money or goods for sex have few legal concerns.<sup>16</sup>

### **Uneven legal Application and Social Stigma: The Situation on the Ground**

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While it is important to engage with Kenya’s legal architecture and international obligations as they exist on paper, it remains essential to inquire into the application of laws as

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<sup>14</sup> Izugbara, *supra* at 120.

<sup>15</sup> Wanjohi Kibicho, *Sex Tourism in Africa: Kenya’s Booming Industry* (Surrey, England: Ashgate, 2009) at 53.

<sup>16</sup> *Ibid* at 53.

they affect those who fall under their scrutiny. The stigmatization of prostitution and sex trade workers has resulted in a situation where violence (including rape and murder committed by clients, community members and law enforcement officials) committed against those engaging in transactional sex is rarely punished.<sup>17</sup> For example, in 2004 Castro Mwangi killed a 25 year old sex worker, Vivian, after having taken her and another young woman home to engage in sex acts. When Vivian refused to have unprotected anal sex, Mwangi killed her. Despite overwhelming evidence to the contrary, the Court acquitted Mwangi, concluding that he acted in self-defence.<sup>18</sup> While shocking, anecdotes such as this provide evidence of systemic issues that underscore the application of Kenyan law as it applies to the sex trade as well as the widespread stigma associated with those who engage in the sale of sex as not deserving of protection from violence.

Exacerbating the situation for Kenyan sex workers is a widespread abuse of legal authority by law enforcement officials. In the article, *Everyday Negotiations of State Relation Among Female Sex Workers in Nairobi, Kenya*, the author identifies that, “My informants recognized criminalization as the bridgehead of most of the issues they faced in their work,”<sup>19</sup> Addressed more broadly in a recent UNIFEM report, it is argued that the Kenyan legal approach to anti-prostitution enforcement amounts to the “criminalization of feminized poverty.”<sup>20</sup> A 2008 report, “Documenting human rights violations of Sex Workers in Kenya,” prepared by FIDA Kenya (Federation of Women Lawyers), paints a damning picture of the interactions between sex workers and law enforcement, detailing the extrajudicial enforcement of sex-trade laws—practices which can include forced bribes, forced labour, humiliation and rape.<sup>21</sup> In the report, of the 12 respondents initially interviewed who responded that they had been detained by police,

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<sup>17</sup> Izugbara, *supra* at 119.

<sup>18</sup> *Ibid* at 119.

<sup>19</sup> *Ibid*, at 121.

<sup>20</sup> Musembi, Kameri-Mbote & Kamau, *supra* at 23.

<sup>21</sup> FIDA Kenya, *Documenting Human Rights Violations of Sex Workers in Kenya: a study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi* (FIDA Kenya, 2008) at 17-19.

only one had been taken to court within 24 hours and set free without paying a fine or bribe.<sup>22</sup> This system of bribery is so entrenched for some sex workers that bribes are paid to law enforcement officials on a regular schedule. Focus group participants in Kisumu even reported that senior officers may request that booking officers release female sex workers directly into their hands. In one reported instance, a sex worker was detained in a senior officer's house for a period of four days—forced to perform sexual acts and domestic chores—only to be released when a newly detained sex worker was arrested and directed to replace her.<sup>23</sup> First-hand accounts by sex-trade workers of non-consensual sexual encounters with law enforcement officers in Nairobi suggest that instances of unprotected sex are more frequent in these scenarios than with paying clients.<sup>24</sup>

### **Prescriptions for Change**

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Additions and amendments to Kenya's legal infrastructure represent significant strides towards addressing the complex issues surrounding the sex trade as it is carried out within and across Kenya's borders. A workable legal framework is beginning to coalesce, but the enforcement and application of Kenyan law remains unpredictable and marred by corruption. If Kenya is to meaningfully address the negative social effects of the sex trade, systemic issues and societal stigmas must be acknowledged and confronted as they affect those engaging in the sale of sex—not in the legal abstract, but in reality and on the ground. To this end, prescriptions vary. There are those that advocate for the decriminalization of the sex trade entirely, suggesting that a regulatory regime and support system for sex trade workers could immediately and positively affect issues such as violence against sex trade workers and

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<sup>22</sup> *Ibid* at 17.

<sup>23</sup> *Ibid* at 18.

<sup>24</sup> Izugbara, *supra* at 126-127.



corruption.<sup>25</sup> More conservative approaches contemplate the introduction and enforcement of legislation targeting the demand side of the industry. Inherent to this approach is an acknowledgment of the marginalization of sex trade workers and the socio-economic conditions compelling individuals to engage in the sale of sex.

While the regulatory/enforcement debate remains particularly contentious and fraught with complex moral issues, other prescriptive measures are less controversial. Addressing the well documented underrepresentation of women in the police force and other law enforcement agencies<sup>26</sup> would be an important step towards ameliorating relations between sex trade workers and law enforcement and could perhaps provide a more effective bridge for transitioning sex trade workers back into the formal economy. Furthermore, full implementation and application of the *Anti-Trafficking in Persons Act* to punish child sex tourists would amount to increased protection for those most vulnerable to sexual exploitation. Increased training for those in law enforcement with regard to identifying victims of human trafficking would further disincentivize sex tourism and the creation of official processes by which law enforcement could refer victims of trafficking crimes for assistance would provide an immediate and positive impact on those negatively affected by the trade.<sup>27</sup>

## LAND OWNERSHIP

*“Quintessentially, land and life are to the agrarian people what energy and gravity are to the physical world itself”- Mwangi Wa-Githumo, Leading Kenyan Political Scientist*

Kenya’s rapidly changing legal landscape is presently transforming the way land is owned and alienated within its borders. Since independence, a series of inherited (and often contradictory) colonial statutes and post-colonial laws have constituted Kenyan land policy, but with the introduction of the 2010 *Constitution* and the newly introduced 2012 *Land Bill* and 2012 *Land Registration Bill*, Kenya finds itself at a nexus of legal transformation. This emerging

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<sup>25</sup> Kibicho, *supra* at 54.

<sup>26</sup> Musembi, Kameri-Mbote & Kamau, *supra* at 23.

<sup>27</sup> US counter-trafficking in persons report, *supra*.

framework attempts to address issues of tenure insecurity, land grabbing, endemic corruption in land administration, and gender inequality.<sup>28</sup> While the aspirations of Kenya's incipient land policy are admirable, it remains to be seen what actual change can be accomplished and how these vested interests will be affected.

### **Background: Colonial legacies and current incarnations of Kenyan Land Policy**

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The history of land ownership in Kenya can be mapped onto three phases—the pre-colonial period, the colonial period, and the period of independence. The pre-colonial period can be generally characterized by two principles of land tenure: 1. Land belonged to the dead, the living and to posterity and access to land was guaranteed to everyone 2. Land was held on a family, lineage or clan basis, holding the members of that group of social organization together through a lineage of male inheritance.<sup>29</sup> The colonial period, beginning with the entrenchment of colonial administration in 1895, is distinguished by the introduction of new European land policy, the most important of which included massive alienation of African held land (up to 50% of high potential land), the creation of reserves for indigenous populations, and the dissolution of the customary land tenure system, which was replaced with a system of individualized tenure. Much of the Kenyan scholarship on the subject suggests that these initiatives resulted in inequality in land ownership and use, resentment by Africans, landlessness, squatting, land degradation and poverty.<sup>30</sup> Unfortunately, these trends have not dissipated during the period of independence—in actuality the disparities have persisted and possibly widened.<sup>31</sup> Continuity between the

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<sup>28</sup> IS Academie, "Kenya: Food Security and Land Governance Factsheet" (LANDac, Royal Tropical Institute, compiled at the request of the Ministry of Foreign Affairs—The Netherlands, 2012) at 1.

<sup>29</sup> Perpetua Wambui Karanja, "Women's Land Ownership Rights in Kenya" (1991) 10:6 *Third World Legal Studies* 109 at 114.

<sup>30</sup> Paul Maurice Syagga, "Land Ownership and Use in Kenya: Prescriptions from and Inequality Perspective" in *Readings on Inequality in Kenya: Sectorial Dynamics and Perspectives* (Nairobi, Kenya: Society for International Development, 2006) 290 at 300.

<sup>31</sup> *Ibid*, 300.

colonial period and the period of independence has been the rule rather than the exception, but the introduction of recent legislation, most notably the 2010 Kenyan *Constitution*, represents the possibility of a new phase in Kenyan land policy, one distinguished by a greater degree of self-direction and rooted in the concerns of the Kenyan people; there is reason for cautious optimism.

Land tenure in Kenya currently takes one of three forms: public, private freehold/leasehold, and community/trust (communal). Currently, 70% of all land is held in community trust, with 20% of all land belonging to private individuals in freehold or leasehold form, and 10% in public ownership (including all unalienated land).<sup>32</sup> The most common form of land acquisition is through inheritance, followed by purchase, while leasing is common in some rural areas.<sup>33</sup> This system is complicated by a series of customary land holding systems that are not formally integrated into the Kenyan Legal system and vary according to community and ethnic group standards.<sup>34</sup>

### **Kenya, Land and Women: Gendered Disparities in Land Ownership**

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Current land regulation as it relates to ownership and inheritance makes both ownership of land and secure access to property much more difficult for women. Presently, women only hold about 1% of registered title in Kenya and only approximately 5-6% of registered title appears in joint ownership.<sup>35</sup> As many grassroots organizations acknowledge, the gendered disparity in formal title ownership is only one aspect of a larger problem, with weak control and insecure access to land for women representing a challenge that more directly affects women on a daily basis in Kenya. Prior to colonial occupation and land reform by British colonial forces, women enjoyed usufructuary rights to land, although not the right to ownership or the right to

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<sup>32</sup> LANDac, *supra* at 5.

<sup>33</sup> *Ibid*, 4.

<sup>34</sup> *Ibid*, 5.

<sup>35</sup> *Ibid*, 5.

land dispossession. The imposition of European colonial law would undermine what land rights women did possess, primarily through destabilizing effects on African systems of social organization which protected women's interests in land. This occurred without the introduction of new avenues for women to achieve security in registered land ownership.<sup>36</sup> This colonial legacy continues to restrict women's secure access to land today.

The introduction of the new Kenyan *Constitution* in 2010 has the potential to restructure women's access to land ownership. Article 60 (f) of the 2010 Kenyan *Constitution* states specifically that land shall be held and managed in accordance with the principle of "the elimination of gender discrimination in law, customs and practice related to land and property in land," but land law remains on the books that directly contradicts this aspiration. For example, the still valid *Transfer of Property Act* of 1948 directly limits the rights of married women to own property independently.<sup>37</sup> While this very recent development in Kenyan land law does establish an official policy infrastructure founded on equality, there remains reason to be skeptical with regard to its application.

### **Land Policy and Violent Conflict**

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Issues surrounding land tenure and land ownership have also been acknowledged as a significant source of violent conflict in Kenya. A 2008 report prepared by the African Centre for Technology Studies suggests that structural-scarcity (scarcity resulting from the unequal distribution of a resource) has fundamentally informed land-conflict in Kenya since its independence. Identifying Kenya as a primarily agrarian society, the report notes that land has vital consequences for social-political organization, and that the increased centralization of power following independence has aggravated grievances between individuals and the state

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<sup>36</sup> Karanja, *supra* at 120.

<sup>37</sup> LANDac, *supra* at 5.

and between private individuals with competing claims to land ownership or usage.<sup>38</sup> A historical analysis reveals that these grievances often result in violent outcomes<sup>39</sup>.

In agrarian states, in which the primary economic activities involve agriculture or other land-based activities, state-based systems of registration typically account for less than 10% of landholdings—national laws overlap with customary, religious and informal systems of land use;<sup>40</sup> this overlap continues in Kenya, but state-based systems of land organization and registration account for much more than 10% of landholdings. While statutory systems of land ownership offer a degree of certainty and predictability with regard to land alienation, inheritance and ownership, they also tend to disproportionately disadvantage the poor who have difficulty accessing formal systems of registration. The result is that many agrarian societies, including Kenya, struggle to alter a pattern of land accumulation by the wealthy and simultaneous land dispossession of the poor.<sup>41</sup> This institutionalized inequality perpetuates social grievances and continues to inform and influence violent conflict in Kenya and across the African continent.

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<sup>38</sup> Judi Wakhungu, Elvin Nyukuri & Chris Huggins, *Land tenure and Violent Conflict in Kenya: In the context of local, national and regional legal and policy frameworks: Consultative conference proceedings report, Nairobi, 6 October 2008* (African Centre for Technology Studies) 2.

<sup>39</sup> For an overview, see Wakhungu, Nyukuri and Huggins, *supra* at 11-16.

<sup>40</sup> *Ibid* 6.

<sup>41</sup> *Ibid* 7.